

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. MATT MORELAND, ESQ.
Becnel Law Firm
P.O. Drawer H
Reserve, LA 70084

MR. ISAAC DIEL, ESQ.

For the Defendants:

MR. JOHN BEISNER, ESQ.
O'Melveny & Myers
1625 Eye Street, NW
Washington, DC 2006

MR. MICHAEL T. COLE, ESQ.
MS. JANE DAVIS, ESQ.
MR. ELI POLIAKOFF, ESQ.
Nelson Mullins
Riley & Scarborough
151 Meeting Street
Suite 600
Charleston, SC 29401

* * *

Court Reporter:

Amy C. Diaz, RPR, CRRS
P.O. Box 835
Charleston, South Carolina 29402

Proceedings recorded by mechanical shorthand,
transcript produced by computer-aided transcription.

1 THE COURT: Okay. I'm ready when y'all are.

2 MR. HOWE: Your Honor, first of all, I wanted to
3 introduce to you Mr. Dan Karon. He is from Cleveland, Ohio.
4 He's a part of a class action firm. And we are not sure
5 whether he has been admitted, and we want to move to admit
6 him.

7 THE COURT: Sure enough.

8 MR. KARON: Thank you.

9 THE COURT: I think I exempted y'all from fees for
10 admission, right?

11 MR. HOWE: You did. But I wanted to make sure we
12 covered that.

13 Secondly, Mr. Whetstone is here and wanted to make
14 sure some issues in his case are not before the Court, and
15 that's what we want to clarify first.

16 Mr. Whetstone?

17 MR. WHETSTONE: Your Honor, it is our understanding
18 that the hearing in regard to Wal-Mart's motion was not
19 scheduled for today. We didn't get any notice on it, and
20 it's my understanding that it's not going to be heard.

21 THE COURT: Do y'all agree with that?

22 MR. COLE: Yes.

23 MR. HOWE: Well done, Mr. Whetstone.

24 THE COURT: I thought he was here for a Rule 5.

25 MR. HOWE: Judge, Mr. Karon specializes in class

1 actions. He is going to be making our argument.

2 THE COURT: I'm not going to hear from you on class
3 action?

4 MR. HOWE: You could, but it would take so long, I'm
5 going to turn it over to Mr. Karon and let him whittle it
6 down.

7 THE COURT: Okay. Mr. Cole, are you arguing the
8 thing?

9 MR. COLE: I think I'm going to take the Mr. Howe
10 approach and let Mr. John Beisner argue.

11 THE COURT: So we have lawyers that really know what
12 they are talking about.

13 MR. COLE: I think you will appreciate that a little
14 more.

15 THE COURT: That's a refreshing change.

16 MR. BEISNER: That remains to be seen, Your Honor.

17 May it please the Court? I am John Beisner. I'm
18 counsel for Bausch & Lomb. And we are here today, as Your
19 Honor noted, on the Rule 12(b)(6) motion we have filed with
20 respect to the master class action complaint that has been
21 filed in this case.

22 A couple of, I guess you might call them
23 housekeeping matters I wanted to just address up front, to be
24 clear about what we are addressing.

25 The first is that the motion today is addressed to

1 the claims of the four named plaintiffs who are listed on
2 this slide here. And because it will be kind of relevant
3 later, I just wanted to note that three of these filed their
4 claims originally here in South Carolina. One was filed
5 originally in California. Three of them, although the
6 pattern shifts at that point, purchased their product in
7 California; one of them purchased the product in
8 Pennsylvania.

9 So that will become relevant when we get to the law
10 issues. But the motion here is addressed only to the named
11 plaintiffs. Of course, if the named plaintiffs claims are
12 dismissed, the action is dismissed, since there is nobody
13 else there at this point. Even though it's styled as a class
14 action, these are really the only parties before the Court at
15 this point.

16 The other thing I just wanted to note, Your Honor,
17 are the pleadings standards that are at issue here. And I
18 note this only because there is one case that should be
19 mentioned to the Court as not in the briefing, because it
20 just came down within the last couple of weeks, and that's
21 the Supreme Court's ruling in the *Bell Atlantic vs. Twombly*
22 case. That case effectively overruled the *Conley vs. Gibson*
23 standard, which plaintiffs cited, which the 12(b)(6) motion,
24 which the Court should be looking at, is whether there is any
25 way that they could prove their claims under the allegations

1 in the complaint.

2 And the Supreme Court said that's not what was meant
3 in *Conley vs. Gibson*. That Rule 8(a) requires more than just
4 fair notice of claims. There must be a showing of the
5 grounds on which the claim rests. There has got to be more
6 to it than just, as the Court says, the labels and
7 conclusions and to formulate recitation, the elements. And
8 that will become relevant to some of the arguments we'll be
9 making later.

10 And Justice Sutor in that decision also noted that
11 a main concern about making sure that Rule 8(a) is treated in
12 this somewhat fuller way is a concern about launching into
13 these big cases and requiring a lot of discovery, when it's
14 not clear if there really is a claim at the outset.

15 I would also note that some of the claims here are
16 subject to Rule 9(b), including the particularity standards,
17 as well, and I'll get to that in a second.

18 I guess the place we need to start on this motion is
19 the choice of law analysis, which I'll move through quickly.
20 But I think the main points are as follows: Under the *Van*
21 *Dusen* case from the Supreme Court, this court, as an MDL
22 court, is obliged to look at where these actions were
23 originally filed to figure out what choice of law principles
24 should apply.

25 That's why I mentioned earlier that we have three

1 plaintiffs who filed their claims originally here in South
2 Carolina and one in California. And so those are the two
3 choice of law analyses that we need to be looking at here.

4 Your Honor knows far better than I do what the South
5 Carolina choice of law principles are. But for tort, as I
6 understand it, it's *lex loci*. And for contracts, it's most
7 significant relationship test.

8 As we argue in our briefing, we believe for the
9 claims that we have at issue that would take you to the place
10 where the product was purchased. And so for those filing in
11 South Carolina, the California residents, it would take to
12 the California law, and for those who purchased the product
13 in Pennsylvania, it would take you to Pennsylvania.

14 And so that New York law, which is mentioned in the
15 complaint and is suggested by plaintiffs as perhaps applying
16 to all the claims that have been filed with this action,
17 because that's where Bausch & Lomb is headquartered, really
18 under South Carolina choice of law principles sort of doesn't
19 get to first base. That you've got to use California and
20 Pennsylvania law for those claims.

21 California, for the one claim that was filed
22 originally in California --

23 THE COURT: Mr. Beisner, are you sure that *lex loci*
24 doesn't apply in contracts, too?

25 MR. BEISNER: Um, Your Honor, if it does --

1 THE COURT: Okay.

2 MR. BEISNER: -- it's the same result.

3 THE COURT: Okay. Well, that's a good answer.

4 MR. BEISNER: So --

5 THE COURT: Okay.

6 MR. BEISNER: I said, Your Honor, I defer, if that
7 is the analysis for South Carolina, but it gets you the same
8 result.

9 California, we think gets you the same result.

10 Where the purchase was made is the relevant test there, as
11 well.

12 We think the key case there is *Osborne*, a California
13 case, that basically says in a case like this, a product
14 liability case, a governmental interest test will get you to
15 the state of product purchase in a case like that. And
16 *Osborne* is a similar case where you've got people asserting
17 economic loss claims for products.

18 So that's the analysis that we think should be
19 applied here.

20 With that, let me move to the actual claims, the
21 counts here.

22 Let me start by saying, I'll go through the New York
23 law claims, but our position is, Your Honor, that New York
24 law doesn't apply to anything here, so it's irrelevant. But
25 the analysis, for a lot of these, is similar.

1 So I'll briefly go through New York law in case for
2 some reason the Court concludes that it's relevant, because I
3 think that that leads you to the same result.

4 A key issue that we've got here, and a reason why
5 the claims would fail under New York law, is that none of the
6 named plaintiffs here, we believe, allege any cognizable
7 injury. What they are alleging here is that they bought a
8 product that they said had the propensity to result in a
9 condition known as fusarium keratitis.

10 Now, there are some people, as we know from the
11 other claims that are filed in this case, that said, I used
12 the product, I got fusarium keratitis. They've got their
13 tort claims, and those are going on separately. But this is
14 a lawsuit that is brought by individuals who didn't get
15 fusarium. They are saying, I got this product and they say
16 nothing happened.

17 THE COURT: It seems a little simplistic to me to
18 take that position when the reason they are not using the
19 product is your client told them not to use the product that
20 they bought.

21 MR. BEISNER: Well, they are not using it now.

22 THE COURT: Because your client said, you know,
23 Don't use it.

24 MR. BEISNER: Sure.

25 THE COURT: Okay?

1 MR. BEISNER: But they used it for a period.

2 THE COURT: So they paid \$5 for a bottle of ReNu and
3 the company says, Don't use it, aren't they out \$5?

4 MR. BEISNER: No, Your Honor, they are not.

5 THE COURT: Oh, so you get to keep the money and
6 they don't get to use the product?

7 MR. BEISNER: Let me explain why they are not. And
8 there is an element missing from plaintiff's complaint and
9 that's what I want to come to.

10 There is two categories of the product we are
11 talking about here. One is there is a product that they used
12 over a period of time.

13 So they bought -- let's say you have a consumer who
14 bought ten bottles of it and used it without consequences.
15 The product did what it was supposed to do. They got no eye
16 infections. Um, you know, what the allegation here is, is
17 that the product didn't do what it was supposed to do with
18 respect to a particular fungus. There is no allegation that
19 the product was ineffective with respect to anything else.

20 So they got a product. They used it without
21 consequence. So they basically, they got what they paid for.
22 And then you are saying, All right, I'm sitting here, I have
23 a half bottle on my shelf in my medicine cabinet. And out
24 comes this press release saying, Don't use it anymore. So
25 I've got that bottle sitting there.

1 Now, the issue that we've got with that, Your Honor,
2 is the following: This is what's in the complaint. This is
3 what is quoted in the complaint. "On or about April 13th,
4 defendant requested that U.S. retailers remove ReNu from
5 their shelves and recommended that consumers switch to
6 another lens care solution until the conclusion of the
7 investigation reports fungal keratitis infections among
8 contact lens wearers in the United States."

9 THE COURT: You need to slow down when you are
10 reading, because she's going to cramp up.

11 MR. BEISNER: I'm sorry. Okay.

12 So that is what is in the complaint.

13 And if you look, Your Honor, that is quoted from the
14 press release, that it's accurate. That's exactly what we
15 said in that April 13th press release. So that is there in
16 the complaint. That's what they say.

17 What the plaintiffs leave out of the complaint is
18 this other line from the press release.

19 "Consumers who wish to return their ReNu with
20 MoistureLoc can visit the Bausch website or call
21 1-888-666-2258 to receive a coupon for another Bausch & Lomb
22 eye care product or receive their money back, your choice."

23 So what you have here is the product that was used
24 was used without consequence; did what it was supposed to do.

25 And what you have left on your shelf, we said, We'll

1 give your money back. In fact, we'll refund the total price
2 of your bottle even though you used part of it. And
3 thousands of people did just that. And that's left out of
4 the complaint.

5 Now, the problem with the complaint, and this is
6 where the *Twombly* case I mentioned at the outset comes in,
7 all the complaint says is: We bought it; you owe us money.

8 There is no allegation in there that they threw out
9 any of the product or anything like that. That's just in the
10 papers, the motion papers that they filed.

11 And so there is no allegation in the complaint that
12 there was any waste here, but if those allegations that are
13 in the motion are credited, it seems to me, in fairness, the
14 Court has also got to look at the entirety of the document
15 that they quote in the complaint and assume that all the
16 class members were entitled to get a refund. We offered that
17 already. I don't know what we are here arguing about. We've
18 done that with respect to the product that was left over.

19 And so we believe that under New York law, that the
20 case law there is plentiful that says if you buy a product
21 and you didn't have a problem with it, there was no
22 manifestation of the defect in that product. Even though
23 others may have had that problem, you are not entitled to any
24 relief under New York law. And those are the cases that we
25 cited in the brief, *Weaver*, um, and a number of other cases

1 on New York law on that.

2 So for that reason, we would argue that those claims
3 are subject to dismissal.

4 There are other reasons, which I won't go into
5 detail, but under New York law, you are required to notify
6 us, to give Bausch & Lomb pre-lawsuit notification under
7 2-607 of the Uniform Commercial Code. That's not pleaded
8 here and it did not happen.

9 New York also has a vertical privity requirement
10 with respect to warranty claims. With implied warranty
11 claims, you have to buy directly from the defendant.
12 Obviously, none of these people bought directly from Bausch &
13 Lomb since it was something sold through stores.

14 The consumer fraud claims in New York are not viable
15 here because the New York Court of Appeals, the highest
16 court, has ruled in the *Goshen* case that New York's consumer
17 protection statutes were applicable only to transactions that
18 occurred in New York.

19 Now, I think plaintiffs have indicated that they are
20 willing to withdraw that claim.

21 THE COURT: That's a no mas. You've got a pretty
22 good case on that one.

23 MR. BEISNER: So I think that we probably needn't
24 bother the Court with that. But I'll let counsel address
25 that. I think that offer was made previously and perhaps we

1 failed to follow-up on getting that documented.

2 And we also, Your Honor, believe that the unjust
3 enrichment claims in New York are invalid because they don't
4 plead that they have no adequate remedy of law.

5 And the *Cirri* case is significant, and this will
6 come up with respect to some of the other states, as well,
7 because plaintiffs have sort of suggested, Well, what if our
8 other claims fail that we have asserted here, don't we have
9 unjust enrichment as a fallback?

10 The *Cirri* case says it doesn't work that way. If
11 the other claims don't work, unjust enrichment isn't a saver,
12 if you will, for those claims. That's there if the remedy
13 for the other claims is inadequate. But if you basically
14 don't have a claim at all, unjust enrichment doesn't get you
15 to relief.

16 Let me turn now to California, which would be
17 applicable to three of the plaintiffs, we contend, Solo,
18 McKay and Skandros. California also recognizes this no
19 injury, no tort principle that I talked about earlier.

20 And I'll note that with respect to three categories
21 that are claims, first of all, the *American Suzuki* case and
22 other cases that follow it in California, hold that if you
23 buy a product and your product, what you bought didn't
24 manifest a defect, you don't have a claim under warranty law
25 in California.

1 THE COURT: Of course, that's the argument with
2 regard to in the *American Suzuki* case, if Suzuki had sent out
3 a recall and said, Don't use a Suzuki because it's going to
4 flip over like a pancake, it would be a different case.

5 MR. BEISNER: Well, but it would also be a different
6 case if it said -- if it --

7 THE COURT: But that, you know --

8 MR. BEISNER: -- if it issued -- but I --

9 THE COURT: And your argument is, and said, We'll
10 buy you a new Suzuki --

11 MR. BEISNER: Yeah.

12 THE COURT: -- that doesn't flip.

13 MR. BEISNER: So I think you've got both factors are
14 applicable there.

15 The California Unfair Competition Law is similarly
16 in that position. Indeed, this is a result of --

17 THE COURT: I mean, all your arguments are going to
18 be based on the fact that Bausch & Lomb said, Send it back to
19 us and we'll send you your money back.

20 MR. BEISNER: It's two parts.

21 I think what we are saying, Your Honor, is they are
22 not -- if you look at the complaint, what they are saying is,
23 We bought the product and nothing happened. They don't --
24 there is no allegation in the complaint that they disposed of
25 anything.

1 What I'm saying is if you credit that, and I think
2 under these cases, there is no loss; they used the product
3 without consequence. And therefore, there is no claim for
4 relief under these various laws that we are looking at here,
5 either warranty law or the statutes in California.

6 If you credit, though, the allegation, which isn't
7 in the complaint but is in their motion, it says, We threw
8 some of it out.

9 THE COURT: It's kind of a unique position to take.

10 MR. BEISNER: Yeah.

11 THE COURT: Did you file a motion to amend their
12 complaint --

13 MR. BEISNER: No.

14 THE COURT: -- for you to amend their complaint?

15 We didn't consider that. And in all honestly, I
16 don't read those briefs word for word, but I didn't see
17 anything in the briefs about that issue.

18 MR. BEISNER: About which issue?

19 THE COURT: We'll send it back to you. The
20 additional allegation that you want to put in their
21 complaint.

22 MR. BEISNER: Right.

23 THE COURT: Was there anything in the briefs about
24 that?

25 MR. BEISNER: I don't think -- I don't think that --

1 well, no, we did attach the press release. I think it's
2 Exhibit 2 to it. I'm not sure how clearly we may have argued
3 that, Your Honor.

4 THE COURT: I think it -- I was checking with my
5 lawyer. I think it's a stealth argument, it's not being able
6 to be picked up on radar.

7 MR. BEISNER: The issue is, Your Honor, the
8 complaint, though, doesn't say anything, I think the
9 fundamental argument we made on that is you didn't argue in
10 your complaint that you disposed of any product. You
11 basically said you just bought it.

12 And remember, Your Honor, what they are saying, they
13 are saying is, We want a refund for all of the ReNu that we
14 bought. I mean, the problem is we've kind of got a moving
15 target here in their motions because the motion doesn't match
16 the complaint. They are saying, We want you to pay us back
17 for every bottle of ReNu that we bought, even though they
18 used it and used it without consequence.

19 The idea of them wanting compensation only for that
20 last bottle that you were referencing, isn't in the
21 complaint. That's not how their complaint is styled. So we
22 are kind of arguing in the air a little bit here, but I think
23 that's what it is coming down to in the papers at this point.

24 In any event, Your Honor, under the California
25 Unfair Competition Law and False Advertising Law, this was

1 amended by referendum in California under Prof 64 several
2 years ago. And the whole purpose was to put in this injury
3 in fact requirement that the person suing has to have
4 suffered injury. And that tracks what the Consumer Legal
5 Remedies Act in California says, as well.

6 So we think that under California law, you buy a
7 product, there is no consequence, there should be no claim.

8 There are additional reasons why the warranty
9 claims, we believe in California, should fail. Um,
10 California also has a privity requirement that you can only
11 sue the person who actually sold you the product; not anybody
12 else in the distribution chain.

13 Plaintiffs come back with a couple of cases that
14 they are just citing the exception, that if you are talking
15 about physical injury, you could sue the manufacturer
16 directly. That doesn't apply in warranty cases.

17 And here, too, we also have the problem with them
18 not giving notice of the claim under 2607 of the UCC, as
19 enacted in California.

20 THE COURT: So your position is that the lawsuit is
21 not sufficient notice?

22 MR. BEISNER: Correct. And --

23 THE COURT: Is there any prejudice to your client
24 that the lawsuit is the only notice you've had?

25 MR. BEISNER: Well, yes.

1 THE COURT: What is that?

2 MR. BEISNER: In a sense, that if we had been
3 notified of the lawsuit, and they are coming in and saying,
4 if we had been notified in advance of the lawsuit, and they
5 said, We want money back for that last bottle. We would have
6 said, Call the 1-800 line and it would have saved us a lot of
7 trouble. So there would have been a remedy for what they
8 were talking about.

9 And the unjust enrichment claims in California, Your
10 Honor, are not a valid cause. We cited a number of cases,
11 including these, that say that unjust enrichment is not a
12 distinct cause of action in California.

13 THE COURT: That's what the headnote in the case
14 says, okay?

15 MR. BEISNER: Okay.

16 THE COURT: What the case says is that unjust
17 enrichment is called restitution in California. If you read
18 the case, it says that you just call it restitution. And
19 there is such a cause of action as restitution. They just
20 call it restitution as opposed to unjust enrichment.

21 MR. BEISNER: Well, Your Honor, I think -- I mean,
22 it's styled what it is here. And they style it that way, I
23 suspect, to be able to say that all the state laws are
24 uniform, with the count that they have here. It's of no
25 moment, though, Your Honor, because California also says that

1 you've got to plead in the *Doe vs. Texaco* case and the
2 *Stationary Engineers* case, that you've got to specifically
3 plead that there is no adequate remedy at law, which they
4 don't plead here. Indeed, they plead to the contrary by
5 asserting the other claims that they have asserted here.

6 The last jurisdiction to deal with is Pennsylvania,
7 where we have the one plaintiff, Cleveland. And here, too,
8 Pennsylvania does not allow lawsuits for potential future
9 injury, which is basically what the plaintiffs are alleging
10 here with the product.

11 They are not alleging that they had any problem with
12 the product; they are just saying others did. And we believe
13 that that forecloses all the claims under Pennsylvania law.

14 Plaintiff cites several cases, *Spagnol*, *Kassab*
15 *Zwiercan* and others, saying that that's wrong. But if you
16 look at those cases, in each of those, the plaintiff incurred
17 an out-of-pocket expense to repair the product or something
18 of that sort. And we don't have any allegation of that sort
19 in the complaint here.

20 So we think that the claim should fail under
21 Pennsylvania law on that ground, as well.

22 There are additional reasons under Pennsylvania law
23 that we believe it should fail. Again, we have the notice
24 issue under UCC 2-607. There is no allegation in the
25 complaint that any sort of notice was provided. And so the

1 warranty claims, we believe, should fail on that ground, as
2 well.

3 We also believe that the consumer fraud claims from
4 Pennsylvania should fail on several grounds.

5 One, is Pennsylvania's use of the economic loss
6 doctrine that says that plaintiffs alleging product liability
7 are limited to warranty theories unless they allege personal
8 injury, which these plaintiffs don't. That's the holding in
9 *Werwenski and Heindel*.

10 There is also the issue raised by the *Silverstein*
11 case that plaintiffs have not alleged a duty to disclose.
12 Plaintiffs in this complaint don't allege, Here is a
13 statement that you made that we have relied upon to our
14 detriment in purchasing the product. They are just saying,
15 You didn't disclose information about the product.

16 And our read of *Silverstein* is that, and other cases
17 that we've cited, is that that sort of obligation doesn't
18 arise unless there is a special relationship that exists,
19 which is not alleged in this case.

20 We also have the issue of reliance. As I just
21 mentioned, plaintiffs don't allege that they have relied in
22 any respect on any representation or absence of a
23 representation here. There is no reference to any
24 advertisements or marketing practices on which they allegedly
25 relied. We think that is fatal to their consumer fraud

1 claims in Pennsylvania.

2 And we also have the problem of noncompliance with
3 Rule 9(b). There is no who, what, when, where with respect
4 to these fraud claims. And this really applies, frankly, to
5 the claims of each of the jurisdictions that we are dealing
6 with.

7 Plaintiffs have asserted 9(b) doesn't apply here.
8 But as noted in our briefs, as exemplified by the *Fass* case,
9 it's well settled that if you are making a claim under a
10 consumer protection statute that is a fundamentally fraud
11 claim and Rule 9(b) does apply.

12 But we don't have any assertion here about any
13 specific representations or other things that you would
14 expect to find under 9(b) in a complaint asserting a fraud
15 claim.

16 The unjust enrichment claims, um, we also believe
17 fail in Pennsylvania. Under the *Lewis* and *Albertson* case, we
18 believe that they fail because there is no allegation of
19 injury. We believe these are analogous to *Lewis* and
20 *Albertson* where they claim that the manufacturer failed to
21 warn about the consequences of use of the product, but that
22 the claimants themselves did not suffer any injury. And
23 therefore, we believe that the unjust enrichment claims in
24 Pennsylvania fail on that ground.

25 But even if they did not, Pennsylvania also says

1 that, as I mentioned earlier, unjust enrichment can't be sort
2 of the catchall saver for claims that are otherwise not
3 viable.

4 If your tort claims fail, your other claims, your
5 unjust --

6 THE COURT: The tort claims didn't fail; they just
7 weren't alleged.

8 MR. BEISNER: Right.

9 THE COURT: Okay.

10 MR. BEISNER: Well, no, but the point is that, if
11 you can't -- if you don't -- I guess the point is that with
12 unjust enrichment, what the courts -- what the courts are
13 saying is that you've got to be able to allege that you don't
14 have an adequate remedy of law.

15 What they are saying there is that if the remedy is
16 adequate, the point isn't that if your claims just fail at
17 law, you don't have the allegations to make it, that you can
18 make an unjust enrichment claim.

19 If you want to file a lawsuit that basically says,
20 Well, I think it's fraudulent that a merchant would charge
21 sales tax, and, of course, all the other claims would fail,
22 it doesn't mean that at the end, when all your other claims
23 fail, you can bring it as an unjust enrichment claim and get
24 past the Rule 12(b)(6) stage. I think that's fundamentally
25 what those claims are saying.

1 So in any event, Your Honor, I think that it comes
2 down to this: Our fundamental position is that we believe
3 that California law should apply to California claims;
4 Pennsylvania law to Pennsylvania claims. That the no injury
5 argument that we have made here basically knocks out all of
6 those claims as a threshold matter.

7 But that to the extent that any of them were to
8 survive that basic argument, we have backup arguments that we
9 think would dispose of the balance of those claims. And for
10 that reason, we believe that all of these claims should be
11 dismissed under Rule 12(b)(6).

12 THE COURT: Okay. Great. Thank you.

13 MR. COLE: Your Honor, just as a point, actually in
14 our brief on Page 1 in our reply brief and Page 9, we do
15 cover the recall and the reimbursement issue. So it's not as
16 stealth as maybe, but it's in there.

17 THE COURT: We'll say it wasn't the front fighter
18 jet; it was the back fighter jet.

19 MR. COLE: But it was flying in the air, as opposed
20 to not being in the air at all.

21 THE COURT: Okay.

22 MR. KARON: Your Honor?

23 THE COURT: Yes, sir. Good morning.

24 MR. KARON: Can you move your laptop, so I have a
25 little more room? I didn't know if you wanted to use it in

1 your reply.

2 MR. BEISNER: Oh, sure.

3 MR. KARON: Good morning.

4 THE COURT: Good morning.

5 MR. KARON: Good to be here, Your Honor. I have
6 been here, but usually I sit behind. It's nice to be up
7 here. I hope it's worth the trip.

8 THE COURT: Okay.

9 MR. KARON: I wanted to start up by clearing up a
10 little bit of confusion that I think defendant's brief may
11 have created concerning what the claims are; why we pleaded
12 it the way we did. Because it's a CAFA case and CAFA cases,
13 since February of '05 are a little new to everybody, and we
14 are getting used to them, but they are certainly still pretty
15 new.

16 With regard to who is in our class, we pleaded the
17 complaint broadly. There is no doubt about that. But what
18 we are talking about today, and what really creates the core
19 group, the folks in the upper class, are those people who had
20 the product and didn't use it and ended up tossing it out,
21 like that they have been talking about this morning. And
22 again, like I said, it's a broadly worded complaint, but
23 still contains that essential set of folks. And it's broad
24 because without, you know, revealing any work product or
25 anything, I mean, we are going back and forth at the time we

1 are putting the complaint together, trying to figure out who
2 this ought to apply to try get the greatest coverage.

3 And, you know, we are talking a lot about folks who
4 have used the product, who used it without incident, can they
5 be part of the class?

6 And I was thinking the whole time they really can't
7 be because they didn't go blind, their eyeballs didn't get
8 burned. And if they had, they would be part of Mr. Hahn's
9 group back there. They didn't pour the stuff out unused. So
10 they didn't describe economic injury, like I'll describe in a
11 minute. They rather used the stuff without incident, and
12 good for them, they are lucky, forget about the case and get
13 on down the road. You should be so lucky to be in that
14 group.

15 That's not what our case involves. That's not what
16 we're here on today. It's those people poured it out unused.

17 And the reason we sued the case like we did, with
18 the New York claims up front and then California and
19 Pennsylvania claims, is because after CAFA, you know, we
20 couldn't sue cases in California and expect them to stay in
21 California, and sue cases in PA and expect them to stay in
22 PA, and sue cases in New York and expect them to stay in
23 there. Because everything is in the Federal Court under
24 Amended Section 1332, right? So we are all going to be
25 together wherever MDL gets transferred, which is here.

1 And, you know, all filing in different courts would
2 have done would have been to result in, you know, a couple
3 extra filing fees. And as much as I respect, I guess, the
4 Federal Judiciary's interest in making a little extra money,
5 rather than not making it on me. So we sued here originally.

6 And we set them up in kind of alternate classes.
7 We've got the New York claims up front applying to a 50-state
8 class, which would be people in all the states who fall under
9 the category I just described.

10 And if that claim --

11 THE COURT: There is no New York lead plaintiff?

12 MR. KARON: Right.

13 THE COURT: Okay.

14 MR. KARON: There isn't, but I'll get to why that's
15 okay come choice of law time, which I'm going to talk about,
16 too. I'm going to talk about it in a little while, though.

17 THE COURT: Let me ask you a question: You filed in
18 South Carolina, does our Door Closing Statute have any affect
19 on your case?

20 MR. KARON: The Door Closing Statute, in terms of
21 what?

22 THE COURT: In case of foreign plaintiff, foreign
23 defendant, cause of action arose outside of South Carolina.

24 MR. KARON: No, I don't think it does, again, for
25 reasons I'll get into with respect to choice of law and some

1 Supreme Court cases that actually speak to that, and then
2 South Carolina choice of law jurisprudence, and also you have
3 to consider when looking at choice of law.

4 But we also sued much more limited California and
5 Pennsylvania claims related only to Californians, with
6 respect to the California counts, and Pennsylvanians, with
7 respect to Pennsylvania counts.

8 Because if, come choice of law time, the Court
9 doesn't think that New York law can apply broadly, despite
10 what we'll argue come choice of law time, the fallback
11 position is going to be a smaller case on behalf of
12 Californians under California law, and Pennsylvanians under
13 the Pennsylvania law. So that's why we set it up like we
14 did, just to kind of clear up any confusion.

15 But one of the big, probably the biggest argument
16 that Bausch & Lomb is making throughout all the briefing is
17 we don't have any damages. And I kind of touched on it
18 before.

19 And I think you get it, but just to be on the safe
20 side, because it's a really important issue, kind of in terms
21 of everything that happens going forward. Rather than
22 explaining it, as I think it's more effective if I kind of
23 show it to you.

24 So what our case is actually about --

25 THE COURT: This is low tech as opposed to high

1 tech?

2 MR. KARON: Let's say, during the class period, you
3 know, a year and a half ago, I walk into Tellis Pharmacy,
4 right, because I have actually been there. And I go out in
5 back and I ask Mrs. Tellis for some ReNu with MoistureLoc.
6 And she sells it to me, and you take a look and see how much
7 it costs. And it costs, if I remember --

8 THE COURT: At Tellis, probably \$500.

9 MR. KARON: It was 8.99 a bottle, let's say, plus
10 six and a half percent sales tax. So it comes at 28.72.

11 So I give Ms. Tellis, and I'll bet you I have 28.72
12 here. Here is 28, and I've got some change, 28.72. And I
13 give it to her and I take my ReNu with me, right?

14 Then, you know, I hear -- I hear all about the
15 recall. I mean, you've got to get rid of the stuff. It's
16 not used, it's sitting in my medicine cabinet, but it's going
17 to blind me, or whatever, like I'm going to use it anymore.
18 I don't have my receipt. She ain't taking it back because
19 she didn't know I bought it from her, or Wal-Mart or Eckerd.

20 So what you are left doing is, you really have no
21 choice but to throw the stuff away. So I don't have it
22 anymore. But I also don't have my money. Because my money
23 has made its way back to Bausch. So I'm out-of-pocket my 28
24 bucks, which I really want back for the unused product, which
25 they have admonished me to throw it away.

1 So when you talk about damages and personal injury,
2 or this and that, that's the damage. It has nothing to do
3 with whether I got burned or not. So as long as we focus on
4 that, I think we'll stay on topic.

5 Because the cases that Bausch & Lomb cites up and
6 down their brief, are really these non-manifesting defect
7 cases. And these are the ones where -- actually, I have one
8 that wasn't in my briefing, and I know it really well because
9 I worked on it. And thankfully, I got out of it before the
10 case totally tanked.

11 It involves these --

12 THE COURT: You still got time to get out of this
13 one.

14 MR. KARON: This one involves -- I didn't spend as
15 much money on that one.

16 THE COURT: Okay.

17 MR. KARON: But this one involved these Chrysler Gen
18 3, Generation 3 seatbelt mechanisms.

19 And what happened there was you've got your seatbelt
20 and you've got your housing, you know, the black part, and
21 the orange part sticks up from underneath, and that's the
22 part you've got to push when you want to release it.

23 What happened in those cases was the orange button
24 was up too high, and it was real sensitive, too, to the
25 touch. So what ends up happening when somebody bumps against

1 it or if you are, God forbid, in an accident and thrown
2 around the passenger compartment and something bumps up, the
3 orange button, it releases, and you are in a lot of trouble.

4 So what ended up happening was a buddy of mine down
5 in Corpus Christi was hired to represent the family of a
6 young fellow who was driving in his Chrysler pickup. He was
7 in an accident, and things got thrown around. Something
8 bumped up against the orange part of the seatbelt, it
9 released, and he went through the windshield and died. And
10 he got a plaintiff's verdict.

11 And on special interrogatory after hearing
12 plaintiff's expert talk about how it's really sensitive, it's
13 up too high, it's sensitive to the touch, they did this
14 sensitive ball depression test, all this stuff. And on
15 interrogatory, the jury came back and said, Yeah, it's a
16 design defect. This is a bum seatbelt; shouldn't have been
17 in this car.

18 So what you figure would have happened, happened,
19 which is that that verdict spawned a bunch of consumer cases
20 all around the country on behalf of Chrysler vehicle owners
21 for having these seatbelts in their cars in state court,
22 because it was pre-CAFA.

23 And what folks wanted in those cases was one of two
24 things: Either money to swap out the bad seatbelts for new
25 ones, or to have Chrysler retrofit the seatbelts with

1 functioning seatbelt mechanisms, right?

2 And every one of those cases was thrown out, I mean,
3 on a motion to dismiss, on the theory that there was a
4 non-manifesting defect because nobody had yet been hurt.

5 And that's just like that *Frank* case that's in the
6 briefing with the collapsing seat back, you know, nothing
7 happened to folks; yet, um, you know, when you are dead or
8 injured, come back and see us, maybe then you will have a
9 claim; at which time Chrysler is going to say, It's not our
10 fault anyway. But you know what? Until that happens, you've
11 got nothing because you have no injury as far as a lot of
12 these courts are concerned.

13 And, you know, it's kind of like, I was thinking,
14 it's kind of like insurance companies who, you know, God
15 forbid they paid to -- they paid for your physical to keep
16 you from getting sick, you know what I mean? But when you
17 get sick, they will pay five times more than it would have
18 taken to keep you from getting sick. Because until then,
19 forget it, Don't even bother seeing us or making a claim.
20 And God forbid it's a family member of yours who is the next
21 one.

22 But that's not what we have here. I mean, there is
23 such a basic, fundamental distinction between those
24 non-manifesting defect cases and our case that it's almost
25 kind of easy to miss.

1 And the difference, of course, is that Chrysler
2 wasn't telling people to throw their cars away. I mean,
3 people are still driving these things, so they are getting
4 some utility out of these things.

5 Here, however, you know, Bausch & Lomb is splashing
6 this recall notice everywhere, telling folks, You better
7 throw that stuff away because we don't want anymore of these
8 injury cases out there. And that's the big difference.

9 And that's why these non-manifesting defect cases
10 don't really work here. Because it's not really the same
11 here. And if you look at the issue for what it is, you see
12 how this money, these damages are still out of the class,
13 because we got rid of that which, you know, for which we paid
14 the money. That didn't happen in *Gen 3* or in *Frank* or any of
15 these other cases.

16 THE COURT: What about Mr. Beisner's position that
17 you should have the entire recall and dial the 888 number and
18 get your money back?

19 MR. KARON: It's funny you said that, because here
20 is the press release.

21 THE COURT: Okay.

22 MR. KARON: Your timing is especially good.

23 They made one kind of passing reference at Page 9 of
24 their reply brief to this refund campaign, which, you know, I
25 think common sense --

1 THE COURT: People could miss that, you know --

2 MR. KARON: That's the thing. If it were this big,
3 meaningful splash, intended to be seen refund campaign,
4 believe me, not only would folks have seen it, and would have
5 I seen it, as the guy working on the case -- and I had never
6 seen it until Page 9 of the brief -- but, you know, we had
7 have seen 30 pages of full-sized, color, glossy, splashing
8 billboard ads and DVD, TV spots and CD, audio spots, and all
9 this stuff saying, Get rid of the product, you know, and you
10 send it in, get your money back. We didn't see any of that.

11 All you see -- actually, may I hand this up to you,
12 Judge?

13 THE COURT: Yeah, sure. No problem.

14 MR. KARON: This is what we are talking about.

15 We've got a press release that even if you see it at
16 the top doesn't make any mention of refund. It's at the
17 bottom, where you've got to go all the way down. And it's
18 got a reference to Bausch's website and an 800 number.

19 So first thing I did, of course, because I'm working
20 this thing, I know it's coming up today, I go to Bausch &
21 Lomb's website. And that's the next page. If you take a
22 look, there is no reference on the website to anything
23 related to a refund. I mean, you don't even know from refund
24 when you look at it.

25 So what I did was you go to the next page. Do you

1 want me to sit tight or keep going?

2 THE COURT: No, I'm fine. I'm right with you.

3 MR. KARON: The next page with the highlighted
4 stuff, there is a search box in the upper, right-hand corner.
5 I put in -- I just made stuff up to kind of come across it.
6 ReNu with MoistureLoc refund seemed to make sense. So I put
7 that in there and I got a couple of hits.

8 One was their form 10-K, which isn't going to help
9 me much with the refund. But the top one is the one I
10 clicked on, this response, an issue summary.

11 So I go to that, and I walk through it, and it
12 actually lets me get a coupon for a new bottle of a contact
13 solution.

14 MR. COLE: Your Honor, I don't want to interrupt,
15 but if we could have copies of what he --

16 MR. KARON: Right there.

17 MR. BEISNER: Oh, they are all attached.

18 MR. KARON: It's all in there.

19 You can click on it, and you will get a \$2.50 coupon
20 against your \$8.99 purchase, right?

21 So I got three bottles. So I click on it. I get
22 one coupon for 2.50. Then I go at it again because I want to
23 get another coupon, get another coupon for 2.50.

24 But then the third time, not being such a charm, I
25 guess, I click on it and tells me, sorry, I've got the most I

1 can get.

2 So you don't even get enough to make up for the
3 money you spent and then you don't even get enough to make up
4 for the number of bottles you bought.

5 So I figure maybe I'll have a little better luck
6 with the 800 number. So I call that. And I'm told, I've got
7 to peel the label off the bottle, send it in, the bottle I
8 threw out however long ago, before I even knew about the
9 refund necessarily, and even then, I'm limited to two.

10 So what do you make of the third bottle? So coming
11 and going, the refund campaign wasn't especially meaningful
12 to me, and I suspect not to a lot of other people.

13 So seeing, as in life, you get nothing unless you
14 ask, we come here today; sued this case for the purpose of
15 getting people the money they are owed back. That money
16 right there.

17 So that's all by way of background.

18 And before I get to the claims, I'm going to get
19 myself some more water.

20 THE COURT: Did you know that the world's largest
21 collection of seatbelts is in Greenville, South Carolina?

22 MR. KARON: Really?

23 THE COURT: You heard of a lawyer named Kendall Few?

24 MR. KARON: That I didn't.

25 THE COURT: Okay.

1 THE COURT: Just in case you get back in, he's got
2 them all.

3 MR. KARON: If you don't dismiss this and we'll come
4 back, maybe I'll get to go visit.

5 THE COURT: No problem.

6 MR. KARON: With regard to the particular claims, we
7 sued three types of claims. Consumer fraud claims, implied
8 warranty claims -- I should know this, I did it -- and unjust
9 enrichment claims.

10 With regard to the New York consumer fraud claim, in
11 that Section 349 claim, Mr. Beisner is right. I did the
12 complaint. I took a look at their Motion to Dismiss, I read
13 that *Goshen* case from the Court of Appeals case in New York.
14 It says what it says.

15 I was talking with my cocounsel, it can't possibly
16 say that, you know, I can distinguish it because I can all
17 this other stuff. She's like, Well, this firm tried to do
18 that and they lost. So much for that.

19 So I put together a one-sentence stipulation of
20 dismissal. I sent it to these fellows, you know, a while
21 back. And I figure they wouldn't have a problem, and don't
22 have a problem. Didn't hear back that it was okay until the
23 briefing.

24 So I don't know why they spent a bunch of time
25 talking about Section 349 because I think the claim stinks.

1 THE COURT: Okay.

2 MR. KARON: So I guess it's out, right?

3 THE COURT: All right.

4 MR. KARON: With regard to the California consumer
5 fraud claim, um, they say that we have a problem with all
6 three California consumer fraud statutory claims, because you
7 need to demonstrate individual reliance. You need to plead
8 it. And then I guess a class certification, you need to
9 prove it. And you can't do that on a classified basis
10 because you necessarily have to talk to everybody in a class.

11 But it's not these claims that require reliance;
12 rather, it's common law fraud that requires reliance, which
13 is why we don't plead it. And that's why you never see any
14 class action lawyers because you can never get it certified.
15 It's the statutory counts that let you do it.

16 And if you take a look at the California decisions
17 on these three consumer fraud theories, they get certified
18 all the time despite these reliance arguments.

19 And if you really think about it, though, we are not
20 talking about a misrepresentation case anyway. That you can
21 say, Oh, we are alleged to have seen it and relied on it and
22 all that. But rather, it's an admissions case. They didn't
23 tell us what the stuff could do to you, which is why
24 plaintiffs bought it, and ended up having to throw it away.

25 So we plead the admission as best we can with

1 respect to reliance, if it's even required, which it isn't.

2 But going further, with respect to particularity,
3 and where Bausch & Lomb says, You weren't specific. You
4 didn't say the who, what, when, where, why, and all this
5 stuff with respect to these consumer fraud claims, you know,
6 we put everything in there that was out there. It's not that
7 tough a set of facts to figure out and plead. I mean, we put
8 that they knew it was bad in Asia; they kept it quiet. And
9 finally, it popped here in the U.S. when the CDC and FDA made
10 them pull it from the shelves.

11 And for those reasons, and the reasons essentially
12 they didn't tell us that they were a problem, they hid it
13 from us, and made a lot more money in the meantime, that they
14 are on the hook for the California consumer fraud claims.

15 And the only fact I figure we didn't plead because
16 we couldn't know it yet, is really, who was responsible for
17 keeping it quiet at Bausch & Lomb and keeping sales going in
18 the U.S. until it was too late and they had to pull it? I
19 mean, I figure, well, hopefully, we'll learn that in
20 discovery, that's not a tough thing to figure out probably.

21 But in the meantime, we put everything in there we
22 had to and could have.

23 In fact, it's so full of facts and I think they are
24 so straightforward that if you see fit to keep us around, um,
25 I think it might not be a half bad idea to move for summary

1 judgment on liability on the consumer fraud claims, they are
2 so well pleaded; at least that's my opinion.

3 With respect to the Pennsylvania consumer fraud
4 claim, there is that *Toy* case out there, right, that the
5 Pennsylvania Supreme Court case is going to hear. I just
6 think that its, you know -- and I'm the guy who wants to move
7 the case, because I can't get anywhere unless the case moves.
8 I think the better decision would be to sit tight on the
9 Pennsylvania consumer fraud claims and what level of
10 reliance, if any, is required, until the *Toy* court resolves
11 it.

12 Because, you know, what Bausch & Lomb says in the
13 briefing is, Oh, they are not going to decide whether
14 reliance is required; they are going to decide what degree of
15 reliance to require. And that's how plaintiffs set up the
16 question. And they boxed themselves in by setting it up that
17 way. But with these courts, as I needn't tell you, you never
18 know what they are going to do. I think it may well be that
19 they decide some level of reliance is required, a lot, a
20 little, or none.

21 What if they say none? We have no problem. What if
22 they say a little? We have to take a look at how we pleaded
23 it to see if we satisfied the new standard the Court hasn't
24 even yet expressed. So to rule on that right now, you know,
25 I don't know how anybody can do it. That's why I suggest

1 sitting tight on the Pennsylvania consumer fraud claim.

2 Well, we also plead breach of implied warranty. And
3 in all three states implied warranty is kind of the same, so
4 I can consider them together.

5 Defendant's first argument concerns privity. And
6 they explain, you know, you need vertical privity to have an
7 implied warranty claim. You don't have it here because you
8 bought from retailers, like Tellis or Eckerd, and we can't be
9 on the hook to them.

10 Well, first of all, no vertical privity is required
11 in New York. Vertical privity has been significantly scaled
12 back in California, at first with respect to food items in
13 the *Duchess* case, and then with respect to vaccines in a
14 later case. And now it's been kind of opened up to all
15 products that are ingested.

16 You can take a look at Bausch & Lomb's opening
17 brief, they even describe this Bausch & Lomb ReNu product is
18 something that is ingested. And there is no vertical privity
19 required in Pennsylvania, either.

20 In fact, with respect to Pennsylvania, they would
21 argue otherwise. So if you take a look at vertical privity's
22 exceptions, in New York and California, what defendant says
23 is that, Okay, the language is in there, but you know what,
24 it only applies when we are talking about personal injury.

25 And the thing is, if you take a look at their cases,

1 that's -- you know, they all concern personal injury because
2 it's not an uncommon thing to see sued. But what they are
3 noting is really an observation, more than it is a rule. I
4 mean, nothing in the case says that we are limiting this
5 exceptions application to only injury-related cases. That is
6 just something they are making up. And that's the state's
7 legislature's job or the Court's job to make up, to
8 implement; not defendants, because it's just not in there.

9 And it kind of makes sense, too, because if you
10 think about the theory behind implied warranties and
11 privities abolishment is to keep the defendant on the hook to
12 the people who they can reasonably expect are going to be
13 affected or suffer damages when a breach of implied warranty
14 occurs when they do it.

15 And in that manner, it ought not matter whether the
16 damages suffered are personal or economic. That has nothing
17 to do with the theory behind about privities abolishment.
18 And that's the reason you don't see the exceptions limited in
19 the case law.

20 Because after all, if you take a look at this
21 situation, who, if not plaintiffs, defendant's end use
22 market, without these purchases, they go out of business. It
23 is going to be affected by a breach of implied warranty here.
24 That's why the exception is limited here.

25 They also argue notice. And they explain that, you

1 know, you need to put us on notice and give them notice
2 before you can properly plead an implied warranty claim.

3 And by the way, Skandros out of California did, he
4 sent a letter. But the other folks didn't. And if they
5 didn't stands to reason because, you know, the whole point in
6 notice, like you mentioned, Judge, is to give defendants an
7 opportunity to cure the breach, right? And these folks knew
8 about it, like, a year, or whenever, before plaintiffs ever
9 knew about it. In fact, so knew about it that they decided
10 to keep it quiet, and keep selling the product here in the
11 U.S.

12 And it's when they found out about it that they
13 pulled the product. And we, of course, found out about it
14 and ended up throwing the product away.

15 THE COURT: So is it your position that they
16 notified themselves?

17 MR. KARON: Well, that's kind of the thing. I see
18 that in the papers. I mean, what's the purpose of giving
19 extra notice for something they already knew about? It's
20 kind of purposeless. And that's why I said in my brief that
21 none of these states, and I'm sure South Carolina included,
22 you know, the law never requires the doing a useless thing.
23 That's one of those common law maxims from the queen's bench
24 days.

25 THE COURT: The law does not require a feudal act.

1 MR. KARON: Yeah. That works, too. Maybe that's
2 how they phrase it in South Carolina, but we are on the same
3 page.

4 THE COURT: When we talk about a useless thing, we
5 talk about Mr. Howe and Mr. Cole.

6 MR. KARON: That's your own business.

7 But then kind of retrospectively, if you think about
8 it, if the whole purpose of giving notice is to give the
9 defendants a right to cure, I mean, they weren't doing it.
10 They were hiding it. They weren't curing it. They are
11 selling product for like another however long in the U.S.
12 after the problems popped in Asia; keeping it quiet until the
13 CDC and FDA made them come clean and recall the stuff.

14 So they weren't doing anything to fix it back then
15 and they are certainly not doing anything to fix it now
16 because they are fighting the customers. And that's why we
17 are here.

18 So the purpose of giving notice is kind of
19 purposeless, given what actually happened.

20 So what does Bausch & Lomb say? They say, Well,
21 take a look at the cases. This constructive notice, not
22 needing to give notice argument, only is triggered where
23 personal injury is concerned, because these were personal
24 injury cases, and it doesn't apply here.

25 And, again, like I said, with respect to privity,

1 that, too, is really an observation more than it is a rule.
2 It is not a rule anywhere. It just so happened the cases
3 involve personal injury.

4 So, again, to extend this notice theme to, or
5 actually, to refuse to extend this notice theme to
6 nonpersonal injury cases doesn't make sense, especially in
7 keeping with the purpose behind which, you know, notice is
8 intended.

9 And in the final theory, we allege for all three
10 states, is unjust enrichment. And I always screw up the
11 standard. But, you know, I'll read it again. So -- it was
12 here. I don't know where I put it. Okay. I'm more prepared
13 than I thought.

14 So long as in your complaint, the plaintiff pleads
15 that he or she can put a benefit upon the defendant,
16 defendant received or retained the benefit under such
17 circumstances that will be inequitable and unconscionable to
18 permit defendant to retain it without paying plaintiff the
19 benefits reasonable value, you have made your claim for
20 unjust enrichment.

21 And I know that especially well because I actually
22 not long ago finished a Law Review article on unjust
23 enrichment and how it's sustained everywhere, and how these
24 are the elements without much else.

25 And with regard to New York and California unjust

1 enrichment, what Bausch & Lomb says, is, you know what, you
2 don't have a claim unless you -- unless You allege that
3 you've got no other, you know, no adequate legal remedy.

4 Well, first of all, obviously, Federal Rule 82
5 allows you to alternatively plead. So that if one theory
6 doesn't hold up at the end of the day, you can sue another
7 theory. And it's for stuff just like this that it lets you
8 do it.

9 But also, if you think about it, um, defendants no
10 adequate legal remedy kind of bootstraps us if you go for it.
11 Because on the one hand, you spend all their powder saying,
12 We don't have all these statutory and common law claims,
13 because of all these reasons of notice and privity and
14 reliance and all this stuff, um, but then we don't have an
15 unjust enrichment claim because we actually have other common
16 law and statutory claims available, but that they say we
17 don't have.

18 So they kind of get us coming and going; doesn't
19 really leave us with anything. And that really just kind of,
20 on a fundamental level, to me at least, isn't fair.

21 With respect to California unjust enrichment, like
22 you and Mr. Beisner were talking about, um, they say it
23 doesn't exist. It actually does exist. Um, I didn't note in
24 my papers, restitution is what they call it, and then they go
25 into it in California.

1 And that kind of stands to reason because if it
2 weren't a remedy in California, defendant couldn't even have
3 even cited those supposed no adequate legal remedy cases out
4 of California concerning unjust enrichment. So it's there.

5 And finally, with respect to Pennsylvania, they say
6 the *Steamfitters* case stands for the proposition that you
7 can't sue for unjust enrichment, um, if your other tort
8 claims fail.

9 Well, as you discussed, and as is pretty evident in
10 the briefing, because I wrote the brief, we don't allege tort
11 claims, we allege anything but tort claims. You can't allege
12 a tort claim because you don't have a personal injury or
13 property damage. So I'm not even going there. That's a
14 non-manifesting defect case, is what that is, and I'm not
15 suing it, believe me. So we don't allege tort claims.

16 So what Bausch & Lomb then says is they kind of take
17 the extension of that theme and say, Oh, well, it means if
18 your tort or other claims fail, you can't sue unjust
19 enrichment. Kind of an end around, no adequate legal remedy
20 argument.

21 And, again, that's not what *Steamfitters* says. It
22 says what it says. We can read the case. It talks about
23 tort claims. And we are not suing them. So *Steamfitters*
24 ought not be the case that boxes us out of the Pennsylvania
25 unjust enrichment claim.

1 So that's it with respect to the legal claims and
2 how I think we properly pleaded them.

3 I wanted to talk a minute or two about choice of law
4 now, because it's obviously an important thing.

5 Well, first of all, so my understanding of the way
6 this works is so long as we properly plead our various causes
7 of action, we have done our job under Rule 12(b)(6), and I
8 think we have.

9 Now, the interesting thing is, you've got a CAFA
10 case, CAFA-nated case, as we call it, highly charged. And we
11 are here because of that statute. And that's why we've got
12 these different, you know, three different, you know, state's
13 laws kind of going at it. And we don't know what -- which
14 one of them, or ones of them, apply yet.

15 And we pleaded our complaint that way, like I
16 mentioned earlier, so as to, in fairness to the whole class,
17 get the broadest coverage as we could, but as
18 constitutionally permissible a manner as we could, because
19 come choice of law time, we will sort this out.

20 And to properly kind of go through choice of law in
21 a CAFA situation, in what was formerly a state case, but now
22 is a multi-state case in Federal Court, you've got to go
23 through a couple of steps.

24 And that *St. Jude* case from Judge Tunheim out of the
25 District of Minnesota, if you had a chance to take a look at

1 it in the briefing, it's not long, it's eight pages. That's
2 a great case for saying how you actually walk through the
3 analysis.

4 He actually walked through it after the Eighth
5 Circuit remanded the case to him and gave him direction as
6 to, you know, a little bit of direction and said, Go through
7 this more methodically and do a proper choice of law
8 analysis, so we can figure out what state's law applies here.
9 And this was a class certification, I might add.

10 And that was kind of the setting which he did the
11 following: What he said is, Well, the first thing you've got
12 to do when you are trying to figure out what state law
13 applies, is you've got to consider that U.S. Supreme Court
14 case which is *Philips vs. Shutts*, which I talk about a little
15 bit in my brief and Bausch & Lomb doesn't. And I'm not going
16 to be cute, it doesn't surprise me, I guess, but you wouldn't
17 expect it to be in there. But it's really important, because
18 it's one of these really important multi-state class action
19 cases.

20 And what the Supreme Court in *Shutts* says was that
21 you can apply a single state's law extraterritorially,
22 meaning to people outside that state, obviously, so long as
23 one of two things happens.

24 Um, one, there is no conflict among any of the
25 State's laws at issue. If there is no conflict, I mean, who

1 cares, right? They are all the same, like in unjust
2 enrichment, I mean, that's what my article goes into, or a
3 lot of folks would say breach of contract, because it's kind
4 of the same everywhere. So you don't really need to get all
5 gummed up with choice because there is no conflict.

6 But if you don't have that, let's say you are suing
7 a statutory claim, you know, and say, it's a consumer fraud
8 claim, like we have here. And despite some plaintiffs'
9 lawyers believing that all state's consumer fraud laws are
10 the same and trotting out their charts, showing they are all
11 the same, I mean, they are not. I mean, they are not.

12 And if you have a situation like that, so long as
13 applying that one state's law, usually the defendant's home
14 state's law, like we are trying here, so long as applying
15 that state's law extraterritorially complies with the due
16 process and full faith and credit clauses, you are okay.
17 It's the fair, right, appropriate thing to do.

18 Such as when, for instance, the defendant's from
19 there or they dreamt up, implemented, concealed, profited
20 from their scam or conspiracy, or whatever else it was there.
21 Um, so long as everybody in the class didn't deal with the
22 company that's from that state. All these kind of factual
23 issues go into deciding whether due process allows you to
24 trigger Shutts's second prong.

25 And if it does, prong one or two, we'll stick with

1 two, because that's kind of what is at issue here, at least
2 with respect to the statutory and implied warranty claims,
3 um, you have really been able to figure out whether applying
4 a single state's law extraterritorially is permitted, whether
5 you can do it. But that's not enough.

6 The next step of the analysis, Judge Tunheim
7 explained, Mr. Beisner started here, was to consider whether
8 applying a single state's law extraterritorially is the
9 preferred way to do it. You have the permitted part and then
10 whether it's preferred.

11 And how you decide whether it's preferred in a
12 certain case, well, we have to go to the forum state's choice
13 of law jurisprudence under the Supreme Court's case, because
14 that's whose law that's going to apply. And you take a look
15 and see whether applying one state's law is a preferred
16 option, as opposed to multiple state's law, under the
17 appropriate choice of law test, per the forum state's of law
18 jurisprudence.

19 And that's, like I said, where Bausch & Lomb takes
20 off and they say, You know what? Lex loci is the test.
21 You've got to look at where the plaintiffs are. You've got
22 some folks from California; you've got a woman from
23 Pennsylvania, and California law applies to Californians,
24 Pennsylvania law applies to Pennsylvanians, and New York law,
25 forget it, there is no place for it because of lex loci,

1 which applies, of course, to tort claims. And that's not
2 what we have.

3 But then they say, Oh, you know, it applies to all
4 claims, you know, you can apply it across the board, you
5 know -- actually, I won't say that. I misspoke. They say
6 the most significant relationship test applies to nontort or
7 contractual based claims. But you know what? That shakes
8 out just the same way. You know what? I mean, if you know
9 South Carolina's choice of law, you know, test, I just read
10 it recently. It's like everybody else's, you know, the most
11 significant relationship test, it's got, like, a bunch of
12 factors, like five or six factors, and you can't just plug
13 them in off a complaint. You need to go through discovery to
14 figure out how the heck to apply them.

15 And that's why you typically see choice of law
16 decided in class certification after the parties have been
17 able, plaintiff in particular, have been able to put together
18 a record and develop some facts, and talk about what facts
19 plug into the tests, so that they can show that one state's
20 law versus another state's law applies.

21 And if come that time, it turns out that, yeah, the
22 test breaks in favor of California and Pennsylvania law, like
23 the lex loci kind of thing, it is what it is. The law is the
24 law, you know. You can't change it. It is what it is, in
25 large part. But if not, New York law may well apply to a

1 multi-state class. And to rule it out on nothing more than
2 a, you know, a few-page complaint with a couple of
3 allegations concerning where plaintiffs live, really isn't
4 fair.

5 But if you take a look at defendant's reply brief,
6 they do cite a couple of cases where choice of law was
7 decided at the Motion to Dismiss stage. To argue that, hey,
8 you can do it up front, it's okay.

9 Well, one of them, um, was the *Bridgestone/Firestone*
10 case under the District of Indiana, um, with Judge Barker.
11 And what she did was to apply *lex loci* because they were
12 largely tort claims. And that's easy to do.

13 But with respect to the non-tort claims, she said,
14 You know what? It's the same test because Indiana's choice
15 of law jurisprudence lets me do it. That's the distinction
16 between what happened up there, and what I would submit
17 should happen down here.

18 Now, Judge Easterbrook in the Eighth Circuit
19 subsequently flipped her because she applied the test wrong.
20 But you know what? It doesn't change what I just described.
21 She did it up front because Indiana rules let her.

22 And in the Fourth Circuit, for instance, that
23 *Carlson* case they cite, Judge Phillips from the panel didn't
24 have a problem figuring out choice of law up front because it
25 was a UCC based claim.

1 And in, you know, his opinion, the law is the same
2 everywhere. So let's just go with it. Kind of like the
3 first prong in *Shutts*. There is no reason to even get to a
4 conflicts test because there is no conflict. So that's why
5 the panel said it was okay to do it early on there.

6 So we believe we properly pleaded our various legal
7 claims, according to different state's laws, which we'll
8 figure out later after we've had a chance to take meaningful
9 discovery and go through exactly what factors satisfied or
10 not the choice of law test.

11 Because if you think about it, every issue I
12 phrased, according to Bausch & Lomb, is mis-cast. Every
13 argument I make is wrong. Every case I cite is mis-cited. I
14 mean, I'm wrong, wrong, wrong, wrong, wrong, and in all
15 respects.

16 And come on, I hear enough of that at home. And if
17 my wife ever sees this, I will disavow that as a scribner
18 error.

19 But I think I understand this stuff well enough to
20 properly plead these claims, arguably, better than I
21 understand my wife saying it.

22 But it kind of begs the question, if we are wrong
23 across the board for this money, then, I mean, just on a gut
24 kind of commonsense level should we be coming back to the
25 class. We are wrong on these claims, we put it into the ones

1 that work, paid attention, and with respect to the injury
2 cases and not sue negligence claims because you can't under
3 the state's laws and all that. I mean, what theory works?

4 I mean, it's not my place to ask these folks what
5 theory works, but it's yours. If there is something else to
6 plead, I would sure as heck like to know what it is. I don't
7 think there is, because I think these work. And where we are
8 wrong, you know, we are plenty happy of being wrong. I was
9 wrong about Section 349, flat out wrong, and I did a
10 one-sentence dismissal. And that's all it took to dump the
11 claim. But I don't think we are wrong about the other stuff.

12 And if Your Honor thinks that we need to clean up
13 the complaint or tweak it or do something to make it make
14 more sense, to better capture the essence of what I described
15 today, I'm happy to do it. That's what I do. We'll do
16 whatever you think we need to.

17 But we think we have properly pleaded consumer
18 fraud, what remains of our consumer fraud claims, with
19 implied warranty and unjust enrichment under these various
20 state's laws, with choice of law to be decided later. And in
21 this manner, we've met our burden under Rule 12(b)(6).

22 And to grant defendant's Motion to Dismiss would
23 really, really be to allow Bausch & Lomb to commit the
24 perfect economic crime.

25 THE COURT: Okay. Thank you.

1 MR. BEISNER: Your Honor, I wish that Justice Suitor
2 were watching this today, because I think what we have seen
3 here is what *Twombly* is all about.

4 I'm not sure I'm here in the right lawsuit, because
5 I think what I've heard counsel say today is that what this
6 is about are people who bought product and wanted to be
7 reimbursed for something that they poured out and couldn't
8 use after the announcement was made and none of that, mine,
9 none of this, the factual allegations that counsel is talking
10 about, are in the complaint. All it says about the named
11 plaintiffs are, as counsel later said, that they bought the
12 product and where they live.

13 The complaint basically seeks a refund for any money
14 that anybody spent on ReNu with MoistureLoc, um, during the
15 entire period it's on the market. But this is a different
16 theory that is being espoused here today that is not
17 reflected in the complaint at all.

18 And, Your Honor, with respect to, you know, the
19 response on the refund, part of it, again, that press release
20 wasn't the only thing that Bausch & Lomb stated about that,
21 there were full page ads all over the place about that
22 program. But we -- but we are off in Never-never Land
23 because there is no reference in the complaint to anything
24 that anybody poured out anything. I mean, this is the
25 problem that *Twombly* is getting at that you need to have in

1 the complaint, the allegations that counsel are really
2 intending to pursue. It's just not there. What was argued
3 here today bears no resemblance to the complaint. And the
4 complaint that was filed should be dismissed.

5 Now, if plaintiffs want to amend, fine, but it's not
6 a tweak. That's an entirely different lawsuit that we are
7 talking about. And, you know, if, you know, counsel said he
8 went on the website, well, the program was a year ago. I
9 mean, there were ads. I mean, it was an entirely different
10 situation.

11 So to sort of stand before the Court and say, I
12 think the website he ran was a couple of days ago, I mean,
13 this program is a year ago when the withdrawal of the product
14 occurred.

15 So I really think that what counsel has really gone
16 through here is an admission that this complaint is
17 inadequate and should be dismissed. If he wants to amend,
18 fine, but the claims that are there now really do not -- do
19 not hold water.

20 Your Honor, let me, before I get into a couple of
21 other things, reference the choice of law issue that counsel
22 raised.

23 The suggestion that he made is that because the
24 Class Action Fairness Act was enacted, that this court should
25 approach this as a possibility of applying one state's law to

1 all of these claims.

2 Let me note in that regard two things. If you look
3 at the purpose of the statute, right up front, Congress
4 passed that statute to stop that. State courts were doing
5 exactly what plaintiff's counsel is saying. That is, they
6 were going to a single state and applying those laws to
7 claims that were coming from all 50 states and derogation of
8 other state's laws. And that's part of the reason why
9 Congress passed that statute was out of recognition that
10 Federal Courts were not doing that; that they were honoring
11 the laws of various states.

12 Counsel is also suggesting that somehow the choice
13 of law analysis ought to be postponed because it's a class
14 action. If these individuals walked into court today and
15 filed these claims and didn't mention anything about being a
16 class action, the Court would have no problem figuring out
17 right here and now what law applies. Where did you buy the
18 product? South Carolina law would take you to what laws
19 applied. There is no need for any analysis.

20 What counsel is basically saying is, Well, since
21 this is a class action, you ought to wait and we'll figure
22 out later what might work best in terms of certifying this as
23 a class. That's a violation of the Rules Enabling Act. The
24 Court should not act any differently with respect to the
25 merits of these claims and the choice of law analysis of

1 these claims under the Rules Enabling Act because, it being a
2 class action, it being the exercise of procedural advice,
3 shouldn't change the applicable law. It shouldn't be any
4 different if these folks walked in as individuals that come
5 in as part of a class action what law should apply here.

6 And so the Court is able to make that choice of law
7 determination now. There is no need for additional facts on
8 any of this. And we are entitled to a ruling on the 12(b)(6)
9 motion, it should not be referred to class certification
10 because the determination ought to be made up front.

11 Your Honor, with respect to some of the merits
12 assertions that were made here, counsel made a suggestion on
13 the no injury argument that the cases that we cited were
14 instances where the potential for injury was theoretical.

15 And I would note that in all of those cases,
16 virtually all of them, the *Frank* case that counsel
17 referenced, was a case -- for example, I was -- there were
18 tort claims out there where people had alleged that they had
19 a seat back problem previously, where they claimed that they
20 had been injured jurisdiction.

21 And what the Court said was, We are not going to get
22 into a situation of compensating people who have not had a
23 problem with the product because that would be a windfall,
24 that's the policy consideration the New York courts have
25 articulated. It's the policy consideration that Judge

1 Easterbrook noted in reviewing what Judge Barker did in the
2 *Firestone* cases, is the idea that you bought the product; you
3 used it; didn't have a problem with it. We are not going to
4 get into analyzing whether or not you are entitled to any
5 compensation unless you had some out-of-pocket expenses to
6 repair it or some real tangible injury that you could point
7 to.

8 THE COURT: For example, if you bought it for 8.99,
9 you would have \$2.50 back for it, wouldn't you be out \$6.49?

10 MR. BEISNER: Not the claim that's been brought
11 here.

12 THE COURT: If that claim were brought here, there
13 would be an economic injury.

14 MR. BEISNER: If we are saying to you, you know, if
15 plaintiffs can put it together in an allegation of some sort
16 that they are out-of-pocket on this, you know, under some of
17 these, I don't think that would be the case with all of these
18 claims, but they might piece together a claim on something,
19 there is no allegation out there that anybody tried and were
20 unable to get back compensation on this. There is nobody
21 alleging out-of-pocket expenses, Your Honor, in the
22 complaint. That's what we are dealing with here. And so I
23 don't --

24 THE COURT: Well, on a Motion to Dismiss, I have to
25 deal with the complaint, right?

1 MR. BEISNER: Correct.

2 THE COURT: The complaint only, right?

3 MR. BEISNER: Correct.

4 THE COURT: So I can't consider what you want me to
5 consider.

6 MR. BEISNER: Yes, you can. No, you can, Your Honor
7 because they have quoted from the press release that's in the
8 complaint.

9 THE COURT: Right.

10 MR. BEISNER: And we are therefore on Motion to
11 Dismiss to have the Court consider the entirety of that
12 document.

13 THE COURT: Based on what?

14 MR. BEISNER: I will give you some case law on that.
15 *Cortech Industries*, 949 F. 2d, 42, Second Circuit, 1991. You
16 know, "If a plaintiff chooses not to attach the complaint or
17 incorporate by reference a prospectus on which it relies
18 which is integral to the complaint, the plaintiff may produce
19 for its failure to state a claim because plaintiff should not
20 so easily be allowed to escape the consequences" -- I'm
21 sorry.

22 THE COURT: I broke her in last week.

23 Okay. Go ahead. I'm sorry.

24 MR. BEISNER: I will pick up. This may be at
25 mid-sentence.

1 "Defendant may produce the prospectus when attacking
2 the complaint for its failure to state a claim because
3 plaintiff should not so easily be allowed to escape the
4 consequence of its own failure."

5 So if plaintiffs are in here saying what, Look, the
6 press release, look what they did, they took the product.
7 They told you not to use it anymore. It's not fair on Motion
8 to Dismiss to say the Court can't consider the rest of the
9 document that they are referencing.

10 THE COURT: Well, then is it fair to consider that,
11 not saying this is true in 2006, that if you went to the
12 website, that you would get a \$2.50 refund for something that
13 you spent 8.99 on? Can I consider that, too?

14 MR. BEISNER: No. If this complaint, Your Honor, is
15 about an individual plaintiff that's before the Court having
16 some bad experience in seeking a refund, that's nowhere in
17 the complaint.

18 THE COURT: Okay.

19 MR. BEISNER: They didn't avail themselves.

20 THE COURT: So if they said, Plaintiff Azalea Solo
21 is a California resident who purchased ReNu at Tellis
22 Pharmacy for \$8.99 and who got notice of the recall, and as a
23 result of the recall, got a coupon for \$2.50, that states a
24 cause of action?

25 MR. BEISNER: Depends on what they've done with the

1 bottles. Do they use most of the product? Your Honor, the
2 reason they are not going into -- of course -- I'm sorry.

3 THE COURT: This is notice pleadings, Mr. Beisner. I
4 mean, what more -- what more notice -- you make an
5 allegation.

6 MR. BEISNER: Okay. You are saying state cause of
7 action.

8 THE COURT: Yes.

9 MR. BEISNER: Okay. Under some of the claims that
10 they have here, it might, yes.

11 THE COURT: It might. All right.

12 How about if plaintiffs -- tell me what you want in
13 your complaint in this case?

14 MR. BEISNER: I think that if what they are talking
15 about here, particularly given the fact that you have fraud
16 claims here, need a who, what, when and where of what their
17 experience was in engaging the company.

18 THE COURT: How about just a contract claim? How
19 about just a breach of warranty claim? You know, I didn't
20 get the benefit of my product. That's a different standard
21 of proof.

22 MR. BEISNER: I think they would need -- if what
23 they are alleging here is that they didn't get a refund that
24 they think they were entitled to, they needed to state the
25 facts of that. What did you get? Did you try to get a

1 refund? What's the process you went through?

2 I mean, the reason, Your Honor, they are not doing
3 that is because it defeats any semblance of a class action,
4 I'm sure, that if that's how we are stating the claim. But I
5 think that that seems to be what counsel is now stating in
6 the complaint has got to say.

7 Your Honor, with respect -- to just a touch on a few
8 issues that were raised here -- with respect to the notice
9 issue, that ground for dismissing some of these claims, the
10 cases just do not, that plaintiffs have cited, just don't
11 support the proposition that there is any excuse on notice.

12 What they are now alleging, they are alleging that,
13 if I understand counsel correctly, it was not in the
14 complaint, what he's now talking about is not notice that
15 people were told not to use the product anymore. He's
16 talking about notice that people didn't get some kind of
17 compensation that they thought they were entitled to from the
18 company. There has been no notice of that given, and that's
19 completely consistent with what the UCC is looking for.

20 There is no allegation in the complaint that anybody
21 were trying to get a refund. So it's totally inconsistent
22 with that.

23 The privity rules just is not cited, cases saying
24 that the privity rules we are talking about don't -- this
25 outside the personal injury context.

1 THE COURT: Of course, in your brief in the
2 California privity cases with regard to the exceptions for
3 things that are supposed to be ingested by people, you say
4 that that is supposed to be only restricted to prescription
5 drugs.

6 MR. BEISNER: Yes. They have not expanded beyond
7 those particular categories. I believe we cite some cases
8 that are continued to uphold.

9 THE COURT: They haven't restricted it to
10 prescription drugs?

11 MR. BEISNER: Well, you are talking about
12 exceptions, Your Honor.

13 And so if you are going to make an exception to the
14 privity requirement, I would think you would need a precedent
15 saying, This is what the exception is, and it applies to this
16 type of claim. And they have not cited any cases that say
17 that.

18 Your Honor, I would also note, you asked the
19 question earlier about unjust enrichment from California.
20 The main point I would note is that if you walk into court in
21 California and you label your claim unjust enrichment, as it
22 was in the cases that we cited, it gets dismissed.

23 Now, whether counsel has got some other alternative
24 theory he can assert, that's up to him to figure out, but
25 those cases hold that you come in with a claim labelled

1 unjust enrichment, those cases upheld dismissal of those
2 claims that are labelled that way.

3 THE COURT: Do you want to look at the *McBride vs.*
4 *Boughton* case, 20 Cal. Rptr. F. 3d, 115 of Page 121, which is
5 a California Court of Appeals case of 2004. The Court
6 treated the plaintiff's unjust enrichment claim as a claim
7 for restitution. They did not dismiss it.

8 I think your lawyer wants to tell you something.
9 I'm wrong.

10 MR. BEISNER: Okay.

11 THE COURT: Okay? Don't confuse the facts. My mind
12 is made up, all right?

13 MR. BEISNER: And I'm looking at the *Melchior* case.

14 THE COURT: As you can see, Mr. Cole doesn't know
15 anything about this, but your lawyer knows something about
16 it.

17 MR. COLE: No, I'm just trying to be calm about
18 this.

19 THE COURT: Okay.

20 MR. BEISNER: We are looking at the *Melchior* case.

21 THE COURT: I'm looking at the *McBride* case.

22 MR. BEISNER: Okay. But there is another -- this is
23 the -- I guess the Court of Appeals come out differently.

24 In *Melchior*, they said --

25 THE COURT: Oh, in California, you know, you could

1 cite a case for any proposition at any time.

2 MR. BEISNER: I should have started there -- I
3 should also admit that I'm a member of the California Bar.

4 And I guess the last point I would make is on the,
5 counsel referenced the *Toy* case before the Pennsylvania
6 Supreme Court, said the Court should hold off looking at the
7 reliance issue there. In the *Toy* case, the issue is not
8 whether reliance is required.

9 The *Weinberg vs. Sun Oil Company* case establishes
10 that proposition from the Pennsylvania Supreme Court. The
11 question before the Court there is what type of reliance
12 needs to be shown?

13 Here, there is no reliance alleged whatsoever. And
14 so *Weinberg*, I think, covers -- covers that determination.
15 And therefore, I don't think there is any need to wait for
16 the Pennsylvania Supreme Court on that issue.

17 Thank you, Your Honor.

18 THE COURT: Okay. Thank you. Anything else?

19 MR. KARON: Nothing from me. Thanks.

20 THE COURT: All right. I'll take it under
21 advisement. Hard to believe I'm going to do that, all right?

22 Now, is there anything else from anybody else in any
23 of these other cases on any scheduling matter or anything
24 like that?

25 Mr. Cole, anything?

1 MR. COLE: Nothing from us, Your Honor.

2 THE COURT: Okay.

3 MR. HOWE: Excuse me, Judge?

4 Judge, we had several conferences with you before.

5 And since everybody is here, we were wondering if you would

6 be available for Mr. Cole and I to meet with you for

7 15 minutes after the hearing.

8 THE COURT: Yeah. That's why I say, that's fine.

9 No problem.

10 MR. HOWE: Can we just come up to your office?

11 THE COURT: Come on up, everybody or anybody. Bring

12 Mr. Hahn, too.

13 MR. COLE: We have to see if he will be nice if he
14 comes.

15 THE COURT: He has been pretty well behaved. I
16 think he's taking his medication this morning.

17 MR. HAHN: I have, Your Honor.

18 THE COURT: Okay. Thanks.

19 *****

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-titled matter.

Amy C. Diaz, RPR, CRR June 29, 2007

S/ Amy Diaz