

1 IN THE DISTRICT COURT OF THE UNITED STATES
2 DISTRICT OF SOUTH CAROLINA
3 CHARLESTON DIVISION

4 IN RE: BAUSCH & LOMB)
5 MDL LITIGATION) 2:06-77777

6 Charleston,
7 South Carolina
8 April 19, 2007

9 TRANSCRIPT OF HEARING
10 BEFORE THE HONORABLE DAVID C. NORTON
11 And THE HONORABLE JUSTICE HELEN E. FREEDMAN,

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Proceedings recorded by mechanical shorthand,
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1 THE COURT: AND JUSTICE HELEN FREEDMAN.

2 THE CLERK: JUDGE, WE HAVE THE CONFERENCE CALL ON,
3 AND SHE SAID TO MAKE SURE AND ANNOUNCE. WE HAVE 18 PEOPLE ON
4 LINE

5 THE COURT: SO WHAT AM I SUPPOSED TO DO?

6 THE CLERK: JUST ANNOUNCE THAT WE ARE GETTING READY
7 TO GO INTO THE CONFERENCE.

8 THE COURT: ALL RIGHT. WE ARE GETTING READY TO GO
9 INTO THE CONFERENCE MODE.

10 I'VE GOT -- WE'VE GOT THE JOINT AGENDA, AND ARE WE
11 STILL GOING BY THE JOINT AGENDA, OR HAS THAT BEEN --

12 MR. HOWE: TO SOME EXTENT, YOUR HONOR. MR. HAHN IS
13 GOING TO OPEN WITH SORT OF A STATUS OF WHERE WE ARE AND THEN
14 MR. PENNOCK HAD SOME ISSUES THAT HE WANTED TO BRING TO THE
15 COURT.

16 THE COURT: AND MR. HOWE, YOU'VE JUST VIOLATED THE
17 COURT REPORTER'S FIRST -- ALTHOUGH SHE KNOWS YOU, YOU ARE
18 SUPPOSED TO IDENTIFY YOURSELF, ALTHOUGH EVERYBODY KNOWS YOU,
19 AND WE UNDERSTAND THAT.

20 MR. HOWE: THANK YOU, YOUR HONOR.

21 THE COURT: YOU ARE WELCOME.

22 YES, SIR, MR. HAHN?

23 MR. HAHN: THANK YOU, YOUR HONOR. BLAIR HAHN ON
24 BEHALF OF THE MDL PLAINTIFF STEERING COMMITTEE.

25 WHAT I WOULD LIKE TO DO FIRST IS GIVE YOU A BRIEF

1 OVERVIEW OF WHERE WE ARE IN THE LITIGATION; WHAT HAS BEEN
2 ACCOMPLISHED TO DATE IN THE LITIGATION. AND THEN MR. PENNOCK
3 IS GOING TO TALK ABOUT THE ISSUES THAT NEED TO BE WORKED OUT,
4 HOPEFULLY WITH THE HELP OF BOTH OF YOUR HONORS, SO WE CAN
5 MOVE FORWARD IN THE DISCOVERY IN A JOINT MANNER.

6 CURRENTLY, WE HAVE ROUGHLY 130 CASES THAT ARE FILED
7 IN THE NEW YORK CONSOLIDATION, AND ROUGHLY 140 CASES FILED IN
8 THE MDL.

9 THE COURT: ARE WE GOING TO -- WE ARE GOING TO VOTE.
10 I'VE GOT 140 VOTES. SHE'S GOT 130 VOTES RIGHT NOW.

11 JUSTICE FREEDMAN: IT'S WEIGHTED.

12 MR. HAHN: AS WE UNDERSTAND IT FROM MR. KAPLAN, WE
13 HAVE ROUGHLY 100 ADDITIONAL CASES FLOATING OUT AROUND OUT
14 THERE THAT ARE IN NOBODY'S COURT, BECAUSE I'M TOLD WE HAVE
15 350 CASES TOTAL SOMEWHERE. THOSE ARE ALL VERY ROUGH NUMBERS,
16 AND HE MIGHT CORRECT ME, BUT THAT'S WHERE WE ARE.

17 WHAT HAS HAPPENED TO DATE IN THE LITIGATION IS WE'VE
18 TAKEN A COUPLE DEPOSITIONS THAT I'LL TALK ABOUT BRIEFLY. AND
19 WE HAVE A DOCUMENT DEPOSITORY THAT'S BEEN ESTABLISHED. AND
20 THE START OF THE PRODUCTION OF DOCUMENTS HAS COMMENCED.

21 I'M GOING TO -- I'VE GOT A BRIEF POWER POINT, JUST
22 SO THE COURT CAN UNDERSTAND WHERE WE ARE FROM THE DOCUMENT
23 DEPOSITORY PERSPECTIVE.

24 THE MDL HAS SET UP A WEBSITE. AND IF YOU LOOK -- I
25 DON'T KNOW IF I CAN POINT -- I DON'T KNOW -- THERE IS NO WAY

1 TO POINT TO IT, BUT AT THE VERY TOP OF THE PAGE, YOU WILL SEE
2 THE ADDRESS FOR THE WEBSITE, WHICH IS RENU MDL LITIGATION DOT
3 COM. THAT'S AVAILABLE TO ANYBODY TO LOG ON.

4 WE CURRENTLY HAVE ALL THE ORDERS, HEARINGS AND
5 TRANSCRIPTS THAT HAVE HAPPENED IN THE MDL. IF ULTIMATELY THE
6 NEW YORK CONSOLIDATION WANTS TO JOIN US WITH ITS WEBSITE, WE
7 ARE HAPPY TO HOST IT, AND ALSO PUT THEIR ORDERS, TRANSCRIPTS
8 AND HEARINGS ON HERE, AS WELL.

9 THAT'S OPEN TO ANYBODY. IF YOU CLICK ON WHAT YOU
10 WANT, THE FIRST ORDER IS PTO 1, IT SHOWS UP. IT CAN BE
11 PRINTED OFF, E-MAILED TO WHOMEVER YOU WANT TO. YOU GO BACK
12 TO THE MAIN HOME PAGE. AND YOU LOOK ON THE RIGHT SIDE OF THE
13 SCREEN, AND THERE IS A DOCUMENT DEPOSITORY LOGIN. THAT'S A
14 SECURE LOGIN.

15 I AM TOLD THAT WITH THIS LITTLE CARD, AND THERE IS A
16 PICTURE OF IT THERE, AND I ALSO HAVE ONE IN MY HAND, I'M
17 GOING TO SHOW YOU HOW LARGE IT IS, THAT WE HAVE TRIPLE --
18 WHAT -- TRIPLE AUTHENTICATION ALGORITHMS. AND THAT THIS IS
19 SOMETHING NOW CONNECTED TO A SATELLITE THAT IS CIRCLING ABOVE
20 US RIGHT NOW. I DON'T UNDERSTAND ANY OF THAT.

21 WELL, WHAT THAT MEANS, FROM A PRACTICAL PERSPECTIVE
22 IS, TO GET INTO THE DEPOSITORY, WHERE WE HAVE CONFIDENTIALITY
23 ISSUES AND WE HAVE TO MAINTAIN A CONFIDENTIALITY PURSUANT TO
24 THE AGREEMENT WE HAVE WITH THE DEFENDANTS, YOU HAVE TO HAVE A
25 USER NAME. YOU HAVE TO HAVE A PASSWORD THAT IS UNIQUE TO

1 THAT USER. YOU THEN HAVE TO HAVE A FOUR-NUMBER PIN THAT'S
2 UNIQUE TO A USER. AND THEN AFTER THE PIN, YOU PUT IN THE
3 NUMBERS OFF THIS LITTLE THING AND THIS LITTLE THING CHANGES
4 NUMBERS EVERY 60 SECONDS. AND IT IS SYNCHRONIZED WITH THE
5 SERVER. SO IF YOU DON'T HAVE ALL THOSE THINGS, YOU CAN'T GET
6 ON THE WEBSITE. THIS IS THE HIGHEST SECURITY AVAILABLE, THAT
7 WE ARE AWARE OF, WITH COMPUTERS. AND IT'S WHAT IS USED BY
8 THE DEFENSE DEPARTMENT, ALTHOUGH THEY PROBABLY --

9 THE COURT: IS THAT THE GOOD NEWS OR THE BAD NEWS?

10 MR. HAHN: THEY ARE NOT THE BEST PEOPLE TO BRAG
11 ABOUT.

12 WE CAN GO ONE STEP FORWARD WITH SECURITY, IF A
13 NEED -- THE NEED ARISES, WHICH IS WE ALSO COULD HOOK YOU ON
14 THE COMPUTER, AND YOU CAN ONLY LOG IN FROM THAT PARTICULAR
15 COMPUTER WITH THAT USER. TO DATE, WE HAVEN'T DONE THAT.

16 ONCE YOU LOG IN, YOU CAN PICK BETWEEN ONE OF TWO
17 PROGRAMS, FYI REVIEWER OR CONCORDANCE. EVERYONE SHOULD HAVE
18 ONE OF THOSE TWO PROGRAMS ALREADY. IF THEY DON'T, THEY ARE
19 VERY INEXPENSIVE, AND THAT'S WHAT DRIVES THE DATABASE.

20 YOU PICK WHICH ONE YOU WANT. YOU LOG ON. AND THEN
21 YOU WILL SEE ON THE LEFT-HAND SIDE UNDER DATABASES, THE RENU
22 DATABASE. YOU SIMPLY CLICK ON THAT, AND YOU ARE IN THE
23 DATABASE.

24 IF YOU LOOK DOWN AT THE BOTTOM, RIGHT CORNER, IT
25 SAYS DOCUMENT 1, 31,000. THOSE -- THAT'S THE NUMBER OF

1 DOCUMENTS THAT HAVE BEEN PRODUCED, TO DATE, FROM BAUSCH &
2 LOMB. WE EXPECT WITH OUTSTANDING DOCUMENT REQUESTS THAT WE
3 WILL HAVE AN ADDITIONAL 100,000 DOCUMENTS COMING IN THE NOT
4 TOO DISTANT FUTURE. SO WE WILL HAVE ABOUT 130,000 DOCUMENTS,
5 WE HOPE WITHIN THE NEXT 30 DAYS OR SO.

6 THESE ARE NOT PIECES OF PAPER, THESE ARE DOCUMENTS.
7 THERE IS MANY, MANY PIECES OF PAPER TO EACH DOCUMENT.

8 THIS DATABASE CAN BE SEARCHED BY KEY WORDS, PHRASES,
9 MULTIPLE WORDS, JUST LIKE YOU ARE DOING A GOOGLE SEARCH. AND
10 IF YOU CLICK ON THE SEARCH BAR ON THE LEFT-HAND SIDE, IT POPS
11 UP AND YOU CAN PUT PHRASES IN THERE, THE WORDS YOU WANT IN
12 THERE. WE DID FUSARIUM. YOU THEN CLICK ON THAT. AND IF YOU
13 LOOK AT THE BOTTOM, IT HAS DOCUMENT 1 OF 2,969. THERE ARE
14 2,969 DOCUMENTS THAT HAVE FUSARIUM IN THE BODY OF THE
15 DOCUMENT AT THIS TIME.

16 IN ADDITION TO THIS, WE CAN HAVE PEOPLE REVIEW THE
17 DOCUMENTS TO PREPARE FOR LITIGATION FROM THEIR DESKS
18 REMOTELY. AND SO YOU DON'T HAVE TO HAVE PEOPLE TRAVELING TO
19 A DEPOSITORY. IT'S ALL DONE VIRTUAL. AND THE MDL LAWYERS
20 WILL BE REVIEWING THE DOCUMENTS AND THEN FILLING IN THE
21 OBJECTIVE CODES, THE SUBJECTIVE FIELDS, SO THAT WE CAN NARROW
22 THE DOCUMENTS TO PREPARE FOR TRIAL, FOR OUR TRIAL EXHIBITS.

23 WE HAVE DONE THE EXACT SAME THING IN THE ZYPREXA
24 MDL. IT HAS WORKED VERY WELL. IT SAVES A LOT OF MONEY AND
25 IT ALLOWS LAWYERS FROM ALL OVER THE WORLD TO COORDINATE AND

1 LOOK AT DOCUMENTS TOGETHER.

2 YOU CLICK AGAIN, THE ACTUAL DOCUMENT COMES UP.

3 SO -- AND THAT'S THE END OF MY POWER POINT.

4 WE PROPOSE WITH THE MDL, AND WE HAVE STARTED
5 DISCUSSIONS, AS A RESULT OF THE RECEPTION LAST NIGHT, TALKING
6 WITH MR. PENNOCK, UM, AS WELL AS MR. WEITZ AND MR. GORDON,
7 UM, THAT WE WORK TOGETHER POTENTIALLY WITH A DEPOSITORY. WE
8 HAVE NOT AGREED TO DO THAT YET. THAT'S SOMETHING THAT THE
9 MDL WOULD BE VERY INTERESTED IN DOING, MAYBE SHARING COSTS
10 AND SHARING THE MANPOWER NECESSARY TO LOOK AT THESE LITERALLY
11 TENS OF THOUSANDS OF DOCUMENTS THAT NEED TO BE LOOKED AT OVER
12 THE COURSE OF THE LITIGATION.

13 DEPOSITIONS. WE HAVE TAKEN TWO DEPOSITIONS TO DATE.
14 WE HAVE TAKEN ONE SO FAR, THE KLUMP DEPOSITION. AND WE'LL BE
15 TALKING ABOUT THAT A LITTLE BIT LATER AS FAR AS THE ISSUES
16 THAT REVOLVE AROUND THAT. AND A SECOND DEPOSITION HAS BEEN
17 TAKEN BY THE NEW YORK GROUP OF AN ORGANIZATIONAL INDIVIDUAL
18 FOR BAUSCH & LOMB.

19 WE BELIEVE THAT WE'LL BE ABLE TO WORK TOGETHER ON
20 DEPOSITIONS. WE MIGHT NEED THE HELP OF A COURT ULTIMATELY TO
21 FIGURE OUT A FEW OF THE ISSUES, SO THAT BAUSCH & LOMB FEELS
22 COMFORTABLE WITH THE PROCEDURE.

23 AT THIS TIME, I'M GOING TO LET MR. PENNOCK TAKE
24 OVER --

25 MR. PENNOCK: THANKS, BLAIR.

1 THE COURT: -- AND DO HIS POWER POINT.

2 MR. PENNOCK: GOOD MORNING, YOUR HONOR, IT'S PAUL
3 PENNOCK, WEITZ AND LUXENBERG FOR THE PLAINTIFFS. I HAD A
4 LAPTOP OVER HERE SOMEWHERE THAT WAS SUPPOSED TO BE HOOKED UP.
5 HOPEFULLY, THAT WAS TAKEN CARE OF. I JUST NEED YOU TO JUST
6 GIVE ME A MOMENT, JUDGE, SO I CAN HOOK THIS IN.

7 THE COURT: SURE.

8 MR. PENNOCK: I'VE ALREADY PROMISED YOU WE WERE GOING
9 TO DO THAT BEFORE WE STARTED, AND IT MUST NOT HAVE.

10 JUDGE, I WANT YOU TO KNOW THAT I DID SEE THE FENCE
11 POST TROPHY THIS MORNING. THAT IS THE NICEST TROPHY. I
12 COULDN'T TELL WHETHER IT WAS A SHOULDER MOUNT OR NOT. HE
13 ALSO SHOWED ME A PICTURE OF THE DUCKS. I THOUGHT FIRST IT
14 WAS A SWARM OF MOSQUITOS.

15 THE COURT: THEY DON'T --

16 MR. PENNOCK: THERE IS AN AWFUL LOT OF DUCKS UP
17 THERE ON 1,000 ACRES.

18 THE COURT: WE USUALLY DON'T HAVE THAT MANY
19 MOSQUITOS UP IN THAT AREA. YOU WILL HAVE TO WAIT FOR
20 THANKSGIVING FOR THAT, MR. PENNOCK.

21 MR. PENNOCK: YEAH, THAT'S WHAT I HEARD.

22 WHILE THEY ARE SETTING THAT UP, MAYBE I COULD STRESS
23 A FEW ISSUES.

24 FIRST OF ALL, YOUR HONOR, OBVIOUSLY, WE ALL THANK
25 YOU FOR YOUR HOSPITALITY LAST NIGHT IN HOSTING THIS

1 CONFERENCE IN THIS BEAUTIFUL COURTROOM, AND THANK YOU FOR
2 ALLOWING US TO HAVE AN OPPORTUNITY TO MEET WITH JUSTICE
3 FREEDMAN IN SUCH A WONDERFUL CITY.

4 WE ARE HERE VERY MUCH LOOKING FORWARD TO WORKING
5 WITH MR. HAHN AND THE PLAINTIFFS THAT ARE MOVING THIS CASE
6 FORWARD IN YOUR COURT. I THINK THAT SOME OF THE THINGS THAT
7 I WOULD LIKE TO TALK ABOUT THIS MORNING RELATIVELY BRIEFLY
8 MAY HELP ADVANCE EXACTLY THAT.

9 I WAS IMPRESSED BY THE DOCUMENT REPOSITORY THAT THE
10 MDL PLAINTIFFS HAVE ALREADY SET UP. IT'S VERY SIMILAR TO THE
11 ONE THAT WE HAVE ALREADY ESTABLISHED FOR NEW YORK, AND A
12 SIMILAR, NOT IDENTICAL STRUCTURE IN TERMS OF SECURITY AND SO
13 FORTH, BUT IT'S A SYSTEM CALLED DOCS, D-O-C-S, ALL CAPS, THAT
14 WAS DEVELOPED ACTUALLY INTERNALLY BY WEITZ & LUXENBERG OVER
15 THE LAST FEW YEARS BY AN IT DEPARTMENT OF ABOUT 15 PEOPLE,
16 JUST WORKING IN DEVELOPING A SYSTEM THAT WILL ALLOW THE TYPES
17 OF THINGS THAT CONCORDANCE, WHICH I THINK THAT SYSTEM IS
18 CONCORDANCE, THAT WILL ALLOW THINGS LIKE THAT, CONCORDANCE
19 CAN DO, AND PERHAPS EVEN SOME ADDITIONAL THINGS.

20 AND ANYWAYS, IT'S A VERY SIMILAR SYSTEM WITH REMOTE
21 ACCESS AND ABILITY TO REVIEW. AND WE THINK THAT THESE TWO
22 SYSTEMS, IF WE DECIDE TO USE TWO DIFFERENT SYSTEMS, WILL BOTH
23 WORK VERY EFFICIENTLY.

24 IN FACT, THE SYSTEM DOCS THAT WE HAVE DEVELOPED
25 HAS -- IS CURRENTLY BEING USED IN TWO MDLS BY THE PLAINTIFFS,

1 THE BEXTRA/CELEBREX MDL, WHICH IS OUT OF THE NORTHERN
2 DISTRICT OF CALIFORNIA AND COORDINATED WITH JUSTICE KORNREICH
3 IN NEW YORK. IN OTHER WORDS, THE DOCUMENT SYSTEM THAT'S
4 BEING USED BY BOTH THE MDL AND THE NEW YORK PLAINTIFFS IS THE
5 DOCS SYSTEM IN BEXTRA/CELEBREX.

6 IN ADDITION, IT'S ALSO BEING USED BY THE MDL IN THE
7 ORTHO EVRA LITIGATION.

8 SO I THINK THAT THE COURT WOULD BE PLEASED TO KNOW
9 THAT BOTH THE PLAINTIFFS IN THE MDL AND IN NEW YORK HAVE
10 ESTABLISHED WHAT WILL BE A VERY EFFICIENT REMOTE ABILITY TO
11 REVIEW THE NO DOUBT HUNDREDS OF THOUSANDS OF DOCUMENTS THAT
12 ARE GOING TO BE PRODUCED IN THIS LITIGATION.

13 JUSTICE FREEDMAN: SO THESE ARE GOING TO BE THE SAME
14 DOCUMENTS ON BOTH SYSTEMS?

15 MR. PENNOCK: UM, YES, YOUR HONOR. I WOULD IMAGINE
16 THAT IT WOULD BE THE SAME DOCUMENTS ON BOTH SYSTEMS.

17 JUSTICE FREEDMAN: OKAY.

18 MR. PENNOCK: AND, YOU KNOW, A LOT OF IT HAS TO DO
19 WITH FAMILIARITY OF USE. I MEAN, WE'VE REVIEWED, MY OFFICE
20 AND OTHER OFFICES THAT HAVE WORKED ON DOCS, WE'VE USED IT
21 AGAIN AND AGAIN AND AGAIN. IT'S EASY TO NAVIGATE. BUT I
22 DON'T THINK THERE IS ANY REALLY DUPLICATION OF EFFORT BECAUSE
23 THE DOCUMENTS JUST COME TO THE TWO DIFFERENT SYSTEMS, GET
24 UPLOADED ELECTRONICALLY, AND THERE THEY ARE. SO IT'S JUST
25 DIFFERENT PEOPLE USING DIFFERENT SYSTEMS TO LOOK AT THE

1 DOCUMENTS THAT EXIST.

2 IN ANY EVENT, YOU KNOW -- MY POWER POINT SLIDE
3 PRESENTATION WASN'T THAT EXCITING ANYWAY. BUT IF WE CAN GET
4 IT PLUGGED IN, YOUR HONOR, I THINK WE HAVE SUBSTANTIALLY
5 NARROWED THE ISSUES BETWEEN THE NEW YORK PLAINTIFFS AND THE
6 DEFENDANTS OVER THE LAST SEVERAL WEEKS.

7 ADMITTEDLY, AT THE OUTSET OF THIS LITIGATION BACK
8 EARLIER IN THE YEAR, THERE WERE REALLY DOZENS OF VERY
9 SIGNIFICANT ISSUES THAT WE HAD WITH THE DEFENDANTS, AND WITH
10 SOME OF THE THINGS THAT THEY WERE URGING JUSTICE FREEDMAN
11 SHOULD DO IN TERMS OF CMOS; HOWEVER, THE FIRST FOUR CMOS HAVE
12 BEEN AGREED TO. THOSE ARE AT LEAST THREE OR, I THINK THE
13 FOURTH ONE, ALSO, ARE ENTERED ALREADY.

14 WE THEN RAN UP AGAINST THE FIFTH CMO, WHICH IS A CMO
15 THAT DEALS WITH CONFIDENTIALITY, THE CONFIDENTIALITY CMO.
16 THIS, OF COURSE, IS A CMO THAT'S TYPICALLY ENTERED IN EVERY
17 MASS TORT THAT OCCURS TODAY.

18 THERE ARE, AS THE COURTS ARE NO DOUBT AWARE, MODEL
19 CMOS FOR CONFIDENTIALITY THAT APPEAR IN THE MANUAL FOR
20 COMPLEX LITIGATION. AND OF COURSE, WE HAVE A GREAT DEAL OF
21 EXPERIENCE IN TERMS OF HOW THESE CMOS SHOULD APPEAR FROM
22 PRIOR MDLS AND PRIOR CONSOLIDATIONS OR COORDINATIONS IN STATE
23 COURTS, SUCH AS THOSE THAT HAVE OCCURRED WITH JUSTICE
24 FREEDMAN.

25 SO WE HAVE A LOT OF EXPERIENCE WITH THAT. AND THERE

1 WERE SOME, AS I'M WELL AWARE, THAT THERE WAS A CMO THAT IS A,
2 OR A CONFIDENTIALITY ORDER, THAT HAS BEEN A STANDING ORDER IN
3 THIS DISTRICT, UM, THAT INCORPORATED SOME OF THE FEATURES
4 THAT THE MANUAL FOR COMPLEX LITIGATION HAS RECOMMENDED AND
5 DID NOT INCORPORATE OTHERS.

6 IN ANY EVENT, I BELIEVE THAT WE HAVE A CMO -- WE ARE
7 VERY CLOSE TO A CMO THAT WILL SORT OF COMPORT WITH WHAT HAS
8 ALREADY BEEN ENTERED WITH REALLY JUST TWO, EXCUSE ME, THREE
9 DISPUTED POINTS, AND I COULD ADDRESS THOSE VERY BRIEFLY.

10 THEY ARE THREE RATHER SIMPLE POINTS. THREE POINTS
11 THAT I THINK WITH A LITTLE SIMPLIFICATION OF LITERALLY THE
12 SEMANTICS AND THE LANGUAGE OF THE DEFENDANT'S PROPOSAL, UM,
13 WE CAN RESOLVE.

14 THE FIRST AND MOST IMPORTANT POINT IS THAT WE FEEL
15 THAT THE DEFINITION OF CONFIDENTIALITY IN THE NEW YORK CMO
16 SHOULD SIMPLY BE -- SHOULD SIMPLY DEFER TO NEW YORK LAW.

17 AS WITH MANY ISSUES, THERE IS A VAST BODY OF LAW
18 WITH RESPECT TO WHAT IS APPROPRIATELY PRIVILEGED OR
19 CONFIDENTIAL UNDER NEW YORK LAW. AND IN DISCUSSIONS WITH THE
20 DEFENDANTS, WE HAVE SIMPLY SUGGESTED THAT THE DEFINITION
21 SHOULD BE THAT. IF THE DOCUMENT IS AFFORDED PROTECTION BY
22 NEW YORK LAW, THEN YOU MAY ASSERT THAT PRIVILEGE. AND
23 THAT -- AND THE DETERMINATION AS TO WHETHER THE PRIVILEGE WAS
24 APPROPRIATELY ASSERTED WILL BE, OF COURSE, DETERMINED, IF
25 IT'S BROUGHT TO JUSTICE FREEDMAN'S ATTENTION, BY JUSTICE

1 FREEDMAN.

2 THE DEFENDANTS HAVE INCORPORATED SOME OTHER LANGUAGE
3 AND HAVE SORT OF, IN MY OPINION, PERHAPS EXPANDED THE
4 DEFINITION A LITTLE BIT, OR AT LEAST SOMEONE COULD LOOK AT
5 THE WORDING THAT THEY HAVE UTILIZED AND SAY TO THEMSELVES, I
6 THINK THAT DEFINITION HAS EXPANDED NEW YORK LAW, AND HAVE THE
7 PLAINTIFFS AGREED TO THAT EXPANSION? WE HAVE.

8 SO WE -- I THINK IT WOULD BE VERY SIMPLE TO JUST
9 SAY, THE DEFINITION OF CONFIDENTIAL IS PER NEW YORK LAW.
10 THAT'S IT. AS I SAID TO THE DEFENDANTS, LOOK, IF I HAD A
11 DEFINITION --

12 JUSTICE FREEDMAN: YOU KEEP SAYING THAT THAT'S
13 CLEAR. I'M UNAWARE OF SUCH CLARITY.

14 MR. PENNOCK: WELL, THERE IS A *MANN* CASE, YOUR
15 HONOR, WHICH I BELIEVE IS A FIRST -- I BELIEVE IT'S THE FIRST
16 CASE. AND I THINK THAT THAT CASE, WHICH IS VERY RECENT, IT
17 JUST CAME OUT, I THINK EARLY IN JUNE OF 2006. I BELIEVE IT
18 WAS *MANN AGAINST COOPER TIRES*. AND I'M SORRY, I DON'T HAVE
19 THE CITE WITH ME. BUT THAT CASE, I THINK, LAYS OUT IN GREAT
20 DETAIL AND WITH GREAT CLARITY WHAT YOUR HONOR HAS POINTED
21 OUT. YOU MAY HAVE HAD TO PULL FROM VARIOUS SOURCES AND CASES
22 UNTIL THAT POINT.

23 AND I THINK THAT THAT CASE GIVES GOOD GUIDANCE ON
24 WHAT IS CONFIDENTIAL AND WHAT WOULD BE PERMITTED TO BE
25 DESIGNATED UNDER NEW YORK LAW.

1 IN ANY EVENT, THE LAW EXISTS AS IT EXISTS. AND WE
2 ARE -- WE ARE CONCERNED ABOUT AGREEING WITH VERBIAGE THAT MAY
3 SOMEHOW BE INTERPRETED AS SOMETHING OTHER THAN NEW YORK LAW.

4 AND IF THE DEFENDANTS CAN STAND UP HERE THIS MORNING
5 AND SAY, YOUR HONORS, WE AGREE THAT NEW YORK LAWS SHOULD BE
6 THE DEFINITION FOR CONFIDENTIALITY, THEN WE ARE ALL IN
7 AGREEMENT ON THAT.

8 THE SECOND OF THE THREE POINTS WITH RESPECT TO THE
9 CONFIDENTIALITY ORDER IS REALLY SOMETHING -- IT'S REALLY MORE
10 OF A PRACTICAL POINT. AND IT HAS TO DO WHEN YOU HAVE THESE
11 CONFIDENTIALITY ORDERS, THIRD PARTIES, EXPERTS, COCOUNSEL WHO
12 ARE NOT COUNSEL OF RECORD, MAYBE CONTRACTORS OR AGENTS THAT
13 YOU HAVE -- ALWAYS HAVE TO SIGN AN ACKNOWLEDGEMENT THAT THEY
14 KNOW THE CONFIDENTIALITY ORDER EXISTS; THAT THEY KNOW THAT
15 THEY ARE SUBJECT TO PENALTIES FROM THE COURT IF THEY VIOLATE
16 THE CONFIDENTIALITY ORDER, AND THAT THEY AGREE TO ABIDE BY
17 THE CONFIDENTIALITY ORDER.

18 IT'S AN ACKNOWLEDGEMENT OR A CERTIFICATION. I'VE
19 READ THE ORDER AND I UNDERSTAND ITS TERMS. I UNDERSTAND THAT
20 I MAY BE SUBJECT TO PENALTY AND EVEN DAMAGES. WE HAVE NO
21 PROBLEM WITH THAT CERTIFICATION.

22 AND AS TO THIRD PARTIES, INCLUDING EXPERTS,
23 CONSULTANTS, AS I SAID, COCOUNSEL, UM, WHO ARE NOT COUNSEL OF
24 RECORD AND ANY NON-EMPLOYEE REVIEWER OF COUNSEL OF RECORD,
25 ANY NON-EMPLOYEE REVIEWER OF THE DOCUMENTS, WE HAVE NO

1 PROBLEM, WE THINK THAT THEY SHOULD SIGN THE CERTIFICATION.
2 WE WOULD WANT THEM TO BECAUSE IT AFFORDS US THE SAME TYPE OF
3 PROTECTION THAT IT AFFORDS THE DEFENDANTS, IN TERMS OF
4 CREATING AN ISSUE THAT DOESN'T NEED TO EXIST THROUGH THE
5 RELEASE OF CONFIDENTIAL INFORMATION.

6 THE ONLY STUMBLING BLOCK IN GETTING TO AN AGREEMENT
7 HERE IS THAT THE DEFENDANTS WANT EVERYONE IN OUR LAW FIRM WHO
8 MAY AT ANY TIME PHOTOCOPY, SEE, FAX, ETCETERA, A DOCUMENT, TO
9 SIGN A CERTIFICATION. THAT'S AN EXTREMELY BURDENSOME CONCEPT
10 TO HAVE THAT ACCOMPLISHED.

11 AND THE DEFENDANTS KNOW THAT IT'S BURDENSOME. IN
12 FACT, THEY DON'T HAVE THEIR PEOPLE DO IT. THEY HAVE, AS WE
13 DO, THEY TALK TO THEIR PEOPLE AND EXPLAIN AS TO WHAT -- WHAT
14 THE ISSUES ARE, AND THAT THESE THINGS ARE CONFIDENTIAL, AND
15 THEY DO NOT HAVE THEM SIGN A CERTIFICATION.

16 SO WE THINK THAT WE, LIKE THEM, ARE UNDER THE BURDEN
17 AND OBLIGATIONS OF THIS COURT'S ORDER. WE WILL BE
18 RESPONSIBLE, LIKE THEM, FOR WHAT OUR EMPLOYEES DO OR DON'T
19 DO. WE ARE COUNSEL OF RECORD. WE ARE ORDERED, AND EVERYONE
20 THAT WORKS FOR US, IS THEREBY ORDERED TO KEEP THESE THINGS
21 CONFIDENTIAL. THERE IS NO NEED TO HAVE THESE PEOPLE SIGN THE
22 ACKNOWLEDGEMENT.

23 THE REASON YOU HAVE THIRD PARTIES DO IT, IS TO
24 ESSENTIALLY OBTAIN JURISDICTION OVER THEM, NOT ESSENTIALLY,
25 IT IS TO OBTAIN JURISDICTION OVER THEM TO THE CONFIDENTIALITY

1 ORDER. BUT AS TO INDIVIDUALS WHO ARE EMPLOYED BY YOUR FIRM,
2 IT DOESN'T NEED TO BE DONE. THAT'S THE ONLY -- THE LAST
3 STUMBLING BLOCK WITH RESPECT TO CMO 5.

4 YOU KNOW, FOLKS, YOU CAN -- WE DON'T NEED TO
5 CONTINUE WITH THAT. I'M ALMOST DONE.

6 MR. COLE: I DON'T WANT TO INTERRUPT, BUT WOULD IT BE
7 BETTER IF WE ADDRESSED EACH OF THESE ISSUES AS THEY CAME UP
8 OR WOULD YOUR HONORS LIKE TO WAIT AND HAVE THE DEFENDANT GO
9 THROUGH AND US RESPOND? BUT WE CAN DO IT EITHER WAY. IT
10 OCCURS TO ME WE MIGHT WANT TO HANDLE THINGS --

11 THE COURT: MAYBE WHEN HE GETS DONE WITH HIS THIRD
12 POINT, THEN YOU CAN RESPOND TO THE THREE POINTS ON THE
13 CONFIDENTIALITY AND CMO.

14 JUSTICE FREEDMAN: I THINK THAT'S A GOOD IDEA. YOU
15 SAID THERE IS A THIRD POINT.

16 MR. PENNOCK: I THINK THE THIRD POINT MAY HAVE BEEN
17 RESOLVED BECAUSE I'M ON TO CMO 6.

18 THE COURT: OKAY.

19 JUSTICE FREEDMAN: OKAY. SHOULD WE HAVE A RESPONSE?

20 THE COURT: YEAH. I GUESS RESPONDING TO THE CMO 5
21 AND CONFIDENTIALITY.

22 MR. COLE: YOUR HONOR, MAY I HAVE A SECOND TO GIVE A
23 SORT OF A WHERE WE ARE, AND AS MR. HAHN DID, AND THEN WE
24 RESPOND?

25 THE COURT: SURE.

1 MR. COLE: I GUESS IN THE HOST CITY SPIRIT, AND
2 SINCE I'M HERE AND I'M LOCAL LIASON COUNSEL, I WANTED TO
3 WELCOME JUSTICE FREEDMAN HERE OFFICIALLY. WE TRIED TO LAST
4 NIGHT. I WANTED TO EXPRESS --

5 JUSTICE FREEDMAN: THANK YOU.

6 MR. COLE: I WANTED TO EXPRESS AND WELCOME ALL THE
7 LAWYERS HERE EVERYWHERE AND HOPE THEY ENJOY CHARLESTON HERE
8 IN THE SPRINGTIME. IT'S A NICE PLACE.

9 I WANTED TO THANK BOTH OF YOU FOR AGREEING TO HAVE
10 THIS JOINT HEARING. AND WE WANT TO EXPRESS WHAT OUR POSITION
11 IS AND HOW WE, AS A DEFENDANT, BAUSCH & LOMB, FEEL ABOUT THE
12 COORDINATION AND THIS HEARING.

13 AND WHILE WE ARE EXCITED TO HAVE YOU, WE UNDERSTAND
14 THAT THE PURPOSE OF ALL OF THIS WE ARE DOING IS TO, AT THE
15 END OF THE DAY, BE THROUGH WITH THE LITIGATION. AND IT'S IN
16 EVERYBODY'S BEST INTERESTS THAT THAT BE DONE AS EFFICIENTLY
17 AS POSSIBLE. AND WE WANT TO DO IT AS EFFICIENTLY AS
18 POSSIBLE. AND WE WANT TO LET BOTH OF THE JUDGES WHO ARE
19 HANDLING THIS KNOW THAT. WE ARE COMMITTED TO WORK TO DO
20 THAT. WE WANT TO COORDINATE. WE HAVE TRIED TO DO THAT WITH
21 BOTH SIDES. WE ACKNOWLEDGE WE'VE HAD SOME BUMPS IN THE ROAD.
22 AND WE'VE ACTUALLY BEEN ABLE TO AGREE MAYBE ON SOME THINGS
23 BETTER WITH THE MDL PLAINTIFFS THAN WE HAVE WITH THE NEW YORK
24 STATE PLAINTIFFS, OF COURSE, BUT WE ARE MAKING A LOT OF
25 PROGRESS WITH THE NEW YORK STATE PLAINTIFFS, AS MR. PENNOCK

1 SAID THIS MORNING. AND WE ARE COMMITTED TO DO THIS.

2 WE -- THIS IS MY FIRST JOINT HEARING ON MASS TORTS.
3 AND I REALLY DIDN'T KNOW WHAT TO EXPECT. AND SO FAR, I'M
4 PRETTY IMPRESSED WITH THE WAY IT'S GOING ALONG.

5 I KNOW THAT IT'S BEEN DONE FROM MY COLLEAGUES IN
6 OTHER LITIGATION. I HEARD MR. PENNOCK SAY THIS MORNING ABOUT
7 BEXTRA/CELEBREX. AND I KNOW JUSTICE KORNREICH, I BELIEVE,
8 AND JUDGE BREYER OUT IN SAN FRANCISCO WERE COORDINATING THAT
9 VERY WELL. THAT'S GOING VERY WELL. WE WOULD LIKE THIS TO GO
10 VERY WELL. WE HAVE NO INTEREST IN DOING ANYTHING BUT BEING
11 MOST EFFICIENT, MOST COOPERATIVE, AND MOVING THIS ALONG.

12 WE ALSO UNDERSTAND THAT IN COORDINATING ANY MASS
13 TORT LITIGATION WHERE YOU HAVE A LOT OF LAWYERS INVOLVED,
14 THAT THERE ARE MANY ISSUES THAT WE HAVE TO DEAL WITH, MANY
15 LAWYERS YOU HAVE TO DEAL WITH, AND AN OUTSIDER MIGHT SAY THAT
16 THERE ARE A LOT OF EGOS THAT YOU HAVE TO DEAL WITH. WE
17 UNDERSTAND THAT. WE ALSO UNDERSTAND THAT WHEN YOU TAKE ONE
18 FAMILY OF LITIGATION, IF YOU WILL, AND PUT IT WITH ANOTHER
19 ONE, YOU HAVE ALL OF THOSE ISSUES MULTIPLIED, PROBABLY NOT BY
20 TWO, BUT PROBABLY BY FOUR.

21 AND WE UNDERSTAND THAT THAT MEANS THAT WE ARE ALL
22 GOING TO HAVE TO BE A LITTLE MORE PATIENT, A LITTLE MORE
23 COOPERATIVE, A LITTLE MORE WILLING TO WORK TOGETHER. AND WE
24 WANT TO LET BOTH OF YOU KNOW THAT WE ARE COMMITTED TO DOING
25 THAT. WE WANT TO BE REASONABLE. WE WANT TO WORK TOGETHER.

1 WE UNDERSTAND THAT BOTH -- THAT WE HAVE RULES HERE IN SOUTH
2 CAROLINA IN FEDERAL COURT; THAT THERE ARE FEDERAL COURT
3 RULES; THAT NEW YORK COURTS HAVE THEIR OWN RULES AND THEIR
4 OWN TRADITIONS, THEIR OWN WAY OF DOING THINGS. BUT WE THINK
5 THAT ALL OF THOSE RULES ARE AIMED AT THE SAME THING, AND
6 THAT'S GIVING LITIGANTS A FAIR DAY IN COURT ON BOTH SIDES.
7 AND WE THINK THAT WE CAN VERY RESPECTFULLY AND NICELY WORK
8 THROUGH THOSE DIFFERENCES AND COME TO A POINT THAT EVERYBODY
9 CAN AGREE WITH.

10 WE THINK THAT HAVING TWO SETS OF RULES IN A
11 DEPOSITION, WHO GETS TO SEE DOCUMENTS AND WHO DOESN'T, OR TWO
12 SETS OF RULES ABOUT WHAT IS CONFIDENTIAL AND NOT
13 CONFIDENTIAL, PUTS A BURDEN ON THE MOVING FORWARD PART OF THE
14 LITIGATION AND RESULTS IN GREAT INEFFICIENCIES, AND IT MAKES
15 IT MUCH HARDER FOR ALL OF US TO GET TO THE END.

16 SO WE ARE VERY EXCITED TO BE HERE IN HOPES OF
17 BRINGING EVERYTHING INTO SORT OF ONE CONSOLIDATED, TO THE
18 EXTENT WE CAN; BEING RESPECTFUL OF EACH OTHER; BEING
19 RESPECTFUL OF THE DIFFERENT JURISDICTIONS; MOVING THIS
20 LITIGATION FORWARD IN A WAY THAT EVENTUALLY WE GET TO THE END
21 OF IT.

22 WE THANK YOU AGAIN FOR BEING HERE. WE JUST WANT YOU
23 TO KNOW WE ARE COMMITTED TO THAT. WE ARE GOING TO HAVE, AS
24 YOU MIGHT EXPECT, WE HAVE SO MANY LAWYERS ON OUR SIDE,
25 DIFFERENT PEOPLE ARE GOING TO ADDRESS DIFFERENT ISSUES, IS

1 WHY I SUGGESTED A WAY TO GO MIGHT BE AS MR. PENNOCK RAISES
2 THINGS, MAYBE WE COULD RESPOND TO THOSE. MR. KAPLAN IS GOING
3 TO RESPOND TO SOME THINGS, MR. BEISNER IS GOING TO RESPOND TO
4 SOME THINGS, AND MR. ORTEGA, AND I THINK MS. WOODBURY AND
5 MR. ANIOLAK, ALL THESE NAMES I THINK ALL THESE PEOPLE KNOW.
6 AND THEY HAVE BEEN NEGOTIATING ON THE VARIOUS SIDES IN THE
7 CMOS AND ARE BETTER EQUIPPED TO DEAL WITH THOSE ISSUES. I'LL
8 PROBABLY POP UP A COUPLE OF TIMES, AS WELL.

9 MR. PENNOCK: YOUR HONOR, I JUST WANT YOU TO KNOW I
10 HAVE NO OBJECTION TO BEING OUTNUMBERED.

11 MR. BEISNER: GOOD MORNING, YOUR HONOR. I'M JOHN
12 BEISNER, COUNSEL FOR BAUSCH & LOMB, AND I WANTED TO RESPOND
13 BRIEFLY TO MR. PENNOCK'S OBSERVATIONS ABOUT CMO NUMBER 5.

14 I THINK MR. PENNOCK IS CORRECT, AND I THINK WE ARE
15 PRETTY CLOSE ON THIS ONE. SO LET ME BRIEFLY ADDRESS THE TWO
16 ISSUES THAT HE RAISED.

17 THE FIRST, OBVIOUSLY IS AN IMPORTANT ONE, AND THAT
18 IS HOW ARE WE GOING TO DEFINE CONFIDENTIAL DOCUMENTS FOR
19 PURPOSES OF THIS ORDER?

20 HERE IS THE ISSUE THAT WE HAVE. MR. PENNOCK
21 REFERENCED SEVERAL TIMES THE MANUAL FOR COMPLEX LITIGATION,
22 AND HOW IT DEFINES CONFIDENTIAL MATERIAL. AND THE ISSUE THAT
23 WE HAVE IS THAT THE ORDER THAT WAS ENTERED HERE IN THE MDL
24 PROCEEDING, WHICH IS THE STANDARD SOUTH CAROLINA ORDER, WHICH
25 WAS DEVELOPED COOPERATIVELY AMONG COUNSEL FOR A LONG PERIOD

1 OF TIME, HAS THE DEFINITION IN IT FROM THE MANUAL ON COMPLEX
2 LITIGATION, BUT WE HAVE PROPOSED AS TRADE SECRETS OR
3 CONFIDENTIAL RESEARCH DEVELOPMENT OR COMMERCIAL INFORMATION.
4 AND IF YOU LOOK IN THE MODEL ORDER IN THE MANUAL FOR COMPLEX
5 LITIGATION 4, IT DEFINES IT AS: "DISCOVERY MATERIAL
6 CONTAINING TRADE SECRETS OR OTHER CONFIDENTIAL PROPRIETARY
7 RESEARCH, DEVELOPMENT, MANUFACTURING OR COMMERCIAL OR
8 BUSINESS INFORMATION MAY BE DESIGNATED CONFIDENTIAL."

9 SO WHAT WE PROPOSE HERE, COMING FROM THE SOUTH
10 CAROLINA ORDER, IS FUNDAMENTALLY THE SAME AS WHAT IS IN THE
11 MANUAL FOR COMPLEX LITIGATION, WHICH HAS BEEN ADOPTED IN A
12 LOT OF DIFFERENT CASES.

13 THE PLAINTIFFS IN NEW YORK HAVE PROPOSED DEFINING IT
14 ONLY AS TRADE SECRETS AND PROPRIETARY INFORMATION. YOU MAY
15 THINK, WELL, THAT'S ANGELS DANCING ON THE HEAD OF A PIN,
16 WHAT'S THE DIFFERENCE? I THINK WHAT WE WOULD PROPOSE, IN THE
17 SPIRIT OF COMPROMISE ON THIS, AND WE COMMUNICATED THIS TO
18 MR. PENNOCK LAST NIGHT, IS TO USE THE LONGER DEFINITION THAT
19 ADDED TO THE END, "TO THE EXTENT PERMITTED BY NEW YORK LAW."

20 I THINK THAT PROTECTS BOTH SIDES. IT GIVES
21 MR. PENNOCK AN ASSURANCE, AND THE PLAINTIFFS, THAT WE ARE NOT
22 TRYING TO DO ANYTHING MORE EXPANSIVE THAN NEW YORK LAW. I
23 THINK USING THE DEFINITIONS IN THE MANUAL ON COMPLEX
24 LITIGATION ASSURES EVERYBODY WE ARE NOT TRYING TO DO ANYTHING
25 NARROWER. SO THAT WOULD BE, I THINK, WE ARE FUNDAMENTALLY

1 SAYING THAT WE WOULD BE WILLING TO AGREE TO THAT.

2 THERE WAS ONE PROVISION IN THE MDL ORDER, A
3 REFERENCE TO SENSITIVE PERSONAL INFORMATION, WHICH I KNOW
4 JUSTICE FREEDMAN, YOU HAVE EXPRESSED SOME CONCERN ABOUT IN
5 ONE HEARING. I'M NOT SURE THAT'S NECESSARY. THAT IS
6 PRIMARILY THERE, I THINK, FOR CONCERN ABOUT THE PRODUCTION OF
7 MEDICAL INFORMATION. BUT WE'VE GOT HIPPA PROTECTION AND
8 THINGS OF THAT SORT ON THAT. SO THE DEFINITION THAT I JUST
9 SUGGESTED, I THINK, WOULD PROBABLY SERVE BOTH PARTIES'
10 INTERESTS WELL.

11 ONE THING I WOULD NOTE ON THIS SUBJECT, IS THAT I
12 WOULD HOPE GOING FORWARD THAT WE COULD DEVISE A MECHANISM, IF
13 THERE ARE CONCERNS ABOUT WHICH DOCUMENTS CAN BE DESIGNATED AS
14 CONFIDENTIAL, THAT WE WOULD HAVE A MECHANISM BETWEEN THE
15 COURTS TO COMMUNICATE ON THIS ISSUE, SO THAT WE DON'T HAVE AN
16 ENTIRELY DIFFERENT SET OF CONFIDENTIAL DOCUMENTS IN THE MDL
17 PROCEEDING VERSUS WHAT IS IN NEW YORK.

18 I THINK THAT THE MANN CASE THAT MR. PENNOCK
19 REFERENCED ACTUALLY BRINGS NEW YORK LAW INTO BEING CONSISTENT
20 WITH FEDERAL LAW. THAT'S WHAT THE OPINION SAYS.

21 BUT OBVIOUSLY, JUSTICE FREEDMAN, YOU WOULD BE MAKING
22 YOUR DETERMINATIONS UNDER NEW YORK LAW, AND JUDGE NORTON, YOU
23 WOULD BE MAKING YOUR DETERMINATIONS UNDER FEDERAL LAW. SO
24 THERE IS A POSSIBILITY THERE MAY BE A FEW DOCUMENTS ON WHICH
25 THERE MAY BE A DISAGREEMENT.

1 SO THAT WOULD BE OUR SUGGESTION FOR RESOLUTION ON
2 THAT ISSUE, AND I THINK IT SERVES THE INTERESTS OF BOTH
3 PARTIES, BOTH SIDES OF THE LITIGATION.

4 ON THE OTHER ISSUE, AND THAT IS THE QUESTION
5 WHETHER, IF I'M UNDERSTANDING MR. PENNOCK CORRECTLY, THE
6 CONCERN THAT EXISTS ABOUT EMPLOYEES DEALING WITH THESE
7 DOCUMENTS, THAT IS THE EMPLOYEES OF MR. PENNOCK'S FIRM OR
8 ANYBODY ON THE PLAINTIFFS' SIDE.

9 I THINK WE NEED TO UNDERSTAND WHAT WE ARE TALKING
10 ABOUT HERE ARE TRADE SECRETS. IF THIS IS GOING TO BE THE
11 DEFINITION, VERY SENSITIVE, CONFIDENTIAL, BUSINESS
12 INFORMATION THAT ARE BEING GIVEN TO THE OTHER SIDE IN THIS
13 LITIGATION AS PART OF THE DISCOVERY PROCESS.

14 I DON'T THINK THAT IT IS TOO MUCH TO EXPECT THAT IN
15 TAKING THOSE DOCUMENTS, THAT IN THE SPIRIT OF TRUST, THAT WE
16 HAVE SOME ASSURANCE THAT ANYBODY SEEING THOSE DOCUMENTS IS
17 GOING TO TREAT THEM AS TRADE SECRETS; THAT THEY ARE NOT GOING
18 TO BE TALKING ABOUT THEM OUTSIDE THE FIRM; THAT THEY ARE NOT
19 GOING TO BE DEALING WITH THEM IN A WAY THAT'S INCONSISTENT
20 WITH THEIR TRADE SECRET STATUS.

21 WHAT FIRMS DO, AND I THINK WHAT THE MANUAL FOR
22 COMPLEX LITIGATION EXPECTS, IS THAT IF EMPLOYEES ARE GOING TO
23 BE GIVEN DOCUMENTS OF THAT SORT, THAT THEY BE SAT DOWN AND
24 EXPLAINED, THIS IS SENSITIVE MATERIAL. YOU ARE NOT SUPPOSED
25 TO BE MAKING COPIES FOR YOURSELF. YOU ARE NOT SUPPOSED TO BE

1 HANDING THESE OUT. AND JUST SIMPLY SIGN AT THE END OF THAT
2 CONVERSATION, I'VE HEARD THAT AND I UNDERSTAND IT, I DON'T
3 THINK IS TOO ONEROUS OF A CONCERN.

4 AND I AM WORRIED THAT IF THERE IS NOT A WILLINGNESS
5 TO DO THAT, THAT WE DON'T HAVE THE PROTECTIONS IN PLACE THAT
6 THE MANUAL FOR COMPLEX LITIGATION SUGGESTS OUGHT TO EXIST IN
7 THIS REGARD.

8 AND SO I THINK THAT THAT IS A REASONABLE REQUEST TO
9 ENSURE THAT EMPLOYEES -- FRANKLY, I'M LESS WORRIED IF AN
10 ATTORNEY SEES A DOCUMENT THAT IS STAMPED CONFIDENTIAL, THEY
11 KNOW WHAT THAT MEANS. BUT IF SOMEBODY WHO IS RUNNING A COPY
12 MACHINE IN THE OFFICE MAY NOT, LEGITIMATELY, MAY NOT KNOW
13 WHAT THAT MEANS, AND MAY PERHAPS NEED SOME INSTRUCTION ON
14 THAT. WE JUST WANT TO MAKE SURE THAT THAT'S THERE BEFORE
15 THESE DOCUMENTS ARE ENTRUSTED TO THEM.

16 THANK YOU, YOUR HONOR.

17 THE COURT: ARE YOUR EMPLOYEES SIGNING THE SAME
18 THING FOR YOU?

19 MR. COLE: THEY ARE NOT.

20 BUT IF WE GET DOCUMENTS, YOU KNOW, WE HAVE TO GO
21 THROUGH THE TRAINING PROCESS THAT WE GO THROUGH. AND WE HAVE
22 TO GIVE OUR CLIENT ASSURANCE THAT THEY ARE SIGNING THOSE.
23 AND WE DO. AND IF WE GET DOCUMENTS, AND FREQUENTLY WE DO IN
24 OUR OFFICES, FROM OTHER CASES THAT ARE CONFIDENTIAL FROM
25 OTHER PARTIES, WE DO GO THROUGH THAT PROCESS. AND I THINK

1 THERE IS A -- IF THE MANUAL SUGGESTS THIS, THAT THERE BE A
2 PROCESS TO CONFIRM THAT PEOPLE WHO ARE GETTING DOCUMENTS
3 ENTRUSTED TO THEM FROM THE OTHER SIDE, HAVE TO GO THROUGH AN
4 ASSURANCE PROCESS ON THAT.

5 JUSTICE FREEDMAN: WOULD IT BE SO BURDENSOME FOR
6 YOUR EMPLOYEES TO SIGN SUCH A CONFIDENTIALITY CERTIFICATION?

7 MR. COLE: WE COULD DO THAT IF -- IF -- I MEAN, I
8 DON'T THINK THERE IS ANY PROBLEM WITH BOTH SIDES DOING THAT.
9 IT'S AN ODD SITUATION BECAUSE IT'S OUR CLIENT'S DOCUMENTS.
10 BUT IF THAT CREATES A SENSE OF EQUALITY ON THAT, I'M SURE WE
11 WOULD BE WILLING TO DO THAT.

12 THE COURT: YOU ARE GOING TO GET A LOT OF SENSITIVE
13 PERSONAL INFORMATION FOR EACH INDIVIDUAL PLAINTIFF.

14 MR. COLE: ABSOLUTELY.

15 THE COURT: AND THAT'S --

16 MR. COLE: NO. NO. AND, YOUR HONOR, THE ORDER IS
17 DRAFTED, I'M SURE IT WORKS BOTH WAYS.

18 JUSTICE FREEDMAN: SO ANYTHING THAT YOU GET FROM THE
19 OTHER SIDE --

20 MR. COLE: ABSOLUTELY. ABSOLUTELY.

21 I MEAN, IF WE DO GET INFORMATION THAT WOULD BE
22 SUBJECT TO THAT, YES, WE WOULD BE OBLIGED. THE ORDER DOESN'T
23 SAY THAT ONLY APPLIES TO THE PLAINTIFFS. I'M SORRY, YES.
24 AND WE WOULD BE SIGNING THAT, IN THE EVENT WE GET DOCUMENTS
25 THAT ARE IN THAT CATEGORY.

1 BUT YOU ARE RIGHT, YOUR HONOR, IF WE HAVE HIPPA
2 INFORMATION THAT IS SUBJECT TO HIPPA, YES, WE WOULD NEED TO
3 DO THAT. SO, YES, I THINK, TO MORE DIRECTLY ANSWER YOUR
4 QUESTION, IT WOULD WORK BOTH WAYS.

5 THANK YOU.

6 MR. PENNOCK: YOUR HONOR, JUST TWO QUICK REPLIES ON
7 THIS ISSUE ON CMO NUMBER 5.

8 FIRST, I THINK I HEARD MR. BEISNER SAY ON THE RECORD
9 THAT THEY ARE NOT INTENDING, BY ANY OF THE LANGUAGE THAT THEY
10 ARE SUGGESTING IN THE CONFIDENTIALITY ORDER, TO EXPAND THE
11 PROTECTIONS UNDER NEW YORK LAW.

12 THAT HAVING BEEN SAID, WE NOW DON'T HAVE TO WORRY
13 THAT SOME POINT A COUPLE YEARS FROM NOW, SOMEONE IS GOING TO
14 COME AND SAY, WELL, WHEN YOU AGREED TO THE CMO, YOU AGREED TO
15 SOMETHING DIFFERENT THAN NEW YORK LAW.

16 SO I THINK THAT ISSUE IS DISPOSED OF.

17 JUSTICE FREEDMAN: SO YOU WOULD AGREE THAT THE
18 LANGUAGE COULD BE USED WITH A TAIL, "TO THE EXTENT NEW
19 YORK" --

20 MR. PENNOCK: "TO THE EXTENT NEW YORK LAW PERMITS."

21 JUSTICE FREEDMAN: "NEW YORK LAW PERMITS OR ALLOWS."

22 MR. PENNOCK: I THINK WE HAVE ESTABLISHED ON THE
23 RECORD THAT THEY HAVE NO INTENTION TO EXPAND THE DEFINITION.

24 AS TO THIS ISSUE OF SIGNING, OF SIGNING THESE
25 CERTIFICATIONS, YOU KNOW, FRANKLY, IT'S NOT EVEN SUCH A -- SO

1 MUCH A PRACTICAL PROBLEM OF HAVING PEOPLE DO IT OR SITTING
2 DOWN AND WE TELL PEOPLE THAT ANYWAY.

3 I USED TO HAVE A NEPHEW, WHO EVERY TIME YOU TOLD HIM
4 NOT TO DO SOMETHING, THAT WAS IT, IT WAS A GUARANTEE. IF YOU
5 SAID, DON'T TOUCH THAT, YOU WOULD COME BACK INTO THE ROOM AND
6 HIS FINGERPRINTS WOULD BE ALL OVER IT. DON'T GO INTO THAT
7 COOKIE JAR, HE WOULD BE UP ON THE COUNTER IN THE COOKIE JAR.

8 AND REALLY, I THINK THEY MAY WANT TO BE CAREFUL WHAT
9 THEY ARE ASKING FOR. BECAUSE IF YOU GO TO SOME OF THESE
10 PEOPLE, AND NOT THAT -- WE HAVE SOME VERY GOOD PROFESSIONALS
11 IN OUR FIRM, BUT EVERY BUSINESS ORGANIZATION NEEDS AND
12 REQUIRES PEOPLE THAT, AT SORT OF A LOWER TIER OF OPERATION.

13 AND IF YOU ARE GOING TO THEM AND TELLING THEM, HEY,
14 BY THE WAY, DID YOU KNOW YOU ARE COPYING ALL THIS IMPORTANT
15 STUFF AND IT CAN'T GET OUT, AND SO ON AND SO FORTH, YOU MAY
16 BE CREATING A PROBLEM THAT YOU DIDN'T HAVE TO BEGIN WITH.
17 AND THAT'S ONE OF THE CONCERNS THAT WE HONESTLY HAVE.

18 BECAUSE IN THE END, IF THIS GETS OUT, WE ARE ON THE
19 HOOK FOR IT. IF SOMEONE IN OUR FIRM, IF WE HAVE BEEN
20 ORDERED, THE PLAINTIFFS' FIRMS HAVE BEEN ORDERED, DO NOT LET
21 THIS STUFF GET OUT, IF SOMEONE IN OUR FIRM LET'S IT OUT, WE
22 ARE POTENTIALLY ON THE HOOK FOR THAT. AND CERTAINLY THEY
23 WOULD ARGUE THAT WE WERE.

24 SO THIS IS -- HAS AS MUCH TO DO WITH PROTECTING US
25 AND PROTECTING THEM AS A PRACTICAL BURDEN. BUT I THINK

1 ENOUGH HAS BEEN SAID ON THAT ISSUE.

2 I THINK THAT, YOU KNOW, IF I COULD MOVE TO A MORE,
3 REALLY A MORE CRUCIAL AND FUNDAMENTAL ISSUE THAT'S AT THE
4 CORE OF WHY WE ARE HERE TODAY, AND THAT'S, YOU KNOW, THE
5 LEVEL OF COORDINATION, COOPERATION THAT WE LOOK FORWARD TO
6 HAVING WITH THE MDL PLAINTIFFS AND YOUR -- AND JUDGE NORTON.

7 IN LOOKING OVER ALL OF THE ISSUES THAT MAY COME UP
8 OR THAT HAVE COME UP TO DATE, IT SEEMS TO ME RIGHT NOW, AND I
9 THINK THIS WAS ECHOED IN SOME CONVERSATIONS THAT I HAD WITH
10 FOLKS THAT ARE INVOLVED IN THE MDL RIGHT NOW, THE CORE ISSUE
11 IS DEPOSITIONS. THERE -- YOU KNOW, HOW DO YOU AVOID --
12 SHOULD YOU AVOID DUPLICATION OF DEPOSITIONS OF THE
13 DEFENDANT'S WITNESSES?

14 AND WE, FROM NEW YORK, KNOWING THAT JUSTICE FREEDMAN
15 ALWAYS HAS THIS AT THE FRONT OF HER CONCERNS, HAVE AGREED AND
16 ARE WILLING TO AGREE THAT THERE SHOULD NOT BE DUPLICATION OF
17 COMPANY WITNESS DEPOSITIONS.

18 WE THINK THAT, HOWEVER, THAT WHATEVER PROCEDURE IS
19 SET UP TO ENSURE THAT THAT DOESN'T HAPPEN, AND TO ENSURE THAT
20 THE RIGHTS OF THE PLAINTIFFS IN NEW YORK ARE PROTECTED, AS
21 WELL AS THE RIGHTS OF THE PLAINTIFFS IN THE MDL, AND TO
22 ASSURE THAT THE DEFENDANT'S CONCERNS ARE MET, WE THINK THAT
23 THERE ARE REALLY SIX BASIC THINGS THAT WE NEED TO AGREE UPON
24 AND HAVE ORDERED THAT WILL DEAL WITH IT ALL, VERY SIMPLY.

25 AND NOW I WISH I DID HAVE MY POWER POINT UP. BUT

1 THE FIRST THING IS COMPLETE PRODUCTION. COMPLETE PRODUCTION
2 OF DOCUMENTS. AS THE COURTS MAY KNOW, THIS DISCOVERY IS
3 CURRENTLY PROCEEDING AND PRIMARILY WILL PROCEED THROUGH WHAT
4 HAS BEEN TERMED A CUSTODIAL PRODUCTION AND DEPOSITION. THAT
5 MEANS -- IT REALLY AND PROBABLY BETTER BE TERMED WITNESS
6 PRODUCTION AND DEPOSITION, AS OPPOSED TO CUSTODIAL. IT JUST
7 MEANS THIS IS THE PERSON THAT WE WANT TO DEPOSE. GIVE ME
8 THAT PERSON'S DOCUMENTS. GIVE ME ALL OF THAT PERSON'S
9 DOCUMENTS, EVERYTHING THEY HAVE. AND WE HAVE A DEFINITION AS
10 TO WHAT ALL OF THE DOCUMENTS ARE. THAT'S BEEN DONE.

11 WHAT WE ARE SUGGESTING IS THAT DEPOSITIONS SHOULD
12 NOT GO FORWARD UNTIL THE DEFENDANTS HAVE CERTIFIED THAT THEY
13 HAVE GIVEN US ALL OF THE DOCUMENTS. THAT'S THE CUSTOM AND
14 PRACTICE THAT HAS DEVELOPED AND THAT OTHER COURTS ARE
15 ORDERING. AND I'M NOT EVEN SURE THEY HAVE A PROBLEM WITH
16 THAT ISSUE, BUT THAT CERTAINLY IS NUMBER ONE.

17 NUMBER TWO -- AND THIS IS WHERE THERE MAY BE A
18 LITTLE CONCERN OR WIGGLE ROOM IN SOME OF THE THINGS THE
19 DEFENDANTS HAVE SUGGESTED -- NUMBER TWO IS WE NEED AMPLE TIME
20 TO LOOK AT THOSE DOCUMENTS.

21 AND SO THAT MEANS THAT IF YOU ARE GOING TO PRODUCE
22 DOCUMENTS FOR THESE DEPOSITIONS, YOU MUST CERTIFY IT. YOU
23 MUST HAVE IT COMPLETE AND CERTIFY IT TO BE COMPLETE AT LEAST
24 30 DAYS BEFORE THE SCHEDULED DEPOSITION DATE.

25 AND HOPEFULLY, YOU KNOW, WE DON'T GET INTO ISSUES IN

1 THE FUTURE THAT THEY ARE GIVING US EVERYTHING ON THE 31ST DAY
2 BEFOREHAND. BUT WE, YOU KNOW, I'M SURE THAT THEY ARE GOING
3 TO ACT IN GOOD FAITH NOT TO DO THAT. BUT THE BOTTOM LINE IS
4 THAT THERE IS A TRICKLE OF DOCUMENTS THAT COMES IN AT THE
5 END, IT NEEDS TO BE AT LEAST 30 DAYS BEFOREHAND. BECAUSE
6 THESE THINGS ARE -- THERE ARE A LOT OF THINGS TO REVIEW. AND
7 AS YOU MIGHT IMAGINE, A LOT OF WORK TO BE DONE TO PREPARE FOR
8 THESE COMPLEX DEPOSITIONS.

9 SO THE SECOND POINT -- I'M SORRY -- THE THIRD POINT
10 IS CALENDAR CONSULTATION. AND WHAT DO I MEAN BY THAT? IF
11 YOU WERE TO ASK ANY LAWYER IN THIS COURTROOM, CAN YOU -- WHAT
12 CAN YOU DO, UM, ON MAY 25TH OR JUNE 1ST? THEY WOULD SAY, I'M
13 BOOKED. I'M BOOKED. I'M BOOKED. WE NEED SOME SIGNIFICANT
14 ADVANCE NOTICE OF WHEN THEY WANT TO PRODUCE THE WITNESS FOR
15 DEPOSITION.

16 I WOULD SUGGEST -- AND WHEN I SAY "I," I MEAN ON
17 BEHALF OF THE NEW YORK PLAINTIFFS -- THAT THERE BE A
18 DISCUSSION AT LEAST 60 DAYS BEFORE THE DEFENDANT'S SCHEDULED
19 DEPOSITION, WHEN THE DEFENDANT'S WITNESS WILL BE PRODUCED AS
20 TO, OKAY, BLAIR, WHO IS GOING TO TAKE YOUR DEPOSITION? WILL
21 THEY BE AVAILABLE ON JUNE 19TH? AND IF IT'S -- SO LONG AS
22 IT'S MORE THAN 60 DAYS OUT, REALLY, EVERYONE SHOULD MAKE
23 THEMSELVES AVAILABLE.

24 AND THEN SOMEONE WILL GET ON THE PHONE AND CALL US
25 IN NEW YORK, AND SAY, THIS DEPOSITION -- WE WANT TO DO THIS

1 DEPOSITION. IT'S MORE THAN 60 DAYS FROM NOW. HERE IS THE
2 DATE WE WANT TO DO IT. WE REALLY NEED YOU TO MAKE SOMEONE
3 AVAILABLE.

4 AND I'M SURE IF I SAID, WELL, YOU KNOW, ACTUALLY,
5 UM, YOU KNOW, IT'S THE END OF TURKEY SEASON, I'M GOING TO BE
6 DOWN IN TEXAS, YOU KNOW, CAN WE DO IT THE FOLLOWING WEEK? I
7 WOULD GET THAT ACCOMMODATION.

8 BUT IN ANY EVENT, WE CERTAINLY NEED -- AND IT SOUNDS
9 LIKE A SIMPLE THING, BUT IT'S REALLY BECOME THE PRACTICAL
10 PROBLEM OF COORDINATION WITH MDLS, THE LACK OF CONSULTATION
11 WITH THE STATE COURT AND THE STATE COURT PLAINTIFFS AS TO
12 WHEN THEY ARE AVAILABLE. AND DEPOSITIONS GET SET AND YOU
13 JUST PLAIN CAN'T GET THERE; YOU HAVE TO BE SOMEWHERE ELSE.

14 SO THAT'S IT, 60 DAYS CONSULTATION. AS I SAID, I
15 THINK IT'S A VERY SIMPLE CONCEPT, WHICH IS -- WHICH I'M
16 THANKFUL FOR SINCE I CAN'T REALLY MASTER ANY COMPLEX
17 CONCEPTS.

18 THE FOURTH POINT IS SIMPLY THAT THE NEW YORK
19 PLAINTIFFS AND THE MDL PLAINTIFFS, AND I THINK THE MDL
20 PLAINTIFFS WOULD AGREE TO THIS, HAVE EQUAL TIME. WE ARE
21 WILLING TO AGREE FOR THE NEW YORK PLAINTIFFS THAT WE, TOO,
22 WILL LIMIT OUR PORTION OF THE DEPOSITION TO SEVEN HOURS, AS
23 JUDGE NORTON HAS ORDERED MDL PLAINTIFFS, PERHAPS THERE IS A
24 STANDING ORDER IN THIS DISTRICT.

25 AND SO IT WOULD BE A SEVEN AND SEVEN, NOT THE DRINK,

1 BUT THAT THE MDL PLAINTIFFS HAVE THEIR SEVEN HOURS, AND WE
2 HAVE OURS, OR VICE VERSA. BUT THAT WE -- THERE IS NO WAY
3 THAT THE -- THAT MOST OF THESE DEPOSITIONS ON THESE VERY
4 COMPLEX ISSUES INVOLVING USUALLY 100,000 PAGES OR MORE,
5 400,000 OR 500,000 PAGES OF DOCUMENTS THAT HAVE BEEN BOILED
6 DOWN, CAN BE DONE EFFECTIVELY IN LESS THAN TWO DAYS, IN OUR
7 MIND. WE ARE GOING TO HAVE DIFFERENT LAWYERS LOOKING AT
8 DIFFERENT THINGS AND FOCUSING IN, BUT A TWO-DAY DEPOSITION,
9 SEVEN HOURS FOR THE MDL, SEVEN HOURS FOR NEW YORK BACK TO
10 BACK, IT WOULD BE BACK TO BACK BECAUSE OF THE COORDINATION
11 POINTS THAT I MADE EARLIER, UM, I THINK THAT THAT WILL BE --
12 WILL REALLY WORK TO GET THIS DONE VERY EFFICIENTLY AND
13 WITHOUT US HAVING TO COME BACK TO THE COURT AND SAY, YOU
14 KNOW, THE SEVEN HOURS, ONE DAY JUST WASN'T ENOUGH, WE NEED
15 ANOTHER DAY. THIS WAY WE START OUT AND WE SPLIT THE
16 DEPOSITION UP AND TAKE IT.

17 THE FIFTH THING THAT I THINK WOULD SIMPLIFY THIS AND
18 JUST REALLY ALLOW NEW YORK PLAINTIFFS TO TAKE THE DEPOSITION,
19 IN COORDINATION WITH THE MDL -- AND THIS IS PROBABLY ONE OF
20 THE BIGGEST STUMBLING OR THE BIGGEST STUMBLING BLOCK THAT WE
21 HAVE -- NEW YORK -- WE -- YOU KNOW, WE ARE NOT ACCUSTOMED TO
22 A SITUATION WHERE ATTORNEYS' WORK PRODUCT AND MENTAL
23 IMPRESSIONS ARE BEING -- ARE BEING GIVEN TO THE OTHER SIDE
24 PRIOR TO A DEPOSITION TAKING PLACE.

25 AND IN OUR VIEW, THE DEFENDANT'S, YOU KNOW,

1 INSISTENCE THAT WE HAVE TO GIVE THEM ALL OF THE DOCUMENTS WE
2 ARE GOING TO USE AT THE DEPOSITION THREE DAYS IN ADVANCE, UM,
3 DOESN'T REALLY DO ANYTHING BUT TIP OUR HAND; ALLOW THEM TO
4 PREPARE THEIR WITNESS FOR MATTERS THAT ARE PROPERLY ADDRESSED
5 BY EFFECTIVE CROSS-EXAMINATION. AND THE BOTTOM LINE IS, I
6 FIND IT HARD TO UNDERSTAND HOW THAT IS NOT WORK PRODUCT.

7 WE HAVE TAKEN SEVERAL HUNDRED THOUSAND DOCUMENTS, WE
8 HAVE BOILED IT DOWN TO LITERALLY 50 DOCUMENTS THAT WE ARE
9 GOING TO USE. WE HAVE SPENT WEEKS, IF NOT MONTHS, TO DO
10 THAT.

11 WE HAVE STRUCTURED QUESTIONING OVER A PERIOD OF A
12 COUPLE OF DAYS OF HOW WE ARE GOING TO DO IT. AND THEN WE'VE
13 GOT TO HAND ALL THE DOCUMENTS OVER TO THE DEFENDANTS. THEY
14 ARE VERY GOOD LAWYERS. IT'S NOT GOING TO TAKE THEM VERY LONG
15 TO FIGURE OUT WHAT THEY ARE DEALING WITH. AND WE DO BELIEVE
16 THAT THAT IS ACTUALLY PROTECTED BY A NEW YORK WORK PRODUCT
17 PRIVILEGE TO HAND OVER DOCUMENTS IN THAT MANNER IN ADVANCE OF
18 DEPOSITIONS.

19 AND THAT IS A VERY, VERY SUBSTANTIAL ISSUE. AND WE
20 WOULD ASK THAT FOR THE NEW YORK PLAINTIFFS, THAT WE NOT HAVE
21 TO TURN OVER THE DOCUMENTS. WE RESPECT AND UNDERSTAND THAT
22 THAT'S ALREADY THE SITUATION FROM THE MDL PLAINTIFFS, BUT FOR
23 OUR HALF OF THE DEPOSITION, WE WOULD LIKE TO MAINTAIN OUR
24 MENTAL IMPRESSIONS TO OURSELVES.

25 THE LAST POINT IS REALLY JUST THAT THE DEPOSITIONS

1 PROCEED UNDER DUAL CAPTIONS, SO THAT WHETHER THE
2 PLAINTIFFS -- WHETHER THE MDL PLAINTIFFS GO FIRST OR THE NEW
3 YORK PLAINTIFFS GO FIRST -- AND I'M SURE THAT WILL ALL WORK
4 OUT, DEPENDING ON WHO THE WITNESS IS, WHO TAKES THE FIRST
5 DAY, WHO TAKES THE SECOND DAY, WE'LL WORK THAT OUT. BUT, YOU
6 KNOW, THERE WILL PROBABLY BE ALTERNATED, OR WE'LL JUST FIGURE
7 OUT WHO THE BEST LAWYER IS TO DO IT. BUT IT SHOULD JUST
8 PROCEED UNDER DUAL CAPTIONS, SO THAT BOTH -- SO THAT THE
9 DEPOSITION CAN BE USED WITHOUT ANY IMPLICATION, UM, FOR
10 EITHER THE MDL PLAINTIFFS OR THE NEW YORK PLAINTIFFS IN
11 EITHER COURT AT TRIAL AND SO FORTH FOR ALL PURPOSES, SUBJECT,
12 OF COURSE TO, YOU KNOW, WHATEVER OBJECTIONS THE DEFENDANTS
13 MAY HAVE IN THE DEPOSITION.

14 SO THAT IS ESSENTIALLY WHAT WE HAVE PROPOSED WITH
15 RESPECT TO THE DEPOSITION PROCEDURES AND COORDINATION.

16 WE THINK THAT IT WILL BE AN IMMENSELY SUCCESSFUL
17 PROCESS IF WE CAN DO THESE SIX THINGS, BECAUSE THESE ARE
18 THE -- THESE ARE THE SIX THINGS THAT WE HAVE DISCOVERED OVER
19 TIME THAT REALLY TRIP EVERYONE UP WHEN IT COMES TO ADEQUATE
20 AND EFFECTIVE COORDINATION OF DEPOSITIONS BETWEEN AN MDL AND
21 A STATE COURT.

22 MR. HAHN: VERY BRIEFLY, YOUR HONOR, FOR THE MDL?

23 THIS IS A CRUCIAL POINT THAT WE HAVE GOT TO GET IT
24 WORKED OUT, Y'ALL NEED TO HELP US GET IT WORKED OUT, BECAUSE
25 WE HAVE NOTICED FOUR DEPOSITIONS. AND BAUSCH & LOMB, I THINK

1 RIGHTFULLY SO, IS REFUSING TO PRODUCE THEM RIGHT NOW, BECAUSE
2 THEY DON'T WANT TO PRODUCE THE PEOPLE TWICE.

3 AT THE SAME TIME, MDL'S PERSPECTIVE, WE ARE MOVING
4 FORWARD AND WE WANT TO TAKE DEPOSITIONS.

5 JUSTICE FREEDMAN: OKAY. HOW FAR IN ADVANCE DID YOU
6 NOTICE THEM?

7 MR. HAHN: UM, I'M NOT -- WELL, I BELIEVE THEY WERE
8 NOTICED 30 DAYS IN ADVANCE. THOSE DATES ARE NOT HARD DATES
9 BECAUSE WE COULDN'T GET DATES FROM THE DEFENDANTS. SO WE DID
10 THAT JUST TO START THE PROCESS.

11 JUSTICE FREEDMAN: OKAY.

12 MR. HAHN: BUT CERTAINLY, WE ARE WILLING TO WORK
13 WITH THE NEW YORK LAWYERS AND WITH MR. PENNOCK.

14 I'LL GO ONE BETTER THAN THAT WITH A LOT OF HIS
15 POINTS. HE TALKED ABOUT YOU'VE GOT TO HAVE COMPLETE
16 PRODUCTION OF DOCUMENTS. WE AGREE. HE WANTS TO HAVE TIME TO
17 LOOK AT THEM. IT MAKES PERFECT SENSE, WE THINK, TO WORK
18 TOGETHER LOOKING AT THE DOCUMENTS. WE HAVE THE VEHICLE
19 AVAILABLE. LET'S POOL OUR RESOURCES TO LOOK THROUGH THE
20 DOCUMENTS, SO THAT WE CAN DO IT IN A TIMELY MANNER; TAKE THE
21 DEPOSITIONS. WE ARE HAPPY TO DO THAT. WE ARE MORE THAN
22 HAPPY TO DO CALENDAR CONSULTS, AND IN FACT, WE NEED TO. I
23 HAVE BEEN GUILTY OF IT, AND MR. PENNOCK HAS BEEN GUILTY, OF
24 SETTING DEPOSITIONS WITHOUT CALLING EACH OTHER.

25 LAST NIGHT, WE SHOOK HANDS AND SAID, WE HAVE BEEN

1 BAD, WE ARE NOT GOING TO DO THAT ANYMORE. WE ALREADY AGREED
2 THAT WE ARE GOING TO DO BETTER. AND WE WILL CERTAINLY WORK
3 WITH BAUSCH & LOMB.

4 MR. PENNOCK: I DIDN'T AGREE THAT I WON'T BE BAD
5 ANYMORE ON ALL COUNTS.

6 MR. HAHN: NO. NO.

7 MR. PENNOCK: OKAY.

8 MR. HAHN: ONE THING THAT TROUBLES ME, THOUGH, IS
9 THAT MR. PENNOCK SAYS THAT HE WANTS EQUAL TIME IN
10 DEPOSITIONS. WHY CUT THE DEPOSITION UP? THEY HAVE VERY
11 SKILLED LAWYERS THAT CAN TAKE WONDERFUL DEPOSITIONS. AND I
12 AM MORE THAN HAPPY TO SAY, WE GOT WITNESS X. WE'VE GOT TO
13 TAKE THAT DEPOSITION. LET'S WORK TOGETHER, GUYS. FIGURE OUT
14 WHO IS GOING TO TAKE THE DEPOSITION AND LET'S TAKE IT, AND
15 THE OTHER SIDE SECOND CHAIR IT. LET'S JUST TAKE THE
16 DEPOSITION. THAT JUST SEEMS TO ME TO MAKE A LOT MORE SENSE
17 THAN CUTTING IT UP. AND THEN WE HAVE ISSUES OF, WELL, THAT
18 QUESTION HAS ALREADY BEEN ASKED, AND WAS THAT ASKED BY LAWYER
19 A OR BY LAWYER B, JUST DOESN'T MAKE ANY SENSE TO ME.

20 PRODUCING THE DOCUMENTS THREE DAYS IN ADVANCE.
21 THAT'S SOMETHING THAT WE HAVE AGREED TO. UM, EVERYBODY IN
22 THIS ROOM THAT LITIGATES KNOWS THAT TYPICALLY YOU'VE GOT TO
23 PRODUCE DOCUMENTS IN ADVANCE OF THE DEPOSITION IN THESE TYPES
24 OF COMPLEX CASES BECAUSE THERE IS SO MANY DOCUMENTS.

25 HOWEVER, THAT DOESN'T MEAN YOU HAVE TO PRODUCE ALL

1 OF THE DOCUMENTS, BECAUSE DOCUMENTS USED FOR IMPEACHMENT IN
2 THE DEPOSITION DON'T HAVE TO BE PRODUCED EARLIER.

3 AND SO THERE ARE SOME SAFEGUARDS FOR TAKING AN
4 EFFECTIVE CROSS-EXAMINATION AND MAKING SURE THAT YOU CAN GET
5 TRUTHFUL ANSWERS OUT OF THE WITNESS.

6 I PERSONALLY DON'T SEE THAT AS A HUGE STUMBLING
7 BLOCK ONE WAY OR THE OTHER. WE'LL DO IT EITHER WAY.
8 WHATEVER YOUR HONORS BELIEVE IS THE PROPER WAY TO PROCEED,
9 WE'LL PROCEED.

10 AND DUAL CAPTIONS, ABSOLUTELY. FROM THE MDL'S
11 PERSPECTIVE, WE WANT TO WORK WITH THE NEW YORK LAWYERS, UM,
12 IF THEY ARE WILLING TO, AND WE ARE READY TO MOVE FORWARD. IF
13 THEY WANT TO GO ON SEPARATE TRACKS, THAT'S FINE, TOO, BUT WE
14 ARE MOVING DOWN THE ROAD.

15 THE COURT: WELL, DOESN'T THE DUAL CAPTIONING SOLVE
16 THE PROBLEM OF SEVEN HOURS EACH, OR EACH ONE OF YOU TAKING
17 THE DEPOSITION, IS DUAL CAPTIONING YOU JUST START OFF AND --

18 MR. HAHN: I WOULD THINK SO, YOUR HONOR.

19 AND I WOULD BELIEVE THAT WE WOULD BE ABLE TO WORK
20 TOGETHER TO FIGURE OUT WHO IS GOING TO TAKE THE DEPOSITION
21 FOR A PARTICULAR WITNESS. I'VE GOT FOLKS ON MY SIDE THAT ARE
22 EXPERTS IN CERTAIN AREAS. THEY HAVE GOT GUYS ON THEIR SIDE
23 THAT ARE EXPERTS IN CERTAIN AREAS. AND IT MAKES SENSE FOR US
24 TO USE THE EXPERTISE FROM THE LARGER PLAINTIFF LAWYER POOL TO
25 TAKE EFFECTIVE DEPOSITIONS.

1 THE COURT: IS THERE ANY -- EXCUSE ME. I'M SORRY.

2 JUSTICE FREEDMAN: OH, NO.

3 THE COURT: IS THERE ANY OBJECTION BY THE DEFENDANTS
4 TO HAVE DIFFERENT LAWYERS DEPOSING THE SAME WITNESS ON
5 DIFFERENT ISSUES?

6 MR. COLE: NO, YOUR HONOR. NOT WITHIN REASON. I
7 MEAN, WE DON'T WANT TO HAVE TEN LAWYERS DO A DEPOSITION. BUT
8 WE UNDERSTAND THAT THEY'VE GOT TWO SETS OF LAWYERS AND THAT
9 BOTH OF THEM WANT TO ASK QUESTIONS, AND THAT'S FINE. WE'VE
10 ALREADY TALKED ABOUT THAT.

11 MR. BECNEL: MAY IT PLEASE THE COURT?

12 LET ME GIVE YOU A SOLUTION TO IT THAT WAS JUST USED
13 IN THE VIAGRA LITIGATION.

14 THE COURT: YOU'VE GOT TO IDENTIFY YOURSELF,
15 MR. BECNEL.

16 MR. BECNEL: DANIEL BECNEL FROM LOUISIANA.

17 JUDGE MAGNUSON, THE SENIOR JUDGE IN MINNESOTA IN
18 VIAGRA, APPOINTED A FORMER STATE JUDGE TO ATTEND ALL
19 DEPOSITIONS AND TO BE THE SETTLEMENT MASTER. AND TO MAKE
20 CALLS ON DOCUMENTS, AND TO SET THE SCHEDULES FOR WHEN THE
21 DEPOSITIONS ARE GOING TO BE. BECAUSE I KNOW ALMOST EVERY
22 LAWYER IN THIS ROOM, AND IF YOU ASK ANY OF US, WELL, WE WANT
23 TO DO IT ON JULY 6TH, SOMEBODY IS GOING TO HAVE A CONFLICT.

24 AND IT JUST MAKES SO MUCH SENSE FOR THE TWO OF YOU,
25 LIKE WE ARE DOING IN VIAGRA, TO APPOINT SOMEBODY YOU HAVE

1 CONFIDENCE IN, USUALLY A RETIRED FEDERAL JUDGE OR STATE JUDGE
2 THAT YOU HAVE CONFIDENCE IN, AND THAT PERSON CRACKS THE WHIP;
3 SITS IN THE DEPOSITIONS; RULES ON OBJECTIONS RIGHT THERE OF,
4 I DON'T WANT YOU TO ANSWER, AND SPEAKING OBJECTIONS,
5 ETCETERA. AND IT HAS WORKED SO BEAUTIFULLY IN BOTH NEW YORK
6 AND IN LONDON, WHEN WE TOOK THOSE DEPOSITIONS JUST A FEW
7 WEEKS AGO.

8 AND WHAT HELPS THE TWO OF YOU IS THAT JUDGE IS YOUR
9 EYES AND EARS ON EVERYTHING THAT'S THAT'S GOING ON: ISSUES
10 THAT ARE IMPORTANT; ISSUES THAT ARE FRIVOLOUS AND CAN HELP,
11 WHEN YOU HAVE A SPECIAL MASTER, LIKE YOU DID WITH THIS
12 COCKTAIL PARTY LAST NIGHT, WHERE EVERYBODY IS KIND OF GETTING
13 ALONG, WHEN YOU HAVE THAT SPECIAL MASTER SITTING THERE
14 WATCHING WHAT'S HAPPENING, HE STARTS TO BREAK DOWN THE ISSUES
15 AND TELLS THE PLAINTIFFS, HEY, YOU ARE KIND OF WASTING TIME
16 DOING THIS, WHY DON'T YOU GO HERE? AND THE SAME THING WITH
17 THE DEFENDANTS.

18 I THOUGHT IT WAS A HECK OF A SYSTEM. WHEN THEY SAID
19 THAT, WELL -- I FIGURED, WELL, IT'S GOING TO COST US MORE
20 MONEY TO DO IT, BUT IT WORKS BEAUTIFULLY. THAT SPECIAL
21 MASTER REPORTS ONLY TO YOU. YOU CONCUR IN THE INDIVIDUAL.
22 AND, YOU KNOW -- AND IT FACILITATES SETTLEMENT DISCUSSIONS
23 DURING THE WHOLE LITIGATION. AND HE SITS DOWN WITH US, AND
24 SAYS, OKAY, TO SCHEDULE THE DEPOSITION IS GOING TO BE THIS
25 WEEK FOR DEPOSITIONS. NOW, PLAINTIFFS AND DEFENDANTS, YOU

1 GIVE US THE PEOPLE THAT ARE GOING TO TAKE THEM.

2 MR. PENNOCK: I NOW WITHDRAW MY OBJECTION TO BEING
3 OUTNUMBERED NOW THAT DANNY HAS SPOKEN. AND I WOULD JUST LIKE
4 TO REPLY TO THAT QUICKLY, JUDGE.

5 I'M NOT -- I HAVE GREAT RESPECT FOR DANNY. I'VE
6 KNOWN HIM FOR MANY, MANY YEARS. I'M NOT FAMILIAR PRECISELY
7 WITH THAT SPECIAL MASTER SITTING IN ON EVERY DEPOSITION
8 SITUATION.

9 IT DOES STRIKE ME AS SOMETHING THAT WOULD BE AN
10 IMMENSELY EXPENSIVE PROPOSITION, AND THAT -- AND ADDITIONAL
11 TRANSACTION COSTS THAT WE HAVE TO BEAR IN THESE CASES. AND I
12 CERTAINLY, IN ALL THE DEPOSITIONS THAT WE'VE HANDLED, I HAVE
13 NEVER HAD TO HAVE A MONITORED DEPOSITION. I THINK THIS MAY
14 BE A UNIQUE SITUATION THAT IT HAPPENED IN THAT PARTICULAR
15 LITIGATION. I DON'T KNOW IF THAT'S BECAUSE THERE WERE A LOT
16 OF PROBLEMS.

17 THE COURT: THAT'S WHAT I WAS GOING TO ASK, WHETHER
18 IT WAS REACTIVE OR PROACTIVE?

19 MR. PENNOCK: I DON'T THINK IT WAS SOMETHING YOU
20 START OUT WITH.

21 MR. BECNEL: NO PROBLEMS. IN FACT, THEY DO IT A
22 LOT. THEY DO IT A LOT IN MINNESOTA IN SOME VERY COMPLEX
23 CASES. AND, I MEAN, IT'S JUST -- IT WAS JUST SO HELPFUL THAT
24 YOU DON'T HAVE ONE ARGUMENT BECAUSE THE SPECIAL -- IT WOULD
25 BE LIKE YOU SITTING DOWN WITH US, JUDGES, AND SAYING, OKAY,

1 WE ARE GOING TO SET THE SCHEDULED -- YOU'VE GOT MORE
2 IMPORTANT THINGS TO DO.

3 AND THIS CASE IS WORTH SUCH A LARGE AMOUNT OF MONEY,
4 THE TRANSACTION COSTS OF WHAT THIS IS GOING TO COST IS
5 NEGLIGIBLE. AND --

6 MR. HAHN: YOUR HONOR, PERHAPS WHAT WE COULD DO IS,
7 MR. BECNEL MAKES A GOOD POINT, IS IF WE HAVE A PROBLEM, WE
8 CAN RE-VISIT IT, AND AT THAT POINT HAVE A SPECIAL MASTER
9 ASSIGNED.

10 MR COLE: YOUR HONOR, WE AGREE. WE DON'T HAVE A
11 PROBLEM YET. IF WE DO HAVE A PROBLEM, THAT'S CERTAINLY A
12 SOLUTION WE OUGHT TO LOOK AT.

13 JUSTICE FREEDMAN: COULD I JUST ASK A QUESTION?
14 THERE ARE THESE HUNDRED CASES OUT THERE FROM DIFFERENT
15 PLAINTIFFS AND DIFFERENT PLACES. ARE YOU ENVISIONING THE
16 PLAINTIFFS IN, OR COUNSEL IN THOSE CASES PARTICIPATING, OR SO
17 FAR WE JUST HAVE TWO NEW YORK --

18 MR. KAPLAN: I'M SORRY, YOUR HONOR. HARVEY KAPLAN.
19 THERE ARE NOT 100 CASES OUT THERE FOR PLAINTIFFS IN OTHER
20 JURISDICTIONS, OR IN THIS ROOM. THERE ARE -- I THINK THE
21 NUMBER IS 27.

22 JUSTICE FREEDMAN: OH, OKAY. YOU CAN MANAGE THAT.

23 MR. COLE: WE ALL WOULD LIKE TO COORDINATE THIS.
24 AND WE ENVISION THAT HOPEFULLY IF WE GET SOMETHING THAT WE
25 CAN ALL LIVE WITH, THAT IT WILL BE FAIR TO THE OTHER

1 PLAINTIFFS AND THEY WILL ALL AGREE AND WE CAN JUST MOVE
2 FORWARD. AND THAT'S -- THE MORE EFFICIENT THIS IS FOR
3 EVERYBODY, THE BETTER IT IS.

4 IF I COULD RESPOND TO MR. PENNOCK BRIEFLY? AND I
5 THINK THIS IS ONE OF THE GREAT THINGS ABOUT HAVING THIS JOINT
6 HEARING AND US GETTING TOGETHER LAST NIGHT. OF THE SIX
7 THINGS THAT HE TALKED ABOUT, WE AGREE TO FIVE OF THEM.

8 AND I THINK WE SHOULD MAYBE HAVE HAD SOME OF THESE
9 DIALOGUES SOONER AND GOTTEN HERE SOONER, BUT WE ARE WHERE WE
10 ARE, AND WE'VE AGREED, WHICH IS GREAT.

11 THE ONLY ONE WE DISAGREED WITH MR. PENNOCK ON REALLY
12 IS THE LOCAL RULE ON HOW WE HANDLE DOCUMENTS IN THE
13 DEPOSITION. THAT IS -- AND JUDGE NORTON KNOWS A LOT MORE
14 ABOUT THIS THAN I DO. THIS IS A RULE THAT'S A SOUTH CAROLINA
15 RULE, IT'S BEEN ADOPTED BY OUR FEDERAL COURTS. IT WAS THE
16 RESULT OF A JOINT TASK FORCE APPOINTED BY OUR CHIEF JUSTICE,
17 WHICH HAS PLAINTIFF PERSONAL INJURY LAWYERS, DEFENSE PERSONAL
18 INJURY LAWYERS AND CRIMINAL LAWYERS ALL INVOLVED. THEY
19 WORKED FOR, I THINK, A YEAR TO COME UP WITH THIS RULE. IT
20 DOESN'T SAY ACTUALLY YOU HAVE TO GIVE THE DOCUMENTS TO THE
21 DEPONENT PRIOR TO THE DEPOSITION. IT JUST SAYS THAT IF YOU
22 DON'T, WHEN YOU SHOW THE PARTY THE DOCUMENT, YOU CAN ADJOURN
23 THE DEPOSITION, AND THE LAWYERS GET TO GO TALK TO THEM ABOUT
24 IT.

25 AND THE OTHER PART OF THAT RULE IS, OTHER THAN THAT,

1 YOU CAN'T TALK TO YOUR WITNESS ONCE A DEPOSITION STARTS. SO
2 IT MAKES IT PRETTY FAIR, YOU KNOW. IT KEEPS ONE SIDE FROM
3 SORT OF AMBUSHING A WITNESS WITH A DOCUMENT WITHOUT LETTING
4 THEM TALK TO THEIR LAWYER ABOUT IT. IT TRADES OFF THAT YOU
5 CAN'T TALK TO YOUR LAWYER DURING THE DEPOSITION PART, OR IF
6 YOU CAN'T DO THAT, WELL, GIVE ME THE DOCUMENTS BEFOREHAND.
7 AND IT HAS WORKED.

8 THERE WAS A LOT OF SQUAWKING FROM ALL SIDES, I
9 THINK, WHEN THE RULE WAS ADOPTED IN SOUTH CAROLINA. IT'S
10 WORKED WELL. WE KNOW IT WORKS WELL. UM, IT'S PART OF THE
11 SAME RULE, WHICH TALKS ABOUT CIVILITY IN THE DEPOSITIONS.
12 AND WE ARE ALL COMFORTABLE WITH IT. AND I THINK IT'S A TRIED
13 AND TRUE RULE. WE HAVE TO HAVE ONE RULE. WE ALL AGREE WE
14 HAVE TO HAVE ONE RULE BECAUSE WE CAN'T TAKE DEPOSITIONS UNDER
15 TWO SETS OF RULES. WE JUST THINK THAT'S A GOOD RULE. IT'S
16 WORKED AND WE WOULD LIKE TO ABIDE BY IT.

17 AS TO HOW THE PLAINTIFFS WANT TO DIVIDE THEIR TIME
18 TAKING DEPOSITIONS, YOU KNOW, THAT'S SORT OF THEIR THING TO
19 WORRY ABOUT. WE DON'T HAVE AN OBJECTION, BECAUSE WE
20 UNDERSTAND THAT THERE ARE TWO GROUPS OF LAWYERS. IF THEY
21 WANT TO DESIGNATE A LEAD LAWYER AND A FOLLOW-UP LAWYER, WE
22 ARE NOT GOING TO SAY, ONLY ONE LAWYER CAN ASK QUESTIONS. WE
23 UNDERSTAND THAT THAT WOULD NOT BE PRACTICAL IN THIS
24 SITUATION. AND, AGAIN, WE WANT TO COOPERATE AND MOVE THINGS
25 FORWARD.

1 AS TO THE OTHER THINGS, YOU KNOW, THE PRODUCTION OF
2 DOCUMENTS, WE AGREE TO, YOU KNOW, SEVEN HOURS A DAY FOR TWO
3 DAYS, WE CAN AGREE TO, HOWEVER THEY CUT THAT UP, THAT'S OKAY
4 WITH US. WE LIKE THE CONSULTATION, THAT MAKES OUR LIVES
5 EASIER. WE DON'T HAVE ANY PROBLEM WITH THAT. THAT'S WHAT WE
6 ARE DOING IN THE MDL. LOVE TO DO IT WITH THEM. WE WOULD
7 LIKE TO COORDINATE THAT.

8 SO ALL OF THE OTHER THINGS HE SAID, EXCEPT FOR HOW
9 WE DEAL WITH THIS RULE OF WHAT DOCUMENTS YOU GIVE, WE ARE
10 COMFORTABLE WITH. AND WE JUST THINK THAT YOU HAVE TO HAVE A
11 RULE ON THE DOCUMENTS. AND WE LIKE AND HAVE SEEN THE SOUTH
12 CAROLINA LOCAL RULE WORK BETTER. WE THINK THAT'S A GOOD
13 RULE. AND THE MANUAL FOR COMPLEX LITIGATION TALKS ABOUT THE
14 SAME SORTS OF ISSUES, GIVING THE DISCOVERY PRIOR TO
15 DEPOSITIONS. THEY GO BETTER. THEY ARE BETTER. THEY GO
16 BETTER. WE THINK IT'S A GOOD IDEA.

17 THE COURT: SO IF I UNDERSTAND CORRECTLY, THE NEW
18 YORK PLAINTIFFS, THE MDL PLAINTIFFS AND THE DEFENDANTS AGREE
19 THAT BEFORE THERE IS A COMPLETE PRODUCTION OF DOCUMENTS AND A
20 CERTIFICATION, THAT YOU HAVE GIVEN ALL DOCUMENTS PRIOR TO THE
21 DEPOSITION?

22 MR. COLE: RIGHT.

23 THE COURT: OKAY.

24 MR. PENNOCK: IT'S 30 DAYS PRIOR.

25 MR. COLE: THIRTY DAYS.

1 THE COURT: WELL, THE CERTIFICATION THAT, THAT
2 CERTIFICATION AND PRODUCTION --

3 MS. WOODBURY: YOUR HONOR, COULD I CLARIFY? I THINK
4 WHAT WE ARE CERTIFYING -- I'M SORRY -- MARIE WOODBURY FOR
5 DEFENDANT BAUSCH & LOMB -- THAT WE HAVE PRODUCED ALL
6 DOCUMENTS FROM THE CUSTODIAL FILES OF THAT WITNESS.

7 IS THAT WHAT YOU ARE ASKING FOR, PAUL?

8 MR. PENNOCK: THAT'S WHAT WE ARE ASKING FOR, AT
9 LEAST 30 DAYS. WE WOULD LIKE THE CERTIFICATION AT LEAST
10 30 DAYS.

11 THE COURT: THIRTY DAYS, OKAY. THAT THERE WILL
12 BE -- EVERYBODY IS AGREEING WITH THE CALENDAR CONSULTATION OF
13 60 DAYS?

14 MR. PENNOCK: YES, YOUR HONOR.

15 MR. COLE: YES, YOUR HONOR.

16 THE COURT: THAT THE DEFENDANTS AND THE -- AGREED TO
17 SEVEN HOURS BACK TO BACK DAYS.

18 MR. COLE: TWO DAYS.

19 THE COURT: TWO DAYS.

20 MR. COLE: RIGHT.

21 THE COURT: AND I'M NOT SURE WHETHER THE MDL
22 PLAINTIFFS AND THE NEW YORK PLAINTIFFS, SINCE THEY ARE GOING
23 TO BE JOINTLY DUAL CAPTIONED, IS THERE ANY FRICTION BETWEEN
24 THE TWO ON THAT NOW?

25 MR. PENNOCK: NO, JUDGE.

1 MR. HAHN: I'M SURE THERE WILL BE IN A LITTLE BIT.
2 WE'LL TAKE CARE OF THAT IN THE PARKING LOT.

3 MR. PENNOCK: NOW WE ARE TALKING.

4 THE COURT: THAT'S WHEN HE'S GOING TO BE BAD, RIGHT?

5 MR. PENNOCK: JUDGE, IF WE CAN ADJOURN NOW, WE'LL
6 HAVE EVERYTHING WORKED OUT.

7 THE COURT: NO PROBLEM. I'LL BE GLAD TO DO THAT.

8 AND THAT EVERYBODY AGREES TO DEPOSITIONS ON DUAL
9 CAPTIONS.

10 SO WHAT WE'LL HAVE TO DECIDE, WHEN WE TALK ABOUT IT,
11 IS WHETHER THE THREE-DAY PRIOR TO THE DEPOSITION DOCUMENT
12 PRODUCTION, EXCEPT FOR IMPEACHMENT DOCUMENTS, THAT'S -- YOU
13 AGREE WITH THAT, RIGHT?

14 MR. COLE: I THINK SO. I HAVE TO GO BACK AND GET
15 THE RULE. I'LL TAKE MR. HAHN'S WORD, IF THAT'S WHAT HE SAYS.

16 THE COURT: OKAY. AND WHETHER THAT -- WHETHER THERE
17 IS A NEW YORK RULE WHICH CONFLICTS WITH THE SOUTH CAROLINA
18 RULE ON THAT. SO WE'LL HAVE TO DEAL WITH THAT.

19 MR. PENNOCK: WE'LL HAVE TO DEAL WITH THAT.

20 THE COURT: OKAY.

21 MR. PENNOCK: THAT'S FINE, YOUR HONOR.

22 THE COURT: DID I STATE EVERYTHING ALL RIGHT?

23 MR. PENNOCK: THAT'S EXACTLY RIGHT.

24 PERHAPS -- COULD I ASK IF WE COULD JUST SUBMIT A
25 VERY SHORT BRIEF ON THAT ISSUE TO YOUR HONORS UNDER NEW YORK

1 LAW?

2 THE COURT: SURE. SEND ME A COPY.

3 JUSTICE FREEDMAN: YOU CAN, BUT I KIND OF -- I HAVE
4 STRONG FEELINGS -- I HAVE FEELINGS ON IT ALREADY. AND I'M
5 NOT SURE YOU WOULD PERSUADE ME ONE WAY OR THE OTHER. YOU CAN
6 DO IT.

7 MR. PENNOCK: OKAY, THANK YOU.

8 JUSTICE FREEDMAN: BUT LET ME JUST MAKE IT CLEAR ON
9 THE SEVEN AND SEVEN, UM, I AGREE WITH MDL COUNSEL THAT THAT
10 MAY NOT MAKE SENSE. ELEVEN AND FOUR MIGHT BE BETTER. I
11 MEAN, AND YOU SHOULD FIGURE OUT WHO IS GOING TO BE THE LEAD
12 LAWYER IN ANY DEPOSITION AND YOU CAN WORK IT OUT, ALTERNATE,
13 IF NEED BE.

14 MR. PENNOCK: I THINK THAT'S EXACTLY RIGHT.

15 JUSTICE FREEDMAN: BUT THEN -- AND JUST NOT COVER
16 THE SAME TOPICS, MAKE SURE YOU DON'T.

17 AND I WOULD SAY THAT SPLITTING IT SEVEN AND SEVEN IS
18 PROBABLY NOT A GOOD IDEA. I WOULD SAY MAYBE 12 AND TWO, OR
19 SOMETHING LIKE THAT, OR 11 AND FOUR.

20 THE COURT: DIVIDE IT UP ANY WAY YOU WANT.

21 MR. PENNOCK: WITH THE SEVEN AND SEVEN GOING IN, IT
22 JUST GIVES US A FRAMEWORK WITHIN WHICH WE CAN DECIDE HOW IT'S
23 ACTUALLY GOING TO GO.

24 BUT I UNDERSTAND, YOUR HONOR, AND THE WHOLE IDEA OF
25 TWO EXAMINERS, YOU WANT TO AVOID DUPLICATIVE QUESTIONING,

1 EVEN IF YOU ARE COVERING THE SAME TOPIC, YOU MAY SUPPLEMENT
2 THAT TOPIC, BUT YOU WANT TO AVOID DUPLICATIVE QUESTIONING AND
3 NOT --

4 JUSTICE FREEDMAN: YEAH. AND IF YOU CONSULT WITH
5 EACH OTHER BEFORE, YOU MAY BE ABLE TO RESOLVE ANY ISSUES
6 BEFORE. THE TWO LAWYERS WHO ARE GOING TO DEPOSE THE WITNESS
7 SHOULD TALK TO EACH OTHER BEFORE.

8 MR. PENNOCK: I'M SURE THAT WILL PROCEED, JUDGE.

9 JUSTICE FREEDMAN: OKAY.

10 THE COURT: BASED ON THAT, YOU DON'T HAVE ANY
11 PROBLEM WITH DIVIDING UP THE 14 HOURS FOR 11 HOURS FOR MDL OR
12 11 HOURS FOR NEW YORK AND THREE HOURS FOR THE OTHER, JUST AS
13 LONG AS IT STAYS 14 HOURS, YOU DON'T CARE?

14 MR. COLE: WE DON'T CARE. WE DON'T WANT TEN LAWYERS
15 DOING IT, BUT WE UNDERSTAND.

16 MR. PENNOCK: UM, YOUR HONOR, THE LAST ISSUE THAT WE
17 HAVE IS WITH RESPECT TO CMO 6.

18 THIS IS A -- THIS WAS THE VERY COMPLEX ORDER, THE
19 ELECTRONIC DISCOVERY PROTOCOL ORDER, AND HOW THE DOCUMENTS
20 WILL BE PRODUCED ELECTRONICALLY, WHAT WOULD BE THE
21 DEFINITIONS FOR THE DOCUMENTS, AND WHAT WE ARE -- WHAT ARE WE
22 ENTITLED TO. WHAT ARE THE -- WHAT DO THEY NOT HAVE TO DO?
23 WE HAVE WORKED THROUGH THIS FOR WEEKS. ERIC ANIOLAK AND I
24 HAVE WORKED ON THIS, HE'S FROM SHOOK HARDY FOR THE
25 DEFENDANTS. AND WE HAVE REALLY NARROWED IT TO TWO ISSUES,

1 AND I MEAN, WE MUST HAVE HAD 100 WHEN WE STARTED. SO WE ARE
2 DOWN TO TWO. THEY ARE NOT INSIGNIFICANT, THOUGH.

3 THE -- WE HAD A DEFINITION THAT WE WORKED OUT. WE
4 HAVE A -- IT'S IN THE VERY FIRST PARAGRAPH OF THE ORDER THAT
5 WE'VE GOTTEN DOWN TO. AND THAT DEFINITION SAYS THAT THE
6 DOCUMENTS, AS TO ALL DERIVATIONS -- THE DOCUMENTS IS ALSO
7 DEFINED -- "DOCUMENTS AS TO ALL DERIVATIONS, MARKETED AND
8 UNMARKETED OF THE CONTACT LENS SOLUTION KNOWN AS RENU
9 MOISTURELOC, SHALL BE PRODUCED ESSENTIALLY." THAT'S THE
10 QUOTE. WE'VE AGREED TO THAT LANGUAGE.

11 THE PROBLEM THAT WE THEN RAN INTO, IS THAT AS YOU
12 GET TO THE, LITERALLY THE NEXT PAGE, THE DEFENDANTS HAVE SOME
13 LANGUAGE IN THERE THAT WE THINK IT'S SORT OF POSSIBLY
14 CHANGING THE DEFINITION, THE OVERALL AND SIMPLE DEFINITION,
15 THAT WE'VE ALREADY AGREED TO.

16 YOU KNOW, AS I WAS TALKING WITH THE DEFENDANTS AND
17 MY COLLEAGUES, I SAID, IT'S LIKE, YOU'VE CREATED, LIKE, AN
18 IRS REGULATION. ALL OF A SUDDEN YOU HAVE A DEFINITION AND
19 THEN YOU'VE GOT, WELL, THIS LITTLE LANGUAGE IN HERE, AND THIS
20 LITTLE LANGUAGE IN HERE, AND NOW YOU REALLY DON'T KNOW WHAT
21 IS -- WHAT HAS BEEN DEFINED.

22 AND SO IT'S REALLY JUST THESE SORT OF EXTRA ADD-ONS
23 TO THE DEFINITION. THERE ARE WORDS THAT COME UP IN THE
24 DOCUMENT, "EXISTING AND ACCESSIBLE". WELL, WHAT DOES THAT
25 MEAN? IF THE DOCUMENT EXISTS, IF YOU HAVE IT, PRODUCE IT.

1 IF YOU DON'T HAVE IT, DON'T PRODUCE IT. THAT'S ALL THAT WE
2 ARE ASKING.

3 AND THEN YOU ASK, WELL, IF IT'S EXISTING, UM, IF IT
4 WAS EXISTING AS OF THE DATE OF A PRESERVATION ORDER THAT WAS
5 ENTERED IN THE LOUISIANA COURT ON JULY 5TH, 2006, YOU KNOW,
6 YOU START PARSING IT OUT. AND AFTER A WHILE YOU GO, WAIT A
7 SECOND. WHAT IS IT THAT YOU ARE OBLIGATED TO PRODUCE? AND
8 WE ARE CONCERNED THAT WE ARE GOING TO END UP WITH A DOCUMENT
9 PRODUCTION THAT IS SUBTOTAL.

10 SO, AGAIN, AND HAD WE THE OPPORTUNITY TO SEE MY NICE
11 SLIDES WITH THE GREAT BACKGROUND AND THE YELLOW PRINT, UM, IT
12 WOULD, YOU KNOW, SIMPLICITY, DO YOU HAVE THE DOCUMENTS? DO
13 THEY MEET THE DEFINITION THAT I SAID WE'VE ALREADY AGREED TO?
14 WE'VE AGREED TO THAT DEFINITION AT THE FRONT OF THE ORDER.
15 DO YOU HAVE THEM? DOES IT MEET THE DEFINITION? YES, WE HAVE
16 THEM. OKAY. DOES IT MEET THE DEFINITION? YES. WELL, THEN
17 PRODUCE THE DOCUMENTS. WE DON'T -- I DON'T EVEN KNOW IF THEY
18 ARE ACCESSIBLE OR ANYTHING. YOU HAVE THEM. IF YOU HAVE
19 THEM, THEN YOU'VE GOT -- THEN THEY ARE ACCESSIBLE. THERE IS
20 A WAY TO GET THEM. AND WE CAN FIGURE OUT AND ARGUE ABOUT,
21 YOU KNOW, WHEN AND THE TIMING, BECAUSE IT'S HARDER TO GET
22 THOSE DOCUMENTS THAN IT IS TO GET THE OTHER SET, THAT'S --
23 THAT'S FINE. THOSE ARE ISSUES THAT I KNOW THAT WILL IMPACT
24 TIME. BUT IF YOU HAVE THE DOCUMENTS, OR YOU HAVE THE
25 INFORMATION, OR YOU HAVE THE DATA AND IT MEETS THE

1 DEFINITION, RENU WITH MOISTURELOC, MARKETED AND UNMARKED
2 DERIVATIONS, PLEASE LET US HAVE THE DOCUMENTS. IF YOU DON'T
3 HAVE THEM, IF THEY DON'T EXIST, THEN YOU DON'T HAVE TO
4 PRODUCE THEM. WE ARE NOT ASKING THEM TO PRODUCE SOMETHING
5 THAT DOESN'T EXIST.

6 SO IT REALLY DOES AGAIN COME TO SIMPLICITY, WHICH I
7 THINK WILL RESULT IN FAR FEWER DISPUTES AND ISSUES GOING INTO
8 THE FUTURE.

9 AND SO THE ORDER THAT WE WILL BE PROPOSING TO YOUR
10 HONOR, JUSTICE FREEDMAN, WILL HAVE THIS SIMPLE DEFINITION AND
11 SIMPLE REQUIREMENT OF PRODUCTION OF THAT DATA INFORMATION.

12 JUSTICE FREEDMAN: AM I RIGHT, THE ONLY DIFFERENCE
13 IS THE WORD "ACCESSIBLE"?

14 MR. PENNOCK: WELL, THERE ARE A NUMBER OF WORDS
15 THAT, IN SOME OF THE PARAGRAPHS THAT WE HAVE CONCERN ABOUT,
16 UM, THAT -- THERE IS A PHRASE "EXISTING AND ACCESSIBLE", UM,
17 THERE IS A -- THEY TALK -- THERE IS A PHRASE, A SENTENCE
18 REGARDING THIS PRESERVATION ORDER THAT WAS ENTERED IN JULY --
19 I BELIEVE IT WAS JULY 5TH, 2006, IN LOUISIANA, THE LOUISIANA
20 COURT IN A RENU CASE. AND IT SEEMS AS THOUGH THEY ARE TRYING
21 TO TIE WHATEVER THEY HAVE TO PRODUCE AS TO WHATEVER WAS
22 EXISTING AT THAT TIME. IT'S UNCLEAR.

23 THE PROBLEM IS, ALTHOUGH THEY HAVE MADE TREMENDOUS
24 EFFORTS TO EXPLAIN TO US WHAT THEY MEAN BY THESE THINGS, WE
25 HONESTLY DON'T UNDERSTAND WHAT THEY MEAN. AND NOT THAT WE

1 ARE SUSPICIOUS OF ANY ILL MOTIVE ON THEIR PART, BUT WE ARE
2 CONCERNED THAT SOME WAY OR ANOTHER, WE WILL GET NOT THE TOTAL
3 NUMBER OF DOCUMENTS AND NOT THE TOTAL INFORMATION THEY ARE
4 OBLIGATED TO PRODUCE UNDER THE AGREED-TO DEFINITION, BUT
5 SOMETHING LESS THAN THAT. AND THAT IS THE CENTER OF THE
6 CONCERN.

7 SO THE SECOND ISSUE ON CMO 6 IS THIS ONE THAT WE
8 JUST CAN'T SEEM TO PUT TO BED. AND IT'S THE PAGE BREAKS
9 ISSUE. WHAT THIS MEANS IS THAT YOU HAVE -- YOU TAKE THESE
10 DOCUMENTS, THESE HARD COPY AND ELECTRONIC DOCUMENTS -- I'M
11 SORRY -- YOU TAKE THESE DOCUMENTS THAT EXIST IN ELECTRONIC
12 FORM. YOU SUCK THE INFORMATION OUT OF THEM, AND YOU GIVE
13 THEM TO US. SO YOU SUCK IT OUT OF YOUR ELECTRONIC, WHATEVER
14 COMPUTER THAT YOU HAVE, AND YOU GIVE THAT, WHAT'S CALLED
15 EXTRACTED TEXT TO US.

16 WHEN WE GET IT, WHETHER IT'S TEN PAGES OR 1,000
17 PAGES, IT NO LONGER HAS PAGE BREAKS IN THE ELECTRONIC FORM.
18 SO IT'S JUST LIKE ONE BIG, LONG PAGE, ONE 500-PAGE PAGE, WHAT
19 WAS PREVIOUSLY 500 PAGES.

20 SO YOU DO A SEARCH FOR A WORD, ALEXANDRINE, WHICH
21 IS, AS YOU KNOW, THE COMPOUND AT ISSUE, ONE OF THE ISSUES IN
22 THE CASE. THAT COMES UP FOUR TIMES IN THAT DOCUMENT. YOU
23 HAVE NO WAY OF KNOWING WHERE -- JUST TELL YOU, OKAY, YEAH,
24 IT'S IN HERE FOUR TIMES. AND YOU CAN KIND OF, BASED ON THE
25 SCROLL BAR FIGURE OUT, SORT OF TRY AND FIGURE OUT WHERE IT

1 IS, BUT YOU CAN'T ACTUALLY JUST GO TO THE PAGE.

2 I HAD A, YOU KNOW, I DID HAVE ONE QUOTE IN MY, IN MY
3 POWER POINT, AND IT'S A QUOTE, "PAGINATION WAS INVENTED TO
4 KNOW WHAT PAGE SOMETHING WAS ON." IT WAS BY YOGI BERRA, OR
5 AT LEAST A QUOTE THAT I ATTRIBUTED TO HIM LAST NIGHT.

6 SO WE JUST WANT -- WE JUST WANT EXTRACTED TEXT WITH
7 PAGE BREAKS. IT'S -- THE FACT OF THE MATTER IS, I SAID TO
8 THE DEFENDANTS, I SAID, LOOK, MAYBE WE ARE ARGUING OVER
9 NOTHING. HOW MANY 500 OR MORE PAGE DOCUMENTS ARE THERE, 500
10 PAGES OR MORE DOCUMENTS? THEY DON'T KNOW YET.

11 I SAID, WELL, THAT COULD BE A REALLY BIG PROBLEM.
12 IF THERE WERE ONE DOCUMENT THAT WAS 500 PAGES OR MORE, AND
13 YOU DIDN'T PAGE BREAK IT, OKAY, WE COULD PROBABLY LIVE WITH
14 IT.

15 BUT THE FACT IS, THERE WILL CERTAINLY BE THOUSANDS
16 OF 10-PAGE, 20-PAGE, 50-PAGE, 75-PAGE, 100-PAGE DOCUMENTS.
17 IMAGINE IF YOU ARE UNDERTAKING A REVIEW OF 27,000 DOCUMENTS,
18 WHICH WE ARE DOING IN MANY CASES RIGHT NOW, AND YOU ARE
19 HAMPERED BY THIS INABILITY.

20 NOW, IF IT'S A ONE-PAGE DOCUMENT OR A TWO-PAGE
21 DOCUMENT, NO BIG DEAL, THREE PAGES, FIVE PAGES, NO BIG DEAL.
22 BUT YOU START GETTING UP, WHEN YOU ARE LOOKING AT 120-PAGE
23 DOCUMENTS, AND EVERY TIME YOU'VE GOT TO FLIP THROUGH THE
24 ENTIRE THING TO FIND YOUR SEARCH TERM, THAT'S VERY, VERY
25 PROBLEMATIC. IT'S IMPRACTICAL. IT CLEARLY HAMPERS IT. AND,

1 IN FACT, IF THE DOCUMENT IS TOO BIG, IT REALLY MAKES ANY
2 SEARCH COMPLETELY IMPOSSIBLE. AND IT JUST LACKS ALL MEANING
3 TO DO A SEARCH.

4 AND SO WE SAID, LOOK, YOU FOLKS, THE DEFENDANTS,
5 THEY WENT OUT AND THEY SAID, WE'VE ALREADY DONE ALL OF THIS
6 PRODUCTION. WE DID IT BEFORE, UM, THE MDL HAD ITS -- BEFORE
7 JUSTICE FREEDMAN HAD HER FIRST HEARING. AND WE DID THIS, YOU
8 KNOW, A YEAR AGO, OR WHENEVER IT WAS.

9 AND SO I SAID, WELL, YOU KNOW, THAT KIND OF FALLS
10 UNDER THE CATEGORY OF, TOO BAD, SO SAD. I MEAN, YOU WENT OUT
11 AND DID IT BEFORE YOU CONSULTED WITH THE DEFENDANT, I'M
12 SORRY, WITH THE PLAINTIFFS OR THE COURTS, ON WHAT IS A
13 REASONABLE WAY TO EXTRACT THIS TEXT. AND SO YOU DIDN'T PUT
14 THE PAGE BREAKS IN. AND NOW IT'S GOING TO COST YOU A LOT
15 MORE MONEY TO GO BACK AND PUT THEM IN. WELL, YOU FIRE THE
16 PERSON THAT DIDN'T TELL YOU TO PUT THEM IN IN THE FIRST
17 PLACE. GET A NEW VENDOR THAT DIDN'T TELL YOU, BY THE WAY,
18 YOU WANT TO PUT PAGE BREAKS IN HERE.

19 SO I THINK THAT THE BURDEN ON US IS ACTUALLY
20 EXPONENTIALLY LARGER THAN THE BURDEN ON THEM TO GO BACK AND
21 FIX IT. BECAUSE EVERY SINGLE LAWYER AND PARALEGAL EVER, FROM
22 NOW TO THE END THAT HAS TO LOOK AT THESE DOCUMENTS, WILL BE
23 SPENDING CONSIDERABLE -- I WOULD SAY FACTORS OF FOUR OR FIVE
24 TIMES MORE, MAYBE EVEN LONGER, TO REVIEW THESE THINGS THAN WE
25 WOULD OTHERWISE HAVE TO.

1 AND THE FINAL PROBLEM WITH IT IS, WHAT ABOUT THE
2 DOCUMENTS THAT -- IF THEY ARE NOT DONE COLLECTING DOCUMENTS,
3 WHAT ABOUT THE ONES THAT THEY ARE GOING TO PRODUCE TOMORROW,
4 OR THAT THEY ARE GOING TO COLLECT TOMORROW AND NEXT WEEK AND
5 THE WEEK AFTER? WHY CAN'T THEY AT LEAST FIX THE PROBLEM NOW,
6 NOW THAT WE KNOW ABOUT IT. LET'S NOT JUST KEEP RUNNING
7 BLINDLY INTO THE NIGHT. AND WHAT ABOUT THE DOCUMENTS THAT
8 THEY HAVE COLLECTED SINCE WE ALERTED THEM TO OUR OBJECTION AT
9 THE VERY INSTANCE, AT THE BEGINNING OF THIS LITIGATION? WHAT
10 ABOUT THOSE? HAVE YOU DONE IT WITH THOSE? AND I THINK THE
11 ANSWER IS NO, WE HAVEN'T.

12 SO IT IS A PROBLEM OF ENORMOUS PRACTICAL
13 IMPLICATION. AND WE WOULD RESPECTFULLY REQUEST THAT THE
14 DEFENDANTS GO BACK AND PUT PAGE BREAKS INTO THESE
15 ELECTRONICALLY EXTRACTED DATA.

16 THANK YOU, YOUR HONORS.

17 MR. HAHN: YOUR HONOR, I -- WE ARE AT A LITTLE BIT
18 OF A LOSS BECAUSE I DON'T REALLY UNDERSTAND WHAT MR. PENNOCK
19 IS TALKING ABOUT. WE'VE GOT PAGE BREAKS. COME USE OUR
20 DOCUMENT DEPOSITORY. THE DOCUMENTS ARE OCR'D BY THE
21 DEFENDANTS AND THEY HAVE CONTINUED TO PRODUCE, I THINK IN
22 VERY GOOD FAITH, DOCUMENTS TO US WITHOUT AN ORDER BEING IN
23 PLACE, WAITING FOR THE ORDER TO BE PUT IN PLACE THAT IS
24 JOINT. AND WE UNDERSTAND WE'VE GOT TO HAVE A JOINT DOCUMENT
25 PRODUCTION ORDER. BUT THEY ARE PRODUCING DOCUMENTS TO US.

1 THEY HAVE DONE 35,000 TO DATE; WE ARE EXPECTING ANOTHER
2 100,000 WITHIN THE NEXT MONTH OR SO.

3 AND THEY ARE WHAT'S CALLED OCR'S. YOU HAVE THE
4 ACTUAL PICTURE OF THE DOCUMENT, IS WHAT'S COMING OUT. AND IF
5 IT'S A 100-PAGE DOCUMENT, YOU HAVE 100 PICTURES OF EACH PAGE.
6 AND WHEN YOU DO A WORD SEARCH, IT WILL TELL YOU WHICH PAGE ON
7 THAT DOCUMENT THE WORD IS ON, AND YOU CAN GO TO THAT PAGE.

8 SO IT MIGHT BE THAT WE JUST ARE CROSSING, YOU KNOW,
9 IN THE NIGHT.

10 MR. PENNOCK: I DON'T THINK SO --

11 MR. HAHN: BUT THAT'S --

12 MR. PENNOCK: -- BLAIR.

13 MR. HAHN: BUT WE'VE GOT PAGINATION, YOGI BERRA AND
14 THE REST OF YOU.

15 MR. PENNOCK: OCR HAS BEEN OFFERED TO US. OCR, AS
16 THE COURTS PROBABLY ARE AWARE, I DON'T KNOW IF BLAIR IS, YOU
17 TAKE THE DOCUMENT AND YOU ESSENTIALLY SCAN IT IN A WAY THAT
18 THE COMPUTER IS SUPPOSED TO PICK UP THE WORD OR THE PHRASE,
19 UM, IT DOESN'T WORK VERY WELL. I MEAN, SOME OCR PROGRAMS
20 HAVE BEEN SCIENTIFICALLY ESTABLISHED ONLY TO PICK UP THE WORD
21 LESS THAN 50 PERCENT OF THE TIME.

22 NO PROGRAM HAS EVER BEEN WRITTEN THAT PICKS IT UP IN
23 EXCESS OF 90 PERCENT OF THE TIME, OR THERE IS NO PROGRAM THAT
24 DOES IT 100 PERCENT OF THE TIME. SO YOU ARE NOT GOING TO
25 FIND THINGS THAT YOU ARE LOOKING FOR. THAT'S AN ESTABLISHED

1 FACT.

2 AND WE HAVE THE ELECTRONIC DATA, THE WAY -- OCR IS
3 SOMETHING OF AN ANTIQUATED METHOD. IT WAS THAT -- NOW THE
4 WAY THINGS HAVE BEEN DONE FOR A FEW YEARS NOW, AND YOU GET
5 THE ACTUAL DATA.

6 AS JUSTICE FREEDMAN MAY RECALL, WE ATTENDED THE
7 ELECTRONIC EVIDENCE RULE DISCUSSIONS, COMMITTEE HEARINGS IN
8 NEW YORK A FEW YEARS AGO, FOR THE AMENDMENT TO THE FEDERAL
9 RULE BECAUSE OF THIS VERY ISSUE. THERE IS -- EVERYTHING NOW
10 EXISTS ELECTRONICALLY. WHAT SHOULD THEY HAVE TO PRODUCE?
11 HOW SHOULD THEY PRODUCE IT? AND IN FACT, THE FEDERAL RULE
12 SAYS YOU HAVE TO PRODUCE IT IN THE NATIVE FORMAT.

13 NOW, WE ARE NOT MAKING THEM PRODUCE IT IN THE NATIVE
14 FORMAT BECAUSE THERE ARE CERTAIN BURDENS THAT WE ARE NOT
15 REQUIRING THEM TO UNDERGO FOR THAT.

16 BUT THE FORMAT THAT THEY HAVE CHOSEN, THIS
17 ELECTRONIC EXTRACTION, WE WANT THEM TO PUT THE PAGE BREAKS IN
18 BECAUSE WE DON'T WANT TO HAVE TO RELY ON THE OCR. IT IS NOT
19 A 100 PERCENT RELIABLE METHOD OF DOING SO.

20 AND IN FACT, IN INSTANCES, DEPENDING -- IT CAN BE AS
21 SIMPLE AS THE PAGE WAS CREASED. I MEAN, THERE ARE DIFFERENT
22 REASONS WHY AN OCR WON'T WORK. BUT THERE -- HOW THE DOCUMENT
23 IS VIEWED BY THE COMPUTER IS VERY SUBPAR. AND THAT'S WHY WE
24 DON'T WANT TO GO WITH IT.

25 AND I WAS UNAWARE THAT THE MDL PLAINTIFFS WERE THAT

1 PLEASED WITH IT. I THOUGHT THEY HAD SOMEHOW BEEN SADDLED
2 WITH IT. AND I DIDN'T KNOW THEY WERE ACCEPTING OF IT.

3 BUT THE DATA HAS BEEN PRODUCED AND IS BEING PRODUCED
4 IN THE ELECTRONIC FORMAT. AND SO WHY NOT DO IT THE MOST
5 INTELLIGENT WAY, WHICH IS PUT THE PAGE BREAKS IN, INTO THE
6 ELECTRONIC, 100 PERCENT SEARCHABILITY? IT'S LIKE SEARCHING
7 FOR A WORD IN YOUR OWN -- ON YOUR OWN COMPUTER ON A
8 WORDPERFECT DOCUMENT. 100 PERCENT SEARCHABILITY WITHOUT ANY
9 CONCERNS THAT THINGS ARE BEING MISSED.

10 AND IN A ONE MILLION, TWO MILLION, THREE MILLION
11 PAGE DOCUMENT PRODUCTION, OR SEVEN MILLION PAGE, IF YOU HAVE
12 A FIVE PERCENT ERROR RATE, IT BECOMES AN ENORMOUS PROBLEM.

13 MR. ANIOLAK: MY NAME IS ERIC ANIOLAK.

14 AND PAUL WAS RIGHT. I HAVE HAD THE UNFORTUNATE TASK
15 OF DISCUSSING ELECTRONIC DISCOVERY WITH HIM FOR THE LAST
16 THREE WEEKS.

17 THE BOTTOM LINE IS WE WANT TO PRODUCE DOCUMENTS TO
18 THE NEW YORK PLAINTIFFS. WE HAVE BEEN ROLLING OUT DOCUMENTS
19 TO THE MDL PLAINTIFFS, ELECTRONIC DOCUMENTS. THEY HAVE
20 LOADED THEM INTO THEIR SYSTEM. UM, WE HAVE NOT PRODUCED ANY
21 ELECTRONIC DOCUMENTS TO THE NEW YORK PLAINTIFFS BECAUSE WE
22 CAN'T AGREE ON SOME OF THESE PROVISIONS. I THINK ONCE THEY
23 GET OUR ELECTRONIC DOCUMENTS AND RUN THEM THROUGH THE SYSTEM,
24 SIMILAR TO WHAT THE MDL SET UP, THEY WILL BE PLEASED WITH
25 WHAT WE ARE DOING WITH THE ELECTRONIC DOCUMENTS.

1 WHAT WE ARE DOING IS CONSISTENT WITH OTHER MASS
2 TORTS IN THE PRODUCTION OF DOCUMENTS. IT'S NOT UNIQUE. WE
3 HAVE LOTS OF EXPERIENCE WITH ROLLING OUT ELECTRONIC DOCUMENTS
4 IN MASS TORTS AND MDL PROCEEDINGS. AND WHAT WE ARE DOING IS
5 CONSISTENT WITH ALL OF THOSE.

6 WHAT MR. PENNOCK IS SUGGESTING, I HAVE NO EXPERIENCE
7 WITH THAT REQUEST TO A COURT. I HAVEN'T SEEN ANY ORDER, UM,
8 THAT ADDRESSES THAT. AND THE MDL PLAINTIFFS HAVE THEIR
9 DATABASE UP AND SEEM TO BE WORKING FINE.

10 MR. PENNOCK'S FIRST POINT WAS THE DEFINITIONS THAT
11 WERE IN, OR ARE CURRENTLY IN THE CMO 6. FRANKLY, I THOUGHT
12 WE HAD ALL THIS STUFF WORKED OUT IN TERMS OF THE ORDER A
13 COUPLE OF DAYS AGO, EXCEPT FOR POSSIBLY PAGE BREAKS. I
14 HAVEN'T TALKED WITH HIM ABOUT THIS ISSUE. I'M NOT SURE I
15 COMPLETELY UNDERSTAND IT.

16 IN FACT, THE DEFINITION OF ACCESSIBLE WAS WHAT --
17 THAT DEFINITION WAS SOMETHING THAT THEY SENT TO US. I MEAN,
18 THAT WAS IN THEIR FIRST PROPOSAL TO US. SO I THINK I REALLY
19 NEED TO GET BACK TO HIM AND SEE WHAT THE HOLDUP IS ON THE
20 DEFINITIONS AND THE ACCESSIBLE -- I SAID THE DEFINITION OF
21 ACCESSIBLE AND SOME OF THE OTHER DEFINITIONS THAT I WASN'T
22 REALLY CLEAR -- IT ALMOST SOUNDED LIKE SOME DRAFTING OR SOME
23 LANGUAGE ISSUES.

24 AND I WOULD PROPOSE TO THE COURT THAT WE SIMPLY
25 CIRCLE BACK AND FIGURE OUT WHAT THE DIFFERENCE IS THERE,

1 BECAUSE I CAN'T EVEN ARTICULATE A RESPONSE, BECAUSE I'M NOT
2 SURE I COMPLETELY UNDERSTAND THE ISSUE.

3 MR. PENNOCK: YOUR HONOR, I'M GOING TO AGREE WITH
4 THAT. ERIC HAS BEEN IMMEDIATELY REASONABLE IN ALL OF OUR
5 DEALINGS, AND I LOOK FORWARD TO TALKING TO Y'ALL.

6 MR. ANIOLAK: OKAY. ON THE PAGE BREAK ISSUE, I'M
7 GOING TO TRY TO EXPLAIN THIS A LITTLE BIT MORE CLEAR.

8 WHEN WE PRODUCED -- THIS IS NOT AN ISSUE WITH HARD
9 COPY DOCUMENTS. THERE IS NO DISPUTE THERE. THIS ONLY
10 HAPPENS WITH ELECTRONIC DOCUMENTS.

11 UM, WHEN WE PRODUCE AN ELECTRONIC DOCUMENT, WE
12 ACTUALLY PRODUCE IT IN TWO WAYS. AND IF I MAY APPROACH?
13 I'VE GOT A COUPLE OF EXAMPLES THAT MAY HELP SORT THIS OUT
14 JUST A LITTLE BIT.

15 SO WHEN WE CAPTURE ELECTRONIC DOCUMENTS, WE ACTUALLY
16 PRODUCE TWO FORMS OF IT. IN ONE FORM WE PRODUCE, AS YOU SEE,
17 IT HAS THE BAUSCH & LOMB LETTERHEAD ON TOP, THAT'S CALLED A
18 TIFF IMAGE. WE PRINTED THIS RIGHT OFF THE DATABASE. AND
19 THIS IS EXACTLY WHAT THE MDL FOLKS CAN DO, AS WELL. IT HAS A
20 BATES NUMBER. SO IT HAS A PAGE NUMBER. AND AS YOU CAN SEE,
21 IT HAS PAGE BREAKS.

22 SO EVERY DOCUMENT THAT WE PRODUCE ELECTRONICALLY HAS
23 PAGE BREAKS AND HAS PAGE NUMBERS AND THIS IS THE TIFF FORM.
24 WE ALSO PRODUCE -- THE SECOND COPY IS THE EXACT SAME DOCUMENT
25 AND THIS IS THE EXTRACTED TEXT.

1 SO THIS ALLOWS THE PLAINTIFFS TO DO WORD SEARCHES.
2 SO IF YOU CAN'T DO WORD SEARCHES THROUGH THE TIFFS, YOU HAVE
3 TO PRODUCE AN EXTRACTED TEXT, WHICH ALLOWS YOU TO DO WORD
4 SEARCHES.

5 WHEN YOU PRINT OUT THE EXTRACTED TEXT, YOU CAN SEE
6 IT PRINTS WITH PAGE NUMBERS. THERE IS NO PAGE BREAKS -- I'M
7 SORRY -- BUT THERE IS NO PAGE NUMBERS ON THE BOTTOM. BECAUSE
8 IN THIS PARTICULAR DOCUMENT, THE CUSTODIAN DID NOT PUT A PAGE
9 NUMBER IN IT.

10 FOR EXAMPLE, WHEN YOUR HONORS WRITE OPINIONS AND YOU
11 GET ON YOUR WORD PROCESSOR OR YOUR CLERKS DO AND TYPE UP THE
12 OPINION, THEY CAN INSERT A PAGE NUMBER AT THE BOTTOM, OR THEY
13 CANNOT INSERT A PAGE NUMBER. AND IF THE CUSTODIAN HAS
14 INSERTED A PAGE NUMBER, THAT PAGE NUMBER WILL BE PRODUCED TO
15 THE PLAINTIFFS.

16 IF YOUR CLERK, FOR EXAMPLE, DID NOT INSERT A PAGE
17 NUMBER AT THE BOTTOM OF THE PAGE, THEN WHEN WE PROVIDE THAT
18 DOCUMENT TO THE PLAINTIFFS, THERE WILL NOT BE A PAGE NUMBER
19 AT THE BOTTOM IN THE EXTRACTED TEXT FORMAT; IT WILL ONLY BE
20 THE BATES NUMBER THAT WE HAVE ON THE ACTIVE VERSION.

21 WHAT THE PLAINTIFFS ARE SUGGESTING WE DO, IS GO BACK
22 IN TO ALL OF THE DOCUMENTS, EVERY ELECTRONIC DOCUMENT, AND
23 GO -- DO WHAT YOUR CLERKS WOULD HAVE TO DO AND PRESS A
24 BUTTON, OPEN THE DOCUMENT UP, AND TRY TO ADD IN A PAGE NUMBER
25 AT THE BOTTOM OF THE PAGE FROM TENS OF MILLIONS OF DOCUMENTS.

1 WE HAVE TALKED TO NUMEROUS VENDORS TO SEE IF THERE
2 IS AN AUTOMATED WAY TO DO THIS AND THERE IS NOT. WE JUST
3 CAN'T DO IT. FOR US TO DO THIS, THE VENDOR SAID, WELL, WE
4 CAN TRY TO DEVELOP SOMETHING, BUT WE ARE NOT SURE WE ARE
5 GOING TO BE ABLE TO DO IT. IF YOU WANT TO GIVE US 100,000
6 AND LET US TINKER AROUND, WE MAY BE ABLE TO DO SOMETHING, BUT
7 AT THE END OF THE DAY, WE MAY NOT BE ABLE TO HELP YOU.

8 SO THAT'S ESSENTIALLY THE ISSUE. THERE IS A COUPLE
9 OF OTHER THINGS I WANT TO SAY ABOUT THAT, THOUGH.

10 THE COURT: BEFORE YOU GET -- ASSUMING THAT THERE IS
11 PAGE NUMBERS ON THIS DOCUMENT HERE, THE ONE WITH BAUSCH &
12 LOMB, ARE THERE CORRESPONDING PAGE NUMBERS ON THIS DOCUMENT?

13 MR. ANIOLAK: YES. IF THE CUSTODIAN PUT, INSERTED
14 PAGE NUMBERS, ABSOLUTELY --

15 THE COURT: OKAY.

16 MR. ANIOLAK: -- THEY WOULD BE THERE.

17 BUT YOU CAN SEE ON THE ONE WITH THE LETTERHEAD,
18 THERE WOULD BE A BATES NUMBER AT THE BOTTOM. AND IF THERE
19 WERE PAGE NUMBERS ON THERE, THERE WOULD BE PAGE NUMBERS ON
20 THERE.

21 WE HAVE THE SAME --

22 JUSTICE FREEDMAN: YOU CAN'T DO A SEARCH IN THIS
23 TIFF?

24 MR. ANIOLAK: YOU CANNOT DO A SEARCH ON THE TIFF,
25 THAT'S CORRECT. YOU SEARCH ELECTRONICALLY THROUGH THE

1 EXTRACTED TEXT WHEN YOU DO YOUR WORD SEARCHES.

2 JUSTICE FREEDMAN: OKAY. AND THERE ARE NO BATES
3 NUMBERS ON THOSE?

4 MR. ANIOLAK: THAT'S CORRECT. THAT'S CORRECT.

5 WE HAVE THE PRECISE PROBLEM THE PLAINTIFFS DO. WE
6 WORK WITH THE SAME ELECTRONIC DOCUMENTS AND THE SAME
7 DATABASE, WE HAVE THE EXACT SAME PROBLEM.

8 SO WHEN WE DO A WORD SEARCH AND WE ARE TRYING TO
9 FIND DOCUMENTS, AND WE SEE FUSARIUM POP UP, WE, TOO, ACTUALLY
10 HAVE TO SPEND A LITTLE BIT OF TIME AND FIGURE OUT WHERE THAT
11 WORD APPEARS IN THE DOCUMENT AND GO OVER THE TIFF TO FIND IT.

12 THE REASON WE HAVE THE SAME PROBLEM, IS BECAUSE
13 THERE IS NO SOLUTION. IF THIS WERE EASY TO DO, OR IF THERE
14 WERE A GOOD WAY TO DO IT, OR IF IT MADE ECONOMIC SENSE, WE
15 WOULD ABSOLUTELY DO IT, BUT WE SIMPLY CAN'T.

16 WHAT THEY ARE SUGGESTING IS INCREDIBLY BURDENSOME,
17 TO GO BACK AND DO THIS FOR ALL THE DOCUMENTS. I HAVE OFFERED
18 MR. PENNOCK TO SIGN AN AFFIDAVIT, SAYING, WE ARE PRODUCING
19 THE DOCUMENTS IN PRECISELY THE SAME FASHION THAT WE USE THAT.
20 WE HAVE NOT INSERTED ANY PAGE NUMBERS OR PAGE BREAKS OR TRIED
21 TO DISADVANTAGE YOU IN ANY WAY.

22 AND FRANKLY, I HAVEN'T HEARD ANY PLAINTIFFS' LAWYER
23 IN ANY OTHER LITIGATION DISCUSS BEING DISADVANTAGED BY HAVING
24 TO SPEND A LITTLE EXTRA TIME READING THE CONTEXT AROUND THE
25 WORD TO GO FIND IT IN THE TIFF FILE.

1 I ALSO TRIED TO COMPROMISE WITH MR. PENNOCK AND
2 OFFERED FOR VERY LARGE DOCUMENTS, WHICH WE CAN IDENTIFY,
3 DOCUMENTS THAT ARE OVER 500 PAGES IN LENGTH, THERE ARE FEW OF
4 THOSE THAT ARE VERY LARGE, WE WOULD DO THE MANUAL PROCESS.
5 WE WILL IDENTIFY THOSE. WE'LL GO IN, WE'LL RUN IT THROUGH
6 THERE. AND BECAUSE IT WILL BE A FEWER NUMBER OF DOCUMENTS,
7 WE ARE WILLING TO DO THAT FOR HIM. BUT WE CAN'T DO IT FOR
8 ALL DOCUMENTS. AND THAT WAS THE COMPROMISE I OFFERED, WERE
9 THOSE LARGER DOCUMENTS.

10 MR. PENNOCK ALSO RAISED THE POINT OF THE FACT THAT
11 WE BEGAN PROCESSING DOCUMENTS BEFORE THESE PROCEEDINGS WERE
12 ORGANIZED. WE DID DO THAT. WE STARTED THIS PROCESS,
13 ESSENTIALLY, IN THE SUMMER OF 2006. AND I ASSUME MR. PENNOCK
14 WILL BE VERY THANKFUL WE DID. BECAUSE IF WE DIDN'T, THIS
15 LITIGATION ESSENTIALLY WOULDN'T GET GOING NOW FOR ANOTHER SIX
16 MONTHS. BUT WE DID BEGIN THE PROCESS OF THOSE DOCUMENTS AND
17 HAVE PROCESSED THE MAJORITY OF THE DOCUMENTS WE WILL LIKELY
18 PRODUCE IN THIS LITIGATION ALREADY.

19 SO MR. PENNOCK IS CORRECT. HE WOULD BE ASKING US TO
20 GO BACK AND RE-PROCESS ALL OF OUR DOCUMENTS, OUR ELECTRONIC
21 DOCUMENTS. AND THE VENDOR HAS ESTIMATED, OUR VENDOR HAS
22 ESTIMATED THAT COST WILL BE OVER \$1 MILLION.

23 SO THERE ARE JUST A LOT OF PRACTICAL PROBLEMS WITH
24 DOING WHAT MR. PENNOCK SUGGESTS, UM, AND WE HAVE THE SAME
25 BURDENS AND THE SAME PROBLEMS. AND FOR THOSE REASONS, UM,

1 THE SUGGESTION THAT WE SHOULD GO BACK AND INSERT PAGE NUMBERS
2 IS JUST NOT -- JUST TOO BURDENSOME AND SIMPLY NOT WORTH THE
3 BENEFITS; NOT WORTH THE COST.

4 JUSTICE FREEDMAN: HOW MANY DOCUMENTS WOULD YOU SAY
5 ARE OVER, SAY, 200 PAGES?

6 MR. ANIOLAK: YOUR HONOR, I HAVEN'T DONE THAT
7 SEARCH. I DID -- BEFORE I LEFT, I DID HAVE OUR IT FOLKS DO A
8 SEARCH FOR OVER 500. AND AT THIS POINT, WE HAD ABOUT 60 OR
9 70.

10 JUSTICE FREEDMAN: AND YOU ARE WILLING TO DO IT FOR
11 THOSE?

12 MR. ANIOLAK: YES. I MEAN, IT WILL LITERALLY
13 REQUIRE SOMEBODY TO SIT DOWN, FIND THE DOCUMENT, OPEN IT UP
14 AND INSERT PAGE NUMBERS AND RE-PROCESS THOSE. BUT FOR THOSE,
15 WE ARE WILLING TO DO THAT, AS A COMPROMISE POSITION. AND I
16 THOUGHT THAT'S WHAT WE TALKED ABOUT EVEN THIS WEEK.

17 JUSTICE FREEDMAN: IS THERE NO WAY YOU COULD DO
18 THAT, MR. PENNOCK? TAKE THE DOCUMENTS, IF YOU GET THEM, AND
19 RE-PROCESS THEM WITH PAGE NUMBERS ON THEM?

20 MR. PENNOCK: ACTUALLY, WE CAN DO THAT. AND
21 MR. ANIOLAK IS RIGHT, IT'S A VERY BURDENSOME PROCESS, BUT WE
22 HAVE --

23 JUSTICE FREEDMAN: THE NEW YORK LAW IS THE
24 REQUESTING PARTY PAYS FOR DOCUMENT PRODUCTION.

25 MR. PENNOCK: THE -- IT'S NOT A MATTER OF PAYING FOR

1 IT; IT'S -- IT REALLY COMES DOWN TO -- EXCUSE ME, ERIC --
2 COMES DOWN TO -- I THINK THERE ARE A COUPLE OF DIFFERENT
3 ISSUES HERE.

4 ONE IS THE GOING BACK ISSUE AND DOING WHAT -- AND
5 RE-DOING SOMETHING. UM, I KNOW THAT THE DEFENDANTS HAVE
6 INDICATED THAT THEY THINK THAT THERE HAVE BEEN A MILLION
7 DOCUMENTS GENERATED AND THAT THEY WOULD HAVE TO GO BACK AND
8 RE-DO, BUT THEY'VE ONLY PRODUCED 30,000 DOCUMENTS, 30,000
9 PAGES.

10 SO IF IT'S ALL DONE ALREADY, THEN MY FIRST QUESTION
11 IS: WELL, WHERE IS IT ALL? IF YOU HAVE IT, GIVE IT TO US.
12 WHAT ARE YOU WAITING FOR? AS HE JUST SUGGESTED, WE SHOULD BE
13 HAPPY THEY STARTED THIS IN JULY. WELL, OKAY, I'LL BE HAPPY
14 WHEN I GET IT.

15 AND SO THAT'S MY FIRST QUESTION. IF YOU HAVE THE
16 DOCUMENTS, GIVE THEM TO US. AND THEN WE CAN KNOW THAT YOU
17 REALLY WOULD NEED TO GO BACK AND RE-DO IT. AND I'M NOT
18 SUGGESTING THAT HE'S MISREPRESENTING ANYTHING AT ALL. I
19 UNDERSTAND -- I DON'T UNDERSTAND TOO MANY ISSUES ABOUT THIS
20 WHOLE TIFF STUFF AND PRODUCTIONS, BUT WHAT I'M SAYING IS, IF
21 YOU REALLY HAVE TO GO BACK AND RE-DO IT ON A MILLION
22 DOCUMENTS, THEN HOW COME WE DON'T HAVE THE MILLION DOCUMENTS?

23 THE SECOND QUESTION, WHY IS IT --

24 JUSTICE FREEDMAN: A MILLION DOCUMENTS OR A MILLION
25 PAGES?

1 MR. PENNOCK: WHATEVER.

2 MR. ANIOLAK: I SAID TO RE-PROCESS THE DOCUMENTS
3 WOULD BE \$1 MILLION. WE WOULD LOVE TO GIVE THE DOCUMENTS TO
4 MR. PENNOCK. WE HAVE ROLLED OUT DOCUMENTS TO THE MDL AND
5 OTHER LAWYERS ACROSS THE COUNTRY. THE ONLY THING HOLDING
6 THEM UP IS THE CMO.

7 MR. PENNOCK: YOU'VE ONLY GIVEN 30,000 DOCUMENTS TO
8 THE MDL, OR PAGES.

9 THE SECOND ISSUE IS, WE RAISED THIS A COUPLE OF
10 MONTHS AGO -- WE HOPE AT LEAST -- BECAUSE EVEN IF IT IS THAT
11 HARD -- AND I'M NOT DISAGREEING THAT THERE IS A BURDEN TO GO
12 BACK IN AND RE-DO IT -- WELL, I KNOW -- OR I SHOULDN'T SAY I
13 KNOW -- I HAVE BEEN TOLD BY OUR IT CHIEF THAT IT IS NOT HARD
14 TO DO IT ON THE FRONT END.

15 AND SO IF YOU CAN'T GO RE-DO IT AT THIS JUNCTURE,
16 AND AS HE SAID, LET'S ROLL THE DOCUMENTS OUT AND SEE HOW BIG
17 OF A PROBLEM IT REALLY IS. WELL, AT LEAST START DOING IT
18 NOW, AT LEAST EXPLAIN WHY YOU HAVEN'T BEEN DOING IT FOR THE
19 LAST EIGHT WEEKS. AND SO THAT'S WHY I SAY, THERE ARE TWO
20 DIFFERENT ISSUES. AND I THINK THEREFORE THERE CAN BE TWO
21 DIFFERENT APPROACHES TO HOW WE DEAL WITH THIS PROBLEM AT THIS
22 JUNCTURE.

23 JUSTICE FREEDMAN: COULD YOU RESPOND, HOW DIFFICULT
24 IS IT TO DO IT PROSPECTIVELY?

25 MR. ANIOLAK: PROSPECTIVE, WE HAVE TALKED TO OUR

1 VENDOR, THEY DO NOT HAVE A SOLUTION TO DO A --

2 JUSTICE FREEDMAN: SO IT WOULD STILL BE HAND DONE?

3 MR. PENNOCK: I'LL HAVE MY IT GUY BE HAPPY TO TELL
4 HIS VENDOR HOW TO DO IT.

5 YOUR HONOR, OUR IT GENTLEMAN, HIS NAME IS JONATHAN
6 JAFFEE, HE TELLS ME -- AND I'M NOT REPRESENTING TO THIS COURT
7 THAT I KNOW THESE THINGS -- I AM TOLD THAT THIS IS A PROCESS
8 THAT CAN BE DONE AND CAN BE DONE READILY. AND PERHAPS THE
9 BEST SOLUTION RIGHT NOW FOR GOING FORWARD IS TO HAVE OUR
10 PERSON MEET AND CONFER WITH YOUR VENDOR, AND WE WILL -- AND
11 WE CAN SEND A COUPLE OF LAWYERS THERE TO MAKE SURE EVERYTHING
12 IS OKAY, UM, IN TERMS OF COMMUNICATIONS.

13 JUSTICE FREEDMAN: MAKE SURE THEY SIGN
14 CERTIFICATIONS.

15 MR. PENNOCK: AND MAKE SURE THEY SIGN
16 CERTIFICATIONS. AND MEET WITH THEIR VENDOR FOR THE GOING
17 FORWARD PROCESS. MAYBE THAT'S THE BEST WAY TO SOLVE THIS
18 RIGHT NOW.

19 JUSTICE FREEDMAN: AT LEAST THAT'S A START. WHY
20 DON'T YOU SEE, BUT IF IT REALLY IS TOO BURDENSOME, MAYBE
21 REALITY HAS TO --

22 MR. PENNOCK: CAN WE AGREE TO DO THAT, THEN, AND --

23 JUSTICE FREEDMAN: WELL, THEY ARE GOING TO STOP
24 PRODUCTION NOW, RIGHT?

25 MR. PENNOCK: WE'LL TAKE THE DOCUMENTS THAT THEY ARE

1 ALREADY READY TO ROLL OUT. WE'LL ACCEPT THOSE AS THEY HAVE
2 DONE IT. WE CAN MEET FOR THE GOING FORWARD ONES AND TRY AND
3 RESOLVE IT ON A GOING FORWARD BASIS. MAYBE THAT'S THE BEST
4 WAY TO APPROACH IT.

5 MR. ANIOLAK: I THINK THAT IS THE BEST WAY. WE WILL
6 ROLL OUT THE DOCUMENTS WE HAVE PRODUCED. I AM MORE THAN
7 WILLING TO LET THEIR IT PERSON TALK TO OUR VENDOR, OR OUR IT
8 PERSON. WE'VE ALREADY -- WE HAD THAT CONVERSATION WITH YOUR
9 IT PERSON. IT'S STILL A MANUAL PROCESS. THEY CAN TALK IF WE
10 WANT, BUT I DON'T FORESEE US GETTING PAST IT.

11 JUSTICE FREEDMAN: WHAT HE'S SAYING IS THAT SOMEBODY
12 HAS TO GO IN AND INSERT PAGES, AND THAT IS --

13 MR. PENNOCK: AS TO WHAT THEY'VE ALREADY DONE, YES.
14 BUT IT'S TO WHAT THEY HAVEN'T ALREADY DONE, NO.

15 JUSTICE FREEDMAN: NO. MY UNDERSTANDING WAS THAT
16 EVEN FOR THOSE THAT HAVEN'T BEEN DONE. THAT'S THE ONLY WAY
17 TO DO IT.

18 MR. ANIOLAK: WHAT SHE'S SAYING IS CORRECT.

19 MR. PENNOCK: WHAT YOUR HONOR IS SAYING IS CORRECT.
20 WE ARE MYSTIFIED AS TO WHY THAT IS SO. SO A MEETING WILL BE
21 HELPFUL.

22 THANK YOU, JUDGE.

23 JUSTICE FREEDMAN: OKAY.

24 MR. BALL: IF YOUR HONOR PLEASE, MAY I APPROACH?

25 THE COURT: SURE.

1 MR. BALL: GORDON BALL FOR THE ECONOMIC LOSS CLASS.

2 OUR STATUS IS RELATIVELY SIMPLE, COMPARED TO WHAT
3 HAS GONE ON THIS MORNING. THE DEFENDANTS HAVE FILED A MOTION
4 TO DISMISS. WE HAVE RESPONDED. IF YOUR HONOR WOULD GRANT US
5 ORAL ARGUMENT AND GIVE US A DATE, IT'S REALLY WHAT WE NEED AT
6 THIS POINT IN TIME.

7 THE COURT: I GUESS, IN THE SPIRIT OF COMPROMISE,
8 60 DAYS OUT.

9 MR. BALL: SIXTY DAYS WOULD BE FINE.

10 THE COURT: I TELL YOU WHAT YOU DO, WHY DON'T YOU
11 JUST GET TOGETHER WITH MR. COLE OR SOMEBODY, WHOEVER IS GOING
12 TO ARGUE IT FOR THE OTHER SIDE, CALL MY OFFICE AND GET A
13 DATE, AND I'M READY TO ROLL.

14 MR. BALL: THANK YOU, YOUR HONOR.

15 THE COURT: ALL RIGHT. NO PROBLEM.

16 MR. BEISNER: YOUR HONOR, THIS IS JOHN BEISNER AGAIN
17 FOR BAUSCH & LOMB. I WILL STEP INTO THE VOID.

18 ON THE CLASS CERTIFICATION ISSUE, WE'LL CONFER AND
19 MAKE ARRANGEMENTS FOR AN ORAL ARGUMENT DATE. WE ALSO HAVE AN
20 ISSUE, AS WELL.

21 JUSTICE FREEDMAN, THIS FORTUNATELY IS NOT -- THIS IS
22 IN THE MDL PROCEEDING.

23 JUSTICE FREEDMAN: OH, ONLY IN THE MDL.

24 MR. BEISNER: THIS IS ONE THING THAT IS NOT --

25 JUSTICE FREEDMAN: THAT'S UNUSUAL.

1 THE COURT: MR. BALL IS GOING TO MAKE A MOTION TO
2 TRANSFER ALL THE CASES TO YOU, WHICH I'M GOING TO GRANT.

3 MR. BALL: I LOVE YOGI BERRA, BUT I WOULD JUST AS
4 SOON BE IN SOUTH CAROLINA.

5 MR. BEISNER: WE ALSO HAVE AN ISSUE OF DISCOVERY
6 BEING SERVED IN ADVANCE OF THE MOTION TO DISMISS BEING HEARD,
7 BUT WE HAVE NOT SPOKEN TO MR. BALL ON THAT.

8 MR. BALL: I DON'T HAVE ANY PROBLEM AT ALL. THEY
9 DON'T HAVE TO ANSWER THE DISCOVERY UNTIL THE MOTION TO
10 DISMISS.

11 THE COURT: OKAY.

12 MR. BEISNER: WE HAD ONE OTHER CMO THAT WE DID WANT
13 TO BRING TO --

14 THE COURT: YOU CAN GO IF YOU WISH.

15 MR. BEISNER: WE HAD ONE OTHER CMO ISSUE I JUST
16 WANTED TO BRIEFLY BRING TO YOUR ATTENTION, IT'S LAID OUT IN
17 THE LETTER THAT IS PRESENTED TO BOTH OF YOUR HONORS. AND
18 THAT IS THE PLAINTIFF FACT SHEET IN THE MDL PROCEEDING.

19 JUSTICE FREEDMAN: OH, YES.

20 MR. BEISNER: I'M SORRY, IN THE NEW YORK PROCEEDING.
21 AND I BRING THIS TO YOUR ATTENTION AND WON'T SPEND
22 MUCH TIME ON THIS. THERE ARE TWO ISSUES, TWO BROADLY-DEFINED
23 ISSUES TO BRING UP.

24 ONE DIFFERENCE OF OPINION THAT WE HAVE NOT BEEN ABLE
25 TO RESOLVE IS THERE IS A PROVISION IN THE PROPOSED ORDER THAT

1 PLAINTIFFS HAVE PUT FORWARD IN NEW YORK THAT WOULD REQUIRE
2 THAT WE CONFER WITH PLAINTIFFS' COUNSEL IN ADVANCE OF
3 NOTICING THE DEPOSITION OF ANY FAMILY MEMBER.

4 WE DON'T HAVE ANY OBJECTION TO THAT, BUT THERE IS A
5 BROADER PROVISION THAT WE HAVE PROPOSED THAT'S ALREADY IN
6 PLACE IN THE MDL THAT IS CONSISTENT WITH THE CONSULTATION
7 THAT WE WERE TALKING ABOUT EARLIER, IS THAT WITH RESPECT TO
8 ALL DEPOSITIONS, BEFORE WE GO OUT WITH SUBPOENAS, WE SHOULD
9 TALK TO THE OTHER SIDE ABOUT THAT.

10 BECAUSE IN THE SAME WAY THAT THERE ARE FAMILY
11 MEMBERS THAT ARE CONCERNED ABOUT, VERY LEGITIMATE CONCERN,
12 THEY GET A SUBPOENA, THEY DON'T KNOW WHAT IT IS ABOUT. THEY
13 ARE AFRAID. WE'VE GOT FORMER EMPLOYEES FROM BAUSCH THAT WILL
14 GET THE SAME THING. I JUST THINK IT'S BETTER TO HAVE A BROAD
15 ORDER THAT SAYS WE ARE GOING TO TALK TO EACH OTHER BEFORE WE
16 GET SERVICE OF PROCESS OUT THERE WITH RESPECT TO ANY
17 WITNESSES.

18 THE OTHER ISSUE --

19 THE COURT: SO FROM WHAT THE LETTER SAYS, WHAT YOU
20 ARE NOT GOING TO DO IS START SENDING OUT -- SENDING OUT
21 SUBPOENAS AND DEPOSITION NOTICES FOR TEN DAYS, LIKE
22 MR. PENNOCK.

23 MR. BEISNER: YES. THE PROVISION WE HAVE IN THE MDL
24 PROCEEDING ALREADY, WHICH WE PROPOSED IN NEW YORK, SIMPLY
25 SAYS, WE WILL CONSULT IN ADVANCE WITH OPPOSING COUNSEL TO

1 SCHEDULE DEPOSITIONS AT MUTUALLY CONVENIENT TIMES AND PLACES,
2 SO BEFORE SERVICE OF PROCESS GETS OUT THERE, WE HAVE
3 CONSULTATION ON THAT.

4 JUSTICE FREEDMAN: THAT'S AN ISSUE.

5 OKAY. GO AHEAD.

6 MR. BEISNER: SO THAT IS ONE THING WE HAVE NOT
7 REACHED RESOLUTION ON.

8 THE OTHER ISSUE IN CMO 7, AND I WON'T GO INTO DETAIL
9 ON THIS BECAUSE IT IS LAID OUT IN THE LETTER THAT WE
10 PRESENTED, UM, AND AT THE RISK OF QUOTING YOGI BERRA ONCE TOO
11 OFTEN HERE, THIS IS A BIT OF DEJA VU ALL OVER AGAIN.

12 PREVIOUSLY HERE, WE HAD A DEBATE BETWEEN BOTH SIDES
13 ON WHAT SHOULD BE IN THE PLAINTIFF FACT SHEET. AND WE HAD A
14 LOT OF BRIEFING ON THAT. MY UNDERSTANDING IS THAT THE TWO OF
15 YOU CONSULTED ABOUT WHAT ULTIMATELY, OR AT LEAST SOME
16 CONVERSATION, ABOUT WHAT ULTIMATELY WENT IN THE PLAINTIFF
17 FACT SHEET. AND NOW WE HAVE SORT OF THIS TODAY ALL OVER
18 AGAIN.

19 SO WE HAVE ISSUES SUCH AS HOW FAR BACK WE SHOULD BE
20 GETTING MEDICAL RECORDS, UM --

21 JUSTICE FREEDMAN: AS I UNDERSTAND THE DIFFERENCE IS
22 SEVEN AND TEN YEARS OR SOMETHING?

23 MR. BEISNER: YES, WE HAVE THAT. WE HAVE THE ISSUE
24 ABOUT WHETHER THE FACT SHEET MAY MAKE INQUIRY ABOUT FAMILY
25 MEMBER EYE INFECTIONS.

1 MR. PENNOCK: JUDGE, I MAY BE ABLE TO SHORT CIRCUIT
2 A LOT OF THIS.

3 JUSTICE FREEDMAN: THAT COULD BE A PROBLEM. I MEAN,
4 YOU CAN ASK A YES/NO QUESTION ABOUT IMMEDIATE HOUSEHOLD
5 MEMBERS, BUT THERE MAY BE A DISCLOSURE PROBLEM, A HIPPA
6 PROBLEM, OR --

7 MR. PENNOCK: WE ARE NOT, WITH RESPECT TO --

8 JUSTICE FREEDMAN: -- A PRIVILEGE, BASIC PRIVILEGE.

9 MR. BEISNER: WITH RESPECT TO OTHER FAMILY MEMBERS,
10 WE ARE NOT ASKING FOR MEDICAL RECORDS OR ANYTHING OF THAT
11 SORT. WE ARE SIMPLY ASKING FOR THE PARTY'S KNOWLEDGE ABOUT
12 THIS. IT'S NOT A VERY DETAILED REQUEST FOR INFORMATION ON
13 THAT.

14 MOST OF IT PERTAINS TO WHETHER THE PLAINTIFF, THE
15 CLAIMANT, HAS FILED OTHER CLAIMS; THINGS OF THAT SORT.

16 SO I JUST BRING THAT TO YOUR ATTENTION. IT'S LAID
17 OUT IN THE LETTER. AND WE DO NEED TO GET THAT RESOLVED SO
18 THAT WE CAN GET THAT PROCESS STARTED IN NEW YORK, AS IT IS
19 NOW BEING STARTED IN THE MDL PROCEEDING.

20 JUSTICE FREEDMAN: I THINK WE CAN RESOLVE IT.

21 MR. PENNOCK: YES, YOUR HONOR. THANK YOU.

22 WE RECEIVED THE DEFENDANT'S LETTER BRIEF YESTERDAY
23 MORNING. AS THE COURT KNOWS, WE WOULD LIKE AN OPPORTUNITY TO
24 SUBMIT SOMETHING SHORT OUTLINING OUR POSITIONS ON THESE
25 ISSUES.

1 THERE IS -- YOU KNOW, THERE ARE A NUMBER OF ISSUES
2 THAT MAY, AT FIRST BLUSH, SEEM MINOR. BUT, IN FACT, CAN
3 COMPLICATE MATTERS. AND, IN FACT, MAY NOT -- THEY MAY NOT BE
4 ENTITLED TO THEM UNDER NEW YORK LAW. IT'S NOT GOING TO
5 CHANGE DRASTICALLY THE CONSTRUCT OF THIS FACT SHEET. UM, BUT
6 WE DO THINK THAT THERE ARE SOME THINGS THAT WE WOULD LIKE TO
7 ADDRESS WITH THE COURT AFTER WE'VE HAD AN OPPORTUNITY TO JUST
8 OUTLINE THEM AS TO WHAT THE ISSUES ARE, AND WHAT OUR
9 POSITIONS ARE ON THEM, AS THE DEFENDANTS DID YESTERDAY.

10 JUSTICE FREEDMAN: I THINK YOU ARE WASTING TIME.

11 MR. PENNOCK: WHAT'S THAT, JUDGE? I'M WASTING TIME?
12 IF I'M TALKING, I'M USUALLY WASTING TIME.

13 JUSTICE FREEDMAN: NO. I MEAN, TO OUTLINE THEM AND
14 GIVE ME A BRIEF. I DON'T REALLY NEED -- I DON'T THINK I NEED
15 A LETTER ON THESE THINGS.

16 MR. PENNOCK: THE ONLY REASON TO SUGGEST THAT, I
17 DIDN'T KNOW IF THE COURT HAD AN OPPORTUNITY TO READ OR IF YOU
18 ARE GOING TO READ THE DEFENDANT'S LETTER.

19 JUSTICE FREEDMAN: I DID.

20 MR. PENNOCK: OKAY. SO WE WOULD JUST LIKE --

21 JUSTICE FREEDMAN: TWICE.

22 MR. PENNOCK: OKAY. THEN WE WOULD LIKE AN
23 OPPORTUNITY TO SUBMIT THREE LETTERS TO YOU, IF YOU READ IT
24 TWICE. WE WOULD LIKE AN OPPORTUNITY TO --

25 JUSTICE FREEDMAN: JUST ONE LETTER THREE TIMES.

1 MR. PENNOCK: -- DO A REPLY.

2 AS TO THE CONSULT PRIOR TO SERVING A SUBPOENA ON A
3 THIRD-PARTY WITNESS, UM, I DO HAVE A PROBLEM WITH THAT. I
4 DON'T HAVE A PROBLEM, AS I TOLD THE DEFENDANTS, WITH
5 CONSULTING THEM AS TO WHEN A DEPOSITION IS GOING TO HAPPEN.
6 I DON'T THINK WE'VE EVER BEEN BEFORE YOUR HONOR, IN ALL OF
7 THE LITIGATIONS WE'VE HAD OVER THE YEARS, ARGUING OVER, I
8 CAN'T DO THE DEPOSITION ON THAT DATE, AND WEITZ & LUXENBERG
9 WON'T AGREE.

10 SO WE WILL CONSULT WITH THEM AND ACCOMMODATE THESE
11 DEFENDANTS, THE DEFENSE COUNSEL, JUST AS WE HAVE EVERY
12 DEFENSE COUNSEL IN ANY LITIGATION. WE SUBPOENA A DOCTOR OR A
13 WITNESS, THE DATE IS MORE OR LESS, AS THE COURT KNOWS, A
14 CONTROL DATE, SOMETIMES IT STICKS; SOMETIMES IT DOESN'T. AND
15 IF IT DOESN'T STICK, IT'S BECAUSE SOMEBODY IS UNAVAILABLE,
16 AND IT'S USUALLY THE PARTY THAT DIDN'T SERVE THE NOTICE.

17 AND I COMMIT TO THE COURT, AS I ALWAYS HAVE, AND TO
18 THE DEFENDANTS, THAT WE WILL NOT GO FORWARD OR FORCE THEM TO
19 GO FORWARD WITH DEPOSITIONS WITHOUT CONSULTING WELL IN
20 ADVANCE OF THE DEPOSITION DATE THEY'RE SCHEDULED.

21 BUT I DO NOT, AGAIN, WANT TO SHARE WITH THEM IN
22 ADVANCE WHAT I'M THINKING ABOUT DOING.

23 I MEAN, YOU KNOW, THIS IS NOT -- THIS IS A VERY
24 INTENSE LITIGATION. IT'S NOT A BROADWAY PLAY, WHERE EVERY
25 SINGLE STEP HAS TO BE CHOREOGRAPHED. AND I CERTAINLY DON'T

1 WANT TO SAY TO THEM, WELL, I'VE GOT -- I WANT TO SUBPOENA
2 THIS PARTICULAR WITNESS. WHO IS HE? I'VE GOT TO TELL THEM
3 WHO IT IS, AND THEN HOW LONG DO I --

4 JUSTICE FREEDMAN: AREN'T YOU GOING TO BE
5 COORDINATING WITH THE MDL IN MOST OF THESE?

6 MR. PENNOCK: ON MOST OF THEM, THEY WOULD. BUT
7 THESE ARE WITNESSES THAT MAY BE VERY SPECIFIC TO A CASE. AND
8 IN FACT, MOST OF THEM, I THINK, WILL BE -- I THINK THAT MOST
9 OF THESE WITNESSES WILL LIKELY BE TREATING PHYSICIANS AND SO
10 FORTH.

11 AND I JUST DON'T SEE, NUMBER ONE, I DON'T WANT TO
12 HAVE TO SIT DOWN AND TELL THEM WHAT I'M THINKING ABOUT DOING
13 AND WHAT DOCTORS I WANT TO DEPOSE. THERE IS JUST NO REASON
14 FOR ME TO DO THAT. I COULD SUBPOENA THEM AND COORDINATE THE
15 DATE WITH THEM, AND I'M WILLING AND I ALWAYS HAVE DONE THAT.

16 NUMBER TWO, YOUR HONOR, IF I MAY?

17 JUSTICE FREEDMAN: YOU WANT TO TELL THEM THAT
18 THEY -- YOU ARE GOING TO SUBPOENA DOCTORS OR STUFF LIKE
19 THAT.

20 MR. PENNOCK: THEN WHAT HAS TO HAPPEN, I HAVE TO
21 WAIT FOR A MEET AND CONFER. I HAVE TO WAIT FOR THEM TO GET
22 BACK TO ME. IT'S JUST -- THERE IS JUST NO REASON TO IMPOSE
23 THAT KIND OF A DELAY PROCEDURE TO THIS PROCESS.

24 JUSTICE FREEDMAN: IS IT A CONFER OR NOTIFY? I
25 CAN'T REMEMBER.

1 MR. PENNOCK: I THINK THEY WANTED US TO CONSULT WITH
2 THEM ON THE DATE THAT WE ARE GOING TO NOTICE FOR. THE NOTICE
3 IS NEVER THE DATE, OR VERY RARELY THE DATE ANYWAY.

4 SO IT IS AN ISSUE IN TERMS OF BEING ABLE TO MOVE A
5 CASE ALONG AT THE SPEED WITH WHICH WE WANT TO MOVE IT. AND I
6 REALLY DON'T WANT TO BE HANDCUFFED. I'VE NEVER HAD TO DO
7 THAT BEFORE. IT'S NOT IN THE CPR, I DON'T KNOW WHY WE WOULD
8 HAVE TO TALK TO THEM ABOUT THE DEPOSITIONS WE ARE THINKING
9 ABOUT NOTICING.

10 JUSTICE FREEDMAN: OKAY.

11 MR. PENNOCK: AND FURTHERMORE, I DON'T THINK THAT
12 THAT'S THE PROVISION IN THE MDL, EITHER.

13 MS. FLEISHMAN: IT'S NOT.

14 MR. PENNOCK: I'M TOLD THAT'S NOT WHAT THE PROVISION
15 IS IN THE MDL.

16 MS. FLEISHMAN: MAY I BE HEARD, YOUR HONOR?

17 JUSTICE FREEDMAN: YES, MS. FLEISHMAN.

18 MS. FLEISHMAN: I'M GOING TO SAY MY NAME. WENDY
19 FLEISHMAN ON BEHALF OF THE MDL PLAINTIFFS. AND ACTUALLY, ON
20 BEHALF OF THE PLAINTIFFS.

21 IN THE COURT ORDER, PTO 6, WE, WHICH WE AGREED UPON,
22 AND AT PAGE 15, YOUR HONORS, IT SETS FORTH THE LANGUAGE FOR
23 SCHEDULING OF DEPOSITIONS. AND IT SAYS SPECIFICALLY, "ABSENT
24 EXTRAORDINARY CIRCUMSTANCES, COUNSEL SHALL CONSULT IN ADVANCE
25 WITH OPPOSING COUNSEL AND PROPOSE DEponents IN AN EFFORT TO

1 SCHEDULE DEPOSITIONS AT MUTUALLY CONVENIENT TIMES AND
2 PLACES." WHICH WE'VE AGREED TO DO. THAT DOESN'T MEAN THAT
3 WHEN WE SEND OUT A SUBPOENA AND SEND OUT A NOTICE OF
4 DEPOSITION. ONCE WE SEND OUT THE SUBPOENA, IF COUNSEL FOR
5 THAT PARTICULAR THIRD-PARTY DEPONENT SAYS, THAT'S NOT A GOOD
6 DATE, WE'LL OBVIOUSLY WORK OUT A SCHEDULE. THAT'S WHAT WE
7 HAVE AGREED TO DO. WE HAVEN'T AGREED TO ABANDON OUR RIGHTS
8 TO GO AND SUBPOENA THIRD-PARTY WITNESSES AND ALERT THEM AT
9 THE SAME TIME.

10 JUSTICE FREEDMAN: OKAY. SO THERE SEEMS TO BE A
11 MISUNDERSTANDING, THEN.

12 MS. FLEISHMAN: I THINK THERE IS A MISUNDERSTANDING
13 OF WHAT WAS AGREED UPON.

14 JUSTICE FREEDMAN: OKAY.

15 MR. BEISNER?

16 MR. BEISNER: WELL, I THINK THAT THAT'S NOT HOW WE
17 WERE INTERPRETING THAT PROVISION, UM, ON THAT.

18 BUT HERE IS THE PRIMARY POINT WE ARE GETTING AT.
19 AND THAT IS THAT, I THINK MR. PENNOCK IS SAYING, I DON'T WANT
20 TO REVEAL IN ADVANCE WHO I WANT TO DEPOSE BEFORE I SERVE A
21 SUBPOENA.

22 ALL I'M SAYING IS, I FRANKLY THINK WE ARE ALL BETTER
23 OFF IF WE TALK ABOUT THOSE THINGS IN ADVANCE. BUT THE SAME
24 RULES I WOULD APPLY TO BOTH SIDES. AND HE IS SAYING, THE
25 DEFENDANT CAN'T NOTICE CERTAIN DEPOSITIONS WITHOUT NOTICING

1 THEIR SIDE, THAT'S THE PROVISION.

2 MR. PENNOCK: I'LL WITHDRAW THAT REQUEST, YOUR
3 HONOR.

4 MR. BEISNER: THANK YOU.

5 MR. PENNOCK: IF THAT'S YOUR BIGGEST PROBLEM, I'LL
6 WITHDRAW THAT.

7 MR. BEISNER: I JUST THINK THE SAME RULES OUGHT TO
8 APPLY.

9 MR. HAHN: I'M HAPPY TO REPORT TO THE COURT THAT I
10 THINK WE ARE DONE.

11 THE ONLY OTHER THING ON OUR AGENDA WAS THE KLUMP
12 DEPOSITION. THE PARTIES HAVE AGREED TO THAT AS A RESULT OF
13 OUR DEPOSITION AGREEMENT EARLIER.

14 THE COURT: IT'S GOING TO BE THE CERTIFICATION OF
15 ALL DOCUMENTS AND THEN 30 DAYS TO REVIEW THE DOCUMENTS AND
16 THEN CONTINUE THE DEPOSITION.

17 MR. HAHN: THAT'S CORRECT, YOUR HONOR, WITHIN
18 30 DAYS.

19 MR. COLE: THAT'S CORRECT. AND WE ARE WITHDRAWING
20 OUR COMMENTS ABOUT THE PROTECTIVE ORDER. WE ARE JUST GOING
21 TO LEAVE IT LIKE IT IS, YOUR HONOR.

22 JUSTICE FREEDMAN: OH, OKAY. GOOD.

23 MR. HAHN: IN CLOSING, YOUR HONOR, FROM THE MDL
24 PLAINTIFF'S PERSPECTIVE, WE THINK THAT COORDINATION MAKES A
25 TREMENDOUS AMOUNT OF SENSE. WE ARE WILLING TO TALK TO THE

1 NEW YORK PLAINTIFFS, UM, TO SET UP LIASON COUNSELS BETWEEN
2 OUR TWO GROUPS, SO THAT INFORMATION CAN FLOW SMOOTHLY. UM,
3 WE WOULD GO SO FAR AS TO SUGGEST TO THE COURT SETTING UP A
4 JOINT SPECIAL MASTER. UM, WE WOULD BE VERY WILLING TO
5 ENTERTAIN THAT IDEA. UM, IF THE SPECIAL MASTER WAS IN
6 CHARLESTON, PERHAPS THAT SPECIAL MASTER'S RULINGS WOULD BE
7 APPEALABLE TO JUSTICE FREEDMAN WITH --

8 THE COURT: THE SPECIAL MASTER TO DO WHAT
9 MR. BECNEL'S SPECIAL MASTER OR --

10 MR. HAHN: FOR DISCOVERY ISSUES, YOUR HONOR. IF WE
11 ARE GOING TO HAVE DISCOVERY ISSUES DURING THE DEPOSITION, WE
12 MIGHT NEED TO REACH OUT AND SPEAK TO SOMEBODY ABOUT A RULE OF
13 LAW.

14 THE COURT: I HAD A VOLUNTEER THIS WEEK TO BE A
15 SPECIAL MASTER OF THE NEXT CASE THAT I NEEDED A SPECIAL
16 MASTER. HIS NAME IS DAN CAPPER. HE'S A PROFESSOR OF
17 EVIDENCE LAW AT FORDHAM UNIVERSITY IN NEW YORK CITY. HE'S A
18 GREAT GUY. HE'S AN EXCELLENT GUY.

19 MR. HAHN: WE WOULD BE MORE THAN WILLING TO USE HIM,
20 YOUR HONOR, BUT WE ARE OPEN TO THAT. AND IT'S --

21 THE COURT: I'M NOT SAYING IF YOU NEED ONE, I MEAN,
22 THAT'S SOMEBODY TO THINK ABOUT.

23 MR. HAHN: WELL, IN TIME IT WOULD KEEP -- IT WOULD
24 STOP THE NECESSITY TO HAVE THESE TYPES, I THINK, OF HEARINGS
25 IN THE FUTURE.

1 MR. COLE: WE HEARD ABOUT THIS LAST NIGHT, THE
2 PROPOSAL, AND ARE INTERESTED, BUT THERE ARE OBVIOUSLY -- WE
3 NEED TO TALK WITH THEM MORE ABOUT WHO THAT PERSON MIGHT BE
4 AND WHAT THEIR ROLE WOULD BE. AND WE ARE VERY WILLING TO SIT
5 DOWN AND TALK ABOUT IT AND SEE IF WE CAN COME UP WITH
6 SOMETHING THAT WE COULD JOINTLY COME BACK TO THE COURT, WE
7 JUST CAN'T QUITE GET THERE THIS MORNING. BUT WE ARE
8 CERTAINLY WILLING TO TAKE A GROUP AND SIT DOWN AND SEE WHAT
9 WE CAN COME UP WITH.

10 MR. PENNOCK: I'M IN MR. COLE'S CAMP ON THIS. WE
11 JUST HEARD ABOUT THIS PROPOSAL. WE ARE -- WE DO HAVE SOME
12 CONCERNS BECAUSE, YOU KNOW, BOTH YOUR HONORS HAVE TREMENDOUS
13 AND VAST TRIAL EXPERIENCE AND LITIGATION EXPERIENCE AND
14 DISCOVERY EXPERIENCE. AND SO WE, YOU KNOW, WE WOULD LIKE THE
15 BENEFIT OF THAT ON THESE VERY IMPORTANT DISCOVERY ISSUES, BUT
16 I THINK WE'LL JUST PUNT THIS ONE, IF WE MAY --

17 THE COURT: THAT'S FINE.

18 MR. PENNOCK: -- AND LOOK AT IT.

19 MR. HAHN: FINALLY, YOUR HONOR, AGAIN FROM THE
20 PLAINTIFF'S PERSPECTIVE WITH THE MDL, IT MAKES A TREMENDOUS
21 AMOUNT OF SENSE TO HAVE ONE VIRTUAL DEPOSITORY. WE DON'T
22 CARE WHERE IT IS. IT MAKES SENSE FOR A NUMBER OF REASONS.
23 AND WE WOULD THEN WORK OUT A COST SHARING AGREEMENT FOR THAT
24 DEPOSITORY. AND WE ARE OPEN TO FURTHER DISCUSSIONS WITH
25 DEFENDANT, I MEAN, WITH NEW YORK PLAINTIFFS TO HOPEFULLY MAKE

1 THAT HAPPEN.

2 THANK YOU, YOUR HONOR.

3 JUSTICE FREEDMAN: YOU SEEM TO HAVE DIFFERENT -- A
4 WHOLE DIFFERENT DEPOSITORY, FROM WHAT I UNDERSTAND.

5 MR. PENNOCK: WE DO, YOUR HONOR. OURS HAS BEEN
6 DEVELOPED INTERNALLY. AND THERE IS NO COST SHARING BECAUSE
7 IT'S DONE AND WE ARE NOT PAYING A VENDOR FOR IT. WE ARE NOT
8 PAYING ANYTHING FOR IT; IT JUST IS IN EXISTENCE AND SET UP.
9 BUT I'LL TALK TO MR. BLAIR FURTHER ABOUT THAT, BECAUSE I
10 WASN'T -- HE AND I HADN'T HAD A CONVERSATION ON OUR TWO
11 DIFFERENT DEPOSITORIES.

12 JUSTICE FREEDMAN: WELL, IT'S POSSIBLE THAT THE MDL
13 MIGHT WANT TO TAKE ADVANTAGE OF YOURS --

14 MR. PENNOCK: EXACTLY.

15 JUSTICE FREEDMAN: -- OR SOMETHING LIKE THAT.

16 MR. PENNOCK: AS MR. HAHN JUST SAID, HE DOESN'T CARE
17 WHERE IT IS.

18 MR. KAPLAN: YOUR HONOR, IT'S HARVEY KAPLAN FOR
19 BAUSCH & LOMB. I JUST WANTED TO THANK YOU BOTH FOR DOING
20 THIS JOINT HEARING. I THINK THAT ALL OF US WOULD AGREE THAT
21 THIS HAS BEEN ENORMOUSLY HELPFUL TO BOTH SIDES IN MOVING
22 FORWARD. AND I BELIEVE THAT, LOOKING DOWN THE ROAD, FUTURE
23 JOINT HEARINGS WOULD BE AN EXCELLENT IDEA. AND WE HOPE THAT
24 WE WILL HAVE GOOD COOPERATION AND COORDINATION ON OTHER
25 ISSUES, AND IT WOULD BE BENEFICIAL FOR US.

1 THE COURT: WE WILL NOT HAVE ANY IN CHARLESTON
2 DURING THE MONTHS OF JUNE, JULY, AUGUST AND SEPTEMBER. THAT
3 WOULD BE A GOOD TIME TO COME TO NEW YORK.

4 JUSTICE FREEDMAN: WE WOULD BE DELIGHTED TO HAVE YOU
5 COME TO NEW YORK.

6 MR. BECNEL: HARRY WEITZ AND I TALKED, AND WE
7 THOUGHT THAT ASPEN, COLORADO, SINCE THE DEFENDANTS HOSTED
8 THIS COCKTAIL PARTY HERE, THAT HE AND I OUGHT TO HOST ONE IN
9 ASPEN, COLORADO. WE'LL GET YOU A STATE COURTHOUSE TO USE, OR
10 IN DENVER. AND IT'S MY UNDERSTANDING THAT MOST FEDERAL
11 JUDGES AND STATE JUDGES LOVE OPERA AND DANCE AND CLASSICAL
12 MUSIC, SO -- AND THEY HAVE THE ASPEN INSTITUTE THERE. IT
13 WOULD BE VERY EDUCATIONAL FOR ALL OF US. AND I THINK IT
14 BREEDS COMRADERY THE WAY THIS IS DONE, AS HARVEY HAS SAID.

15 THE COURT: KIND OF LIKE PALADIN, HAVE CASE WILL
16 TRAVEL. NO PROBLEM.

17 JUSTICE FREEDMAN: I AM ACTUALLY PREPARED TO MAKE A
18 COUPLE OF THE RULINGS. LET ME JUST SAY, CAN WE CUT OUT THE
19 WORD ACCESSIBLE? IT SEEMS TO ME THAT WOULD TAKE CARE OF THAT
20 ISSUE COMPLETELY. JUST EXISTING. BUT THAT'S UP TO YOU.

21 I GATHER WE HAVE RESOLVED THE SUBPOENA PROBLEM. YOU
22 ARE NOT -- YOU ARE GOING TO CONSULT WITH, IN TERMS OF THE
23 TIMING OF THE DEPOSITIONS, BUT NOT NECESSARILY NOTIFY EACH
24 OTHER BEFORE SERVING SUBPOENAS, IS THAT --

25 MR. PENNOCK: THAT'S CORRECT, JUDGE.

1 JUSTICE FREEDMAN: IS THAT WHERE THAT IS? OKAY.
2 I'M JUST LOOKING FOR SOME OF THE -- I'M LOOKING TO SEE THE
3 ISSUES.

4 YOU'VE RESOLVED THE TWO DAYS, HOW YOU ARE GOING TO
5 DIVIDE UP THE TIME, SO THAT'S NOT AN ISSUE, AND THE AMOUNT OF
6 TIME YOU NEED TO LOOK AT THE DOCUMENTS AND ALL THAT.

7 THE PLAINTIFF'S FACT SHEET. I PRETTY MUCH LIKE THE
8 MDL FACT SHEET. I DIDN'T HAVE ANY PROBLEM WITH IT.

9 IN TERMS OF ANY BREACH OF PRIVILEGE BECAUSE OF
10 FAMILY MEMBERS, IF A PARTICULAR PLAINTIFF DOESN'T WANT TO
11 ANSWER THAT QUESTION, LET THAT PLAINTIFF NOT ANSWER THAT
12 QUESTION AND WE'LL DEAL WITH IT, OKAY? I MEAN, LET'S NOT
13 MAKE A BIG ISSUE OVER IT. BUT IF A PLAINTIFF WANTS TO SAY
14 THAT HIS TWO-YEAR-OLD KID HAD CONJUNCTIVITIS LAST WEEK OR
15 PINK EYE, YOU KNOW, WAIVE THE KID'S PRIVILEGE. SO THAT CAN'T
16 BE A BIG ISSUE.

17 IN TERMS OF THE OTHER QUESTIONS, OTHER LAWSUITS,
18 OTHER WORKERS COMP CLAIMS, THESE ARE QUESTIONS THAT ARE GOING
19 TO BE ASKED IN A DEPOSITION ANYWAY. FILL THEM IN. IT
20 DOESN'T HURT. AND THEY ARE POSSIBLY marginally tangentially
21 RELEVANT. BUT I THINK THAT THOSE ARE VALID QUESTIONS. SO
22 ANSWER THOSE QUESTIONS.

23 AND WHETHER YOU HAVE TO GO BACK TO SEVEN OR TEN
24 YEARS, MOST PEOPLE AREN'T GOING TO REMEMBER TEN YEARS ANYWAY,
25 BUT LET'S SAY TEN YEARS. IT'S OKAY. THERE IS NO HARM DONE

1 BY PUTTING THAT IN. IT DOESN'T HARM -- I DON'T SEE ANY HARM
2 TO THE PLAINTIFFS. AND I DON'T THINK IT MAKES IT SO MUCH
3 MORE ONEROUS. IF THEY CAN'T REMEMBER TEN YEARS, THEY WON'T
4 REMEMBER SEVEN YEARS, EITHER.

5 AND LET'S SEE, THE ALLEGED WORK PRODUCT CLAIM, I
6 HAVE FEELINGS ABOUT THAT. IF YOU WANT, I'LL RESERVE ON THAT.

7 MR. PENNOCK: WE WOULD APPRECIATE THAT, JUDGE, SO WE
8 COULD HAVE AN OPPORTUNITY TO SUBMIT SOMETHING SHORT ON THAT.

9 JUSTICE FREEDMAN: IS THERE ANY OTHER ISSUE HERE?

10 MR. ANIOLAK: YOUR HONOR, I WOULD LIKE TO --

11 JUSTICE FREEDMAN: OH, THE EMPLOYEES SIGNING. YOU
12 KNOW, AS WE SAY IN NEW YORK, IT WOULDN'T HURT. YOU DON'T
13 HAVE TO PUT THAT IN THERE.

14 YOU KNOW, I KNOW YOU ARE RAISING AN ISSUE, YOU ARE
15 GIVING EMPLOYEES IDEAS POTENTIALLY, BUT I THINK IT WOULD
16 REALLY ALLAY THE CONCERNS OF THE DEFENDANTS TREMENDOUSLY, AND
17 I THINK IT'S -- WHY DON'T YOU JUST DO IT.

18 MR. PENNOCK: JUDGE, AND --

19 JUSTICE FREEDMAN: THAT APPLIES TO -- OH, YOU WANT
20 TO MAKE THE OTHERS DO IT, TOO?

21 MR. BEISNER: YES.

22 JUSTICE FREEDMAN: OKAY. WHAT'S FAIR IS FAIR.
23 GOOSE GANDER.

24 MR. PENNOCK: JUDGE, I JUST WANT AN OPPORTUNITY TO
25 THEN LOOK AT THAT ACKNOWLEDGEMENT AGAIN AND MAKE SURE THAT

1 THE LANGUAGE AND WHAT PEOPLE ARE COMMITTING TO IS CLEAR AND
2 SO FORTH.

3 JUSTICE FREEDMAN: OKAY. WE CAN PLAY AROUND WITH
4 THAT, IF NEED BE. I DIDN'T FOCUS ON THAT.

5 MR. ANIOLAK: YOUR HONOR, I WOULD LIKE TO CLARIFY
6 THE COMMENT ABOUT DEFINITION OF ACCESSIBLE IN THE ELECTRONICS
7 DOCUMENT. JUST SO YOU KNOW, IT WAS MY UNDERSTANDING WE WERE
8 GOING TO TALK WITH MR. PENNOCK AND SEE IF WE COULD GET THAT
9 WORKED OUT, THAT DEFINITION OR DEFINITION OF ACCESSIBLE, IS
10 BASED ON THE SEDONA PRINCIPLES AND SOME OF THOSE CONCEPTS.
11 WE WILL NEED SOME DEFINITION OF ACCESSIBLE WITHOUT
12 ELIMINATING THAT ENTIRE PROVISION. SO WE WILL NEED TO TALK
13 TO MR. PENNOCK ABOUT THAT FURTHER.

14 JUSTICE FREEDMAN: YEAH. I THINK YOU WILL GET
15 ENOUGH DOCUMENTS, BUT THE ACCESSIBLE MEANS, THERE IS SOME WAY
16 IN WHICH YOU CAN PRODUCE THEM.

17 MR. ANIOLAK: AND WE ARE --

18 JUSTICE FREEDMAN: UNLESS YOU HAVE TO GO TO
19 JUNKYARDS TO GET HARD DRIVES, MAYBE YOU DON'T HAVE TO DO
20 THAT.

21 MR. ANIOLAK: WE ARE WILLING TO COMPLY WITH THE
22 SEDONA PRINCIPLES ON THOSE CONCEPTS. AND THAT'S WHAT WE ARE
23 TRYING TO INCORPORATE INTO THE ORDER. AND WE CAN TALK TO
24 MR. PENNOCK ABOUT THAT FURTHER. WE ARE WILLING TO COMPLY
25 WITH THOSE KINDS OF SEDONA GUIDELINES ON ACCESSIBLE.

1 JUSTICE FREEDMAN: OKAY. I AM MARGINALLY RESERVING
2 DECISION ON THE THREE-DAY RULE, OKAY? THREE-DAY
3 NOTIFICATION, UM, SUBMISSION, OKAY?

4 MR. PENNOCK: THANK YOU, JUDGE.

5 JUSTICE FREEDMAN: I'LL JUST SAY PRELIMINARILY, THAT
6 MAKES THE DEPOSITIONS GO A LOT MORE SMOOTHLY IF PARTIES ARE
7 NOT CONFRONTED WITH DOCUMENTS THAT THEY HAVEN'T SEEN FOR A
8 LONG PERIOD OF TIME AND CAN'T REMEMBER WHAT THEY ARE.

9 MR. PENNOCK: YOU KNOW, JUDGE, A LOT OF IT IS
10 SUBSTANTIVE ISSUE. SOME OF IT'S PRACTICAL ISSUE, BECAUSE WE
11 WORK THE THREE DAYS BEFORE THE DEPO. AND YOU ARE SITTING
12 THERE AT ONE IN THE MORNING DECIDING THE DOCUMENTS, TO A
13 LARGE EXTENT, THAT YOU ARE GOING TO USE.

14 JUSTICE FREEDMAN: TO THAT EXTENT, WE MAYBE WILL LET
15 A LOOP -- WE'LL LEAVE A LITTLE LOOPHOLE, NO MORE THAN TEN
16 SURPRISE DOCUMENTS.

17 THE COURT: IS THERE ANYTHING ELSE FROM ANYBODY
18 ELSE? I THINK YOU, OKAY.

19 MR. KIRCHNER: JESSE KIRCHNER FOR THE MDL
20 PLAINTIFFS. THE FOLKS THAT HAVE BEEN PARTICIPATING BY
21 CONFERENCE CALL, WE HAVE THE ABILITY TO OPEN THOSE LINES UP
22 FOR QUESTIONING, IF ANYBODY IS --

23 THE COURT: ANYBODY ON THE CONFERENCE CALL HAVE ANY
24 QUESTIONS OR ANY ISSUES THEY WANT TO BRING UP?

25 MR. KIRCHNER: I THINK YOU NEED TO LET THE

1 OPERATOR --

2 THE COURT: OKAY.

3 THE OPERATOR: AT THIS TIME IF YOU WOULD LIKE TO ASK
4 ANY QUESTIONS, YOU PRESS STAR AND NUMBER ONE ON YOUR
5 TELEPHONE KEY PAD. IT WILL TAKE A MOMENT TO COMPILE THE
6 ROSTER.

7 THE FIRST QUESTIONS COMES FROM THE LINE OF DANIEL
8 KLEIN.

9 MR. KLEIN: YOUR HONOR, DANIEL KLEIN FROM CHICAGO,
10 ILLINOIS.

11 YOUR HONOR, I BELIEVE OUR LOCAL COUNTY JUDGE HAS
12 BEEN IN CONTACT WITH JUDGE NORTON, UM, IT'S OUR DESIRE TO
13 COORDINATE OUR CASES WITH THIS PROCESS, AND WE HAVE ALL OF
14 OUR CASES IN COOK COUNTY, ILLINOIS ALL IN FRONT OF JUDGE
15 ROBERT LOPEZ SHAPIRO. WE HAVE LOCAL LEAVE TO CROSS NOTICE
16 DEPOSITIONS WITH THE MDL. AND WE HAVE RECEIVED CROSS NOTICE
17 DEPOSITIONS FROM THE NEW YORK STATE CASES. UM, WE DO NOT
18 HAVE DOCUMENTS YET IN OUR CASE.

19 I KNOW THAT THE LAST DEPOSITION THAT WENT LAST WEEK
20 IN THE STATE CASE, UM, WE DID NOT HAVE THE DOCUMENTS THAT
21 THEY WERE USING.

22 SO I'M WONDERING IF THERE IS SOME COORDINATION
23 PROCESS WE CAN PARTICIPATE IN OR THAT, SO THAT WE CAN HAVE
24 THE DOCUMENTS THAT ARE GOING TO BE USED FOR THE DEPOSITIONS,
25 AS WELL, AT SOME POINT AHEAD OF TIME.

1 MR. COLE: YOUR HONOR, I'LL BE HAPPY TO WORK ON
2 BEHALF OF THE DEFENDANTS IN THE MDL LIASON COUNSEL; I'M SURE
3 MR. HAHN WOULD WITH THE COOK COUNTY LAWYERS TO WORK OUT A
4 PROCESS LIKE THAT. AGAIN, WE ALL THINK IT'S BEST THAT WE
5 COORDINATE. AND IF HE COULD CALL ME AND I'LL GET BLAIR ON
6 THE PHONE AND WE'LL WORK THROUGH HOW TO DO THAT.

7 THE COURT: MR. KLEIN, DO YOU HAVE THE NUMBERS OF
8 MR. MIKE COLE AND BLAIR HAHN?

9 MR. KLEIN: I HAVE SPOKEN WITH MR. HAHN. HE HAS
10 BEEN KIND ENOUGH TO KEEP ME ABREAST OF WHAT HAS BEEN GOING
11 ON, AND I DO NOT HAVE MIKE COLE'S PHONE NUMBER.

12 MR. HAHN: I CAN GET IT TO HIM, YOUR HONOR.

13 THE COURT: JUST GO THROUGH MR. HAHN AND HE'LL TAP
14 IN MR. COLE, OKAY?

15 MR. KLEIN: I APPRECIATE THAT. THANK YOU.

16 THE OPERATOR: THE NEXT QUESTION COMES FROM TIM
17 FLAHERTY.

18 MR. FLAHERTY: TIM FLAHERTY, SAN FRANCISCO.

19 WE HAVE SUBMITTED A MOTION FOR JUDGMENT ON THE
20 PLEADINGS ON BEHALF OF WAL-MART ON ONE OF THE CASES BEFORE
21 YOU, AND I WAS JUST INQUIRING ON THE STATUS OF THE PROPOSED
22 ORDER. THERE WAS NO OPPOSITION TO THE MOTION, YOUR HONOR.

23 MR. REICHERT: I CAN SPEAK TO THAT.

24 THE COURT: OKAY.

25 IS THIS IN THE CALIFORNIA CLASS CASE, MR. FLAHERTY?

1 MR. FLAHERTY: YES, IT WAS, OR IS.

2 THE COURT: YOUR NAME, PLEASE?

3 MR. RIKARD: THIS IS ROBERT RIKARD. I'M A SOUTH
4 CAROLINA LAWYER THAT JIM FRANCE AND PATRICK KEEGAN HAVE
5 ASSOCIATED.

6 THIS IS THE CASE, YOUR HONOR, THAT WE HAD TALKED TO
7 YOUR CLERKS OFFICE ABOUT THIS WEEK, WHERE THE WAL-MART
8 ATTORNEYS FILED THE CASE, FILED THEIR MOTION IN THE MAIN MDL
9 CASE, BUT HAVE NOT FILED IN OUR CASE. SO WE WERE NEVER
10 SERVED WITH IT.

11 YOUR LAW CLERK SPOKE TO JESSE, I BELIEVE YESTERDAY,
12 AND SAID, COULD WE PLEASE WORK SOMETHING OUT WHERE PERHAPS
13 THEY WOULD JUST RE-FILE OUR CASE SO WE WOULD RECEIVE PROPER
14 NOTICE AND WE WOULD RESPOND TO IT.

15 THE COURT: IS THAT OKAY WITH YOU?

16 MR. FLAHERTY: YOUR HONOR, I BELIEVE WE DID SERVE
17 ALL THE APPROPRIATE PARTIES. WE EVEN CONTACTED THE
18 CALIFORNIA COUNSEL FOR THE WOOTEN PLAINTIFF PRIOR TO FILING
19 THE MOTION. UM, AND I BELIEVE SINCE THE MOTION WAS FILED,
20 MADE OTHER ATTEMPTS TO CONTACT THEM, AS WELL. SO I'M NOT
21 SURE I'M FOLLOWING WHAT MR. KEEGAN IS SAYING.

22 MR. KEEGAN: YOUR HONOR, I CHECKED THE DOCKET
23 YESTERDAY AND JESSE E-MAILED ME, AND THE ONLY PERSON ON THE
24 PLAINTIFFS' SIDE THAT WAS SERVED WAS GEDNEY HOWE AS LIASON
25 COUNSEL. CALIFORNIA CLASS COUNSEL WERE NOT SERVED. I'M

1 LOCAL COUNSEL HERE FOR THE WOOTEN PLAINTIFF. I WAS NOT
2 SERVED. AND IT WAS NOT FILED UNDER THE WOOTEN CASE NUMBER,
3 IT WAS FILED UNDER THE MAIN MDL DOCKET.

4 SO THE ONLY PERSON ON THE PLAINTIFFS' SIDE THAT EVER
5 RECEIVED NOTICE WAS LIASON COUNSEL, WHICH IS NOT APPROPRIATE
6 UNDER THE RULES, IS NOT APPROPRIATE NOTICE.

7 IF THEY WILL NOT CONSENT TO RE-FILING IT, I WILL
8 CERTAINLY MAKE THE MOTION NOW THAT WE BE ALLOWED TO FILE OUR
9 PLEADINGS OUT OF TIME. AND I WOULD ASK THAT WE HAVE 30 DAYS
10 TO RESPOND TO THEIR MOTION TO DISMISS.

11 THE COURT: MR. BALL, DO YOU HAVE SOMETHING?

12 MR. BALL: THIS IS THE FIRST I'VE HEARD OF IT, IF
13 YOUR HONOR PLEASE. I'VE NEVER SEEN THE DOCUMENT, SO I
14 DON'T --

15 THE COURT: OKAY. YOU CAN'T RESPOND TO SOMETHING
16 THAT YOU WERE NOT SERVED WITH.

17 I GUESS THE BALL IS IN YOUR -- THE BALL IS IN YOUR
18 COURT OUT THERE IN CALIFORNIA.

19 WHAT DO YOU WANT TO DO?

20 MR. FLAHERTY: WELL, YOUR HONOR, I GUESS I NEED SOME
21 DIRECTION FROM THE COURT. I DON'T HAVE THE FILE HERE IN
22 FRONT OF ME, UM, TO EVEN DETERMINE WHETHER THE
23 REPRESENTATIONS ABOUT THE LACK OF SERVICE ARE CORRECT. I
24 GUESS I'LL JUST ACCEPT THEM AT THEIR FACE VALUE. IF THE
25 COURT SO REFLECTS WE DIDN'T PROPERLY SERVE IT, THEN, YOU

1 KNOW, I WOULD TEND TO AGREE WITH COUNSEL THAT IT SHOULD BE
2 RE-FILED. AGAIN, I WOULD BE LOOKING FOR SOME DIRECTION FROM
3 THE COURT, BUT WHETHER THE MOTION WAS SERVED OR NOT, WE
4 BELIEVE IT WAS.

5 THE COURT: WELL, I MEAN, I'LL TELL YOU WHAT, I'LL
6 GIVE YOU TEN DAYS FROM TODAY TO DETERMINE WHETHER OR NOT IT
7 WAS FILED, IT WAS SERVED CORRECTLY. IF IT WAS, THEN YOU CAN
8 TAKE BRANCH A. IF IT WASN'T, YOU CAN TAKE BRANCH B, OR AS
9 YOGI BERRA SAID, IF THERE IS A FORK IN THE ROAD, TAKE IT.
10 AND I'LL AWAIT YOUR INPUT AS TO HOW YOU WANT TO PROCEED.

11 HOW DOES THAT SOUND?

12 MR. FLAHERTY: THAT SOUNDS VERY FAIR.

13 THE COURT: OKAY. SURE ENOUGH. THANKS. WAIT A
14 MINUTE. MR. KIRCHNER WANTS TO SAY SOMETHING.

15 MR. KIRCHNER: IF I CAN GIVE SOME BRIEF INSIGHT? AS
16 I UNDERSTAND, THE DOCUMENTS THAT PERTAIN TO ONE CASE IN
17 PARTICULAR INDIVIDUALLY NEED TO BE FILED IN THAT INDIVIDUAL
18 CASE NUMBER. AND I BELIEVE THAT THIS MOTION ONLY APPLIED TO
19 THE WOOTEN CASE. IT WAS MISTAKENLY FILED IN THE MAIN MDL.
20 SO MR. RIKARD AND HIS COCOUNSEL NEVER RECEIVED THOSE.

21 THE COURT: OKAY. WELL, I'LL FIRE EVERYBODY IN THE
22 CLERK'S OFFICE TEMPORARILY. THEY MIS-FILED IT.

23 MR. KIRCHNER: IT'S NOT YOUR OFFICE'S FAULT.

24 THE COURT: THEN I'LL FIRE WHOEVER DID IT.

25 THE CLERK: MR. FLAHERTY.

1 THE COURT: MR. FLAHERTY, OKAY.

2 NO, SO WHY DON'T YOU GO AHEAD AND CHECK THAT AND LET
3 ME KNOW IN TEN DAYS HOW YOU WANT TO PROCEED, OKAY?

4 THE CLERK: HE'S ALREADY GONE.

5 THE COURT: HE'S OFF? OKAY.

6 THE OPERATOR: YOUR HONOR, AT THIS TIME THERE ARE NO
7 FURTHER QUESTIONS.

8 THE COURT: SAY THAT AGAIN?

9 THE CLERK: NO OTHER QUESTIONS.

10 THE COURT: NO OTHER QUESTIONS. OKAY.

11 ANYBODY LIVE HAVE ANY QUESTIONS OR ISSUES THEY WANT
12 TO BRING UP?

13 ALL RIGHT. WELL, THERE IS PLENTY OF RESTAURANTS
14 THAT NEED PEOPLE FOR LUNCH.

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I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-TITLED MATTER.

AMY C. DIAZ, RPR, CRR APRIL 26, 2007

S/ AMY DIAZ