[LETTERHEAD]

August 5, 2016

Jennifer Baxter
State Bar of California
845 S. Figueroa Street
Los Angeles, CA 90017

***** VIA E-MAIL *****

Re: Charles Dodgson, Case No. 16-O-141831

Dear Ms. Baxter:

I am in receipt of your letter dated July 1, 2016. This letter and documents Bates numbered CD 0001-0124 are being submitted to you as my written response.

Thank you for granting an extension of time to respond. While the entirety of my response is being provided here via email, please let me know if you would like me to provide a hard copy as well.

Background

My law firm was hired to represent ABC Co. ("ABC") in litigation involving a failed real estate transaction brought by XYZ Inc. ("XYZ") in California. The case caption is *XYZ Inc. v. ABC Co.*, Case No. 10-CV-632579 in the United States District Court for the Southern District of California.

Our firm was hired only two weeks before trial began. Thus, the final pretrial conference had already taken place and I had to adopt all pretrial filings and stipulations already entered into by previous counsel. This presented an unusual challenge to take a case to trial with another counsel's trial plan already firmly in place. Most relevant to the discussion of this matter is the fact that the document I am alleged to have improperly referenced in my closing was not identified by previous counsel on the exhibit list. I was not able to add it to the exhibit list without bringing some type of emergency motion on the eve of trial which was not feasible.

The document was the opposing party's response to a petition filed at an administrative agency – the Bureau of Real Estate – regarding the license of a broker involved in the failed transaction.

At trial, testimony was elicited from a number of witnesses which touched on or directly addressed the contents of the document. However, the document was never introduced into evidence because it was not on the exhibit list and the court refused to allow motions to bring in additional documents. In addition, there was no opportunity to utilize the

document as an impeachment exhibit. Thus, try as I might, I could not get the document into evidence.

In my closing argument, I did my best to walk the fine line between discussing the trial testimony about the contents of the document and referencing the document directly. The trial court thought that I did so appropriately and rejected XYZ's motion for a new trial based upon my statements at closing argument. The trial court held that my comments in summation were non-prejudicial because they were a very small part of a lengthy closing and did not influence the outcome of the trial. However, the Court of Appeals for the 9th Circuit disagreed, and the court overturned the trial court's verdict and granted a new trial.

My Self-Reporting

I reported the 9th Circuit reversal of the trial court verdict on May 22, 2016. The original order reversing the verdict was issued January 14, 2016, but I immediately sought rehearing; rehearing was not denied until April 27, 2016. Thus, I believe that my self-reporting obligation was triggered on April 27, giving me until May 27, 2016 to report. I fully admit that I was unaware of the self-reporting obligation until just prior to May 22, and I promptly reported to the State Bar of California within two days of learning of my self-reporting obligation.

My Comments at Closing Argument

Your letter asks whether I referred to a document not in evidence in closing argument and whether I then proceeded to misrepresent its contents. The direct answer to the first question is that I did make reference to a document that was not in evidence, but only by way of repeating the trial testimony of a witness who -- on direct testimony that had been elicited by XYZ's own lawyer -- was the first person who made reference to the document that was not in evidence.

The direct answer to the second question is no; I did not misrepresent the contents of that document.

I contend that I did not act improperly, and to understand my answer, I provide here the full content of the comments at issue.

In my closing argument, I discussed the document (the response to the Bureau of Real Estate petition) as follows:

> . . . Did the broker's conduct impact this transaction and cause it to fail? Yes, it did. There have been a lot of talks about the fact that the broker is not on trial here, and it is true that he is not. However, remember that ABC filed a petition at the Bureau of Real Estate regarding this transaction

> and is conduct. You'll have that petition with you in the jury room. And, of course, he didn't show you his denial, did he?
>
> He told you he denied the petition, and that his denial was based on the idea that the transaction could still have gone forward but it was ABC that prevented it from closing. So he tried to shift the blame from his own conduct on behalf of XYZ.

I Did Not Believe I Referred to a Document Not in Evidence in the Way that Conduct is Prohibited

As cited by the 9th Circuit, it is law that in closing arguments, an attorney may not "make reference, over objection, to matters not in evidence." *Janich Bros. v. Am. Distilling Co.*, 570 F.2d 848, 860 (9th Cir. 1977). However, it is permissible to refer to testimony from the trial in closing, and it is also permissible to refer to the lack of admitted evidence and ask the jury to draw a negative inference from the missing item. *United States v. Latimer*, 511 F.2d 498, 502-03 (10th Cir. 1975) (citing cases including *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 174, 94 S.Ct. 414).

In making my closing argument, I believed I was acting permissibly and referring to testimony by the witness as to the contents of the document and asking the jury to draw a permissible negative inference from the document not being introduced into evidence.

I Did Not Misrepresent the Contents of the Document

Not to impugn in any way the 9th Circuit and its decision in this case, but I was not misrepresenting the contents of the document in my closing remarks. The point I was trying to make in my closing was that the document was not introduced, and the jury could ponder what XYZ and its broker were hiding by not bringing it in.

I admit that the way I went about making this point was confusing, and that the 9th Circuit interpreted my unartful way of explaining my position as a misrepresentation of the contents of the document. It was never my intention to misrepresent the contents of the document, as the document itself was not available in evidence to be read by the jury. What I intended was to draw upon the witness's testimony that the document was a denial of the Bureau of Real Estate petition and to explain what that denial meant in the overall legal landscape. It is permissible for a lawyer to draw inferences from evidence (including witness testimony), and that is what I attempted to do in my summation.

I Accept the 9th Circuit's Conclusion

At this stage, after the 9th Circuit reversal, I accept that the comments I made in my closing argument were not construed by the court in the way I intended them. While I naturally takes issue with my comments being characterized as "misconduct," I accept that my intent was not delivered through my words.

"Misconduct" Implies an Intent I Lacked

I had no intent whatsoever to commit any misconduct. As you can see from a reading of the briefs in the District Court when XYZ sought a new trial, at the 9th Circuit when XYZ appealed, and at the 9th Circuit when ABC sought rehearing, I at all times have maintained that my comments were not a mischaracterization or an improper reference to a document not in evidence. The 9th Circuit obviously disagreed, but it was never my intent to behave improperly.

The District Court (Trial Court) Did Not Think My Comments Warranted Reversal of Verdict

Supporting my position that my comments should not be viewed as giving rise to attorney discipline is the fact that the court which presided over the actual trial, the U.S. District Court for the Central District of California, did not find that my comments warranted reversal of the jury's verdict. A copy of the District Court opinion on this matter is enclosed.

My Long Discipline-Free Record

I am business trial lawyer with extensive trial experience and an excellent reputation within the business litigation community. I was admitted to practice in December 1974. In my 40-year career, I have not once been investigated or been disciplined by the State Bar of California or any court or agency; to my knowledge, not one complaint has been filed against me. My long record and stellar reputation are a testament to my character and principled practice; they underscore my good faith in this case.

Documents Supporting My Response

I provide the following documents in support of my response. An explanation of the significance of each document is provided.

1. **9th Circuit Memorandum (January 14, 2016).** In this Memorandum, the 9th Circuit denied XYZ judgment as a matter of law, finding that this was "a close case" in which the "jury could have reasonably resolved many of the key factors in ABC's favor." However, the court also found that XYZ should have a new trial "based on ABC's counsel's misconduct during summation."

2. **9th Circuit Order (April 27, 2016).** The 9th Circuit denied rehearing of the motions decided in its Memorandum dated January 14, 2016.

3. **Briefs in 9th Circuit appeal. (a) Appellant's Opening Brief (by XYZ); (b) Brief of Appellee (by ABC); (c) Reply Brief of Appellant (by XYZ).** The brief most relevant to this response is the one filed by ABC in which I maintained the meaning behind my closing argument.

4. **Petition for Rehearing and Rehearing En Banc by Appellee (by ABC).** A transcript of the 9th Circuit oral argument in this case is attached as an exhibit to ABC's brief.

5. **District Court Order Ruling on Plaintiff's Motion for Judgment as a Matter of Law or New Trial In the Alternative (October 4, 2014).** The trial court, following trial, ruled that my comments did not warrant reversal of the jury verdict and a new trial.

6. **Bureau of Real Estate petition and response.**

7. **May 22, 2016 Self-Reporting Filing.**

Requested Resolution

I understand and accept the finality of the 9th Circuit's decision. However, I submit that my comments in summation at the trial in that case do not warrant attorney discipline. Thus, I respectfully request that this investigation be closed without further action.

If any further information would be helpful, please contact me directly.

Sincerely,

Charles Dodgson