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8 **BEFORE THE NEVADA ATHLETIC COMMISSION**

9 **STATE OF NEVADA**

10 * * *

11 **IN THE MATTER OF:**

12 **JOSEPH GILBERT**

) MOTION TO REMOVE
) EXECUTIVE DIRECTOR
) KEITH KIZER
)

13 COMES NOW, RESPONDENT, JOSEPH S. GILBERT, an individual (hereinafter "Mr.
14 Gilbert"), by and through his attorney of record, MARK D. SCHOPPER, moves the Nevada
15 State Athletic Commission (hereinafter "Commission") to remove the Executive Director Keith
16 Kizer ("Executive Director") from any and all further involvement in the Matter of Joey Gilbert.
17 This Motion is based upon all the papers and pleadings on file, the attached Points and
18 Authorities, attached documents, and any argument that the Commission may request at a
19 hearing.

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. INTRODUCTION**

22 Public interest and principles of fundamental fairness and due process of law require that
23 the Commission conduct its affairs in an open, objective, and impartial manner free of undue
24 influence and the abuse of power and authority.
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1 While Mr. Gilbert has taken issue with many of the Executive Director's tactics and
2 public statements, he has continued, along with his legal counsel and expert witnesses, to
3 conduct an investigation and prepare a defense in this matter. He has continued to do this with
4 the belief that he will receive a full and fair hearing before the Commission. However, the
5 Executive Director's current actions have reached a particularly disturbing level, and they
6 ultimately threaten the fundamental fairness and due process to which Mr. Gilbert is entitled. In
7 point of fact, the Executive Director has acted in a manner so far outside the bounds of
8 acceptable professional behavior that there is no alternative but to inform the Commission of the
9 Executive Director's misconduct, and to respectfully request that the Commission remove him
10 from any and all further involvement related to the matter of Joey Gilbert.¹

11 The Executive Director's actions arguably include the following: 1) prohibited *ex parte*
12 communication with Mr. Gilbert's expert witness, Dr. Robert Voy, 2) defamation of character, 3)
13 willful or grossly negligent filing of a false allegation, and 4) abuse of power.

14 The Executive Director's actions in regards to the *ex parte* communication he sent to Dr.
15 Voy may ultimately also be found to include: 1) dissuading a person from testifying or producing
16 evidence in violation of Nev. Rev. Stat. §199.230, and/or 2) the use of intimidation with the
17 intent to influence a witness or person who may be called as a witness in an official proceeding
18 in violation of Nev. Rev. Stat. §199.240.

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23 ¹ The Commission, having the legal authority to employ an executive director, has: 1) the authority to warn
24 and reprimand its executive director (NAC 284.638), 2) the authority to suspend or demote its executive director
25 (NAC 284.642), and 3) the authority to dismiss the executive director for, *inter alia*, a) any activity which is
incompatible with an employee's conditions of employment established by law, b) disgraceful personal conduct
which impairs the performance of a job or causes discredit to the agency, c) discourteous treatment of the public, 4)
incompetence or inefficiency, d) inexcusable neglect of duty, e) dishonesty, and f) a violation of any rule of the
Commission (NAC 284.650).

1 Additionally, from the first day the Commission filed the complaint against Mr. Gilbert
2 in this matter, the Executive Director has wrongfully and unfairly sought to influence this matter
3 in the media through false, misleading, negligent, and/or defamatory statements. As shown
4 below in detail, the Executive Director has—through false and misleading statements—already
5 convicted (so to speak) Mr. Gilbert in the media. In fact, the Executive Director’s media
6 statements have been so extreme that they may have the effect of entrenching the Commission in
7 the position which its Executive Director has so publicly stated, making it difficult, if not
8 impossible, for the Commission to reach a different conclusion after actual consideration of the
9 record. As the Commission is fully aware—and notwithstanding the fact that this matter will be
10 determined by a quasi-judicial proceeding—Mr. Gilbert is entitled to due process and a full and
11 fair hearing. At this time, the Executive Director’s actions have, at the very least, seriously
12 compromised such.

13 **II. FACTUAL BACKGROUND**

14 On or about October 1, 2007, Executive Director Keith Kizer filed a complaint against
15 Mr. Gilbert on behalf of the Commission. The complaint alleges violations of NAC 467.850 &
16 NAC 467.886. The Executive Director allegedly based the complaint on results from the testing
17 of Mr. Gilbert’s urine samples performed by Quest Laboratories in Las Vegas, Nevada. The
18 urine samples were collected by the Commission at Mr. Gilbert’s fight on September 21, 2007.
19 The Quest results were reported to the Commission on or about September 27, 2007. The
20 complaint in this matter alleged that Mr. Gilbert tested positive for six substances: 1)
21 methamphetamine, 2) amphetamine, 3) stanozolol, 4) nordiazepam, 5) temazepam, and 6)
22 oxazepam.
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1 Following the filing of the complaint against him, Mr. Gilbert demanded that his urine
2 specimens collected at the fight on September 21, 2007, be sent to the Center for Human
3 Toxicology at the University of Utah ("CHT") for retesting. CHT's testing results are on file
4 with the Commission.

5 Starting on the day the complaint was filed against Mr. Gilbert, the Executive Director
6 has made numerous statements in the media regarding this matter. The Executive Director's first
7 media statements were on or about October 2, 2007, and his most recent "media release" and
8 statements were made on or about January 8-10, 2008. Attached hereto (Exhibit - A) is an
9 abbreviated list (12 pages) of the Executive Director's statements in the print media.² On January
10 9, 2008, the Executive Director issued a media release regarding Mr. Gilbert's test results from
11 CHT. In the media release and subsequent statements, the Executive Director claimed that the
12 CHT lab results "confirmed" and "matched" Quest's (Commission testing laboratory) results.

13 Frustrated by the Executive Director's continued and regular media statements regarding
14 the facts of this matter, Mr. Gilbert began drafting a factual response to the Executive Director's
15 media statements. Mr. Gilbert's draft response utilized the Executive Director's own media
16 statements to illustrate how, in his judgment, the Executive Director's statements were false,
17 misleading, negligent, and/or defamatory.

18 Following some of the Executive Director's most recent statements (Jan. 8-10, 2008) in
19 the media, Mr. Gilbert and his legal counsel requested that Mr. Gilbert's expert witnesses, Dr.
20 Robert Voy and Dr. Ray Kelly, PhD, draft analytical responses to some of the Executive
21 Director's statements that again appeared to be false, misleading, contradictory, and/or
22 incorrectly and unfairly framed the issues in the media. After reading the Executive Director's
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² Which does not include all of the Executive Director's comments on television and radio.

1 most recent statements in the media, both Dr. Voy and Dr. Kelly agreed to draft responses. Dr.
2 Kelly drafted his response and forwarded it to Mr. Gilbert and his legal counsel. Dr. Voy began
3 drafting his response at midday on January 10, 2008.

4 Dr. Robert Voy is a world-renowned expert in the field of sports medicine and drug use
5 and sport. He is a former Chief Medical Officer for the U.S. Olympic Committee and former
6 medical review officer for the NFL Players Association. He also served on the President's
7 Commission for a Drug-Free America. In fact, Dr. Voy is so well respected that former U.S.
8 Olympic Committee President, Robert Helmick, stated in a New York Times article that "[t]here
9 is no one with better professional qualifications" than Dr. Voy.

10 In regards to boxing, Dr. Voy is recognized as one of the best doctors in the sport (if not
11 the best). He is a former President of USA Boxing, the body that governs amateur and Olympic
12 boxing in the United States, and he was also a member of the subcommittee for boxing of the
13 International Olympic Committee. Beyond all of this, Dr. Voy is the author of the book: Drugs,
14 Sport, and Politics. This book is standard reading for anyone interested in drug testing in sports,
15 and the book was recently quoted in the Mitchell Report (the report to the Commissioner of
16 Baseball on drug use in MLB). Finally, it should be emphasized that Dr. Voy is a former
17 physician for the Nevada State Athletic Commission.
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19 Needless to say, Dr. Voy is a pivotal and indispensable expert witness for Mr. Gilbert's
20 defense. In point of fact, there is no other expert witness in the world with Dr. Voy's knowledge
21 and experience in regards to boxing, drug testing, and drug testing protocols. Again, Dr. Voy is
22 absolutely critical to Mr. Gilbert's defense of the allegations against him. Moreover, anyone
23 (including the Executive Director) with a working knowledge of Mr. Gilbert's matter before the
24 Commission would understand that.
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1 Contemporaneous with Dr. Voy drafting his statement, the separate statement being
2 drafted by Mr. Gilbert in response to many of the Executive Director's public statements
3 ("Gilbert Release") was prematurely released to the media through one of Mr. Gilbert's press
4 people, Chul Yim, and was published on the Internet. The Gilbert Release (an E-mail) sent to the
5 media by Mr. Gilbert's press person included the statement drafted by Mr. Gilbert as text in the
6 body of the E-mail, as well as three attached documents. The first attached document was an MS
7 Word document version of Mr. Gilbert's statement (See Exhibit - B). The second attached
8 document was an MS Word document authored by Dr. Ray Kelly PhD, Toxicologist, and was
9 also a response to the Executive Director's statements in the media (See Exhibit - C). The third
10 attached document (PDF file) was a statement by Mr. Gilbert's legal counsel, Mark Schopper,
11 which was released to the media on January 10, 2008, in response to the Executive Director's
12 "media release" and statements of January, 8 & 9, 2008 (See Exhibit - D). Dr. Voy neither had
13 knowledge of these documents, nor of their release to the media.

14 When Mr. Gilbert's legal counsel learned of the premature release of Mr. Gilbert's
15 statement, and that counsel's personal cell phone number had been placed on the document by
16 the press person, an immediate correction was called for. Mr. Yim then re-released said
17 documents with a "Correction", which appeared at the top of Mr. Yim's E-mail. Mr. Yim's
18 correction stated that Mr. Gilbert's counsel had no knowledge of the release.

19 Some time on January 10, 2007, someone in the media received Mr. Yim's E-mail, along
20 with the Gilbert Release and the attached documents, and forwarded such to the Executive
21 Director. Thereafter, the Executive Director forwarded the Gilbert Release along with an *ex*
22 *parte* communication to Dr. Voy, also on January 10, 2008. The Executive Director sent this E-
23 mail communication with his Nevada government E-mail address: kkizer@boxing.nv.gov. The
24 Executive Director's *ex parte* communication stated: "I take it that like Mr. Schopper, you had
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1 nothing to do with this or the potshot at Dr. John Hyatt.” (See Exhibit – E), for the full text and
2 content of the Executive Director’s *ex parte* communication).

3 Dr. Voy was midway through drafting his own response to the Executive Director’s
4 media statements when he received the Executive Director’s *ex parte* E-mail communication.
5 Following the receipt of this *ex parte* communication, Dr. Voy notified Mr. Gilbert that he would
6 not be finishing his response to the Executive Director’s statements in the media. Dr. Voy also
7 expressed some reluctance to continue as an expert witness for Mr. Gilbert as a result of the
8 Executive Director’s communication. Dr. Voy’s reluctance stemmed from an apprehension that
9 the Executive Director was trying this matter in the media.

10 **III. LEGAL ARGUMENT**

11 **A. LEGAL STANDARD**

12 The due process clause of the Fourteenth Amendment to the United States Constitution
13 prohibits a state from depriving “any person of life, liberty, or property, without due process of
14 law,” and is a limitation on the states in the interest of individuals. See Cronson v. Clark, 810
15 F.2d 662, 665 (7th Cir.1987), cert. denied, 484 U.S. 871, 108 S.Ct. 199 (1987); Com. of Pa. v.
16 Porter, 659 F.2d 306 (3rd Cir.1981), cert. denied, 458 U.S. 1121, 102 S.Ct. 3509 (1982).
17 Similarly, the Nevada Constitution protects individuals against deprivations by the state of life,
18 liberty, or property, without due process of law. Nev. Const. art. 1, § 8.

19 The Nevada State Athletic Commission is a public commission of the State of Nevada
20 established pursuant to NRS 467.020, and is authorized by statute to decide all matters which
21 come before it. See Nev. Rev. Stat. Chapter 467. “[A]ny tribunal permitted by law to try cases
22 and controversies not only must be unbiased but also must avoid even the appearance of bias.”
23 Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 150, 89, S.Ct. 337,
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1 340 (1968). See also Exxon Corp. v. Heinze, 32 F.3d 1399, 1403 (9th Cir. 1994) (“the
2 Constitution is concerned not only with actual bias but also with ‘the appearance of justice.’”).

3 Procedural due process in the administrative setting requires that the hearing be
4 conducted “before a reasonably impartial, noninvolved reviewer.” Gai v. City of Selma, 68
5 Cal.App.4th 213, 219 (1998). Moreover, “the broad applicability of administrative hearings to
6 the various rights and responsibilities of citizens and businesses, and the undeniable public
7 interest in fair hearings in the administrative adjudication arena, militate in favor of assuring that
8 such hearings are fair.” Nightlife Partners, Ltd. v. City of Beverly Hills, 108 Cal.App.4th 81, 133
9 Cal.Rptr.2d 234 (2003).

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11 **B. *EX PARTE* COMMUNICATION AND WITNESS INTIMIDATION**

12 A review of the Nevada Revised Statutes reveals that Nevada has two statutes that apply
13 in cases of witness tampering. Section 199.230 of the Nevada Revised Statutes relates to cases or
14 proceedings in which someone prevents or dissuades a person from testifying or producing
15 evidence.³ Section 199.240 of the Nevada Revised Statutes relates to the use of intimidation
16 with the intent to influence any witness or person who may be called as a witness in an official
17 proceeding.⁴

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19 ³ **NRS 199.230 Preventing or dissuading person from testifying or producing evidence.** A person who, by
20 persuasion, force, threat, intimidation, deception or otherwise, and with the intent to obstruct the course of justice,
21 prevents or attempts to prevent another person from appearing before any court, or person authorized to subpoena
22 witnesses, as a witness in any action, investigation or other official proceeding, or causes or induces another person
23 to absent himself from such a proceeding or evade the process which requires him to appear as a witness to testify or
24 produce a record, document or other object, shall be punished:

25 1. Where physical force or the immediate threat of physical force is used, for a category D felony as provided in
NRS 193.130.

2. Where no physical force or immediate threat of physical force is used, for a gross misdemeanor.

⁴ **NRS 199.240 Bribing or intimidating witness to influence testimony.** A person who:

1. Gives, offers or promises directly or indirectly any compensation, gratuity or reward to any witness or person
who may be called as a witness in an official proceeding, upon an agreement or understanding that his testimony
will be thereby influenced; or

2. Uses any force, threat, intimidation or deception with the intent to:

1 With respect to whether the Executive Director's *ex parte* communication violated either
2 of the aforementioned criminal statutes, it is respectfully submitted that this question is best left
3 to the appropriate Nevada authorities. Nonetheless, the seriousness of the present proceeding
4 (and the Executive Director's actions) demands a discussion of the harassing and intimidating
5 nature of the Executive Director's *ex parte* communication, and the prejudicial effect it has had
6 on Mr. Gilbert's defense.

7 The Executive Director's *ex parte* communication to Dr. Voy stated: "I take it that like
8 Mr. Schopper, you had nothing to do with this or the potshot at Dr. John Hyatt." The Executive
9 Director's reference to "this", as shown below in the text of the Executive Director's E-mail
10 communication to Dr. Voy, plainly refers to the Gilbert Release included as text in the body of
11 the E-mail, and the three attached documents. The reference to Dr. Hiatt was in regards to a
12 media statement made by Mark Schopper that Dr. Hiatt had resigned from Quest.

13 While the Executive Director's reference to "this", along with a reference to a previous
14 comment made in the media relating to Dr. Hiatt, may not appear as much more than a short and
15 rude query— it most assuredly is more—much more. Put into context, the Executive Director's
16 *ex parte* communication with Mr. Gilbert's expert witness is a very serious matter.
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18 The first page of the Executive Director's communication to Dr. Voy read as follows:

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23 (a) Influence the testimony of any witness or person who may be called as a witness in an official proceeding;
24 (b) Cause or induce him to give false testimony or to withhold true testimony; or
25 (c) Cause or induce him to withhold a record, document or other object from the proceeding,
is guilty of a category C felony and shall be punished as provided in NRS 193.130, and may be further punished by
a fine of not more than \$50,000.

1 -----
2 Subj: **FW: CORRECTION: In the Matter of Nevada's Joey Gilbert Professional Boxer**
3 Date: 1/10/2008 3:54:41 PM Pacific Standard Time
4 From: kklzer@boxing.nv.gov
5 To: VOYROBT@aol.com

6 I take it that like Mr. Schopper, you had nothing to do with this or the potshot at Dr. John Hyatt.

7 **From:** chulyim@gmail.com [mailto:chulyim@gmail.com] **On Behalf Of** Chul Yim
8 **Sent:** Thursday, January 10, 2008 1:45 PM
9 **Subject:** CORRECTION: In the Matter of Nevada's Joey Gilbert, Professional Boxer

10 CORRECTION: The press releases, and documents you received was solely done by Joey Gilbert and
11 not his representative Mark Schopper. The decision to release information to the media was Mr. Gilbert's
12 decision without consultation of Mr. Schopper. If you have any questions, please contact Mr. Gilbert
13 directly at joeygilbert@msn.com . Thank you for your time.

14 ----- Forwarded message -----

15 **From:** Chul Yim <chul@jgpromotions.com>
16 **Date:** Jan 10, 2008 12:49 PM
17 **Subject:** In the Matter of Nevada's Joey Gilbert, Professional Boxer
18 **To:** chul@jgpromotions.com

19 **For Immediate Release:**
20 **Contact:** Mark Schopper, 775.000.0000

21 **In the Matter of Joey Gilbert, Professional Boxer**

22 *Reno, NV, January 10, 2008* - Drug testing must be done in accordance to published protocols
23 officially adopted by the testing organization. The protocol steps must be followed and meet
24 every requirement as stated therein. Otherwise the drug testing is considered by some to be a
25 human rights challenge, and is certainly a violation of a licensee's due process rights.

Unfortunately, the Nevada State Athletic Commission (NSAC) does not have any protocols in
place. Despite the fact that this is not the first time an athlete has had substantial problems and
concerns due to lack of protocol, the NSAC has neglected to approve one of the dozens of
approved protocols used in professional sports worldwide.

Virtually every known organization or professional sports body (and most amateur) has a
protocol (explained in detail below) in place to protect the athlete and strictly forbid the releasing
of private information including test results to the media until they have been confirmed. There
are far too many organizations, sanctioning bodies or regulatory agencies (state or national) with
testing protocols in place to list here, but some notables are: International Olympic Committee,
NCAA, PGA, LPGA, FIFA, NFL, NBA, WNBA, MLB, WADA, USADA and many more.

(Note: for Privacy reasons, Mr. Schopper's personal cellular phone number has been removed from the excerpt
provided above).

1 First, the Executive Director's communication essentially accuses Dr. Voy of drafting the
2 Gilbert Release that was sent to the media. Not that it should make any difference in the
3 Commission's evaluation of the Executive Director's actions, it is nevertheless important to
4 clarify again that Dr. Voy had no knowledge of the Gilbert Release whatsoever. Nonetheless, the
5 Executive Director's accusation is very troubling.

6 Dr. Voy has every legal, ethical, and moral right to participate in the defense of his client,
7 which includes rebutting information to protect Mr. Gilbert from the substantial undue
8 prejudicial effect of the Executive Director's constant false, misleading, and arguably
9 defamatory media statements (discussed below in detail). Furthermore, the rebuttal of such
10 information is necessary to mitigate the continued adverse publicity caused by the Executive
11 Director's statements, which have verifiably damaged Mr. Gilbert's career and future.
12 Accordingly, even had Dr. Voy participated in the drafting of the Gilbert Release—he should not
13 be harassed or intimidated by the Executive Director of a government commission for doing so.
14 And, harassing and intimidating language was all that the Executive Director's *ex parte*
15 communication contained.
16

17 A review of the Executive Director's *ex parte* communication reveals that it is
18 completely devoid of any meaningful content relevant to the present matter. If there were some
19 valid reason for the Commission to question Dr. Voy about something relevant to the merits of
20 this matter, then there are procedures in place to do so. Nev. Rev. Stat. §467.115. Additionally,
21 in such a situation the Commission's question and the doctor's response would both be on the
22 record. The Executive Director did not use the proper method of discovery for the obvious
23 reason that his communication was not relevant to the merits of this proceeding. No, the
24 accusatory and intimidating communication was simply an attempt to silence Dr. Voy.
25

1 The Gilbert Release obviously rattled the Executive Director, and his *ex parte*
2 communication unmistakably demonstrates that he had a very serious problem with its content. It
3 is not difficult to understand why the Executive Director was rattled by the Gilbert Release.
4 Likewise, it is not difficult to understand why the Executive Director sought to harass and
5 intimidate Dr. Voy.

6 The Gilbert Release discusses a number of the Executive Director's false and misleading
7 media statements, as well as a number of issues regarding serious irregularities (including the
8 filing of at least one false allegation) in the handling of this matter. Many of these issues include
9 matters on which Dr. Voy is a noted authority, e.g., drug testing protocols.⁵

10 As detailed below, the Executive Director's abuse of power and severe mishandling of
11 this matter were made possible in part because the Commission does not have any drug testing
12 protocols in place. Additionally, the Executive Director has suggested numerous times in the
13 media that the Commission does not need drug testing protocols. Thus, the Executive Director
14 must be very uneasy about his false and misleading statements, together with the details of his
15 mishandling of this matter, being unveiled to the Commission or making it into the media, which
16 would explain his intimidating communication to Dr. Voy following the release of some of this
17 information in the Gilbert Release.

18 The reference to Dr. Hiatt in the Executive Director's accusatory communication to Dr.
19 Voy is simply further intimidation by the Executive Director in his an attempt to silence Dr. Voy.
20 The statement about Dr. Hiatt leaving Quest was clearly attributed in the Reno Gazette Journal to
21 Mark Schopper. Nonetheless, the Executive Director's communication basically accuses Dr. Voy
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25 ⁵ Knowing that Dr. Voy is an expert on most of the issues (testing protocols) presented in the Gilbert Release, it is
no coincidence that the Executive Director sent the *ex parte* communication to Dr. Voy, and not to Mr. Gilbert's
other expert witness, Dr. Kelly (toxicologist).

1 of taking a "pot shot" at Dr. Hiatt, who is one of Dr. Voy's colleagues. This accusation is
2 irresponsible and baseless, and it is an obvious attempt to harass and intimidate Dr. Voy.
3 Moreover, in light of the fact that the reference to Dr. Hiatt was clearly attributed in the
4 newspaper, the Executive Director's communication can only be read as a threat—suggesting
5 that "pot shots" will be taken at Dr. Voy in the media.

6 Finally, the tone and content of the Executive Director's *ex parte* communication
7 demonstrate that his opinion is that Mr. Gilbert and his defense team have done something wrong
8 by issuing the Gilbert Release.⁶ Such maligning of Mr. Gilbert and his defense team directly to
9 Dr. Voy, once again can only be interpreted as an attempt to dissuade the esteemed doctor from
10 providing his expert witness services to Mr. Gilbert's defense team.

11 What makes the Executive Director's *ex parte* communication that much more
12 intimidating is that it was sent from the Executive Director of a powerful government
13 Commission that oversees an area (Sports/Boxing) in which Dr. Voy is a noted expert. As the
14 Executive Director of a powerful government commission, the Executive Director has open
15 access to the media. And, following the careless, malevolent, and negligent manner with which
16 the Executive Director has handled media statements regarding Mr. Gilbert (Dr. Voy's client), it
17 is understandable that someone in Dr. Voy's position might be intimidated. Moreover, it is
18 important to note that Dr. Voy does not have a personal relationship with the Executive Director.
19 Therefore, such a communication from the Executive Director was totally unexpected and
20 inappropriate on any level.
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24 ⁶ In light of the fact that the Executive Director has spoken (at length) with the media regarding this matter dozens of
25 times, it is difficult to understand how the Executive Director could have any issue with Mr. Gilbert or his
representatives making media statements. We again respectfully refer the Commission to the twelve (12) pages of
attached quotes attributed to the Executive Director in the media. Again, this is an abbreviated list of only the most
relevant statements, and does not include his numerous statements on television or radio.

1 In this regard, it is important to point out some more subtle aspects of the Executive
2 Director's communication. First, this *ex parte* communication was sent from the official E-mail
3 address of the Executive Director of a government commission, which of course gives it the
4 appearance and weight of official comment. Second, the E-mail communication did not contain
5 the prefatory greeting and valediction that are customary in professional communications.
6 Without an existing relationship between the parties, any reasonable person in the professional
7 world would interpret these exclusions as antagonistic and a sign of blatant disrespect under the
8 circumstances. Taking into account that the Executive Director sent this communication to an
9 esteemed expert of Dr. Voy's caliber, this lack of professionalism is even that much more
10 troubling. Considering the accusatory and intimidating tone of the communication, its *ex parte*
11 nature, the lack of an existing relationship between the parties, along with these exclusions, any
12 reasonable person would be intimidated by such a communication from the executive director of
13 a government commission.

14
15 In short, the Executive Director's *ex parte* communication can only be seen as an attempt
16 to intimidate and/or dissuade the doctor from participating in Mr. Gilbert's defense. And,
17 unfortunately, the Executive Director's communication ultimately had such an effect. Moreover,
18 if the Commission were to judge the Executive Director's *ex parte* communication by its result—
19 then there can be no doubt that the purpose of the communication was to silence Dr. Voy. In fact,
20 what other purpose could the Executive Director have had for sending such a communication?

21 Assuming *arguendo* that the Executive Director's communication to Dr. Voy should
22 somehow prove not to be a violation of either NRS 199.230 (dissuading statute), or NRS 199.240
23 (intimidation statute), it was nonetheless a serious breach of commonly observed ethical and
24 professional standards.
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1 The Executive Director is an attorney. In fact, he was formerly the attorney for the
2 Commission. As an attorney, the Executive Director should know better than to contact Mr.
3 Gilbert's witness at all, much less than to send an accusatory, intimidating, and harassing email.
4 Attorneys (much less Executive Directors of a government commission) "must use their common
5 sense to avoid conduct which could appear to be an improper attempt to influence a witness who
6 is about to testify." Erickson v. Newmar Corp., 87 F.3d 298, 303 (9th Cir. 1996). The Executive
7 Director's E-mail to Dr. Voy was prohibited *ex parte* communication regardless of the Executive
8 Director's job title. Nonetheless, as an attorney who should know better, and as the Executive
9 Director of a Nevada Commission, there is simply no excuse for the Executive Director's
10 behavior.

11 The Ninth Circuit Court of Appeals has noted, that "[t]here is a scarcity of case law on
12 the issue of *ex parte* contact with expert witnesses, possibly because the violation seldom
13 happens." Erickson, 87 F.3d at 302, citing Campbell Indus. v. M/V Gemini, 619 F.2d 24 (9th
14 Cir.1980). Nevertheless, a noted legal ethics treatise discusses the ethical implications of
15 communications with an adversary's expert witness, 2 Geoffrey Hazard & W. Hodes, The Law
16 of Lawyering sec. 3.4:402 (2d ed.Supp.'94), and advises that: "*Since existing rules of civil*
17 *procedure carefully provide for limited and controlled discovery of an opposing party's expert*
18 *witnesses, all other forms of contact are impliedly prohibited."* Id.

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20 The reason that such *ex parte* communications are prohibited could not be better
21 illustrated than by the present situation. The Executive Director's *ex parte* communication to Dr.
22 Voy has had a prejudicial effect on Mr. Gilbert's ability to present his defense. Following the
23 Executive Director's *ex parte* communication to Dr. Voy, the esteemed doctor stopped drafting
24 his analytical response to the Executive Director's media statements and informed Mr. Gilbert
25

1 that he would not be finishing it. As noted, Dr. Voy has also expressed some reluctance to further
2 participate in Mr. Gilbert's defense as a result of the Executive Director's *ex parte*
3 communication. One can understand such a reluctance considering the Executive Director's
4 thinly veiled threat to take a "pot shot" at Dr. Voy in the media.

5 At a minimum, due process requires that a quasi-judicial proceeding must afford the right
6 to present evidence. Moreover, it goes without saying that the need for expert witnesses is only
7 magnified in a matter such as the present one—because of the complex scientific evidence
8 involved. It is axiomatic that Mr. Gilbert cannot effectively present his evidence if his expert
9 witness chooses to limit or withdraw his participation in this matter. In sum, the Executive
10 Director's *ex parte* communication to Dr. Voy has had a prejudicial effect on Mr. Gilbert's
11 defense.

12 The Executive Director's *ex parte* communication to Dr. Voy should be sufficient for the
13 Commission to remove the Executive Director from this matter entirely. However, the Executive
14 Director's misconduct does not end there, unfortunately.

15 C. MEDIA TRIAL & FALSE ALLEGATIONS

16
17 Mr. Gilbert's difficulty, when he appears before the Commission for his hearing, is that
18 he has already been convicted in the media—so to speak. The Executive Director, acting in a
19 capacity as the official spokesperson for the Commission, has orchestrated a media trial of Mr.
20 Gilbert quite literally from day one. Media coverage of the Executive Director's "statements"
21 and "media releases" has been extensive—including local, national, and international newspaper
22 reports, radio, local television, and highly visited websites such as ESPN.COM and SI.COM
23 (Sports Illustrated). As a result, the Executive Director's false, misleading, negligent, and
24 defamatory statements in the news media have irreparably damaged Mr. Gilbert's reputation.
25 More importantly for purposes of this motion, the Executive Director's statements have so

1 tainted this matter that Mr. Gilbert's right to a full and fair hearing has been severely
2 compromised.

3 Consider the following media statement made by the Executive Director:

4 "They already tested and verified it," Kizer said. "I couldn't imagine
5 it being different. I've never heard of it being different again. I'm not
6 going to ask for (retesting) because I'm very confident the Quest
7 reports are 100 percent accurate." (Reno Gazette Journal, October
8 3, 2007).

9 Amazingly, the Executive Director publicly states that he is "very confident" Quest
10 reports are "100 percent accurate." This statement essentially states to the world that the
11 Commission is certain that the allegations against Mr. Gilbert are 100% accurate.

12 Since the Executive Director made this statement in the media, however, it has been
13 conclusively shown that Quest is not 100% accurate. In fact, no drug testing in the world is
14 100% accurate and every informed person knows that, which is why testing protocols like B-
15 sample "verification of positive tests" are used to protect athletes. However, the Quest test was
16 not "verified" as the Executive Director falsely stated. Quest did not verify its results by testing
17 the "B" sample, which is standard testing protocol for nearly every league, organization, agency
18 and/or commission that performs drug testing in the world of sports.⁷

19 As the Commission is aware, after the complaint was filed Mr. Gilbert requested that his
20 sample be sent to the Center for Human Toxicology.⁸ CHT's reporting limit for
21 methamphetamine is 100 times more sensitive than the Quest test. CHT tested the post-fight
22 sample and found no trace of methamphetamine. A subsequent test of the pre-fight sample by
23 CHT verified and confirmed that there was no methamphetamine whatsoever present in Mr.
24 Gilbert's system. These tests show conclusively that Quest's positive result for
25 methamphetamine in its general drug screen was a false positive result, i.e., clearly incorrect.

⁷ Additional laboratory tests and a thorough medical review ascertain the source of a drug detected and eliminate
misinterpreting a clinical false-positive result that would implicate an individual as an illicit drug user.

⁸ One of only two International Olympic Committee sanctioned labs in the United States.

1 The Executive Director also stated in the media that Mr. Gilbert definitely took steroids
2 and methamphetamine:

3 **"I checked with our chemist," Kizer said. "He said you don't**
4 **test positive for a methamphetamine unless you took**
5 **methamphetamine and you don't test positive for steroids**
6 **unless you took steroids." (Reno Gazette Journal, October 3,**
7 **2007).**

8 -and-

9 **"The only way you test positive for steroids or**
10 **methamphetamine is by taking them," Kizer said.**
11 **(Nevada Appeal, October 4, 2007).**

12 -and-

13 **Kizer said the only way to test positive for steroids or**
14 **methamphetamine is to do the drugs and that a person who**
15 **hasn't done the drugs or been exposed to them should test for 0**
16 **ng. (Nevada Appeal, October 17, 2007).**

17 These three statements are particularly disturbing. First of all, in these three statements
18 the Executive Director—acting as the official spokesperson for the Commission—has very
19 publicly stated that Mr. Gilbert used steroids and methamphetamine. Second, it goes without
20 saying that such inflammatory and sensationalized language by a public official should never be
21 permitted during the pendency of a contested case. Third, his irresponsible statements again
22 illustrate how the Executive Director has used the media to influence the public, the
23 Commission, and the outcome of this proceeding.

24 The Executive Director's first two statements are even that much more disturbing
25 considering that they were made only one or two days after the complaint was filed. As the
Commissioners are aware, there has not been a hearing in this matter, the complicated scientific
evidence has not been explained by the experts (who are actually qualified to do so), and the
Commission certainly has not rendered a decision. Nevertheless, the Executive Director
communicated a message to the world (and the Commissioners) that this matter has been

1 decided, i.e., Mr. Gilbert unquestionably took steroids and methamphetamine. Moreover, the
2 Executive Director provided further authority by stating that the Commission's own chemist had
3 confirmed this!

4 It is not clear from the Executive Director's authoritative statement with which of the
5 Athletic Commission's chemists he spoke. However, it is commonly known by doctors, drug
6 testing laboratories, and toxicologists, that there are literally dozens of over the counter cold
7 medicines, cough syrups, nasal sprays, diet pills, medical conditions, and prescription
8 medications that can and do routinely cause false positives for methamphetamine. Moreover, this
9 information is readily available on thousands of Internet websites. Therefore, it is simply
10 unbelievable that the Commission's "chemist" would ever make such a ludicrous statement.
11 Moreover, what purpose could the Executive Director have to make these three statements unless
12 to improperly influence the ultimate outcome of this matter?

13 It should also be pointed out that Quest did not perform a "discrimination test" on the
14 positive methamphetamine result, which, along with medical review officers, is industry-wide
15 standard procedure for positive drug tests for methamphetamine. The Executive Director
16 reported to Mr. Gilbert's previous legal counsel that the Commission never requests
17 discrimination tests. Accordingly, there was no way for Quest or the Commission to know
18 whether Mr. Gilbert's one positive test result (general drug screen) for methamphetamine was in
19 reality methamphetamine—and not simply over the counter cough syrup—which often produces
20 false positives for methamphetamine.⁹ To illustrate the seriousness of this, consider that if Mr.
21 Gilbert had not demanded the re-test at CHT, he would have been sanctioned by the Commission
22 for something he did not do and, thus, forever been labeled a meth user.

23
24
25 ⁹ In light of the fact that the Commission does not utilize discrimination tests, every positive test result for
Methamphetamine recorded by the Commission to date is suspect.

1 There is another very troubling aspect of the Executive Director's handling of this
2 particular issue. As the Commission is aware, Quest reported a positive result for the street drug
3 methamphetamine from its general drug screen on Mr. Gilbert's post-fight urine sample.
4 However, it must be emphatically pointed out that Quest's original testing of Mr. Gilbert's post-
5 fight sample comprised two separate drug screen profiles ("general drug screen", and "stimulant
6 panel"), both of which included tests for methamphetamine. According to the Commission's own
7 report from Quest, one of these drug screens (stimulant panel) contained an explicit negative
8 result for methamphetamine.

9 What is particularly disturbing about this situation is that the Commission had the
10 negative results of the stimulant panel for methamphetamine all along. However, the Executive
11 Director never made this negative test result public. And, in spite of the negative test result the
12 Executive Director included methamphetamine as an allegation in the complaint against Mr.
13 Gilbert. While the Executive Director has since denied any knowledge of a stimulant panel
14 (Reno Gazette Journal, December 14, 2007), it is difficult to fathom how that could be true.

15 First, Quest's documents show that Quest reported the results of the stimulant panel to
16 the Commission on September 27, 2007, two full days before it reported the general drug screen.
17 Second, the Office of the Attorney General has confirmed in writing that the "stimulant panel" is
18 conducted "as part of the standard testing for each main event and/or title contest of unarmed
19 combat conducted in Nevada." (See Exhibit - F, January 4, 2008 A.G. Letter). In light of the
20 September 27, 2007 report date for the stimulant panel, and the disclosure by the Office of the
21 Attorney General, it is evident that the Executive Director knew or should have known about the
22 negative result before the complaint was ever filed against Mr. Gilbert. Filing a complaint
23 against a professional athlete for illicit drug use is a very serious matter. Accordingly, it goes
24 without saying that such a complaint should never be filed without the Executive Director first
25 checking the results of the Commission's own tests.

1 In light of the fact that the Executive Director has made at least five (5) other verifiably
2 false statements in the media regarding the testing results in this matter, it seems much more
3 likely that the Executive Director did know about the negative stimulant panel and nevertheless
4 willfully reported a false positive to the media and included a false allegation against Mr. Gilbert
5 in the Complaint. In any event, the Executive Director was, at best, grossly negligent for
6 including the methamphetamine allegation in the complaint and reporting the results to the
7 media.

8 Whatever the case may be, the Executive Director's failure to check and/or report the
9 Commission's own negative test result, and then further stating in the media that he was "very
10 confident" the results were "100% accurate," and further stating that "you don't test positive for
11 methamphetamine unless you took methamphetamine"—resulted in newspapers, television
12 stations, and websites around the world reporting that Mr. Gilbert was using methamphetamine.
13 This is inexcusable. In fact, the entire methamphetamine allegation could have, and should have,
14 been avoided.¹⁰

15 Next, the Executive Director skews the facts in regards to the CHT results:

16 **"The labs had disagreed," Kizer said. "As I mentioned before,**
17 **the tie goes to the fighter. I'm waiting to get the steroid test**
18 **back from Utah. I figure there's no need to wait for dropping**
19 **the meth with the two labs in disagreement." (Reno Gazette**
20 **Journal, December 14, 2007).**

21 Here, the Executive Director states that the labs "disagreed," and the results were
22 somehow a "tie." This, again, could not be further from the truth. As discussed above, there was
23 a "tie" in Quest's initial testing results (i.e., one positive, and one negative). Nevertheless, the
24 Executive Director included the methamphetamine allegation in the complaint.

25 ¹⁰ Contrary to the Executive Director's public statement that the Commission should not be compared to governing
bodies that have testing protocols in place, the methamphetamine allegation in this matter would have been entirely
avoided had the Commission been following any one of the numerous protocols that have been adopted by other
governing bodies which oversee drug testing in sports.

1 In the above media statement, the Executive Director states that the CHT lab and the
2 Quest lab were in disagreement. Contrary to the Executive Director's statement, however, the
3 labs were not actually in disagreement on December 14, 2007, when the Executive Director
4 made his media statement. In fact, on November 30, 2007, Quest's Director, Dr. John Hiatt, sent
5 the Executive Director a letter in which Dr. Hiatt stated: "I must conclude that it is very doubtful
6 that Mr. Gilbert's post-fight sample contains methamphetamine." (See Exhibit - G, Hiatt Letter).
7 Thus, it is inexcusable for the Executive Director to continue to publicly state that there was a
8 "disagreement" or a "tie," which, of course, leaves a question in people's minds.

9 Next, in regard to the stimulant panel the Executive Director explains that even Mr.
10 Gilbert's own expert witness agreed with Quest and the Executive Director:

11 **"Because he tested negative doesn't mean anything," Kizer**
12 **said, pointing out the different thresholds. "In fact, Gilbert's**
13 **(other) toxicologist - Dr. (Raymond V.) Kelly - reviewed the**
14 **positive sample - the A sample - and told Quest that he didn't**
15 **find an error with this. Kelly found no problem with the test.**
16 **In fact, Mr. Gilbert knew about it before we did." (December**
17 **14, 2007).**

18 This statement is simply beyond belief. It is inexcusable for the Executive Director to
19 report to the public and the Commission that even Mr. Gilbert's expert witness agrees with
20 Quest's testing results. Most importantly, this statement could not be further from the truth. As
21 will plainly come out at the hearing on this matter, Dr. Kelly has uncovered a very serious testing
22 irregularity with the test results being referred to by the Executive Director in his media
23 statement, i.e., they are fatally flawed.

24 Next, the Executive Director paints Mr. Gilbert as a villain:

25 **"I just think about poor Mr. Howe getting knocked down twice**
26 **in the first round," Kizer said, "It's very disturbing." (Reno**
27 **Gazette Journal, October 3, 2007).**

1 The obvious implication of the above statement is that Mr. Gilbert won the fight because
2 he was taking illegal substances, i.e., the Executive Director is suggesting that Mr. Gilbert
3 cheated. Moreover, he made this statement before there was an investigation, hearing, or
4 decision in this matter. In fact, he made it only one day after the complaint was filed.

5 Next, the Executive Director states (incorrectly) that Mr. Gilbert has admitted guilt:

6 **“Right now, the evidence is pretty overwhelming,” Kizer said.**
7 **“Basically, (Gilbert) has already admitted to four of the six**
8 **substances he took purposefully after he was told not to.”**
9 **(Reno Gazette Journal, October 9, 2007).**

10 This statement is completely false on every level. Mr. Gilbert never admitted to anything.
11 To put this statement in context, consider that the Executive Director has not only stated in the
12 media that he is “very confident” that the Quest tests are “100% accurate,” and that the “only
13 way you test positive for steroids or methamphetamine is by taking them”—then the Executive
14 Director proceeds to state the evidence is “overwhelming” and that Mr. Gilbert has “already
15 admitted” to the four other substances. In short, a more blatant example of someone trying to
16 improperly influence the outcome of a matter before the Commission is difficult to imagine.

17 The Executive Director did not stop there, however. He also found a way to explain to the
18 public and the Commission why Mr. Gilbert took steroids and methamphetamine.

19 **“You’ve got the meth and you’ve got the steroids, too.**
20 **Unfortunately, they seem to go hand in hand. You’ve got**
21 **steroids to add a little bulk and you do the meth to cut the**
22 **weight to get back to where you should have been.” (Reno**
23 **Gazette Journal, October 9, 2007).**

24 For the Executive Director of the Commission to imply that Mr. Gilbert used illicit drugs
25 as part of his training regimen, is contemptible. Mr. Gilbert is recognized as one of the hardest
workers in the sport of boxing. One of the greatest champions in the history of boxing, Sugar
Ray Leonard, stated on national television that Mr. Gilbert is one of the most well-conditioned

1 and well-rounded athletes he has ever met. For the Executive Director to disparage Mr. Gilbert
2 in this manner is again inexcusable and contemptible. Moreover, the tests results show that the
3 Executive Director was flat out wrong.

4 Next, the Executive Director states that Mr. Gilbert tested positive for all three of the
5 required metabolites of Stanozolol:

6
7 **Kizer said Gilbert tested for the three metabolites required for**
8 **a positive test for the steroid. "There's no other way those**
9 **three metabolites showed up unless you took Stanozolol,"**
10 **Kizer said. (Reno Gazette Journal, October 9, 2007).**

11 This statement by the Executive Director is truly remarkable. Here, the Executive
12 Director reports in the media that Mr. Gilbert tested positive for "all three" of the "required"
13 metabolites for a "positive" steroid test. The Executive Director further basically states that these
14 "three" metabolites mean that Mr. Gilbert took steroids for certain. The most notable problem
15 with this particular statement is that Quest only found two (2) metabolites—not three. The
16 Executive Director had this information (2 metabolites) for over a week when he made this false
17 media statement.

18 The following media statements by the Executive Director are provided as further
19 examples of his obvious animus toward Mr. Gilbert.

20 **"He needs to show up in Reno where the fight happened"**
21 **Kizer said, "its only fair to community, the media, and the**
22 **citizens that want to go and watch the hearing or support their**
23 **idol." (Reno Gazette Journal, November 15, 2007).**

24 **"Just because he's Mr. Reno doesn't mean we'll sweep it under**
25 **the rug."**
26 **"If he didn't do the drugs, it's too bad he tested positive."**
27 **(Nevada Appeal, November 16, 2007).**

28 Such antagonistic statements by a public official in a contested case, are truly
29 unprecedented and definitely unwarranted.

1 Next, following the re-test results for steroids being reported by CHT, the Executive
2 Director issued a "media release" stating that the results "**matched**" a previous test. (Nevada
3 Appeal, January 8, 2008). Another paper reported: "**Kizer released a document from the Utah**
4 **lab Tuesday to media outlets after its test on Gilbert's urine sample and said it confirmed**
5 **the original results from Quest.**" (Reno Gazette Journal, January 9, 2008). This story was
6 picked up by the Associated Press and put on the wires. Newspapers and major sports websites
7 such as ESPN.COM and SI.COM (Sports Illustrated) picked up the story and repeated the
8 Executive Director's statement that the results were "confirmed", to millions of people around
9 the world.

10 Once again, the Executive Director's statements and "media release" were absolutely
11 false. As the CHT test results clearly indicate, they did not "confirm", and they do not "match",
12 the Quest results. CHT only found one metabolite, and Quest found two. Moreover, Quest has
13 already confirmed that at least two metabolites are required for a positive test.¹¹ For the
14 Executive Director to blatantly state something so utterly false in the media is, again,
15 inexcusable. There is only one reason for the Executive Director to do a "media release" and to
16 make a false statement in the media—and that is to improperly influence the outcome of this
17 matter. After making the false report to the media that the test "confirmed" and "matched"
18 previous tests, the Executive Director proceeded in the media to add the following commentary:
19 "**There's no surprise there.**" (Reno Gazette Journal, January 8, 2008).
20
21
22
23
24

25 ¹¹ In fact, Quest's certifying scientist for Mr. Gilbert's tests, Kathy Brown, has confirmed to Mr. Gilbert's expert toxicologist, Dr. Kelly, that she could not recall Quest ever reporting a positive finding to the Commission for only one (1) metabolite.

1 Apparently, the Executive Director has forgotten how many metabolites are required for
2 a positive test. Again, in his earlier media statements he stated that three metabolites were
3 required for a positive test. Now, however, he claims any number of metabolites is sufficient:

4 **"I'm not sure a positive/negative test is relevant," Kizer said.**
5 **"The question is, 'Is their proof of use?' One, two or three**
6 **Stanozolol metabolites in the urine is proof of use." (Reno**
7 **Gazette Journal, January 10, 2008).**

8 The truly unbelievable aspect of this last statement is that the Executive Director is now
9 stating that it does not matter if Mr. Gilbert tested positive or negative. No, according to the
10 Executive Director (in numerous news reports) one metabolite is now proof that Mr. Gilbert took
11 steroids. However, the Executive Director stated previously in the media that the Commission
12 defers to Quest (private outside company) on issues of thresholds or cut-offs for positive tests.
13 The Office of the Attorney General has confirmed that the cut-offs "are set by Quest
14 Laboratories." Now, however, the Executive Director is unbelievably reporting in the media that
15 Mr. Gilbert violated the Commission rules regardless of where the cut offs are set, and regardless
16 of what has been used in the past as a cut off for other athletes who have tested positive.

17 The final statement provided below, is a good example of how the Executive Director has
18 mislead the public and the Commission through the media. Mr. Gilbert's legal counsel requested
19 a copy of the Commission's drug testing protocols, and was informed that the Commission
20 didn't have any (though the repeated request to confirm this in writing has been ignored). When
21 Mr. Gilbert's counsel responded to some of the Executive Director's media statements, and
22 suggested that a number of the current problems in this matter resulted from the Commission's
23 lack of protocols, the Executive Director replied that the Commission should not be compared to
24 other sports with protocols (i.e., the Commission does not need protocols), and he then reported
25 the following:

1 **Kizer said the commission has protocols for the collection of**
2 **urine samples following fights, which are tested by Quest**
3 **Diagnostics. Kizer said the Nevada Attorney General's Office**
4 **explained those protocols in a letter to Schopper. (Reno**
5 **Gazette Journal, January 10, 2008).**

6 Contrary to the Executive Director's media statement, counsel for the Commission
7 actually replied with the following: "the Commission Inspectors collect the pre-fight and post-
8 fight samples from the contestants and give those samples to the Chief Inspector or a ringside
9 physician in brown paper bags labeled with each individual contestant's name." Simply put, this
10 does not constitute a protocol for collection. Suffice it to say, the Executive Director's statement
11 was once again an attempt to mislead the public and the Commission.

12 The Executive Director has made many other false and misleading statements in the
13 media. Though, it is not necessary to present all of these statements here to show that the
14 Executive Director has used his authority and the media to improperly influence the outcome of
15 this matter.

16 When the "Executive Director" of the Nevada State Athletic Commission makes
17 authoritative statements in the media, they are received by the general public as statements by the
18 Commission itself. The Executive Director is in charge of implementing and enforcing the
19 Commission's regulations on a day-to-day basis. He has been acting as the Commission's
20 official spokesperson in the media regarding this matter—and many other non-related matters.
21 Thus, the general public is under the mistaken but understandable assumption that the
22 Commission has already concluded that there is proof of use of steroids and methamphetamine,
23 and that Mr. Gilbert has made an admission to the other four substances, and that Mr. Gilbert's
24 expert witness agrees with the Commission's test results, and the CHT test results "matched" and
25 "confirmed" Quest's results, etc.

1 Why the Executive Director (public official) of a Nevada commission is issuing "media
2 releases" and making public statements on issues of fact in a contested case is beyond
3 comprehension. Moreover, the tone and content of these media statements has irreparably
4 damaged Mr. Gilbert. Such adverse publicity causes serious concern because "it imposes a
5 deprivation on private persons or firms without the due processes of law normally associated
6 with government action encroaching upon property or persons." Gellhorn, Adverse Publicity by
7 Administrative Agencies, 86 HARV.L.REV. 1380, 1394 - 1419 (1973).

8 A number of courts have held that the issuance of press releases announcing charges or
9 administrative action by the agency that will ultimately decide the case does not violate due
10 process guarantees. See, e.g., F.T.C. v. Cinderella Career and Finishing Schools, Inc., 404 F.2d
11 1308, 1315 (D.C.Cir.1968)(Federal Trade Commission has authority to alert public to suspected
12 violations of the law by factual press releases whenever Commission has reason to believe that a
13 respondent is engaged in activities made unlawful by the Federal Trade Commission Act);
14 Lawrence v. Department of Health, 133 Wash.App. 665, 673 (2006)(filed charges against a
15 surgeon, did not tarnish his reputation and violate his constitutional right to due process); S.E.C.
16 v. Rivlin, 1999 WL 1455758, 3 (D.D.C. 1999)(press release issued by the SEC did not violate
17 due process rights because it was specifically authorized by the Securities and Exchange Act);
18 Consumer Protection v. Consumer Pub., 304 Md. 731, 764, 501 A.2d 48, 65 (1985) (the issuance
19 of press releases announcing charges by the agency that will ultimately decide the case does not
20 violate due process guarantees). However, in the above cases nothing in the press releases or
21 media statements expressed a bias or prejudice against the petitioner. To the contrary, the press
22 releases and media statements in these cases consist solely of the allegations. Any further
23 statements were issued under statutory authority predicated upon official action to educate, warn,
24 or caution consumers and the general public on important matters, e.g. defective products,
25 deceptive advertising practices, poisonous foods, etc.

1 Mr. Gilbert's matter is not of the type discussed above. In the present matter, the
2 Commission does not have a duty to notify the public of any aspect of Mr. Gilbert's matter. The
3 complaint against Mr. Gilbert is a matter of public record. Thus, it is available to anyone.
4 Beyond that, any discussion of the facts of this matter is prejudicial to Mr. Gilbert. "As a general
5 rule, agency publicity regarding adjudications should be kept to the barest minimum, at most
6 announcing the commencement of the proceeding, the interim decision by the hearing officer,
7 the final agency action, and the result of judicial review." Gellhorn, Adverse Publicity by
8 Administrative Agencies, 86 HARV.L.REV. 1380, 1394--1428 (1973).

9 The Executive Director's public discussion of the facts in this matter is truly
10 unprecedented. In fact, a review of state and federal case law nationwide did not produce one
11 instance of an agency or commission routinely discussing the facts of a contested case in the
12 media. What is more, it is truly unprecedented for a respondent to be again and again confronted
13 with a situation in which the Executive Director, speaking on behalf of the Commission, has
14 either publicly distorted the scientific evidence beyond all reasonable interpretation, ignored it
15 altogether, and/or pronounced definitive determinations on matters of fact. In fact, the Executive
16 Director has so muddied the scientific, legal, and factual waters with false and misleading
17 statements that the possibility of a bias against Mr. Gilbert is a very legitimate concern.

18 The Executive Director's issuance of media releases and his continued statements prior to
19 final adjudication of the facts in the present matter constitutes the appearance of prejudgment of
20 the issues by the Commission. And, it is well established that "[a] fair trial in a fair tribunal is a
21 basic requirement of due process. Fairness, of course, requires an absence of actual bias in the
22 trial of cases. But our system of law has always endeavored to prevent even the probability of
23 unfairness." Anderson v. Sheppard, 856 F.2d 741, 745 (6th Cir.1988)(quoting In re Murchison,
24 349 U.S. 133, 136 (1955)). "Next in importance to the duty of rendering a righteous judgment is
25 that of doing it in such a manner as will beget no suspicion of the fairness or integrity of the

1 judge." State ex rel. Pratt v. Weygandt, 164 Ohio St. 463, 471, 132 N.E.2d 191, 197
2 (1956)(quoting Haslam v. Morrison, 113 Utah 14, 20, 190 P.2d 520, 523 (1948)).

3 With respect to the Commission presiding over this matter, Mr. Gilbert is well aware of
4 the Commissioners' respective distinguished professional reputations and contributions to the
5 Commission. Accordingly, it is important to be clear that the aforementioned concerns are in no
6 way a reflection that Mr. Gilbert believes the Commissioners want to do anything but render a
7 fair decision in this matter.

8 Mr. Gilbert also recognizes that the Commissioners may have been unaware of many of
9 the Executive Director's media statements. However, it is also clear that the Commissioners
10 neither exist in a vacuum nor do they possess limitless ability to resist becoming unfavorably
11 predisposed to Mr. Gilbert after being inundated with false and misleading statements from the
12 Commission's own Executive Director. As noted above, the Executive Director's extreme false
13 and misleading media statements may have the effect of entrenching the Commission in a
14 position which its Executive Director has so publicly stated, making it difficult, if not
15 impossible, for the Commission to reach a different conclusion after actual consideration of the
16 record. Hopefully the Commission will appreciate that its apparent consent to the Executive
17 Director making media statements creates a strong appearance of bias on the part of the
18 Commission. As noted above, "any tribunal permitted by law to try cases and controversies not
19 only must be unbiased but also must avoid even the appearance of bias." Commonwealth
20 Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 150, 89, S.Ct. 337, 340 (1968). At
21 present, it is respectfully submitted that there is a substantial appearance of bias.

22 Finally, the Executive Director's statements have irreparably damaged Mr. Gilbert's
23 reputation with the general public. Every time that the Executive Director makes false,
24 misleading, and/or defamatory statements in the media, tens of thousands of people are misled
25 and Mr. Gilbert is irreparably damaged. It goes without saying that this result is grossly unfair to

1 Mr. Gilbert. Moreover, in the event of ultimate adjudication in Mr. Gilbert's favor, the damage
2 done through the media activities of the Executive Director will be beyond repair or remedy. In
3 Cinderella, The United States Court of Appeals for the District of Columbia Circuit found "no
4 doubt that a press release of the kind . . . involved results in a substantial tarnishing of the name,
5 reputation, and status of the named respondent throughout the related business community as
6 well as in the minds of some portion of the general public." 404 F.2d, at 1313.

7 The press release issued by the Federal Trade Commission ("F.T.C.") in Cinderella was
8 issued under the F.T.C.'s authority as defined by statute. *Id.* Moreover, the press release merely
9 stated that the F.T.C. had "reason to believe" that a law had been violated. The F.T.C. did not
10 indicate in its press release, or in any subsequent media statements, the type of factual
11 conclusions that the Executive Director has made in this matter.

12 It is respectfully submitted, that in order for the Commission to avoid the further
13 appearance of bias in this matter the Executive Director must be removed.

14 D. IMPROPER RELEASE OF PERSONAL MEDICAL INFORMATION

15
16 While Nevada's Public Records Law, NRS Chapter 239, provides that public records
17 must be open to inspection and copying unless otherwise made confidential by law, the Office of
18 the Attorney General advises in its *Nevada Board and Commission Manual* that Boards and
19 Commissions "should use their common sense and be cautious about records that contain
20 personal, sensitive information." Of course, there is not much that is more personal or sensitive
21 than an individual's medical records, which are generally considered confidential.

22 On June 11, 2007, Mr. Gilbert explained his prescription medications to the Commission
23 in a letter. In that letter Mr. Gilbert discussed his use of Adderall for Attention Deficit Disorder
24 and Attention Deficit Hyperactive Disorder. Further, he stated: "This is not something I am
25 particularly proud of having and I do not like to tell anyone or have anyone know that I take

1 Adderall from time to time to focus. I do not want anyone knowing I have ADD & ADHD
2 because sometimes it is referred to as a disability and considered a sign of weakness.”

3 In one of the Executive Director’s first media interviews, he revealed the following:

4 **Kizer identified the amphetamine as Adderall, which is a drug**
5 **used to treat attention deficit disorder, narcolepsy and severe**
6 **depression. (Reno Gazette Journal, October 3, 2007).**

7 Mr. Gilbert did not test positive for Adderall. The Quest test allegedly shows minimal
8 amounts of amphetamine. There was no mention whatsoever of Adderall in Quest’s report. Thus,
9 it is clear that the Executive Director made an assumption based on Mr. Gilbert’s prescriptions
10 and reported to the world that Mr. Gilbert took Adderall. There was no reason for the Executive
11 Director to release Mr. Gilbert’s personal medical information (Adderall) in the media,
12 especially after Mr. Gilbert asked that it be kept confidential. If the ADD/Adderall issue were to
13 come out in a hearing, or it was pulled from the public records by a reporter, that is one thing.
14 But there is no excuse for the Executive Director to identify the Adderall to the general public.
15 This public statement was simply a malevolent act aimed at embarrassing Mr. Gilbert.

16 Next, the Executive Director makes another misleading statement:

17 **“He tested positive before for medications which he claimed**
18 **were doctor’s prescriptions,” Kizer said. (Las Vegas Review**
19 **Journal, October 7, 2007).**

20 Here, the Executive Director states that Mr. Gilbert “claimed” he had “prescriptions.” For
21 the Executive Director to imply that Mr. Gilbert was lying about his prescriptions is simply
22 appalling. In fact, the Executive Director was well aware of Mr. Gilbert’s prescriptions. Mr.
23 Gilbert’s doctor William C. Torch, M.D., M.S., sent the Commission a letter on June 11, 2007,
24 confirming Mr. Gilbert’s medical prescriptions.
25

1 In numerous other media statements, the Executive Director has gone out of his way to
2 discuss Mr. Gilbert's ADD, and his medications. Additionally, many of his statements were
3 simply false. For example, the Executive Director stated that Mr. Gilbert admitted to taking
4 Xanax. (Nevada Appeal, November 15, 2007). First off, Mr. Gilbert did not test positive for
5 Xanax, which brings up another very disturbing point, i.e., it is abundantly clear from the
6 Executive Director's "Xanax" statement in the media that he is simply digging through Mr.
7 Gilbert's Commission file and circulating the included medical information to the media.

8 Next, the Executive Director discusses another of Mr. Gilbert's medications.

9 **Kizer has said that the Valium would account for positive tests**
10 **for noriazepam, oxazepam and temazepam, but that wouldn't**
11 **excuse Gilbert taking the drug before a fight after being**
12 **warned by the commission not to. (Nevada Appeal, January 9,**
13 **2008).**

14 Contrary to the Executive Director's frequent media statement that Mr. Gilbert
15 purposefully refused to comply with a Commission order that he not take his prescription
16 medications before a bout, the only medication Mr. Gilbert was told he could not take "before or
17 during a bout" by then Chairman Tony Alamo was Adderall. Nowhere in Dr. Alamo's letter
18 does it even mention Valium. What's more, Valium can show up in a drug screen for up to forty-
19 two (42) days after the use thereof. As is commonly known, Valium is a sleep aid. To suggest
20 that Mr. Gilbert took a sleep aid "before" his fight is simply preposterous. Moreover, Mr. Gilbert
21 notified the Commission prior to the fight that he had taken Valium approximately 30 days prior
22 to the fight. The Commission did not stop the fight. To the contrary, the Executive Director let
23 the fight proceed and then filed allegations against Mr. Gilbert.

24 Mr. Gilbert made the Executive Director aware of his prescription for Valium in a June
25 2007 letter, which was addressed directly to the Executive Director. Likewise, the Executive
Director was made aware that Valium metabolizes into nordiazepam, temazepam and oxazepam.
(See Exhibit - H, Gilbert letter). Therefore, for the Executive Director to include nordiazepam,

1 temazepam and oxazepam as three separate allegations in the complaint against Mr. Gilbert was
2 simply an act of malice. Thereafter, the Executive Director stated: "I don't think we've ever
3 had anyone test positive for that many things," Kizer told ESPN.com. "Six things? I don't
4 remember anyone who had more than, say, three in their system in my 10 years [of being
5 involved with the commission]." The Executive Director's sensationalized statements about
6 "six" substances resulted in newspapers and websites around the world holding Mr. Gilbert up to
7 public scorn. In fact, the *Berliner Kurier* (Berlin Germany, October 6, 2007) ran a story with the
8 Executive Director's statements and called Mr. Gilbert the "Dumbest Doper in the World." (See
9 Exhibit - I, *Berliner Kurier*, October 6, 2007 article).

10 It is clear, however, that three of the alleged six substances were actually only one:
11 Valium. Moreover, Dr. Alamo explicitly stated that the Commission does "not dictate what
12 forms of treatments are indicated for [Mr. Gilbert's] underlying medical conditions." (See
13 Exhibit - J, Dr. Alamo letter). Mr. Gilbert complied with the Commission letter, disclosed his
14 medications before the September 21, 2007 fight, and was allowed to fight by the Commission.
15 Thereafter, the Executive Director filed three (3) allegations for the Valium, which he knew was
16 in reality only one (1) medication.

17 If the Executive Director had checked his facts, and if he had protocols such as
18 Therapeutic Use Exemptions and Medical Review Officers in place, this situation would never
19 have occurred. Nonetheless, it has occurred, and the Executive Director has used it as an
20 opportunity to publicly disclose Mr. Gilbert's medical conditions and medications. In addition to
21 the statements provided above, the Executive Director has made other references (often
22 incorrect) to Mr. Gilbert's medical conditions and medications in the media. We again
23 respectfully refer the Commission to the attached list of the Executive Director's media
24 statements.

25

1 E. DEFAMATION

2 While this proceeding is not the proper venue to argue in detail whether the Executive
3 Director has defamed Mr. Gilbert, a discussion thereof is presented here in summary fashion to
4 illustrate the seriousness of what has transpired.

5 To prevail on a defamation claim, a party must show publication of a false statement of
6 fact. Wellman v. Fox, 108 Nev. 83, 86, 825 P.2d 208, 210 (1992), cert. denied, 506 U.S. 820,
7 113 S.Ct. 68, 121 L.Ed.2d 34 (1992). A statement is defamatory when, “[u]nder any reasonable
8 definition[,] such charges would tend to lower the subject in the estimation of the community and
9 to excite derogatory opinions against him and to hold him up to contempt.” Las Vegas Sun v.
10 Franklin, 74 Nev. 282, 287, 329 P.2d 867, 869 (1958).

11 To constitute slander *per se*, the alleged defamation must be oral and must fall into one of
12 four categories. Nevada Independent Broadcasting Corp. v. Allen, 99 Nev. 404, 409,
13 (Nev.,1983). In the instant matter, the relevant categories relate to oral communications that: 1)
14 accuse someone of committing a crime, or 2) the allegation must be one which would tend to
15 injure the plaintiff in his or her trade, business, profession. Id. at 409.

16 While the Executive Director has made many false statements in the media that may
17 ultimately be found to be slanderous, one sticks out as particularly unsettling: “The only way
18 you test positive for . . . methamphetamine is by taking [it].” This reference to Mr. Gilbert’s
19 alleged positive drug test for methamphetamine appeared in the Nevada Appeal on October 4,
20 2007, which was only two days after the complaint was filed in this matter.

21 Of course, under any reasonable definition the charge of methamphetamine use would
22 tend to lower Mr. Gilbert in the estimation of the community, etc. Additionally, taking
23 methamphetamine (an illicit drug) is, of course, a crime. And, considering the scourge that
24 methamphetamine is in our society, it is not difficult to understand how the Executive Director’s
25 statement would tend to injure Mr. Gilbert in both of his professions (Boxing/ Law). Finally, the

1 statement was utterly false. As discussed above, it has been proven conclusively that there was
2 no methamphetamine in Mr. Gilbert's system whatsoever. Accordingly, it certainly appears that
3 the Executive Director's statement constitutes a case of defamation.

4 Considering that the Executive Director of the Nevada State Athletic Commission made
5 this false statement in a media statement directed at the general public, and further considering
6 that this statement was made during the pendency of a contested case, it should be plainly
7 evident at this point that the Executive Director's conduct has been nothing short of appalling.
8 To make matters worse, the Executive Director made the above statement numerous times in
9 numerous different publications. A public official should never be allowed to make such
10 statements with impunity.

11 **F. ABUSE OF POWER**

12 It should be evident from the information provided above, that the Executive Director's
13 mishandling of this matter amounts to much more than just a few isolated incidents of
14 misconduct or errors in judgment. To the contrary, the Executive Director's has made repeated
15 false and misleading public statements. He has also harassed and intimidated Mr. Gilbert's
16 expert witness. He has committed acts of willful misconduct and/or gross negligence. And, he
17 has shown a complete disregard for Mr. Gilbert's due process rights. In sum, the Executive
18 Director's conduct amounts to a vexatious abuse of power. Moreover, the Executive Director's
19 misconduct in this matter is of the type and severity that undermines public confidence that the
20 Commission's decisions are fair.

22 **G. CONCLUSION**

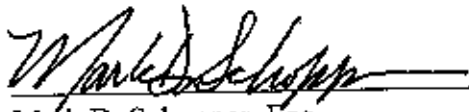
23 Ultimately, the Commission will hold a hearing and render a decision in this matter. The
24 Executive Director is not an indispensable part of the hearing or decision. To the contrary, the
25 Executive Director has been nothing but a hindrance to a fair outcome of this matter.

1 Accordingly, for the foregoing reasons, for the legitimacy of any decision that is rendered
2 in this proceeding, and as a matter of simple fairness, Mr. Gilbert respectfully requests that his
3 motion be granted, and that: 1) the Executive Director be entirely removed from this matter, 2)
4 the Executive Director not be permitted to participate in the hearing (unless called as a witness
5 under oath), 3) the Executive Director not be permitted to make any further statements to the
6 media regarding this matter, 4) the Executive Director not be permitted to discuss the allegations
7 against Mr. Gilbert with any of the Commissioners, and 5) the Commission grant whatever
8 additional relief it deems appropriate.

9 Finally, Mr. Gilbert respectfully requests that the Commission conduct a full
10 investigation of the Executive Director's conduct related to this matter and take whatever
11 additional remedial measures and/or impose whatever additional sanctions the Commission
12 deems appropriate under the circumstances.

13 DATED this 28 day of January 2008.

14 Respectfully submitted,
15 MARK SCHOPPER LAW, LLC

16
17 By: 
18 Mark D. Schopper, Esq.
19 Nevada State Bar No. 9179
20 Attorney for Respondent
21
22
23
24
25

1 **CERTIFICATE OF FAX AND MAILING**

2 I hereby certify that on this 28 day of January, 2008, I served a copy of the
3 foregoing Motion upon each of the parties by fax and by depositing a copy of same in a sealed
4 envelope in the United States Mail, Reno, Nevada, First-Class Postage fully prepaid, and
5 addressed to:

6 NEVADA ATHLETIC COMMISSION
7 Chairman John Bailey, Esq.
8 State of Nevada, Department of Business & Industry
9 555 E. Washington Ave., Suite 3200
10 Las Vegas, Nevada 89101

11 Fax: 702-486-2577

12 **And**

13 CHRISTOPHER ECCLES
14 Deputy Attorney General
15 555 East Washington Ave., Ste. 3900
16 Las Vegas, Nevada 89101

17 Fax: 702-486-3416

18 **And**

19 KEITH KIZER
20 Executive Director, Athletic Commission
21 State of Nevada, Department of Business & Industry
22 555 E. Washington Ave., Suite 3200
23 Las Vegas, Nevada 89101

24 Fax: 702-486-2577

25 And that there is regular communication by mail between the place of mailing and the
place(s) so addressed.

26 
27 _____
28 An employee of Mark Schopper Law, LLC