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13 **UNITED STATES DISTRICT COURT**

14 **CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION**

15 KEVIN MICHAEL BROPHY, JR., an
16 individual,

17 Plaintiff,

18 v.

19 BELCALIS ALMANZAR aka CARDI B,
20 an individual; KSR GROUP, LLC, a New
21 York limited liability company;
22 WASHPOPPIN, INC., a New York
23 corporation; and DOES 1-20, inclusive,

24 Defendants.

Case No. 8:17-cv-01885-CJC(JPRx)

**PLAINTIFF’S MOTION FOR
NEW TRIAL PURSUANT TO
FRCP RULE 59**

Judge: Hon. Cormac J. Carney

Date: April 10, 2023
Time: 1:30 p.m.

Courtroom: 9B

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE THAT on April 10, 2023 at 1:30 p.m., or soon thereafter as this matter may be heard before The Honorable Cormac J. Carney, Courtroom 9B, United States Courthouse, 411 West Fourth Street, Santa Ana, California 92701, Plaintiff by and through his attorneys of record herein, will move this Court for an order granting a new trial pursuant to Federal Rules of Civil Procedure, Rule 59.

Plaintiff's motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, Declarations of A. Barry Cappello, Lawrence J. Conlan and attached exhibits, the oral argument of counsel, and any such matters the Court may consider.

This motion is made following the conference of counsel pursuant to Local Rule 7-3 which took place by agreement of counsel on January 19, 2023.

Dated: January 25, 2023

CAPPELLO & NOËL LLP

/s/ Lawrence J. Conlan

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25 **MEMORANDUM OF POINTS**
26 **AND AUTHORITIES IN**
27 **SUPPORT OF PLAINTIFF’S**
28 **MOTION FOR NEW TRIAL**
PURSUANT TO FRCP RULE 59

Judge: Hon. Cormac J. Carney

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1 **I. INTRODUCTION**

2 Federal Rule of Civil Procedure 59 authorizes the Court to vacate a judgment
3 and order a new trial where prejudicial errors of law were committed, when the
4 verdict is against the weight of the evidence, and when the cumulative effect of
5 those factors resulted in an unfair trial.

6 In this case, two significant prejudicial errors of law occurred during trial.
7 First, Plaintiff was deprived of his fundamental and substantial right to cross-
8 examine Cardi B at trial. Defendants were permitted to elicit testimony from her on
9 direct examination, and Plaintiff was not permitted to cross-examine her, leaving
10 the credibility of a key party witness to remain unchallenged and unimpeached. As
11 explained below, when the right to cross-examine has been denied, or even unduly
12 restricted, harm is presumed, the prejudice is undeniable, and new trial is required.
13 *Alford v. United States*, 282 U.S. 687, 691 (1931) (reversing Ninth Circuit
14 affirmation of trial court's order limiting cross-examination and remanding for new
15 trial); see also *McNeill v. Butz*, 480 F.2d 314, 321 (4th Cir. 1973); *United States v.*
16 *Price*, 577 F.2d 1356, 1364 (9th Cir. 1978); *United States v. Caudle*, 606 F.2d 451,
17 458 (4th Cir. 1979) (reversing and remanding for new trial); *United States v. Jones*,
18 982 F.2d 380, 384 (9th Cir. 1992) (reversing and remanding for new trial, holding
19 recross must be allowed to probe new matters elicited on redirect).

20 Second, Defendants made an untimely, surprise oral motion in limine to
21 exclude crucial and relevant testimony of Cardi B from a defamation trial which
22 took place in federal court in Atlanta, Georgia in January 2022. The claims in that
23 case, in which Cardi B, as a plaintiff, sued for false statements made about her on
24 the internet, are strikingly similar to the claims in this case. Plaintiff sought to
25 examine Cardi B on her sworn testimony regarding the alleged injury she suffered
26 due to the way she was being publicly portrayed. The Court granted Defendants'
27 oral motion, without reviewing the testimony Plaintiff sought to present and which
28 Defendants sought to exclude. The exclusion was in error, and substantially

1 prejudiced Plaintiff's presentation of his case.

2 Additionally, over the course of the trial, abundant evidence was presented
3 demonstrating that Defendants knowingly misappropriated Plaintiff's likeness, that
4 Plaintiff did not consent to that misappropriation, and that Plaintiff suffered
5 significant harm. Despite this evidence, the jury delivered a verdict for
6 Defendants. The jury's verdict was against the weight of evidence, and a new trial
7 is warranted.

8 Finally, the conduct of Cardi B on the witness stand not only prompted
9 prejudicial error in denying cross-examination, but also substantially and
10 prejudicially impacted Plaintiff's presentation of his case. Whether viewed
11 independently or taken as a whole, the above errors and conduct of a Defendant
12 party witness rendered the trial fundamentally unfair to Plaintiff, and a new trial
13 should be ordered.

14 **II. RELEVANT FACTS**

15 **A. Prior to trial, the Court confirmed that no further pretrial motions** 16 **would be permitted, and each party would have two opportunities** 17 **to examine each witness.**

18 On June 9, 2020, the Court issued a Scheduling Order setting the Pretrial
19 Conference date, *including hearing of motions in limine*, as October 5, 2020, and
20 the date of the commencement of jury trial as October 13, 2020. Dkt. No. 78¹.
21 Defendants ultimately filed their motions in limine, two of which the Court denied
22 on January 12, 2022. Dkt. 171.

23 At the July 18, 2022 pre-trial conference, the Court advised the parties of its
24 "two-examination" rule, that each party would have "two shots" at each witness:

25 //

26 //

27 ¹ The Court's procedures also state that all motions in limine will be heard at the
28 pretrial conference, and all motions in limine must be in writing with sufficient
notice pursuant to Local Rule 6-1. See [https://www.cacd.uscourts.gov/honorable-](https://www.cacd.uscourts.gov/honorable-cormac-j-carney)
[cormac-j-carney](https://www.cacd.uscourts.gov/honorable-cormac-j-carney) at ¶ 12.

1 The two-examination rule, there's -- that's the only rule
2 that I have that's carved in stone. Direct, cross, redirect,
3 recross, that's it. And let's not call any witness twice. So
4 whether it's the plaintiff's witness or the defense witness,
ask all your questions during the direct, redirect, cross or
recross.

5 [...]
I'm not going to limit you on issues. I'm just saying you
only got two shots at each witness. Cover it.

6 Declaration of Lawrence J. Conlan ISO Motion for New Trial ("Conlan
7 Decl."), Ex. 1 [Jul. 18, 2022 Tr.] at 61:17-22; 62:25-63:2 (emphasis added).

8 When Defendants raised the issue of potential further pre-trial motions at a
9 rescheduled August 17, 2022 pre-trial conference, the Court confirmed no further
10 pretrial motions would be permitted:

11 Let me stop you. All pretrial motions, done. So the
12 defendants are going to have to live with whatever Mr.
Dowling did.

13 Conlan Decl., Ex. 2 [Aug. 17, 2022 Tr.] at 17:6-8 (emphasis added).

14 Relying on the Court's rulings and published procedures, Plaintiff understood
15 that no further motions in limine could be filed, and prepared for trial on that basis.
16 Declaration of A. Barry Cappello ("Cappello Decl.") ¶ 10. Plaintiff had been
17 monitoring the Defendant Belcalis Almanzar aka Cardi B's defamation case in
18 Atlanta, Georgia, including the trial which took place in January 2022 (the "Atlanta
19 Trial") which was tried by her trial counsel in this action. *Id.* ¶ 11. Plaintiff did so,
20 in order to use her sworn testimony regarding her alleged emotional distress-type
21 harm, including for impeachment. *Id.* at ¶¶ 11-12. The Atlanta Trial involved
22 defamation claims brought by Almanzar, and sworn testimony by her regarding the
23 harm she and her family had allegedly suffered due to false statements being made
24 about her. Because of the striking parallel between Almanzar's claims and alleged
25 injuries in the Atlanta Trial, and Plaintiff's claim and injuries in this action,
26 Plaintiff's planned examination of Almanzar involved the use of several excerpts of
27 Almanzar's sworn testimony. See *id.* at ¶ 12, Exh. 1.

28 //

1 **B. In the middle of trial, Defendants made a surprise and untimely**
2 **oral motion in limine to exclude Almanzar's Atlanta testimony,**
3 **which was granted without an adequate examination of the**
4 **disputed evidence.**

5 Plaintiff specifically referred to Defendants' testimony from the Atlanta Trial
6 in his opening statement:

7 Now, as part of my cross-examination of Ms. Almanzar,
8 she's going to tell you, I believe, just how harmful and
9 how stressful and how much anxiety can be caused when
10 somebody accuses you publicly and puts it on the Internet
11 of wrongful sexual conduct. She'll tell you it's even worse
12 that when you confront that person and you refuse to take
13 it down, and you confront them time and again and they
14 don't take it down. And she will tell you how she suffered
15 because of that.

16 Conlan Decl., Ex. 3 [Oct. 18, 2022 Tr.] at 168:20-169:2.

17 Defendants did not object during or after the opening statement; following
18 the first day of trial, or during the morning of the second day of trial. Cappello
19 Decl. ¶ 14; see also Conlan Decl. ¶ 2.

20 It was only shortly before Plaintiff was ready to call Almanzar to the stand in
21 this action, that Defendants made a surprise oral motion to exclude *any* use of
22 Almanzar's sworn testimony from the Atlanta Trial. Conlan Decl., Ex. 4 [Oct. 19,
23 2022 Tr.] at 141:2-143:6. After hearing brief argument, and without reviewing the
24 disputed testimony, the Court acknowledged the potential relevance of the proffered
25 evidence but broadly excluded the use of Almanzar's Atlanta Trial testimony. *Id.* at
26 147:18-23.

27 **C. Plaintiff was denied the right to cross-examine Almanzar following**
28 **her direct testimony.**

 When Plaintiff called Almanzar, to the stand, it was clear she had no interest
 in answering the questions posed, and instead engaged in a variety of theatrics.
 Almanzar refused to answer simple questions, repeatedly veered off-topic and
 disclosed privileged and confidential mediation communications. See generally *id.*
 at 206:11-207:22; 210:20-212:24

//

1 In an attempt to restrain Almanzar's theatrics and encourage her to answer
2 questions being posed, Plaintiff's counsel asked her to respect the time of the jury
3 and everyone else in the courtroom. Defendants' counsel responded with an
4 objection "to that admonition" and an accusation: "I mean, this is counsel's party
5 and this is what he's doing." The Court sustained the objection and Plaintiff's
6 counsel responded "[i]t's not my party if it's coming from there. That's canned
7 testimony." *Id.* at 211:19-213:12.

8 The Court then halted proceedings and excused the jury. Outside of the
9 presence of the jury, the Court presented several scenarios on how it might address
10 the interruption, but did not allow argument. *Id.* at 214:1-9.

11 After a short recess, the Court returned and imposed time limits on the
12 remaining examination of Almanzar.

13 All right. Here's how I'm going to proceed. And I know
14 neither side is going to be happy with it. I'm going to put
15 time limits on the examinations. The plaintiffs have 30
16 minutes more of cross-examination. Ma'am, you're going
17 to need to answer any question with a "yes" or "no" or "I
18 can't answer that question 'yes' or 'no.'" And if Mr.
19 Cappello wants an explanation why you can't answer it
20 "yes" or "no," then he'll ask you.

21 Then, Mr. Anderson, after the cross-examination is done
22 in a half hour, you have one hour. And, obviously, you
23 don't ask leading questions. But at the same time, it's an
24 hour. I feel these time limits are appropriate under Rule
25 611.

26 *Id.* at 214:12-25.

27 The Court did not state that no cross-examination would be permitted by
28 Plaintiff, after Defendants had finished their direct examination. Plaintiff's counsel
resumed Almanzar's examination, but curtailed it to reserve sufficient time after
Defendants' direct examination, and then yielded to Defendants. Plaintiff
understood there would be an opportunity for cross-examination following
Defendants' examination, as the law requires, and consistent with the Court's
instruction at the prior pre-trial conference, that "two shots at each witness" would

1 be permitted. See *id.* at 217:15-227:18; Cappello Decl. ¶ 7.

2 Defendants' counsel then called Almanzar as part of their own case, which
3 included a number of topics concerning Almanzar's upbringing, family, religious
4 beliefs, early career, and accounting information not prepared by Almanzar
5 concerning royalties from the *Gangsta Bitch* mixtape. See Conlan Decl. Exh. 4
6 [Oct. 19, 2022 Tr.] at 228:6-242:9. Much of the testimony that Defendants'
7 counsel solicited from Almanzar was classic character evidence, designed to elicit a
8 sympathetic view of Almanzar and suggest that she follows a positive moral
9 compass.

10 When Defendants' examination concluded, Plaintiff's counsel stood up to
11 exercise Plaintiff's right to cross-examine the witness. However, the Court
12 immediately ended the examination, and excused Almanzar from the stand:

13 MS. MOORE: I have no further questions, Your Honor.

14 THE COURT: Okay.

15 MS. MOORE: Thank you.

16 THE COURT: **No. We're done.** Ma'am, we're done. You
17 can step down.

18 *Id.* at 242:5-9; see also Cappello Decl. ¶ 9 [adding context]; Conlan Decl. ¶ 6
19 [same].

20 At the end of second day of trial, Plaintiff made a further offer of proof
21 regarding the Court's exclusion of the Atlanta Trial testimony, and highlighted
22 issues raised by Almanzar in her testimony, which Plaintiff was not given the
23 opportunity to rebut. Conlan Decl. Ex. 4 [Oct. 19, 2022 Tr.] at 268:4-24; see also
24 *id.* at 270:6-16. The Court declined to reconsider its ruling. *Id.* at 270:24.

25 **D. The evidence at trial proved Defendants' liability and Plaintiff's**
26 **harm.**

27 At trial, the jury heard uncontroverted testimony from Plaintiff that his back
28 tattoo was his art, his masterpiece, and is part of his identity. Conlan Decl., Ex. 3
[Trial Transcript ("TT") Day 1] at 186:19-21. There was also *uncontroverted*
testimony from Plaintiff that he never consented to the use of his likeness, and that

1 he suffered substantial embarrassment and harm from the misuse of his likeness. *Id.*
2 at 189:14-15; 213:21-23; Conlan Decl. Exh. 4 [TT Day 2] at 32:8-11; 39:8-10.

3 Through a wealth of trial testimony and exhibits admitted into evidence,
4 Plaintiff established that Defendants knew they were using Plaintiff's likeness to
5 advertise their mixtape, whether through actual knowledge or constructive
6 knowledge of their agents. Conlan Decl. Exh. 5 [TT Day 3] at 179:21-24; 187:4-10;
7 Exh. 6 [Trial Exh. 125] ("I copied and pasted directly from google.") and Exh. 7
8 [Trial Exh. 128] ("The picture(s) of Brophy are present on numerous tattoo
9 websites. . . all the pics I'm seeing of Brophy, including what you sent me, have
10 him standing vertically, with both arms at his sides. In the cover art photo your did,
11 however, the tattoo is transposed onto the back of the original model. . .")

12 Notably, Defendants did not argue at trial that Timm Gooden, who
13 photoshopped Plaintiff's likeness onto the mixtape cover for Defendants, was
14 acting outside the scope of his authority. Nor did they argue that Mr. Dowling,
15 Defendants' attorney, was acting outside the scope of this authority when he readily
16 identified Plaintiff's likeness. The undisputed evidence showed Defendants knew
17 they were using Plaintiff's actual likeness, and continued to use it over Plaintiff's
18 objection, despite receiving a cease-and-desist letter from Plaintiff and their
19 subsequent defense against Plaintiff's lawsuit.

20 Finally, even setting aside Plaintiff's uncontradicted and compelling
21 testimony regarding the harm he suffered, California Civil Code section 3344
22 serves as a substitute for proof of damages. Upon a showing of knowing use of a
23 person's likeness without consent, the statute authorizes the greater of seven
24 hundred fifty dollars (\$750) or the actual damages suffered. Cal. Civ. Code §
25 3344(a).

26 The jury's verdict for Defendants cannot be reconciled with the evidence that
27 Defendants used Brophy's likeness without his prior consent—all that is needed for
28 Brophy to prevail on his Section 3344 claim.

1 **III. ARGUMENT**

2 **A. Legal standard for a new trial under Rule 59.**

3 A motion for a new trial pursuant to Rule 59 may be granted “for any of the
4 reasons for which new trials have heretofore been granted in actions at law in the
5 courts of the United States.” Fed. R. Civ. P. 59(a). These reasons include, but are
6 not limited to, claims “that the verdict is against the weight of the evidence. . .or
7 that, for other reasons, the trial was not fair to the party moving.” *Molski v. M.J.*
8 *Cable, Inc.*, 481 F.3d 724, 729 (9th Cir.2007).

9 A new trial may also be granted based on errors of law during trial, including
10 erroneous evidentiary rulings that affect a party’s substantial rights and result in
11 prejudice. *Millenkamp v. Davisco Foods Intern. Inc.*, 562 F.3d 971, 976-977 (9th
12 Cir. 2009); see also *Dean v. Trans World Airlines Inc.*, 924 F.3d 805, 812 (9th Cir.
13 1991) (reversing and remanding for new trial after trial court erroneously excluded
14 admissible impeachment evidence).

15 Finally, “even if no single error were prejudicial, where there are several
16 substantial errors, ‘their cumulative effect may nevertheless be so prejudicial as to
17 require reversal.’” *Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002), quoting
18 *United States v. de Cruz*, 82 F.3d 856, 868 (9th Cir. 1996).

19 **B. The summary denial of Plaintiff’s right to cross-examine**
20 **Almanzar was *per se* prejudicial error requiring a new trial.**

21 Plaintiff called Almanzar as a hostile witness on direct. See FRE 611(c)(2).
22 Plaintiff therefore did not use certain evidence, including evidence of bad character,
23 but would have, if Defendants “opened the door” in Almanzar’s own testimony.
24 See FRE 404(a). But after Defendants did open the door on their own direct
25 examination by introducing evidence of “good character”, the Court refused to
26 allow Plaintiff’s cross-examination of the witness. This fundamental denial of due
27 process and impairment of a substantial right requires a new trial.

28 //

1 “Cross-examination of a witness is a matter of right.” *Alford v. United States*,
2 282 U.S. 687, 691 (1931); see also *Harries v. United States*, 350 F.2d 231, 236 (9th
3 Cir. 1965) (right to cross-examine witnesses “fundamental in our judicial system.”).
4 The right to cross-examine witnesses applies equally in both criminal and civil
5 cases. See *McNeill v. Butz*, 480 F.2d 314, 321 (4th Cir. 1973) (“In various civil
6 settings, the Supreme Court has stressed the critical nature of the right to confront
7 and cross-examine adverse witnesses.”), citing *Goldberg v. Kelly*, 397 U.S. 254,
8 269 (1970); see also *Douglas v. Owens*, 50 F.3d 1226, 1230, fn. 6 (3rd Cir. 1995).

9 As the Supreme Court explained in *Alford*, the right to cross-examination is
10 so fundamental that if denied, harm is presumed:

11 “It is the essence of a fair trial that reasonable latitude be
12 given the cross-examiner, even though he is unable to
13 state to the court what fact a reasonable cross-examination
14 might develop. Prejudice ensues from a denial of the
15 opportunity to place the witness in his proper setting and
16 put the weight of his testimony and his credibility to a
17 test, without which the jury cannot fairly appraise them.
18 To say that prejudice can be established only by showing
19 that the cross-examination, if pursued, would necessarily
20 have brought out facts tending to discredit the testimony
21 in chief, is to deny a substantial right and withdraw one of
22 the safeguards essential to a fair trial. In this respect a
23 summary denial of the right of cross-examination is
24 distinguishable from the erroneous admission of harmless
25 testimony.”

26 *Alford*, 282 U.S. at 692, emphasis added and citations omitted.

27 The Ninth Circuit has similarly held that denial of cross-examination is *per*
28 *se* harmful error. See *United States v. Price*, 577 F.2d 1356, 1364 (9th Cir. 1978)
29 (“Obviously, the denial of all right of cross-examination cannot be harmless.”)².

30 ² Multiple circuits and California appellate courts have also recognized that the
denial of cross-examination is *per se* harmful error. See *Douglas v. Owens*, 50 F.3d
1226, 1231 (3rd Cir. 1995); *Francis v. Clark Equipment Co.*, 993 F.2d 545, 550
(6th Cir. 1993); *Degolos v. Fidelity & Cas. Co. of New York*, 313 F.2d 809, 812
(5th Cir. 1963); *United States v. Jorgenson*, 451 F.2d 516, 520 (10th Cir. 1971)
Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 F. 668 (8th Cir. 1904);
see also *In re George G.*, 68 Cal. App. 3d 146, 157 (Ct. App. 1977) *McCarthy v.*
Mobile Cranes, Inc., 199 Cal. App. 2d 500, 509-510 (Ct. App. 1962) (complete
denial of cross-examination is prejudicial error under the California Constitution).

Whether viewed as a denial of cross-examination or re-cross, the denial of Plaintiff's right to cross-examine Ms. Almanzar after Defendants' examination took place was prejudicial error. "To deny recross examination on matter first drawn out on redirect is to deny the defendant the right of any cross-examination as to that new matter. The prejudice of the denial cannot be doubted." *United States v. Caudle*, 606 F.2d 451, 458 (4th Cir. 1979) (reversing and remanding for new trial because "trial court lacks discretion to curtail cross-examination until after questioner has had reasonable chance to pursue matters raised on direct"); see also *United States v. Jones*, 982 F.2d 380, 384 (9th Cir. 1992) (reversing and remanding for new trial, holding recross must be allowed to probe new matters elicited on redirect).

While no harm need be shown, the denial of Plaintiff's right to cross-examination, in fact, materially prejudiced Plaintiff. Indeed, Defendants introduced significant testimony from Almanzar—a party and key witness—without any opportunity for Plaintiff to rebut or challenge that same testimony or impeach Almanzar's credibility. This included otherwise impermissible "good character" evidence, which "opened the door" to contrary impeachment evidence.

For example, in a sidebar prior to commencing their direct examination, Defendants requested (in another surprise motion in limine), and Plaintiff stipulated, not to inquire into Almanzar's prior gang membership. Conlan Decl. ¶ 4 [Oct 19, 2022 Tr.] at 174:21-24. But thereafter, Defendants "opened the door" to character evidence by eliciting testimony about Ms. Almanzar's religious faith, and her commitment to her family and community. Questions about her gang membership, and other questions concerning Ms. Almanzar's other bad acts and criminal conduct to which she had not moved in limine to exclude, should therefore have been "fair game". See e.g. *United States v. Osazuwa*, 564 F.3d 1196, 1175 (9th Cir. 2009) (A party can "introduce otherwise inadmissible evidence when defendant 'opens that door' by introducing potentially misleading testimony");

1 *K.J.P. v. County of San Diego*, 2022 WL 17494968 (S.D. Cal. Aug. 17, 2022) (prior
2 bad acts evidence properly admitted for impeachment under FRE 607). Plaintiff
3 similarly was unable to impeach Almanzar’s direct testimony about her
4 commitment to her family with a prior sworn declaration in this case, when she
5 sought to delay trial, purportedly for family reasons, only to jet off to Paris for
6 fashion week once the trial was continued.

7 Denying Plaintiff his fundamental right to cross-examine Almanzar deprived
8 the jury of the “greatest legal engine ever invented for the discovery of truth.”
9 *California v. Green* 399 U.S. 149, 158 (1970). The jury was therefore unable to
10 fully evaluate Almanzar’s credibility and the testimony of a key witness. Denial of
11 cross-examination was prejudicial error, requiring a new trial.

12 **C. It was prejudicial error to exclude the Atlanta Trial testimony**
13 **based on Defendants’ untimely motion in limine.**

14 To merit a new trial based on the erroneous exclusion of evidence, a party
15 must show the evidentiary ruling was erroneous, and that the exclusion
16 “substantially prejudiced” that party. *Harper v. City of Los Angeles*, 533 F.3d
17 1010, 1030 (9th Cir. 2008). Erroneous exclusion of evidence yields a
18 “presumption of prejudice.” *Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir. 2005).

19 To avoid a new trial, the party benefiting from the error must show it is
20 “more probable than not that the jury would have reached the same verdict.” *Id.*
21 (erroneous exclusion of evidence “directly probative of central issues in dispute”
22 was abuse of discretion requiring reversal).

23 It was prejudicial error to exclude the Atlanta Trial evidence on FRE 403
24 grounds, without examining the actual evidence proffered in response to
25 Defendants’ untimely oral motion in limine. This error requires a new trial.

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1 **1. Defendants’ oral motion in limine to exclude the Atlanta**
2 **Trial testimony was untimely and highly prejudicial to**
3 **Plaintiff’s presentation of his case**

4 A pretrial order controls the subsequent course of the action unless modified
5 “upon a showing of good cause” *El-Hakem v. BYJ, Inc.*, 415 F.3d 1068, 1077 (9th
6 Cir. 2005); see also Fed. R. Civ. P. 16(b)(4). Failure to comply with the pretrial
7 order alone justifies denial of a motion. See e.g. *Perry v. Brown*, No. CV 18-9542-
8 JFW(SSx), 2019 WL 6888048 at *1 (C.D. Cal. June 11, 2019) (denying late-filed
9 motion in limine as untimely); *U.S. Dominator, Inc. v. Factory Ship Robert E.*
10 *Resoff*, 768 F.2d 1099, 1104 (9th Cir. 1985) (trial court properly denied motion as
11 untimely based on failure to seek modification of pre-trial order); see also *Dedge v.*
12 *Kendrick*, 849 F.2d 1398 (11th Cir. 1988) (affirming denial of motion as untimely
 under pretrial order).

13 Here, the Court’s pretrial order and published procedures require all motions
14 in limine to be heard at the pretrial conference³. Dkt. 78. The Court reaffirmed this
15 requirement prior to trial, when it advised Defendants’ newly-retained counsel that
16 “All pretrial motions are done.” Conlan Decl. Exh 2. [Aug. 17, 2022 Tr.] at 17:6-7.

17 Despite the Court’s rulings and published procedures, Defendants
18 sandbagged Plaintiff with a surprise last-minute oral motion in limine to exclude
19 any testimony by Almanzar in the Atlanta Trial. Cappello Decl. ¶ 15; Conlan Decl.
20 ¶ 2; see also Conlan Decl. Exh. 4 [Oct. 19 2022 Tr.] at 140:23-147:23; 267:24-
21 270:24. Defendants made no effort to meet and confer prior to bringing their
22 motion, no notice was provided to Plaintiffs prior to Defendants bringing their
23 motion, and no explanation was provided by Defendants for their delay. Cappello
24 Decl. ¶ 14; Conlan Decl. ¶ 2; see also Conlan Decl. Exh. 4 [Oct. 19 2022 Tr.] at
25

26 ³ <https://www.cacd.uscourts.gov/honorable-cormac-j-carney> at ¶ 12 (“All Motions
27 in Limine will be heard at the Pre-Trial Conference. All Motions in Limine must be
28 filed and served in compliance with Local Rule 6-1 (“Unless otherwise provided by
 rule or order of the Court, no oral motions will be recognized and every motion
 shall be presented by written notice of motion”).

1 143:8-14. Notably, Almanzar's trial counsel in the Atlanta Trial, Lisa Moore, was
2 also Almanzar's trial counsel in this action, and Defendants well-knew exactly how
3 Almanzar had testified in that action.

4 As a result, Plaintiff had limited ability to respond to Defendants' contentions
5 seeking exclusion. See Conlan Decl. Exh. 4 [Oct. 19, 2022 Tr.] at 140:23-147:23;
6 267:24-270:24 [identifying prejudice]. Granting Defendants' motion created a
7 glaring void in Plaintiff's trial strategy, and diminished his credibility in the eyes of
8 the jury (having referred to evidence in his opening statement that could not be
9 used). See Conlan Decl. Exh. 3 [Oct. 18, 2022 Tr.] at 168:20-169:3 [previewing in
10 opening statement Almanzar sworn testimony]. The prejudice caused by
11 Defendants' litigation tactic is clear, and Defendants' motion should have been
12 denied on the ground of untimeliness, alone.

13 **2. The exclusion of all Atlanta Trial testimony was overly**
14 **broad, failed to balance the relevant factors and**
substantially prejudiced Plaintiff.

15 There is no dispute that Almanzar's Atlanta Trial testimony is admissible as
16 an opposing party statement. See FRE 801(d)(2). The Court also conceded that the
17 proffered testimony was relevant, both to the credibility of Almanzar and to issues
18 in this case, such as the harm suffered by Plaintiff. Conlan Decl. Exh. 4 [Oct 19,
19 2022 Tr.] at 147:12-23. However, the Court excluded the testimony on 403
20 grounds, without explicitly engaging in a balancing of the FRE 403 factors as the
21 law requires. *Id.* at 147:12-23; see also *U.S. v. Moran*, 493 F.3d 1002, 1014 (9th
22 Cir. 2007) (de novo standard of review applicable where court did not engage in
23 explicit balancing of Rule 403 factors).

24 In fact, Plaintiff offered to preview the testimony at issue, but the Court
25 excluded the Atlanta Trial testimony without reviewing that evidence at all. *Id.* at
26 147:18-23. This was error. The Ninth Circuit has held that the exclusion of
27 evidence on FRE 403 grounds without reviewing the evidence is error, and violates
28 a party's right to due process and fair trial. *United States v. Curtin*, 489 F.3d 935,

1 958 (9th Cir. 2007) (“We hold *as a matter of law* that a court does not properly
2 exercise its balancing discretion under Rule 403 when it fails to place on the scales
3 and *personally examine* and evaluate all that it must weigh.”) (emphasis added).

4 Put simply, “one cannot evaluate in a Rule 403 context what one has not seen
5 or read.” *Id.*; see also *United States v. McElmurry*, 776 F.3d 1061, 1069 (9th Cir.
6 2015) (holding district court must “read every word” of what will be presented to
7 the jury and reversing and remanding for new trial with order for district court to
8 analyze evidence under FRE 403 “with knowledge of what the evidence is”).

9 Finally, the broad exclusion of the Atlanta Trial testimony failed to
10 appropriately balance the relevant factors, and was in error for that reason alone.
11 The “default” rule is *all* relevant evidence is admissible. FRE 402. The balancing
12 test of Federal Rule of Evidence 403 strongly favors admissibility, and exclusion is
13 a disfavored remedy. FRE 403 (evidence may be excluded only where probative
14 value *substantially outweighed* by other factors); see also *United States v. Fleming*,
15 215 F.3d 930, 939 (9th Cir. 2000) (“Rule 403 favors admissibility); *United States v.*
16 *Monzon-Silva*, 791 Fed.Appx. 671, 672 (9th Cir. 2020) (exclusion of relevant
17 evidence is “an extraordinary remedy to be used sparingly”). “In performing the
18 403 balancing, the court should give the evidence its maximum reasonable
19 probative force and its minimum reasonable prejudicial value.” *Deters v. Equifax*
20 *Credit Information Services, Inc.*, 202 F.3d 1262, 1274 (10th Cir. 2000).

21 Here, the Court excluded evidence that was not just relevant, but critical to
22 Plaintiff’s case. “The more essential evidence is to a party’s case, the more
23 probative it is.” *Sowers v. R.J. Reynolds Tobacco Company*, 9745 F.3d 1112, 1122
24 (11th Cir. 2020). In excluding the Atlanta Trial testimony, the Court improperly
25 minimized the probative value of the evidence, and unduly relied on Defendants’
26 counsel’s characterization of the evidence (it would consume too much time to
27 explain, because it was testimony from a trial in a different state).

28 //

1 The Court also erred in failing to consider whether the factors favoring
2 exclusion could be mitigated given Plaintiff's need for the evidence, such as
3 whether a limited portion could be utilized, or a limiting instruction provided. See
4 Advisory Note to FRE 403 ("In reaching a decision whether to exclude on grounds
5 of unfair prejudice, consideration should be given to the probable effectiveness or
6 lack of effectiveness of a limiting instruction"); *United States v. Boulware*, 384
7 F.3d 794, 808 (9th Cir. 2004) (concerns about undue weight "could have been dealt
8 with by a cautionary instruction", and court "should easily have been able to
9 control" waste of time or confusion of issues).

10 Here, the Court declined to review the testimony excerpts that Plaintiff
11 intended to use, accepted Defendants' characterization of the evidence, and then
12 disallowed all use of Almanzar's testimony from the Atlanta Trial. The testimony
13 was directly probative of Almanzar's understanding of the harm caused when one is
14 falsely portrayed on the internet, and contradicted her dismissive view of Plaintiff's
15 rights in this action. The Atlanta Trial testimony went directly to Almanzar's
16 credibility and to a central issue in dispute—the harm suffered by Plaintiff. *Obrey*,
17 400 F.3d at 702. The erroneous exclusion was prejudicial, requiring a new trial.

18 **D. The jury's verdict was against the weight of evidence at trial,**
19 **requiring a new trial.**

20 A new trial should be ordered where, after giving full respect to the jury's
21 findings, the judge "is left with the definite and firm conviction that a mistake has
22 been committed." *Landes Constr. Co., Inc. v. Royal Bank of Canada.*, 833 F.2d
23 1365, 1371–72 (9th Cir.1987). On a motion for new trial, "the district court has
24 'the duty ... to weigh the evidence as the court saw it, and to set aside the verdict of
25 the jury, even though supported by substantial evidence, where, in [the court's]
26 conscientious opinion, the verdict is contrary to the clear weight of the evidence.'" *Molski*
27 at 729 (quoting *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir.
28 1990)).

1 In determining whether a new trial should be granted, the court is permitted
2 to weigh the evidence and assess the credibility of witnesses; the evidence need not
3 be viewed from a perspective most favorable to the prevailing party, and the Court
4 does not presume that the verdict was correct. *Landes* at 1371.

5 **1. The evidence at trial proved that Defendants knowingly used**
6 **Plaintiff's likeness to advertise their mixtape without**
7 **Plaintiff's consent.**

8 Through witness testimony and trial exhibits, Plaintiff established that
9 Defendants knew they were using Plaintiff's likeness to advertise and promote their
10 mixtape, through actual knowledge and/or constructive knowledge of their agents.

11 The jury heard testimony from Plaintiff, his wife Lindsay, and a disinterested
12 witness—tattoo artist, Tim Hendricks—that the tattoo on the mixtape was readily
13 recognizable as Plaintiff, and that many others saw it, and recognized it as Plaintiff.
14 Conlan Decl. Exh. 4 [TT Day 2] at 27:12-13 and 23:16-18; see also *id.* at 131:4-7
15 (“I knew it was him. It was definitely him to me. That was his back. That was the
16 shape of his back, his arm. Those were all of his tattoos on his back and his arm.”);
17 Conlan Decl. Exh. 5 [TT Day 3] at 218:19-21 (“Q. When you see a picture of this
18 tattoo, you know that’s the tattoo you put on Mike Brophy’s back; right? A. Yeah,
19 without a doubt.”).

20 The jury also heard uncontradicted testimony from Gooden, who, at
21 Defendants’ request, took Plaintiff’s likeness directly from a picture he found on
22 the internet, and placed it onto the album cover with virtually no changes. Conlan
23 Decl. Exh. 4 [TT Day 2] at 176:14:19 (“Q. And those all came from the original
24 photograph of the tattoo that you copied; right? A. Yes. Q Okay. And you didn’t
25 change any of those tattoos, right, when you put it on to the model’s back? A. Just
26 in the way I described.”); Conlan Decl. Exh. 6 [Trial Exh. 125] (“I copied and
27 pasted directly from google.”); see also Conlan Decl. Exhs. 7, 8, 9, 10 [Trial Exhs.
28 Ex. 2, 70, 71, 128 (“I did another search and this is more than likely (sic) were I got
it from.”)].

1 There was also uncontradicted evidence that Defendants’ attorney, Alan
2 Dowling, immediately identified the tattoo as Plaintiff from a simple Google search
3 within months after the lawsuit was filed, but Defendants continued to use
4 Plaintiff’s likeness. Conlan Decl., Exh. 7 [Trial Ex. 128] (“The picture(s) of
5 Brophy are present on numerous tattoo websites. . . all the pics I’m seeing of
6 Brophy, including what you sent me, have him standing vertically, with both arms
7 at his sides. In the cover art photo your did, however, the tattoo is transposed onto
8 the back of the original model. . .”)

9 Tellingly, there was no attempt by Defendants to argue that Gooden or
10 Dowling were acting outside the scope of their authority as Defendants’ agents.
11 (Dkt. 229 at pID #7451-2 [Jury Instruction No. 14, 15].) Even if Defendants could
12 make that argument, the evidence admitted at trial showed Defendants’ ratification
13 of Gooden’s acts, and Dowling’s ongoing knowledge. See, e.g., *Acton v. Merle*
14 *Norman Cosmetics, Inc.*, 163 F.3d 605 (9th Cir. 1998) (ratification may occur by
15 acceptance of benefits of agent’s act, including by acquiescence or silence).

16 Despite knowingly using Plaintiff’s likeness on the mixtape cover, and
17 without his consent, Defendants continued to maintain the mixtape cover art on
18 multiple online services, and received hundreds of thousands of dollars in revenue
19 generated by streams of the mixtape. See Conlan Decl. Exhs. 11-14, 15, 16-20
20 [Trial Exhs. 209-212, 272, 275-279; Conlan Decl. Exh. 21 [Trial Exh. 290].)

21 Defendants testified—and admitted documents corroborated—that
22 Defendants knew the value and importance of privacy and publicity rights. This
23 included testimony from Shaft that Defendants had obtained a release from the
24 model they used for the mixtape. Conlan Decl. Exh. 5 [TT Day 3] at 152:4-11 (“Q.
25 Okay. And do you have similar provisions where you get the consent to use their
26 name and likeness? A. They’re different, but yes. Q. Similar Concept? A. Correct.
27 Q. Okay. And so at least as of May of 2015, you understood the importance of that
28 concept; right? A. Yeah.”); see also Conlan Decl. Exhs. 22, 23 (Trial Exhs. 13,

1 218.) Yet Defendants never bothered to investigate whose tattoo and likeness they
2 were adopting to enhance the commercial appeal of their mixtape cover. As
3 Almanzar's deposition testimony introduced at trial amply demonstrated,
4 Defendants "did not give a fuck" about Plaintiff or the harm Defendants were
5 causing. Conlan Decl., Exh. 24 [Almanzar Dep.] 58:1-62:7; 90:24-91:18; see also
6 Conlan Decl., Exh. 4 [TT Day 2] at 177:2-3, 178:19-22.

7 To the extent the jury's verdict could have been based on a failure to show
8 Defendant's knowing use of Plaintiff's likeness, the verdict was clearly against the
9 weight of the evidence presented at trial, and a new trial should be granted.

10 **2. Plaintiff provided ample evidence of harm and is entitled to**
11 **nominal and/or statutory damages of at least \$750.**

12 At trial, Plaintiff and his wife testified at length regarding the harm caused by
13 Defendants' misappropriation of Plaintiff's likeness. Conlan Decl. Exh. 4 [TT Day
14 2] at 137:10-13 ("A. Yeah. I feel like he doesn't sleep as well. He's – you know,
15 he's got to take Prilosec every day, grinds his teeth. We just had to get a mouth
16 guard. And I'm like, you, it's from your stress and constantly always thinking about
17 this."); see also *id.* at 135:15-23, 136:5-11. Plaintiff's testimony strongly supports a
18 damages award (be it significant or nominal) in Plaintiff's favor.

19 Civil Code, section 3344 states that in any action brought under the statute,
20 the person who violated the section "*shall be liable* to the injured party ... in an
21 amount equal to the greater of seven hundred fifty dollars (\$750) or the actual
22 damages suffered by him or her as a result of the unauthorized use....". *Id.*,
23 emphasis added. The evidence at trial demonstrated that Plaintiff suffered harm.
24 Plaintiff is therefore entitled to nominal and/or statutory damages of at least \$750.

25 To the extent the jury's verdict was based on a failure to find harm, that
26 verdict is clearly against the weight of evidence presented at trial, and a new trial
27 should be granted.

28 //

1 **3. Defendants failed to support their defense of “transformative use”**
2 **with any admissible evidence.**

3 In determining whether a work is transformative, courts consider whether the
4 defendant changes the work, or uses the work in a different context that
5 “transforms” it into a new creation. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508
6 F.3d 1146, 1164 (9th Cir. 2007).

7 The evidence at trial was that Gooden lifted Plaintiff’s likeness directly from
8 an image he found on the Internet, and pasted it onto the mixtape with minimal
9 adjustment. Conlan Decl. Exh. 5 [TT Day 3] at 171:16-19 (“A. No problem. First,
10 I copied the image straight from Google, the Internet, wherever – the gallery I
11 found it from. I pasted it into the actual document onto its own separate layer.”);
12 175:6-9 (“Q. And that mixtape cover reflects that the back tattoo that you found on
13 the Internet and pasted onto the document you were working with? A. Yes.”).

14 Defendants’ trial testimony and deposition testimony similarly showed that
15 Defendants had no interest in the artistic merit of the tattoo or “transforming”
16 Plaintiff’s likeness into a new creation, and their sole concern was superficial
17 factors unrelated to Plaintiff’s likeness, such as the appearance of Ms. Almanzar’s
18 face. *Id.* at 169:22-23 (“A. Well, my primary objective was to put something on
19 there that wasn’t so – like this and to distract from Cardi’s face.”); 38:19 (“A. Yeah.
20 It’s Cardi. That’s the Focus. Focus is Cardi B.”); see also Conlan Decl. Exh. 4 [TT
21 Day 2] at 200:4-5 (“All I was – when I was taking these pictures, all I care about,
22 how my face look.”).

23 To the extent the jury’s verdict could have been based on Defendant
24 establishing an affirmative transformative use defense, it is clearly against the
25 weight of the evidence presented at trial, and a new trial should be granted.

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E. Defendants’ misconduct at trial was a deliberate strategy to frustrate Plaintiff’s presentation of his case and improperly influence the jury

Misconduct by counsel or a party that prejudices the adverse party is justification for a new trial. *Wiedemann v. Galiano*, 722 F.2d 335, 337 (7th Cir. 1940). Ultimately, the Court considers whether or not “the trial was ... fair to the party moving.” *Id.* (quoting *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940)).

Where a motion for a new trial is based on misconduct, a new trial must be ordered if “the flavor of misconduct ... sufficiently permeate[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.” *Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 516–17 (9th Cir. 2004) (quoting *Kehr v. Smith Barney*, 736 F.2d 1283, 1286 (9th Cir. 1984)).

Here, Almanzar repeatedly engaged in theatrics, refused to answer basic questions, impermissibly disclosed privileged and confidential settlement communications, and generally acted with total disregard and disrespect for the jury’s time and formal nature of court proceedings. See generally Conlan Decl. ¶ 4 [Oct. 19, 2022 Tr.] at 206:11-207:22; 210:20-212:24. As the conduct of proceedings deteriorated, the Court interceded and brought proceedings to a halt. *Id.* at 213:11-214:9.

The deliberate nature of Defendants’ strategy to undermine Plaintiff’s ability to present his case was exposed by a switch in demeanor that puts Dr. Jekyll and Mr. Hyde to shame. On direct from her own counsel, Almanzar provided lucid, direct and fully responsive answers to questions—answers which, as noted in Section III.B, *supra*, were allowed to remain unchallenged by virtue of the Court’s erroneous and summary denial of cross-examination.

As a result of Almanzar’s antics, Plaintiff was forced to spend extraordinary amounts of time conducting his case-in-chief, and was prevented from obtaining

1 simple answers from a key party witness. Even those few answers given were
2 invariably delivered in a cloud of obfuscation, including repeated attempts to
3 sidetrack and distract the jury by asserting facts and theories wholly unrelated to the
4 question posed.

5 As previously noted, the question for the Court is whether the trial was fair to
6 Plaintiff. *Wiedemann*, 722 F.2d at 337. Taking a clear-eyed view with the benefit
7 of hindsight, the trial was plainly unfair to Plaintiff, and a new trial should be
8 ordered.

9 **F. Taken as a whole, the cumulative effect of the above legal errors**
10 **and witness misconduct deprived Plaintiff of a fair trial and a new**
11 **trial should be ordered.**

12 An accumulation of errors, even if not individually prejudicial, can amount to
13 prejudicial error requiring a new trial. See *Killian v. Poole*, 282 F.3d 1204, 1211
14 (9th Cir. 2002) (“[E]ven if no single error were prejudicial, where there are several
15 substantial errors, ‘their cumulative effect may nevertheless be so prejudicial as to
16 require reversal.’”) (quoting *United States v. de Cruz*, 82 F.3d 856, 868 (9th Cir.
17 1996); *Jerden v. Amstutz*, 430 F.3d 1231, 1241 (9th Cir. 2005) (applying
18 cumulative error doctrine to evidentiary errors in civil context and reversing and
19 remanding for new trial).

20 Here, even if the Court concludes its erroneous exclusion of the Atlanta Trial
21 evidence and summary denial of Plaintiff’s right to cross-examine Defendant
22 Almanzar were insufficiently prejudicial by themselves, the cumulative impact of
23 those errors, along with Almanzar’s recalcitrant trial tactics, were sufficient to
24 affect Plaintiff’s substantive right to a fair trial and a new trial should be ordered.

25 **IV. CONCLUSION**

26 Based on the above legal authorities and evidence admitted at trial, Plaintiff
27 respectfully requests an order vacating the judgment and setting the matter for a
28 new trial.

1 Dated: January 25, 2023

CAPPELLO & NOËL LLP

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3 By: /s/ Lawrence J. Conlan

4 A Barry Cappello

5 Lawrence J. Conlan

6 Richard Lloyd
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CERTIFICATE OF COMPLIANCE

“The undersigned, counsel of record for Plaintiff, certifies that this brief contains 6,943 words, which complies with the word limit of L.R. 11-6.1.

Dated: January 25, 2023

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