VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

VIRGINIA STATE BAR EX REL
SEVENTH DISTRICT COMMITTEE
VSB Docket No. 22-070-124954

Complainant,

v. **Case No. 2022-16347**

Phillip Ben-Zion Leiser,

Respondent.

FINAL JUDGMENT MEMORANDUM ORDER
(PUBLIC REPRIMAND WITH TERMS)

THIS MATTER was heard on February 13 and 14, 2023, by a Three-Judge Circuit Court duly impaneled pursuant to Section 54.1-3935 of the Code of Virginia (1950) as amended, consisting of the Honorable Louise M. DiMatteo, Judge of the 17th Judicial Circuit; the Honorable Lisa B. Kemler, Chief Judge of the 18th Judicial Circuit; and the Honorable Clarence N. Jenkins, Jr., Judge of the 13th Judicial Circuit and designated Chief Judge ("Chief Judge") of the Three-Judge Circuit Court (collectively "the Court").

Bar Counsel Renu M. Brennan represented the Virginia State Bar ("VSB"). Respondent, having received proper notice of the proceeding, appeared *pro se*.

The Chief Judge swore the court reporter, and each member of the Court verified that he or she had no personal or financial interest that might affect or reasonably be perceived to affect his or her ability to be impartial in this matter.

WHEREUPON a hearing was conducted upon the Rule to Show Cause issued

against Respondent. The Rule directed Respondent to appear and to show cause why his license to practice law in the Commonwealth of Virginia should not be suspended, revoked, or otherwise sanctioned by reason of the allegations of ethical misconduct set forth in the Certification issued by a subcommittee of the Seventh District Committee of the VSB.

Misconduct Phase

The Court accepted the parties' Stipulations attached as Exhibit 1 of this Order.

Pursuant to the Pre-Hearing Order entered January 6, 2023, the Court admitted VSB Exhibits 1-5 and 8-46 and Respondent's Exhibits A-K into evidence.

Both parties made opening statements.

The Court received the testimony of Ronald H. McCall for the VSB.

The VSB then rested. Respondent testified in his case. Respondent did not call any other witnesses.

At the conclusion of all of the evidence, Respondent moved to strike the VSB's evidence on all allegations of the Certification. After hearing argument from the VSB and Respondent, the Court deliberated and denied the Motion to Strike.

Both parties made closing statements.

Upon due deliberation and in consideration of the parties' comprehensive Stipulations, Exh. 1 to this Order, exhibits, and witness testimony, the Court made the following findings of fact by clear and convincing evidence:

FINDINGS OF FACT

1. In 1997, Respondent was admitted to the VSB. At all relevant times, Respondent was a member of the VSB. Stipulation ¶ 1. VSB Exh. 3 (Affidavit of DaVida M. Davis, Director of Regulatory Compliance).

2. Respondent represented defendant NAG, Inc. in a civil case pending in the Loudoun County Circuit Court, *Robert George Vorthman, III v. NAG, Inc.* (CL19-4436). Plaintiff filed suit December 6, 2019. NAG, Inc. was served November 28 and 30, 2020 in California and Washington, D.C., respectively. Stipulation ¶ 2. VSB Exhs. 10 (Respondent's June 7, 2022 Response to the Bar Complaint) and 14 (Vorthman v. NAG, Inc. Complaint filed December 6, 2019).

3. Effective November 24, 2020, as a result of the COVID-19 emergency, the Loudoun County Circuit Court Second Transition Plan ("Second Transition Plan") limited civil motions to three pages and supporting briefs to five pages. The Second Transition Plan permitted deviations upon motion for good cause shown. Stipulation ¶ 3. VSB Exh. 15 (Second Transition Plan). Respondent's testimony.

4. On December 21, 2020, Respondent, on behalf of NAG, Inc., filed a 14-page[1] motion to dismiss and/or transfer and memorandum of law. Stipulation ¶ 4. VSB Exh. 16 (Motion to Dismiss or Transfer and Memorandum of Law filed December 21, 2020). *See also* VSB. Exh. 10 (Respondent's June 7, 2022 Response to the Bar Complaint).

[1] The fourteenth page is the certificate of service.

5. On January 7, 2021, Respondent filed a praecipe requesting that NAG, Inc.'s motion to dismiss/transfer be heard on January 22, 2021. Stipulation ¶ 5. VSB Exh. 17 (Praceipe filed January 7, 2021).

6. On January 8, 2021, the Clerk's Office informed Respondent that NAG, Inc.'s hearing was "not set- wrong form & time." Stipulation ¶ 6. VSB Exh. 17 (Praceipe filed January 7, 2021). Respondent's testimony.

7. On January 8, 2021, Respondent, through his attorney spouse signing on Respondent's behalf, filed a new praecipe again requesting hearing on NAG, Inc.'s motion to dismiss/transfer on January 22, 2021. Stipulation ¶ 7. VSB Exh. 18 (Praceipe filed January 9, 2021). Respondent's testimony.

8. On January 15, 2021, plaintiff's counsel filed an opposition to NAG, Inc.'s motion to dismiss/transfer. Stipulation ¶ 8. VSB Exh. 19 (Plaintiff's Opposition to Defendant's Motion to Dismiss/Transfer).

9. By email dated January 20, 2021, to Respondent and plaintiff's counsel, the Court's docket manager stated:

   I am directed to remove this case from the docket on Friday, Jan. 22, 2021 at 10 a.m. because the memorandum in support exceeds five pages, and there is no R. 4:15(b) certification.

   I've attached our 2nd transition plan for reference.

   Stipulation ¶ 9. VSB Exh. 20 (Email from Amy Bain to Respondent).

   Respondent's testimony.

10. On January 25, 2021, Respondent refiled the praecipe requesting a hearing on the motion to dismiss/transfer on February 19, 2021. Stipulation ¶ 10. VSB Exh. 21 (Praceipe filed January 25, 2021). Respondent's testimony.

11. On January 25, 2021, Respondent also filed a two-page motion to dismiss and 14-page memorandum of law in support. Stipulation ¶ 11. VSB Exhs. 22 and 23 (Motion to Dismiss and Memorandum of Law in Support of Motion to Dismiss filed January 25, 2021). Respondent's testimony.

12. On February 12, 2021, plaintiff, by counsel, filed its opposition to the motion to dismiss. Stipulation ¶ 12. VSB Exh. 24 (Plaintiff's Opposition to Defendant's Motion to Dismiss filed February 12, 2021).

13. By email dated February 17, 2021, the Court's docket manager told Respondent and plaintiff's counsel that she was "directed to remove the motion to dismiss from the docket this Friday because the brief in support exceeds the allowed page limit as outlined in our 2nd Transition Plan." Stipulation ¶ 13. VSB Exh. 25 (Emails between Amy Bain and Respondent dated February 17 and 18, 2021). Respondent's testimony.

14. Instead of filing a motion seeking a deviation for good cause shown, by email dated February 17, 2021 to the docket manager, Respondent argued that he had not "been presented with any legal authority which modifies the 20 page [sic] limit of Rule 4:15(c)." Rule 4.15(c) provides that, absent leave of court, a brief may not exceed 20 pages in length.[2] Respondent stated:

> If I am being told that the Court *will not* schedule a hearing on any motion in which the memorandum of law exceeds 5 pages, that is unacceptable.

[2] 4:15 (c) *Filing and Service of Briefs* - Counsel of record may elect or the court may require the parties to file briefs in support of or in opposition to a motion. Any such briefs should be filed with the court and served on all counsel of record sufficiently before the hearing to allow consideration of the issues involved. Absent leave of court, if a brief in support of a motion is five or fewer pages in length, the required notice and the brief must be filed and served at least 14 days before the hearing and any brief in opposition to the motion must be filed and served at least seven days before the hearing. If a brief will be more than five pages in length, an alternative hearing date, notice requirement, and briefing schedule may be determined by the court or its designee. Absent leave of court, the length of a brief may not exceed 20 pages, double spaced.

> My client will not have his constitutional right to a *meaningful* opportunity to be heard abridged by this or any Court, through the establishment of arbitrary and unreasonable page limits that contradict the Rules of the Supreme Court of Virginia.

Respondent apologized for his frustration and requested clarification.

Stipulation ¶ 14. VSB Exh. 25 (Emails between Amy Bain and Respondent dated February 17 and 18, 2021). Respondent's testimony.

15. By email dated February 18, 2021, the docket manager again attached the Second Transition Plan, which she stated was "the basis of the removal." Stipulation ¶ 15. VSB Exh. 25 (Emails between Amy Bain and Respondent dated February 17 and 18, 2021). Respondent's testimony.

16. Respondent did not refile the motion to dismiss. Stipulation ¶ 16. Respondent's testimony.

17. Respondent never sought leave to file a brief in excess of five pages. Respondent's testimony.

18. In his August 2022 supplemental response to the bar complaint Respondent stated:

> It is indisputable that the effort to obtain leave of court for an extended page limit would result in the delay of the hearing on the underlying substantive motion for which the page extension is sought. Under the rule, all of that additional time, work, and (client) money would have to be expended and invested, instead of simply reading the extra nine pages of Leiser's MoL in support of NAG's motion to dismiss. Thus, whether the Court granted or denied the motion for an extended page limit, it would have created extra work for itself and both counsel, and delayed the underlying proceedings...

Stipulation ¶ 37. VSB Exh. 11 (Respondent's August 25, 2022 Supplemental Response to Bar Complaint).

19. Respondent also later analogized his decision not to move for a departure from the five-page limit to civil disobedience and stated to the bar investigator that "he [was] willing to be a test case to expose judicial chicanery." Respondent further stated that he had a "Rosa Parks moment, and ... he was not going to get out of his seat and move to the back of the bus." Stipulation ¶ 38. VSB Exh. 12 (Report of Investigation). Testimony of Ronald H. McCall.

20. By email dated April 2, 2021, plaintiff's counsel emailed Respondent that it had been over six weeks since the clerk had removed Respondent's motion to dismiss from the docket for a second time due to the failure to properly submit the motion in accordance with the court's requirements. She noted that "as no further action has been taken by Nag, Inc., either to submit a proper motion or to file its answer, we intend to file a motion for entry of default judgment" and provided three dates. Counsel stated that the email was a good faith effort to resolve the matter. VSB Exh. 26 (Email dated April 2, 2021 from Joanne Dekker to Respondent).

21. Respondent did not respond to plaintiff's counsel's April 2, 2021 email. VSB Exh. 30 (Transcript of May 21, 2021 hearing). Respondent's testimony.

22. In his June 2022 response to the bar complaint, Respondent stated, "[a]fter the Court's mid-February 2021 rejection of my attempt to docket for a hearing NAG's motion to dismiss--- the second such rejection, the case remained essentially dormant for about the next six weeks as I mulled over my next move." VSB. Exh. 10 (Respondent's June 7, 2022 Response to the Bar Complaint). Respondent's testimony.

23. Accordingly, in April 2021, plaintiff moved for default judgment against NAG, Inc., noting that the motion to dismiss had twice been removed from the docket and that a proper motion had not been refiled, nor had an answer. Stipulation ¶ 17. VSB Exh. 27 & 28 (Plaintiff's Motion and Memorandum in Support of Motion for Entry of Default Judgment). Respondent's testimony.

24. In a ten-page brief[3] in opposition to the motion for default judgment, filed April 27, 2021, Respondent, for the first time, argued that the Second Transition Plan violated Rule 4:15(c). See Stipulation ¶ 18. VSB Exh. 29 (Memorandum of Law in Opposition to Motion for Default Judgment). Respondent's testimony.

25. On May 21, 2021, the Honorable James P. Fisher of the Loudoun County Circuit Court presided at the virtual hearing on Plaintiff's motion for entry for default judgment. This was Judge Fisher's first involvement in the case. VSB Exh. 10 (Respondent's June 7, 2022 Response to the Bar Complaint). Respondent's testimony.

26. Notwithstanding that Respondent's brief was in excess of the page limit imposed by the Second Transition Plan and that Respondent did not seek leave to file a brief in excess of five pages, Judge Fisher accepted and considered Respondent's Opposition to the Motion for Default Judgment. Exhs. 30 and 31 (Transcript of May 21, 2021 hearing and June 17, 2021 Order). VSB Exh. 10 (Respondent's June 7, 2022 Response to the Bar Complaint). Respondent's testimony.

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[3] Per Respondent, "My response to that MFDJ on behalf of NAG ... consisted of ten pages—the first two of which were devoted to arguing why the MFDJ should be overruled. The remaining pages were allocated to demonstrating the invalidity of the Court's five-page limit it had attempted to impose upon the filing of MoL, through the adoption of the Second Transition Plan, and by means of which it had twice thwarted my efforts to docket NAG's motion to dismiss for a hearing." VSB Exh. 10 (Respondent's June 7, 2022 Response to the Bar Complaint), p. 4.

27. At the May 21, 2021 hearing, Plaintiff's counsel addressed the impact of Respondent's actions on her client:

> ... This motion comes on ... essentially because the Defendant NAG disappeared. NAG filed its first motion to dismiss the case and sever in 2020, and a hearing was scheduled on January 25, 2021. And ... there were issues with the page limitations, and the Clerk's Office rejected that or took it off the docket...
>
> So then NAG refiled its motion, essentially verbatim to the original file, and again, this is verbatim. It exceeded the Court's page limitations, and the Clerk kicked it out once again. And that was set for February 19, 2021, and again, it was removed from the docket.
>
> And then rather than refile the motion to dismiss in any format, NAG simply disappeared, leaving this case and Mr. Vorthman's right to proceed with the case in limbo.
>
> Six weeks later, I contacted opposing counsel by email to see if he planned to refile the motion, advised him that we would seek a motion for entry of default judgment if it wasn't filed. This clearly is a lack of interest on Defendant's part to defend itself. I did not hear from counsel. I had no hearing dates. I heard nothing back. So we recorded a motion for ... default judgment on April 9th through counsel. It was also filed with the Court on that day. And it was not until the following week that opposing counsel contacted me.
>
> I submit that while a motion to dismiss may be considered a responsive pleading, in this instance, NAG specifically did nothing after Feb 19th, and let this case – did not respond to counsel's emails. It's an impermissible delay tactic, and we've simply got to get this case moving, and if NAG wasn't going to defend the case, then we should have entry of a default judgment.
>
> And as to NAG's opposition to the motion to enter a default judgment and objections to the Court's five page – relating to its motion to dismiss, I'd submit that the transition order simply allows parties to submit a motion to extend the page limitation, which, of course, I would not object to. So considering that NAG did nothing on this case for six weeks, we would ask the Court for entry of default.

Respondent argued his client was not in default and requested the Court overrule the motion and schedule a hearing on his client's motion to dismiss.

Judge Fisher concluded:

> The difficulty with this scenario is it arises during I think a difficult time for everybody, and so the Court has attempted to set forth procedural rules pursuant to authority granted by the Supreme Court. But in this scenario, this is the type of procedural snafu that could end up making bad law.
>
> I'm not inclined to grant the motion for a default judgment. I think what I'm going to do is rule that the Defendant has responded with a responsive pleading.... I'm going to deny the motion for default judgment, because, unless I heard something wrong, they did file a motion to dismiss within 21 days.

Respondent then requested the Court docket his motion to dismiss, and the Court asked Respondent to draft an order overruling the motion for default judgment, deeming the motion to dismiss a proper responsive pleading,

> and the Court will direct that the matter be ripe for docketing for any motions thereupon.... All right, I'm sorry for that confusion. Hopefully things get us – we end up getting back to normal at some point in the future and we don't have these kind of snafus. But best of luck to you, and I hope you all have a good weekend. We'll look forward to that order being submitted to chambers, and we'll enter it.

VSB Exh. 30 (Transcript of May 21, 2021 hearing).

28. By Order entered June 17, 2021, Judge Fisher overruled the motion for default judgment and concluded that NAG's timely-filed motion to dismiss was a responsive pleading. Judge Fisher also ordered the Clerk to docket for a hearing any pending or yet-to-be-filed motions, upon request of the parties' counsel of record. Stipulation ¶ 19. VSB Exh. 31 (June 17, 2021 Order). Respondent's testimony.

29. On June 24, 2021, and then by emails July 14 and 15, 2021, Respondent tried unsuccessfully to docket his motion. Stipulation ¶¶ 20-23, VSB Exhs. 32-33

(Praecipe filed June 24, 2021 and emails between Respondent and Bain dated July 14 & 15, 2021). Respondent's testimony.

30. On September 30, 2021, Respondent refiled the praecipe requesting a hearing on the motion to dismiss/transfer on October 22, 2021. This filing was accepted. Stipulation ¶ 24, VSB Exh. 34 (Praecipe filed September 30, 2021). Respondent's testimony.

31. On October 22, 2021, the hearing did not go forward because plaintiff's counsel sought a continuance, which Respondent did not oppose. Stipulation ¶ 25. Respondent's testimony.

32. On October 28, 2021, Respondent refiled the praecipe requesting a hearing on the motion to dismiss/transfer on December 17, 2021. Stipulation ¶ 26, VSB Exh. 35 (Praecipe filed October 28, 2021). Respondent's testimony.

33. On December 17, 2021, Judge Fisher heard and denied Respondent's motion to dismiss on the merits. Stipulation ¶ 27. VSB Exh. 36 (Transcript of December 17, 2021 hearing). Respondent's testimony.

34. At the December 17, 2021 hearing, Judge Fisher allowed both sides the opportunity to argue their positions and allowed Respondent the final word. Judge Fisher inquired regarding Plaintiff's stipulation to dismiss two counts of the complaint and so ordered the counts dismissed. Judge Fisher ruled, "the Court has looked at the record of the case and listened to the arguments of counsel, and after doing all of that, I'm going to deny the motion to dismiss as to all the remaining counts, finding that Ms. Collette's arguments thereon are well taken as a matter of fact and/or law, the Court accepting those arguments in full." As the

Court had previously requested Respondent, the prevailing party, to draft the Order overruling the motion for default judgment, the Court requested Plaintiff's counsel draft an order with findings of fact and conclusions of law and allowed Respondent to file a certificate of objections. VSB Exhs. 10 & 36 (Respondent's June 7, 2022 Response to the Bar Complaint and Transcript of December 17, 2021 hearing). Respondent's testimony.

35. Respondent did not raise the Second Transition Plan or the prior refusals to docket his motion to dismiss in January and February 2021 in his Objections to the Order Denying the Motion to Dismiss. VSB Exh. 37 (Defendant's Objections to Order Denying Motion to Dismiss). Respondent's testimony.

36. The only hearings over which Judge Fisher presided were the hearings on May 21, 2021, at which he accepted Respondent's filings and overruled the motion for default judgment, and the December 17, 2021 hearing on the motion to dismiss. VSB Exh. 10 (Respondent's June 7, 2022 Response to the Bar Complaint). Respondent's testimony.

RESPONDENT'S MOTION TO RECONSIDER AND MEMORANDUM IN SUPPORT

37. On January 18, 2022, Respondent filed a motion to reconsider and memorandum in support. Stipulation ¶ 28. VSB Exhs. 38, 39, and 40 (January 18, 2022 letter from Respondent to Judge Fisher, Motion to Reconsider, and Memorandum of Law in Support of Motion to Reconsider). VSB Exh. 10 (Respondent's June 7, 2022 Response to the Bar Complaint). Respondent's testimony.

38. In his cover letter dated January 18, 2022, addressed to the Honorable James P. Fisher, Respondent stated:

> It would be extremely unwise for the Court to treat the attached motion to reconsider with the dismissiveness with which it treated NAG's motion to dismiss. (ftnt: No pun intended.) Leiser has filed this motion to give the Court the opportunity to right a wrong and to avoid further unwanted scrutiny of its decision to deny NAG's motion to dismiss. But the Court's failure to read and carefully consider this motion and its accompanying memorandum of law is the surest way to guarantee that others will.

Stipulation ¶ 29. VSB Exh. 38 (January 18, 2022 letter from Respondent to Judge Fisher).

39. In his motion to reconsider, Respondent moved the Court to:

> . . . reconsider its decision, vacate its order (if any has been entered) denying NAG's motion to dismiss as having been improvidently denied; recuse itself from any further proceedings in this matter, and ensure NAG's motion is re-docketed for hearing before a different judge --- preferably, one who is not from this jurisdiction. Alternatively, NAG requests the Court hold a hearing on this motion, followed by a *meaningful* hearing on NAG's underlying motion to dismiss, to include a reasoned explanation from the Court concerning the legal and factual bases for its decision.

Stipulation ¶ 30. VSB Exh. 39 (Motion to Reconsider).

40. Respondent's 12-page memorandum of law argued as follows:

> ... Which begs the question: If the governing law did not serve to inform the Court's decision, then what *was* the basis for its ruling?
>
> To answer that question, one needs to understand that Leiser had apparently created a bit of a kerfuffle in Judges' Chambers, by refusing to abide by the Court's requirement that counsel seek leave of court before filing a MoL in excess of five pages. In defiance of that page limit, Leiser had filed a fourteen page [sic] MoL in support of NAG's motion to dismiss. Over a period of many months, the Court removed NAG's motion from its docket *three* times for exceeding its five-page limit, prompting several emails from Leiser to one of the court clerks, including a threat to mandamus the clerk, if necessary, to docket NAG's motion for a hearing. Those emails likely contributed to the Court's antipathy toward Leiser.

Stipulation ¶ 31. VSB Exh. 40 (Memorandum of Law in Support of Motion to Reconsider).

41. Respondent begins his brief by stating that the Court "*purported* to adjudicate NAG's motion to dismiss" and "gave zero indication it had thoughtfully considered the issues raised by NAG's motion." *Id.* at 1.

Respondent continues:

> The Court's conduct in relation to that hearing, along with its ruling denying NAG's motion to dismiss, indicates the absence of any intention to fairly adjudicate that motion; reflects utter disdain for the rule of law; and demonstrates the Court's bias against NAG's counsel, Leiser. Its ruling betrays its oath of office to protect and defend the Constitution and laws of the United States and of the Commonwealth of Virginia. Yet, in a superficially clever but ultimately sophomoric and transparent attempt to avoid detection of its chicanery and exposure of the real reason behind its decision, the Court hitched its wagon to Vorthman's meritless---if not frivolous---arguments, cynically pretending to have actually engaged in a good faith analytical process to decide the legal issues in contention, apparently believing that riding Vorthman's coattails would inoculate the Court from criticism, by imbuing its decision with the veneer of credibility and the façade of legitimacy. The Court employed this stratagem presumably anticipating that if its misconduct were ever challenged, its no-questions-asked adoption of Vorthman's arguments would be sufficient to afford it plausible deniability.
>
> Before addressing the *real* reason for the Court's decision, Leiser will briefly touch upon the merits. However, he will not tarry long in rehashing the merits of the arguments because that would be an exercise in futility. The Court made it vividly clear that the relative merits of the parties' arguments were completely irrelevant to its decision-making process. Still, there are a few points worth mentioning that might give this Court reason to second-guess [sic] the wisdom of its decision to feign reliance upon Vortham's arguments, in support of its misguided ruling denying NAG's motion to dismiss. Neither that ruling nor the Court's misplaced reliance on Vorthman's rationale therefor will survive close scrutiny—whether by an appellate tribunal, the Judicial Inquiry and Review Commission (JIRC), or the media. That scrutiny will inexorably lead to the public's perception of the Court as amateurish and clearly not up to the task of adjudicating complex legal issues. And that is the Court's *best case* [sic] scenario as to the perception of it that will result from an up-close examination of its ruling.

Id at 2.

> ...While it is not surprising that an inexperienced attorney might confuse and conflate a demurrer with a motion to dismiss for lack of SMJ, what is the Court's excuse for making that identical novice "mistake?"

Id. at 3.

> ...And so, in that context, the Court's hollow recitation of a common legal phrase ("findings of fact") often employed in judicial decisions, but which was entirely inappropriate to *this* occasion, [footnote omitted] coupled with its wholesale "adoption"---lock, stock, and barrel---of Vorthman's findings of fact, conclusions of law, and arguments asserted in support thereof, is revelatory of its attempt to create the mirage that it had actually engaged in a meaningful analysis of the issues.

Id. at 5.

> It is a principle of physics that nature abhors a vacuum. So do litigants and lawyers. And the vacuum created by the Court's mere one sentence conclusory ruling, which it uttered without articulating the rationale for its decision, suggests there is an alternative narrative explaining its decision that has nothing to do with the issues in dispute or their proper resolution. That narrative becomes even more compelling when viewed in the light of the flagrant nature and egregiousness of the court's "errors," in its supposed "analysis" of the issues that had been submitted for its adjudication. Application of the doctrine of *res ipsa loquitor* is appropriate when considering the Court's "mistakes" because they speak for themselves. That the Court fails to understand the difference between NAG's motion to dismiss and a demurrer; that it has willfully failed to educate itself concerning the FLSA's jurisdictional threshold-settled law for the last half century; and that it fails to understand the concept of legal standing as it relates to Vorthman's assertion of his CA claims reveal the Court was completely disinterested in the law governing the issues in contention. Which begs the question: If the governing law did not serve to inform the Court's decision, then what was the basis for its ruling?

Id. at 6.

Stipulation ¶ 32. VSB Exh. 40 (Memorandum of Law in Support of Motion to Reconsider).

42. Respondent argued the Court "extinguish[ed] his client's legal rights" to "send a clear message to Leiser, ... to punish him." He continued:

> Leiser's willful flouting of the five-page limit and his audacity in challenging the validity of the Court's "rule," form the backdrop for the Court's adjudication of NAG's motion to dismiss and sheds quite a bit of light on its treatment of NAG and its counsel in its resolution of that motion. Apparently, the Court viewed Leiser's challenge to its page-limit [sic] as a full frontal [sic] assault on its authority and a demonstration of his disrespect for the Court. And so, the *real* reason for the Court's denial of NAG's motion to dismiss was its desire to send a clear message to Leiser, that if he dares to challenge the Court, by speaking truth to power, this Court will find a way to punish him. And, apparently, extinguishing his client's legal rights is, in the Court's view, acceptable collateral damage necessary to the achievement of that aim.
>
> With respect to the specific errors inherent in the Court's ruling, ... it shocks the conscience that a circuit court judge would make any one of them. But when a single ruling reflects multiple errors, each of which shocks the conscience, that suggests more than a willful disregard of the law. Coupling that with the Court's attempt to thwart NAG from defending against this lawsuit, by repeatedly directing the clerk to remove from the docket NAG's motion to dismiss Vorthman's complaint, creates a sufficiently compelling circumstantial case that Leiser's disregard of the Court's five-page limit was the dominant-indeed, the exclusive-factor that underpinned its decision to deny that motion to dismiss.

Id. at 7-8.

Respondent included a footnote at the end of that sentence stating:

> Should the Court decline to take appropriate corrective measures concerning its ill-conceived ruling, the personal involvement of Judge Fisher in the Court's multiple decisions to remove NAG's motion from the docket will have to be investigated.

Id. at fn. 6.

Stipulation ¶ 33. VSB Exh. 40 (Memorandum of Law in Support of Motion to Reconsider).

43. Respondent argued in his Answer to the Certification that the Court "apparently viewed NAG's rights as collateral damage necessary to achieving that aim." VSB Exh. 1 (Complaint filed December 5, 2022 in disciplinary proceeding).

44. Respondent also argued that Judge Fisher "apparently bitterly resented" Mr. Leiser's challenge to the five-page limit rule and for that reason failed to consider the merits of the motion to dismiss which was "DOA—dead on arrival—from the moment it landed on the Court's desk."

Id. at 9. Respondent continued:

> The Court's repeated efforts, to thwart Leiser from effectively arguing on behalf of NAG, is apparently rooted in its resentment—which seems to be shared by many judges in many jurisdictions—at having to do the work the job of a judge requires—*being and continuing to become learned in the law*. Through their persistent and petulant refusal to do so, even when the governing law is spoon-fed to them by competent counsel, some judges reveal they apparently consider the courts to be their personal playgrounds on which they have unfettered discretion to make the rules, break the rules, change the rules, ignore the rules, or selectively enforce the rules, all at their personal whim, based on nothing more than who they like and who they dislike. And by placing obstacles in the paths of litigants and their lawyers who want to *effectively* argue their cases; by requiring them to spend their time and their clients' money asking the Court's permission to exceed five pages---in other words, to do that which the law already permits them to do, judges create for themselves greater leeway to do whatever they feel like doing, rather than what the law compels them to do. But judges do not get to engineer the outcomes they desire, as this Court so blatantly did in this case, by ignoring inconvenient arguments, inconvenient facts, or inconvenient laws.

Id. at 9-10.

Stipulation ¶ 34. VSB Exh. 40 (Memorandum of Law in Support of Motion to Reconsider).

45. Respondent stated that Judge Fisher did not provide a detailed rationale for his decision to deny the motion to dismiss because he could not "articulate those reasons, at least, not without exposing its [the trial court's] subterfuge."

> The Court's reticence to do so in this case is telling. It is a byproduct of its attempt to fly under the radar, to avoid unwanted attention to and scrutiny of its mendacity. Its one-sentence ruling reflects its attempt to use Vorthman's arguments as a shield behind which to cynically conceal

> the truth that its ruling had nothing to do with the relative merits of the opposing arguments, but was, instead, motivated by nothing other than its desire to punish Leiser for what the Court wrongly perceived as his disrespect toward the Court.

Id. at 11.

Stipulation ¶ 35. VSB Exh. 40 (Memorandum of Law in Support of Motion to Reconsider).

46. Respondent argued that entry of the order denying the motion to dismiss will risk the "unmasking of its charade" and "place this Court's conduct squarely at issue, as well as how that conduct reflects on the Court's competence, integrity, and intellectual honesty." Respondent continued:

> It will become clear that its decision was not the result of a good faith effort to conduct a meaningful legal analysis, which will then lead to a more focused inquiry to determine the Court's *real* reason for its decision.

Id. at 11-12.

> Leiser is quite capable of distinguishing between judicial integrity and judicial chicanery; between intellectual honesty and intellectual sophistry; and between the rule of law and the whim of individual judges masquerading as the rule of law-and so is the media and the public. The Court should also keep in mind that it is not the words contained in this MoL that bring disrepute to this Court; its own misconduct is responsible for that. Leiser is willing to stand by his words-every single one of them. The question this Court must consider is whether it is prepared to defend its conduct in this case.

Id. at 12.

Stipulation ¶ 36. VSB Exh. 40 (Memorandum of Law in Support of Motion to Reconsider).

47. Respondent's memorandum began and ended with assertions that Judge Fisher had engaged in chicanery. Respondent further stated that Judge Fisher engaged in subterfuge, subverted justice, was mendacious, and engaged in egregious judicial

misconduct. The alleged mendacity and chicanery was denying the motion to dismiss because Judge Fisher's "*real*" goal was to punish Respondent for filing briefs in excess of the page limit. VSB Exh. 40 (Memorandum of Law in Support of Motion to Reconsider). Respondent's testimony.

48. By letter received February 8, 2022, Judge Fisher provided Respondent's letter, Motion to Reconsider, and Memorandum in Support, to the VSB. Judge Fisher stated that Respondent's memorandum "contains false accusations concerning both qualifications and integrity and are clearly either intentionally or recklessly made." VSB Exh. 4 (Bar Complaint).

49. There is no factual basis for Respondent's attacks on Judge Fisher or for the statements that Judge Fisher denied the motion because Respondent violated the Second Transition Plan. The record contradicts Respondent's statements. In May 2021, Judge Fisher deemed the motion to dismiss a responsive pleading, overruled the motion for default judgment against Respondent's client, ordered the clerk to docket Respondent's motion to dismiss even though it exceeded the page limits set forth by the Second Transition Plan, and then heard the motion to dismiss on the merits. VSB Exhs. 10, 30, 31, and 36. (Respondent's June 7, 2022 Response to the Bar Complaint, Transcript of May 21, 2021 hearing, June 17, 2021 Order, and Transcript of December 17, 2021 hearing). Respondent's testimony.

50. Notwithstanding the foregoing, Respondent, in his response to the bar complaint, his supplemental response to the bar investigator, his interview with the bar investigator, his Answer to the Complaint in this disciplinary proceeding, and his

testimony, continues to assert that Judge Fisher engaged in chicanery and egregious judicial misconduct. VSB Exhs. 1, 10, 11, and 12 (Complaint filed December 5, 2022 in disciplinary proceeding, Respondent's June 7, 2022 Response to the Bar Complaint, Supplemental Respondent to Bar Complaint, and Report of Investigation). Testimony of Respondent and Ronald H. McCall.

51. Respondent admitted to the bar investigator that his language was blunt and harsh, stating that he saw through Judge Fisher's behavior and intended to take action at the trial court level because the appellate remedies, in his opinion, were inadequate. Respondent did not need to file an appeal or a complaint with the Judicial Inquiry and Review Commission. Instead, Respondent stated that his approach was to attack the judge. Respondent further stated that the only decision Judge Fisher could make was to grant his motion to dismiss. Indeed, Respondent, said Judge Fisher had no authority to enter any orders other than to dismiss the case. VSB Exh. 12 (Report of Investigation). Testimony of Ronald H. McCall.
52. Respondent attacked Judge Fisher's integrity and "stated that he did and will continue to attack Judge Fisher's intellectual honesty and integrity for the reasons set out in his letter and pleadings... and that Judge Fisher's decision was motivated by antipathy for violating the page limit rule." Respondent stated that "the issue is [Judge Fisher's] choice not to apply governing law and that it was either feigned incompetence or actual gross incompetence." VSB Exh. 12 (Report of Investigation). Testimony of Ronald H. McCall.
53. In his response to the bar complaint, Respondent admitted that his attacks on Judge Fisher's integrity and otherwise are all assumptions, inferences,

extrapolations, and suspicions, all of which Respondent inferred from the absence of questions and a limited ruling on the motion to dismiss. In his response to the bar complaint, Respondent admitted:

> And, while I have no *direct* evidence of his chicanery, there is a plethora of compelling *indirect*---or circumstantial--- evidence supporting the inferences I drew and the conclusions I reached ....

and

> As a technical matter, my criticism of Judge Fisher had nothing to do with his qualifications, of which I have no knowledge. My criticism concerned his competence and integrity, which I was provided ample opportunity to observe, and compelling evidence with which to draw the inferences that I informed the conclusions I ultimately reached.

VSB Exh. 10 (Respondent's June 7, 2022 Response to the Bar Complaint).

54. While admitting he had no evidence to support his statements attacking Judge Fisher's integrity, Respondent repeated his accusation that Judge Fisher "engaged in egregious judicial misconduct."

    VSB Exh. 10 (Respondent's June 7, 2022 Response to the Bar Complaint).

55. Opposing counsel Robert Tucci told the bar investigator that Respondent's actions "made his job incredibly hard." VSB Exh. 12 (Report of Investigation).

    Testimony of Ronald H. McCall.

56. In August 2022, Plaintiff filed a Motion to Compel discovery responses from Respondent's client which states in part:

    > Defendant has since filed a Motion for Reconsideration of its Motion to Dismiss on January 18, 2022. Among other disparaging and demeaning statements directed at this Court and contained in Defendant's Motion for Reconsideration, Defendant stated "It would be extremely unwise for the Court to treat the attached motion to reconsider with the dismissiveness with which it treated NAG's motion to dismiss."

VSB Exh. 44, ¶ 20 (Memorandum of Points and Authorities in Support of Plaintiff's Motion to Compel Responses to Discovery, Set One).

57. By Order entered September 16, 2022, the Circuit Court of Loudoun County, granted Plaintiff's Motion to Compel discovery responses and ordered attorneys' fees and costs in the amount of $4,565 against Respondent's client. Judge Jeanette A. Irby presided over the matter. VSB Exh. 13 (Supplemental Report of Investigation).

58. By Order entered October 28, 2022 on plaintiff's motion for entry of default judgment and terminating sanctions for defendant's failure to comply with the September 2022 Order, the Court, through a judge designate, entered default judgment on liability against Respondent's client on five of the nine counts of the complaint. Respondent's Exh. A (October 28, 2022 Order entering default judgment and terminating sanctions against Defendant).

NATURE OF MISCONDUCT

Upon consideration of the stipulations, witnesses' testimony, exhibits, arguments of counsel, and the entirety of the record, the Court finds that the evidence establishes by clear and convincing evidence that such conduct by Respondent violated the following provisions of the Rules of Professional Conduct as follows:

RULE 8.2 Judicial Officials[4]

A lawyer shall not make a statement that the lawyer knows to be

---

[4] Comment 1: "False statements by a lawyer concerning the qualifications or integrity of a judge can unfairly undermine public confidence in the administration of justice. To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized."

Committee Commentary: "...the dignity of courts and the attendant requirement that judicial officials be treated with respect acts as a restraint on lawyer criticism of those officials..."

false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer.

Respondent's statements attacking Judge Fisher and Respondent's handling of the ruling on the motion to dismiss violate Rule 8.2. Respondent accused Judge Fisher of plotting and planning to rule against Respondent's client, in violation of the law and his duty, because Judge Fisher was allegedly angry with Respondent for causing a kerfuffle" about page limits. There is no evidence in the record to support Respondent's attacks. The accusations made against Judge Fisher are all assumptions, inferences, extrapolations, suspicions, which Respondent inferred from the absence of questions and a limited ruling on the motion to dismiss. Respondent concluded from the mere statement that Judge Fisher agreed with opposing counsel's argument on a motion to dismiss that the "real" reason for his denial of the motion to dismiss was to punish Respondent and deliberately extinguish Respondent's client's rights.

In his memorandum of law in support of a motion to reconsider the motion to dismiss, Respondent made factual statements that Judge Fisher directly directed the clerk to remove the motions from the docket due to the page limit limitation. There was no information available to Respondent that Judge Fisher knew about, much less had any role in, the removal of Respondent's motions. Moreover, the page limitation was simply a local procedure implemented during a pandemic. Respondent could have filed any number of professionally worded motions or taken appropriate action with the Court to address whether the Second Transition Plan which imposed the restriction was appropriate or valid. Additionally, Respondent's insistence and repeated statements equating the gravity of this issue with the civil rights movement and civil disobedience is inapposite and improper.

The memorandum of law in support of the motion to reconsider is replete with crude attacks on Judge Fisher's competence, integrity, and intellectual honesty and accuses Judge Fisher of judicial chicanery, intellectual sophistry, and states that Judge Fisher was masquerading as the law.

These are some examples of Respondent's pattern of making allegations without any factual basis. Respondent made his statements against and about Judge Fisher with reckless disregard as to the truth or falsity of Respondent's statements concerning Judge Fisher's qualifications and integrity.

The following exhibits, stipulations, and cases were most compelling in analysis of Rule 8.2:

VSB Exhibit 10, Respondent's June 7, 2022 Response to the Bar Complaint
VSB Exhibit 12, Report of Investigation
VSB Exhibit 38, Respondent's January 18, 2022 Letter to Judge Fisher
VSB Exhibit 39, Motion to Reconsider
VSB Exhibit 40, Memorandum of Law in Support of Motion to Reconsider

Stipulations 32-36

Pilli v. VSB, 269 Va. 391, 611 S.E.2d 389 (2005)
Anthony v. Virginia State Bar, 270 Va. 601, 621 S.E.2d 121 (2005).

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

...

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

Respondent violated Rule 3.4(d) by knowingly disobeying a standing rule. Respondent's admissions prove that he knowingly disobeyed the Court's rule regarding page limitations. VSB Exhs. 20-23 and Stipulations 10 &11. Respondent did not take steps, in good faith, to test the validity of the Second Transition Plan's restriction on page limitations. As an attorney who has been practicing law for 25 years, Respondent knew or should have known that emails addressing legal argument with Amy Bain, the docketing manager, are not the appropriate manner to challenge the Second Transition Plan's page limitation.

After the Court twice rejected Respondent's filings and notified Respondent of the reason therefor, on January 20 and February 17, Respondent did nothing. He did not test the validity of the rule nor did he file anything. He ignored Plaintiff's counsel's email of April 2, 2021. It was not until Plaintiff filed a motion for default judgment which prompted Respondent's opposition to the motion for default judgment, VSB Exh. 29, in which Respondent finally raised to the Court whether its page limitation was appropriate or valid. At the May 21, 2021 hearing, Judge Fisher overruled the motion for default judgment and ordered the clerk to docket for hearing any pending or yet to be filed motions upon request of counsel. VSB Exh. 31. This included NAG, Inc.'s already filed motion to dismiss. The Court thus does not credit Respondent's assertion that he tried in good faith to challenge the page limitation.

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

...

(g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

All of the behavior described in support of the finding that Respondent violated Rule 3.4(g) proves to the Court by clear and convincing evidence that Respondent's behavior disrupted the proceedings, including a statement by

Robert Tucci, Plaintiff's counsel, at VSB Exh. 12, p. 9, wherein Mr. Tucci expressed concerns about the delay created by Respondent's behavior. By Respondent's admission, the delay and disruption was intentional.

RULE 3.5 Impartiality And Decorum Of The Tribunal

...

(f) A lawyer shall not engage in conduct intended to disrupt a tribunal.

The clear and convincing evidence reflects that Respondent was not acting in good faith and that he intended to and did disrupt the tribunal. As contained in VSB Exh. 12, the Report of Investigation, Respondent admitted to engaging in conduct intended to disrupt the tribunal and intended to continue to do so. At VSB Exh. 12, p. 7, Respondent admitted that his language in his Memorandum of Law in Support of the Motion to Reconsider was blunt and harsh, stating that Respondent saw through Judge Fisher's behavior and intended to take action at the trial court level because the appellate remedies, in his opinion, were inadequate. Respondent further stated that the only decision Judge Fisher could make was to grant Respondent's clients' motion to dismiss. Indeed, Judge Fisher had no authority to enter any orders other than to dismiss the case. All of this constitutes evidence that Respondent flouted the entire judicial process in violation of Rule 3.5(f). Respondent does not believe that he needs to file an appeal or a complaint before the Judicial Inquiry and Review Commission, or anything else. In Respondent's own words, Respondent's approach was to attack the judge. VSB Exh. 12, p. 6. Respondent's admissions and his approach convince the Court that Respondent was not acting in good faith and intended to disrupt the tribunal.

DISMISSAL OF VIOLATIONS OF RULES 3.4(i) and 8.4(b)

The Court dismissed the alleged violations of Rules 3.4(i) and 8.4(b) as follows:

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

...

(i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

The Court found that Rule 3.4(i) is aimed at addressing conduct towards the opposing party to gain advantage or undermine positions. The alleged threats against a judge do not fall within the breast of Rule 3.4(i).

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

...

(b) commit a criminal or deliberately wrongful act that reflects

adversely on the lawyer's honesty, trustworthiness or fitness to practice law[.]

While the Court found that the VSB proved misconduct under Rules 8.2, 3.4(d) and (g), and3.5(f), the Court did not find, by clear and convincing evidence, that the misconduct found reflected adversely on Respondent's honesty, trustworthiness, or fitness to practice law.

Sanctions Phase

The Court then proceeded to the sanctions phase of the proceeding. The VSB and Respondent presented opening statements.

The VSB introduced a certification of Respondent's disciplinary record. Respondent had no disciplinary history. The Court admitted the Certification as VSB Exhibit 47.

Counsel for the VSB and the Respondent presented argument regarding the sanctions to be imposed on Respondent for the misconduct found, and the Court recessed to deliberate.

Determination/Public Reprimand with Terms

After due consideration of the evidence as to mitigation and aggravation and argument of counsel, the Court reconvened to announce its sanction of a Public Reprimand with Terms. The terms are as follows:

1. **NO FURTHER MISCONDUCT**

   For a period of three (3) years following the entry of this Memorandum Order for a Public Reprimand with Terms, Respondent will not engage in any conduct that violates Rules 8.2, 3.4(d) and (g), and 3.5(f) of the Virginia Rules of Professional Conduct, including any amendments thereto, and/or which violates any analogous provisions, and any amendments thereto, of the disciplinary rules of another jurisdiction in which Respondent may be admitted to practice law. The terms contained in this paragraph will be deemed to have been violated when any ruling, determination, judgment, order, or decree has been issued against Respondent by a disciplinary tribunal in Virginia or elsewhere, containing a finding that Respondent has violated one or more provisions of the Rules of Professional Conduct referred to above, *provided, however*, that the

conduct upon which such finding was based occurred within the period referred to above, and provided, further, that such ruling has become final.

2. **MANDATORY CONTINUING LEGAL EDUCATION ("MCLE")**

On or before December 31, 2023, Respondent will complete ten (10) hours of continuing legal education credits by attending courses approved by the Virginia State Bar in the subject matter of legal ethics and professionalism. Respondent's Continuing Legal Education attendance obligation set forth in this paragraph will not be applied toward his MCLE requirement in Virginia or any other jurisdictions in which Respondent may be licensed to practice law. Respondent will certify his compliance with the terms set forth in this paragraph by delivering a fully and properly executed Virginia MCLE Board Certification of Attendance form (Form 2) to Bar Counsel, promptly following his attendance of each such CLE program(s).

3. **COUNSELING WITH THOMAS SPAHN, ESQ.**

Respondent must participate in counseling with Thomas Spahn, Esq., to discuss the specific conduct found to have been violated in these rules. The counseling must take place within six (6) months of February 14, 2023, as scheduled by the counseling attorney with Respondent.

Respondent will be required to compensate Mr. Spahn at his prevailing rate. Mr. Spahn will review the record and the Court's findings in preparation for Respondent's counseling session/s. Furthermore, Mr. Spahn will prepare a report to the VSB expressing whether the Respondent timely complied with this provision, including payment of counseling fees.

If Respondent violates any of the above terms, an alternative sanction of a Six-Month Suspension shall be imposed pursuant to Part Six, Section IV, Paragraph 13-18.O of the Rules of Supreme Court of Virginia. Any proceeding initiated due to failure to comply with terms will be considered a new matter, and an administrative fee and costs will be assessed pursuant to Paragraph 13-9.E of the Rules of Supreme Court of Virginia.

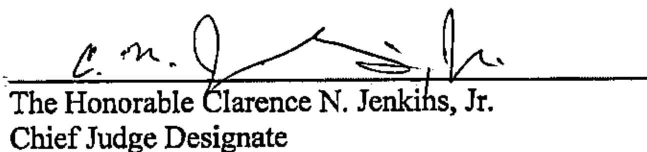
It is further ORDERED that the Clerk shall send a copy teste of this Final Judgment Memorandum Order to Respondent, Phillip Ben-Zion Leiser, by certified mail, return receipt requested, to The Leiser Law Firm, 1750 Tysons Blvd., Ste. 1500, Tysons Corner, VA 22102, his address of record with the VSB; to the Honorable Joanne

Fronfelter, Clerk of the Disciplinary System, Virginia State Bar, 1111 E. Main Street, Suite 700, Richmond, VA 23219; and to Renu M. Brennan, Bar Counsel, Virginia State Bar, 1111 E. Main Street, Suite 700, Richmond, VA 23219.

The hearing was recorded by Gregory Koenig of ICR Rudiger & Green Court Reporting, 1629 K Street NW, Suite 300, Washington DC 20006, telephone 703-331-0212.

The Clerk of the Disciplinary System shall assess costs pursuant to Part Six, Section IV, Paragraph 13-9.E of the Rules.

ENTERED: 2/17/2023



The Honorable Clarence N. Jenkins, Jr.
Chief Judge Designate

____
The Honorable Louise M. DiMatteo

____
The Honorable Lisa B. Kemler, Chief Judge

I ask for this:

VIRGINIA STATE BAR

By: Renu M. Brennan
Renu M. Brennan, Bar Counsel
VSB No. 44529
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-3565
(804) 775-0575
brennan@vsb.org

SEEN AND ___________:

By:___________________________
Phillip Ben-Zion Leiser, Esq.
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The Leiser Law Firm
1750 Tysons Blvd Ste 1500
Tysons Corner, VA 22102
(703) 734-5000
pbleiser@leiserlaw.com

VSB
EXHIBIT
01

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

VIRGINIA STATE BAR EX REL
SEVENTH DISTRICT COMMITTEE
VSB Docket No. 22-070-124954
Complainant,

v. **Case No. 2022-16347**

Phillip Ben-Zion Leiser,
Respondent.

STIPULATIONS OF FACT

1. In 1997, Respondent was admitted to the Virginia State Bar (VSB). At all relevant times, Respondent was a member of the VSB.
2. Respondent represents defendant NAG, Inc. in a civil case pending in the Loudoun County Circuit Court, *Robert George Vorthman, III v. NAG, Inc.* (CL19-4436). Plaintiff filed suit December 6, 2019. NAG, Inc. was served November 28 and 30, 2020 in California and Washington, D.C., respectively.
3. Effective November 24, 2020, the Loudoun County Circuit Court Second Transition Plan ("Second Transition Plan") limited civil motions to three pages and supporting briefs to five pages. The Second Transition Plan permitted deviations upon motion for good cause shown.
4. On December 21, 2020, Respondent, on behalf of NAG, Inc., filed a 14-page[1] motion to dismiss and/or transfer and memorandum of law.
5. On January 7, 2021, Respondent filed a praecipe requesting that NAG, Inc.'s motion to dismiss/transfer be heard on January 22, 2021.
6. On January 8, 2021, the Clerk's Office informed Respondent that NAG, Inc.'s hearing was "not set- wrong form & time."

[1] The fourteenth page is the certificate of service.

7. On January 8, 2021, Respondent, through his attorney spouse signing on Respondent's behalf, filed a new praecipe again requesting hearing on NAG, Inc.'s motion to dismiss/transfer on January 22, 2021.

8. On January 15, 2021, plaintiff's counsel filed an opposition to NAG, Inc.'s motion to dismiss/transfer.

9. By email dated January 20, 2021, to Respondent and plaintiff's counsel, the Court's docket manager stated:

   I am directed to remove this case from the docket on Friday, Jan. 22, 2021 at 10 a.m. because the memorandum in support exceeds five pages, and there is no R. 4:15(b) certification.

   I've attached our 2nd transition plan for reference.

10. On January 25, 2021, Respondent refiled the praecipe requesting a hearing on the motion to dismiss/transfer on February 19, 2021.

11. On January 25, 2021, Respondent also filed a two-page motion to dismiss and 14-page memorandum of law in support.

12. On February 12, 2021, plaintiff, by counsel, filed its opposition to the motion to dismiss.

13. By email dated February 17, 2021, the Court's docket manager told Respondent and plaintiff's counsel that she was "directed to remove the motion to dismiss from the docket this Friday because the brief in support exceeds the allowed page limit as outlined in our 2nd Transition Plan."

14. Instead of filing a motion seeking a deviation for good cause shown, by email dated February 17, 2021 to the docket manager, Respondent argued that he had not "been presented with any legal authority which modifies the 20 page [sic] limit of Rule

4:15(c)." Rule 4.15(c) provides that, absent leave of court, a brief may not exceed 20 pages in length.[2] Respondent stated:

> If I am being told that the Court *will not* schedule a hearing on any motion in which the memorandum of law exceeds 5 pages, that is unacceptable. My client will not have his constitutional right to a *meaningful* opportunity to be heard abridged by this or any Court, through the establishment of arbitrary and unreasonable page limits that contradict the Rules of the Supreme Court of Virginia.

Respondent apologized for his frustration and requested clarification.

15. By email dated February 18, 2021, the docket manager again attached the Second Transition Plan which she stated was "the basis of the removal."

16. Respondent did not refile the motion to dismiss.

17. By motion filed in April 2021, plaintiff sought entry of default judgment against NAG, Inc., noting that the motion to dismiss had twice been removed from the docket and that a proper motion had not been refiled, nor had an answer.

18. In a ten-page brief in opposition to the motion for default judgment, filed April 27, 2021, attached as Exhibit A, Respondent asked the Court to grant NAG, Inc. leave to file its corrected Memorandum in support of its Motion to Dismiss. Respondent asserts he made this request to amend NAG, Inc.'s already refiled pleadings solely to incorporate two previously filed exhibits. Respondent argued that the Second Transition Plan violated Rule 4:15(c):

    While it is true that this Court's Second Transition Plan "permit[s] deviations from the above page limits upon motion for good cause shown," the question remains as to how

[2] 4:15 (c) *Filing and Service of Briefs* - Counsel of record may elect or the court may require the parties to file briefs in support of or in opposition to a motion. Any such briefs should be filed with the court and served on all counsel of record sufficiently before the hearing to allow consideration of the issues involved. Absent leave of court, if a brief in support of a motion is five or fewer pages in length, the required notice and the brief must be filed and served at least 14 days before the hearing and any brief in opposition to the motion must be filed and served at least seven days before the hearing. If a brief will be more than five pages in length, an alternative hearing date, notice requirement, and briefing schedule may be determined by the court or its designee. Absent leave of court, the length of a brief may not exceed 20 pages, double spaced.

such a procedural mechanism promotes either judicial efficiency or effectiveness? After careful analysis, research, and writing, Counsel has concluded, in his professional judgment gained from nearly a quarter century of experience practicing law in the courts of this Commonwealth, that the particular legal and factual issues relevant to NAG's motion to dismiss Vorthman's complaint requires a 14-page MoL in order to fully and fairly argue his client's position – a page-length that is well within the 20-page limit prescribed by Rule 4:15(c). ...

Exh. A at 7-8.

19. By Order entered June 17, 2021, the Honorable James P. Fisher overruled the motion for default judgment and concluded that NAG's timely-filed motion to dismiss was a responsive pleading. The Court further ordered the Clerk to docket for a hearing any pending or yet-to-be-filed motions, upon request of the parties' counsel of record.
20. On June 24, 2021, Respondent refiled the praecipe requesting a hearing on the motion to dismiss/transfer on July 16, 2021.
21. By email July 14, 2021, the docket manager advised Respondent that she was directed to remove his motion from the docket because Respondent exceeded the page limit.
22. By emails dated July 14 and 15, 2021, Respondent referred the docket manager to the Court's Order overruling the motion for default judgment and stated that the Clerk had been ordered to docket his motion for hearing. Respondent concluded his email with the statement: "Because if I am not provided an explanation for this decision my next filing will be to have the Clerk of the Court held in contempt of court."
23. By email dated July 15, 2021, the docket manager stated she was "informed that this case doesn't comply with the rule to be docketed, and it should not be docketed."
24. On September 30, 2021, Respondent refiled the praecipe requesting a hearing on the motion to dismiss/transfer on October 22, 2021.

25. On October 22, 2021, the hearing did not go forward because plaintiff's counsel sought a continuance, which Respondent did not oppose.

26. On October 28, 2021, Respondent refiled the praecipe requesting a hearing on the motion to dismiss/transfer on December 17, 2021.

27. On December 17, 2021, notwithstanding Respondent's repeated failure to comply with the Second Transition Plan, the Honorable James P. Fisher of the Loudoun County Circuit Court heard and denied Respondent's motion to dismiss on the merits.

RESPONDENT'S MOTION TO RECONSIDER AND MEMORANDUM IN SUPPORT

28. On January 18, 2022, Respondent filed a motion to reconsider and memorandum in support. Respondent's motion and memorandum, and letter of enclosure, are attached collectively as Exhibit B to this Certification.

29. In his cover letter dated January 18, 2022, addressed to the Honorable James P. Fisher, Respondent stated:

> It would be extremely unwise for the Court to treat the attached motion to reconsider with the dismissiveness with which it treated NAG's motion to dismiss. (ftnt: No pun intended.) Leiser has filed this motion to give the Court the opportunity to right a wrong and to avoid further unwanted scrutiny of its decision to deny NAG's motion to dismiss. But the Court's failure to read and carefully consider this motion and its accompanying memorandum of law is the surest way to guarantee that others will.

30. In his motion to reconsider, Respondent moved the Court to:

> . . . reconsider its decision, vacate its order (if any has been entered) denying NAG's motion to dismiss as having been improvidently denied; recuse itself from any further proceedings in this matter, and ensure NAG's motion is re-docketed for hearing before a different judge --- preferably, one who is not from this jurisdiction. Alternatively, NAG requests the Court hold a hearing on this motion, followed by a *meaningful* hearing on NAG's underlying motion to dismiss, to include a reasoned explanation from the Court concerning the legal and factual bases for its decision.

31. Respondent's 12-page memorandum of law argued as follows:

> … Which begs the question: If the governing law did not serve to inform the Court's decision, then what *was* the basis for its ruling?
>
> To answer that question, one needs to understand that Leiser had apparently created a bit of a kerfuffle in Judges' Chambers, by refusing to abide by the Court's requirement that counsel seek leave of court before filing a MoL in excess of five pages. In defiance of that page limit, Leiser had filed a fourteen page [sic] MoL in support of NAG's motion to dismiss. Over a period of many months, the Court removed NAG's motion from its docket *three* times for exceeding its five-page limit, prompting several emails from Leiser to one of the court clerks, including a threat to mandamus the clerk, if necessary, to docket NAG's motion for a hearing. Those emails likely contributed to the Court's antipathy toward Leiser.

Exh. B, Memo, p. 6.

32. Respondent begins his brief by stating that the Court "*purported* to adjudicate NAG's motion to dismiss" and "gave zero indication it had thoughtfully considered the issues raised by NAG's motion." *Id.* at 1.

Respondent continues:

> The Court's conduct in relation to that hearing, along with its ruling denying NAG's motion to dismiss, indicates the absence of any intention to fairly adjudicate that motion; reflects utter disdain for the rule of law; and demonstrates the Court's bias against NAG's counsel, Leiser. Its ruling betrays its oath of office to protect and defend the Constitution and laws of the United States and of the Commonwealth of Virginia. Yet, in a superficially clever but ultimately sophomoric and transparent attempt to avoid detection of its chicanery and exposure of the real reason behind its decision, the Court hitched its wagon to Vorthman's meritless---if not frivolous---arguments, cynically pretending to have actually engaged in a good faith analytical process to decide the legal issues in contention, apparently believing that riding Vorthman's coattails would inoculate the Court from criticism, by imbuing its decision with the veneer of credibility and the façade of legitimacy. The Court employed this stratagem presumably anticipating that if its misconduct were ever challenged, its no-questions-asked adoption of Vorthman's arguments would be sufficient to afford it plausible deniability.
>
> Before addressing the *real* reason for the Court's decision, Leiser will briefly touch upon the merits. However, he will not tarry long in rehashing the merits of the arguments because that would be an exercise in futility. The Court made it vividly clear that the relative merits of the parties' arguments were completely irrelevant to its decision-making process. Still, there are a few points worth mentioning that might give this Court reason to second-guess [sic] the wisdom of its decision to feign reliance upon Vortham's arguments, in support of its misguided ruling denying NAG's motion to dismiss. Neither that ruling nor the Court's misplaced reliance on Vorthman's rationale therefor will survive close scrutiny—whether by an appellate tribunal, the Judicial Inquiry and Review

Commission (JIRC), or the media. That scrutiny will inexorably lead to the public's perception of the Court as amateurish and clearly not up to the task of adjudicating complex legal issues. And that is the Court's *best case* [sic] scenario as to the perception of it that will result from an up-close examination of its ruling.

Id at 2.

...While it is not surprising that an inexperienced attorney might confuse and conflate a demurrer with a motion to dismiss for lack of SMJ, what is the Court's excuse for making that identical novice "mistake?"

Id. at 3.

...And so, in that context, the Court's hollow recitation of a common legal phrase ("findings of fact") often employed in judicial decisions, but which was entirely inappropriate to *this* occasion, [footnote omitted] coupled with its wholesale "adoption"---lock, stock, and barrel---of Vorthman's findings of fact, conclusions of law, and arguments asserted in support thereof, is revelatory of its attempt to create the mirage that it had actually engaged in a meaningful analysis of the issues.

Id. at 5.

It is a principle of physics that nature abhors a vacuum. So do litigants and lawyers. And the vacuum created by the Court's mere one sentence conclusory ruling, which it uttered without articulating the rationale for its decision, suggests there is an alternative narrative explaining its decision that has nothing to do with the issues in dispute or their proper resolution. That narrative becomes even more compelling when viewed in the light of the flagrant nature and egregiousness of the court's "errors," in its supposed "analysis" of the issues that had been submitted for its adjudication. Application of the doctrine of *res ipsa loquitor* is appropriate when considering the Court's "mistakes" because they speak for themselves. That the Court fails to understand the difference between NAG's motion to dismiss and a demurrer; that it has willfully failed to educate itself concerning the FLSA's jurisdictional threshold-settled law for the last half century; and that it fails to understand the concept of legal standing as it relates to Vorthman's assertion of his CA claims reveal the Court was completely disinterested in the law governing the issues in contention. Which begs the question: If the governing law did not serve to inform the Court's decision, then what was the basis for its ruling?

Id. at 6.

33. Respondent argued the Court "extinguish[ed] his client's legal rights" to "send a clear message to Leiser, ... to punish him." He continued:

Leiser's willful flouting of the five-page limit and his audacity in challenging the validity of the Court's "rule," form the backdrop for the Court's adjudication of NAG's motion to

dismiss and sheds quite a bit of light on its treatment of NAG and its counsel in its resolution of that motion. Apparently, the Court viewed Leiser's challenge to its page-limit [sic] as a full frontal [sic] assault on its authority and a demonstration of his disrespect for the Court. And so, the *real* reason for the Court's denial of NAG's motion to dismiss was its desire to send a clear message to Leiser, that if he dares to challenge the Court, by speaking truth to power, this Court will find a way to punish him. And, apparently, extinguishing his client's legal rights is, in the Court's view, acceptable collateral damage necessary to the achievement of that aim.

With respect to the specific errors inherent in the Court's ruling, ... it shocks the conscience that a circuit court judge would make any one of them. But when a single ruling reflects multiple errors, each of which shocks the conscience, that suggests more than a willful disregard of the law. Coupling that with the Court's attempt to thwart NAG from defending against this lawsuit, by repeatedly directing the clerk to remove from the docket NAG's motion to dismiss Vorthman's complaint, creates a sufficiently compelling circumstantial case that Leiser's disregard of the Court's five-page limit was the dominant-indeed, the exclusive-factor that underpinned its decision to deny that motion to dismiss.

Id. at 7-8.

Respondent included a footnote at the end of that sentence stating:

Should the Court decline to take appropriate corrective measures concerning its ill-conceived ruling, the personal involvement of Judge Fisher in the Court's multiple decisions to remove NAG's motion from the docket will have to be investigated.

Id. at fn. 6.

Respondent argued in his Answer to the Certification that the Court "apparently viewed NAG's rights as collateral damage necessary to achieving that aim."

34. Respondent also argued that Judge Fisher "apparently bitterly resented" Mr. Leiser's challenge to the five-page limit rule and for that reason failed to consider the merits of the motion to dismiss which was "DOA—dead on arrival—from the moment it landed on the Court's desk."

Id. at 9. Respondent continued:

The Court's repeated efforts, to thwart Leiser from effectively arguing on behalf of NAG, is apparently rooted in its resentment—which seems to be shared by many judges in many jurisdictions—at having to do the work the job of a judge requires—*being and*

continuing to become learned in the law. Through their persistent and petulant refusal to do so, even when the governing law is spoon-fed to them by competent counsel, some judges reveal they apparently consider the courts to be their personal playgrounds on which they have unfettered discretion to make the rules, break the rules, change the rules, ignore the rules, or selectively enforce the rules, all at their personal whim, based on nothing more than who they like and who they dislike. And by placing obstacles in the paths of litigants and their lawyers who want to *effectively* argue their cases; by requiring them to spend their time and their clients' money asking the Court's permission to exceed five pages---in other words, to do that which the law already permits them to do, judges create for themselves greater leeway to do whatever they feel like doing, rather than what the law compels them to do. But judges do not get to engineer the outcomes they desire, as this Court so blatantly did in this case, by ignoring inconvenient arguments, inconvenient facts, or inconvenient laws.

Id. at 9-10.

35. Respondent stated that Judge Fisher did not provide a detailed rationale for his decision to deny the motion to dismiss because he could not "articulate those reasons, at least, not without exposing its [the trial court's] subterfuge."

The Court's reticence to do so in this case is telling. It is a byproduct of its attempt to fly under the radar, to avoid unwanted attention to and scrutiny of its mendacity. Its one-sentence ruling reflects its attempt to use Vorthman's arguments as a shield behind which to cynically conceal the truth that its ruling had nothing to do with the relative merits of the opposing arguments, but was, instead, motivated by nothing other than its desire to punish Leiser for what the Court wrongly perceived as his disrespect toward the Court.

Id. at 11.

36. Respondent argued that entry of the order denying the motion to dismiss will risk the "unmasking of its charade" and "place this Court's conduct squarely at issue, as well as how that conduct reflects on the Court's competence, integrity, and intellectual honesty."

Respondent continued:

It will become clear that its decision was not the result of a good faith effort to conduct a meaningful legal analysis, which will then lead to a more focused inquiry to determine the Court's *real* reason for its decision.

Id. at 11-12.

> Leiser is quite capable of distinguishing between judicial integrity and judicial chicanery; between intellectual honesty and intellectual sophistry; and between the rule of law and the whim of individual judges masquerading as the rule of law-and so is the media and the public. The Court should also keep in mind that it is not the words contained in this MoL that bring disrepute to this Court; its own misconduct is responsible for that. Leiser is willing to stand by his words-every single one of them. The question this Court must consider is whether it is prepared to defend its conduct in this case.

Id. at 12.

37. In his Supplemental Response to the Bar Complaint, Respondent addressed his conscious decision not to move the Court for permission to file a brief in excess of five pages:

> It is indisputable that the effort to obtain leave of court for an extended page limit would result in the delay of the hearing on the underlying substantive motion for which the page extension is sought. Under the rule, all of that additional time, work, and (client) money would have to be expended and invested, instead of simply reading the extra nine pages of Leiser's MoL in support of NAG's motion to dismiss. Thus, whether the Court granted or denied the motion for an extended page limit, it would have created extra work for itself and both counsel, and delayed the underlying proceedings...

38. In his interview with the bar investigator, Respondent analogized his repeated failure to abide by the Second Transition Plan and conscious decision not to move for a departure from the five-page limit to civil disobedience and stated that "he is willing to be a test case to expose judicial chicanery." Respondent further stated that he had a "Rosa Parks moment, and … he was not going to get out of his seat and move to the back of the bus." Respondent noted, "some judges understand their role and become learned in the law, and some are happy to be informed by a competent attorney."

Respectfully submitted,

Renu Brennan

Renu M. Brennan (VSB#44529)
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Phillip B. Leiser (w/o prejudice to Δ's request the court consider the entire pleading, not merely its designated excerpts.) PBL

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VSB
EXHIBIT
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FILED
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VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY
(Civil Division)

ROBERT GEORGE VORTHMAN, III,	)	
Plaintiff,	)	
v.	)	Case No. CL-19-4436
NAG, INC.,	)	
Defendant.	)	

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR DEFAULT JUDGMENT

COMES NOW, Defendant, NAG, INC. ("NAG"), by Counsel, pursuant to VA. R S. Ct. 3:8, 3:19(a), and 4:15(c), and respectfully moves this Honorable Court to deny Plaintiff Vorthman's motion for default judgment ("MFDJ"). In support thereof, NAG advances the following arguments.

According to VA. R. S. Ct. 3:19(a), "A defendant who fails timely to file a responsive pleading as prescribed in Rule 3:8 is in default." *Id.* Rule 3:8(a) provides,

> A defendant must file pleadings in response within 21 days after service of the summons and complaint upon that defendant . . . . A demurrer, plea, *motion to dismiss*, and motion for a bill of particulars will each be deemed a pleading in response . . . ." *Id.* (emphasis added).

According to Vorthman, NAG was properly served with a copy of the Summons and Complaint . . . on [11/30/20 and] filed its Motion to Dismiss or Transfer on [12/21/20]."[1] Vorthman's Memorandum of Law in support of its MFDJ (hereafter, "MFDJ") at ¶¶ 2-4. Thus, Vorthman tacitly concedes that NAG timely filed a pleading in response, in compliance with

[1] Vorthman also alleges he served NAG in CA two days earlier on 11/28/20.

Rule 3:19(a). Hence, NAG is not in default. However, Vorthman complains that NAG "failed to meet the requirements of Rule 4:15(b), to confer with Plaintiff's counsel, and also failed to meet the Court's requirements for page limitations." (MFDJ at ¶ 4). Neither of those "requirements" provides a legitimate basis upon which this Court could enter a default judgment against NAG.

VA. R. S. Ct. 4:15(b) provides, in pertinent part,

> Reasonable notice of the presentation of a motion must be served on all counsel of record. Absent leave of court, . . . reasonable notice must be in writing and served at least seven days before the hearing. Counsel of record must make a reasonable effort to confer before giving notice of a motion to resolve the subject of the motion and to determine a mutually agreeable hearing date and time. The notice must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. *Id.*

The Rule's requirement that the moving party (in this case, Defendant, NAG, who filed the motion to dismiss or transfer) confer with Vorthman (through counsel) "in an effort to resolve the dispute without court action" does not apply prior to the time the parties are at issue. That is, a defendant need not confer with his opponent prior to complying with his Rule 3:8(a) directive to file a responsive pleading—including, specifically, a motion to dismiss—within 21 days after service of the summons and complaint. For that reason, NAG was not required to confer with Vorthman prior to filing its motion to dismiss. NAG *did*, however, confer with Vorthman to determine a mutually agreeable hearing date on its motion to dismiss, in full compliance with the dictates of Rule 4:15(b).

Pursuant to VA. R. S. Ct. 4:15(c), NAG's memorandum of law ("MoL") filed in support of its motion to dismiss consisted of fourteen pages.[2] A few days prior to the scheduled hearing, the clerk notified counsel that she had been directed to remove the matter from the Court's

[2] including an entire page containing only the certificate of service

1/22/21 docket because (i) the motion and MoL were combined into a single document; (ii) there was no Rule 4:15(b) certification; and (iii) the MoL exceeded five pages. On 1/25/21 NAG refiled its MoL, having corrected the first two deficiencies, but without "correcting" the third "deficiency"—the fact that the length of the MoL exceeded five pages—and re-docketed its motion to dismiss for a hearing after, once again, conferring with Vorthman as to a mutually agreeable date.

Once again, several days prior to the scheduled hearing, the clerk notified counsel that she had been directed to remove the motion from the Court's 2/19/21 docket. In her 2/17/21 email, attached hereto as **Exhibit 1**, Ms. Amy Bain stated, "I am directed to remove the motion to dismiss from the docket this Friday because the brief in support exceeds the allowed page limit as outlined in our 2nd transition plan." *Id.* Indeed, this Court's Second Transition Plan specifies in § I(B), "Briefs must accompany a motion [and] shall be limited to five pages . . . . The Court may permit deviations from the above page limits upon motion for good cause shown." *Id.* at p.3.

This Court's purported limitation on the length of NAG's MoL filed in support of its motion to dismiss is contrary to law and therefore, invalid. For that reason, the Court is obligated to consider the respective parties' filings, as submitted,[3] and docket NAG's motion to dismiss for a hearing, on a date that is mutually convenient for the Court and both counsel. According to VA. R. S. Ct. 4:0 ("Rule 4:0"), "The Rules in this Part Four apply in civil cases in the circuit courts." *Id.* It follows that Rule 4:15(c) applies to NAG's motion to dismiss. That Rule provides,

[3] NAG has filed, contemporaneously herewith, a corrected MoL in support of its previously filed motion to dismiss, because, in its previously-filed MoL, counsel inadvertently neglected to attach the two exhibits referenced therein at p.4, fn. 3. Counsel had attached the two exhibits to its first MoL filed in support of its motion to dismiss but inadvertently omitted them when he re-filed that MoL.

> (c) . . . If a brief will be more than five pages in length, an alternative hearing date, notice requirement, and briefing schedule may be determined by the court or its designee. Absent leave of court, the length of a brief may not exceed 20 pages, double spaced.
>
> (d) . . . [U]pon request of counsel of record for any party, . . . the court *will* hear oral argument on a motion. VA. R. S. Ct. 4:15(d) (emphasis added).

Although it is clear that this Court's purported restriction on the length of an MoL is invalid, Counsel debated whether to simply "go along to get along," and file a motion, as instructed by the Clerk, seeking leave of Court to file a brief in excess of five pages, so as to avoid antagonizing the Court, and thereby risk prejudicing the outcome of NAG's underlying motion to dismiss. However, after careful consideration, Counsel ultimately concluded that, by requesting permission from this Court to exceed its five-page limit, he would be (or at least be perceived as) tacitly conceding that this Court could legitimately deny his request, and by so doing, effectively muzzle his arguments and thereby jeopardize his ability to properly, competently, and professionally represent his client's interests. Having learned from his prior unfortunate experience regarding this very issue, in the Fairfax County Circuit Court, long before the onset of the current pandemic, Counsel has concluded that adopting a "go-along-to-get-along" approach merely invites the Court to steamroll over his clients' constitutional right to a *meaningful* opportunity to be heard, as safeguarded by the Fourteenth Amendment's due process clause. Therefore, he must stand his ground and insist that the Court accept the corrected MoL—filed contemporaneously, herewith, in support of NAG's motion to dismiss—as-is, since it is fully compliant with the requirements of Rule 4:15(c)—and to schedule a hearing on that motion.

The question concerning the applicable page-limit distills to whether there is legal authority that permits this Court to amend, abrogate, disregard, or rescind the Rules promulgated

by SCV, which, by their express terms, govern pleadings filed by litigants *in this very Court.* Confirming that Rule 4:15(c) is dispositive of the question before the Court is VA. CODE ANN. § 8.01-3(A), which provides,

> . . . [SCV], subject to §§ 17.1-503 and 16.1-69.32,[4] may, from time to time, . . . make general regulations for the practice in all courts of the Commonwealth; and may prepare a system of rules of practice and a system of pleading . . . to be used in all such courts. This section shall be liberally construed so as to eliminate unnecessary delays and expenses. VA. CODE ANN. § 8.01-3.

The limitation provided by § 17.1-503(A) provides,

> A. [SCV] may formulate rules of practice and procedure for the circuit courts . . . . Such rules, *subject to the strict construction of the provisions of § 8.01-4, . . . shall be the only rules of practice and procedure in the circuit courts of the Commonwealth* . . . . *Id.* (emphasis added).

According to VA. CODE ANN. § 8.01-4,

> The . . . circuit courts may, from time to time, prescribe rules for their respective . . . circuits. *Such rules shall be limited to those rules necessary to promote proper order and decorum and the efficient and safe use of courthouse facilities and clerks' offices. No rule of any such court shall be prescribed or enforced which is inconsistent with this statute* or any other statutory provision, *or the Rules of Supreme Court* or contrary to the decided cases, or which has the effect of abridging substantive rights of persons before such court. *Any rule of court which violates the provisions of this section shall be invalid.* . . . VA. CODE ANN. § 8.01-4 (emphasis added).

Although the General Assembly has authorized circuit courts to enact their own "local rules," the code section set forth above is merely academic as it relates to this discussion because this Court has elected *not* to prescribe any "local rules."[5] Furthermore, even had the five-page

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[4] VA. CODE ANN. § 16.1-69.32 concerns SCV's promulgation of Rules governing practice and procedure in the District Courts, and is therefore not at issue in this dispute.

[5] According to this Court's own website, "The Loudoun County Circuit Court does not have a list of local rules." http//www.courts.state.va.us/Home/Virginia's Court System/Circuit Court/Individual Circuit Court Homepages/Loudoun Circuit Court/Local Court Links/Local Website/Home/Departments & Offices/Courts

limit been promulgated pursuant to a local rule of this Court, such rule would have been invalidated by the text of § 8.01-4, since it is inconsistent with VA. R. S. Ct. 4:15(c). Moreover, a rule imposing a five-page limit cannot credibly be justified as "necessary to promote proper order and decorum and the efficient and safe use of courthouse facilities and clerks' offices." § 8.01-4. Therefore, applying the express language of § 8.01-4, the five-page limit purportedly imposed by this Court is invalid.

Although no Rule promulgated by either SCV or this Court—pursuant to its limited legislative authority to promulgate local rules—purports to alter or modify the 20-page limit imposed by Rule 4:15(c), this Court apparently relies upon the provisions of its Second Transition Plan, which specifies in Section I(B), "Briefs must accompany a motion [and] shall be limited to five pages . . . . The Court may permit deviations from the above page limits upon motion for good cause shown." *Id.* at p.3.[6] While not disputing the legitimacy of this Court's creation of a plan to transition back to normal operations after more than a year of restrictions imposed by the public health emergency created by the COVID-19 pandemic, NAG contends that SCV's Declaration of Judicial Emergency[7] provides no basis for the particular restriction at issue. A thorough review of all twenty orders, along with the various interim amendments thereto, reveals no express or implied intent to alter or amend Rule 4:15(c), or to confer authority upon the circuit courts to do so.[8] In short, the COVID-19 Judicial Emergency provides no

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& Judicial Services/Clerk of the Circuit Court/Civil Division/Civil Division FAQs/Where Can I Find a List of Your Local Rules? (last visited 3/30/21).

[6] The limitation also appears in the Court's First Transition Plan, dated 4/29/20, and designated as its "Order Establishing Temporary Hearing Procedures," at p.5, at § III(E)(2). Both Transition Plans were adopted in order to facilitate a return to normal operations theretofore impeded by the COVID-19 pandemic.

[7] On 3/16/20, SCV issued an Order Declaring a Judicial Emergency in Response to COVID-19 Emergency. That Order has been extended and amended multiple times, culminating in the most recent incarnation—the 20th Order extending declaration of judicial emergency in response to COVID-19 Emergency, dated 4/12/21 and effective through 5/9/21, unless further extended.

[8] Neither does any provision of SCV's May 2020 Pandemic Continuity of Operations Planning: Reconstitution—Guide to Transitioning from Emergency to Routine Operations provide any relevant guidance. Nor does this

authority for this Court to abrogate, amend, or rescind the Rules promulgated by SCV, including the twenty-page limit for MoL, as prescribed by that Rule.

Although there is no connection between limiting the length of briefs filed by counsel and protecting the public health, there is undoubtedly a connection between a court's severely restricting counsel's ability to properly, competently, and professionally represent his clients' interests, through its arbitrary and capricious imposition of a 75% reduction in the maximum length of his MoL, and the perhaps unintended consequence of dumbing down the practice of law, to the detriment of litigants and the public's confidence in the integrity of the judicial process and the judiciary's adherence to the rule of law. Lawyers are not in the business of writing fifth grade book reports. They write to persuade judges on what are often complex and multi-layered, multi-faceted, multifarious legal issues. Sometimes a myriad of issues exists—jurisdictional, procedural, evidentiary, or substantive. Sometimes, there are multiple, independent legal and factual bases for a particular request for relief or important nuances that must be addressed in order to properly distinguish a particular decision that controls and that is adverse to a client's position. Moreover, appropriately detailed factual development and legal analysis is crucial in support of or in opposition to any dispositive motion. Five pages is often insufficient to accommodate all of that.[9] When advocates are stymied by such arbitrary one-size-fits-all page-limits, it is litigants who suffer. A fast-food-drive-thru approach to deciding important questions of law does not promote justice; instead, it promotes a system that values

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Court's 10/15/20 Plan for the Resumption of Jury Trials (as revised and resubmitted and approved by VSC), or its 3/16/20 COVID-19 Contingency or Action Plan address this matter.

[9] Moreover, the five-page limit is illusory. After taking into consideration the caption of the case, the signature block and certificate of service, as well as other more substantive but nonetheless required boilerplate—such as the "Comes now" and "Wherefore" clauses, as well as the required citations to both the Record and to relevant legal authority, a litigant is typically left with only about three pages of double-spaced text within which to develop his factual and legal arguments—at least under the "soup to nuts" theory, that the five-page limit is all-inclusive, so that the caption of the case, text of the argument, "Wherefore" clause, signature block, and certificate of service must all fit within that five-page limit.

speed over accuracy, resulting in quicker judicial decisions but decisions which often suffer from legal infirmity.

While it is true that this Court's Second Transition Plan "permit[s] deviations from the above page limits upon motion for good cause shown," the question remains as to how such a procedural mechanism promotes either judicial efficiency or effectiveness? After careful analysis, research, and writing, Counsel has concluded, in his professional judgment gained from nearly a quarter century of experience practicing law in the courts of this Commonwealth, that the particular legal and factual issues relevant to NAG's motion to dismiss Vorthman's Complaint requires a 14-page MoL in order to fully and fairly argue his client's position—a page-length that is well within the 20-page limit prescribed by Rule 4:15(c). But rather than simply read that motion and its accompanying MoL, along with Vorthman's response thereto, the Second Transition Plan requires counsel, before ever filing his motion to dismiss, to first explain to the Court why a particular motion requires more than five pages to properly address. How should counsel do that without getting into the underlying merits of the motion, itself, with a Court that has, at that stage, presumably not even read the Complaint, and which, therefore, presumably, would have no knowledge about the legal or factual issues involved in the case? And in that posture, how could a court's decision as to the appropriate page-limit be anything but arbitrary and capricious?

But assume that, in preparing to rule on a hypothetical motion filed by NAG requesting leave of court to exceed its five-page limit, the Court had done its due diligence by reading the Complaint and listening attentively as NAG's counsel outlined for the Court the arguments he intended to raise in support of NAG's yet-to-be-drafted-or-filed motion to dismiss. How is that an efficient use of the Court's time and resources? By the time the Court hears the parties'

respective arguments in support of and in opposition to an extended page-limit, the Court could have long since simply read the 14-page MoL, and disposed of the case, rather than debate whether 14 pages are necessary, as opposed to 11 or 8 or 5 pages.

Moreover, how could NAG be expected to argue in support of a motion for leave of court to exceed its five-page limit with respect to a MoL that had not yet been drafted? How should NAG's counsel predict, with any accuracy, whether his MoL in support of his motion to dismiss will require 5, 12, or 19 pages, until he has read his opponent's brief and the authorities cited therein, conducted necessary legal research, and formulated and written his arguments in response thereto? Essentially, counsel has to write a brief in order to determine how long it is, and only then is in a position to seek permission from the Court to file a "long" brief. And if he is refused that permission he must then re-write the brief to conform to a lower-than-expected page limitation. Hardly an effective or efficient expenditure of time and resources.

Counsel is willing to abide by any procedure the Court would like him to follow, so long as that procedure does not unfairly deprive his client of a *meaningful* opportunity to be heard. Rule 4:15(c) affords counsel a twenty-page limit for his MoL. His fourteen page memorandum (including the certificate of service) falls well within that prescribed limit.

WHEREFORE, Defendant, NAG INC., respectfully requests this Honorable Court deny Vorthman's MFDJ, as NAG has timely filed pleadings in response to his Complaint. NAG further requests leave of Court to file its Corrected MoL[10] in support of its previously-filed motion to dismiss, and to schedule a hearing on that motion, on a date that is mutually agreeable to the Court, the parties, and their counsel. NAG also seeks an award of legal fees, costs, and expenses reasonably incurred in opposing Vorthman's MFDJ.

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[10] The only "correction" to the MoL is the attachment of the two exhibits referenced therein, which exhibits were attached to NAG's first MoL, but were inadvertently omitted from the second MoL which was filed in accordance with the Clerk's instructions to separate the motion from the MoL.

Respectfully submitted,

NAG, INC.

by Counsel

By: Phillip B. Leiser, Esq.
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Tysons Corner, Virginia 22102
TEL: (703) 734-5000, ext. 701
FAX: (703) 734-6000
VASB # 41032
Counsel for Defendant, NAG, Inc.

CERTIFICATE

I HEREBY CERTIFY that I have on this 23rd day of April 2021, caused a true and accurate copy of the foregoing **Opposition to Plaintiff's Motion for Default Judgment** to be served upon Plaintiff by faxing and emailing a copy to his counsel of record:

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The Spiggle Law Firm
4830A 31st St. South
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TEL: (202) 449-8527
FAX: (202) 540-8018
jdecker@spigglelaw.com
VASB # 29941
Counsel for Plaintiff, Robert George Vorthman, III

Phillip B. Leiser, Esq.

Phillip B Leiser

From: Phillip B Leiser <pbleiser@leiserlaw.com>
Sent: Saturday, February 20, 2021 9:36 PM
To: 'Swapan Nag'
Subject: FW: Vorthman v. NAG Inc. CL 19-4436

From: Bain, Amy [mailto:Amy.Bain@loudoun.gov]
Sent: Wednesday, February 17, 2021 12:34 PM
To: pbleiser@leiserlaw.com; Joanne Dekker <jdekker@spigglelaw.com>
Subject: Vorthman v. NAG Inc. CL 19-4436

Good Afternoon,

I am directed to remove the motion to dismiss from the docket this Friday because the brief in support exceeds the allowed page limit as outlined in our 2nd transition plan.

Thank you,

Amy

Amy D. Bain
Docket Manager
Loudoun County Circuit Court
(703)771-5772

VSB
EXHIBIT
B

THE LEISER LAW FIRM
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Karen A. Leiser*
Owner / Managing Attorney
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Phillip B. Leiser, *of counsel*
Jeffrey S. Saradar, *of counsel*

18 January 2022

FILED
2022 JAN 18 PM 2:53
CIRCUIT COURT
CLERKS OFFICE
LOUDOUN COUNTY, VA
TESTE: ________ D.C

Honorable James P. Fisher
Loudoun County Circuit Court
P.O. Box 550
18 East Market Street, 3rd floor
Leesburg, Virginia 20178

RE: Vorthman v. NAG, Inc. (CL-19-4436)

Dear Judge Fisher:

It would be extremely unwise for the Court to treat the attached motion to reconsider with the dismissiveness with which it treated NAG's motion to dismiss.[1] Leiser has filed this motion to give the Court the opportunity to right a wrong and to avoid further unwanted scrutiny of its decision to deny NAG's motion to dismiss. But the Court's failure to read and carefully consider this motion and its accompanying memorandum of law is the surest way to guarantee that others will.

Very truly yours,

Phillip B. Leiser, Esq.

cc: Francisco Mundaca, Esq.
Swapan Nag
Enclosures

[1] No pun intended.

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FILED
2022 JAN 18 PM 2:54
CIRCUIT COURT CLERKS OFFICE LOUDOUN COUNTY, VA
TESTE D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY
(Civil Division)

ROBERT GEORGE VORTHMAN, III,	)	
Plaintiff,	)	
v.	)	Case No. CL-19-4436
NAG, INC.,	)	
Defendant.	)	

MOTION TO RECONSIDER

COMES NOW, Defendant, NAG, INC. ("NAG"), by Counsel, pursuant to VA. R. S. Ct. 4:15(c), and files this motion to reconsider the Court's 12/17/21 bench ruling which denied, *in toto*, NAG's motion to dismiss for, *inter alia*, lack of subject matter jurisdiction ("SMJ"). First, the Court lacks SMJ over Vorthman's FLSA claims because NAG did not meet the FLSA's $500,000/yr. jurisdictional threshold, as demonstrated by NAG's unrefuted Schedule C tax returns for 2017 and 2018—the years in question. Second, Vorthman lacks legal standing upon which to assert claims arising under CA labor law. Vorthman was, at all relevant times, a VA employee and NAG, a VA employer. Their relationship is governed strictly by VA law. Third, at the time Vorthman filed the complaint underlying this action, the relevant VA labor statutes provided no right of access to the courts for an allegedly aggrieved employee to assert a private right of action. And once created, such right of action was not created retrospectively. Therefore, this Court lacks SMJ over Vorthman's VA claims.

In support of this motion, NAG has filed an accompanying memorandum of law ("MoL").

WHEREFORE, Defendant, NAG, INC., by Counsel, respectfully moves this Honorable Court to reconsider its decision, vacate its order (if any has been entered) denying NAG's motion

01/19/2022 notified chambers via email that MREC was filed
SM

to dismiss as having been improvidently denied; recuse itself from any further proceedings in this matter, and ensure NAG's motion is re-docketed for a hearing before a different judge—preferably, one who is not from this jurisdiction. Alternatively, NAG requests the Court hold a hearing on this motion, followed by a *meaningful* hearing on NAG's underlying motion to dismiss, to include a reasoned explanation from the Court concerning the legal and factual bases for its decision.

Respectfully submitted,

NAG, INC.

by Counsel

By: Phillip B. Leiser, Esq.
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pbleiser@leiserlaw.com
VASB # 41032
Counsel for Defendant, NAG, Inc.

CERTIFICATE

I HEREBY CERTIFY that I have on this 18th day of January 2022, caused a true and accurate copy of the foregoing Motion to Reconsider to be served upon Plaintiff by faxing and emailing a copy to his counsel of record:

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CIRCUIT COURT
CLERKS OFFICE
LOUDOUN COUNTY, VA
TESTE: D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY
(Civil Division)

ROBERT GEORGE VORTHMAN, III,	)	
Plaintiff,	)	
v.	)	Case No. CL-19-4436
NAG, INC.,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RECONSIDER

COMES NOW, Defendant, NAG, INC. ("NAG"), by Counsel, pursuant to VA. R. S. Ct. 4:15(c), and files this memorandum of law ("MoL") in support of its motion to reconsider the Court's 12/17/21 ruling denying NAG's motion to dismiss for lack of subject matter jurisdiction ("SMJ"). In support of this motion, NAG sets forth the following arguments.

On 12/17/21, after nearly a year of delays, a good portion of which is attributable to the Court, it finally *purported* to adjudicate NAG's motion to dismiss. The proper resolution of the issues raised in NAG's motion did not present the Court with a perfunctory task. But at the hearing, the Court asked not a single substantive question,[1] engaged in no colloquy with counsel, ignored NAG's hypothetical, provided no analysis, and declined to explain its decision—other than by its one sentence utterance which expressly adopted, wholesale, Vorthman's arguments, while rejecting, *in toto*, those advanced by NAG. In short, the Court gave zero indication it had thoughtfully considered the issues raised by NAG's motion.

The Court's conduct in relation to that hearing, along with its ruling denying NAG's motion to dismiss, indicates the absence of any intention to fairly adjudicate that motion; reflects utter

[1] The Court asked its only question at the conclusion of the argument when it confirmed with Vorthman's counsel that he was voluntarily dismissing two of the nine counts of his Complaint.

disdain for the rule of law; and demonstrates the Court's bias against NAG's counsel, Leiser. Its ruling betrays its oath of office to protect and defend the Constitution and laws of the United States and of the Commonwealth of Virginia. Yet, in a superficially clever but ultimately sophomoric and transparent attempt to avoid detection of its chicanery and exposure of the *real* reason behind its decision, the Court hitched its wagon to Vorthman's meritless—if not frivolous—arguments, cynically pretending to have actually engaged in a good faith analytical process to decide the legal issues in contention, apparently believing that riding Vorthman's coattails would inoculate the Court from criticism, by imbuing its decision with the veneer of credibility and the façade of legitimacy. The Court employed this stratagem presumably anticipating that if its misconduct were ever challenged, its no-questions-asked adoption of Vorthman's arguments would be sufficient to afford it plausible deniability.

Before addressing the *real* reason for the Court's decision, Leiser will briefly touch upon the merits. However, he will not tarry long in rehashing the merits of the arguments because that would be an exercise in futility. The Court made it vividly clear that the relative merits of the parties' arguments were completely irrelevant to its decision-making process. Still, there are a few points worth mentioning that might give this Court reason to second-guess the wisdom of its decision to feign reliance upon Vorthman's arguments, in support of its misguided ruling denying NAG's motion to dismiss. Neither that ruling nor the Court's misplaced reliance on Vorthman's rationale therefor will survive close scrutiny—whether by an appellate tribunal, the Judicial Inquiry and Review Committee (JIRC), or the media. That scrutiny will inexorably lead to the public's perception of the Court as amateurish and clearly not up to the task of adjudicating complex legal issues. And that is the Court's *best case* scenario as to the perception of it that will result from an up-close examination of its ruling.

Turning to the merits, the Court's first egregious error was its adoption of Vorthman's wholly unsupported argument that NAG's motion to dismiss should be treated as a demurrer. (Vorthman's opp. to NAG's motion to dismiss, at pp. 2 and 8). A demurrer challenges the sufficiency of a pleading's allegations of fact to state a cognizable cause of action, while a motion to dismiss for lack of SMJ asks for virtually identical relief,[3] but for reasons completely independent of the determination as to whether the causes of action asserted were well-pled. Whether Vorthman's claims were well-pled has no relevance to whether this Court can exercise SMJ over the dispute. While it is not that surprising that an inexperienced attorney might confuse and conflate a demurrer with a motion to dismiss for lack of SMJ, what is the Court's excuse for making that identical novice "mistake?"

Second, as the following statutory provisions and precedents illustrate, federal law has been clear, for at least the last half century, that an employer's minimum gross annual revenues of $500,000 establishes the statutorily-mandated *jurisdictional threshold* of the FLSA. To begin with, 29 U.S.C. § 203(r)(1) defines "Enterprise" as "the related activities performed . . . by any person . . . for a common business purpose, and includes all such activities whether performed in one or more establishments by one or more corporate . . . units . . . ." *Id.* And as USCA-4 has repeatedly held, "The FLSA's dollar volume threshold focuses on the 'volume of sales made or business done by the enterprise . . . .'" *Brock v. Hamad*, 867 F.2d 804, 809 (4th Cir. 1989), citing 29 U.S.C. § 203(s)(1)[(A)(ii)]. See also, *Velasquez v. Salsas & Beer Rest., Inc.*, 735 F. App'x 807, 809 (4th Cir. 2018) (stating, "[t]he FLSA applies to a business, or enterprise, only if . . . it 'has employees engaged in commerce . . . *and*' its 'annual gross volume of sales made or business done is not less than $500,000.'" (citing 29 U.S.C. § 203(s)(1)[(A)(ii)]) (emphasis

[3] A dismissal by demurrer can be with or without prejudice. A dismissal for lack of SMJ is always without prejudice.

added); *Cook v. Nu-Tech Hous. Servs., Inc.*, 953 F.2d 1283 (4th Cir. 1992) (noting that "... the provisions of the FLSA currently apply to enterprises engaged in commerce and having an 'annual gross volume of sales made or business done [of] not less than $500,000. . . . Whether Nu-Tech's annual business done was of the volume stipulated by 29 U.S.C. § 203(s)(1)[(A)(ii)] . . . during the relevant time period is a question of fact that can be determined by the [trial] court on remand." *Id.* And, for the grand finale, as SCOTUS has declared, "[t]he Act imposes its requirements . . . only on an 'enterprise engaged in commerce . . . . One of the statutory elements of the latter term is the dollar-volume limitation, which in this case is $500,000 annually." *Falk v. Brennan*, 414 U.S. 190, 197 (1973).

At the motion-to-dismiss stage of the proceedings, the *only* material fact *potentially* at issue was whether NAG's annual gross revenues for the years in question exceeded the statutory $500,000 jurisdictional threshold that would subject it to the dictates of the FLSA and thereby confer SMJ on this Court to adjudicate that particular claim. (Vorth. Compl. at Count IX). As proof that NAG's gross revenues fell far below that jurisdictional threshold, NAG had attached to his MoL in support of his motion to dismiss, as Exhibits 1 and 2, its Schedule C tax returns for the years in question—2017 and 2018, respectively, the authenticity and veracity of which Vorthman never challenged because he had no facts with which to contradict them.[3] On what basis, then, did the Court reject those exhibits, *sua sponte* and *sub silentio*, and ignore the uncontroverted facts established thereby?

Third, in its one sentence ruling,[4] the Court stated it was "adopting" Vorthman's findings of fact and conclusions of law. Vorthman's proposed order denying NAG's motion to dismiss

[3] Line 1a of each of those exhibits, attached hereto for the Court's convenience, established NAG's annual gross revenues to be $379,938 and $175,175, respectively.
[4] Perhaps the Court believes that whatever its ruling lacked in substance it made up for in brevity. While brevity is encouraged, it is not a substitute for legal analysis and explanation. And the concision with which the Court issued

contains a section entitled, "Findings of Fact," none of which this Court could have "found" since no evidence was presented and no testimony adduced in support of any of those "findings of facts." The motion to dismiss was not evidentiary in nature. And so, in that context, the Court's hollow recitation of a common legal phrase ("findings of fact") often employed in judicial decisions, but which was entirely inappropriate to *this* occasion,[5] coupled with its wholesale "adoption"—lock, stock, and barrel—of Vorthman's findings of fact, conclusions of law, and arguments asserted in support thereof, is revelatory of its attempt to create the mirage that it had actually engaged in a meaningful analysis of the issues.

Fourth, at oral argument, Leiser raised the hypothetical of a Walmart employee in Idaho who sues Walmart in an Idaho court for failing to pay him the NY state-mandated minimum wage of $15/hr., despite his neither living nor working in NY. The hypothetical Idaho employee's claim of entitlement is based solely upon his flawed reasoning that since Walmart operates its business in both jurisdictions, and is therefore subject to NY labor laws, it must pay NY-mandated wages—even to its Idaho employee who neither works nor lives in NY, and who therefore has no legal standing to claim entitlement to rights granted by NY to employees working in NY.

Vorthman wears the same shoes as the hypothetical Idaho Walmart employee. NAG—a CA company—may be a CA employer but Vorthman is not a CA employee. Completely independent of whether NAG is or is not a CA employer, the company was certainly a VA employer—because it hired Vorthman, who lives in VA, and more importantly, worked for NAG from his home office in VA. For that reason, the relationship between NAG—a VA employer—and Vorthman—its VA employee—is governed by VA's labor laws—whether statutory,

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its ruling denying NAG's motion to dismiss compels the conclusion that its decision was not premised upon any good faith effort to conduct a *bona fide* legal analysis.

[5] other than as it pertained to the ascertainment of NAG's annual gross revenues, for the purpose of determining this Court's SMJ over Vorthman's FLSA claims

regulatory, or common law. The fact that NAG may or may not also be a CA employer of others is a red herring; it is completely irrelevant. Vorthman simply has no legal standing to use as a sword against NAG, claims arising under CA labor laws. His claim of entitlement to the benefits conferred or protections afforded by CA labor laws advances the identical spurious argument that supported the hypothetical Idaho Walmart employee's meritless claim of entitlement to NY wages.

It is a principle of physics that nature abhors a vacuum. So do litigants and lawyers. And the vacuum created by the Court's mere one sentence conclusory ruling, which it uttered without articulating the rationale for its decision, suggests there is an alternative narrative explaining its decision that has nothing to do with the issues in dispute or their proper resolution. That narrative becomes even more compelling when viewed in the light of the flagrant nature and egregiousness of the Court's "errors," in its supposed "analysis" of the issues that had been submitted for its adjudication. Application of the doctrine of *res ipsa loquitor* is appropriate when considering the Court's "mistakes" because they speak for themselves. That the Court fails to understand the difference between NAG's motion to dismiss and a demurrer; that it has wilfully failed to educate itself concerning the FLSA's jurisdictional threshold—settled law for the last half century; and that it fails to understand the concept of legal standing as it relates to Vorthman's assertion of his CA claims reveal the Court was completely disinterested in the law governing the issues in contention. Which begs the question: If the governing law did not serve to inform the Court's decision, then what *was* the basis for its ruling?

To answer that question, one needs to understand that Leiser had apparently created a bit of a kerfuffle in Judges' Chambers, by refusing to abide by the Court's requirement that counsel seek leave of court before filing a MoL in excess of five pages. In defiance of that page limit, Leiser

had filed a fourteen page MoL in support of NAG's motion to dismiss. Over a period of many months, the Court removed NAG's motion from its docket *three* times for exceeding its five-page limit, prompting several emails from Leiser to one of the court clerks, including a threat to mandamus the clerk, if necessary, to docket NAG's motion for a hearing. Those emails likely contributed to the Court's antipathy toward Leiser.

Leiser's willful flouting of the five-page limit and his audacity in challenging the validity of the Court's "rule," form the backdrop for the Court's adjudication of NAG's motion to dismiss and sheds quite a bit of light on its treatment of NAG and its counsel in its resolution of that motion. Apparently, the Court viewed Leiser's challenge to its page-limit as a full frontal assault on its authority and a demonstration of his disrespect for the Court. And so, the *real* reason for the Court's denial of NAG's motion to dismiss was its desire to send a clear message to Leiser, that if he dares to challenge the Court, by speaking truth to power, this Court will find a way to punish him. And, apparently, extinguishing his client's legal rights is, in the Court's view, acceptable collateral damage necessary to the achievement of that aim.

With respect to the specific errors inherent in the Court's ruling, explained, *supra*, at pp. 3-6(T), it shocks the conscience that a circuit court judge would make any one of them. But when a single ruling reflects multiple errors, each of which shocks the conscience, that suggests more than a wilful disregard of the law. Coupling that with the Court's attempt to thwart NAG from defending against this lawsuit, by repeatedly directing the clerk to remove from the docket NAG's motion to dismiss Vorthman's complaint, creates a sufficiently compelling circumstantial

case that Leiser's disregard of the Court's five-page limit was the dominant—indeed, the exclusive—factor that underpinned its decision to deny that motion to dismiss.[6]

Underscoring the likely correctness of that inference about the Court's underlying motive in its mishandling of NAG's motion to dismiss, on 4/27/21 Leiser filed a MoL in opposition to Vorthman's motion for default judgment ("MFDJ"). In it, he carefully explained to the Court why its five-page limit was invalid.[7] In short, the five-page limit stands in direct conflict with Rule 4:15(c) promulgated by SCV, and which expressly applies to the circuit courts. (Rule 4:0). That rule permits the filing of a MoL of up to twenty pages, without first seeking leave of court. This Court's five-page "rule" also ignores the dictates of VA. CODE ANN. §§ 8.01-3(A), 8.01-4, and 17.1-503(A),[8] which specifically prohibit lower courts from adopting local rules that are in conflict with those promulgated by SCV.[9]

Yet, despite the absence of any validly adopted local rules; despite its five-page "rule" being in direct conflict with well-established law; and despite having been placed on notice of that conflict eight months prior to the hearing at issue, when Leiser filed NAG's opp. to Vorth. MFDJ, the Court's website continues to mandate, "Briefs must accompany a motion [and] shall

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[6] Should the Court decline to take appropriate corrective measures concerning its ill-conceived ruling, the personal involvement of Judge Fisher in the Court's multiple decisions to remove NAG's motion from the docket will have to be investigated.

[7] That MoL in opp. to Vorth. MFDJ was, itself, ten pages long, two of which were entirely devoted to NAG's response to that motion. Thus, it took Leiser only eight pages to argue the invalidity of the Court's five-page rule.

[8] The pertinent text of each of those statutes is set forth at p. 5 of NAG's MoL in opp. to Vorth. MFDJ—the last substantive motion this Court adjudicated in this case prior to its 12/17/21 bench ruling denying NAG's motion to dismiss.

[9] And, as explained in NAG's MoL in opp. to Vorth. MFDJ at p. 5(B) and fn. 5, contained therein, this Court's five-page limit could not have been established through any rule-making process because this Court has not adopted any local rules. According to its own website, "The Loudoun County Circuit Court does not have a list of local rules." www.courts.state.va.us/Home/Virginia's Court System/Circuit Court/Individual Circuit Court Homepages/Loudoun Circuit Court/Local Court Links/Local Website/Home/Departments & Offices/Courts & Judicial Services/Clerk of the Circuit Court/Civil Division/Civil Division FAQs/Where Can I Find a List of Your Local Rules? (last visited 3/30/21).

be limited to 5 pages . . . . The Court may permit deviations from the above page limits upon motions for good cause shown."[10]

The Court clearly remains invested in enforcing its invalid five-page rule and apparently bitterly resented Leiser's challenge to it. And so, irrespective of the validity, *vel non*, of its five-page limit, and regardless of the merits of NAG's arguments in support of its motion to dismiss, that motion was DOA—dead on arrival—from the moment it landed on the Court's desk. It is not a stretch of the imagination to conclude that the outcome of NAG's motion to dismiss was preordained as soon as the Court identified Leiser as its author.

The Court's repeated efforts, to thwart Leiser from effectively arguing on behalf of NAG, is apparently rooted in its resentment—which seems to be shared by many judges in many jurisdictions—at having to do the work the job of a judge requires—*being and continuing to become learned in the law*. Through their persistent and petulant refusal to do so, even when the governing law is spoon-fed to them by competent counsel, some judges reveal they apparently consider the courts to be their personal playgrounds on which they have unfettered discretion to make the rules, break the rules, change the rules, ignore the rules, or selectively enforce the rules, all at their personal whim, based upon nothing more than who they like and who they dislike. And by placing obstacles in the paths of litigants and their lawyers who want to *effectively* argue their cases; by requiring them to spend their time and their clients' money asking the Court's permission to exceed five pages—in other words, to do that which the law already permits them to do, judges create for themselves greater leeway to do *whatever they feel like doing*, rather than what the law compels them to do. But judges do not get to engineer the outcomes they desire, as

[10] www.loudoun.gov/Government/Court & Judicial Services/Circuit Court/Docket/Civil Docket/Civil Motions Day/Page Limits (last visited 12/25/21).

this Court so blatantly did in this case, by ignoring inconvenient arguments, inconvenient facts, or inconvenient laws.

To set the record straight, Leiser intended no disrespect to the Court by refusing to abide by its invalid five-page limit. He exceeded it for the simple reason that, in his professional judgment as NAG's counsel, the legal issues involved could not be adequately addressed within that page limit. As counsel, his job is to help educate the Court concerning the legal issues in contention, along with their proper resolution, so that the Court is better equipped to make an informed and hopefully correct decision. But whether or not the Court agrees that NAG's MoL in support of its motion to dismiss required in excess of five pages, Leiser was under no obligation to justify its length or to seek the Court's permission to exceed its five-page limit, because his MoL was in full compliance with Rule 4:15(c).

During the entire year in which this case has been active, Leiser's singular focus has been to protect NAG's rights. He steadfastly denies that he has, at any time, or in any way, been disrespectful to this Court. To the contrary, he has at all times acted in good faith and conducted himself competently, professionally, and with integrity. And he expects *nothing less* from this Court. As Justice Louis Brandeis wisely admonished, "[i]f we desire respect for the law, we must first make the law respectable."

In order to fulfill its constitutional duty to provide NAG with a *meaningful* opportunity to be heard, and to thereby make the law respectable, the Court must address each of the arguments raised by NAG and explain *why* it adopted Vorthman's arguments and rejected NAG's, thereby providing a firm basis upon which to assess the Court's fidelity to the rule of law. We, the People, will never place our unconditional trust in any government official or government institution—including this one. To paraphrase Ronald Reagan, We, will trust but We will verify.

And that verification, which takes the form of either a written or oral explanation for a Court's decision, must come *from the Court*, so that it can be processed and evaluated through the People's eyes and ears. The Court does not have the discretion to outsource its constitutional responsibility to opposing counsel through its wholesale "adoption" of his arguments, findings of fact and conclusions of law, conveyed through its one-sentence ruling to that effect. When a court declines to articulate the reasons for its decision, as it effectively did here, the strong inference naturally follows that its pockets are empty—that it *cannot* articulate those reasons, at least, not without exposing its subterfuge.

The Court's reticence to do so in this case is telling. It is a byproduct of its attempt to fly under the radar, to avoid unwanted attention to and scrutiny of its mendacity. Its one-sentence ruling reflects its attempt to use Vorthman's arguments as a shield behind which to cynically conceal the truth that its ruling had nothing to do with the relative merits of the opposing arguments, but was, instead, motivated by nothing other than its desire to punish Leiser for what the Court wrongly perceived as his disrespect toward the Court.

If the Court enters Vorthman's proposed order it will risk the unmasking of its charade. Entry of that proposed order will place this Court's conduct squarely at issue, as well as how that conduct reflects on the Court's competence, integrity, and intellectual honesty. In short, the Court's conduct will become the *front and central* issue of this case. If anyone were to scrutinize its decision, the Court will, to put it mildly, have a difficult time justifying its rubber-stamping of Vorthman's arguments. It can falsely claim that it fairly considered the arguments, but its attempt to persuade will fail because the supposed legal and factual bases for its decision will quickly unravel. It will become clear that its decision was not the result of a good faith effort to

conduct a meaningful legal analysis, which will then lead to a more focused inquiry to determine the Court's *real* reason for its decision.

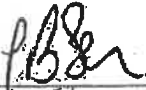
Leiser is quite capable of distinguishing between judicial integrity and judicial chicanery; between intellectual honesty and intellectual sophistry; and between the rule of law and the whim of individual judges *masquerading* as the rule of law—and so is the media and the public. The Court should also keep in mind that it is not the words contained in this MoL that bring disrepute to this Court; its own misconduct is responsible for that. Leiser is willing to stand by his words—every single one of them. The question this Court must consider is whether it is prepared to defend its conduct in this case.

WHEREFORE, Defendant, NAG, INC., by Counsel, respectfully moves this Honorable Court to reconsider its decision, vacate its order (if any has been entered) denying NAG's motion to dismiss as having been improvidently denied; recuse itself from any further proceedings in this case, and ensure NAG's motion is re-docketed for a hearing before a different judge—preferably, one who is not from this jurisdiction. Alternatively, NAG requests the Court hold a hearing on this motion, followed by a *meaningful* hearing on NAG's underlying motion to dismiss, to include a reasoned explanation from the Court, concerning the legal and factual bases for its decision.

Respectfully submitted,

NAG, INC.

by Counsel



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Counsel for Defendant, NAG, Inc.

CERTIFICATE

I HEREBY CERTIFY that I have on this 18th day of January 2022, caused a true and accurate copy of the foregoing **Memorandum of Law in Support of Motion to Reconsider** to be served upon Plaintiff by faxing and emailing a copy to his counsel of record:

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Form **1120S** | Department of the Treasury Internal Revenue Service

U.S. Income Tax Return for an S Corporation

▶ Do not file this form unless the corporation has filed or is attaching Form 2553 to elect to be an S corporation.
▶ Go to www.irs.gov/Form1120S for instructions and the latest information.

OMB No. 1545-0123 **2017**

For calendar year 2017 or tax year beginning , 2017, ending

EXHIBIT 1

A S election effective date 10/04/2001	TYPE OR PRINT: NAG, INC. 355 SOUTH GRAND AVE, SUITE 2... LOS ANGELES, CA 90071-1591	D Employer identification number 80-0000562
B Business activity code number (see instructions) 541330		E Date incorporated 10/04/2001
C Check if Schedule M-3 attached ☐		F Total assets (see instructions) $ 32,288.

G Is the corporation electing to be an S corporation beginning with this tax year? ☐ Yes ☒ No If "Yes," attach Form 2553 if not already filed

H Check if: (1) ☐ Final return (2) ☐ Name change (3) ☐ Address change (4) ☐ Amended return (5) ☐ S election termination or revocation

I Enter the number of shareholders who were shareholders during any part of the tax year ▶ 1

Caution: Include only trade or business income and expenses on lines 1a through 21. See the instructions for more information.

	Line	Description				Amount
Income	1a	Gross receipts or sales	1a	379,938.		
	b	Returns and allowances	1b			
	c	Balance. Subtract line 1b from line 1a			1c	379,938.
	2	Cost of goods sold (attach Form 1125-A)			2	
	3	Gross profit. Subtract line 2 from line 1c			3	379,938.
	4	Net gain (loss) from Form 4797, line 17 (attach Form 4797)			4	
	5	Other income (loss) (see instructions — attach statement) See Statement 1			5	596.
	6	Total income (loss). Add lines 3 through 5			6	380,534.
Deductions (see instructions for limitations)	7	Compensation of officers (see instructions - attach Form 1125-E)			7	8,580.
	8	Salaries and wages (less employment credits)			8	242,013.
	9	Repairs and maintenance			9	1,840.
	10	Bad debts			10	
	11	Rents			11	1,925.
	12	Taxes and licenses			12	24,144.
	13	Interest			13	5,759.
	14	Depreciation not claimed on Form 1125-A or elsewhere on return (attach Form 4562)			14	6,408.
	15	Depletion (Do not deduct oil and gas depletion.)			15	
	16	Advertising			16	2,805.
	17	Pension, profit-sharing, etc., plans			17	
	18	Employee benefit programs			18	
	19	Other deductions (attach statement) See Statement 2			19	106,730.
	20	Total deductions. Add lines 7 through 19			20	400,204.
	21	Ordinary business income (loss). Subtract line 20 from line 6			21	-19,670.
Tax and Payments	22a	Excess net passive income or LIFO recapture tax (see instructions)	22a			
	b	Tax from Schedule D (Form 1120S)	22b			
	c	Add lines 22a and 22b (see instructions for additional taxes)			22c	
	23a	2017 estimated tax payments and 2016 overpayment credited to 2017	23a			
	b	Tax deposited with Form 7004	23b			
	c	Credit for federal tax paid on fuels (attach Form 4136)	23c			
	d	Add lines 23a through 23c			23d	
	24	Estimated tax penalty (see instructions). Check if Form 2220 is attached ▶ ☐			24	
	25	Amount owed. If line 23d is smaller than the total of lines 22c and 24, enter amount owed See Below			25	413.
	26	Overpayment. If line 23d is larger than the total of lines 22c and 24, enter amount overpaid			26	
	27	Enter amount from line 26 Credited to 2018 estimated tax ▶ Refunded ▶			27	

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

▶ Signature of officer | Date | ▶ President Title | May the IRS discuss this return with the preparer shown below (see instructions)? ☒ Yes ☐ No

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN
Jimmy Colabavala				P00639083

Firm's name ▶ Jimmy Colabavala | Firm's EIN ▶ 95-4784592

Firm's address ▶ 633 West Fifth Street, Suite 2639 Los Angeles, CA 90071 | Phone no. 213 689 0321

BAA For Paperwork Reduction Act Notice, see separate instructions. SPSA0106L 09/17/17 Form 1120S (2017)

Late Filing 400.

Form **1120S** U.S. Income Tax Return for an S Corporation — 2018

Department of the Treasury, Internal Revenue Service

EXHIBIT 2

A S election effective date: 10/04/2001

B Business activity code no.: 541330

Name: KAG, INC.

355 SOUTH GRAND AVE, SUITE 2[illegible]

LOS ANGELES, CA 90071-1591

D Employer identification number: 80-0000562

E Date incorporated: 10/04/2001

F Total assets: $ -678.

G Is the corporation electing to be an S corporation beginning with this tax year? [ ] Yes [X] No

H Check if: (1) [ ] Final return (2) [ ] Name change (3) [ ] Address change (4) [ ] Amended return (5) [ ] S election termination or revocation

I Enter the number of shareholders who were shareholders during any part of the tax year: 1

Line	Description	Amount
1a	Gross receipts or sales	175,175.
1b	Returns and allowances	
1c	Balance. Subtract line 1b from line 1a	175,175.
2	Cost of goods sold (attach Form 1125-A)	
3	Gross profit. Subtract line 2 from line 1c	175,175.
4	Net gain (loss) from Form 4797, line 17 (attach Form 4797)	
5	Other income (loss) (see instructions—attach statement) See Statement 1	1.
6	Total income (loss). Add lines 3 through 5	175,176.
7	Compensation of officers (see instructions - attach Form 1125-E)	
8	Salaries and wages (less employment credits)	73,667.
9	Repairs and maintenance	1,305.
10	Bad debts	
11	Rents	1,423.
12	Taxes and licenses See Statement 2	7,234.
13	Interest (see instructions)	7,769.
14	Depreciation not claimed on Form 1125-A or elsewhere on return (attach Form 4562)	3,894.
15	Depletion (Do not deduct oil and gas depletion.)	
16	Advertising	
17	Pension, profit-sharing, etc., plans	
18	Employee benefit programs	
19	Other deductions (attach statement) See Statement 3	94,076.
20	Total deductions. Add lines 7 through 19	189,415.
21	Ordinary business income (loss). Subtract line 20 from line 6	-14,234.
22a	Excess net passive income or LIFO recapture tax (see instructions)	
22b	Tax from Schedule D (Form 1120S)	
22c	Add lines 22a and 22b (see instructions for additional taxes)	
23a	2018 estimated tax payments and 2017 overpayment credited to 2018	
23b	Tax deposited with Form 7004	
23c	Credit for federal tax paid on fuels (attach Form 4136)	
23d	Refundable credit from Form 8827, line 8c	
23e	Add lines 23a through 23d	
24	Estimated tax penalty (see instructions). Check if Form 2220 is attached [ ]	
25	Amount owed. If line 23e is smaller than the total of lines 22c and 24, enter amount owed	0.
26	Overpayment. If line 23e is larger than the total of lines 22c and 24, enter amount overpaid	
27	Enter amount from line 26: Credited to 2019 estimated tax / Refunded	

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Sign Here — Signature of officer — Date — President (Title)

May the IRS discuss this return with the preparer shown below? [X] Yes [ ] No

Paid Preparer Use Only

Print/Type preparer's name: Jimmy Colabavala — Preparer's signature — Date — Check [ ] if self-employed — PTIN: P00619093

Firm's name: Jimmy Colabavala — Firm's EIN: 95-4784592

Firm's address: 633 West Fifth Street, Suite 2639, Los Angeles, CA 90071 — Phone no.: 213 689 0321