UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

LEAD PLAINTIFFS' REPLY IN SUPPORT OF ITS' MOTION TO STRIKE AND SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION FOR A FINDING OF CONTEMPT AND APPROPRIATE SANCTIONS

I. INTRODUCTION

Contempt motions are by their nature serious. Here, however, defendants file such a motion against plaintiffs' counsel for providing an allegedly privileged document to their expert, Catherine Ghiglieri, without any substantive basis to do so. Although a necessary condition of any contempt motion is explicit language in a prior Court Order that prohibits the improper conduct, defendants do not cite and cannot cite any such language. If this were not enough, defendants' motion also runs counter to the substantial prior use of this document by plaintiffs prior to the provision of this document to their expert, and defense counsel's acquiescence in that use. To be sure, no fewer than seven defense attorneys were aware of plaintiffs' prior use of this document at depositions and did not object. Further, at no time did defense counsel request that this document be stricken from the exhibits at the two depositions, and they are not requesting this relief now. Finally, although defendants became aware that Ms. Ghiglieri received a copy of the document on August 15, 2007, defendants did not bring this motion until after they had been caught using a prohibited OCC report of examination. Dkt. No. 1202 at 5. In sum, the record reflects: (1) that there is no Court Order supporting defendants' position; (2) that prior to the provision to Ms. Ghiglieri, plaintiffs used this document three times, twice at depositions; (3) that defense counsel did not object to the use of this document during the depositions, even though one occurred after February 27, 2007; and (4) that defendants were all silent for ***14 months*** after the initial use of the document and ***6 months after*** provision to Ms. Ghiglieri. Under these circumstances, there has been no contempt.

As additional grounds for denial of this motion, defendants have failed to comply with Local Rule 37.1, which requires an affidavit supporting any assertions of contempt be filed with the opening brief. Defendants have failed to do so and plaintiffs respectfully urge the Court to strike defendants' motion for failure to satisfy this crucial procedural obligation.

Finally, if this Court is not inclined to deny this motion as this juncture, plaintiffs' counsel reiterate their request for oral evidence as set forth under L.R. 37.1. The Court should take evidence from defense counsel, including those defense attorneys physically present at the two depositions and Mr. Kavaler as well as defense expert Robert E. Litan. Plaintiffs note that although defendants in their briefs offer various explanations for their conduct at the depositions, they do not support these explanations with any substantive declarations from defense counsel. Plaintiffs are entitled to test the veracity of the conclusory factual assertions made in defendants' briefs and those made in plaintiffs' responsive briefs. *See* L.R. 37.1(b), (c).

II. ARGUMENT

A. Defendants' Refusal to Provide Sworn Facts Cannot Support the Serious Accusation of Civil Contempt

1. Defendants Have Improperly Failed To Provide This Court with a Sworn Affidavit as Required Under Local Rule 37.1(a)

Plaintiffs' motion to strike under L.R. 37.1(a) must be granted. Dkt. No. 1202. No court has found an attorney in "contempt" under circumstances remotely similar to those before the Court. Defendants cite no cases that support the manifestly unjust result they seek. They ignore precedent cited by plaintiffs. They refuse to provide a sworn affidavit "set[ting] out with particularity the misconduct complained of" as ***required*** under Local Rule 37.1(a). Defendants treat this simple, black-letter command as a mere suggestion. The rule has a purpose, rooted in due process, and directly related to the severity of the claims asserted.

Defendants ignored L.R. 37.1(a) in their opening brief. They told the Court on March 13, 2008, "that's something that's easily rectified. And could be filed and still the motion could be dealt with substantively with that affidavit filed if it was required as opposed to having briefing on

whether an affidavit is required or isn't, and substantive briefing." Exhibit 1 at 23.[1] While defense counsel's statements are less than a model of clarity, L.R. 37.1 is simple and unambiguous:

> A proceeding to adjudicate a person in civil contempt . . . ***shall be commenced*** by the service of a notice of motion or order to show cause. ***The affidavit upon which such notice of motion or order to show cause is based shall set out with particularity the misconduct complained of***, the claim, if any, for damages occasioned thereby, and such evidence as to the amount of damages as may be available to the moving party.

L.R. 37.1(a).[2] Defendants ignore this rule, seeking to deprive plaintiffs of their procedural rights and making it impossible for the Court to even commence contempt proceedings, let alone adjudicate one on the merits.

Defendants baldly state that they do not have to follow L.R. 37.1(a) because their "opening brief explained the factual basis for their motion, and was signed by an officer of the Court." Defs' Reply at 9.[3] This is a non sequitur and renders nugatory the requirement of an affidavit as expressly provided by L.R. 37.1. Moreover, defendants' failure to provide the Court with a complete factual record giving rise to civil contempt (*i.e.*, their failure to inform the Court of the prior use of the document at issue in depositions as well as in Court filings) underscores the need, as mandated by L.R. 37.1, for an explicit affidavit "set[ting] out with particularity the misconduct complained of." Additionally, the Opening Brief[4] was signed by defendants' local counsel, Adam Deutsch, who was neither present at the depositions nor the meet and confer relating to defendants' motion and thus,

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[1] All "Ex.__" references are attached hereto.

[2] Emphasis has been added and citations, internal quotations and footnotes omitted, unless otherwise indicated.

[3] "Defs' Reply" refers to Reply Memorandum of Law in Support of Defendants' Motion for a Finding of Contempt and for Appropriate Sanctions and Opposition to Plaintiffs' Motion to Strike. Dkt. No. 1213.

[4] "Opening Brief" or "Defs' Mem." refers to Memorandum of Law in Support of Defendants' Motion for a Finding of Contempt and for Appropriate Sanctions. Dkt. No. 1200.

has no personal knowledge of the alleged "misconduct" at issue or the parties' meet and confer attempts.

Defendants' failure to comply with L.R. 37.1 is an act in contempt of this Court's Orders. In *Olojo v. Kennedy-King College*, No. 05 C 6234, 2006 U.S. Dist. LEXIS 42109 (N.D. Ill. June 7, 2006), the court found an out-of-state attorney had "demonstrated contempt for this court by disregarding our local rules" by filing a complaint and other papers without designating local counsel. *Id.* at *35-*36. In that case, Judge Aspen ***commenced*** contempt proceedings in that case by entering an "order[] to show cause." *Id.* at *37. As defendants have had ample opportunity to review and follow L.R. 37.1 (indeed they told the Court their error could "easily be rectified"), this Court should consider initiating contempt proceedings for defendants' blatant disregard of the Local Rules under *Olojo*. The unequivocal command violated in *Olojo* (local counsel must be designated but was not designated) is analogous to the unequivocal command violated by defendants here (a sworn affidavit must be filed but was not filed).

2. Defendants Do Not Cite a Single Case that Supports Their Serious Contempt Accusations and Grossly Distort Their Actions Prior to Filing This Surprise Contempt Motion

While defendants engage in inflammatory rhetorical demands that the Court "punish Plaintiffs' counsel for their continued acts of contempt," Defs' Mem. at 6, they provide this Court with no factual or legal basis for this. Significantly, defendants cite case authority that highlights their own failure to satisfy their burden. In *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 738 (7th Cir. 1999), the Seventh Circuit articulated the standard that the moving party must show the alleged contemnor violated "a decree that sets forth in specific detail an unequivocal command." *Id.* Here, defendants have not cited any explicit language from a prior Court Order that plaintiffs' counsel allegedly violated by providing the document to Ms. Ghiglieri. The absence of any such language

requires denial of this motion. The other cases defendants cite in their opening brief are equally unsupportive of defendants' position here. *See* Defs' Mem. at 6-7.[5]

Plaintiffs have ***complied*** with the Protective Order. Following defendants' assertion of privilege, they brought a motion on the withheld Ernst & Young LLP ("E&Y") documents, which this Court ***granted*** on December 6, 2006. The plain import of this Order was that Bates number HHS-E 0001208 ("Document 1208") was discoverable and that plaintiffs were entitled to use it in discovery. Defendants obfuscate but do not dispute this fact. Moreover, how is it possible, then, that marking Document 1208 one day later at Mr. Robin's December 7, 2007 deposition was a violation of a dispute the Court resolved in plaintiffs' favor? Plainly, even assuming everything defendants say is factually accurate, it is impossible. But everything defendants say is not factually accurate, which helps explain the absence of a sworn affidavit from anyone who is competent to testify as to the circumstances surrounding the deposition or the document.

For example, defendants attack plaintiffs' "stealth in marking" Document 1208 at the Ken Robin deposition "by separating it from the cover email to which it was attached in Defendants' production." Defs' Reply at 6. This fresh accusation suffers two defects.

First, there was no "stealth" involved.[6] Here is the colloquy immediately following plaintiffs' counsel's marking of Document 1208:

> MR. SLOANE: Mr. Baker, my colleague informs me that this is an annexure to an e-mail. ***Do you have the e-mail?***
>
> MR. BAKER: I don't have the e-mail. I don't understand why I have [this] but not the e-mail. ***I would like the e-mail. Have you got the e-mail?***

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[5] Defendants cut-and-paste three of those cases back into their reply. *See* Defs' Reply at 8.

[6] Defendants fail to inform the Court that what they claim is the attached cover e-mail was produced as a ***separate document*** by defendants and bears a ***different*** Bates number (HHS-E 0001207.0001 - .0002).

See Robin Tr. at 173:12-18, attached hereto as Ex. 2. One of Mr. Sloane's three colleagues obviously recognized Document 1208 on sight and notified him that it had a cover e-mail.

Second, assuming contrary to the facts that defense counsel were unaware of this document's allegedly disputed nature, defense counsel had 30 days to review the deposition transcript and to recall any inappropriately marked exhibits. However, they did not attempt to recall this document.

Thus, the record is that defense counsel recognized this document at the December 7, 2006 Ken Robin deposition, permitted plaintiffs' counsel to ask questions about the document and did not recall the document from the record of that deposition. From these premises, defendants cannot ask the Court to exercise its extraordinary powers of contempt against plaintiffs' counsel for providing access to this transcript and exhibits to their expert witness for her analysis.

These same points pertain to the use of this document at the Robin Allcock deposition. Like Mr. Sloane, Ms. Best was assisted at that deposition by other Cahill Gordon & Reindel LLP attorneys. There is no declaration from any of these attorneys that they did not recognize this document or understand it to have been subject to any dispute at the time of that deposition. To be sure, Ms. Best is intimately familiar with the E&Y dispute and was involved in the briefing on these issues. It beggars credulity to indicate that she was somehow unaware of this document prior to its use at Ms. Allcock's deposition. However, again assuming for the moment that Ms. Best and her colleagues mistakenly permitted the use of this document at the Robin Allcock deposition, they could have recalled the document after the deposition, but as with the Ken Robin deposition, they did not. Remarkably, defendants seek to justify their own failure to act by asking the Court to punish plaintiffs' counsel!!

B. Defendants Ignore the Highly Analogous Case Law Supporting the Conclusion that Defendants Have Waived Any Privilege Arguments

As indicated in plaintiffs' opposition, the case law on point strongly supports the conclusion that even if the document at issue was ever privileged – and plaintiffs vigorously dispute that given

this Court's December 6, 2006 Order – defendants have waived it. *See* Pls' Opp. at 9-10.[7] Defendants ignore these cases. Plaintiffs therefore address only the following factual inaccuracies (in addition to those noted above) in defendants' latest papers that inform the Court's waiver determination.

Defendants argue that Peter Sloane did not waive defendants' privilege of Document 1208 at the Ken Robin deposition. To support this point, defendants argue that Mr. Sloane was considering appealing this Court's December 6, 2006 Order with respect to E&Y. *See* Defs' Reply at 6. This "reservation of rights," however, has no effect. Defendants did object to this Court's December 6, 2006 Order and their objection was denied by Judge Guzman on February 1, 2007. Further, defendants have provided no reason why they allowed this "reservation" to persist for over 14 months.

Ms. Best had a second bite at this apple and although more knowledgeable than Mr. Sloane on this issue, did not assert this document was privileged. To be sure, Ms. Best permitted counsel to question Ms. Allcock on the substance of this document without objection.

Further, the Robin Allcock deposition was provided to defendants' own expert, Mr. Litan, who relied upon it. Defendants state in their brief (but provide no declaration) that Mr. Litan was not provided this document. Defendants do not explain how Mr. Litan can rely upon the entire deposition and not be provided with this document, which was an exhibit to the deposition.

In any event, defendants did not recall this document for more than 6 months after it was listed in Ms. Gighlieri's report on August 15, 2007. It is defendants' obligation to take action to protect their privilege and they cannot delay doing so, particularly when it would prejudice plaintiffs.

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[7] "Pls' Opp." refers to Lead Plaintiffs' Opposition to Defendants' Motion for a Finding of Contempt and Appropriate Sanctions. Dkt. No. 1208.

Here, there is no question but that defendants did nothing while plaintiffs used this document at depositions and provided it to their expert, who relied upon it. As explained in case law cited by plaintiffs and not disputed by defendants, withdrawing the document from use at this juncture is unfair to plaintiffs and would be prejudicial to plaintiffs. Pls' Opp. at 9-10.

In sum, plaintiffs "hid" nothing from defendants and violated none of this Court's orders. All of plaintiffs' actions reflect the honest view that it was permissible to use this document. Defendants' contemporaneous behavior is completely consistent with plaintiffs' view. The document was marked at two depositions attended by very experienced and able attorneys, and was clearly listed in Ms. Ghiglieri's report. It is fundamentally unfair for defendants to now try and recall this document which the parties understood was fair game.

C. Defendants Do Not Provide the Court with Complete Information, Including the "Cover E-Mail" They Claim Was "Hidden"

As pointed out in plaintiffs' opposition, defendants mischaracterized Document 1208 in their moving papers by quoting from their October 25, 2006 privilege log that Document 1208 is a "[r]efund forecast performed by E&Y at the request of Household counsel." Pls' Opp. at 4. That description is inaccurate, as noted, because defendants previously represented to the Court that it was actually a document "reflect[ing] work performed by Household . . . employees and not just E&Y." *Id.* at 4-5; Defs' Opp. at 7 n.7.[8] This description matters because the Court stated in its February 27, 2007, ruling on the "withheld" documents that "any ***communications between E&Y and Household***" dated after the Class Period was not subject to the *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) exception. February 27, 2007 Order at 2. Importantly, the Court made another

[8] "Defs' Opp." refers to the Household Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel the Production of Documents Pertaining to Household's Consultations with Ernst & Young LLP. Dkt. No. 764.

finding that defendants relegate to a footnote in order "to avoid undue complexity." Defs' Mem. at 2 n.1. The Court held that as to documents covered "only by the work product product privilege," plaintiffs demonstrated substantial need and all of those materials "must be produced." February 27, 2007 Order at 2. Rather than provide a clear explanation, or description to the Court of the contents of the one document upon which their entire contempt motion rests, they are inexplicably silent.

Defendants reference another document in support of their arguments, the "missing cover email" discussed above. But they do not provide a copy of that e-mail to the Court. Defendants' failure to submit this document provides an additional basis for striking their motion. This Court cannot make findings of fact, *i.e.*, that defendants were justified in failing to object to the introduction and use of Document 1208 for 14 months, based on a document they have not even provided to the Court.

Based on defendants' privilege log description, moreover, it is clear that no E&Y personnel or Household International, Inc. ("Household") attorneys were copied on the e-mail, and defendants do not make this contention in their motion.[9] Thus, it is clear that Document 1208: (1) is not a communication with E&Y; (2) is not privileged under the Court's "E&Y" rulings; (3) at most discusses E&Y work product; and (4) even if "E&Y work product," must be produced under the "E&Y" rulings discussed above.

In this context, plaintiffs respectfully leave for the Court's consideration whether defendants have been candid in their briefing of this matter. It is plaintiffs' view that defendants have been less than forthright, and have not provided sworn affidavits for that and other reasons. Importantly, as

[9] Indeed, although defendants claim the e-mail was sent to a Household attorney, the privilege log entry for HHS-E 0001207 does not identify any attorney.

discussed below, many questions that are vital to any contempt finding remain unanswered. Whatever defendants' motivation is for bringing their contempt motion, it must be denied.

D. Defendants Have Not Completed the Meet and Confer Process

In a footnote, defendants represent to the Court that "[t]he parties attempted unsuccessfully to meet and confer under Local Rule 37.2 on this issue." Defs' Mem. at 6 n.13. This statement is patently false. Plaintiffs provide the entire meet and confer transcript to the Court. Ex. 3. Defendants stated "you might see a motion instead of a letter," on the question of whether the document at issue was subject to the Court's prior orders. *Id.* at 28. Defendants never told plaintiffs they were going to file a procedurally improper contempt motion. *See* Ex. 3.[10] If they had, plaintiffs would have initiated a discussion on the factual bases of any contempt allegations.

More importantly, as set forth in plaintiffs' opposition , the February 22, 2008 colloquy between counsel took place prior to plaintiffs' review of Mr. Hall's letter of the prior day and plaintiffs' responsive letter on February 28, 2008. Defendants cannot assert that the meet and confer had been completed on February 22, 2008.

III. CONCLUSION

For the reasons set forth above and in plaintiffs' other submissions, plaintiffs respectfully urge the Court to grant plaintiffs' motion to strike, Dkt. No. 1202; or, in the alternative, deny defendants' motion in full.

DATED: April 8, 2008

COUGHLIN STOIA GELLER
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/s/ Azra Z. Mehdi
AZRA Z. MEHDI

[10] Plaintiffs provide the Court with the entire discussion on the "privileged" document. *Id.* at 25-36.

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Exhibit 1

Household Hearing on 3-13-08

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS (Chicago)

LAWRENCE E. JAFFE, etc., et al., Plaintiffs,	)	
v.	)	Docket No. 02-CV-5893
HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	)	Chicago, Illinois March 13, 2008

STATUS HEARING
BEFORE THE
HONORABLE MAGISTRATE JUDGE NAN R. NOLAN

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are you seeing Judge Guzman next week? Is that what it is?

MS. MEHDI: Yes, your Honor.

MS. BEST: (Inaudible, multiple voices) --

THE COURT: Yes, but --

MS. MEHDI: We believe that these issues should really interfere with what's going to be primarily a summary judgment briefing schedule.

THE COURT: Yeah. And I don't -- So we're striking our status here is what I'm saying. But I have to give you --

I have to give you a ruling date.

MS. BEST: Okay.

THE COURT: Hold on just one moment.

MR. DEUTSCH: Your Honor, this is Adam Deutsch. Can I just raise one issue with regard to the motion to strike?

THE COURT: Yes.

MR. DEUTSCH: One of the questions was whether an affidavit -- One basis was that an affidavit was required?

THE COURT: Right.

MR. DEUTSCH: And what I would think is that if that's something that's easily rectified. And could be filed and still the motion could be dealt with substantively with that affidavit filed if it was required as opposed to having briefing on whether an affidavit is required or isn't, and substantive briefing.

THE COURT: Right. Well, we unfortunately have this with summary judgment all the time, where -- I mean we're very

used to dealing with motions to strike, affidavits, statements of compliance, and we always take it with the brief because part of the thing -- I agree with you. And if the affidavit can cure it then -- I haven't even read this, but if an affidavit can cure it we're certainly not going to -- We'll deal with the substance, too, okay? So obviously everybody is operating on both levels here.

Because sometimes you don't know if there's any real

prejudice until you look at the whole -- I mean I'm going to be looking at the whole package, okay?

MR. DEUTSCH: Thank you.

THE COURT: Now there's one more thing that came up, and this is because you're all working very hard, I know, and there's been some history of flying back and forth with, you know, heated litigation. There have been a couple, in these last briefs, about comments about one of them was the Court was already -- This went to whether we were aware of the subpoenas. I, you know, because Ms. Best repeatedly advised the Court's law clerk of this fact during her improper attempt -- This is what the plaintiffs -- In her improper attempt to argue.

There's been several references to my law clerk and conversations with the law clerk. Now I want to tell you I don't know how they do this in San Francisco and New York. I have, because you're out-of-town counsel, and because I've been trying to get a spirit of cooperation in here, we have made ourself available almost at your beck and call. Allison works

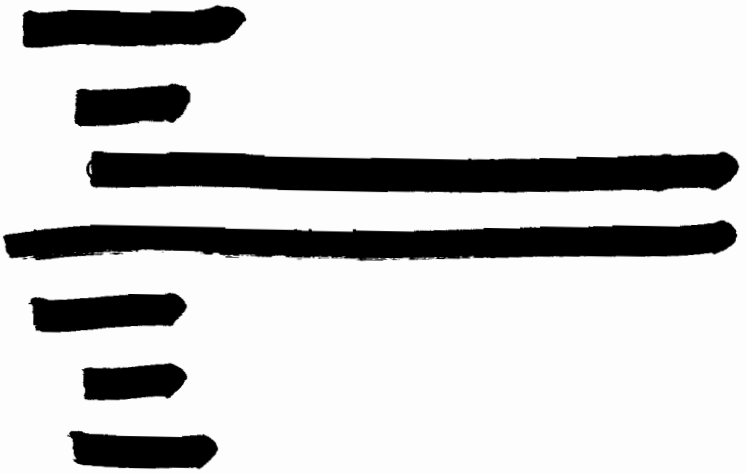
Exhibit 2

page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN,)
on behalf of Itself and All)
Others Similarly Situated,)
Plaintiffs,)
vs.) No. 02 C 5893
HOUSEHOLD INTERNATIONAL, INC.,)
et al.,)
Defendants.)

The videotaped deposition of KENNETH H. ROBIN, taken before Richard H. Dagdigian, Illinois CSR No. 084-000035, Notary Public, Cook County, Illinois, pursuant to the Federal Rules of Civil Procedure for the United States District courts pertaining to the taking of depositions, at Suite 3200, 30 North LaSalle Street, Chicago, Illinois, commencing at 9:05 a.m. on the 7th day of December 2006.



MR. BAKER: Let's mark this next in order.

(Robin Deposition Exhibit No. 59 was marked as requested.)

MR. SLOANE: Mr. Baker, my colleague informs me that this is an annexure to an e-mail. Do you have the e-mail?

MR. BAKER: I don't have the e-mail. I don't understand why I have there but not the e-mail. I would like the e-mail.

Have you got the e-mail?

MR. SLOANE: Right here in my coat pocket, I'm sure. No, I don't have it.

MR. BAKER: All right. Well, I will look into this.

MR. SLOANE: Conduct an investigation.

MR. BAKER: Can we go off the record very

Exhibit 3

LERACH COUGHLIN STOIA GELLER RUDMAN

Moderator: Jason Davis
February 22, 2008
1:00 pm CT

Landis Best: Hi, good afternoon.

Operator: The recordings have begun. Please go ahead.

Landis Best: Good afternoon.

Man: Good afternoon. Is this Landis?

Landis Best: Yes, yes.

Man: Hey, Landis. You have (Jason), (Cam), and (Luke).

Landis Best: (Jason), (Cam), and (Luke)?

Man: Yep.

Landis Best: I'm here with David Owen and Craig Kesch and Jason Hall.

Man: Greetings.

Man: Hey guys.

Man: Hey (unintelligible).

Man: So the - I guess the two-part agenda, first just going through the responses to our subpoenas on (unintelligible) experts, seems like this one will be pretty short.

So we just wanted to first hear your principal objections. It looks like the primary one is based on the stip that had previously been entered into?

Man: I think the responses (and) objections that you guys have speak for themselves. I don't think we have anything to add to that. Obviously our position is among others set forth in the responses that, you know, this is a subject of a stipulation that these subpoenas are outside the stipulation and that you guys have agreed and you're trying to go back on your agreement.

Man: Why do you think that the subpoenas are outside of the scope of the stip?

Man: Well, you know, there's only two reasons why you would talk to a witness or why you have discovery over an individual in connection with litigation. And one is because they're a fact witness and the other is because they're an expert witness. You know, with respect to these guys' positions as experts, we've agreed to what's discoverable and this is not consistent with that agreement.

Man: But…

Man: We think you're trying - want to back out of your agreement.

Man: Well, you also - so you're talking about the text of the stip as limiting our

ability to conduct expert discovery. And I guess the question I would have is if this is outside of the scope of that, why didn't you exclude it in Paragraph 4?

Man: I'm not understanding you.

Man: So there's - there are a couple of numbered paragraphs in the stipulation.

Man: (Unintelligible).

Man: And on Page 2, you have Paragraph 4, which states the types of information that need not be disclosed. And the information that we are requesting is not in any of those categories.

Landis Best: Yeah, but we would refer you back to Paragraph 1 of the stip, which says that to modify the provisions and to limit the scope of discoverable information relating to such experts' opinions as follows.

Man: But that's - that refers to 26(a)(2)(B) and my understanding of that is just the starting point of what's absolutely minimally necessary in submitting information in connection with your initial expert reports.

Man: All right, listen, we're not going to agree with you. We think you agreed. We think you're backing out of it. You guys are obviously at liberty to do whatever it is you need to do. But our position is set forth in the objection.

Man: Well, we appreciate you explaining your position a little bit more.

Landis Best: Well, that's it. I mean, we believe we reached an agreement with you guys about discoverability issues involving experts and we think that the document, the stipulation, we understood it to encompass what's discoverable of our

experts. And we think it's outside of the scope.

Man: Yeah, okay. That's fine. (Unintelligible) say anything more.

Landis Best: Yeah, and we have other - you know, we have other objections as well, but that's…

Man: Yeah, no, they're equally meritorious, so we can go from there.

Man: I would agree with that characterization.

Man: Okay, I agree with you. I think we're - we both agree they're not meritorious then.

Man: (Unintelligible) I think you said that they were.

Landis Best: Yeah.

Man: Yes.

Man: They all have an equal amount of meritoriousness.

Man: Okay.

Man: That would be…

Man: (Unintelligible) on that we agree.

Man: No, (David). No.

Man: But I think we all understand each other. Let's not belabor it.

Man: Okay.

Landis Best: Okay.

Man: Thanks (Luke).

Man: Let's talk about the other stipulation.

Landis Best: Okay.

Man: Have you got a response to what we've proposed?

Landis Best: Well, hopefully you guys received our letter from yesterday.

Man: No.

Landis Best: We sent a letter to you, (Cam), and also to (Luke) was CCd on it last night.

Man: I - no, we haven't - neither one of us has seen any such thing.

Landis Best: Okay.

Man: Did you check your fax room?

Man: Well, the faxes come to us here are - you know, we get it on email.

Landis Best: Okay, well, we didn't get any sort of a response that the faxes did not - we not successful, so…

Man: Okay. Well, maybe they're there. Do you…

Landis Best: Okay.

Man: …can you tell us the general gist of the letter?

Landis Best: Yeah, the general gist is that we find the changes that you guys proposed to be unacceptable for a couple of reasons. One is that it's - you know, what you propose is language that's entirely open-ended with - it's - there's no mooring to any list of witnesses or disclosures, such as our disclosure of the 23 witnesses that we made pursuant to our expert disclosures.

And so since it's so open-ended, we can't agree to something like that. And the judge's order itself and what we talked about in court specifically discussers our notice on the 23 witnesses and our - and what we made clear at the status conference that we were - our intention for listing them and our intentions in terms of calling - potentially calling them as witnesses just to talk about what they knew at the time, what they did at the time, what they observed at the time, and what their opinions were at the time, why they felt what they did was right, you know, it was all based upon our disclosure of those witnesses.

And you want to strip that out and make it completely open-ended, which we just can't agree to.

Man: I don't follow you. What are you - I mean, the judge specifically talked about this stipulation being applicable to both sides' witnesses. So I don't understand what you're trying to say.

Landis Best: Well, I understand that your concern is for reciprocity. And we think that that's covered in the stipulation that we provided, which makes it clear that with respect to these disclosed witnesses, it's entirely reciprocal. You guys can call them, we can call them…

Man: Please.

Landis Best: …and we agree.

Man: Please, please, please, come on, Landis. I'm not dumb. You're not dumb. That's not reciprocity. Come on. That's not what the judge meant when she said it would apply to our witnesses, too. So let's not go there. You got something else that you want to say or that would actually advance the ball?

Landis Best: Well, I think that does advance the ball. I mean, the judge's order itself refers to the 23 witnesses. I mean, look, our stipulation relates to the 23 witnesses and it's tied to our expert disclosure.

I think that's clear. I mean, that's something that could be, you know, we've agreed to make it reciprocal with respect to those witnesses. We've…

Man: Why would we want any - we don't care about any of those - their opinions. We don't want any of that. We don't think it helps us at all. Why would we - I don't understand, Landis.

Man: You're ignoring, Landis, the context in which the discussion about a stipulation came up. You guys have said that you may or may not think that this stuff falls under Sunstar and these opinions may or may not be expert opinions and you laid out the categories which she said these people are going to testify to.

Our position has been that this is not subject to Sunstar. It doesn't make these witnesses expert witnesses and in a general sense, when you're talking about events at the time and opinions that are formed at the time and the basis for those opinions.

And I've said that to the judge. And I've said because you guys are - were refusing to comply with her order, I said in order to get by this, Judge, maybe we should just enter an order that settles the question as to whether this is expert opinion or lay opinion and let's just get by it because you were ordered to do something, you said you couldn't do it.

And the reason you said you couldn't do it was because this is the type of opinion these people were going to offer. And the judge said well, would you be willing to enter into a stipulation to that effect? And she mentioned that it would apply to both parties. And I said yeah. And Landis, you said yes.

Landis Best: Yes.

Man: And now what you're trying to do is somehow make it so that your witnesses can come in and essentially you can argue with impunity that these types of opinions are, in fact, expert opinion testimony, which is in a opinion - which is a position you guys haven't taken thus far.

You've hedged your bets up to now and said it may apply. But the second you get a stipulation and you're able to get your expert, quote/unquote expert or your lay opinion testimony in that you want, you're going to turn around and say hey, you guys, this is expert opinion and you can't get it in.

And we don't agree with that and we're not going to enter into a stipulation

that allows you to do that. And I don't Judge Nolan is going to accept that.

And so what we've done is proposed a very fair reciprocal agreement that covers this potential contingency that you guys have identified. And you don't want to enter into it. Why?

Landis Best: Well, I think I've explained why. I mean, it's completely open-ended. We have no - it's not tied to any sort of disclosure. I mean, the record before Magistrate Judge Nolan is what it is.

In our discussion before her at the status conference, it's clear that ours - our position is always based and always related to our disclosures. We read Sunstar. We - it is what it is. We can all read it and draw conclusions from it.

And our position is solely defensive. We solely want to make sure that our witnesses won't be excluded as potentially lay witnesses giving testimony that may be based upon specialized knowledge.

We're not trying to spring any surprises or do anything. You've taken the depositions of almost all of these people, all of them except for one. So we're solely being defensive. We're not trying to spring anything or do anything.

And yet now you want us to agree to an open-ended stip that would apply to anybody in the whole wide world whereas we've already showed, you know, our cards.

We've put our 23 witnesses on the table that we thought could be impacted by this decision. You haven't put any witnesses on the table. I mean, have you thought of…

(Cam): Is that what this is about, is that you want us to come up with a list of witnesses? Is that what this is about? If we gave you a list of witnesses we thought it would apply to, would that resolve the issue?

Landis Best: It may.

((Crosstalk))

(Cam): …I don't want a may, Landis. Come on.

Landis Best: Yeah. I mean, certainly if you all had a proposal in that regard, we would consider it.

(Cam): I don't want it considered. If we gave you a list and you - look, you want to add to your list, fine, we'll let you add to your list. We don't care. We...

Landis Best: But (Cam), make a proposal and we'll consider it. We'll consider it quickly. We'll consider it in good faith and we'll get right back to you. We will, you know…

(Cam): Landis, I have - I'm sorry. After all that's been said and done between our two firms, we have absolutely no faith in you whatsoever.

Landis Best: Well, I'm sorry about that, (Cam). You know, it's very difficult to engage in a discussion if that's your view. Make…

(Cam): I agree.

Landis Best: Make a proposal and we'll consider it.

(Cam): No. No.

Man: We - what difference does it make who's on the list if the testimony is - if the testimony that's going to be offered is confined to knowledge and opinions at the time, what difference does it make who's on the list?

You're sort of backtracking on arguments that you've made about your own witnesses. We just - are you willing to accept a list from us of people who we don't want to have any objection, specious or otherwise, because you may think that this is expert testimony that we're going to try to offer so that we can get past this issue?

If your concern really is that you want to be able to put your witnesses on with their testimony, then you shouldn't really care about what witnesses we would have on that list, should you?

Landis Best: I'm not sure I'm really following you.

Man: Well, Landis…

Landis Best: I mean, of course, I mean, I think, you know, you would have - the same reason that you guys had concerns when we submitted our list, you know, would…

Man: But you said those concerns aren't valid, Landis, because these type of opinions that they're giving aren't going to be…

Man: (Unintelligible).

Man: …traditional expert opinions.

Man: No, ordinary is what you said.

Man: They're so ordinary…

Landis Best: Well, I mean, but you also took depositions of all of those people and you were able to question them about what they did and what they knew…

Man: Oh, come on. Let's not go down that…

Landis Best: …at the time. Who do I know who you might have on your list?

Man: (Unintelligible) deposed - who - I mean, there's one person we never deposed on this list.

Landis Best: There's one person…

Man: Well, did it…

Landis Best: …you never deposed, (John Nichols). One person.

Man: (Unintelligible) right. So.

Man: And there's a reason for that, (Cam).

Man: And let's also talk about did you guys obstruct our questioning of these people on their quote/unquote opinion testimony? Yes.

Landis Best: No, we didn't.

Man: No.

Man: Listen, let's not rehash the old arguments. Essentially what we have here is an order from the judge to you…

Man: Regarding the 23 witnesses, that's exactly right.

Man: (Unintelligible) to either provide the testimony that they're going to give or to strike them from the list.

You guys came back and you said we can't do either because they may or may not fall under Sunstar and we don't know what testimony they're going to give.

And we are trying to work with you in a fair way to resolve this problem. And I'm not sure I understand…

Landis Best: But we have the problem of …

Man: …what the issue is, Landis.

Landis Best: The problem that we have is the open-ended nature…

Man: So if we…

Landis Best: …of the language you proposed. If you…

Man: So if we…

Landis Best: …could make a proposal…

Man: …provide a list of people, then that problem is eliminated.

Landis Best: Right.

Man: (Unintelligible).

Landis Best: So if you…

Man: So if we provide a list of people, then we can enter into the stipulation as modified by us and just say that it covers the list of people, right?

Landis Best: We would like to look at the list first so that we understand who these people are. Maybe it's someone that we've never even heard of before.

Man: Why would you want to do that? What - why do you care?

Man: Why should we not be able to do that?

Man: Because then you know what? We're going to provide you a list and you're going to come up with 1000 other excuses to draw this thing out.

Landis Best: (Unintelligible).

Man: That's our concern really.

Man: Yeah.

Man: That's our concern.

Man: We give you the list and the first thing you say is no, we can't agree to this list. Take these people off or do this or whatever. It's (unintelligible)…

Man: I mean, it…

Man: It's a nonstarter.

Landis Best: Well, our..

Man: In fact, the list is going to be people who have been identified in one way or another in this case.

Landis Best: Okay. Well, look, make your proposal. I don't know why you think…

Man: So if we limit our list to people who are - who have been identified in discovery in this case, is that a good enough limitation for you and does that satisfy your concerns?

Landis Best: No. I mean, again, it - there's a lot of people who've been identified in discovery in this case. I don't know what you mean by that.

Man: Well, you just said you're worried that our list will include someone you've never heard of before. And so I'm trying to satisfy that concern. And this is my point, is that it doesn't seem like these are really the issues you have. It just seems like you want this to be sort of a one-sided thing. And…

Landis Best: Well, no.

Man: …we can't really agree to that.

Landis Best: It's not a one-sided thing. I mean, we - again, we provided our - it all arises in the context of our meeting the deadline set under the federal rules for disclosure of witnesses potentially with specialized knowledge…

(Luke): Well, it…

Landis Best: …under Sunstar.

(Luke): It - but that - of course, the court has found that you haven't provided all of the information necessary, okay.

Landis Best: Well, she stayed that right now, (Luke). So…

(Luke): Right. But…

Landis Best: …we're beyond that issue now.

(Luke): …because we're going to enter - she expected that we would enter into a stipulation.

Landis Best: Right.

(Luke): And so you didn't provide all of the information necessary. And so, I mean, what are you trying to do? Are you trying - are you saying that because we didn't disclose any witnesses that we shouldn't be able to enter into a stipulation? Because our opinion on this -- and you don't really directly refute this -- is that this stuff is not expert opinion testimony.

Landis Best: Look, I mean, our - we think that there's some risk based upon Sunstar as to how these people will be interpreted by the court. And so that…

Man: And so you would like to enter a stipulation that puts the risk on us…

Landis Best: No, it doesn't put the risk on you.

Man: It puts the risk on us for any witness that we may have and allows you to 100% attack and shift your position to of course Sunstar requires this, right? I mean, that's what you're trying to do.

Landis Best: No, no. I mean, that's not - I've told you what our objection is. And it's the open-ended nature of it, which completely takes it out of the situation in which it arose, which is with respect to the 23 witnesses we identified. For all we know, we - you might want to call some of these witnesses on the list of 23 that we set forward.

Man: And how - and why does that change anything?

Landis Best: Why? Because they could've been precluded under Sunstar.

Man: But so…

Landis Best: Because you didn't disclose them.

(Cam): (Yeah), we don't think so, though. We - the only chance that you would have them dinged on Sunstar grounds is if we indicated an intention to do so. And we've already said we don't.

So, I mean, you could've just asked us that up front. You could've said look, these people - no, but, come on, it was all a big game. You know it and we know it. I don't know why you pretend it wasn't.

Landis Best: I don't know what you're talking about, (Cam). Look…

(Cam): (Unintelligible) exactly like (Luke) says. It's a big setup for your motion (unintelligible) trial.

Landis Best: I don't - I'm not following you at all. That's…

Man: I think you're following us, Landis.

Landis Best: We have our concern. If you want to make - I think you wanted to make some sort of a proposal to us that deals with the open-ended nature, we'll consider it. And if not, then, you know, I'm not sure what kind of progress we're going to make on the call now.

And what we would need to do is apprise Magistrate Judge Nolan where we are, because we think there's no reason why you can't enter into a reciprocal stip, which this is, with respect to the 23 witnesses that we identified.

Man: But we don't believe that the stip is reciprocal.

Man: No, that's okay, that's okay.

Landis Best: It is reciprocal.

Man: (Unintelligible)…

Landis Best: It applies to either party.

Man: …Landis, fine. You say - save those arguments. We don't need to hear any

more from you on that issue. We quite understand your position. You think it's reciprocal. We have explained why we don't think it's that. So we don't need to go any further.

We can go - if - and if you're not willing to leave it just the way it is -- which is plenty fair, it's exactly neutral, we were very careful in that way -- you don't want to do it, that's fine. We can say to Judge Nolan we proposed something and you didn't like it and this is why. And we can go from there.

And we'll just go back to the status quo, which is you're left with a motion you have to either answer. You either obey the order or strike these people. That's where we're at.

Landis Best: Well…

Man: That's what you want. That's when - and then - and we're there because that's where you want to be. That's fine.

Landis Best: No, we - but we're…

Man: (Unintelligible) discussion about that.

Landis Best: That's fine. We'll apprise Magistrate Judge Nolan of where we are if you're not willing to think of some other proposal to make.

Man: Well, we've made a proposal, Landis.

Landis Best: Okay.

Man: We have said if you - if your concern is the open-ended nature, we will - if

you agree that this will satisfy you, we will provide a list of people that it will cover from our side so that we can be - we can have some assurance that you're not going to throw this stip back in our face at trial, which is what I think you're planning to do. And you have said you're not going to do that. And we are not - I think that we're - that's an unreasonable position to take.

I think now you're changing the scope of things, too, because what we're talking about is a type of testimony. And that's what we've been talking about.

And you're - you now want specific people. And I'm saying if you'll agree that that'll satisfy you, we will give you a list. But we're not going to give you a list to give you another excuse to belabor this thing and continue it on.

So please, don't misrepresent anything. And if you're going to appraise Judge Nolan…

Man: (Unintelligible).

Man: …don't leave that out because we're not…

Landis Best: No.

Man: …going to leave that out.

Landis Best: Well, you know, that - I understand that you're thinking - you're expecting us to just accept that sight unseen. If you provide us a list, we'll consider it. If you make a proposal, we'll consider it. We're not saying…

Man: Well, that's our proposal. Our proposal is that we will - if you agree that this

will satisfy your concern about the…

Man: Open-ended.

Man: …open-ended nature of this stipulation, which, of course, is not open-ended because it refers and relates to a specific type of testimony, it - but if you will agree that a list will satisfy you, then we'll provide you a list.

But like I said, we have no confidence. And your unwillingness to accept that sort of proves my point, which is providing a list to you will be useless. You will then take that list and try to find some excuse as to why our list shouldn't be, you know, our list should not be applicable but yours should or something like that. And we don't want to go down that road. And so I'm making a proposal to you and it sounds like you're rejecting it.

Landis Best: No. I'm saying let us see the list.

(Luke): (Unintelligible).

Landis Best: We may agree to it. We can't agree to it in a vacuum without, you know, with sight unseen, you know…

(Luke): (Unintelligible) I've also…

Landis Best: …we agree to whatever list you give us…

(Luke): …I've also said that it'll include people who have been identified in this case. And it - still that doesn't satisfy you.

Man: We don't know what means, (Luke).

Landis Best: Yeah. I mean, the case…

(Luke): What do you mean that you don't know what that means?

Landis Best: The case is huge in scope. There's over 5 million pages of documents…

(Luke): So what?

Landis Best: …that have been produced. There could be names on - I mean, look, if…

(Luke): But what does that matter, Landis? I mean, these are all witnesses…

((Crosstalk))

Man: …we're going to bring 5000 witnesses to the case?

(Luke): I mean, think about it. I think that you're just - you're making an excuse. But think about it in rational terms here. Witnesses that we can put on at trial are going to be witnesses that we can put on a trial.

All we're trying to do is resolve this specific issue. And, of course, if we weren't able to put them on at trial and - for simple (on opinion) lay testimony, then we wouldn't be able to put them on at trial for this stuff. The scope is not all that broad.

And you're not really agreeing to anything given the limitations and given what you have - the characterization that it's ordinary testimony. You're not really agreeing to anything that's so frightful here.

The concern we had before was that you guys were going to elicit new opinions from these witnesses. You've now said that you're not going to.

Man: Then you have no concern, right? That's the problem. That's the point…

(Luke): No, we do have a concern.

Man: You just said that you had your concern, we allayed it, so now you have no concern?

(Luke): No.

((Crosstalk))

Man: No, you know what, look, we're getting pointless and just we're going back and forth. We made a proposal. Our proposal was you take our list, accept it as-is. You've said no, so we don't need to have any more discussion. Looks like we're done. Okay? Thank you.

Landis Best: Okay. All right.

Man: (Unintelligible).

Man: Do we have anything else?

Man: No.

Landis Best: Yeah.

Man: So are you guys going to give us the information under the order?

Man: (Unintelligible).

Landis Best: Well, we're going to go back to - we're going to apprise Magistrate Judge Nolan of the situation. Hopefully maybe she can intervene and maybe she'll say plaintiffs provide the list to - so we can consider it. Who knows what she's going to say. But we'll apprise her of where we are.

Man: In what form?

Landis Best: I don't know. I haven't thought that far ahead.

Man: All right. Well, you know what? Let's call her tomorrow and ask for a status conference?

Landis Best: Tomorrow's Saturday, isn't it?

Man: All right, we'll call her on Monday then.

Man: (Unintelligible).

Landis Best: Well, let us - let me - I don't have my calendar right in front of me, so, you know, we'll figure that out.

Man: Yeah, all right. Well, listen, well, you can do whatever you want. We've told you we want to call her and have a - request a status conference. If you're going to write her a letter, that's fine. You - we can't stop you. But I think it would be inappropriate in light of what we - our…

Landis Best: Okay. All right. Well, I guess you guys didn't get our other letter from last

night.

Man: Oh, we just told you we didn't get any letters from you last night.

Landis Best: Okay. Well, I sent a letter and Jason sent a letter.

Jason Hall: And the other letter, (Cam), relates to this Ernst & Young document that we've been discussing in correspondence.

(Cam): (Okay), look, I went through all my email this morning. I didn't get any letter from you.

Jason Hall: Okay. Well, do you want to talk about this now or do you want to talk about it some other time?

(Cam): I want to - well, I'd like to see your letter. I mean, I guess if your letter - what did your letter say? Tell me.

Jason Hall: Well, the letter I think essentially responds to your letter of the 20th and says in a nutshell the following -- you guys specifically raised this particular document in a brief that you submitted to Judge Nolan on February 22 of 2007.

Judge Nolan adjudicated the issue and found that this very document was privileged. And so I don't understand the basis for your claim that the document's not privileged.

(Cam): I'm asking you is there any language in there that says that we have to return the document.

Jason Hall: So is your position then that the document has been found by the court to be privileged but you're not going to return it?

(Cam): I - no. I don't know what the language is you're referring to, but I do know that we submitted that the judge has never ordered us to give it back and I don't even think you've ever asked for it back.

Jason Hall: We have asked for it back by (Ken Smith)'s letter…

(Cam): I know. I - and that was…

Jason Hall: …that was read to you on the record in the deposition of (Katherine Galleri).

(Cam): (Unintelligible).

Landis Best: And (Cam), there's a protective order. The protective order is an order entered by the court that governs matters (unintelligible)…

(Cam): (Okay), well, then, look, we're at an impasse. I told you we were at an impasse from the first…

Landis Best: No, there's been a ruling on the document, (Cam). There's no impasse on the document.

(Cam): Well (unintelligible)…

Man: (Unintelligible).

(Cam): Go ahead. Make your motion.

Man: (Unintelligible).

Landis Best: There's no motion here.

Man: I mean, this is…

((Crosstalk))

Man: …we'll take your position under advisement.

(Cam): …make a motion. That was our point. You've never asked the court for - to have this document back. She's never ordered the document back.

Craig Kesch: But (Cam), your position is you...

((Crosstalk))

Craig Kesch: …two separate motions, one for the privilege and one for the return of the document? That's the position? You need a ruling on the privilege and an order directing the return of the document?

(Cam): No. When the document was quote/unquote inadvertently produced, that's generally typical, Craig. I don't know what - where you practice law, but…

Craig Kesch: Well, that's in…

(Cam): …that's the way it works.

Craig Kesch: ….clear contravention of the protective order, (Cam).

Landis Best: Can…

Man: And - yeah…

Landis Best: …just so you understand, when we bring this before Magistrate Judge Nolan, she's going to have a document that she's already ruled as privileged. She's going to have a protective order that she's already entered that governs what happens when there's a privileged document. There's a clear record of our asking for this document back. Are you sure you want us to go forward with this, (Cam)?

(Cam): Well, I haven't seen the letter, but basically I'm comfortable, yeah. Let me look and see…

Man: (Unintelligible).

(Cam): …what Jason said in his letter, but they way you've described it now, yes, I'm comfortable.

Landis Best: Okay.

Man: Well, if you're comfortable, you might see a motion instead of a letter.

Thanks (Cam).

(Cam): Well, wait a sec. Before you do that, we - didn't I - if you want to do it, we're going to have a status conference. Why don't you just raise it and we can talk about a briefing then.

I assume there's going to be a briefing on these issues, right?

Man: We'll let you know about the status conference.

Landis Best: Yeah.

(Cam): Well, look…

Man: (Unintelligible)…

(Cam): …you know what?

Man: …sent a letter.

Man: (Unintelligible).

Landis Best: We sent a letter to you guys.

Man: (Unintelligible).

Man: If you don't have the letter, I don't know what to tell you. We'll check with our fax department.

Man: That's what (Cam) said he wants to see is the letter…

(Cam): I want to see…

Man: … that you sent last night that we haven't seen yet.

(Cam): Yeah. I want to see that letter.

Man: Well, I think you've had problems with your fax room before as I recall. I had a whole thing with (Azra) about this.

Man: Multiple times.

Man: Yeah.

I remember I actually had a confirmation…

Man: Yeah.

Man: …of a fax that said you guys - you guys said you didn't get. (Starting) to lose credibility.

Man: Well, you know, well, okay. All right, well, if at some point we ever approach a level of credibility, let us know. All right?

Man: Okay.

Man: Okay.

Man: But in the meantime, we do have an issue and we're definitely going to - we want to talk to Judge Nolan. We're telling you this now. We want to call Judge Nolan on Monday.

We want to set up a briefing schedule on our motion to compel on the subpoenas. So, I mean, if you guys want to talk about a briefing schedule, maybe we can agree to it now.

Man: We think that…

Man: (Unintelligible).

Man: …Nolan is not the proper party to bring any motions on your subpoenas.

Man: And you don't have a response yet from the only subpoena that pending in the Northern District of Illinois.

Man: All right, well, we'll bring it to her attention anyway. I don't - you know, if you want…

Man: (Unintelligible).

Man: …you can make that argument that (unintelligible) that's fine.

Man: Okay.

Man: All right.

So we're going to call her on Monday. You want to be part of the call?

Man: We have to be part of the call and we don't know if we're around Monday. We'll get back to you.

Man: Well, we're going to call her on Monday. And we'll check in with you before we do.

Man: So yeah, if someone's going to be around, email us and let us know who we should talk to.

Landis Best: But we would certainly appreciate that you let us know and give us a heads up on when you're going to call the magistrate judge to talk about substantive issues with her, so, you know.

Man: We're tell you Monday morning. If you want to join…

Craig Kesch: (Unintelligible) we don't know if we're around. You're not suggesting that you're going to call her ex parte in our absence, are you?

Man: Are you telling - are you saying you're not around, Craig?

Landis Best: We don't know. We're sitting here on Friday afternoon…

Man: Not one of you people? All right, fine. Just email us and let us know who is around, when they're available, and we'll try and patch them in before we call Nolan. If they're not around, well, then we'll just keep it on a very short discussion. We'll just ask for a briefing schedule and a status conference.

Landis Best: Well, we don't think you should be calling her without someone from our side on and we would appreciate your…

Man: Oh, that's a new (turn) you take because you guys call all the time.

Landis Best: We don't talk - we don't call her to talk about substantive issues. (Unintelligible)…

Man: What is substantive, Landis?

Landis Best: What?

Man: Substance is when we talk to her but it's not when you talk to her?

Landis Best: Yeah.

Man: We're talking about trying to set up a status conference…

Man: (Unintelligible).

Man: …which you guys obviously don't want to have happen because, well, I won't even…

Man: (Unintelligible).

Landis Best: Just give us a call…

Man: …on the reasons. (Unintelligible).

Landis Best: Just give us a call. Give us a call on Monday. Send us an email. Send multiple people because we're all busy and that way someone'll get ii.

(Cam): No, Landis.

Landis Best: And we'll try to get someone…

(Cam): I said to you - I'm requesting right now that you email me now or later on this afternoon for you who is available on Monday morning and when and we'll try and patch that person in.

If that person's available, we'll patch them in and we'll call Nolan together.

Landis Best: Okay, (Cam), you know, you don't need to raise your voice on this.

((Crosstalk))

(Cam): I'm not, but…

Landis Best: You are. You're yelling and screaming…

((Crosstalk))

(Cam): …actually just closer to the phone.

Landis Best: You know, (Cam), just - we don't have our calendars in front of us. We will look and see. Are you talking - what time are you talking about on Monday?

(Cam): Monday morning our time.

Landis Best: Monday morning your time.

(Cam): Yeah.

Landis Best: So that's…

(Cam): (Unintelligible) you plenty of time.

Landis Best: …9 o'clock your time.

(Cam): Hopefully someone's around.

Landis Best: Noon our time. Are you saying noon New York time?

Man: We're saying Monday morning our time. That's a three-hour window, Landis.

Man: (Unintelligible).

Man: It's a short call. I mean, this is just really crazy that you guys can't even say sure, call David, sure, call Landis and we'll patch you in. I mean, it's so absurd. And you're going to see how crazy it looks on the transcript of this call. I mean, it's just absolutely ridiculous.

Landis Best: Just - all I'm saying is email us…

Man: You're clearly saying that you don't know. You can't make someone available on Monday morning?

Man: Right.

Man: But…

Landis Best: I'm sure we can. We just want to know the time and want to be given the professional courtesy to check our calendars so that we have a convenient time.

Man: Sure. We - anytime between 9:00 and 11:00 our time, which is noon and 2:00 your time, and if you're not available then, let us know when you are available on Monday.

Landis Best: Okay.

((Crosstalk))

Man: …if we're available, okay?

Landis Best: Okay. That sounds great.

Man: So we'll expect an email from you today.

Landis Best: Thank you.

Man: Can we get - are we going to get that email today, Landis?

Landis Best: We'll let you know when we're available.

Man: Great.

Landis Best: Thanks. Bye-bye.

Man: Bye.

END

DECLARATION OF SERVICE BY ELECTRONIC MAIL AND BY U.S. MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on April 8, 2008, declarant served by electronic mail and by U.S. Mail to the parties the: **LEAD PLAINTIFFS' REPLY IN SUPPORT OF ITS' MOTION TO STRIKE AND SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION FOR A FINDING OF CONTEMPT AND APPROPRIATE SANCTIONS**. The parties' email addresses are as follows:

TKavaler@cahill.com PSloane@cahill.com PFarren@cahill.com LBest@cahill.com DOwen@cahill.com	NEimer@EimerStahl.com ADeutsch@EimerStahl.com MMiller@MillerLawLLC.com LFanning@MillerLawLLC.com

and by U.S. Mail to:

Lawrence G. Soicher, Esq.
Law Offices of Lawrence G. Soicher
110 East 59th Street, 25th Floor
New York, NY 10022

David R. Scott, Esq.
Scott & Scott LLC
108 Norwich Avenue
Colchester, CT 06415

I declare under penalty of perjury that the foregoing is true and correct. Executed this 8th day of April, 2008, at San Francisco, California.

/s/ Marcy Medeiros
MARCY MEDEIROS