

1 CASE NUMBER: BC429385
2 CASE NAME: TRUST COMPANY OF THE WEST VS.
3 JEFFREY GUNDLACH, ET AL
4 LOS ANGELES, MONDAY, AUGUST 22, 2011
5 CALIFORNIA
6 DEPARTMENT 322 HON. CARL J. WEST, JUDGE
7 APPEARANCES: (AS HERETOFORE NOTED.)
8 REPORTER: WENDY OILLATAGUERRE, CSR #10978
9 TIME: A.M.

10
11
12 (THE FOLLOWING PROCEEDINGS WERE
13 HELD IN OPEN COURT OUTSIDE THE
14 PRESENCE OF THE JURY:)

15
16 THE COURT: GOOD MORNING, LADIES AND
17 GENTLEMEN.

18
19 (ALL COUNSEL RESPONDED "GOOD MORNING, YOUR HONOR.")

20
21 THE COURT: IN THE TCW VERSUS GUNDLACH MATTER,
22 WE'RE CONVENING OUT OF THE PRESENCE OF THE JURY TO
23 RESUME OUR DISCUSSION OF PENDING JURY INSTRUCTIONS OR
24 REQUESTED INSTRUCTIONS.

25 WHEN WE LAST DID THIS, WHICH I THINK WAS
26 TOWARD THE END OF JULY, I THINK WE LEFT OFF WITH
27 DEFENDANT'S SPECIAL JURY INSTRUCTION NUMBER SIX.

28 DOES THAT --

08:59AM

09:53AM

09:53AM

1 MR. HELM: I BELIEVE SO. I THINK WE WERE --
2 I'M NOT SURE WHERE WE WERE ON FIVE.

3 THE COURT: WELL, I ISSUED A RULING. THE
4 OBJECTION WAS SUSTAINED. THE ISSUE WILL BE RESOLVED BY
5 THE JURY'S FINDINGS, WAS THE COMMENT; AND I THINK THAT
6 WAS IN THE MINUTE ORDER THAT FOLLOWED THAT HEARING.

09:54AM

7 MS. STEIN: YOUR HONOR, I BELIEVE FIVE WAS
8 DEFERRED. IT WAS A PREEMPTION INSTRUCTION, IF I'M
9 CORRECT?

10 THE COURT: DEFENDANT'S SPECIAL JURY
11 INSTRUCTION NUMBER FIVE, I SHOW, AND YOU CAN CHECK THE
12 MINUTE ORDER THAT CAME OUT OF THAT CONFERENCE. BUT BY
13 MY NOTES, IT SAYS THE OBJECTION IS SUSTAINED THE ISSUE
14 WILL BE SOLVED BASED ON THE JURY'S FINDINGS.

09:54AM

15 IT WAS JULY 18TH, IN THE MINUTE ORDER ON
16 JURY INSTRUCTIONS?

09:54AM

17 AND SPECIAL JURY INSTRUCTION NUMBER SIX
18 IS ALSO -- GOES TO THE PREEMPTION ISSUES.

19 MR. HELM: YES, I THINK AT THE TIME THAT WE
20 LAST DISCUSSED THESE, OUR MOTION IN LIMINE ON
21 PREEMPTION HAD NOT BEEN DECIDED. SO MY IMPRESSION WAS
22 THAT WE WERE DEFERRING THE -- AT LEAST SOME OF THESE,
23 UNTIL THE MOTION IN LIMINE HAD BEEN DECIDED. I THINK
24 THE COURT WILL RECALL ITS RULING ON THAT. I THINK THAT
25 WAS OUR MOTION IN LIMINE NUMBER FIVE.

09:55AM

09:55AM

26 THE COURT: WHAT WAS THE DATE OF OUR
27 CONFERENCE?

28 MS. STEIN: THE 12TH, YOUR HONOR.

1 MR. HELM: I'M NOT SURE WE SAW AN ORDER ON
2 THAT, YOUR HONOR.

3 THE COURT: OKAY. WELL, MY PRACTICE IS, I GO
4 THROUGH AND HIGHLIGHT. AND I USUALLY SEND IT TO ELMER.
5 MAYBE I DIDN'T.

09:56AM

6 AND MAYBE WE SET IT, AS INDICATED, ON
7 THE RECORD FROM BEFORE. IT LOOKS LIKE THAT'S WHAT WE
8 DID.

9 OKAY. I GUESS IT WASN'T IN THE MINUTE
10 ORDER. BUT IT'S IN MY NOTES. AND AT LEAST INITIALLY,
11 SPECIAL JURY INSTRUCTION NUMBER FIVE WAS NOT GOING TO
12 BE ALLOWED.

09:56AM

13 SPECIAL JURY INSTRUCTION NUMBER SIX,
14 WHICH WE NOW HAVE, IS BASICALLY -- AND I MAY HAVE SEEN
15 OVER THE WEEKEND, AN AMENDMENT TO THIS. BUT AS IT
16 READS IN THE ORIGINAL SUBMISSION, (READING):

09:57AM

17 TCW CANNOT MAINTAIN A BREACH
18 OF FIDUCIARY DUTY CLAIM THAT RELIES
19 ON THE SAME GENERAL FACTS AS THE
20 MISAPPROPRIATION OF THE TRADE
21 SECRET CLAIM. YOU MAY NOT FIND
22 BREACH OF FIDUCIARY DUTY LIABILITY
23 BASED ON ANY CONDUCT THAT TCW ALSO
24 ALLEGES CONSTITUTES
25 MISAPPROPRIATION OF TRADE SECRETS.

09:57AM

09:57AM

26 I THINK THAT IS AN ACCURATE STATEMENT OF
27 THE LAW.

28 AND WITH THAT IN MIND, THE ONLY QUESTION

1 THAT I WOULD HAVE IS WHETHER WE OUGHT TO BE USING THE
2 COMMON NUCLEUS OF FACT LANGUAGE AS OPPOSED TO SAME
3 GENERAL FACTS.

4 MR. HELM: WE HAVE NO OBJECTION TO NUCLEUS OF
5 FACTS. WE WERE DEBATING WHICH WOULD BE MORE
6 UNDERSTANDABLE TO THE JURY.

09:58AM

7 THE COURT: WELL, I THINK COMMON NUCLEUS OF
8 FACT IS USED IN ANOTHER -- IN ANOTHER INSTRUCTION THAT
9 HAS BEEN PROPOSED, IF I'M NOT MISTAKEN.

10 MR. QUINN: I THINK ONE PROBLEM WITH THAT,
11 YOUR HONOR, IS THAT AN INSTRUCTION TO SOMEONE TO
12 COPY -- THE INSTRUCTION ITSELF, WOULD NOT BE A
13 MISAPPROPRIATION UNDER CUTSA, BUT THE INSTRUCTION MIGHT
14 BE A BREACH OF FIDUCIARY DUTY. IF YOU TELL SOMEBODY TO
15 BASICALLY MISAPPROPRIATE A TRADE SECRET, YOU MAY NOT BE
16 LIABLE FOR GIVING THAT INSTRUCTION FOR
17 MISAPPROPRIATION, BUT YOU MAY BE LIABLE FOR BREACH OF
18 FIDUCIARY DUTY.

09:58AM

09:58AM

19 IS THAT THE SAME NUCLEUS OF FACT? TO
20 ME, THAT'S A --

09:58AM

21 THE COURT: IN MY VIEW, IT IS. IT'S HARD TO
22 SEPARATE THE TWO. THE ACT OF COPYING VERSUS THE
23 INSTRUCTION TO COPY, DIRECTED TO AN UNDERLING, IS ONE
24 CONTINUOUS OPERATIVE SET OF FACTS THAT LEADS TO A CLAIM
25 FOR MISAPPROPRIATION OF TRADE SECRETS.

09:59AM

26 THERE HAS BEEN TESTIMONY, AND I BELIEVE
27 THERE IS EVIDENCE, OF CONDUCT UNRELATED TO THE
28 BREACH -- TO THE MISAPPROPRIATION CLAIMS THAT COULD BE

1 CONSTRUED AND COULD BE DETERMINED BY THE JURY TO
2 CONSTITUTE A BREACH OF FIDUCIARY DUTIES.

3 NOW, THERE ARE ARGUMENTS ON THE OTHER
4 SIDE THAT --

5 MR. QUINN: WELL, YOUR HONOR, I REALLY THINK
6 WE HAVE TO MAKE A DISTINCTION THERE, BECAUSE
7 INSTRUCTING SOMEONE TO DO SOMETHING, IN ITSELF, MAY NOT
8 BE MISAPPROPRIATION, AND MAY BE A BREACH OF FIDUCIARY
9 DUTY. YOU CAN'T JUST -- WE CAN'T JUST PREEMPT THAT.

09:59AM

10 THE COURT: WELL, DO YOU WANT TO WAIVE THE
11 CLAIMS FOR MISAPPROPRIATION OF TRADE SECRETS AGAINST
12 THE PERSON THAT GAVE THE INSTRUCTIONS, AND SAY THAT
13 WE'RE ONLY PURSUING THOSE AGAINST THE PEOPLE THAT
14 ACTUALLY DID IT? I DON'T THINK SO.

09:59AM

15 MS. ESTRICH: YOUR HONOR?

10:00AM

16 THE COURT: YES, MS. ESTRICH.

17 MS. ESTRICH: I THINK WHAT MAY CLARIFY THIS IS
18 IF WE MAKE CLEAR IN THE MISAPPROPRIATION INSTRUCTIONS,
19 AS I UNDERSTAND IT, THAT A DIRECTION TO ANOTHER TO
20 STEAL TRADE SECRETS, THERE'S SUBSTANTIAL CASE AUTHORITY
21 THAT MAY ITSELF CONSTITUTE MISAPPROPRIATION.

10:00AM

22 AND SINCE THAT CONFORMS TO THE EVIDENCE
23 AS WE NOW HAVE RECEIVED IT, I THINK IT WOULD BE
24 APPROPRIATE -- CONSISTENT WITH THE POSITION THAT THE
25 DEFENDANTS ARE TAKING. IF WE'RE NOT GOING TO INCLUDE
26 THE DIRECTION AS FIDUCIARY DUTY, THEN WE OUGHT TO MAKE
27 CLEAR THAT THE DIRECTION IS SUFFICIENT. AND I THINK
28 THAT I'M HAPPY TO PROVIDE YOU LAW THAT IS SUFFICIENT TO

10:00AM

1 CONSTITUTE MISAPPROPRIATION ITSELF.

2 THE COURT: AND THAT -- I MEAN, I THINK IT'S
3 ONE WAY OR THE OTHER.

4 MS. ESTRICH: RIGHT.

5 AND I THINK AS LONG AS THE DOUBLELINE
6 PARTIES ARE COMFORTABLE WITH IT, AN ADDITIONAL
7 INSTRUCTION, WHICH WILL NOW BE NECESSARY, GIVEN THE
8 PROOF, TO MAKE CLEAR THAT MISAPPROPRIATION IS NOT
9 LIMITED TO THE PERSON WHO DOES THE ACTUAL COPYING, BUT
10 ALSO INCLUDES THE PERSON OF AUTHORITY.

10:01AM

10:01AM

11 THE COURT: MR. HELM, I'LL SUSTAIN THE
12 OBJECTION TO SPECIAL JURY INSTRUCTION -- OVERRULE THE
13 OBJECTION TO SPECIAL JURY NUMBER SIX.

14 THIS MODIFICATION WILL HAVE TO BE MADE
15 TO CLARIFY THE OTHER SIDE OF THE COIN, TO SATISFY THE
16 POINT RAISED BY MR. QUINN.

10:01AM

17 MR. HELM: YES, YOUR HONOR. IF TRADE SECRET
18 INFORMATION WAS ACQUIRED, DISCLOSED OR USED, WE DON'T
19 DISAGREE THAT THE PERSON WHO DIRECTED THE ACQUISITION,
20 USE OR DISCLOSURE COULD BE LIABLE FOR TRADE SECRET
21 VIOLATION.

10:01AM

22 MS. ESTRICH: AND WE WOULD PROPOSE AND
23 HOPEFULLY WORK TOGETHER ON LANGUAGE MAKING THAT CLEAR.

24 THE COURT: ALL RIGHT. SO WE DON'T HAVE AN
25 ISSUE ON SPECIAL JURY INSTRUCTION NUMBER SIX. I'M
26 GOING TO OVERRULE THE OBJECTION.

10:02AM

27 AND YOU ARE GOING TO MAKE APPROPRIATE
28 CHANGES TO THE OTHER INSTRUCTIONS.

1 MS. ESTRICH: THANK YOU VERY MUCH, YOUR HONOR.

2 THE COURT: ALL RIGHT.

3 MR. HELM: ALL RIGHT. I'M SORRY. GO AHEAD.

4 I THINK SEVEN NOW, IN LIGHT OF -- SEVEN
5 WAS AN ALTERNATIVE TO SIX; SO IF SIX IS BEING GIVEN, I
6 DON'T THINK WE NEED SEVEN.

10:02AM

7 THE COURT: SO DEFENDANT'S SPECIAL JURY
8 INSTRUCTION NUMBER SEVEN IS WITHDRAWN?

9 MR. HELM: YES.

10 THE COURT: ALL RIGHT. CASI 4401. IS THAT
11 THE NEXT ONE? AND THIS IS THE ONE THAT MAY REQUIRE THE
12 MODIFICATION THAT WE WERE JUST TALKING ABOUT.

10:02AM

13 4401; ISN'T THAT RIGHT?

14 MS. ESTRICH: THE ONLY OTHER ISSUE ON THAT WAS
15 THE BUT FOR LANGUAGE, WHICH WE DISCUSSED LAST TIME, BUT
16 I'M NOT SURE THERE WAS A FORMAL RULING ON THAT.

10:03AM

17 WE WERE PROPOSING THE BUT FOR LANGUAGE
18 WAS IMPROPER AND THE --

19 THE COURT: WE HAVE SUBSTANTIAL FACTORS --

20 MS. ESTRICH: THAT'S CORRECT.

10:03AM

21 THE COURT: -- TO DETERMINE THAT IT IS.

22 MS. ESTRICH: AND WE CAN CLARIFY THAT.

23 MR. HELM: WELL, BUT THE SUBSTANTIAL FACTOR
24 INSTRUCTION INCLUDES THE STATEMENT (READING):

25 CONDUCT IS NOT A SUBSTANTIAL

10:03AM

26 FACTOR IN CAUSING HARM, IF THE SAME

27 HARM WOULD HAVE OCCURRED WITHOUT

28 THAT CONDUCT.

1 AND SO IT'S IN BRACKETS IN THE CASI,
2 BUT ONLY BECAUSE IT'S NOT GIVEN IF THERE ARE CONCURRENT
3 INDEPENDENT CAUSES WHICH ARE MULTIPLE FORCES OPERATING
4 AT THE SAME TIME, AND INDEPENDENTLY, EACH OF WHICH
5 WOULD HAVE BEEN SUFFICIENT BY ITSELF TO BRING ABOUT THE
6 SAME HARM.

10:04AM

7 I'M READING FROM THE DIRECTIONS FOR USE
8 FROM CASI 430. AND SO SINCE THE BUT FOR REQUIREMENT IS
9 PART OF THE SUBSTANTIAL FACTOR, WE THINK IT SHOULD BE
10 INCLUDED IN POINT FIVE ON 4401.

10:04AM

11 THE COURT: OKAY.

12 THE VERSION THAT I HAVE IN FRONT OF ME,
13 UNLESS YOU ALL HAVE MODIFIED IT, IS THAT -- IT'S
14 PARAGRAPH FIVE OF CASI 4401 READS AS PROPOSED.

15 (READING):

10:04AM

16 THE DEFENDANT'S ACQUISITION,
17 USE FOR DISCLOSURE WAS A
18 SUBSTANTIAL FACTOR IN CAUSING TCW'S
19 HARM, OR DEFENDANTS TO BE UNJUSTLY
20 ENRICHED.

10:04AM

21 AND THAT IN THE ABSENCE OF THEIR
22 MISAPPROPRIATION OF TRADE SECRETS, THE HARM TO TCW OR
23 UNJUST ENRICHMENT WOULDN'T HAVE OCCURRED.

24 NOW, THIS GOES TO THE POINT WE WERE
25 TALKING ABOUT EARLIER. AND MY UNDERSTANDING IS THAT
26 TCW'S POSITION IS THAT THEY ARE INCAPABLE OF OFFERING
27 PROOF OF OR ESTABLISHING A RIGHT TO UNJUST ENRICHMENT
28 OR DAMAGES ON THE TRADE SECRET CLAIM. AND THAT'S WHY

10:05AM

1 THEY WANT TO BRING IN CORNELL AND OFFER THE REASONABLE
2 REALITY TESTIMONY.

3 SO DON'T WE NEED TO CHANGE THIS LANGUAGE
4 TO CONFORM TO THAT?

5 MR. HELM: HARM IS STILL A REQUIREMENT, YOUR
6 HONOR, FOR LIABILITY, IF THERE IS LIABILITY. 10:05AM

7 IF HARM HAS BEEN SHOWN, AND THE -- THEY
8 THEN SAY THAT YOU CAN'T PROVE THE AMOUNT OF THE LOST
9 PROFITS OR THE UNJUST ENRICHMENT, A REASONABLE ROYALTY
10 MEASURE MAY BE PURSUED BY THE COURT. 10:06AM

11 BUT I AM AWARE OF NO AUTHORITY WHICH
12 SAYS THAT THE HARM REQUIREMENT, WHICH IS PART OF THE
13 CASI INSTRUCTION, CAN EVER BE DISPENSED WITH.

14 THE COURT: OKAY. BUT WE DON'T WANT THE
15 LANGUAGE ON UNJUST ENRICHMENT, IN EFFECT, DAMAGES. 10:06AM
16 THIS HAS TO BE REVISED TO CORRESPOND TO THE CASE THAT'S
17 BEING PUT ON AND BEING ARGUED.

18 MR. HELM: WELL --

19 THE COURT: AN ELEMENT OF THE CLAIM OF
20 MISAPPROPRIATION OF TRADE SECRET IS RESULTING HARM. 10:06AM

21 NOW, RESULTING HARM COULD THEORETICALLY
22 BE THE LOSS OF A REASONABLE ROYALTY ON THE USE OF THE
23 TRADE SECRETS. SO I DON'T SEE THAT AS A REAL ISSUE,
24 BUT I THINK THIS LANGUAGE NEEDS TO BE CLARIFIED.

25 MS. STEIN: YOUR HONOR, WHAT IF WE TOOK OUT
26 THE LANGUAGE OR THE UNJUST ENRICHMENT, THEN WE LEAVE
27 THE TERM HARM? 10:06AM

28 THE COURT: MS. ESTRICH?

1 MS. ESTRICH: THE HARM CAN COME IN A NUMBER OF
2 FORMS. I DON'T THINK ANYBODY IS DEBATING THE HARM IS
3 REQUIRED. THE HARM COULD COME FROM THE LOSS OF TRADE
4 SECRETS AND THE UNAVAILABILITY OF THE INJUNCTION.

5 THE REASONABLE ROYALTY REQUIREMENT GOES
6 TO THE PROVABILITY OF THE SPECIFIC ELEMENTS OF UNJUST
7 ENRICHMENT OR LOSS BY THE PLAINTIFFS.

10:07AM

8 AND AS I UNDERSTAND IT, THESE ISSUES ARE
9 GOING TO BE ADDRESSED IN DETAIL IN THE CONTEXT OF THE
10 CORNELL TESTIMONY, WHICH, AS I UNDERSTAND IT IS, WE ARE
11 SUBMITTING A BRIEF THIS MORNING THAT INCLUDES A
12 CROSS-MOTION. IT WOULD BE ARGUED WEDNESDAY AFTERNOON.
13 AND IT MIGHT BE BEST TO DEFER THAT ASPECT OF WHAT
14 LANGUAGE SHOULD BE CHANGED.

10:07AM

15 BUT WE CERTAINLY AGREE THAT SOME HARM IS
16 REQUIRED. WHAT WE DON'T AGREE IS THAT -- NOR DO WE
17 AGREE THAT WE CAN'T PROVE ANY HARM.

10:07AM

18 WE AGREE WE CAN PROVE HARM. IT'S SIMPLY
19 THE EXACT MEASURE OF UNJUST ENRICHMENT OR LOST PROFITS
20 BY US IS UNPROVABLE.

10:08AM

21 MR. HELM: WELL, THIS DOESN'T REALLY GO TO THE
22 MEASURE OF DAMAGES.

23 WHAT ABOUT MS. STEIN'S SUGGESTION THAT
24 WE JUST GET RID OF, OR DEFENDANTS TO BE UNJUSTLY
25 ENRICHED, IN THE SECOND LINE, AND/OR THE UNJUST
26 ENRICHMENT IN THE THIRD AND FOURTH LINES?

10:08AM

27 THE COURT: I THINK THAT'S OKAY.

28 BUT THEN IF WE'RE GOING TO USE THE

1 SUBSTANTIAL FACTOR LANGUAGE, YOU EITHER NEED A
2 CORRESPONDING INSTRUCTION ON THE RELATIONSHIP BETWEEN
3 SUBSTANTIAL FACTOR AND THE BUT FOR CONCURRENT CAUSES,
4 OR YOU NEED TO PUT IT INTO THIS. AND I'M HAPPY TO SEE
5 YOU DO IT ANY WAY YOU WANT TO DO.

10:08AM

6 MR. EMANUEL: I THINK, YOUR HONOR, WE OUGHT TO
7 VIEW THIS THE WAY CASI WROTE ITS SUBSTANTIAL FACTOR.
8 AND THEN WE CAN DISCUSS 430 AND THE LANGUAGE OF THAT
9 WHICH DEFINES SUBSTANTIAL FACTOR.

10 MR. HELM: YOUR HONOR, WE THINK IT'S VERY
11 IMPORTANT THAT IT BE IN BOTH.

10:09AM

12 AND IF WE WANT TO DEFER THE DISCUSSION
13 UNTIL WE DISCUSS CASI 430, WE CAN DO THAT. BUT WE
14 DEFINITELY BELIEVE IT HAS TO BE IN THIS PART OF THE
15 INSTRUCTION AS WELL.

10:09AM

16 MR. EMANUEL: YOUR HONOR, THAT JUST CREATES
17 REDUNDANCY, BECAUSE EVERY CAUSE OF ACTION HAS TO HAVE
18 CAUSATION FOR HARM. SO UNDER DEFENDANT'S LOGIC, WE
19 WOULD BE DEFINING SUBSTANTIAL FACTOR EVERY SINGLE TIME.

20 CASI DOESN'T DO IT THAT WAY. HERE'S THE
21 DEFINITION OF SUBSTANTIAL FACTOR. IT'S DEFINED ONCE,
22 AND THEN THEY USE THE PHRASE IN OTHER INSTRUCTIONS.

10:09AM

23 MS. STEIN: YOUR HONOR, I THINK ONE OF THE
24 ISSUES WITH CASI IS THAT THE 430 INSTRUCTION ON
25 SUBSTANTIAL FACTOR WAS MODIFIED AFTER VENNER VS. SWEET
26 TO INCLUDE THAT BUT FOR LANGUAGE. THESE OTHER
27 INSTRUCTIONS WERE NOT MODIFIED ACCORDINGLY. THAT
28 DOESN'T MEAN THAT THEY SHOULD NOT NOW RELATE TO THE

10:09AM

1 MORE CURRENT SUBSTANTIAL FACTOR INSTRUCTION THAT CASI
2 HAD ISSUED.

3 THE COURT: WELL, GENERALLY THE SUBSTANTIAL
4 FACTOR IS APPLICABLE MORE IN THE TORT CONTEXT OF
5 NEGLIGENCE AND OTHER THINGS. THERE STILL IS,
6 FUNDAMENTALLY, A NEED THAT THE HARM NOT HAVE OCCURRED
7 BUT FOR THE ACT OF THE DEFENDANTS.

10:10AM

8 AND WHEN YOU GET INTO THE LESS -- THIS
9 TYPE OF CASE, WITH THE MISAPPROPRIATION, I THINK IT
10 BECOMES MORE SIGNIFICANT. BUT YOU LOOK AT VENNER VS.
11 SWEET WAS A LEGAL MALPRACTICE CASE, IF I'M NOT
12 MISTAKEN. IN THE CONTEXT OF THOSE CASES, IT NEEDS TO
13 BE EXPLAINED.

10:10AM

14 NOW, HOW WE GO ABOUT EXPLAINING IT, I
15 DON'T KNOW. I LEAVE THAT TO YOU. YOU HAVE THE BEST
16 LEGAL MINDS IN THE BUSINESS. PULL IT TOGETHER. IT
17 PROBABLY OUGHT TO BE IN BOTH PLACES, BECAUSE IT ISN'T
18 JUST A GENERAL STATEMENT OF THE LAW, BUT WE WILL NEED A
19 MODIFICATION OF CASI 4401 TO CORRESPOND TO THE LANGUAGE
20 WE USE IN CASI 430.

10:10AM

10:11AM

21 AND THERE SHOULD BE REFERENCE TO THE
22 NEED THAT IT STILL BE BUT FOR THE CONDUCT, IT WOULD NOT
23 HAVE OCCURRED. AND THAT GOES TO THE CONCURRENT CAUSES.

24 MR. HELM: WELL, WE HAVE PUT THE LANGUAGE ON
25 THE BUT FOR REQUIREMENT IN BRACKETS.

10:11AM

26 OUR SUGGESTION WOULD BE THAT WE LEAVE
27 PARAGRAPH FIVE AS WE HAVE WRITTEN IT, EXCEPT WE DELETE,
28 OR DEFENDANTS TO BE UNJUSTLY ENRICHED, FROM THE SECOND

1 LINE, AND DELETE OR THE UNJUST ENRICHMENT IN THE THIRD
2 LINE, CARRY OVER TO THE FOURTH.

3 THE COURT: THAT'S FINE, BUT IT'S STILL GOING
4 TO REQUIRE SOME FURTHER MODIFICATION. YOU DON'T HAVE
5 ANY OF THE REFERENCE OR CLARIFICATION OF THE CONCURRENT
6 CAUSES OF BUT FOR IN THERE NOW.

10:11AM

7 MR. HELM: WELL, WE BELIEVE THERE IS NO
8 SHOWING OF CONCURRENT CAUSES IN THIS CASE; AND
9 THEREFORE, THERE'S NO NEED TO DESCRIBE CONCURRENT
10 CAUSES.

10:11AM

11 MR. EMANUEL: WELL, BUT, YOUR HONOR, IF THERE
12 ARE NO DUAL CAUSES, WHETHER YOU CALL IT CONCURRENT OR
13 OTHERWISE, THEN I DON'T KNOW WHAT WE'RE TALKING ABOUT.

14 THE COURT: WELL, I THOUGHT THE DEFENSE WAS
15 SUGGESTING, IN SOME OF THE EXAMINATION OF WITNESSES,
16 THAT THE LOSSES OCCURRED BECAUSE OF WHAT THE DEFENDANT
17 DID, NOT BECAUSE OF WHAT THE DEFENDANT DID, NOT BECAUSE
18 THE DEFENDANTS -- OR WHAT THE PLAINTIFF DID, NOT
19 BECAUSE OF WHAT THE DEFENDANTS DID.

10:12AM

20 MR. HELM: YES. THAT'S THE BUT FOR
21 REQUIREMENT, YOUR HONOR, THAT'S IN CASI.

10:12AM

22 THE COURT: SO YOU ARE SAYING YOU ARE HAPPY
23 WITH 430, AND CHANGING 4401 THE WAY YOU SUGGESTED, AND
24 THAT'S IT?

25 MR. HELM: WE'RE HAPPY WITH CHANGING 4401, AS
26 WE HAVE SUGGESTED, AND GIVING 430 WITH THE BRACKETED
27 BUT FOR LANGUAGE, WHICH WE THINK IS REQUIRED, BECAUSE
28 THIS IS NOT AN INDEPENDENT CONCURRENT CAUSE CASE.

10:12AM

1 THE COURT: DOES THAT MAKE YOU HAPPY,
2 MR. EMANUEL?

3 MR. EMANUEL: FIRST OF ALL, I'D LIKE TO SEE IT
4 WRITTEN OUT, IF IT'S THE LANGUAGE HERE, AND IF THE
5 SUGGESTION IS -- AND THE COURT MAY BE RIGHT I HADN'T
6 THOUGHT ABOUT THIS, THAT THE INSTRUCTION OF CAUSATION
7 MAY BE DIFFERENT FROM CAUSE OF ACTION TO CAUSE OF
8 ACTION.

10:12AM

10:12AM

9 WE NEED TO GO BACK AND LOOK AT THE
10 DIFFERENT CAUSES OF ACTION SEE WHICH DEFINITIONS APPLY
11 TO WHICH ONES, AND MAKE SURE THEY ARE ALL CONSISTENT
12 WITH ONE ANOTHER AND THE FACTS OF THE CASE.

13 SO I THINK THIS HAS -- IT NEEDS TO BE
14 MODIFIED. TRYING TO DO IT JUST GETTING THE COURT TO
15 SAY, I APPROVE SOMETHING, IF I DO SOMETHING ELSE, I
16 DON'T THINK IT'S THE WAY WE SHOULD DO IT. LET'S GET IT
17 WRITTEN OUT.

10:13AM

18 THE COURT: I HAVE A BETTER APPROACH.

19 I PUT A LITTLE NOTE HERE THAT SAYS,
20 PARTIES TO CONTINUE TO CONFER ON THIS ISSUE.

10:13AM

21 MR. EMANUEL: VERY WELL, YOUR HONOR.

22 THE COURT: IT'S A CATCHALL THAT WORKS PRETTY
23 WELL.

24 MR. EMANUEL: WE MAKE SOME PROGRESS DOING
25 THAT. THANK YOU, YOUR HONOR.

10:13AM

26 THE COURT: SO THAT'S STILL AN OPEN ISSUE.

27 CASI 4404.

28 MS. STEIN: YOUR HONOR, I BELIEVE LAST TIME,

1 YOU OVERRULED TCW'S OBJECTION.

2 THE COURT: I DIDN'T THINK WE GOT THERE.

3 MR. EMANUEL: YOUR HONOR, THAT WOULD BE A
4 SURPRISE TO ME, BECAUSE I DON'T HAVE A RULING IN MY
5 NOTES.

10:13AM

6 THE COURT: WELL, I DO SHOW OVERRULED.

7 MR. EMANUEL: I MISSED IT.

8 MR. HELM: BECAUSE YOU HAD -- I BELIEVE, JUST
9 TO HELP EXPLAIN, I BELIEVE THAT 4404 WAS OFFERED BY THE
10 PLAINTIFFS. AND IN CONJUNCTION WITH DISCUSSING THAT,
11 WE ALSO DISCUSSED OUR VERSION OF 4404. I THINK THAT'S
12 HOW IT AROSE.

10:14AM

13 MS. ESTRICH: AND I BELIEVE WE RESOLVED IT BY
14 CORRECTING A WORDING ERROR, WHICH MAY BE INCONSISTENT
15 WITH OTHERS, BUT I DO BELIEVE WE RESOLVED IT.

10:14AM

16 ISN'T THAT RIGHT, MS. STEIN?

17 MS. STEIN: I BELIEVE THAT THEIR CONCERN WAS
18 THE USE OF THE INFORMATION TWICE. AND WE HAVE -- WE
19 RESPONDED THAT WE'D ALREADY DIRECTED THAT WORDING
20 THERE.

10:14AM

21 MS. ESTRICH: RIGHT. THAT WAS THE WORDING
22 ERROR.

23 MS. STEIN: SO THE OBJECTION IS OVERRULED.

24 THE COURT: RIGHT. AND THAT WAS BECAUSE YOU
25 ALL HAD RESOLVED THE LANGUAGE, RIGHT?

10:14AM

26 MR. EMANUEL: IT'S COMING BACK TO ME NOW, YOUR
27 HONOR, RIGHT. IT WAS A MINOR --

28 THE COURT: FOR SOME REASON, I DIDN'T THINK WE

1 GOT THAT FAR IN OUR LAST DISCUSSION, BUT I GUESS WE
2 DID.

3 MR. EMANUEL: I THINK WE GOT THAT FAR, ONLY
4 BECAUSE WE DID THE OTHER 4404.

5 THE COURT: OH, WE SKIPPED AHEAD, AND I PUT
6 THE NOTES IN. 10:15AM

7 MR. EMANUEL: RIGHT. YOU DEALT WITH THEM
8 TOGETHER.

9 THE COURT: SPECIAL JURY INSTRUCTION NUMBER
10 NINE -- 10:15AM

11 MR. HELM: EIGHT.

12 THE COURT: FOR SOME REASON, I DON'T SHOW
13 EIGHT ON MY NOTES. HOLD ON.

14 ALL RIGHT. MY REACTION TO SPECIAL JURY
15 INSTRUCTION NUMBER EIGHT AS PROPOSED, IS THAT -- I
16 DON'T KNOW THAT YOU NEED TO HAVE PROMPT. I THINK IT'S
17 THE RESPONSIBILITY OF THE HOLDERS OF TRADE SECRET TO
18 TAKE REASONABLE STEPS TO PROTECT THEIR TRADE SECRETS
19 WHENEVER THEY DETECT A PROBLEM, OR, I DON'T EVEN KNOW
20 IF YOU HAVE TO SAY WHENEVER THEY DETECT A PROBLEM. 10:16AM

21 THE STANDARD IS, THEY HAVE TO TAKE
22 REASONABLE STEPS TO PROTECT THEM. AND I'M NOT SURE IT
23 GOES BEYOND THAT.

24 MS. ESTRICH: YOUR HONOR, OUR VIEW ON THIS IS,
25 WE'VE ALREADY GOT INSTRUCTIONS ON REASONABLE STEPS. 10:16AM

26 THE DEFENDANTS HAVE PROPOSED A SERIES OF
27 SPECIAL JURY INSTRUCTIONS, WHICH WE BELIEVE ARE SIMPLY
28 UNNECESSARY IN THIS PARTICULAR CASE. THE CYPRESS CASE

1 THEY CITE IS A STATUTE OF LIMITATIONS CASE THAT RELATES
2 TO WHEN THE STATUTE RUNS. THE OTHER CASES, AS I
3 UNDERSTAND IT, ARE ALSO STATUTE OF LIMITATIONS CASES.

4 AND OUR VIEW IS THE STANDARD CASI
5 INSTRUCTIONS PROVIDE FOR REASONABLE STEPS AND NO
6 FURTHER, AND SOMEWHAT CONFUSING SPECIFIC INSTRUCTIONS
7 ARE NECESSARY.

10:16AM

8 THE COURT: WHO WANTS TO BE HEARD ON THAT
9 MR. HELM OR?

10 MR. KREILKAMP: YOUR HONOR, JACOB KREILKAMP
11 FOR THE DEFENDANTS.

10:16AM

12 WE BELIEVE THAT THIS IS AN APPROPRIATE
13 INSTRUCTION THAT WE'RE ENTITLED TO. THE CYPRESS CASE,
14 AT THE VERY END OF THE CASE, ADDRESSES REASONABLE
15 ACTION TO PROTECT SECRECY. IT'S THE FAILURE OF THE
16 TRADE SECRET OWNER TO TAKE PROMPT ACTION TO PROTECT THE
17 SAFE TRADE SECRETS CAN SERVE AS A DEFENSE.

10:17AM

18 THERE'S ANOTHER CASE THAT WE CITED TO
19 YOU IN OUR IN LIMINE BRIEFING. I CAN GIVE YOU THE
20 CITE. THAT SPECIFICALLY DISCUSSES THE REASONABLE
21 ACTION REQUIREMENT AND ADOPTS THE PROMPT INSERTIVE
22 (SIC) CORRECTIVE ACTION LANGUAGE FROM THE INTERMEDIC
23 (PHONETIC) CASE.

10:17AM

24 THE COURT: WELL, I THINK I REJECTED THAT, IN
25 SAYING THAT I WASN'T GOING TO ALLOW YOU TO OFFER
26 TESTIMONY ON THE FAILURE TO SEEK INJUNCTIVE RELIEF OR
27 OTHER THINGS.

10:17AM

28 SO I MEAN, I'VE BEEN THROUGH IT, AND I

1 THOUGHT ABOUT IT, MR. KREILKAMP, BUT I -- RIGHT OR
2 WRONG IS NEVER IN DOUBT. I THINK I'VE ALREADY RULED ON
3 THAT.

4 MR. HELM: BUT THIS IS NOT LIMITED TO
5 INJUNCTIVE RELIEF, YOUR HONOR. 10:17AM

6 THE COURT: I UNDERSTAND.

7 MY SENSE IS -- WHAT IS THE CORRESPONDING
8 CASI NUMBER?

9 MS. ESTRICH: I LEAVE THAT TO MR. EMANUEL.

10 MR. EMANUEL: PUT IT ON ME. 10:17AM

11 4044, I BELIEVE IT IS.

12 THE COURT: OKAY.

13 MS. ESTRICH: REASONABLE EFFORTS TO PROTECT
14 SECRECY --

15 MR. KREILKAMP: AND YOUR HONOR, WE'VE 10:18AM
16 REQUESTED THIS INSTRUCTION, BECAUSE WE'VE DRAWN IT FROM
17 DIRECTLY RELEVANT CASE LAW THAT DISCUSSES THE NEED TO
18 TAKE PROMPT AND CORRECTIVE ACTION. THAT'S WHY WE'VE
19 ASKED FOR IT.

20 MS. STEIN: AND, YOUR HONOR, HERE I DO NOT 10:18AM
21 BELIEVE -- WE'RE NOT TALKING ABOUT THEIR FAILURE TO
22 FILE FOR INJUNCTIVE RELIEF; RATHER, TCW'S KNOWLEDGE OF
23 DOWNLOADING FOR A PERIOD OF TIME WHEN THEY DID NOTHING
24 TO STOP IT.

25 THE EVIDENCE HAS COME IN THAT WAY, AND 10:18AM
26 THAT'S WHAT THIS INSTRUCTION IS DIRECTED TOWARDS, NOT
27 WHEN THEY FILED SUIT.

28 THE COURT: WELL, THE TIME IN WHICH IT WAS

1 DISCOVERED THAT THE DOWNLOADING WAS OCCURRING IS
2 SOMEWHAT OF A DISPUTED FACTOR HERE. AND THERE'S -- ONE
3 SIDE OF THAT ARGUMENT WAS THAT IT WAS VERY CLOSE IN
4 TIME, LATE NOVEMBER, TO THE TERMINATION ON
5 DECEMBER 4TH.

10:19AM

6 DEFENDANTS HAVE SOME ARGUMENTS THAT
7 THERE WAS SOME INDICATION, OR SOME REASON TO BELIEVE,
8 THAT SOMETHING WAS GOING ON SOONER THAN THAT, BUT I
9 HAVEN'T NECESSARILY SEEN THE EVIDENCE ON THAT.

10 MS. ESTRICH: YOUR HONOR, THERE'S AN
11 ADDITIONAL ISSUE. WHAT'S REASONABLE DEPENDS ON THE
12 CONTEXT. AND THERE WILL, I THINK, BE TESTIMONY AS TO
13 DISPUTED ISSUES OF FACT AS TO WHAT STEPS WERE AVAILABLE
14 TO DEFENDANTS -- TO THE PLAINTIFFS AT THAT TIME --

10:19AM

15 THE COURT: YEP.

10:19AM

16 MS. ESTRICH: AND THE ACTION OF THE COSTS.

17 SO THIS INSTRUCTION AS THEY'VE WRITTEN
18 IT, BASED ON STATUTE OF LIMITATIONS CASES, DOESN'T EVEN
19 USE THE WORD REASONABLE.

20 THE COURT: THE OBJECTION TO DEFENDANT'S
21 SPECIAL JURY INSTRUCTION NUMBER EIGHT WILL BE
22 SUSTAINED.

10:19AM

23 THEN WE GO TO NUMBER NINE. I GUESS MY
24 GENERAL COMMENT IS, I'M SATISFIED WITH THE KIND OF
25 PLAIN VANILLA CASI INSTRUCTIONS ON THIS, TO THE EXTENT
26 THAT THEY WORK. AND I DON'T WANT TO PARSE OUT EVERY
27 SUBPART OF THE CASI INSTRUCTION WITH A SPECIAL
28 INSTRUCTION.

10:20AM

1 MR. HELM: WELL, YOUR HONOR, IF WE COULD
2 ADDRESS THE PEOPLESOFT CASE.

3 MR. KREILKAMP: YOUR HONOR, WE HAVE TWO
4 INSTRUCTIONS, NINE AND 14, WHICH WE'VE DRAWN FROM THE
5 PEOPLESOFT CASE.

10:20AM

6 THIS IS A CASE THAT HAS FACTS THAT ARE
7 REMARKABLY SIMILAR TO THOSE HERE, A SOFTWARE PROGRAM
8 WITH DIFFERENT MODULES, DISPUTES OVER WHETHER THE
9 LAYING OUT OF INFORMATION ON A SCREEN CAN BE A TRADE
10 SECRET OR NOT.

10:21AM

11 WE BELIEVE THAT THESE -- THE PRINCIPLES
12 WE'VE DRAWN, AND INSTRUCTIONS NINE AND 14, ARE VERY
13 RELEVANT HERE, AND WE'RE ENTITLED TO THEM.

14 MS. ESTRICH: YOUR HONOR, WE WOULD SIMPLY TAKE
15 THE POSITION THAT HERE AS IN A NUMBER OF THESE SPECIAL
16 INSTRUCTIONS, THAT THE CASI INSTRUCTIONS ARE PERFECTLY
17 APPROPRIATE. THE CASE THEY CITE IS AN UNREPORTED
18 FEDERAL COURT DECISION INTERPRETING SPECIFIC FACTS AND
19 LANGUAGE THEY ARE CITING TO. IT'S DICTA.

10:21AM

20 AND IN ANY EVENT, GIVING JURY
21 INSTRUCTIONS, WE BELIEVE THE CASI INSTRUCTIONS ARE
22 PROPER AND NEED NOT BE AUGMENTED.

10:21AM

23 THE COURT: FIRST OF ALL, I THINK WE GO BACK
24 TO THE OLD ISSUE THAT WE'VE BEAT UP PRETTY GOOD HERE,
25 KIND OF CONFLATING THE CONFIDENTIAL INFORMATION AND
26 PROPRIETARY INFORMATION WITH TRADE SECRET; AND THOSE
27 NEED TO BE SEGREGATED OUT. THAT ALONE SEEMS TO ME TO
28 BE ENOUGH TO REJECT THIS SPECIAL NUMBER NINE.

10:21AM

1 SO I'LL SUSTAIN THE OBJECTION TO SPECIAL
2 INTERROGATORY NINE.

3 SPECIAL NUMBER 11.

4 MR. HELM: WE THINK THIS IS AN IMPORTANT
5 PRINCIPLE, YOUR HONOR, THAT THE JURY NEEDS TO BE
6 APPRISED OF.

10:23AM

7 THE COURT: I THINK IT'S EMBODIED IN THE CASI
8 INSTRUCTION ON WHAT IS AND IS NOT A TRADE SECRET. AND
9 ALL IT'S GOING TO DO IS LEAD TO CONFUSION AS TO -- I
10 CAN SEE THE QUESTION. WHAT'S A GENERAL CONCEPT? AND
11 IT'S COVERED BY THE BASIC INSTRUCTIONS, TELLING THE
12 JURY WHAT A TRADE SECRET IS AND WHAT THEIR OBLIGATIONS
13 ARE.

10:23AM

14 THE OBJECTION WILL BE SUSTAINED.

15 SPECIAL -- DEFENDANT'S SPECIAL NUMBER
16 12. TELL ME WHERE THIS, MS. ESTRICH, IS COVERED IN THE
17 GENERAL INSTRUCTION, BECAUSE I THINK THIS IS A FAIRLY
18 GOOD STATEMENT OF THE LAW.

10:23AM

19 MS. ESTRICH: WELL, IT'S NOT -- FIRST OF ALL,
20 THE CYBER TECH CASE THEY ARE RELYING IS A PRE CUTSA
21 CASE WHICH THE COURTS, THIS DISTRICT APPEALS COURT HAVE
22 DECLINED TO FOLLOW.

10:24AM

23 SECOND OF ALL, COMBINATIONS OF GENERALLY
24 KNOWN INFORMATION IS CAN BE TRACED IF THEY ARE COMBINED
25 IN A NOVEL WAY. SO IF THE COURT IS INCLINED TO GIVE
26 ANY SUCH INSTRUCTION, THEN WE WOULD HAVE TO HAVE AT
27 LEAST ONE OR TWO ADDITIONAL SENTENCES, BECAUSE THIS IS
28 NOT EVEN AN ACCURATE STATEMENT OF THE LAW.

10:24AM

1 INFORMATION IS NOT A TRADE SECRET IF IT
2 IS GENERALLY KNOWN. BUT GENERALLY KNOWN INFORMATION,
3 AS THE COURT IS AWARE, CAN BE COMBINED IN A UNIQUE WAY
4 TO CONSTITUTE A TRADE SECRET.

5 WE THINK THE DEFINITION OF TRADE SECRET,
6 WHICH SAYS THAT IT MUST DERIVE ITS VALUE FROM ITS
7 SECRECY, AND THEREFORE, CAN'T BE GENERALLY KNOWN, AND
8 MUST BE -- THERE MUST BE REASONABLE STEPS TAKEN TO
9 PROTECT IT, IS CERTAINLY ADEQUATE. BUT IF THE COURT IS
10 INCLINED TO GIVE ANY SUCH INSTRUCTION, WE WOULD SAY IT
11 HAS TO BE REWRITTEN TO BE CONSISTENT WITH ESTABLISHED
12 LAW.

13 MR. HELM: YOUR HONOR, THEY HAVE SUBMITTED A
14 JURY INSTRUCTION ON COMBINATIONS WHICH WE WILL DISCUSS
15 AT A FUTURE TIME.

16 THE COURT: WHAT NUMBER IS IT?

17 MR. HELM: WELL, I THINK ACTUALLY THE LATEST
18 ONE THAT THEY OFFERED IS IN THE NEW JOINT STATEMENT.

19 MR. KREILKAMP: 23A. TCW'S SPECIAL
20 INSTRUCTION 23A.

21 MR. HELM: AND IF THAT'S APPROPRIATE TO GIVE,
22 WE CAN DEBATE THAT THEN. BUT I DON'T SEE ANY REASON
23 WHY THIS INSTRUCTION SHOULDN'T BE GIVEN. AND IF AN
24 INSTRUCTION ON COMBINATION IS APPROPRIATE, WE CAN
25 DISCUSS IT IN THE CONTEXT OF WHAT THEY'VE PROPOSED.

26 THE COURT: I DON'T HAVE A PROBLEM GIVING THIS
27 INSTRUCTION IF THE NEXT FOLLOWING INSTRUCTION IS 23A,
28 AND IT CLARIFIES THE ISSUE.

1 BUT PART OF IT IS THE ORDER IN WHICH WE
2 GIVE THEM, AND I'LL WORK ON THAT.

3 MS. ESTRICH: AND WHETHER THAT INSTRUCTION HAS
4 NOT BEEN AGREED TO BY THE OTHER SIDE.

5 MR. KREILKAMP: YOUR HONOR, WE BELIEVE THAT
6 IT'S APPROPRIATE TO WORK OUT THE ISSUES REGARDING
7 COMBINATION IN THE CONTEXT OF THAT INSTRUCTION.

10:26AM

8 THIS INSTRUCTION SIMPLY CLARIFIES
9 SOMETHING THAT THE COURT -- NO ONE DISPUTES THAT THE
10 COURTS HAVE HELD THAT INFORMATION IS NOT TRADE SECRET
11 IF IT'S GENERALLY KNOWN WITHIN THE INDUSTRY. THAT'S AN
12 IMPORTANT CLARIFYING POINT THAT ISN'T IN THE CASI.

10:26AM

13 MR. HELM: IT DOESN'T HAVE TO BE KNOWN BY
14 EVERY MEMBER OF THE GENERAL PUBLIC THAT -- THE RELEVANT
15 AUDIENCES WITHIN THE INDUSTRY.

10:26AM

16 MR. EMANUEL: BUT STILL, YOUR HONOR THE POINT
17 IS WELL TAKEN. IT IS MORE NUANCED THAN JUST BECAUSE
18 PEOPLE KNOW IT, THAT IT ISN'T NECESSARILY A TRADE
19 SECRET IF THERE'S SOME UNIQUE COMBINATION, SOME
20 COMPILATION, SOME SELECTION.

10:26AM

21 THE COURT: HERE WE GO.

22 THE OBJECTION IS OVERRULED, SUBJECT TO
23 RESOLVING ISSUES WITH RESPECT TO THE COMBINATION OF
24 INFORMATION, AS ADDRESSED IN PLAINTIFF'S SPECIAL JURY
25 INSTRUCTION NUMBER 23A.

10:27AM

26 MR. EMANUEL: THANK YOU, YOUR HONOR.

27 THE COURT: NUMBER -- AT SOME POINT, WE JUST
28 NEED TO MOVE ALONG. WE'VE GOT A BIG BOOK OF THINGS

1 HERE.

2 MR. HELM: THANK YOU, YOUR HONOR.

3 THE COURT: NUMBER 13.

4 I THINK THIS IS GOING, FROM MY
5 PERSPECTIVE, A LITTLE FURTHER THAN WE NEED TO GO, IN
6 TERMS OF CLARIFYING WHAT THE GENERAL INSTRUCTION ON
7 MISAPPROPRIATION IS.

10:27AM

8 AND I DON'T THINK THAT THE CINEBET
9 (PHONETIC) SOFTWARE FIRM IS NECESSARILY APPLICABLE
10 HERE. THAT WAS A CASE APPLYING THE STANDARD FOR A
11 PRELIMINARY INJUNCTION, WHICH IS NOT BEING REQUESTED
12 HERE.

10:28AM

13 MR. KREILKAMP: WE'LL SUBMIT, YOUR HONOR.

14 THE COURT: OKAY.

15 SO THE OBJECTION WILL BE SUSTAINED.

10:28AM

16 DEFENDANT'S SPECIAL JURY INSTRUCTION
17 NUMBER 14.

18 MS. ESTRICH: YOUR HONOR, WE BELIEVE THIS ONE
19 MISSTATES THE LAW, GOING BACK TO THE POINT I WAS MAKING
20 EARLIER, THE FACT THAT ELEMENTS MAY BE COMBINED IN A
21 NOVEL WAY IN THE COMBINATION OF OTHERWISE KNOWN
22 ELEMENTS, OR SOME KNOWN ELEMENTS AND SOME UNKNOWN
23 ELEMENTS COMBINED IN A NOVEL WAY, MAY ITSELF BE A TRADE
24 SECRET.

10:29AM

25 AND THIS ONE SEEMS TO SUGGEST EXACTLY
26 THE OPPOSITE.

10:29AM

27 MR. KREILKAMP: YOUR HONOR, I THINK WE WOULD
28 AGREE, THIS WOULD BE BEST TAKEN UP WHEN THE COURT

1 ADDRESSES 23A.

2 AND YOU MIGHT DECIDE THAT THEY ARE NOT
3 BOTH NECESSARY. YOU MAY DECIDE THERE CAN BE A
4 MODIFICATION, OR THEY CAN SOMEHOW BE RECONCILED.

5 THE COURT: IT'S PLAINTIFF'S INSTRUCTION 23A;
6 IS THAT RIGHT? 10:30AM

7 MR. EMANUEL: YES.

8 THE COURT: I'LL SUSTAIN THE OBJECTION TO
9 DEFENDANT'S SPECIAL INSTRUCTION 14, SUBJECT TO
10 RESOLUTION OF ISSUES CONCERNING PLAINTIFF'S SPECIAL
11 JURY INSTRUCTION NUMBER 23A. 10:30AM

12 NUMBER 15. I DON'T THINK THIS IS EVEN
13 IN -- THERE'S NO FOUNDATION FOR THIS IN THE EVIDENCE AS
14 I'VE SEEN IT.

15 MS. ESTRICH: THAT'S CORRECT. 10:30AM

16 MR. HELM: I'M SORRY, YOUR HONOR, WHAT?

17 THE COURT: I'M SAYING I DON'T SEE ANY
18 FOUNDATION OR REASON TO GIVE THIS INSTRUCTION IN THE
19 EVIDENCE THAT I'VE SEEN, OR OF WHICH I'M AWARE.

20 MR. HELM: THIS GOES TO THE POINT OF WHETHER
21 INFORMATION ABOUT CLIENT PREFERENCES IN TRADING IS A
22 TRADE SECRET. 10:31AM

23 AND THIS AUTHORITY SUGGESTS IT'S NOT,
24 WHAT THE CLIENTS' PREFERENCES ARE.

25 THE COURT: WELL, BUT I DON'T THINK IT'S
26 EVIDENCE ANY OF THESE -- THESE PROGRAMS MAY ASSIST IN
27 PROVIDING AND MEETING CLIENT REQUIREMENTS. 10:31AM

28 BUT THE PROGRAMS THEMSELVES, IN WHAT HAS

1 BEEN PUT ON THE TABLE, DOESN'T SAY THAT ANY PARTICULAR
2 ASPECT OF WHAT WAS CLAIMED TO HAVE BEEN TRADE SECRET
3 AND MISAPPROPRIATED WAS SOLELY FOR THE PURPOSE OF
4 MEETING A CLIENT PREFERENCE OR REQUIREMENT.

5 MR. HELM: WELL, SOME OF WHAT HAS BEEN CLAIMED
6 TO BE TRADE SECRET HERE ARE DOCUMENTS WHICH CONTAIN
7 INVESTMENT GUIDELINES FOR CLIENTS; WHAT ARE THEIR
8 PREFERENCES WITH RESPECT TO WHAT THEY INVEST IN.

10:31AM

9 MR. BRIAN: I THINK THERE WAS TESTIMONY ABOUT
10 THAT FROM MR. ARENTSEN, YOUR HONOR.

10:32AM

11 MS. ESTRICH: YOUR HONOR, WE HAVEN'T CLAIMED
12 TRADE SECRET STATUS AS TO AN EMPLOYEE'S ABILITY BASED
13 ON SOMETHING IN THEIR HEAD, WHICH IS THE LANGUAGE THEY
14 ARE USING HERE.

15 OBVIOUSLY, WHETHER PARTICULAR SOURCES OF
16 INFORMATION ARE OR ARE NOT TRADE SECRET IS A SEPARATE
17 ISSUE ADDRESSED BY THE INSTRUCTION. BUT THIS ONE SEEMS
18 TO SUGGEST THAT SOMEHOW YOUR ABILITY THAT WHAT'S IN
19 YOUR HEAD IS, YOU KNOW, IS UN -- IS AT ISSUE HERE, AND
20 IT JUST ISN'T.

10:32AM

10:32AM

21 MR. KREILKAMP: YOUR HONOR, IN OUR RESPONSE TO
22 THE OBJECTION, WE PROPOSED A CLARIFICATION TO STATE, AN
23 EMPLOYER CANNOT CLAIM TRADE SECRET PROTECTION FOR THE
24 PARTICULAR PREFERENCES AND REQUIREMENTS OF ITS CLIENT
25 STATED IN VERY GENERAL TERMS.

10:32AM

26 WE DREW THAT FROM THE METRO CASE. WE
27 THINK IT'S VERY APPLICABLE HERE, WHERE IT'S OUR VIEW
28 THAT THE EVIDENCE, AS IN THE METRO TRAFFIC CASE, SHOWS

1 ONLY VERY VAGUE REFERENCES TO HOW THESE PREFERENCES ARE
2 A TRADE SECRET.

3 MS. ESTRICH: BUT THAT GOES TO THE DEBATE OVER
4 WHAT IS AND WHAT IS NOT A TRADE SECRET.

5 THE METRO TRAFFIC CASE INVOLVED A VAGUE
6 JOB DESCRIPTION. AND WHAT WE'RE ARGUING HERE IS THE
7 PARTICULAR KIND OF CLIENT INFORMATION COMBINED IN THE
8 FORMS IT WAS, AND USED IN THE MANNER IT WAS,
9 CONSTITUTED A TRADE SECRET.

10:33AM

10 OUR VIEW WOULD BE, THERE'S NO NEED FOR
11 THIS SPECIAL INSTRUCTION. AT BEST, IT'S CONFUSING; AT
12 WORST, IT'S WRONG.

10:33AM

13 MR. KREILKAMP: WE BELIEVE THAT'S A FACTUAL
14 DISPUTE. BUT THAT THE STATEMENT OF LAW THAT SIMPLY
15 STATING THE PREFERENCES AND REQUIREMENTS IN GENERAL
16 TERMS ISN'T SUFFICIENT.

10:33AM

17 THE COURT: I'M GOING TO SUSTAIN THE
18 OBJECTION.

19 SPECIAL JURY INSTRUCTION NUMBER 16 FOR
20 THE DEFENDANTS.

10:33AM

21 THE PROBLEM I HAVE WITH THIS INSTRUCTION IS
22 THAT IT MIGHT LEAD TO A MISINTERPRETATION BY THE JURY
23 AS TO WHETHER A CLIENT LIST IS A PROTECTABLE TRADE
24 SECRET. AND I THINK BOTH SIDES CAN SEE THAT IN THE
25 PROPER CONTEXT, IT MAY BE.

10:34AM

26 NOW, HERE WE HAVE SOME PUBLIC CLIENTS
27 AND PRIVATE CLIENTS. THE PUBLIC CLIENTS, THEIR
28 IDENTITY IS NOT A TRADE SECRET, BECAUSE THEY HAVE

1 PUBLICLY FILED STATEMENTS AND INFORMATION SHOWING THAT
2 IN THIS CASE, TCW IS MANAGING THEIR MONEY.

3 SO I DON'T KNOW -- EITHER YOU HAVE TO
4 CLARIFY THAT, OR I THINK THE OTHER INSTRUCTIONS THAT WE
5 HAVE ON WHAT CONSTITUTES A TRADE SECRET WOULD BE
6 ADEQUATE.

10:35AM

7 MR. HELM: WELL, YOUR HONOR, MAYBE IF YOU
8 WOULD LIKE US TO CLARIFY IT, AND WE CAN GO BACK AND
9 GIVE SOME CLARITY. BUT I THINK IT IS IMPORTANT. IT'S
10 NOT SIMPLY ONES THAT ARE MADE AVAILABLE BY TCW.
11 THERE'S BEEN TESTIMONY THAT THERE ARE -- THERE'S BEEN
12 TESTIMONY THAT THERE ARE DATABASES THAT ONE CAN
13 PURCHASE FOR NOT THAT MUCH MONEY, THAT ALLOW YOU TO
14 EASILY IDENTIFY WHO FINANCIAL ADVISORS ARE, WHO OTHER
15 PEOPLE ARE, AND WE THINK THAT ALL OF THAT WOULD BE
16 SUPPORTED BY AN INSTRUCTION LIKE THAT.

10:35AM

10:35AM

17 THE COURT: WELL, I REALLY QUESTION IT BECAUSE
18 IT'S THE DIFFERENTIATION BETWEEN THE PUBLIC ENTITY OR
19 PUBLIC PENSION FUNDS AND PUBLIC ORGANIZATIONS FOR WHOM
20 TCW PROVIDED INVESTMENT ADVICE OR COUNSELING, VERSUS
21 PRIVATE INVESTORS OR ENTITIES THAT HAD NO OBLIGATION TO
22 MAKE PUBLIC STATEMENTS. AND I THINK THAT'S WHERE I
23 THINK THE CONFUSION WOULD COME IN, IF YOU GAVE THIS
24 INSTRUCTION.

10:36AM

25 MR. HELM: THE QUESTION IS WHETHER THEY ARE
26 EASILY IDENTIFIABLE. AND IT'S CLEAR FROM THE CASE LAW
27 THAT WHEN CLIENTS ARE EASILY IDENTIFIABLE, THAT IT'S
28 NOT TRADE SECRET.

10:36AM

1 THIS ISN'T A CASE WHERE THE BIBLE
2 SALESMAN WHO GOES DOOR TO DOOR AND, YOU KNOW, THE ONLY
3 WAY YOU FIND OUT WHO IS INTERESTED IN BIBLES IS BY SHOE
4 LEATHER AND POUNDING THE PAVEMENT AND GOING DOOR TO
5 DOOR OVER A LONG PERIOD OF TIME, IN ORDER TO FIND THOSE
6 PEOPLE WHO ARE INTERESTED IN BUYING BIBLES.

10:36AM

7 THE PEOPLE WHO ARE INTERESTED IN
8 INVESTING LARGE AMOUNTS OF MONEY IN THESE THINGS ARE
9 WELL KNOWN WITHIN THE INDUSTRY. IT'S NOT A SECRET.
10 EVERYBODY -- THEY ALL -- THEY ALL GO TO THE SAME
11 FINANCIAL ADVISORS AND ASSET MANAGERS. IT'S WELL
12 KNOWN.

10:36AM

13 AND WE THINK THIS IS A VERY IMPORTANT
14 PRINCIPLE OF LAW THAT THE JURY NEEDS TO BE AWARE OF.
15 WE CAN ARGUE THE FACTS OVER WHETHER THEY ARE OR ARE NOT
16 EASILY IDENTIFIABLE IN PARTICULAR CASES, BUT THE
17 PRINCIPLE IS IMPORTANT TO BE GIVEN TO THE JURY, WE
18 BELIEVE.

10:37AM

19 MR. KREILKAMP: AND, YOUR HONOR, THESE CASES
20 THAT WE'VE CITED TO YOU ARE VERY SIMILAR FACTUAL
21 CIRCUMSTANCES WITH REGARD TO THE INDUSTRY. AND THAT'S
22 WHY WE THINK WE'RE ENTITLED TO THIS INSTRUCTION.

10:37AM

23 MS. ESTRICH: YOUR HONOR, I DON'T KNOW IF YOU
24 NEED ANYTHING MORE FROM ME. BUT WE TAKE THE
25 POSITION -- AND THERE'S FOUR OR FIVE MORE OF THESE, BUT
26 THE EFFORTS TO PARSE OUT ASPECTS OF WHAT IS CLEAR FROM
27 THE GENERAL INSTRUCTIONS, OBVIOUSLY THAT WHICH IS
28 GENERALLY KNOWN IS NOT A TRADE SECRET. THAT'S IN THE

10:37AM

1 GENERAL INSTRUCTIONS.

2 IF THE DEFENDANTS WANT TO ARGUE THAT
3 CERTAIN INFORMATION IS GENERALLY KNOWN OR WAS AVAILABLE
4 GENERALLY, THAT'S PART OF THEIR ARGUMENT. BUT TO GIVE
5 SPECIFIC INSTRUCTIONS AS TO EACH ELEMENT OF THEIR
6 DEFENSE SEEMS TO US TO BE INCONSISTENT WITH CASI, AND
7 UNNECESSARY.

10:38AM

8 IT GIVES UNDUE EMPHASIS TO ASPECTS OF THE
9 GENERAL INSTRUCTIONS.

10 THE COURT: ALL RIGHT.

10:38AM

11 THE OBJECTION WILL BE SUSTAINED, BUT
12 WITHOUT PREJUDICE TO THE DEFENDANT'S RIGHT TO MAKE AN
13 OFFER WITH RESPECT TO FOUNDATIONAL EVIDENCE SUPPORTING
14 THE INSTRUCTION.

15 I'LL RECONSIDER IT.

10:38AM

16 MY UNDERSTANDING OF THE EVIDENCE TO DATE
17 IS THAT WHILE THERE MAY BE SERVICES OR LISTS OR
18 PUBLICLY AVAILABLE INFORMATION WITH RESPECT TO CERTAIN
19 OF TCW'S CLIENTS, THAT IS NOT A -- THERE IS NOT
20 EVIDENCE THAT THERE ARE LISTS OF ALL OF THEIR CLIENTS,
21 AND THAT THERE ARE INSTITUTIONAL OR NONINSTITUTIONAL
22 PRIVATE CLIENTS THAT ARE NOT SUBJECT TO IDENTIFICATION
23 ANYWHERE. AND THERE'D HAVE TO BE SOME CLARIFICATION,
24 IT WOULD SEEM TO ME, TO GIVE THIS; BUT IT MAY BE
25 APPROPRIATE.

10:39AM

10:39AM

26 THERE'S EVIDENCE IN THE RECORD TO
27 SUPPORT IT. YOU CAN MAKE THAT ARGUMENT WHEN WE GET
28 RIGHT DOWN TO THE INSTRUCTIONS.

1 MR. HELM: WE'LL REVISIT IT, YOUR HONOR.

2 THE COURT: ALL RIGHT.

3 DEFENDANT'S NO. 17, I'M NOT CONVINCED
4 THAT THAT'S AN ACCURATE STATEMENT OF LAW. I MIGHT --
5 MY INCLINATION IS TO SUSTAIN THE OBJECTION.

10:40AM

6 MR. KREILKAMP: YOUR HONOR, WE'VE RELIED ON
7 BOTH THE ROGERS CASI CASE, WHICH IS APPLYING CALIFORNIA
8 LAW. AND ROGERS CASI RELIES ON THE METRO CASE, WHICH
9 WAS REFERENCED EARLIER, BOTH STATE THIS PRINCIPLE. AND
10 IT'S OBVIOUSLY AN IMPORTANT ONE IN THIS CASE.

10:40AM

11 A HUGE AMOUNT OF THE PURPORTED TRADE
12 SECRETS HERE ARE -- IS INFORMATION THAT A THIRD PARTY
13 COULD CALL TCW AND SAY, I WANT YOU TO FAX THAT TO THE
14 NEW YORK TIMES RIGHT NOW, AND TCW WOULD HAVE TO DO IT.
15 YOU THINK THIS IS CATEGORICAL, AND WE DON'T THINK THAT
16 THOSE MATERIALS CAN BE TRADE SECRET, SO WE THINK
17 ROGERS, CASI AND METRO BOTH STATE THAT PRINCIPLE.

10:40AM

18 MS. ESTRICH: YOUR HONOR, ROGERS SAYS THAT
19 PUBLIC INFORMATION ABOUT A CLIENT ISN'T A TRADE SECRET.

20 WE WOULD SUGGEST -- WE WOULD AGREE THAT
21 CLIENT DATA AVAILABLE FROM THE CLIENT IS NOT A TRADE
22 SECRET, IS NOT AN ACCURATE STATEMENT OF THE LAW. THEY
23 CAN ARGUE THAT THEY COULD HAVE GOTTEN THIS INFORMATION,
24 OR THAT IT WAS PUBLICLY AVAILABLE; BUT SIMPLY THE FACT
25 THAT THE CLIENT HAD THE INFORMATION DOESN'T MAKE IT
26 A -- NOT A TRADE SECRET.

10:40AM

10:41AM

27 WE ALSO BELIEVE THAT, AGAIN, EACH OF
28 THESE INSTRUCTIONS IS COVERED BY CASI.

1 THE COURT: I THINK, ULTIMATELY, THE QUESTION
2 IS, WHAT WILL BE CLAIMED AS TRADE SECRET IN THIS CASE.
3 AND THAT ISN'T ENTIRELY CLEAR AT THIS POINT.

4 BUT IF IT IS, AS I CURRENTLY UNDERSTAND
5 THE GENERAL THRUST, THE PROGRAMS, THE PROPRIETARY
6 PROGRAMS AND COMBINATIONS OF DATA THAT CAME OUT OF
7 THOSE PROGRAMS, I'D BE SURPRISED IF THE ARGUMENT IS
8 ULTIMATELY MADE, OR IF WE REALLY ARE PURSUING SOME OF
9 THESE GENERALIZED LISTS AS TRADE SECRET INFORMATION,
10 BUT WE'LL HAVE TO WAIT AND SEE WHERE IT IS.

11 FOR NOW, I'M GOING TO SUSTAIN THE
12 OBJECTION. YOU CAN REVISIT IT IF --

13 MR. KREILKAMP: I JUST KNOW, YOUR HONOR, THAT
14 MR. SMITH TESTIFIED AT LENGTH LAST WEEK ABOUT CLIENT
15 PORTFOLIO MAKEUPS, THE IDENTITY OF PARTICULAR FUNDS.
16 EXACTLY THE ITEMS LISTED IN THE ROGERS CASEY CASE,
17 ABOUT WHICH THE COURT SAYS WHICH IS NOT THE KIND OF
18 INFORMATION THAT LENDS ITSELF TO TRADE SECRET
19 PROTECTION.

20 SO THAT'S OUR BASIS; BUT WE COULD
21 REVISIT IT.

22 THE COURT: PART OF IT IS THE INSTRUCTIONS ARE
23 GIVEN AFTER THE ARGUMENT. AND IF CERTAIN ARGUMENTS ARE
24 MADE THAT SOME OF THESE MORE GERMANE THAN OTHERS, I
25 WILL HAVE TO DEAL WITH IT.

26 MR. KREILKAMP: THANK YOU, YOUR HONOR.

27 THE COURT: SPECIAL NUMBER 18.

28 IS THERE GOING TO BE EVIDENCE THAT THE

1 LISTS THAT ARE CLAIMED TO BE CONFIDENTIAL, OR
2 PROPRIETARY, OR TRADE SECRET, LISTS HAVE BEEN THE
3 SLOWEST PUBLICLY?

4 MR. KREILKAMP: YOUR HONOR, I THINK THIS GOES
5 BACK TO THE DISCUSSION WE JUST HAD ABOUT NUMBER 16.

10:43AM

6 OUR VIEW OF THE CASES WE'VE CITED IS NOT
7 THE POSITION THAT EVERY SINGLE CLIENT ON A LIST MUST BE
8 IN THE PUBLIC DOMAIN. RATHER, THAT THEY MAKE A MORE
9 CATEGORICAL HOLDING THAT IN CERTAIN INDUSTRIES, SUCH AS
10 THIS ONE, WHERE THE IDENTITY OF CLIENTS IS EASILY
11 ASCERTAINABLE, WHERE MANY OF THEM ARE USED PUBLICLY, IN
12 MARKETING AND OTHER WAYS.

10:43AM

13 AS A CATEGORY, THOSE KINDS OF LISTS
14 CAN'T BE TRADE SECRET.

15 THE COURT: WELL, THIS SAYS TCW'S CLIENT
16 LISTS, CLIENT LISTS ARE NOT TRADE SECRETS IF THEY ARE
17 DISCLOSED PUBLICLY AS A MARKETING TOOL BY TCW.

10:43AM

18 IS THERE GOING TO BE EVIDENCE THAT THE
19 LISTS THAT ARE CLAIMED TO BE TRADE SECRETS WERE
20 PUBLICLY DISCLOSED?

10:44AM

21 OF COURSE, I'M NOT GIVING AN INSTRUCTION
22 THAT ISN'T SUPPORTED BY ANY EVIDENCE IN THE RECORD.
23 AND IF YOU ARE TELLING ME THAT ULTIMATELY THAT EVIDENCE
24 IS GOING TO BE OFFERED, THEN IT'S A FINE INSTRUCTION.

25 IF THERE'S NO SUCH EVIDENCE, IT'S NOT A
26 GOOD INSTRUCTION.

10:44AM

27 MR. HELM: I THINK WHAT THE EVIDENCE WILL BE
28 WILL CERTAINLY SHOW THAT THE CONTENTS OF THE CLIENT

1 LISTS HAVE BEEN DISCLOSED. WHETHER EVERY SINGLE ONE
2 HAS BEEN, IT'S ANOTHER ISSUE.

3 BUT WOULD THINK WE WOULD BE ENTITLED TO
4 LET THE JURY KNOW THAT CERTAINLY ANY CLIENTS THAT TCW
5 HAS MARKETED AND DISTRIBUTED AS REPRESENTATIVE CLIENTS
6 COULD NOT BE TRADE SECRET CLIENTS.

10:44AM

7 THE COURT: I THINK THAT'S TOO NARROW.
8 MR. HELM.

9 IF THERE'S A LIST OF A HUNDRED PEOPLE,
10 AND IT'S PUBLICLY KNOWN THAT 35 OR 75 OF THOSE HUNDRED
11 ARE TCW CLIENTS, THE LIST ITSELF CONTAINING A HUNDRED,
12 MAY STILL BE CONFIDENTIAL OR SUBJECT TO THE TRADE
13 SECRET PROTECTION. IF THE REMAINING 25 ARE NOT KNOWN
14 TO ANYBODY, AND ARE AMONG THE LARGEST INVESTORS THEY
15 HAVE. I DON'T KNOW.

10:44AM

10:45AM

16 BUT I DON'T THINK THAT YOU CAN SAY
17 BECAUSE SOME OF TCW'S CLIENTS ARE KNOWN AND IN THE
18 PUBLIC DOMAIN, THAT ANY LIST OF THEIR CLIENTS IS NOT A
19 TRADE SECRET.

20 AND IF YOU THINK THAT'S THE LAW, THEN I
21 HAVE TO GO BACK AND LOOK AT SOMETHING MORE CONCRETE TO
22 CONVINCE ME OF IT.

10:45AM

23 MR. KREILKAMP: COULD I MAKE A SUGGESTION,
24 YOUR HONOR?

25 THE COURT: YES.

10:45AM

26 MR. KREILKAMP: FOR NUMBER 16, YOU SUSTAINED
27 WITHOUT PREJUDICE TO A FOUNDATION TO SUPPORT THE
28 INSTRUCTIONS. I'D PROPOSE THAT IF -- WHEN WE GET TO

1 THAT, WE MAY HAVE A PROPOSAL TO A SLIGHTLY REWORDED
2 VERSION OF THIS, OR WE MAY DROP IT.

3 THE COURT: I'LL DO THAT.

4 MR. KREILKAMP: OKAY.

5 THE COURT: ALL RIGHT. THAT WAS NUMBER 18.

10:45AM

6 LOOKING NOW AT DEFENDANT'S SPECIAL
7 NUMBER 19.

8 WHO WANTS TO TELL ME ABOUT THIS ONE?

9 MR. HELM: YOUR HONOR, IF I COULD, THIS IS AN
10 EXTREMELY IMPORTANT INSTRUCTION. AND IT BEARS DIRECTLY
11 ON ONE OF THE ISSUES THAT HAS BEEN RAISED.

10:46AM

12 THERE IS A LIST THAT WAS USED TO -- IN
13 ADVANCE OF THE DECEMBER 8TH MUTUAL FUND CALL.

14 THE COURT: YEAH, I'M AWARE OF THAT.

15 MR. HELM: AND THE E-MAIL IS IN THE RECORD.
16 HOW IT WAS USED IS IN THE RECORD. THERE'S AN E-MAIL IN
17 THERE THAT BASICALLY SAYS, COME AND JOIN A CONFERENCE
18 CALL.

10:47AM

19 AND THERE IS A PRINCIPLE OF LAW WHICH
20 SAYS THAT EVEN IF YOU HAVE A TRADE SECRET LIST, A
21 DEPARTING EMPLOYEE HAS A RIGHT TO USE THE LIST TO SEND
22 OUT TO THE OLD CLIENTS AND SAY, I'M LEAVING. I HAVE A
23 NEW AFFILIATION.

10:47AM

24 AND SO OUR POSITION IS THAT THAT E-MAIL
25 THAT WAS SENT TO THE PEOPLE ON THAT LIST DID NOTHING
26 MORE THAN THIS. AND SO THE JURY MUST HAVE A STATEMENT
27 OF THE LAW. NOW, THEY MAY DISAGREE. THEY MAY SAY IT
28 WENT BEYOND THAT LEGAL PRINCIPLE, AND THEY ARE ENTITLED

10:47AM

1 TO THAT. AND THE JURY WILL DECIDE.

2 BUT THE JURY NEEDS TO KNOW THIS
3 STATEMENT OF LAW, WHICH IS (READING):

4 THE PARTING EMPLOYEES MAY USE
5 CUSTOMER LISTS TO ANNOUNCE A NEW
6 AFFILIATION, EVEN IF THOSE CUSTOMER
7 LISTS ARE TRADE SECRET.

10:47AM

8 MS. ESTRICH: YOUR HONOR, THE CASE THEY CITE,
9 THEN GOES ON TO SAY THAT IT IS, IN FACT, IMPERMISSIBLE
10 TO GO BEYOND ANNOUNCING A NEW AFFILIATION, TO
11 PERSONALLY PETITION, IMPORTUNE AND INTRIGUE CUSTOMERS
12 TO CALL FOR INFORMATION ABOUT THE BETTER PRODUCTS THE
13 DEFENDANT IS OFFERING.

10:48AM

14 SO OUR VIEW WOULD EITHER BE NO
15 INSTRUCTION AT ALL HERE, BUT CERTAINLY NOT A MISLEADING
16 INSTRUCTION THAT GIVES YOU HALF THE PICTURE.

10:48AM

17 WE DON'T THINK THE EVIDENCE SUPPORTS THE
18 CLAIM THAT THE CONFERENCE CALLS, OR THE ACTIVITY OF THE
19 DEFENDANTS HERE WAS JUST ANNOUNCING AN AFFILIATION.
20 THIS ISN'T A BIRTH NOTICE THEY SENT OUT. IF YOU LOOK
21 AT THE WEBCAST THEY MADE, IT DOESN'T JUST SAY, HI, WE
22 WANTED TO GIVE OUR NEW ADDRESS.

10:48AM

23 IT GOES ON TO DO PRECISELY WHAT THE
24 COURT IN THE CASE THEY CITE SAYS IS MISAPPROPRIATION.
25 SO WE DON'T SEE AN EVIDENTIARY BASIS HERE.

10:48AM

26 THEY, IN FACT, INVITED THEM TO A
27 SUBSTANTIVE CALL, NOT TO, HERE'S MY NEW ADDRESS.

28 AND THERE'S SIMPLY NO FOUNDATION FOR

1 GIVING AN INSTRUCTION THAT'S SIMPLY NOT APPLICABLE TO
2 THESE FACTS AND IS -- TELLS HALF A STORY, WHEN THE
3 WHOLE STORY IS QUITE THE CONTRARY.

4 THE COURT: ISN'T PART OF YOUR CASE, THAT WHAT
5 WAS SAID IN THE CALL IS ACTIONABLE?

10:49AM

6 MS. ESTRICH: CASE.

7 THE COURT: AND IF THAT'S THE CASE, THEN YOU
8 HAVE AN ACTIONABLE CLAIM IN THE CONTENTS OF THE CALL.

9 BUT DOES THE USE OF THE LIST MERELY, FOR
10 PURPOSES OF INVITING PEOPLE TO THEN VOLUNTARILY SHOW UP
11 OR NOT SHOW UP, THE TWO DIFFERENT CONCEPTS, IT SEEMS TO
12 ME, AND IN SOME RESPECTS, YOU ARE ASKING ME TO LET YOU
13 HAVE IT BOTH WAYS.

10:49AM

14 MS. ESTRICH: NO, BECAUSE WHAT I WOULD SAY IS
15 ALL THAT THE LAW SAYS IS YOU CAN USE THE LIST TO
16 ANNOUNCE A NEW AFFILIATION. THERE'S NO EVIDENCE THAT
17 SAYS THAT THE LIST WAS USED TO ANNOUNCE A NEW
18 AFFILIATION. THERE WAS NO EVIDENCE THE LIST WAS USED
19 TO INVITE PEOPLE TO A SUBSTANTIVE CALL IN WHICH WE
20 CLAIM VIOLATIONS OCCURRED.

10:49AM

21 NOW, THIS INSTRUCTION, PARTICULARLY
22 STANDING ALONE, WOULD SEEM TO SUGGEST TO THE JURY THAT
23 OH, YOU CAN JUST USE A LIST TO ANNOUNCE A NEW
24 AFFILIATION, AND THAT'S WHAT HAPPENED HERE.

10:50AM

25 THERE WAS NO EVIDENCE THAT A LIST WAS
26 USED SIMPLY TO ANNOUNCE A NEW AFFILIATION. THAT WOULD
27 BE SENDING OUT, HERE'S OUR NEW ADDRESS.

10:50AM

28 THE LIST WAS USED HERE FOR SUBSTANTIVE

1 PURPOSES, TO INVITE PEOPLE TO A SUBSTANTIVE CALL, WHICH
2 WE CLAIM IS A VIOLATION.

3 MR. HELM: YOUR HONOR, WE HAVE A DISAGREEMENT
4 OVER WHAT THE MEANING OF THAT E-MAIL IS.

5 BUT THE POINT IS THE JURY NEEDS TO BE 10:50AM
6 GIVEN THE LEGAL PRINCIPLE AROUND WHICH WE ARGUE. IF --
7 WE DON'T THINK IT'S NECESSARY, BUT IF THE COURT WANTED
8 TO ADD DEPARTING EMPLOYEES MAY USE --

9 THE REPORTER: COUNSEL, CAN YOU PLEASE SLOW
10 DOWN. 10:50AM

11 MR. HELM: IF THE COURT WANTED TO AMEND SO IT
12 SAYS DEPARTING EMPLOYEES MAY USE CUSTOMER LISTS TO
13 ANNOUNCE A NEW AFFILIATION, WITHOUT SOLICITING
14 PATRONAGE OR BUSINESS, WHICH IS THE LANGUAGE THEY REFER
15 TO, WE WOULD NOT OBJECT TO THAT. 10:51AM

16 WE DON'T THINK IT'S NECESSARY, BECAUSE
17 ANNOUNCING A NEW AFFILIATION ISN'T SOLICITING PATRONS
18 INTO A BUSINESS. BUT IF THEY WANT TO PUT THAT IN, WE
19 WOULDN'T OBJECT TO THAT.

20 BUT THE JURY MUST BE GIVEN THE LAW THAT 10:51AM
21 APPLIES TO THIS, THAT EACH SIDE CAN THEN ARGUE THE
22 FACTS AS THEY SEE FIT.

23 THE COURT: THE OBJECTION WILL BE OVERRULED
24 SUBJECT TO DEFENDANT'S RIGHT TO SEEK A FURTHER
25 CLARIFYING INSTRUCTION. 10:51AM

26 AND YOU MAY, MS. ESTRICH, WANT TO TALK
27 TO MR. HELM ABOUT THIS LANGUAGE THAT HE'S SUGGESTING.
28 I SEE YOUR ARGUMENT, THAT WHAT WAS SAID DURING THE CALL

1 AS BEING THE GROUNDS FOR A SUBSTANTIVE CLAIM IS
2 SEPARATE AND DISTINCT FROM THE USE OF LISTS
3 MS. VANEVERY HAD ON HER COMPUTER AND SENT TO
4 MR. GUNDLACH OR SENT TO THE ORGANIZATION THAT WAS
5 RUNNING THE CALL.

10:51AM

6 SO THERE YOU HAVE IT.

7 NUMBER 20. I THINK THIS IS JUST A
8 RESTATEMENT OF THE BASIC ELEMENTS OF THE CLAIM. AND I
9 GUESS I DON'T HAVE REAL STRONG FEELINGS ONE WAY OR THE
10 OTHER, AS LONG AS IT'S GIVEN IN CONTEXT. IF IT WOULD
11 FOLLOW 4404, IT MIGHT NOT BE A PROBLEM.

10:52AM

12 MS. ESTRICH: YOUR HONOR, WE WOULD ARGUE IT'S
13 AN INACCURATE MISSTATEMENT. MERE SUGGESTION OF THE
14 TRADE SECRETS IS SUFFICIENT TO CONSTITUTE USE OR
15 DISCLOSURE TO ESTABLISH UNJUST ENRICHMENT.

10:52AM

16 WELL, FIRST OF ALL --

17 THE COURT: SLOW DOWN, MA'AM.

18 MS. ESTRICH: I'M SORRY. I WAS JUST READING
19 WHAT WAS THERE.

20 THE COURT: WHENEVER WE READ, WE TEND TO DO IT
21 FASTER.

10:52AM

22 MS. ESTRICH: I KNOW. I'M A FAST READER. I'M
23 FROM BOSTON. (READING):

24 MERE POSSESSION OF TRADE
25 SECRETS IS INSUFFICIENT TO
26 CONSTITUTE USE OR DISCLOSURE.
27 TRADE SECRET MISAPPROPRIATION MAY
28 BE PROVEN BY ACQUISITION, USE OR

10:52AM

1 DISCLOSURE. TO ESTABLISH HARM OR
2 UNJUST ENRICHMENT CONFUSES THE
3 ISSUE HERE.

4 WE ACKNOWLEDGE THAT WE MUST PROVE HARM.
5 WE CAN PROVE HARM FROM ACQUISITION, USE OR DISCLOSURE. 10:53AM
6 THE MEASURE OF DAMAGES MAY BE UNJUST ENRICHMENT. IT
7 MAY BE LOSSES TO US, OR IT MAY BE, IF NEITHER OF THOSE
8 ARE PROVABLE, A REASONABLE ROYALTY.

9 SO I WOULD ARGUE, FINALLY, FOR MY LAST
10 TIME, THAT THIS INSTRUCTION IS NOT A FULL AND ACCURATE 10:53AM
11 STATEMENT OF THE LAW; THAT IT'S UNNECESSARY, AND THAT
12 TO THE EXTENT IT'S GIVEN, IT'S ENOUGH TO EVEN CONFUSE
13 ME.

14 MR. KREILKAMP: YOUR HONOR, WE AGREE WITH THE
15 COURT'S POSITION THAT IT SHOULD BE GIVEN IN CONTEXT. 10:53AM
16 THERE'S NOTHING IN WHAT I JUST HEARD FROM MS. ESTRICH
17 THAT CONFLICTS WITH WHAT WE PUT HERE.

18 THE REASON WE'RE PROPOSING THIS IS THAT
19 THERE ARE A NUMBER OF CASES THAT ADDRESS EXACTLY THIS
20 ISSUE. WHERE, FOR EXAMPLE, AN EMPLOYEE HAS DOWNLOADED 10:53AM
21 INFORMATION ONTO A HARD DRIVE, BUT IT WAS NEVER USED.
22 AND WE THINK IT'S IMPORTANT THAT THE JURY UNDERSTAND
23 THAT MERE POSSESSION IS INSUFFICIENT TO CONSTITUTE USE
24 OR DISCLOSURE. WE'RE NOT CARVING OUT AN ACQUISITION.
25 THERE'S AN INSTRUCTION ON THAT, AND THEY CAN ARGUE IT. 10:54AM

26 MS. ESTRICH: YOUR HONOR, BUT THIS INSTRUCTION
27 SEEMS TO SUGGEST THAT ACQUISITION ISN'T ENOUGH; OR THAT
28 POSSESSION WHICH MIGHT PROVE ACQUISITION WOULDN'T BE

1 ENOUGH TO PROVE MISAPPROPRIATION; OR THAT HARM IS
2 LIMITED TO DAMAGES OR UNJUST ENRICHMENT. SO I WOULD
3 SAY, AGAIN, YOU HAVE A VERY PARTIAL INSTRUCTION,
4 UNNECESSARY, GIVEN THE OTHER INSTRUCTIONS, AND KIND OF
5 CONFUSING.

10:54AM

6 THE COURT: WELL, MAYBE THE WORD POSSESSION
7 SHOULD BE MERE -- WHETHER ACQUISITION ALONE, WITHOUT A
8 USE OR DISCLOSURE, CAN CAUSE THE HARM. I MEAN, AND THE
9 CONCEPT IS JUST POSSESSING IT, AND NOTHING MORE
10 SUFFICIENT. AND I THINK THAT'S THE ISSUE.

10:55AM

11 MS. ESTRICH: BUT IT IS SUFFICIENT, YOUR
12 HONOR, IF YOU HAVE POSSESSION, IT MAY PROVIDE EVIDENCE
13 IT MAY ESTABLISH WRONGFUL ACQUISITION. THE HARM COULD
14 COME -- I'M JUST BEING THEORETICAL HERE. FROM YOUR
15 HAVING IT, YOUR BEING ABLE TO TELL CLIENTS YOU HAVE IT,
16 YOU ARE BEING ABLE TO PUBLICLY ANNOUNCE YOU ARE READY
17 TO GO. EVEN IF WE CAN'T PROVE HOW MUCH USE THERE WAS,
18 IT'S WELL ESTABLISHED IN TRADE SECRET LAW THAT
19 ACQUISITION IS ENOUGH. AND POSSESSION IS CERTAINLY
20 STRONG EVIDENCE OF WRONGFUL ACQUISITION, WHEN YOU HAVE
21 NO RIGHT TO HAVE SOMETHING.

10:55AM

10:55AM

22 MR. HELM: YOUR HONOR, WHAT MS. ESTRICH JUST
23 DESCRIBED AS BEING THE HARM FROM MERE ACQUISITION IS
24 DISCLOSURE. SHE SAID YOU MIGHT ACQUIRE IT AND THEN
25 TELL YOUR CLIENTS ABOUT IT. WELL, THAT WOULD BE
26 DISCLOSURE.

10:55AM

27 IT IS TRUE THAT MERE ACQUISITION CAN
28 CONSTITUTE MISAPPROPRIATION THAT WOULD WARRANT AN

1 INJUNCTION. BUT IF MERE ACQUISITION CAUSED NO HARM,
2 THERE IS NO CIVIL LIABILITY FOR DAMAGES. AND SO IT IS
3 EXTREMELY IMPORTANT THAT THE JURY UNDERSTAND THAT
4 MERELY POSSESSING THE INFORMATION IS NOT THE SAME AS
5 SAYING IT HAS BEEN DISCLOSED OR USED IN A DAMAGING WAY.

10:56AM

6 MS. ESTRICH: YOUR HONOR, IF I MIGHT JUST
7 CLARIFY MY POINT. IF I ADVERTISE TO PEOPLE THAT I'M
8 READY TO GO IN A MONTH, BECAUSE WE'RE REBUILDING THE
9 SAME SYSTEMS WE HAD, AND WE ARE GOING TO BE OFF THE
10 GROUND BECAUSE WE CAN DUPLICATE THE SYSTEM. I HAVEN'T
11 DISCLOSED THE SUBSTANCE OF MY TRADE SECRET, BUT I'VE
12 CERTAINLY GONE OUT AND MARKETED TO THE GENERAL PUBLIC
13 THAT I'M IN POSSESSION OF SOMETHING, WHICH, IN MY VIEW,
14 IS WRONGFUL POSSESSION, WHICH WILL ALLOW ME TO GET OFF
15 THE GROUND.

10:56AM

10:57AM

16 NOW, I DON'T THINK THAT MR. HELM WOULD
17 CONCEDE THAT THAT WAS DISCLOSURE, BUT I WOULD CERTAINLY
18 CONCEDE AND ARGUE THAT THAT'S ACQUISITION AND THAT THE
19 ACQUISITION MAY CAUSE HARM; THAT'S FOR THE JURY TO
20 DECIDE.

10:57AM

21 MR. HELM: BUT IF THEY ARE REBUILDING IT,
22 USING THE INFORMATION THAT'S USE. IT'S NOT THE
23 POSSESSION. THE POSSESSION ITSELF DOESN'T CAUSE HARM.

24 AND WE HAVE CASE AUTHORITY HERE THAT IS
25 SUBSTANTIAL. WE THINK THIS INSTRUCTION SHOULD BE
26 GIVEN.

10:57AM

27 THE COURT: THE OBJECTION WILL BE OVERRULED.

28 THE INSTRUCTION IS TO BE GIVEN IN THE

1 CONTEXT OF CASI 4404.

2 DEFENDANT'S SPECIAL JURY INSTRUCTION NUMBER
3 22.

4 MR. HELM: THIS IS NOW OUT, BECAUSE THE BREACH
5 OF CONFIDENCE CLAIM IS OUT. 10:57AM

6 MS. STEIN: I BELIEVE WE NOW SKIPPED TO 29,
7 BECAUSE BETWEEN 22 AND 29 ARE ALL BREACH OF CONFIDENCE
8 INSTRUCTIONS.

9 MR. HELM: THAT'S THE MOST PROGRESS WE'VE MADE
10 IN A MINUTE. 10:58AM

11 THE COURT: ARE WE GOING TO 29, OR IS 29 ALSO
12 PART OF THAT?

13 MS. STEIN: NO, TO 29.

14 MR. HELM: 29 IS NEXT.

15 THE COURT: SO 22 THROUGH 28 ARE WITHDRAWN,
16 BASED ON THE COURT'S RULING OF THE BREACH OF CONFIDENCE
17 CLAIM? 10:58AM

18 MR. HELM: YES, YOUR HONOR.

19 THE COURT: WHAT'S A PROBLEM WITH 29?

20 MR. EMANUEL: YOUR HONOR, AS WE DISCUSSED,
21 THERE'S A SERIES OF INTRODUCTORY INSTRUCTIONS WHICH THE
22 DEFENDANTS PURPORT NOT TO BE SUBSTANTIVE. AND THE
23 COURT HAS ASKED US TO MAKE THEM MORE NEUTRAL. 10:59AM

24 THERE IS A PROBLEM WITH 29 IN THAT IT
25 NARROWS TCW'S CLAIMS. IT DOESN'T EXACTLY STATE THEM. 10:59AM
26 AND IT HAS BEEN OUR POSITION ALL ALONG, IF THERE'S
27 GOING TO BE INTRODUCTORY INSTRUCTION, SIMPLY SAY, I
28 WILL NOW INSTRUCT YOU ON, WHATEVER THE CAUSE OF ACTION

1 IS GOING TO BE, IT DOESN'T NEED TO SAY WHAT THE CLAIMS
2 ARE, WHAT THE DEFENSES ARE. THAT WILL BE THE REST OF
3 THE INSTRUCTION.

4 I THOUGHT WE KIND OF HANDLED THIS IN THE
5 LAST SESSION WHEN THE COURT SAID, LET'S HAVE NEUTRAL
6 INTRODUCTORY INSTRUCTIONS. 11:00AM

7 MR. HELM: YOUR HONOR, THE ONLY POINT WE'RE
8 TRYING TO MAKE SURE THE JURY HAS IN MIND IS THAT THE
9 WRONGFUL CONDUCT THAT'S THE BASIS OF THE INTERFERENCE
10 CLAIM IS ALL CONDUCT THAT TOOK PLACE AFTER DECEMBER THE 11:00AM
11 4TH, BECAUSE WE HAVE A LOT OF TESTIMONY OF THINGS THAT
12 HAVE BEEN GOING ON BEFORE THEN.

13 AND WE JUST THINK IT'S -- I THINK IT IS
14 NEUTRAL. IT'S ACCURATE. THAT IS WHAT THEIR CLAIM IS,
15 THAT THE ONLY CONDUCT THAT'S ALLEGED TO CONSTITUTE 11:00AM
16 UNLAWFUL INTERFERENCE ALL TOOK PLACE AFTER
17 DECEMBER 4TH.

18 SO WE JUST THINK TO ORIENT THE JURY THAT
19 THAT'S WHAT WE'RE TALKING ABOUT WOULD BE HELPFUL. WE
20 THINK IT'S COMPLETELY ACCURATE, AND THE INSTRUCTION 11:01AM
21 WOULD BE BENEFICIAL.

22 MR. EMANUEL: WELL, WAIT A MINUTE. NOW, WE'RE
23 USING INTRODUCTORY INSTRUCTION TO ARGUE DEFENDANT'S
24 THEORY.

25 I'M NOT SAYING IT'S NOT ACCURATE, YOUR 11:01AM
26 HONOR, BUT THAT'S NOT WHAT AN INTRODUCTORY INSTRUCTION
27 IS FOR. WE CAN PUT THAT INTO THE OTHER SUBSTANTIVE
28 INSTRUCTIONS. OTHERWISE, WE ARE NOW EMPHASIZING

1 DEFENDANT'S THEORY BY ADDING ADDITIONAL INSTRUCTIONS TO
2 THEIR BENEFIT.

3 THE COURT: I DON'T THINK -- I'M GOING TO
4 SUSTAIN THE OBJECTION TO THIS. I WILL ENTERTAIN, AND
5 YOU ALL CAN GET TOGETHER A GENERAL INTRODUCTORY
6 INSTRUCTION THAT PUTS IN FAIRLY BASIC TERMS, THE CLAIMS
7 ASSERTED BY EACH SIDE IN THIS LAWSUIT, AS AN
8 INTRODUCTION TO ALL OF THE INSTRUCTIONS.

11:01AM

9 AND IF YOU CAN CLARIFY THAT CERTAIN
10 CLAIMS RESULT FROM CONDUCT AFTER DECEMBER 4TH, OTHER
11 CLAIMS RESULT -- AND THERE IS A DISTINCTION, EVEN IF
12 THE PLAINTIFF'S CLAIMS, THE ONES THAT ARE BASED ON
13 THINGS THAT HAPPENED BEFORE DECEMBER 4TH AND THINGS
14 THAT HAPPEN AFTER DECEMBER 4TH. SEE WHAT YOU COME UP
15 WITH.

11:01AM

11:02AM

16 MR. HELM: I PREDICT WE WILL BE UNABLE TO
17 AGREE, YOUR HONOR, BUT WE WILL TRY.

18 THE COURT: WELL, SEE WHAT YOU CAN DO.

19 ALL RIGHT. DEFENDANT'S SPECIAL
20 INSTRUCTION NUMBER 30.

11:02AM

21 MR. EMANUEL: YOUR HONOR, I HAVE A NOTE.

22 THE COURT: WE'VE ALREADY GONE OVER THIS.

23 MR. EMANUEL: WE ALLUDED TO THAT IN CONNECTION
24 WITH AN EARLIER SET, AND THE PARTIES ARE SUPPOSED TO BE
25 WORKING ON THIS.

11:02AM

26 THE COURT: HOW ARE YOU DOING?

27 MR. EMANUEL: WELL, WE'VE BEEN WORKING ON
28 OTHER THINGS SO FAR. WE'LL GET TO THIS ONE.

1 THE COURT: I THINK THAT THAT WAS BECAUSE WE
2 CROSS-REFERENCED THIS ONE IN ONE OF THE EARLIER ONES
3 THAT WE TALKED ABOUT.

4 MR. EMANUEL: YES. THEY ARE ESSENTIALLY
5 COMPETING INSTRUCTIONS.

11:02AM

6 THE COURT: AND WHAT IS THE CORRESPONDING
7 INSTRUCTION?

8 MS. STEIN: I BELIEVE, YOUR HONOR, THAT TCW
9 PROPOSED CASI 2203.

10 OUR OBJECTION TO THAT INSTRUCTION WAS
11 SUSTAINED. AND MY NOTES SAY THAT THE COURT WAS GOING
12 TO GIVE DEFENDANTS SPECIAL INSTRUCTION NUMBER 30, WITH
13 SOME MODIFICATION.

11:03AM

14 MR. EMANUEL: YEAH. I DON'T KNOW THAT IT
15 WAS -- I DON'T HAVE THE NOTES. IF THE COURT, IN FACT,
16 WAS GOING TO GO WITH NUMBER 30, IT SAYS IT NEEDS TO BE
17 EXPLAINED IN CONTEXT, IS THE NOTATION THAT I HAVE, AND
18 THE PARTIES ARE TO DISCUSS.

11:03AM

19 THE COURT: WORK ON GETTING IT INTO CONTEXT,
20 AND THEN LET ME KNOW IF IT'S STILL AN OPEN ISSUE.

11:03AM

21 MR. HELM: THANK YOU, YOUR HONOR. WE'LL DO
22 THAT.

23 THE COURT: ALL RIGHT.

24 NUMBER 31. MY INCLINATION IS, THIS GOES
25 BEYOND THE CASI, AND THE CASI INSTRUCTION ON
26 INTERFERENCE IS PROBABLY ADEQUATE.

11:04AM

27 MS. STEIN: YOUR HONOR, IF I MAY.

28 THE COURT: YES.

1 MS. STEIN: WE BELIEVE UNDER THE FACTS OF THE
2 CASE, THIS INSTRUCTION IS APPROPRIATE.

3 IT'S VERY IMPORTANT THAT THE JURY
4 UNDERSTAND THAT AS A PREREQUISITE FOR FINDING
5 LIABILITY, THAT THE CONTRACT OTHERWISE WOULD HAVE BEEN 11:04AM
6 PERFORMED; AND THAT IN THIS CASE, TCW MADE SOME
7 ACCOMMODATIONS TO ITS CLIENTS WITHOUT HAVING ANY CLIENT
8 SUGGEST THAT THEY WERE GOING TO BREACH THAT CONTRACT.
9 THOSE ACCOMMODATIONS WERE MADE VOLUNTARILY.

10 WE HAVE EVIDENCE FROM MR. WALLS THAT 11:04AM
11 THEY WERE MADE TO SECURE CLIENT SATISFACTION FOR THE
12 FUTURE. THIS IS NOT THE ORDINARY INTERFERENCE CASE.
13 AND THOSE ACCOMMODATIONS THAT TCW GAVE VOLUNTARILY
14 SHOULD BE POINTED OUT TO THE JURY.

15 MR. EMANUEL: WELL, THAT'S CAUSATION 11:05AM
16 INSTRUCTION, SUBSTANTIAL FACTOR. THAT'S WHAT THOSE
17 ARGUMENTS GO TO. THEY ARE EMPHASIZING THEIR THEORY.

18 WE WANT THE COURT TO TELL THEM THERE'S
19 NO CAUSATION, BECAUSE IT WAS VOLUNTARY. THAT'S
20 ARGUMENT FOR THE JURY, AS LONG AS THE COURT INSTRUCTS 11:05AM
21 THEM ON SUBSTANTIAL FACTOR.

22 AND I UNDERSTAND WE'RE STILL WORKING ON
23 THE -- SOME OPTIONAL LANGUAGE, AND I HAVEN'T HEARD ANY
24 SUGGESTION HERE YET WHAT ADDITIONAL LANGUAGE THEY NEED
25 TO SUBSTANTIAL FACTOR FOR THIS CAUSE OF ACTION, LEAVING 11:05AM
26 OPEN THE POSSIBILITY THAT THERE MIGHT BE, THAT -- WE
27 PUT IN THE CORRECT INSTRUCTION ON SUBSTANTIAL FACTOR,
28 AND COUNSEL STAND UP AND ARGUE WE MEET IT OR DON'T MEET

1 IT.

2 MS. STEIN: YOUR HONOR, THE CASES WE CITE, THE
3 DRIVE-IN (PHONETIC) CASE, THE AUGUSTINE (PHONETIC)
4 CASE, ALL THESE CALIFORNIA CASES STATE THAT IN ORDER TO
5 STATE A VALID CLAIM FOR INTERFERENCE, THE PLAINTIFFS'
6 BURDEN TO SHOW THAT THE CONTRACT WOULD OTHERWISE HAVE
7 BEEN PERFORMED. THAT IS WHAT THIS JURY INSTRUCTION
8 SEEKS TO ADDRESS, AND IT IS IMPORTANT. IT IS
9 DEFENDANT'S THEORY OF THE CASE. DEFENDANTS ARE
10 ENTITLED TO INSTRUCTIONS ON EVERY THEORY OF THEIR CASE.

11:06AM

11:06AM

11 MR. EMANUEL: I'M KIND OF AT A LOSS.
12 INTERFERENCE IS MORE THAN JUST BREACHING PERFORMANCE.
13 IT'S MAKING PERFORMANCE MORE DIFFICULT OR MORE
14 EXPENSIVE.

15 AND OBVIOUSLY, I'M NOT IN THE COURTROOM
16 EVERY DAY, YOUR HONOR, SO I APOLOGIZE FOR THAT. BUT I
17 DON'T HAVE AN UNDERSTANDING THAT DEFENDANTS' THEORY IS
18 THAT -- LET'S PUT IT THE OTHER WAY, THE THEORY HERE IS
19 THAT THESE CONTRACTS WOULD HAVE BEEN PERFORMED IN THE
20 ORDINARY COURSE, BUT FOR THEIR INTERFERENCE, PLAINTIFF
21 INCURRED COSTS.

11:06AM

11:06AM

22 SO I DON'T KNOW THAT PLAINTIFF -- EITHER
23 SIDE IS SAYING THAT THE CONTRACTS WOULDN'T HAVE BEEN
24 PERFORMED.

25 WHAT BOTH SIDES, OR AT LEAST PLAINTIFF
26 IS SAYING, IS THAT PERFORMANCE WAS MORE EXPENSIVE.

11:06AM

27 MS. STEIN: AND, YOUR HONOR --

28 THE COURT: WELL, THEY ARE SAYING THAT

1 PERFORMANCE WAS MORE EXPENSIVE BECAUSE PLAINTIFF CHOSE
2 TO TAKE A COURSE OF ACTION THAT LED TO SIGNIFICANT
3 DISSATISFACTION AMONG YOUR INVESTORS. AND IN ORDER TO
4 ACCOMMODATE THEM, AT LEAST, THIS IS THE ARGUMENT THAT'S
5 BEING MADE, AND WHETHER IT'S FULLY SUPPORTED BY THE
6 EVIDENCE, OR NOT, I'M NOT SAYING.

11:07AM

7 MR. EMANUEL: WELL, YOUR HONOR, EVEN IF WE
8 TOOK THAT THEORY, LET'S SAY IT WAS MORE EXPENSIVE
9 BECAUSE WE VOLUNTARILY, DEFENDANTS' THEORY, REDUCED IT
10 BECAUSE WHY? AND COMPANIES DON'T VOLUNTARILY CUT
11 PROFITS. THEY DID IT FOR A REASON, BECAUSE SOMEONE
12 INTERFERED.

11:07AM

13 MR. BRIAN: NO, THAT'S NOT THE TESTIMONY.

14 THE COURT: PRE INTERFERENCE, PRE TERMINATION,
15 THERE HAS BEEN EVIDENCE, AND AT LEAST A SUGGESTION,
16 THAT YOU KNEW THE CONSEQUENCES OF CERTAIN CONDUCT YOU
17 CHOSE TO TAKE. AND YOU TOOK THOSE ACTIONS, KNOWING
18 FULL WELL WHAT THE CONSEQUENCES WOULD BE, WITHOUT
19 REGARD TO ANYTHING DONE AFTER THE TERMINATIONS BY THE
20 GUNDLACH PARTIES OR ANYBODY ELSE, AND THEN IT CAME TO
21 PASS.

11:07AM

22 MR. EMANUEL: I GUESS --

23 MR. QUINN: WELL, THAT IS THEIR ARGUMENT.

24 THE COURT: THAT'S THEIR ARGUMENT.

25 MR. QUINN: THAT'S THEIR ARGUMENT, YES.

11:08AM

26 AND THERE IS EVIDENCE FROM WHICH THEY
27 CAN ARGUE THAT.

28 THE COURT: AND YOUR ARGUMENT IS?

1 MR. QUINN: OUR ARGUMENT IS, YES, THERE WAS A
2 LOW -- THERE WAS SOME DISSATISFACTION. THERE WERE SOME
3 PEOPLE CLAMORING FOR CHANGE. WE THOUGHT WE COULD
4 HANDLE IT, BUT FOR GUNDLACH POURING GASOLINE ON THE
5 FIRE.

11:08AM

6 NOBODY HAD THE POWER THAT HE HAD TO MAKE
7 THAT SITUATION IMPOSSIBLE TO DEAL WITH. HE WAS THE
8 FACE OF THE COMPANY. HE'S THE CREATOR OF THESE FUNDS.
9 HE'S SAYING THINGS LIKE NOBODY IS MANAGING YOUR MONEY
10 RIGHT NOW. AND YOU KNOW, YOU SHOULD DISREGARD THE
11 CONTRACTS.

11:08AM

12 AND THE JURY IS ENTITLED TO CONCLUDE FROM
13 THAT, THAT THAT IS A SUBSTANTIAL FACTOR, THAT WE WERE
14 PUT IN A SITUATION WHERE WE HAD TO REACT TO THAT BY
15 MAKING THE CONCESSIONS THAT WE DID.

11:09AM

16 YOUR HONOR, THE EVIDENCE IN THE RECORD
17 SO FAR IS TWOFOLD ON THIS. ONE IS THAT THEY MADE A
18 DECISION BEFORE MR. GUNDLACH SAID ANYTHING TO PROPOSE
19 MODIFICATIONS OF THE CONTRACTUAL ARRANGEMENTS; THAT'S
20 IN EVIDENCE. THERE'S A GARRETT WALLS E-MAIL OF
21 DECEMBER 5TH.

11:09AM

22 MR. QUINN: DECISION? THERE'S NO EVIDENCE OF
23 A DECISION.

24 MR. BRIAN: THERE'S EVIDENCE THAT THAT WAS
25 DISCUSSED BEFORE IT WAS EVER -- MR. GUNDLACH EVER SAID
26 A WORD.

11:09AM

27 THE SECOND THING THAT'S IN EVIDENCE IS
28 THAT THEY MADE THE DECISION, DESPITE THEIR KNOWLEDGE

1 THAT THEY DIDN'T HAVE TO MAKE ANY MODIFICATIONS OF THE
2 CONTRACT BECAUSE OF A BUSINESS DECISION TO CURRY FAVOR
3 WITH THE CUSTOMERS FOR THE FUTURE. THAT'S WHAT THE
4 EVIDENCE IS FROM WHICH WE CAN ARGUE OUR THEORY.

5 AND THIS INSTRUCTION IS ENTIRELY
6 APPROPRIATE, WITH THAT ARGUMENT, BASED ON THE EVIDENCE
7 IN THE RECORD.

11:09AM

8 MR. EMANUEL: YOUR HONOR, BUT FOR THE TASK FOR
9 THE PERSON HAVING TO DRAFT JURY INSTRUCTIONS.

10 THIS COMPETING THEORY, IT'S AN ISSUE OF
11 CAUSATION. DID IT CAUSE INTERFERENCE? THAT IS
12 SIMPLY -- ALL WE NEED IS AN INSTRUCTION ON CAUSATION,
13 NOT SLANTED TOWARDS ONE SIDE'S THEORY OR THE OTHER
14 SIDE'S THEORY. DID IT CAUSE IT?

11:10AM

15 IF DEFENDANT IS RIGHT, NO CAUSATION;
16 WOULD HAVE HAPPENED ANYWAY. IF WE'RE RIGHT, THEN THE
17 SUBSTANTIAL FACTOR TEST OF CAUSATION IS ALL THAT'S
18 NEEDED HERE, UNLESS SOMEONE COMES FORWARD AND SUGGESTS
19 TO ME IT NEEDS TO BE TWEAKED WITH SOME PHRASING WHICH I
20 HAVEN'T HEARD YET.

11:10AM

21 THE COURT: ALL RIGHT. MY SENSE IS, I'M GOING
22 TO SUSTAIN THE OBJECTION.

23 I THINK, AS PROPOSED, IT IS TOO
24 ONE-SIDED. AND IF THERE IS A MORE GENERIC OR NEUTRAL
25 VERSION OF THIS TYPE OF AN INSTRUCTION THAT YOU CAN
26 WORK OUT WITH MR. EMANUEL, I'LL BE WILLING TO ENTERTAIN
27 IT.

11:10AM

28 MR. BRIAN: WE'LL PROPOSE SOMETHING MORE

1 NEUTRAL. I'M NOT SURE OF THE LATTER PART OF THAT
2 SUGGESTION, YOUR HONOR.

3 THE COURT: THAT YOU CAN WORK WITH
4 MR. EMANUEL?

5 MR. BRIAN: WE CAN WORK WITH MR. EMANUEL. 11:11AM

6 MR. EMANUEL: I'M A VERY REASONABLE GUY.

7 MR. BRIAN: WE'LL PROPOSE SOMETHING.

8 THE COURT: LOOK AT IT, AND LET'S SEE WHAT WE
9 CAN DO WITH IT.

10 I WOULD SAY THAT THE SAME APPROACH 11:11AM
11 SHOULD BE TAKEN TO 32. AND MAYBE A NUMBER OF THESE CAN
12 BE COMBINED INTO SOMETHING A LITTLE MORE GENERAL THAT
13 WILL WORK. BUT AS THEY ARE NOW, I CAN'T.

14 MS. STEIN: WE'LL WORK ON THAT, YOUR HONOR.

15 MR. EMANUEL: I THINK IT'S A GOOD SUGGESTION, 11:12AM
16 YOUR HONOR THAT WE NOT HAVE MULTIPLE INSTRUCTIONS ON
17 CAUSATION. WE OUGHT TO COME UP WITH AS FEW AS
18 NECESSARY.

19 THE COURT: WELL, WE HAVE A GENERAL CAUSATION
20 INSTRUCTION OUT OF CASI. AND IF YOU WOULD JUST LIKE TO 11:12AM
21 SIT WITH THAT. PEOPLE CAN ARGUE THAT BOTH WAYS. THERE
22 MAY BE SOME WAY TO, IN A MORE GENERAL SENSE, CONVEY
23 BOTH SIDES' VIEWS.

24 AND YOU KNOW, ON THE SPECIFIC FACTS OF
25 THIS CASE, WHICH WOULD, YOU KNOW, SOMETIMES THE GENERIC 11:12AM
26 CAUSATION INSTRUCTIONS ARE HARD FOR THE JURORS TO PUT
27 INTO THE CONTEXT OF THE EVIDENCE THEY'VE HEARD. AND
28 ALL I'M SAYING IS I THINK YOU CAN WORK ON THAT.

1 MR. HELM: WE'LL TAKE THAT INTO ACCOUNT, YOUR
2 HONOR, AND GET BACK TO YOU.

3 THE COURT: HOW FAR DO I GO WITH THESE SAME
4 KIND OF THINGS?

5 MR. HELM: WE'RE UP TO A NEW TOPIC NOW. 11:12AM

6 THE COURT: ALL RIGHT. 33.

7 MY UNDERSTANDING IS THAT THE DEFENDANTS'
8 REAL OBJECTION TO THIS IS THE MULTI FACTORS TO BE
9 CONSIDERED, AND THAT YOU WANT THAT CLARIFIED; BUT YOU
10 ARE NOT, IN SUBSTANCE, OBJECTING TO THE INSTRUCTION. 11:13AM

11 MR. EMANUEL: WELL, THIS, I THINK, IS WHAT
12 YOUR HONOR JUST REMARKED A SECOND AGO.

13 THERE'S A GENERIC INSTRUCTION. I'M NOT
14 QUARRELING WITH THE FACTS. THE COURTS HAVEN'T SAID,
15 THESE ARE THE FACTORS YOU CONSIDER. BUT THIS IS FOR A 11:13AM
16 JURY.

17 IF THE JURY JUST GOES THROUGH THESE
18 FACTORS, THEY ARE, IN EFFECT, INVITED TO CREATE NEW LAW
19 AS TO WHAT JUSTIFIES INTERFERENCE.

20 THE LAW IS PRETTY CLEAR WHAT JUSTIFIES 11:13AM
21 INTERFERENCE. IT'S A FORM OF LAWFUL COMPETITION. AND
22 WE DO NOT NEED TO INSTRUCT THE JURY ON THE GENERAL
23 PRINCIPLES OF WHAT FACTORS THE COURTS LOOK AT TO COME
24 UP WITH JUSTIFICATION.

25 IF DEFENDANTS' THEORY IS THAT THEY WERE 11:14AM
26 LAWFULLY COMPETING, I WOULDN'T NOT HAVE AN OBJECTION TO
27 AN INSTRUCTION THAT SAYS, IF YOU FIND -- I DON'T WANT
28 TO PUT WORDS ON THE RECORD THAT I MIGHT WANT MORE

1 REFLECTION TO QUARREL WITH. BUT THE NOTION BEING, IF
2 YOU FIND THAT THERE WAS LAWFUL COMPETITION, THEN THAT'S
3 A DEFENSE; THAT'S JUSTIFICATION.

4 BUT JUST TO LAY OUT THIS MULTI-FACTORED
5 TEST, TO ME, IT'S TOO VAGUE, TOO GENERIC, AND INVITES 11:14AM
6 THE JURY TO COME UP WITH NEW LEGAL PRINCIPLES OF WHAT
7 IS JUSTIFICATION OR NOT, WHEN, IN FACT, IN THE CASES
8 ARE VERY SPECIFIC IT IS COMPETITION, LAWFUL
9 COMPETITION, NOT JUST ANY COMPETITION.

10 MR. HELM: YOUR HONOR, I THINK MR. EMANUEL'S 11:14AM
11 QUARREL IS WITH THE CALIFORNIA SUPREME COURT AND WHAT
12 THE LAW IS, NOT WITH THIS JURY INSTRUCTION.

13 THERE IS A DEFENSE TO AN INTERFERENCE
14 CLAIM CALLED JUSTIFICATION. IT IS A MULTI-FACTOR TEST
15 THAT THE JURY APPLIES. THE FACTORS ARE SET FORTH IN 11:15AM
16 THE RESTATEMENT AND IN THE CALIFORNIA SUPREME COURT'S
17 CASES. THIS IS EXACTLY TAKEN FROM WHAT THE LAW IS.
18 THERE IS NO STANDARD CASI INSTRUCTION ON IT, SO WE HAVE
19 TO DRAFT IT BASED ON WHAT THE LAW IS AS STATED IN THE
20 CASES. AND THIS IS EXACTLY WHAT THE LAW IS. I DON'T 11:15AM
21 LIKE IT EITHER, TO TELL YOU THE TRUTH.

22 I WISH THERE WERE MORE CLARITY IN THE
23 LAW OF WHAT WAS JUSTIFICATION. I DON'T LOVE A
24 MULTI-FACTOR TEST, BUT THAT'S WHAT THE LAW IS. THAT'S
25 WHAT THE COURT HAS GIVEN US, AND THAT'S WHAT HAS TO BE 11:15AM
26 TOLD TO THE JURY, SO THAT THEY CAN APPLY THE DEFENSE
27 THAT WE HAVE ASSERTED AND THAT IS AVAILABLE TO US FOR
28 JUSTIFICATION PURPOSES.

1 MR. EMANUEL: YOUR HONOR, THERE CAN'T BE A
2 JUSTIFICATION FOR AN INSTRUCTION LIKE THAT. UNDER THAT
3 RATIONALE, YOU CAN COME IN AND SAY, I WANT TO JUSTIFY
4 MY CONDUCT. BECAUSE IF I HAD THIS SUM OF MONEY, I
5 WOULD GIVE IT TO STARVING CHILDREN IN SOME THIRD WORLD
6 COUNTRY OR SOME OTHER VERY LOFTY, EMOTIONAL -- WOW,
7 THAT'S REALLY A GOOD THING TO DO. THAT'S NOT THE
8 JUSTIFICATION THAT THE LAW PERMITS FOR INTERFERING WITH
9 THE CONTRACT.

11:16AM

10 AND THAT'S MY QUARREL WITH THE
11 INSTRUCTION. THIS IS NOT AN INVITATION TO SET SOCIAL
12 POLICY. IT'S NOT AN INVITATION TO MAKE NEW LAW.

11:16AM

13 THIS INSTRUCTION HAS TO BE MORE
14 SPECIFIC, TO SAY IT IS JUSTIFIED BECAUSE IT WAS -- PICK
15 SOMETHING, LAWFUL COMPETITION. IT WAS JUSTIFIED
16 BECAUSE I WAS -- IT WAS SELF-DEFENSE. I DON'T KNOW,
17 BUT YOU GOT TO SAY SOMETHING.

11:16AM

18 THE COURT: WHY NOT TAKE THE LANGUAGE FROM THE
19 SUPREME COURT'S DECISION IN ENVIRONMENTAL PLANNING,
20 THAT SAYS -- IT'S A QUOTE THAT IS IN THE NOTE ON THE
21 INSTRUCTION.

11:16AM

22 BUT THE CONTOURS OF JUSTIFICATION OR
23 PRIVILEGE ARE NOT PRECISELY DEFINED. IN RELATION TO
24 THE TORT OF INTERFERENCE WITH CONTRACT, WE HAVE SAID
25 WHETHER AN INTENTIONAL INTERFERENCE BY A THIRD PARTY,
26 IT IS JUSTIFIABLE DEPENDS ON THE BALANCING OF THE
27 IMPORTANCE, SOCIAL AND PRIVATE, OF THE OBJECTIVE
28 ADVANCED BY THE INTERFERENCE AGAINST THE IMPORTANCE OF

11:17AM

1 THE INTEREST INTERFERED WITH, CONSIDERING ALL THE
2 CIRCUMSTANCES, INCLUDING THE NATURE OF THE ACTOR'S
3 CONDUCT AND THE RELATIONSHIP BETWEEN THE PARTIES.

4 WHY NOT JUST MAKE THAT STATEMENT?

5 MR. EMANUEL: BECAUSE, IF I MAY, YOUR HONOR,
6 LOOK AT THE PHRASE. THE OBJECTIVE ADVANCED. WHAT IS
7 IT THAT DEFENDANTS ARE CLAIMING WAS THE OBJECTIVE
8 ADVANCED BY THE CONDUCT.

11:17AM

9 REMEMBER, JUSTIFICATION IS AN
10 AFFIRMATIVE DEFENSE. ESSENTIALLY, YOU DON'T GET TO IT.
11 AND IF YOU SAY, I DID, IN FACT, INTERFERE, HERE'S WHY.
12 ONCE YOUR HONOR HEARS WHAT THAT OBJECTIVE WAS, WHAT THE
13 WHY WAS, THEN YOUR HONOR CAN SAY, YES, I WILL SEND IT
14 TO THE JURY WITH THIS INSTRUCTION.

11:17AM

15 BUT IF ALL THEY DO IS SAY, WELL, WE WANT
16 THE JURY TO DECIDE IF THE OBJECTIVE WAS JUSTIFIED.

11:18AM

17 NO. YOU HAVE GOT TO HAVE SOME EVIDENCE
18 UPON WHICH THIS INSTRUCTION WOULD GO, JUST TELL US WHAT
19 THE OBJECTIVE WAS. AND THEN WE CAN MAKE A DECISION
20 WHETHER THIS INSTRUCTION SHOULD BE GIVEN.

11:18AM

21 MR. HELM: WELL, IT'S PERFECTLY CLEAR WHAT ONE
22 OF THE OBJECTIVES WAS, MR. GUNDLACH WAS AN INVESTOR IN
23 THE FUND. THAT'S IN THE RECORD.

24 THE COURT: I UNDERSTAND.

25 MR. HELM: AND THE RESTATEMENT, WHEN IT TALKS
26 ABOUT WHAT ARE THE FACTORS, IT SAYS THE RELATIONS
27 BETWEEN THE PARTIES, THE INTEREST SOUGHT TO BE ADVANCED
28 BY THE ACTOR, THOSE ARE ALL -- IT'S PERFECTLY

11:18AM

1 LEGITIMATE FOR US TO ARGUE THAT BECAUSE HE WAS AN
2 INVESTOR IN THE FUNDS, HE HAD A RIGHT TO DISCLOSE HIS
3 OPINIONS AND VIEWS ON A SUBJECT THAT WAS OF CONCERN TO
4 ALL INVESTORS.

5 AND YOUR HONOR ASKED, WHY DON'T WE JUST 11:18AM
6 SAY THE QUOTE FROM ENVIRONMENTAL PLANNING, THE FIRST
7 PARAGRAPH. WE ATTEMPTED TO DO THAT. IT PARED IT DOWN
8 A LITTLE BIT TO AVOID REPETITION WITH SOME OF THE
9 THINGS THAT WERE IN THE SECOND. BUT IN DECIDING
10 WHETHER AN INTENTIONAL INTERFERENCE WITH CONTRACTUAL 11:19AM
11 RELATIONS, THAT PARAGRAPH VERY CLOSELY TRACKS THE
12 LANGUAGE THAT YOUR HONOR JUST READ FROM ENVIRONMENTAL
13 PLANNING. AND THEN THE RESTATEMENT FACTORS HAVE BEEN
14 ADOPTED BY THE CALIFORNIA COURTS.

15 AND SO THOSE -- WE THINK, THAT IS 11:19AM
16 CALIFORNIA LAW. THOSE ARE THE RELEVANT FACTORS. THE
17 JURY, ESPECIALLY SINCE THIS IS A PRIVILEGE THAT --
18 WHOSE CONTOURS ARE NOT PRECISELY DEFINED, WE THINK IT
19 IS HELPFUL TO GIVE THE JURY THE FACTORS WHICH THE
20 COURTS HAVE HELD ARE THE RELEVANT ONES TO BE 11:19AM
21 CONSIDERED. IT IS THE JURY'S DECISION ON WHETHER IT
22 WAS JUSTIFIED. THEY SHOULD BE TOLD WHAT THE FACTORS
23 ARE.

24 MR. EMANUEL: YOUR HONOR, IN SOME WAYS,
25 MR. HELM'S ARGUMENT PROVES MY POINT. IN OTHER WORDS, 11:19AM
26 YOU TAKE A RANDOM FACT. I'M AN INVESTOR. THEN I GET
27 TO SAY OR DO WHATEVER I WANT. WHAT IS THE OBJECTIVE
28 BEING ADVANCED? THAT IS WHAT I'M QUARRELING WITH. WE

1 NEED TO KNOW WHAT THAT IS, SO THE JURY CAN DECIDE THAT
2 OBJECTIVE IS -- JUSTIFIES INTERFERENCE OR DOESN'T.

3 BUT YOU CANNOT JUST SAY, WELL, HE'S GOT
4 THIS POSITION. WHAT'S THE OBJECTIVE ADVANCED? THAT'S
5 WHAT THE SUPREME COURT ASKED TO BE BALANCED.

11:20AM

6 THE COURT: OKAY. I'LL INSTRUCT THE JURY ON
7 JUSTIFICATION.

8 IN THE ABSENCE OF AN AGREED INSTRUCTION,
9 THE COURT WILL GIVE THE INSTRUCTION AS PROPOSED, WITH
10 THE FACTORS IDENTIFIED BY THE RESTATEMENT.

11:20AM

11 YOU CAN TALK TO ONE ANOTHER, YOU CAN
12 WORK ON IT. AND AT THE END OF THE DAY, I MAY TWEAK IT
13 A LITTLE. THIS CONCEPT OF WHAT WAS THE OBJECTIVE
14 ADVANCED SEEMS TO ME TO BE, YOU KNOW, RIGHT FOR
15 ARGUMENT ON BOTH SIDES.

11:20AM

16 AND THAT'S WHAT THE JURY IS GOING TO
17 DECIDE. AND IF THEY DECIDE IT WAS AN OBJECTIVE, YOU
18 KNOW, THAT WAS IMPROPER, THEN PLAINTIFFS ARE GOING TO
19 DO FINE. IF THEY THINK IT WAS A LEGITIMATE OBJECTIVE
20 IN -- THEN THEY WON'T. BUT THAT JUST GOES TO THE HEART
21 OF WHAT YOU ARE GIVING TO THE JURY.

11:21AM

22 SO ANYWAY, YOU CAN TALK ABOUT THAT AMONG
23 YOURSELVES A LITTLE MORE.

24 NUMBER 34. MY TENTATIVE IS TO SUSTAIN
25 THE OBJECTION. I THINK IT'S DUPLICATIVE AND COVERS THE
26 AREA WE'RE ALREADY COVERING IN THE PRIOR INSTRUCTIONS.

11:21AM

27 MR. HELM: VERY WELL, YOUR HONOR.

28 THE COURT: ALL RIGHT. NUMBER 35. SAME LOGIC

1 WOULD BE TO ME TO SUSTAIN THE OBJECTION. I THINK IT'S
2 COVERED BY 33.

3 YOU WANT TO BE HEARD ON THAT?

4 MR. HELM: WELL, YOUR HONOR, WE THINK IT IS
5 CLEAR THAT THE RELATIONS BETWEEN THE PARTIES ARE ONE OF
6 THE FACTORS. IF HE'S ENDEAVORING TO ADVANCE SOME
7 INTEREST OF HIS OWN, THAT THAT IS LEGITIMATELY SUBJECT
8 TO THE JUSTIFICATION PRIVILEGE, AND IT WOULD BE
9 APPROPRIATE TO IDENTIFY THAT.

11:22AM

10 THE COURT: IT SEEMS TO ME, YOU HAVE MADE THAT
11 ARGUMENT, AND IT'S THE SAME THING I'M SAYING. THE JURY
12 IS GOING TO DECIDE WHO THEY WANT TO BELIEVE, AND FIGURE
13 OUT WHAT THE MOTIVATING FACTOR WAS.

11:23AM

14 MR. HELM: THANK YOU, YOUR HONOR. WE'LL LIVE
15 WITH THAT.

11:23AM

16 THE COURT: 36. I THINK IT'S ONLY A PARTIAL
17 REFERENCE TO THE CASE LAW THAT YOU SUGGEST SUPPORTS IT.
18 AND I THINK IT'S COVERED BY THE CASI INSTRUCTIONS AND
19 THE OTHER ONES THAT WE ARE SUPPOSED TO GIVE. SO MY
20 INCLINATION WOULD BE TO SUSTAIN THAT ONE, ALSO.

11:23AM

21 AND I THOUGHT WE HAD ANOTHER INSTRUCTION
22 THAT WE'D GONE OVER EARLIER, ABOUT ADDRESSING STEPS
23 PREPARATORY TO COMMENCEMENT OF A NEW BUSINESS OR --

24 MR. HELM: WE DID, ON THE FIDUCIARY DUTY
25 CLAIM, YOUR HONOR.

11:24AM

26 THE REASON THAT WE PUT IT HERE WAS -- IT
27 WAS TALKING ABOUT A DIFFERENT CLAIM, AND WE JUST WANTED
28 TO -- AGAIN, WE'RE TRYING TO PUT OURSELVES IN THE

1 JURY'S MIND, IN TRYING TO SORT THROUGH ALL THIS STUFF.
2 AND WE JUST THOUGHT IT WAS IMPORTANT TO MAKE CLEAR THAT
3 THE INTERFERENCE WASN'T BY VIRTUE OF STARTING THEIR OWN
4 BUSINESS; IT WAS THE STATEMENTS THAT WERE MADE.

5 SO AGAIN, WE'RE SIMPLY TRYING TO FOCUS 11:24AM
6 THE JURY ON WHAT THE CLAIM IS. WE THOUGHT IT WOULD BE
7 HELPFUL. IF YOUR HONOR THINKS IT'S TOO MUCH, WE CAN
8 LIVE WITHOUT IT. WE HONESTLY DID THINK IT WOULD BE
9 HELPFUL TO REPEAT IT IN THE CONTEXT OF THE INTERFERENCE
10 CLAIM. 11:24AM

11 THE COURT: I'LL SUSTAIN THE OBJECTION.

12 NUMBER 37. I'LL SUSTAIN THAT ONE, TOO.

13 I'M NOT EVEN SURE THAT ONE IS SUPPORTED
14 BY THE EVIDENCE IN THE STATE OF THE RECORD AS WE HAVE
15 IT TODAY. 11:25AM

16 MR. HELM: YOUR HONOR, MAY I BE HEARD ON THAT?

17 THE COURT: YEAH.

18 MR. HELM: THERE CERTAINLY ARE -- I'M NOT SURE
19 WHAT YOUR HONOR'S COMMENTS ARE ON THE STATE OF THE
20 RECORD. THERE WERE, ON STATEMENTS MADE ABOUT THE 11:25AM
21 RELATIVE ABILITIES OF MET WEST AND HIS TEAM, WE THINK
22 THAT THEY WERE SUBSTANTIALLY TRUE --

23 THE COURT: THERE MAY BE.

24 BUT WHAT ABOUT THE STATEMENTS ABOUT
25 MANAGEMENT IS FROZEN? THERE IS NO MANAGEMENT OF THE 11:25AM
26 FUNDS AT THIS POINT, AND THAT WAS IN CONTRADICTION OF
27 THE EXPRESS TERMS OF ITS CONTRACTS.

28 MR. HELM: IF THAT WERE THE ONLY STATEMENT

1 THAT WAS ALLEGED, THEN WE COULD ARGUE THAT. BUT THAT
2 ISN'T -- THERE'S BEEN A WHOLE RANGE OF STATEMENTS THAT
3 HAVE BEEN ALLEGED. AND THE -- IT IS A DEFENSE UNDER
4 THESE CASES THAT YOU CANNOT BE HELD LIABLE FOR
5 INTERFERENCE FOR MAKING SUBSTANTIALLY TRUE STATEMENTS.

11:26AM

6 AND SO WE -- THE JURY SHOULD BE TOLD
7 THAT, SO WE CAN MAKE ARGUMENTS WITH RESPECT TO THOSE
8 STATEMENTS THAT ARE ALLEGED THAT WE THINK COULD BE
9 PROVEN TO BE SUBSTANTIALLY TRUE.

10 AND IF THEY ARE NOT SUBSTANTIALLY TRUE,
11 THAT'S FINE, THEN THIS DOESN'T APPLY. BUT WE NEED TO
12 BE GIVEN THE LEGAL PRINCIPLE FROM WHICH TO ARGUE THAT.
13 THIS IS AN IMPORTANT INSTRUCTION FOR US.

11:26AM

14 THE COURT: WELL, I'M NOT SUGGESTING,
15 NECESSARILY, THAT YOU CAN'T ARGUE IT. YOU CAN ARGUE A
16 LOT OF THINGS AROUND THESE INSTRUCTIONS, BUT THE
17 GENERAL STATEMENTS OF THE LAW ARE WHAT GOVERN. AND YOU
18 WANT SPECIFIC STATEMENTS THAT YOU CAN PUT UP ON THE
19 BOARD WHILE YOU ARE MAKING THE ARGUMENT.

11:26AM

20 MR. HELM: YOUR HONOR, THIS IS -- THESE
21 PROTECTIONS APPLY FROM THE FIRST AMENDMENT. AND WE
22 THINK IT IS NOT CLEAR, FROM THE CASI, THAT THIS WOULD
23 BE THE CASE.

11:26AM

24 AND IT IS AN IMPORTANT PRINCIPLE THAT
25 IS -- IT PROVIDES AN IMPORTANT OVERLAY ON WHAT CAN AND
26 CANNOT SUPPORT LIABILITY. AND WE THINK IT'S AN
27 IMPORTANT INSTRUCTION THAT SHOULD BE GIVEN.

11:26AM

28 THE COURT: MR. EMANUEL?

1 MR. EMANUEL: WELL, FIRST, WE HAVEN'T EVEN
2 HEARD THE OTHER SIDE'S CASE IN CHIEF YET, SO I THINK
3 IT'S JUST PREMATURE.

4 SECONDLY, THE -- THE COURT IS RIGHT. SO
5 FAR, WE HAVE HEARD FALSE STATEMENTS, TO WHICH THIS
6 WOULD NOT APPLY. 11:27AM

7 AND MORE THAN THAT, EVEN TO THE EXTENT
8 THAT THEY -- IT KIND OF, THIS ARGUMENT OVERLAPS INTO
9 THE NEXT ONE. I JUST STATED OPINION, AND I'M KIND OF
10 FORESHADOWING THE NEXT INSTRUCTION, WHICH BASICALLY
11 SAYS -- THE FIRST AMENDMENT SAYS, THERE'S NO SUCH THING
12 AS A FALSE STATEMENT OF AN OPINION. 11:27AM

13 BUT EVEN OPINIONS SOMETIMES IMPLY FALSE
14 FACTS. SO IT -- WE REALLY NEED TO HEAR FIRST, WHAT
15 DEFENDANT IS GOING TO SAY THAT THEIR POSITION IS
16 REGARDING THESE STATEMENTS. 11:27AM

17 AND SECONDLY, THERE IS GOING ON HERE
18 SOMETHING THAT IS NEITHER FACT NOR OPINION. YOU ARE
19 CALLING UP PEOPLE BY AN ILL-GOTTEN LIST, AND SAYING
20 ORGANIZE AND BREACH YOUR CONTRACTS. DON'T PERFORM,
21 INSIST ON DEMANDS, WHATEVER -- YOUR HONOR IS MORE
22 FAMILIAR THAN I AM. 11:28AM

23 THE COURT: THEY ARE NOT CALLING UP PEOPLE.
24 THEY HAD A CONFERENCE CALL, AND PEOPLE CALLED IN.

25 MR. EMANUEL: I'M SORRY. I MISSPOKE. 11:28AM

26 THE COURT: AND THEY HAPPEN TO HAVE PUT THE
27 INVITATIONS OUT, USING THE LIST THAT IS DISPUTED.

28 MR. EMANUEL: AND THEN, HAVING GOTTEN THE

1 INTERESTED PARTIES ON THE LINE, THEN THEY USE IT FOR
2 THEIR AGENDA TO -- YOU SHOULD BREACH YOUR CONTRACT, YOU
3 SHOULD INSIST ON -- WHAT YOUR HONOR IS MORE FAMILIAR
4 WITH, THE EVIDENCE.

5 BUT ESSENTIALLY, IT'S SORT OF A -- THE
6 FIRST AMENDMENT DOESN'T PROTECT ALL SPEECH. IT DOESN'T
7 PROTECT ILLEGAL ACTIVITY. SO THAT TO THE EXTENT WHAT
8 THEY ARE SAYING IS, WHEN I SPEAK TO THEM, AND I AM
9 URGING ILLEGAL ACTION, BREACHING CONTRACT, WE'RE NOT
10 EVEN IN THE FIRST AMENDMENT.

11 MR. HELM: YOUR HONOR, IT IS A FAIR GROUND FOR
12 ARGUMENT THAT THEY CAN MAKE THAT SOME OF THE STATEMENTS
13 WERE NOT SUBSTANTIALLY TRUE OR FAIR STATEMENTS OF
14 OPINION. THEY CAN MAKE THAT ARGUMENT.

15 BUT THE JURY MUST BE TOLD WHAT THE LAW
16 IS. AND THE LAW IS CLEAR THAT YOU CANNOT BE HELD
17 LIABLE FOR INTERFERENCE FOR MAKING A STATEMENT THAT
18 IS -- A STATEMENT OF FACT THAT IS SUBSTANTIALLY TRUE OR
19 BY EXPRESSING AN OPINION.

20 NOW, THEY ARE GOING TO ARGUE THERE ARE
21 SOME THINGS THAT DON'T FALL INTO THOSE CATEGORIES.
22 THAT'S FINE. THAT'S WHY WE HAVE A TRIAL. WE'LL DECIDE
23 WHICH COMES ON ONE SIDE OF THE LINE AND WHICH COMES ON
24 THE OTHER.

25 BUT WE THINK IT'S IMPERATIVE THAT THE
26 JURY BE TOLD THIS, WHICH IS THE LAW, BOTH ON 37, ABOUT
27 BY MAKING STATEMENTS THAT WERE SUBSTANTIALLY TRUE. AND
28 ON 38, BY MAKING STATEMENTS OF OPINION. THE SAVAGE

1 CASE SUPPORTS IT, THE GLADDY VERSUS NEW YORK TIMES CASE
2 SUPPORTS IT. WE HAVE THE CITES HERE.

3 THE COURT: THEY ARE ALL HERE.

4 I'M GOING TO DEFER, PENDING FURTHER
5 CONSIDERATION OF THE EVIDENCE OFFERED BY THE DEFENDANT.

11:30AM

6 AND I WOULD SAY THAT 37 AND 38 SHOULD BE
7 COMBINED, TO THE EXTENT THAT IT'S APPROPRIATE. SO YOU
8 CAN WORK ON COMING UP WITH SOMETHING ON A COMBINED
9 BASIS THAT MAKES THE STATEMENT OF LAW THAT MR. HELM IS
10 ARGUING.

11:30AM

11 BUT I'M GOING TO WAIT AND SEE, BECAUSE
12 AT THIS POINT, I'M NOT SURE THAT 37 WOULD FIT IN THE
13 MIX. AND I WOULD RATHER HAVE A MUCH MORE GENERIC
14 STATEMENT TO THE JURY, AND LET THEM DECIDE WHAT'S TRUE
15 AND WHAT'S NOT TRUE, AND WHETHER THERE ARE DEFENSES OF
16 THAT NATURE THAT ARE APPROPRIATE HERE.

11:30AM

17 DEFENDANT'S SPECIAL JURY INSTRUCTION
18 NUMBER 47.

19 MR. HELM: I'M SORRY, ARE YOU REFERRING TO 38?

20 MR. EMANUEL: 47.

11:31AM

21 MR. HELM: YOUR HONOR, IF WE'RE AT A BREAKING
22 POINT COULD WE TAKE A --

23 MR. BRIAN: YOUR HONOR, I HAVE TO RAISE AN
24 ISSUE BEFORE I HAVE TO LEAVE AT NOON. I SPOKE TO
25 MR. MADISON, AND HE IS OF THE GENERATION THAT HAS
26 MULTI-DAY WEDDINGS, SO HE'S -- I ACTUALLY THOUGHT --

11:31AM

27 MR. QUINN: HE HAS THE MEANS TO HAVE A
28 MULTI-DAY -- WHEN WE SPOKE YESTERDAY BY E-MAIL, I

1 THOUGHT THAT WEDNESDAY AFTERNOON WOULD WORK PERFECTLY
2 FOR HIM, BECAUSE I THINK HE DID WANT TO PUT OFF THE
3 ARGUMENT WITH RESPECT TO THE SOCIETE GENERALE
4 DOCUMENTS; BUT IT TURNS OUT THAT WEDNESDAY AFTERNOON
5 DOES NOT WORK.

11:31AM

6 THE COURT: IT STARTS WEDNESDAY, THURSDAY,
7 FRIDAY, SATURDAY.

8 MR. BRIAN: THAT WAS MY POINT.

9 THE COURT: BUT HE HAS A NICE TIE ON.

10 MR. MADISON: THANK YOU, YOUR HONOR.

11:31AM

11 MR. BRIAN: SO WHAT I WAS GOING TO SUGGEST,
12 THE ISSUES THAT I THINK NEEDED TO BE TAKEN UP WITH
13 MR. MADISON, WERE THE SOCIETE GENERALE DOCUMENTS, WHICH
14 FRANKLY DON'T HAVE TO BE TAKEN UP UNTIL WE GET TO THE
15 POINT OF PLAYING THE VIDEOTAPE, WHICH THE EARLIEST
16 WOULD BE, I THINK, NEXT WEDNESDAY OR THURSDAY.

11:32AM

17 SO I WAS GOING TO SUGGEST THAT WE ARGUE
18 THAT NEXT MONDAY, WHEN MR. MADISON IS BACK, IF THAT
19 WORKS FOR YOUR HONOR.

20 WITH RESPECT TO CAMPOS, I'M NOT GOING TO
21 ARGUE THAT. MR. WEINGART IS GOING TO ARGUE THAT. AND
22 IF IT WORKS FOR THE COURT AND MR. MADISON, THAT COULD
23 BE ARGUED TOMORROW OR THIS AFTERNOON.

11:32AM

24 AND WITH RESPECT TO THE GREG WARD
25 DOCUMENTS, WHICH I THINK IS THE THIRD ISSUE THAT
26 MR. MADISON HAS, I WAS GOING SUGGEST THAT WE'RE GOING
27 TO ARGUE THAT EARLY WEDNESDAY MORNING, POSSIBLY AT 8:00
28 OR 8:15, PRIOR TO THE TESTIMONY, IF THAT WORKS FOR THE

11:32AM

1 COURT AND FOR MR. MADISON.

2 MR. MADISON: I AGREE AND I APPRECIATE THE
3 COURTESY.

4 THE COURT: THAT'S FINE.

5 MR. MADISON: AND MY WEDDING IS IN NORTHERN
6 CALIFORNIA, AND I'M EXPECTED TO BE AT THE REHEARSAL.
7 CALL ME CRAZY.

11:32AM

8 THE COURT: CAN'T YOU SEND A STAND-IN?

9 THAT'S FINE. WE'LL WORK IT OUT.

10 AND I'M SURE YOU WILL HAVE A DELIGHTFUL
11 WEEKEND, AND I EXPECT TO HEAR FIRST THING MONDAY
12 MORNING.

11:33AM

13 MR. MADISON: WELL, YOUR HONOR, THE ONLY OTHER
14 ISSUE ON MR. CAMPOS IS, IT WOULD BE HELPFUL TO KNOW
15 BEFORE -- HE LIVES AND PRACTICES IN WASHINGTON DC.

11:33AM

16 WE'RE CONFIDENT, OF COURSE, THAT THE
17 COURT'S RULING WILL STAND, AND WE'LL BE ABLE TO PRESENT
18 SOME TESTIMONY.

19 BUT IF THAT WERE TO CHANGE, IT WOULD BE
20 BETTER TO KNOW, AND NOT HAVE TO BRING HIM OUT HERE.

11:33AM

21 THE COURT: WHEN WERE YOU PLANNING TO BRING
22 HIM OUT?

23 MR. MADISON: WELL, WE'RE STILL TALKING ABOUT
24 THAT, ALSO. THERE'S A CHANCE THAT HE WOULD COME OUT
25 WEDNESDAY AFTERNOON, AND WE'D TRY TO PRESENT HIM
26 THURSDAY. AND MR. QUINN WOULD EXAMINE HIM, INSTEAD OF
27 MYSELF.

11:33AM

28 BUT AGAIN, THIS KIND OF RELATES --

1 THE COURT: I HAVE TO LOOK BACK. THERE'S BEEN
2 NO NEW BRIEFING ON THE CAMPOS ISSUE. I HAVE TO GO BACK
3 AND LOOK AT THE NOTES FROM THE OLDER DEAL.

4 CAN ANYBODY TELL ME WHAT MOTION THIS
5 WAS?

11:34AM

6 MR. BRIAN: IT WAS THE SUBJECT, YOUR HONOR, OF
7 YOUR RULING ON JULY 4TH. AND AT THAT TIME, YOUR
8 TENTATIVE WAS TO EXCLUDE IT.

9 THEN THERE WAS SUBSEQUENT BRIEFING.

10 AND THEN YOU MODIFIED THE RULING, IN
11 LIGHT OF THIS -- I MISPRONOUNCED THE CASE, THE ANTOWER
12 (PHONETIC) CASE, IN WHICH YOU SAID, I BELIEVE -- I'M
13 PARAPHRASING -- THAT YOU WOULD CONSIDER PERMITTING
14 QUESTIONS THROUGH HYPOTHETICAL QUESTIONS.

11:34AM

15 WE DID NOT VIEW THAT AS A DEFINITIVE
16 RULING. WE UNDERSTAND MR. MADISON --

11:34AM

17 THE COURT: WHAT WAS DATE OF THE ORIGINAL ONE?

18 MR. BRIAN: I THINK THE ORIGINAL TENTATIVE WAS
19 JULY 4TH.

20 I THINK YOU ISSUED A LONG TENTATIVE, AND
21 THERE WAS SUBSEQUENT BRIEFING ON THE ISSUES.

11:34AM

22 AND I DON'T REMEMBER THE DATE OF THE
23 ORDER OR THE NUMBER OF THE MOTION IN LIMINE.

24 THE COURT: BUT THAT WAS --

25 OKAY. JULY 4TH CAME OUT BEFORE OUR
26 CONFERENCE ON THE 5TH, WHEN WE WENT OVER ALL THESE
27 MOTIONS IN LIMINE.

11:34AM

28 MR. BRIAN: RIGHT.

1 THE COURT: AND THEN WE SET CERTAIN ONES FOR
2 BRIEFING.

3 MR. BRIAN: AND MR. MADISON'S COLLEAGUE
4 BELIEVES IT WAS MOTION -- OUR MOTION? NUMBER 2 -- 2A?

5 THE COURT: DEFENDANT'S 2A? 11:35AM

6 MR. BRIAN: DEFENDANT'S 2A.

7 THE COURT: ALL RIGHT. HOLD ON. IT WAS
8 THAT'S RIGHT. OKAY.

9 AND I SAID AT THE INITIAL CONFERENCE,
10 MOTION IS PREMATURE, BECAUSE I DON'T HAVE THE PROPER
11 TESTIMONY BEFORE ME. 11:35AM

12 I'M GENERALLY SATISFIED WITH THE
13 INSTRUCTIONS. AND THE BREACH OF FIDUCIARY DUTY WILL BE
14 SUFFICIENT FOR THE JURY TO DETERMINE, IF MR. GUNDLACH'S
15 CONDUCT RESULTED IN A BREACH OF HIS DUTIES. 11:35AM

16 THE COURT VIEWS, AS A QUESTION OF FACT,
17 AND QUESTIONS WHETHER IT IS BEYOND THE COMMON
18 UNDERSTANDING OF THE JURY.

19 AND WHAT WAS THE NEXT RULING THAT I MADE
20 ON THIS SAME SUBJECT? CAN YOU GIVE ME A ROUGH DATE? 11:35AM

21 MR. BRIAN: I DON'T REMEMBER THE DATE.

22 MR. MADISON: IT MAY HAVE BEEN JULY 11TH, YOUR
23 HONOR.

24 MR. BRIAN: I THINK IT'S A BIT LATER THAN
25 THAT. 11:35AM

26 MR. MADISON: MAYBE IT'S LATER. I THINK THAT
27 WAS THE BRIEFING.

28 MR. SURPRENANT: YOUR HONOR, I BELIEVE IT'S

1 JULY 21ST, PAGES 5 AND 6. I'M LOOKING AT IT NOW.

2 THE COURT: I HAVE RULINGS ON MOTIONS IN
3 LIMINE ON 7/24, I DON'T SHOW THEM ON 7/21. YOU SAID
4 21ST?

5 MR. SURPRENANT: IT SAYS 7/21/11. 11:36AM

6 THE COURT: OH, I'VE GOT IT.

7 THOSE ARE JUST NOTES ON A PRETRIAL
8 CONFERENCE.

9 HOLD ON A MINUTE.

10 MR. BRIAN: I FOUND IT, IF YOU WANT ME TO WALK 11:36AM
11 IT UP, YOUR HONOR.

12 THE COURT: THAT WOULD BE GREAT.

13 MR. BRIAN: I'M SHOWING HIM MINUTES DATED
14 JULY 21ST.

15 THE COURT: THIS IS THE SAME THING I WAS 11:37AM
16 SAYING THIS MORNING WHEN WE WERE TALKING IN -- THE USE
17 OF HYPOTHETICALS IS CONDITIONED ON AND SUBJECT TO THERE
18 BEING SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE
19 HYPOTHETICAL.

20 AND I GUESS AT THIS POINT, MR. MADISON, 11:37AM
21 WHAT I'D SUGGEST YOU DO IS SUBMIT THE HYPOTHETICALS AND
22 LET US LOOK AT THEM.

23 AND I DON'T WANT TO BRING MR. CAMPOS OUT
24 HERE FOR NOTHING, BUT I THINK IT IS A STRETCH TO HAVE
25 HIM TESTIFYING ABOUT WHAT CONSTITUTES A BREACH OF 11:38AM
26 FIDUCIARY DUTY. AND I'M SURE I LOOKED AT ANTOWER
27 VERSUS PHOTO DYNAMICS AT OR AROUND THE 21ST OF JULY,
28 BUT I DON'T REMEMBER EVERYTHING THAT'S IN IT. AND I'LL

1 LOOK AT IT AGAIN, IF YOU WANT; BUT YOU NEED TO PUT THE
2 HYPOTHETICALS ON THE TABLE IN ORDER FOR ME TO DETERMINE
3 WHETHER I'M GOING TO LET HIM TESTIFY OR NOT.

4 MR. MADISON: WE CAN DEFINITELY DO THAT. BUT
5 THE TENOR OF THE LAST ORDER WAS CONSISTENT WITH
6 ANTOWER. WE WOULD NOT BE ABLE TO PRESENT TESTIMONY
7 ABOUT WHAT THE LAW WAS; BUT INSTEAD, WE WOULD BE ABLE
8 TO PRESENT A HYPOTHETICAL. AND THIS IS ON ALL FOURS
9 WITH THE ANTOWER CASE. PRESENT A HYPOTHETICAL BASED,
10 OBVIOUSLY, ON EVIDENCE THAT'S IN THE CASE, AS TO
11 WHETHER THOSE FACTS, IF EXTANT, WOULD, IN THE EXPERT'S
12 OPINION, CONSTITUTE A BREACH OF FIDUCIARY DUTY.

11:38AM

11:38AM

11:39AM

13 AND THAT WAS THE -- THE SCOPE OF WHAT
14 THE COURT WOULD ALLOW MR. -- AND THAT IS THE LAW UNDER
15 ANTOWER.

11:39AM

16 THE COURT: THAT'S WHAT I'VE SAID.

11:39AM

11:39AM

11:39AM

17 I'M STILL HAVING SOME REAL RESERVATIONS,
18 I GUESS, IN LOOKING AT IT AGAIN, ABOUT THE WHOLE
19 CONCEPT THAT MR. CAMPOS OR ANY OTHER EXPERT SHOULD
20 USURP THE FUNDAMENTAL RESPONSIBILITY OF THE JURY TO
21 DETERMINE, WAS THERE OR WASN'T THERE A FIDUCIARY -- A
22 BREACH OF FIDUCIARY DUTY. I DON'T THINK THE FACTS IN
23 THIS CASE ARE THAT COMPLICATED.

24 NOW, YOU KNOW, I -- AND NOTWITHSTANDING
25 ALL THE TESTIMONY ABOUT MORTGAGE-BACKED SECURITIES AND
26 THE DERIVATIVES AND THE BUSINESS THEY ARE IN, THE
27 FUNDAMENTAL ISSUES ARE PRETTY SIMPLE.

28 WAS TAKING INFORMATION OR MEETING WITH

1 OTHER EMPLOYERS OR PLANNING TO LEAVE, OR ANY NUMBER --
2 TELLING UNDERLINGS TO DOWNLOAD MATERIALS, A BREACH OF
3 FIDUCIARY DUTY? I DON'T THINK THAT'S THAT COMPLICATED.
4 AND I DON'T THINK IT TAKES MR. CAMPOS OR ANYONE ELSE
5 FROM WASHINGTON DC OR NEW YORK TO TELL US WHETHER IT IS
6 OR ISN'T.

11:40AM

7 MR. MADISON: WELL, WE BRIEFED A LOT OF THIS,
8 I BELIEVE, PREVIOUSLY. AND THE ANTOWER CASE DISCUSSES
9 THAT EXACT SORT OF IDEA.

10 AND HERE, WHERE YOU HAVE MR. GUNDLACH,
11 WHO'S AN OFFICER, DIRECTOR AND CHIEF INVESTMENT
12 OFFICER, AND HE KIND OF WINS THE TRIPLE CROWN FOR
13 FIDUCIARIES. HE'S A MEMBER OF THE BOARD. HE'S THE
14 PRESIDENT OF ONE OF THE MOST IMPORTANT CORPORATIONS.
15 AND --

11:40AM

16 THE COURT: THAT'S A GREAT ARGUMENT TO THE
17 JURY. I'VE GOT THE PICTURE.

18 MR. BRIAN: YOUR HONOR, IF I MIGHT JUST --

19 MR. MADISON: IF I CAN FINISH.

20 THE COURT: LET HIM FINISH.

11:40AM

21 MR. MADISON: MY POINT IS, AND WHERE THE
22 DEFENSE NOW CLEVERLY IS, WELL, YEAH, WE DID ALL THOSE
23 THINGS. AND THEY SURE LOOK LIKE A BREACH OF FIDUCIARY
24 DUTY, BUT WE WERE GOING TO TELL YOU BEFORE WE ACTUALLY
25 PULLED THE PLUG.

11:40AM

26 IT GETS INTO ISSUES OF DISCLOSURE. AND
27 SOMEONE UNIQUELY IN MR. GUNDLACH'S POSITION, WHEN
28 THERE'S AN OBLIGATION TO DISCLOSE, AND WHETHER IT'S

1 REASONABLE TO TAKE THE POSITION THAT HE'S NOW TAKING,
2 THAT HE DIDN'T BREACH HIS FIDUCIARY DUTY, BECAUSE HE
3 PLANNED TO TELL THEM ALL ALONG, THAT WAS ALL PART OF A
4 BIG SURPRISE.

5 AND WHAT YOUR HONOR IS REALLY SAYING IS, 11:41AM
6 THIS IS THE ULTIMATE ISSUE IN THE CASE, AT LEAST AS TO
7 THAT CLAIM. AND IT IS. AND CALIFORNIA LAW BY STATUTE,
8 AND ANTOWER REINFORCED THIS, ONCE AGAIN, IS -- EXPERT
9 TESTIMONY IS PERMITTED ON THE ULTIMATE ISSUE.

10 SO I DON'T THINK WE HAVE A -- JURORS WHO 11:41AM
11 ARE FAMILIAR WITH THE CONCEPTS OF BOARDS OF DIRECTORS,
12 PRESIDENTS OF CORPORATIONS AND CHIEF INVESTMENT
13 OFFICERS. AND CERTAINLY THEN, WHEN YOU INTRODUCE THIS
14 TEMPORAL ELEMENT OF ALL THESE THINGS GOING TO, AND THE
15 CLAIM BY THE DEFENDANT THAT HE IS -- WAS GOING TO 11:41AM
16 DISCLOSE AT SOME POINT, WE THINK IT'S WAY ABOVE THE
17 STANDARD FOR EXPERT TESTIMONY.

18 AND REMEMBER, THE DEFENSE, AFTER SAYING
19 THAT THIS WASN'T THE OPINION OF AN EXPERT, THEY WENT
20 OUT AND GOT A GREAT EXPERT TO REBUT MR. CAMPOS, A 11:42AM
21 PROFESSOR OF LAW, UP AT STANFORD, WHO PERFORMED
22 OPINIONS ON ALL THE THINGS THAT MR. CAMPOS DID.

23 MR. BRIAN: MAY I RESPOND NOW, YOUR HONOR?

24 THE COURT: SURE.

25 MR. BRIAN: I RAISED THIS ISSUE RIGHT NOW 11:42AM
26 TO -- BECAUSE AN ACCOMMODATION TO MR. MADISON'S
27 SCHEDULE, NOT TO ARGUE IT, MR. WEINGART IS ACTUALLY
28 GOING TO ARGUE THIS ISSUE.

1 BUT I AGREE WITH YOUR HONOR. IN FACT,
2 YESTERDAY, I REQUESTED MR. MADISON TO PROVIDE US WITH A
3 PROFFER OF MR. CAMPOS' TESTIMONY.

4 I THINK YOUR HONOR'S REQUEST THAT IT BE
5 DONE IN THE FORM OF THE HYPOTHETICAL QUESTIONS IS
6 EXACTLY RIGHT, BECAUSE WE HAVE NO IDEA RIGHT NOW WHAT
7 MR. CAMPOS IS GOING TO SAY.

11:42AM

8 YOUR HONOR WAS OBVIOUSLY TROUBLED BY IT.

9 I DISAGREE WITH MR. MADISON'S
10 INTERPRETATION OF YOUR EARLIER RULINGS. YOU INITIALLY
11 DECIDED TO EXCLUDE IT ALL TOGETHER.

11:42AM

12 YOU THEN SAID YOU WOULD CONSIDER IT. I
13 READ THAT. AND I THINK IT'S THE ONLY FAIR READING,
14 THAT WANTED TO SEE HOW THE EVIDENCE CAME IN IN THE
15 TRIAL, TO DECIDE WHETHER OR NOT IT WOULD OR WOULD NOT
16 BE APPROPRIATE TO ALLOW AN EXPERT WHO'S A LAWYER TO
17 TESTIFY REALLY ON ISSUES THAT ARE FLIRTING VERY CLOSE
18 TO WHAT IS OR IS NOT PERMISSIBLE TESTIMONY.

11:43AM

19 THE COURT: I'VE GOT IT.

20 WHEN CAN YOU PUT THE ROUGH DRAFT OF YOUR
21 HYPOTHETICALS ON THE TABLE?

11:43AM

22 MR. MADISON: WE COULD FILE BY TOMORROW
23 MORNING.

24 THE COURT: WE ARE GOING TO TRY AND HAVE IT
25 ARGUED TOMORROW MORNING. CAN YOU GET IT TO ME TONIGHT?

11:43AM

26 MR. MADISON: BY THIS AFTERNOON, ABSOLUTELY.

27 THE COURT: I'LL LOOK AT THEM EARLY IN THE
28 MORNING.

1 COME IN AT 8:30 OR 9:00. WHAT TIME DO
2 YOU WANT TO COME IN?

3 MR. BRIAN: MR. WEINGART GETS UP EARLY.

4 MR. MADISON: I HAVE ANOTHER APPEARANCE
5 TOMORROW MORNING AT 9 O'CLOCK, BUT IT'S A -- IT SHOULD
6 BE VERY SHORT. IF WE COULD DO --

11:43AM

7 THE COURT: 10 O'CLOCK? 10:00?

8 MR. MADISON: THAT WOULD BE GREAT, YOUR HONOR.

9 MR. BRIAN: THAT'S FINE.

10 MR. MADISON: THE ONLY OTHER THING, TOO, YOUR
11 HONOR, I'M HAPPY TO BRING MR. CAMPOS IN AND HAVE HIM
12 TAKE THE STAND IF YOU HAVE ANY QUESTIONS IN A
13 GATEKEEPER-TYPE HEARING. I DON'T WANT YOUR HONOR TO
14 FEEL LIKE A FACTOR HERE IS, WE CAN AVOID IT ALL
15 TOGETHER.

11:43AM

16 THE COURT: I KNOW COST IS NO OBJECT. AND
17 HE'D BE HAPPY TO FLY OUT AND SPEND THE DAY, AND BILL,
18 AND DO ALL THE THINGS THAT YOU ALL DO.

19 BUT LET ME LOOK AT THE HYPOTHETICALS.
20 WE'LL TALK ABOUT IT TOMORROW MORNING.

11:44AM

21 I WILL GO BACK AND TAKE ANOTHER LOOK AT
22 ANTOWER. I THINK, JUST TO BE HONEST WITH YOU, IT'S A
23 LITTLE BIT OF AN UPHILL BATTLE, BECAUSE MY INITIAL
24 REACTION IS, WE'RE GOING INTO AREAS THAT AREN'T
25 NECESSARY.

11:44AM

26 LET'S LOOK AT THE HYPOTHETICAL AND SEE
27 WHAT IT IS. WE'LL DO IT TOMORROW MORNING AT
28 10 O'CLOCK.

1 MR. BRIAN: OKAY. AND WE'LL DO MR. WARD AT
2 8:00 OR 8:15 WEDNESDAY MORNING, AND THE SOCIETE
3 GENERALE DOCUMENTS MONDAY.

4 THE COURT: YES.

5 MR. BRIAN: AND, YOUR HONOR, WITH THAT, MAY I
6 HAVE PERMISSION TO EXCUSE MY --

7 THE COURT: YOU MAY BE EXCUSED.

8 AND HAVE A NICE TRIP. ALL RIGHT?

9 MR. BRIAN: THANK YOU.

10 MR. KREILKAMP: YOUR HONOR, I HAVE A VERY
11 BRIEF HOUSEKEEPING MATTER. IT WILL TAKE 30 SECONDS.

12 THE COURT: SURE.

13 MR. KREILKAMP: THIS RELATES TO THE CONN
14 NOTES.

15 THE PARTIES HAVE CONFERRED AND AGREED
16 UPON A, IN EFFECT, A REDACTION REPLACING THE QUINN
17 EMANUEL NAME --

18 THE COURT: I SAW THAT REDACTION ON SOMETHING
19 THAT WAS FILED THIS MORNING OR LAST NIGHT.

20 MR. KREILKAMP: WE HAVE A NEW VERSION, WE
21 AGREED TO IT. AND THE PARTIES HAVE STIPULATED TO IT.

22 WE JUST WANT TO PUT IT ON THE RECORD
23 THAT MR. CONN WILL NOT TESTIFY THAT THEY AREN'T HIS
24 NOTES OR THAT THEY'VE BEEN ALTERED IN SOME WAY.

25 THE PARTIES JOIN AND STIPULATE TO THAT.

26 THE COURT: THAT'S TRUE?

27 MR. MADISON: YES, YOUR HONOR.

28 THE COURT: AND MR. CONN IS COMING IN TOMORROW

11:45AM

11:45AM

11:45AM

11:45AM

11:45AM

1 OR PROBABLY WEDNESDAY, OR NOT TILL --

2 MR. MADISON: NO, YOUR HONOR, PROBABLY NOT.

3 THE COURT: ALL RIGHT.

4 MR. BRIAN: NOT JUST PROBABLY NOT.

5 MR. MADISON: WE'VE REPRESENTED, NOT, BASED ON
6 OUR RELIANCE ON MR. BRIAN'S ESTIMATE OF HOW LONG HE'S
7 GOING TO NEED WITH MR. STERN.

11:46AM

8 THE COURT: OKAY. WHY DON'T WE BREAK. WE'VE
9 BEEN GOING QUITE A WHILE.

10 AND DO YOU WANT TO COME BACK AND JUST
11 PICK UP THESE JURY INSTRUCTIONS THIS AFTERNOON, AND
12 KEEP WADING THROUGH THEM? I THINK THAT'S THE BEST
13 THING TO DO.

11:46AM

14 MR. EMANUEL: NO TIME LIKE THE PRESENT, YOUR
15 HONOR.

11:46AM

16 THE COURT: EVERYBODY DOESN'T NEED TO BE HERE.
17 IF YOU ARE HAPPY TO BE HERE, YOU ARE WELCOME TO BE.

18 MR. HELM: 1:30, YOUR HONOR?

19 THE COURT: YEAH.

20 MR. HELM: WE'LL SEE YOU THEN.

11:46AM

21 THE COURT: AND WE'LL TRY TO GET THROUGH ALL
22 OF THEM THIS AFTERNOON, AND AT LEAST KNOW --

23 MR. EMANUEL: IN THE ORIGINAL SET.

24 THE COURT: IN THE ORIGINAL SET.

25 I HAVE NOT LOOKED AT THE ONES YOU GAVE
26 ME AT 8:45 THIS MORNING.

11:46AM

27 MR. EMANUEL: VERY WELL, YOUR HONOR.

28 THANKS, YOUR HONOR.

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MR. HELM: THANK YOU.

(RECESS TAKEN.)

(THE NEXT PAGE NUMBER IS 4351.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 322

HON. CARL J. WEST, JUDGE

TRUST COMPANY OF THE WEST)

PLAINTIFFS,)

VS.)

NO. BC 429385)

JEFFREY GUNDLACH ET AL,)

DEFENDANTS.)

REPORTER'S DAILY TRANSCRIPT OF PROCEEDINGS

AUGUST 22, 2011 P.M. SESSION

APPEARANCES:

FOR PLAINTIFF:

QUINN EMANUEL URQUHART & SULLIVAN
BY: **ERIC J. EMANUEL, ESQ.**
DOMINIC SURPRENANT, ESQ.
STEVEN MADISON, ESQ.
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FOR DEFENDANT:

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213.683.5113
BRAD.BRIAN@MTO.COM
MARK.HELM@MTO.COM

1 CASE NUMBER: BC 429385
2 CASE NAME: TCW VS. GUNDLACH
3 LOS ANGELES, CALIFORNIA AUGUST 22, 2011
4 DEPARTMENT 322 HON. CARL J. WEST, JUDGE
5 APPEARANCES: (AS NOTED ON TITLE PAGE.)
6 REPORTER: RAQUEL A. RODRIGUEZ, CSR
7 TIME: P.M. SESSION
8
9

10 --0--

01:36PM

11 MR. SURPRENANT: MR. MADISON IS RUNNING A FEW
12 MINUTES LATE. HE WAS GOING TO COVER THE CONSPIRACY
13 INSTRUCTIONS. IF WE CAN SKIP THOSE UNTIL HE GETS HERE.

14 THE COURT: IS 47 A CONSPIRACY INSTRUCTION?

15 MR. EMANUEL: YES. WE WERE GOING TO START
16 THOSE. BUT IF WE CAN START WITH 54, WE WOULD
17 APPRECIATE THAT, YOUR HONOR.

01:36PM

18 THE COURT: NO PROBLEM.

19 I DON'T REALLY THINK THE UNCLEAN HANDS DEFENSE
20 IS SOMETHING THAT THE JURY NEEDS TO BE INSTRUCTED ON,
21 QUITE FRANKLY.

01:37PM

22 MR. HELM: MAY I ASK THE COURT'S THINKING ON
23 THAT?

24 THE COURT: WELL, AS I SEE IT, IT'S AN
25 EQUITABLE DEFENSE THAT THE COURT WILL RULE ON. AT SOME
26 POINT IN TIME.

01:37PM

27 AND I DON'T SEE WHERE -- I MEAN, WHAT
28 QUESTION ARE WE GOING TO ASK THE JURY IN YOUR VERDICT

1 FORM THAT THIS GOES TO?

2 MR. HELM: WELL --

3 THE COURT: I DON'T THINK THE JURY CAN DENY --
4 NECESSARILY DENY, RELIEF OR EVEN MAKE A FINDING ON --

5 MS. STEIN: YOUR HONOR, UNDER UNILOGIC CASE,
6 THE COURTS HAVE HELD THAT IF THE EVIDENCE OVERLAPS WITH
7 OTHER EVIDENCE, LEGAL CLAIMS IT CAN GO TO THE JURY.

01:38PM

8 HERE, WE WOULD BE ARGUING THAT TCW'S
9 CONDUCT, SECRETLY PLANNING TO TERMINATE MR. GUNDLACH,
10 AND MR. GUNDLACH HAVING HEARD RUMORS THAT HE WAS GOING
11 TO BE TERMINATED, LED HIM TO PLAN TO COMPETE.

01:38PM

12 AND THE PLANNING TO COMPETE IS ONE OF
13 THE BASES FOR THEIR BREACH OF FIDUCIARY CLAIM.

14 SO WE WOULD SUGGEST IF TCW'S CONDUCT IS
15 VERY MUCH AT ISSUE IN THIS CASE IN CONNECTION WITH THAT
16 CLAIM, AND THAT AN UNCLEAR HANDS DEFENSE, THEREFORE,
17 WOULD BE APPROPRIATE.

01:39PM

18 MR. HELM: WE ALSO HAVE THE ARGUMENT, YOUR
19 HONOR, THAT THEY WOULD -- AND THEY DON'T HAVE TO AGREE
20 WITH US ON THESE, BUT THEY WERE PLANNING TO GET RID OF
21 HIM FOR A LONG TIME.

01:39PM

22 THEY WERE ACCEPTING MONEY FROM NEW
23 INVESTORS WITH MR. GUNDLACH, PARTICIPATING IN THAT.

24 THEY WERE INDUCING HIM TO TRY TO
25 CONTINUE TO BRING IN NEW BUSINESS, KNOWING THEY WERE
26 GOING TO BE GETTING RID OF HIM, AND THAT THAT AFFECTS
27 THE EQUITABLE RELATIONS BETWEEN THE PARTIES IN A WAY
28 THAT GIVES RISE TO UNCLEAR HANDS DEFENSE.

01:39PM

1 MR. SURPRENANT: YOUR HONOR, I THINK YOUR
2 HONOR'S INITIAL COMMENTS WERE APPROPRIATE. AND UNLESS
3 YOU WANT MORE, I THINK YOUR HONOR HAS IT --

4 THE COURT: I GUESS I JUST HAVE A RESERVATION
5 ABOUT THE INSTRUCTION AND THE UNCLEAN HANDS DEFENSE ON
6 WHAT ARE BASICALLY CLAIMS AT LAW.

01:41PM

7 WHERE IS THE EQUITABLE CLAIM THAT WE'RE
8 FACING HERE?

9 MR. HELM: UNDER UNILOGIC WE CITED AT THE
10 BEGINNING --

01:41PM

11 THE COURT: I SEE THE CITATION TO IT,
12 UNILOGIC.

13 MS. STEIN: I WAS GOING TO SAY, THERE ARE
14 EQUITABLE DEFENSES TO LEGAL CLAIMS. THIS WOULD BE SUCH
15 A SITUATION AS I MENTIONED.

01:41PM

16 I THINK BREACH OF FIDUCIARY DUTY SAYS IT
17 ALL. TCW SET THIS UP IN SUCH A WAY THAT THEIR CONDUCT
18 GAVE RISE TO CERTAIN CONDUCT FROM MR. GUNDLACH.

19 AND NOW THEY HAVE CHARGED HIM WITH
20 BREACH OF FIDUCIARY FOR THE CONDUCT THAT WAS STIMULATED
21 BY THEIR OWN BEHAVIOR.

01:42PM

22 THE COURT: I DON'T THINK THAT'S NECESSARILY
23 AN UNCLEAN HANDS DEFENSE, QUITE FRANKLY.

24 MS. STEIN: WELL --

25 MR. HELM: YOUR HONOR, LET ME TRY THIS ONE.

01:42PM

26 THE COURT HAS -- JUST TO ADD A LITTLE
27 MORE COLOR TO IT. THE COURT, I BELIEVE, SAW THE CHART
28 THAT WE GAVE DURING MR. GUNDLACH'S PRESENTATION ABOUT

1 HOW THE TOTAL RETURN BOND FUND GREW FROM, I THINK,
2 \$3 BILLION AT THE BEGINNING OF '09 TO \$12 BILLION AT
3 THE END OF '09.

4 SO, FROM JUNE TO DECEMBER THEY'RE
5 PLOTTING TO GET RID OF THIS GUY. IT WENT UP -- LET'S
6 SEE IF IT WENT UP NINE -- IT WENT UP \$4-1/2 BILLION
7 DURING THE TIME THEY WERE LYING IN WAIT BEFORE THEY
8 FIRED HIM.

01:42PM

9 THEY'RE NOT TELLING HIM THAT THEY'RE
10 FIRING HIM. THEY'RE NOT TELLING THE INVESTORS. HE'S
11 BRINGING IN MONEY BY THE BOATLOAD INTO THIS NEW FUND.

01:43PM

12 HE'S CREATING A NEW FUND, THE PPIP
13 PROGRAM, WHICH THEY ULTIMATELY DIDN'T KEEP -- GET TO
14 KEEP. THE FEDERAL GOVERNMENT NIXED IT.

15 BUT THE EVIDENCE SUGGESTS THEY WERE
16 HOPING THEY COULD DO A LITTLE BAIT AND SWITCH BY
17 BRINGING IN A NEW MANAGER AND KEEPING THAT.

01:43PM

18 SO, IT SEEMS TO US THAT THAT -- THAT
19 SUPPORTS AN UNCLEAR HANDS DEFENSE. THEY GET ALL THESE
20 ASSETS BROUGHT IN, SORT OF UNDER FALSE PRETENSES AND
21 GET RID OF THE GUY, AND THEN IT DROPS BACK DOWN TO
22 WHERE IT WAS.

01:43PM

23 MR. SURPRENANT: YOUR HONOR, THAT SOUNDS LIKE
24 A CLOSING ARGUMENT. THEY'RE FREE TO MAKE IT.

25 I WOULD ALSO POINT OUT IT IS AN
26 EQUITABLE DEFENSE, AND THE JURY IS GOING TO HAVE REALLY
27 VERY LITTLE COMPREHENSION, WHAT IT MEANS TO BE -- THAT
28 TCW'S CONDUCT WAS UNCONSCIONABLE, IN BAD FAITH, OR

01:43PM

1 INEQUITABLE. YOU'D HAVE TO INSTRUCT THEM ON THE
2 MEANING OF ALL THOSE.

3 IT'S JUST NOT A DEFENSE TO THE LEGAL
4 CLAIMS, AS YOUR HONOR HAS SUGGESTED.

5 THE COURT: I'M GOING TO SUSTAIN THE
6 OBJECTION.

01:44PM

7 NUMBER 55. I DON'T THINK YOU CAN MAKE A
8 GENERAL STATEMENT ON WAIVER. I MEAN, YOU CAN'T HAVE AN
9 INADVERTENT WAIVER. IT HAS TO BE A KNOWN, INTELLIGENT,
10 AND IT HAS TO BE AS SPECIFIC CLAIMS.

01:45PM

11 ARE YOU SAYING GENERALLY YOU THINK
12 BECAUSE WHATEVER TCW DID THEY WAIVED ALL CLAIMS IN THIS
13 ACTION?

14 MR. HELM: WELL, THEY MAY HAVE WAIVED CERTAIN
15 CLAIMS, YOUR HONOR.

01:45PM

16 THE COURT: WELL, THEN MAYBE YOU OUGHT TO --
17 IF THE INSTRUCTION'S APPROPRIATE AT ALL, IT OUGHT TO GO
18 TO THE CLAIMS THAT IT'S DIRECTED TO. AND IT DOESN'T
19 SEEM TO DO THAT.

20 MS. STEIN: WE CAN MODIFY IT, YOUR HONOR.

01:46PM

21 THE COURT: I'M NOT SURE. WE BETTER DISCUSS
22 IT. I DON'T WANT TO PUT OFF TO ANOTHER DAY, ANOTHER
23 PROBLEM.

24 WHAT ARE THE CLAIMS THAT ARE WAIVED?

25 MR. HELM: FOR EXAMPLE, YOUR HONOR, THEY SAY
26 THAT MR. GUNDLACH WAS SO SELFISH AND DIFFICULT AND
27 UNREASONABLE THAT HE BREACHED HIS FIDUCIARY DUTIES, AND
28 IT WAS SUCH A DISRUPTIVE FORCE THEY WERE FORCED TO FIRE

01:46PM

1 HIM BECAUSE HE WAS IN BREACH OF HIS FIDUCIARY DUTIES.

2 OUR SUGGESTION IS THAT HE DIDN'T JUST
3 BECOME WHATEVER THE WAY HE WAS THE LAST THREE MONTHS OF
4 HIS TENURE. HE WAS THERE FOR 25 YEARS.

5 THEY WERE PERFECTLY HAPPY TO TOLERATE
6 THE KIND OF BEHAVIOR THAT HE EXHIBITED FOR MANY, MANY
7 YEARS.

01:46PM

8 THE COURT: DO YOU OFFER ANY AUTHORITY FOR AN
9 IMPLIED WAIVER OR --

10 MR. HELM: IT'S NOT IMPLIED, YOUR HONOR. THEY
11 DELIBERATELY ACTED SO INCONSISTENTLY WITH AN INTENT TO
12 ENFORCE THE RIGHT IN QUESTION, THAT A REASONABLE PERSON
13 WOULD BELIEVE THEY'D RELINQUISH THE RIGHT.

01:46PM

14 IT'S AN INTENTIONAL -- THEY
15 INTENTIONALLY TOLERATED HIS CONDUCT FOR YEARS. AND TO
16 THEN SUDDENLY SAY, OH, WE'RE SHOCKED. SUDDENLY NOW
17 SHOCKED THAT WE HAVE A FUND MANAGER WHO ACTS THIS WAY.
18 WE THINK THAT'S A WAIVER.

01:47PM

19 MR. SURPRENANT: YOUR HONOR, AS A MATTER OF
20 EVIDENCE, OBVIOUSLY, DEFENDANTS ARE FREE TO ARGUE THAT.

01:47PM

21 OBVIOUSLY, WE BELIEVE THE EVIDENCE IS
22 THAT THE CONDUCT, MISCONDUCT, WAS ACCELERATING AND
23 BECOMING MORE ERRATIC, AND WE WERE STILL TRYING TO WORK
24 WITH HIM TO GET HIM WITHIN THE FOLD. TESTIMONY FROM
25 MR. STERN LAST WEEK.

01:47PM

26 SO MY ARGUMENT WAS GOING TO BE, THEY
27 HAVE IDENTIFIED NO EVIDENCE THAT WOULD GIVE RISE TO
28 WAIVER. AND I DO BELIEVE THAT IS CORRECT.

1 MR. EMANUEL: YOUR HONOR, ON THE BROADER
2 PICTURE, LET'S SAY FOR THE SAKE OF ARGUMENT MR. HELM IS
3 RIGHT.

4 HE HAD THIS BEHAVIOR WE TOLERATED FOR
5 YEARS. THEY BELIEVE TO GET TO THE CONCLUSION THEN
6 THERE IS NO CLAIM OF BREACH OF FIDUCIARY DUTY, NO
7 MATTER WHAT THE MAN DID.

01:48PM

8 THAT DOESN'T FOLLOW. YOU'VE GOT TO
9 RELINQUISH THE RIGHT. IN OTHER WORDS, THERE'S A
10 KNOWING RELINQUISHMENT OF THE RIGHT TO SEEK DAMAGES FOR
11 BREACH OF FIDUCIARY DUTY.

01:48PM

12 WHATEVER THIS ARGUMENT IS, AS
13 MR. SURPRENANT SAYS, THEY CAN MAKE THAT ARGUMENT, BUT
14 IT DOES NOT GO TO THE RIGHT TO ENFORCE THE CLAIM FOR
15 FIDUCIARY DUTY BREACH.

01:48PM

16 MR. HELM: WE'RE SIMPLY SAYING THAT THERE MAY
17 BE SOME FORMS OF ALLEGED MISCONDUCT THAT THEY'VE WAIVED
18 THE RIGHT TO CHALLENGE. THAT WOULD BE ONE EXAMPLE OF
19 IT.

20 IT'S PART OF THE BREACH OF FIDUCIARY
21 DUTY.

01:48PM

22 THE COURT: WELL --

23 MR. HELM: ALSO, THERE ARE THINGS RELATING,
24 FRANKLY, TO THE USE OF INFORMATION.

25 THEY CLAIM THAT, YOU KNOW, PUTTING
26 INFORMATION ON A THUMB DRIVE AND TAKING IT HOME WAS A
27 TERRIBLE VIOLATION OF THE POLICY.

01:48PM

28 AND WE THINK THERE'S EVIDENCE SHOWING

1 THAT PEOPLE WERE DOING THAT ALL THE TIME. PEOPLE WERE
2 TAKING WORK HOME AND PUTTING IT ON THUMB DRIVES GOING
3 ON.

4 AND SIMPLY SAYING THAT IT WAS TAKEN OUT
5 OF THE BUILDING SHOULDN'T BE SOMETHING THEY COULD
6 ENFORCE.

01:49PM

7 NOW, MIGHT THEY BE ABLE TO SAY THERE WAS
8 OTHER CONDUCT WRONGFUL? SURE, THEY COULD --

9 THE COURT: BUT TO GO TO THE PURPOSE FOR THE
10 DOWNLOADING AND THE PURPOSE FOR TAKING THINGS OUT OF
11 THE BUILDING, AND IN THE BROADER SENSE, I MEAN, YEAH,
12 THERE WERE HUNDREDS OF EMPLOYEES AT TCW.

01:49PM

13 SOME OF THEM WORKED AT HOME AND SOME DID
14 THINGS ON A DAILY BASIS. THAT'S NOT THE CRUX OF THIS
15 LAWSUIT.

01:49PM

16 AND THE EVIDENCE IS FAR DIFFERENT THAN A
17 CASUAL DOWNLOADING SO THAT ONE COULD WORK AT HOME.

18 AND SO I DON'T SEE IT.

19 I'LL SUSTAIN THE OBJECTION, SUBJECT TO
20 DEFENDANTS -- SUBJECT TO THE DEFENDANTS' ABILITY TO
21 MODIFY, TO IDENTIFY SPECIFIC WAIVERS THAT THEY CLAIM,
22 BASED ON THE EVIDENCE OFF OF THE TRIAL.

01:49PM

23 YOU CAN TAKE A CRACK AT IT. CERTAINLY
24 I'M NOT GOING TO GIVE THE BROAD-BRUSH, GENERAL, FORM
25 WAIVER INSTRUCTION, AT LEAST UNLESS SOMETHING CHANGES
26 DRAMATICALLY.

01:50PM

27 BUT, IF IT'S NARROWED DOWN AND THERE'S
28 SOME SPECIFIC CONDUCT THAT WE HAVE EVIDENCE OF, THAT

1 YOU CLAIM IS THE BASIS FOR THE BREACH OF FIDUCIARY DUTY
2 CLAIM, I'LL TAKE A LOOK AT IT.

3 MR. HELM: I UNDERSTAND, YOUR HONOR.

4 MS. STEIN: THANK YOU, YOUR HONOR.

5 THE COURT: 55A. WAIT A MINUTE. THAT WAS
6 MBF -- 1F 20. I THOUGHT I HAD IT DOWN AS 55. 55 WAS
7 THE LACHES DEFENSE, RIGHT?

01:50PM

8 MR. SURPRENANT: YES, YOUR HONOR.

9 MR. HELM: BEFORE LACHES WE HAVE THIS.

10 THE COURT: SOMETHING'S OUT OF ORDER IN MY
11 BOOK HERE.

01:51PM

12 MR. SURPRENANT: NEXT ONE SHOULD BE
13 DEFENDANTS --

14 THE COURT: THE ONE I -- I WAS JUST TALKING
15 ABOUT I THOUGHT WAS 55. BUT THAT'S NOT WHAT I WAS
16 READING.

01:51PM

17 MR. HELM: WAIVER IS WHAT I WAS TALKING ABOUT.

18 MR. SURPRENANT: NEXT ONE IS ESTOPPEL.

19 THE COURT: RIGHT. WE WERE --

20 MR. HELM: -- WAIVER WAS LABELED MB 300 F.20
21 AND MB 300 F.21. NOT VERY MELLIFLUOUSLY NAMED.

01:51PM

22 MR. SURPRENANT: WE WERE JUST ON THAT.

23 MR. EMANUEL: LET'S JUST WAIT FOR JUDGE.

24 THE COURT: RIGHT. I JUST HAD MY NOTES.

25 300 F.20 WAS THE WAIVER ONE. AND THAT'S
26 WHAT I JUST TOLD YOU WHAT I WAS GOING TO DO.

01:52PM

27 MS. STEIN: CORRECT YOUR HONOR.

28 THE COURT: 300 F 27 IS THE ESTOPPEL.

1 MR. HELM: YES, YOUR HONOR.

2 THE COURT: AND I WOULD SAY BASICALLY THE SAME
3 RULING AS THE WAIVER. YOU CAN'T HAVE A GENERAL
4 ESTOPPEL ARGUMENT, IN MY VIEW, ON THE EVIDENCE THAT
5 I'VE GOT.

01:52PM

6 NOW, WE HAD TALKED ABOUT THAT AT SOME
7 OTHER -- SOME OTHER POINT IN TIME. AND I'VE GOT A NOTE
8 HERE SAYING I SUSTAINED IT.

9 BUT I'LL HAVE THE SAME RULING AS ON THE
10 WAIVER INSTRUCTION.

01:53PM

11 MR. HELM: THANK YOU, YOUR HONOR.

12 THE COURT: NOW, WE GO ON TO 55.

13 HOW DID YOU CHOOSE THE NUMBERING
14 METHODOLOGY?

15 MS. STEIN: THOSE ARE THE MATTHEW BENDER
16 NUMBERS. I USED THEM BECAUSE WE WERE USING THE CACI
17 NUMBERS FOR THE CACI, AND THIS IS FROM THE BENDER BOOK.
18 I WANTED THE COURT TO REALIZE I DIDN'T JUST MAKE THOSE
19 UP.

01:53PM

20 THE COURT: THAT'S OKAY.

01:53PM

21 MR. HELM: IT ALSO MAKES THINGS A LITTLE MORE
22 FUN.

23 THE COURT: IT THREW ME OFF FOR A LITTLE BIT.

24 NOW WE'RE ON 55?

25 MR. EMANUEL: YES, YOUR HONOR.

01:53PM

26 THE COURT: I GUESS JUST A BASE LEVEL, I HAVE
27 A PRETTY HARD TIME WITH THE LACHES DEFENSE WITH A
28 LAWSUIT FILED A MONTH AFTER THE -- 45 DAYS AFTER THE

1 EVENTS THAT GAVE RISE TO THE LAWSUIT.

2 THAT'S JUST, YOU KNOW, CALL ME QUIRKY,
3 BUT IT JUST SEEMS PRETTY -- A STRETCH, MR. HELM. I
4 KNOW YOU HAD THE ARGUMENT THAT -- WITH THE FAILED TO
5 SEEK INJUNCTIVE RELIEF AND SOME OTHER THINGS.

01:54PM

6 MR. HELM: WE ALSO HAVE THE ARGUMENT, YOUR
7 HONOR, BUT THEY WERE AWARE OF THE DOWNLOADING AT SOME
8 EARLIER TIME, WHICH WE MAY BE DISPUTING. AND THEY SAT
9 BACK AND WAITED.

10 YOU KNOW, WE THINK WE CAN ARGUE, GEE,
11 THIS IS -- THIS DOWNLOADING'S OCCURRING, LET'S SEE IF
12 WE CAN WAIT AND MAYBE THEY'LL TRIP THEMSELF UP WITH
13 SOME OTHER THING.

01:54PM

14 AND WE CAN ARGUE THAT WAS DELAY IN
15 ASSERTING A CLAIM. IT WAS NOT REASONABLE OR EXCUSABLE
16 AND RESULTED IN PREJUDICE.

01:55PM

17 THE COURT: ANYBODY WISH TO BE HEARD ON THE
18 PLAINTIFF'S SIDE?

19 MR. SURPRENANT: YES, YOUR HONOR. LET ME GET
20 MY BOOK OUT HERE.

01:55PM

21 THE FACT, THE UNDISPUTED FACT, AND
22 MR. WILSON'S TESTIMONY IS NOT CONTRADICTED, THAT THE
23 DOWNLOADING TO EXTERNAL DEVICES WAS FIRST COMMUNICATED
24 TO TCW ON NOVEMBER 25TH.

25 THREE BUSINESS DAYS LATER, THEY WERE
26 CONFRONTED.

01:55PM

27 THERE IS EVIDENCE OF COPYING, BUT NOT
28 DOWNLOADING.

1 AND I THINK YOUR HONOR'S TENTATIVE
2 REJECTION OF A LACHES DEFENSE, IS APPROPRIATE. AND THE
3 OBJECTION SHOULD BE SUSTAINED.

4 MR. HELM: MR. WILSON'S EVIDENCE IS NOT GOING
5 TO BE THE ONLY EVIDENCE ON THIS. WE'RE PUTTING IN MORE
6 EVIDENCE, PROBABLY ON WEDNESDAY, ABOUT MEMOS MR. STERN
7 SENT TO THE FRENCH, WHICH HAD REFERENCES TO DOWNLOADING
8 AT EARLIER TIMES.

01:56PM

9 THE COURT: AT THIS POINT I'LL SUSTAIN THE
10 OBJECTION. AND I'LL PUT WITHOUT PREJUDICE.

01:56PM

11 AND IF YOU HAVE FURTHER EVIDENCE, I JUST
12 THINK IT'S A STRAIN. THERE'S A STATUTE OF LIMITATIONS
13 ON THIS CLAIM. THE LACHES DEFENSE IS JUST NOT A
14 GENERALLY 30- OR 45-DAY DEFENSE.

15 NOW, I THINK IT'S HARD PRESSED. THERE'S
16 CONFLICTING EVIDENCE, BUT THAT'S JUST AN ARGUMENT. AND
17 I DON'T THINK THAT NECESSARILY GOES TO THE FACT THAT
18 THERE'S CONFLICTING EVIDENCE GIVES RISE TO A LACHES
19 EVIDENCE ON THESE CLAIMS.

01:56PM

20 55 A.

01:57PM

21 MR. HELM: THIS ONE WAS ONE OF THE
22 INTRODUCTORY ONES THAT WE HAD SUBMITTED. ON
23 REFLECTION, WE THINK WE'LL WITHDRAW MR. WILL SONS IN
24 LIGHT OF YOUR COMMENTS, YOUR HONOR. WE'LL WORK WITH
25 TCW TO COME UP WITH SOME AGREEABLE SUBSTANTIAL FACTOR
26 INSTRUCTIONS, AND WE'LL WITHDRAW THIS ONE.

01:57PM

27 THE COURT: ALL RIGHT.

28 56. OTHER THAN THE GRAMMAR, I'M NOT

1 SURE -- MR. WILL SONS, YOUR HONOR, I THINK THIS IS ONE
2 OF THE CAUSATION INSTRUCTIONS THAT WE SHOULD SPEAK
3 TOGETHER AND COME UP WITH SOMETHING ACCEPTABLE.

4 MR. HELM: CAN WE PUT THIS ON HOLD PENDING
5 FURTHER DISCUSSION?

01:58PM

6 THE COURT: I DON'T THINK IT'S AN IMPROPER
7 STATEMENT OF THE LAW, BUT I THINK IT OUGHT TO BE --
8 IT'S EITHER COVERED IN THE CACI'S OR OUGHT TO BE
9 BLENDED IN WITH THE CAUSATION INSTRUCTION THAT YOU'RE
10 WORKING ON.

01:58PM

11 MS. STEIN: THAT'S FINE, YOUR HONOR.

12 THE COURT: ALL RIGHT. 58. ISN'T THERE A
13 STANDARD CACI ON CLEAR AND CONVINCING EVIDENCE?

14 MS. STEIN: THERE IS, YOUR HONOR, AND YOU
15 RULED AGAINST US ON THIS VERY INSTRUCTION LAST TIME.

01:59PM

16 THE COURT: I HAVE NOTES OR HIGHLIGHTS ON THIS
17 INSTRUCTION, WHICH MEANS THE LAST TIME WE TALKED ABOUT
18 IT WE DID SOMETHING WITH IT.

19 I DON'T HAVE NOTES IN THIS PART OF MY
20 NOTES; WE DIDN'T GET TO THIS PART.

01:59PM

21 MS. STEIN: YOU REJECTED THIS IN FAVOR OF THE
22 CACI 201.

23 I'D LIKE TO REITERATE. I THINK THAT
24 CACI DOES NOT GO FAR ENOUGH AND DOES NOT PASS THE
25 LANGUAGE OF THE CALIFORNIA SUPREME COURT OR THE SECOND
26 DISTRICT COURT OF APPEAL IN TERMS OF WHAT THE
27 DIFFERENTIATION IS BETWEEN WHAT CLEAR AND CONVINCING
28 EVIDENCE IS.

01:59PM

1 HIGHLY PROBABLE SEEMS LIKE MORE PROBABLE
2 THAN NOT. AND THE CALIFORNIA SUPREME COURT HAS GONE
3 MUCH FURTHER THAN THAT. AND I BELIEVE CACI JUST HAS
4 NOT KEPT UP.

5 THE COURT: WHAT'S THE OLD BAJI INSTRUCTION ON
6 CLEAR AND CONVINCING EVIDENCE? 02:00PM

7 MS. STEIN: I THINK IT WAS VERY SIMILAR, YOUR
8 HONOR, AND THE TWO CASES WE CITE MOCK AND MATHOU BOTH
9 CRITICIZE THAT BAJI INSTRUCTION FOR NOT GOING FAR
10 ENOUGH. BOTH OF THOSE CASES ARE FROM THE 2ND DISTRICT. 02:00PM

11 THE COURT: WHAT'S THE PLAINTIFF'S VIEW ON
12 THIS?

13 MR. SURPRENANT: TWO THINGS, YOUR HONOR.

14 I THINK HIGHLY PROBABLE. IT IS HIGHLY
15 PROBABLE THAT THE FACT IS TRUE, IS PLAINLY A MORE
16 ONEROUS BURDEN THAN MORE LIKELY THAN NOT. SO I BELIEVE
17 THE CACI INSTRUCTION ACCURATELY SETS FORTH THE LAW. 02:00PM

18 AND I WOULD SAY THAT IF, IF, AS I WOULD
19 URGE THE COURT TO SUSTAIN IT. BUT IF YOUR HONOR DOES
20 NOT SUSTAIN THE OBJECTION, WE HAVE AN OBJECTION THAT IT
21 SAYS THAT GUNDLACH, VANEVERY, SANTA ANA, MAYBERRY, AND
22 DOUBLELINE ACTED WILLFULLY AND MALICIOUSLY. 02:01PM

23 OBVIOUSLY, THEY DON'T ALL HAVE TO HAVE
24 ACTED THAT WAY. ANY OF THEM WOULD BE --

25 THE COURT: WHY WOULDN'T YOU SAY THAT A
26 DEFENDANT ACTED WRONGFULLY AND MALICIOUSLY? 02:01PM

27 MS. STEIN: THAT WOULD WORK.

28 MR. SURPRENANT: THAT WOULD BE ACCEPTABLE, BUT

1 I THINK THE CACI 201 AND IT'S HIGHLY PROBABLE IT'S
2 TRUE, I THINK CAPTURES --

3 THE COURT: IS CACI 201 AN AGREED INSTRUCTION
4 OR DID WE TALK ABOUT THAT BEFORE?

5 MS. STEIN: WE TALKED ABOUT THAT BEFORE, YOUR
6 HONOR.

7 THE COURT: WHERE IS THAT IN THE PILE?

8 MR. HELM: I BELIEVE IT'S THE FIRST ONE,
9 PAGE 7 OF THE JURY STATEMENT.

10 MS. STEIN: THAT MADE MY PITCH FOR THE
11 ANGELINA P. LANGUAGE THE LAST TIME WE WERE HERE.

12 MR. EMANUEL: THE MOCK CASE IS '92, AND
13 ANGELINA P. IS 1981.

14 THIS CACI WAS REVISED AS OF
15 OCTOBER 2004. SO IT'S NOT AS IF SOMEONE HASN'T BEEN
16 THINKING ABOUT THOSE CASES.

17 THE COURT: THERE ARE A LOT OF ISSUES IN THE
18 CACI'S.

19 MR. EMANUEL: GRANTED.

20 THE COURT: WE WILL GET MORE AND MORE
21 DECISIONS ON THE CACI'S AS TIME GOES ON.

22 MR. EMANUEL: I AGREE WITH THAT.

23 MR. HELM: WE THINK WE ALL CAN LOOK AT IT AND
24 WE SEE THE CASES, AND WE SEE THE CACI AND THIS IS ONE
25 WE'RE NOT UP TO SNUFF ON THIS ONE.

26 SAYING HIGHLY PROBABLE DOESN'T REALLY
27 CONVEY WHAT THE CASES DO, WHICH IS SO CLEAR AS TO LEAVE
28 NO SUBSTANTIAL DOUBT.

1 THEY HAVE A TOTALLY DIFFERENT FEEL INTO
2 THEM. AND --

3 MR. EMANUEL: THE PROBLEM WITH THAT
4 INSTRUCTION, THAT'S ALMOST LIKE NO REASONABLE DOUBT.

5 THE COURT: THAT'S WHAT I WAS THINKING. 02:03PM

6 MR. EMANUEL: LESS THAN THAT, MORE THAN THE
7 OTHER.

8 THE COURT: I THINK JUST SAYING HIGHLY
9 PROBABLE IS NOT ENOUGH. AND SO I WOULD LEAN TOWARDS
10 SOMETHING ALONG THESE LINES. 02:03PM

11 I WOULD URGE YOU -- I DO NOT THINK IT'S
12 A BEYOND-A-REASONABLE-DOUBT STANDARD.

13 AND SOMEWHERE THERE HAS TO BE A WAY OF
14 LETTING THE JURY KNOW THAT'S NOT THE STANDARD.

15 MR. SURPRENANT: YOUR HONOR, COULD I SUGGEST 02:03PM
16 SOMETHING? IF WE WERE TO SUBSTITUTE IN, "A DEFENDANT"
17 FOR "ALL THE DEFENDANTS," AND THEN STRIKE EVERYTHING
18 AFTER "SUBSTANTIAL DOUBT." I THINK THAT'S THE LANGUAGE
19 THAT COMES VERY CLOSE TO BEYOND A REASONABLE DOUBT.

20 MR. EMANUEL: I THINK WE'RE GOING TO HAVE TO 02:04PM
21 WORK ON THIS. I UNDERSTAND THE COURT'S DIRECTION.

22 MS. STEIN: THAT WOULD BE FINE, YOUR HONOR.

23 THE COURT: I WOULDN'T HAVE A -- WELL, I MEAN,
24 IF, MR. EMANUEL, WE HAVE A LITTLE DISSENSION ON THE
25 LEFT SIDE. 02:04PM

26 MR. SURPRENANT: I DIDN'T PICK THAT UP, YOUR
27 HONOR.

28 MR. HELM: IT'S THREE TO ONE.

1 THE COURT: IF WE CAN DO THAT, OBVIOUSLY, WE
2 WANT TO REACH AGREEMENT WHEREVER WE CAN. IF WE
3 SUBSTITUTE THE NAMES FOR, A DEFENDANT, AND SAY CLEAR
4 AND CONVINCING EVIDENCE IS THAT WHICH IS SO CLEAR AS TO
5 LEAVE NO SUBSTANTIAL DOUBT, PERIOD.

02:04PM

6 IF WE CAN GET AN AGREEMENT, I'D GO WITH
7 THAT.

8 MR. EMANUEL: NO.

9 MR. SURPRENANT: I'VE BEEN OUTVOTED, YOUR
10 HONOR.

02:04PM

11 MR. HELM: WE CAN LIVE WITH THAT.

12 MS. STEIN: YES.

13 MR. EMANUEL: TOO CLOSE TO -- SUBSTANTIAL
14 DOUBT AND REASONABLE DOUBT, WHAT'S THE DIFFERENCE?

15 MS. STEIN: YOUR HONOR, THAT IS THE LANGUAGE
16 THE CALIFORNIA SUPREME COURT USED. IT CONCLUDED THAT
17 THAT'S WHAT CLEAR AND CONVINCING MEANT. IN THE CIVIL
18 CONTEXT.

02:04PM

19 THE COURT: COULD YOU WORK IN THE SUFFICIENTLY
20 STRONG TO COMMAND UNHESITATING ASSENT TO EVERY
21 REASONABLE MIND -- EVERY REASONABLE MIND? OR IS IT
22 MORE LIKE BEYOND A REASONABLE --

02:05PM

23 MR. EMANUEL: IF SOMEONE COULD EXPLAIN TO ME
24 HOW THEY DIFFER FROM BEYOND A REASONABLE DOUBT, WE CAN
25 DO IT BY THE FLY.

02:05PM

26 BUT I THINK THE COURT UNDERSTANDS MY
27 POSITION. BEYOND A REASONABLE DOUBT IS HIGHEST
28 CRIMINAL STANDARD NOT APPLICABLE HERE. UNLESS PEOPLE

1 ARE GOING TO TRY AND CONVINC ME CLEAR AND CONVINCING.

2 THE COURT: CLEAR AND CONVINCING IS SOMETHING
3 LESS THAN BEYOND A REASONABLE DOUBT.

4 MR. EMANUEL: THAT'S WHAT I THOUGHT IT TO BE.

5 THE COURT: NO DOUBT. OKAY.

02:05PM

6 I'M SAYING, SUBJECT TO FURTHER
7 DISCUSSIONS AMONG YOURSELVES, AND MAYBE SOME COMPROMISE
8 BETWEEN YOU AND MR. SURPRENANT, I WOULD GO WITH
9 SOMETHING THAT, YOU KNOW, CONTRASTS CLEAR AND
10 CONVINCING AND BEYOND A REASONABLE DOUBT IF YOU CAN
11 COME UP WITH SOMETHING.

02:06PM

12 MR. EMANUEL: THANK YOU, YOUR HONOR.

13 MR. SURPRENANT: WE'LL UNDERTAKE THAT.

14 THE COURT: THAT SEEMS TO ME TO BE FAIR. WE
15 DON'T WANT TO LEAVE THEM TO THE CONCLUSION IT SHOULD BE
16 A CRIMINAL STANDARD. IF WE CAN COMPROMISE THAT, I'LL
17 GO WITH IT.

02:06PM

18 MR. HELM: THANK YOU, YOUR HONOR. WE'LL LOOK
19 FOR OTHER LANGUAGE THAT MAYBE SOUNDS BETTER.

20 THE COURT: ALL RIGHT.

02:06PM

21 MR. SURPRENANT: I THINK I'M 30 INSTRUCTIONS
22 AWAY FROM ADDRESSING THE NEXT ONE.

23 IF I COULD BE EXCUSED?

24 THE COURT: YES, YOU MAY.

25 MR. EMANUEL: WE CAN GO BACK AND DO THE
26 CONSPIRACY INSTRUCTION. MR. MADISON IS HERE.

02:06PM

27 IF THAT'S OKAY WITH THE COURT.

28 THE COURT: ALL RIGHT.

1 MR. HELM: LET'S SEE, 47?

2 THE COURT: LET ME JUST SEE.

3 MS. STEIN: ON THIS INSTRUCTION YOU WOULD HAVE
4 TO --

5 THE COURT: I'VE GOT TO GET BACK TO IT.

02:07PM

6 MS. STEIN: SORRY.

7 (PAUSE) +

8

9 THE COURT: IS THERE ANY EVIDENCE TO SUPPORT
10 THIS?

02:08PM

11 MR. EMANUEL: I'M SORRY, YOUR HONOR. WHERE?

12 THE COURT: NUMBER 47, THE FIRST OF THE
13 CONSPIRACY.

14 MR. MADISON: IF I COULD, ARE YOU ASKING THE
15 PLAINTIFF?

02:08PM

16 THE COURT: YES, IT'S YOUR INSTRUCTION.

17 MR. MADISON: WELL, NO, THIS IS THE DEFENSE
18 INSTRUCTION.

19 MR. HELM: BUT IT'S THEIR CLAIM.

20 MR. MADISON: ABOUT OUR CLAIM.

02:08PM

21 THE COURT: IT'S YOUR CLAIM.

22 MR. MADISON: OF COURSE, THERE'S AMPLE
23 EVIDENCE OF THE CONSPIRACY, PRETTY MUCH.

24 THE COURT: CONSPIRACY TWO, ONE INTERFERE WITH
25 TCW'S PROSPECTIVE ECONOMIC RELATIONS WITH ITS
26 EMPLOYEES.

02:08PM

27 MR. MADISON: THAT'S OUT OF THE CASE.

28 MR. HELM: THAT SHOULD BE OMITTED.

1 THE COURT: I DIDN'T THINK WE HAD ANY OF THAT.

2 MR. MADISON: THAT'S OUT OF THE CASE. I
3 APOLOGIZE.

4 THE COURT: CONTRACTS WITH ITS INVESTOR
5 CLIENTS -- DO WE PUT A PERIOD AFTER THAT? IF THAT'S
6 THE CASE, THEN, WHERE DO MAYBERRY AND SANTA ANA AND
7 VANEVERY COME INTO THAT CONSPIRACY?

02:08PM

8 BECAUSE I THOUGHT THE INTERFERENCE WAS
9 BASICALLY MR. GUNDLACH'S TELEPHONE CALLS.

10 MR. MADISON: WELL, MS. VANEVERY IS CLEAR --

02:09PM

11 THE COURT: SHE GAVE THE LIST.

12 MR. MADISON: SHE'S CLEARLY INVOLVED BECAUSE,
13 REMEMBER, THERE ARE A FLURRY OF E-MAILS, AND THERE'S AN
14 EFFORT TO GET INFORMATION ABOUT THE CONTRACTS.

15 AND WE HAVE E-MAILS IN EVIDENCE

02:09PM

16 INVOLVING MS. VANEVERY, MR. GUNDLACH. THERE'S THIS
17 FELLOW, BOB BORDEN FROM SOUTH CAROLINA, WHO ASKS FOR
18 CERTAIN INFORMATION.

19 HE CLAIMS IT'S TO DO HIS JOB AS A MEMBER
20 OF THE ADVISORY COMMITTEE; THEN HE'LL SEND THE
21 INFORMATION TO HIS PERSONAL ADDRESS.

02:09PM

22 THEN HE'LL SEND IT FROM THAT ADDRESS TO
23 THE DEFENDANTS. THEIR GMAIL ADDRESS, THAT'S ALL PART
24 AND PARCEL. AND, OF COURSE, CONSPIRACY --

25 THE COURT: ALL THAT IS IS PROVIDING THE LIST
26 OF SMCF INVESTORS. SMCF IT SEEMS TO ME, IT'S THE
27 TRANSCRIPTS OF THE CALLS ARE THE ONLY REAL EVIDENCE OF
28 INTERFERENCE.

02:10PM

1 MR. MADISON: THAT CERTAINLY IS THE INSTRUMENT
2 OF THE INTERFERENCE.

3 BUT AS TO THE CONSPIRACY, THERE ARE
4 COMMUNICATIONS AMONG THE DEFENDANTS AND OTHERS ABOUT
5 WHY THEY'RE COMPILING THIS INFORMATION AND HOW THEY
6 INTEND TO USE IT. THE PURPOSE OF THE OBJECT OF THE
7 CONSPIRACY.

02:10PM

8 THAT'S SORT OF THE POINT OF CONSPIRACY,
9 IS THAT --

10 THE COURT: IT'S ONLY AMONG GUNDLACH AND
11 VANEVERY. I DON'T THINK -- I DON'T REMEMBER ANYTHING
12 WITH MAYBERRY OR SANTA ANA HAVING ANYTHING TO DO WITH
13 THIS.

02:10PM

14 MR. MADISON: I WOULD HAVE TO GO BACK AND
15 CHECK SOME OF E-MAILS, YOUR HONOR. I'D CERTAINLY --

02:11PM

16 THE COURT: I CAN'T REMEMBER EVERYTHING YOU
17 PUT UP ON THE WALL, BUT I DON'T THINK THOSE TWO HAD --
18 YOU KNOW, ALL THERE IS IS AN E-MAIL LIST ABOUT -- I'D
19 LIKE TO GET A LIST OF THE PEOPLE ON THE CALL IN
20 SEPTEMBER.

02:11PM

21 AND SHE SAYS, IS THIS WHAT YOU WANTED?
22 OR WILL THIS DO IT? THAT'S THE EXTENT OF WHAT I RECALL
23 ON THAT SUBJECT.

24 AND THEN THAT LIST WAS PROVIDED TO
25 WHOEVER WAS ORGANIZING THE CONFERENCE CALL.

02:11PM

26 MR. MADISON: CERTAINLY NOT PREPARED TO ARGUE
27 A DIRECTED VERDICT MOTION, YOU KNOW, ON THAT PART OF
28 THE CONSPIRACY CLAIM RIGHT NOW. I CAN'T REMEMBER ALL

1 THE EVIDENCE THAT WELL, EITHER.

2 I DO KNOW THE DEFENDANTS ARE ALL NAMED
3 AS DEFENDANTS IN THE CONSPIRACY CLAIM. AND I BELIEVE
4 BY THE END OF OUR CASE IN CHIEF WE WILL HAVE EVIDENCE
5 AS TO EACH OF THEM. IF NOT, WE'LL CERTAINLY LOOK AT
6 THAT.

02:11PM

7 THE COURT: THIS ONLY GOES -- WELL --

8 MR. EMANUEL: YOUR HONOR, REMEMBER --

9 THE COURT: -- IT GOES BEYOND. IT GOES TO
10 EVIDENCE TO BREACH THEIR FIDUCIARY DUTIES AND TO
11 INTENTIONALLY INTERFERE WITH CONTRACTS.

02:12PM

12 MR. MADISON: RIGHT.

13 THE COURT: I WAS FOCUSED MORE ON INTERFERENCE
14 CONTRACTS.

15 MR. EMANUEL: THIS IS NOT OUR INSTRUCTION. WE
16 OBJECT. IT'S SUPPOSED TO BE AN INTRODUCTION AS
17 THE COURT IS NOW REALIZING ISN'T EVEN SUFFICING TO DO
18 THAT.

02:12PM

19 AND WE WOULD -- WE HAVE ALREADY
20 SUBMITTED IN THAT PACKAGE YOU RECEIVED LAST NIGHT, OR
21 THIS MORNING, AN ALTERNATIVE INSTRUCTION TO ALL THE
22 CONSPIRACY INSTRUCTIONS THAT DEFENDANTS HAVE SUBMITTED
23 PIECEMEAL.

02:12PM

24 AND I SUGGEST THAT EVEN DEFENDANTS
25 SHOULD TRY TO DO ONE CONSPIRACY INSTRUCTION.

02:12PM

26 MR. MADISON: IF I COULD CHIME IN THERE.

27 WHICH WE RELY ON THE CACI CONSPIRACY
28 INSTRUCTION AS TO WHAT THE ELEMENTS OF CONSPIRACY ARE,

1 MODIFIED SLIGHTLY JUST TO FIT THE -- OUR CASE.

2 THE COURT: ALL RIGHT.

3 MR. HELM: I THINK THE COURT RAISES A GOOD
4 POINT, THOUGH. IT MAY BE THAT THE CONSPIRACY CLAIM
5 DOESN'T APPLY TO ALL THE CLAIM AND SOME KIND OF --

02:13PM

6 THE COURT: YOU ALL ARE WORKING ON THE
7 INTRODUCTORY FOR THE NATURE OF THE CLAIM?

8 MR. EMANUEL: YES. WE ARE GOING TO HAVE
9 NEW --

10 THE COURT: I'LL SUSTAIN THE OBJECTION,
11 SUBJECT TO THE PARTIES' PROPOSAL FOR INTRODUCTORY
12 INSTRUCTION.

02:13PM

13 MR. EMANUEL: MAYBE LATER IN THE CASE WE'LL
14 LOOK BACK AND WE'LL SAY, AS COUNSEL JUST POINTED OUT,
15 THERE'S NO CONSPIRACY FOR ONE OR MORE CAUSES OF ACTION.
16 I DON'T KNOW.

02:13PM

17 THE COURT: WELL, JUST LOOKING AT THIS,
18 THERE'S -- YOU KNOW, IT PUTS THEM ALL TOGETHER AND
19 SUGGESTS THEY'RE ALL INVOLVED. I CAN SEE THEY'RE NOT.

20 BUT WE START FINE-TUNING IT AND IT GETS
21 MORE DIFFICULT.

02:13PM

22 MR. MADISON: AGAIN, JUST ON THAT NOTE, THE
23 CONSPIRACY CLAIM IS ONE CLAIM IN THE COMPLAINT. AND IT
24 ALLEGES MULTIPLE OBJECTS OF THE CONSPIRACY, AS WELL AS
25 DEFENDANTS AND NON-NAMED DEFENDANTS.

02:14PM

26 SO --

27 MR. HELM: WE'LL GET TO THAT. THAT'S A
28 DISPUTED ISSUE.

1 THE COURT: YOU CAN'T BLITHELY PUT ALL THE
2 DEFENDANTS IN AS COCONSPIRATORS IF THEY HAD NO
3 INVOLVEMENT OF CERTAIN ASPECTS OF YOUR CONSPIRACY
4 CLAIM.

5 MR. MADISON: I THINK IF THERE IS A CONSPIRACY 02:14PM
6 THAT HAS MULTIPLE OBJECTS, IT IS POSSIBLE FOR THE JURY
7 TO FIND THAT THE DEFENDANTS ONLY AGREED AS TO CERTAIN
8 OF THE OBJECTS, BUT THAT -- I DON'T BELIEVE -- I DON'T
9 BELIEVE --

10 THE COURT: I WOULDN'T PUT A LOT OF EFFORT 02:14PM
11 INTO IT. IT DOESN'T SEEM TO ME TO BE THE STRONGEST
12 PART OF THE CASE. BUT YOU DON'T WANT TO LEAVE ANYTHING
13 UNTURNED.

14 ANYWAY --

15 MR. MADISON: JUST SO WE'RE CLEAR, THE POINT 02:14PM
16 OF A CONSPIRACY CLAIM, FOR EXAMPLE, MS. VANEVERY, WHO
17 ONLY ENGAGED IN THE ACTIVE SORT OF PART OF THE
18 DOWNLOADING, AS NEAR AS WE CAN TELL ON COUPLE OF
19 OCCASIONS, YOU KNOW, BECAUSE SHE'S PART OF THE
20 CONSPIRACY, SHE HAS LIABILITY VICARIOUSLY FOR THE 02:14PM
21 DOWNLOADING.

22 THAT'S THE --

23 THE COURT: THE BIGGEST THING YOU'VE GOT FROM
24 HER IS THIS LIST. AND, IN FACT, I'M NOT SURE THAT IT
25 WASN'T A LIST THAT JUST WAS -- YOU KNOW, THE EVIDENCE, 02:15PM
26 IT SEEMS UNCLEAR TO ME AT THIS POINT. WHETHER IT WAS
27 JUST A LIST THAT HAPPENED TO STILL BE ON HER COMPUTER
28 FROM WHEN SHE DID THE CALL IN SEPTEMBER, OR WHETHER SHE

1 CONSCIOUSLY DOWNLOADED IT TO HER COMPUTER TO GET AHOLD
2 OF IT SO SHE CAN SEND IT TO GUNDLACH.

3 MR. MADISON: THERE ARE OTHER EXAMPLES IN HER
4 CASE AS WELL, SO ...

5 THE COURT: WELL, OKAY.

02:15PM

6 48. DO YOU HAVE NEW CONSPIRACY
7 INSTRUCTIONS YOU ALL ARE PROPOSING?

8 MR. EMANUEL: TCW SUBMITTED A NEW ONE, YOUR
9 HONOR. AND I DON'T KNOW IF THE DEFENDANTS -- I GUESS
10 IT DEPENDS ON WHAT HAPPENS TODAY, WHAT DEFENDANTS ARE
11 GOING TO DO.

02:15PM

12 MS. STEIN: IT'S IN THE NEW BATCH SENT TO YOU
13 LAST NIGHT, I BELIEVE, YOUR HONOR.

14 THE COURT: I HAVE TWO OF THEM.

15 DID THE DEFENDANTS MODIFY THEIRS, TOO?

02:16PM

16 MS. STEIN: NO. TCW LACHES DEFENSE. TCW
17 SUBMITTED A MODIFIED VERSION OF CACI 3600, TO WHICH WE
18 OBJECTED.

19 THE COURT: IN LIEU OF THIS SPECIAL
20 INSTRUCTION 48?

02:16PM

21 MR. EMANUEL: NO. THESE ARE DEFENDANTS'
22 INSTRUCTIONS.

23 MS. STEIN: NOT IN LIEU. THEY SUBMITTED
24 CACI 3600 WAS MODIFICATIONS.

25 MR. MADISON: WE ORIGINALLY PROPOSED USING
26 CACI.

02:16PM

27 THE COURT: RIGHT.

28 MR. MADISON: WE STILL PROPOSE USING CACI. WE

1 JUST MODIFIED IT A BIT. SO THAT'S OUR POSITION.

2 AND THAT'S AN INSTRUCTION THAT WAS JUST
3 LODGED LAST -- PROBABLY LAST NIGHT.

4 MS. STEIN: PAGE 20.

5 THE COURT: I'M LOOKING AT IT RIGHT NOW.

02:16PM

6 MR. EMANUEL: I THINK LAST TIME, IF I RECALL,
7 CORRECT ME IF I'M WRONG, I DON'T MEAN TO MISSPEAK --
8 BUT I THINK 3600 WAS INADVERTENTLY ADMITTED FROM THE
9 TCW'S PROPOSED INSTRUCTIONS.

10 WE HAD TALKED ABOUT ONE, BUT IT DIDN'T
11 GET INTO THE JOINT STATEMENT.

02:17PM

12 SO WE ARE CORRECTING THAT OMISSION FOR
13 THE NEXT ROUND.

14 THE COURT: WASN'T IT AN AGREED INSTRUCTION IN
15 THE AGREED PACKET?

02:17PM

16 MS. STEIN: NO, YOUR HONOR. BECAUSE WE
17 DISAGREE AS TO THE CLAIMS TO WHICH CONSPIRACY APPLIES.

18 IT IS OUR POSITION THAT IT DOES NOT
19 APPLY TO MISAPPROPRIATION OF TRADE SECRETS, BUT IT'S
20 PREEMPTED.

02:17PM

21 AND AS TCW HAS NOW REVISED ITS MODIFIED
22 3600, THEY PURPORT TO HAVE IT APPLY TO NON-NAMED
23 COCONSPIRATORS.

24 AND WE OBJECT TO THAT AS WELL.

25 MR. MADISON: WE CAN RESPOND IF YOU'D LIKE.

02:17PM

26 I'M NOT SURE YOU WANT TO ENGAGE US ON
27 THAT INSTRUCTION NOW, YOUR HONOR.

28 THE COURT: MY SENSE IS, READING, LOOKING AT

1 48, AND LOOKING AT CACI 3600, THE TWO NEED TO BE
2 COMBINED, AND WE SHOULD HAVE A SINGLE INSTRUCTION ON
3 THIS SUBJECT.

4 AND, YOU KNOW, I WILL LEAN TOWARD THE
5 CACI LANGUAGE -- THERE'S NO RED LINES OR ANYTHING HOW
6 MUCH YOU'VE MODIFIED WHAT YOU PROPOSED. THE TWO SIDES
7 NEED TO RECONCILE THESE.

02:18PM

8 AND THAT'S WHERE I'LL LEAVE IT.

9 MS. STEIN: THANK YOU, YOUR HONOR. WE WILL.

10 THE COURT: OKAY.

02:18PM

11 MR. HELM: SHOULD WE DO THAT WITH ALL THE
12 CONSPIRACY INSTRUCTIONS?

13 THE COURT: IS THAT 49 THROUGH 58?

14 I'M HAPPY TO CONTINUE TO LOOK AT THEM
15 INDIVIDUALLY. ARE THEY ALL GOING TO FALL IN THAT
16 SAME --

02:18PM

17 MS. STEIN: I THINK SO.

18 I THINK WE CAN WORK OUT SOMETHING, YOUR
19 HONOR. I THINK IT'S DIFFICULT TO ASSESS THE SPECIALS
20 WITHOUT SEEING THE CACI.

02:19PM

21 THE COURT: I HAVE THE CACI IN FRONT OF ME.

22 MS. STEIN: OKAY.

23 THE COURT: I THINK THE SPECIALS SHOULD BE
24 RECONCILED WITH CACI. AND, IDEALLY -- THIS IS A VERY
25 LARGE BOOK OF JURY INSTRUCTIONS, AND WE SHOULD BE
26 REDUCING THE NUMBER OF JURY INSTRUCTIONS, IF ANYTHING,
27 TO THE SIMPLEST AND MOST STRAIGHTFORWARD PRONOUNCEMENT
28 OF THE LAW FOR THE JURY.

02:19PM

1 THAT LACHES DEFENSE THEY'RE GOING TO
2 TAKE IT IN THERE, THEY HAVE -- IF THEY HAVE 200 --
3 WELL, I HAVE 357 PAGES. THERE'S ARGUMENT IN HERE, IN
4 MY LITTLE BOOK. IT'S JUST TOO MUCH.

5 AND THEY NEED TO FLOW -- I MEAN, WE HAVE
6 TO KIND OF REORGANIZE SOME. WE'RE TAKING THEM OUT OF
7 SYNC. THEY NEED TO MAKE SENSE TO PEOPLE SO WE CAN LOOK
8 AT THEM AND UNDERSTAND THEM.

02:19PM

9 MS. STEIN: WE'LL WORK ON COMBINING THEM, YOUR
10 HONOR.

02:19PM

11 MR. MADISON: WELL --

12 MS. STEIN: I DON'T THINK WE NEED TO GO
13 THROUGH ALL THE CONSPIRACY INSTRUCTIONS.

14 THE COURT: WE DON'T NEED TO DEAL WITH
15 MR. MADISON ANYMORE?

02:20PM

16 MS. STEIN: CORRECT.

17 MR. MADISON: CAN I MENTION, IN MY DYING GASP
18 HERE, THAT IT'S ACTUALLY THROUGH NUMBER 54, YOUR HONOR?

19 THE COURT: RIGHT.

20 MR. MADISON: I THINK YOUR HONOR SAID 58. BUT
21 IT'S 54.

02:20PM

22 THE COURT: OKAY.

23 MR. MADISON: WHAT I'M HEARING THE COURT
24 INDICATE IS THAT THERE SHOULD BE ONE INSTRUCTION
25 ESSENTIALLY USING THE CACI MODEL INSTRUCTION --

02:20PM

26 MR. HELM: WELL --

27 MR. MADISON: -- BUT MODIFIED. THE DEFENDANTS
28 CAN PROPOSE MODIFICATIONS IF THEY'D LIKE.

1 MR. HELM: THAT'S WHAT I HEARD.

2 MR. MADISON: I'M JUST SAYING, YOUR HONOR --

3 THE COURT: I DON'T THINK IT SHOULD BE ONE
4 INSTRUCTION, BUT I DON'T THINK IT SHOULD BE EIGHT OR
5 TEN INSTRUCTIONS.

02:20PM

6 AND THERE MAY BE SOME CLARIFICATION THAT
7 REQUIRES A SEPARATE INSTRUCTION, BUT THE GOAL SHOULD BE
8 TO HAVE IT INTEGRATED IN AND RECONCILED WITH CACI 3600.

9 AND I WOULD THINK THAT A STATEMENT OF
10 MANY OF THESE THINGS CONTAINED IN 48 -- LET ME JUST
11 LOOK AT THEM.

02:20PM

12 49.

13 50 HAS GOT TO BE COVERED IN CACI. I
14 MEAN, IT GIVES YOU THE ELEMENTS OF A CIVIL CONSPIRACY,
15 DOES IT NOT?

02:21PM

16 MR. HELM: THIS IS CLARIFYING THE POINT, THAT
17 THERE'S NO INDEPENDENT ACTION FOR CIVIL CONSPIRACY,
18 THAT IT'S A -- IT PIGGYBACKS ON SOME OTHER WRONG THAT
19 WAS COMMITTED, AND THAT'S THE ADDITION TO WHAT'S IN
20 CACI.

02:21PM

21 THE COURT: IT WOULD SEEM ONE SENTENCE IN
22 WHATEVER WE COME UP WITH AS AN INTRODUCTORY INSTRUCTION
23 SAYING THE CLAIMS IN THIS CASE ARE:

24 PLAINTIFF SEEKS DAMAGES FOR
25 MISAPPROPRIATION OF TRADE SECRETS
26 AND INTERFERENCE WITH CONTRACT.

02:22PM

27 DEFENDANTS SEEKS DAMAGES FOR BREACH
28 OF AN ORAL CONTRACT.

1 YOU KNOW, THERE IS A CONSPIRACY ALLEGATION
2 THAT PLAINTIFF MAKES, THAT MEANS THAT PARTIES CAN BE
3 LIABLE FOR CONSPIRING TO DO ANY OF THE OTHER THINGS.

4 SOMETHING THAT -- IT'S ONE SENTENCE.

5 MR. HELM: THAT'S SORT OF LIKE WHAT WE HAVE IN
6 53, YOUR HONOR. WHY DON'T WE --

02:22PM

7 THE COURT: I HAVEN'T SEEN 53.

8 DID YOU WRITE IT, MR. HELM?

9 MR. HELM: WE DID.

10 THE COURT: DO YOU HAVE PRIDE OF AUTHORSHIP?

02:22PM

11 MR. HELM: NO PRIDE OF AUTHORSHIP. SOME OF
12 WHAT YOUR HONOR WAS DESCRIBING, WE ATTEMPTED TO DO WHAT
13 MS. STEIN SAID. AND I'M REITERATING, AND WE'LL GO
14 THROUGH AND SEE IF WE CAN PARE IT DOWN TO WHAT WE
15 REALLY THINK ARE THE ESSENTIALLY THINGS NEED TO BE
16 THERE.

02:22PM

17 WE'LL SEE ABOUT ADDING IT AS CACI OR AS
18 A SEPARATE, AND IF WE HAVE DISAGREEMENTS WE'LL --

19 THE COURT: MAKE IT SIMPLE. THE MORE
20 STRAIGHTFORWARD IT IS, THE BETTER OFF YOU ARE.

02:23PM

21 MR. HELM: WE HEAR, YOUR HONOR. WE WILL MAKE
22 THAT ATTEMPT AND COME BACK TO YOU.

23 THE COURT: ALL RIGHT.

24 NOW WE'LL JUMP BACK OVER TO 58; IS THAT
25 RIGHT? WE WERE ON 58. I THINK WE'RE FINISHED.

02:23PM

26 MR. HELM: YES. I THINK NOW TO CACI 304.

27 THE COURT: WHO DOESN'T LIKE THAT.

28 MR. EMANUEL: THIS IS A STANDARD CACI. I'M

1 NOT AWARE YET THAT THERE'S GOING TO BE A CLAIM FOR AN
2 ORAL CONTRACT. THAT'S MY ONLY QUARREL WITH THIS.

3 THIS IS A CORRECT STATEMENT OF THE LAW
4 IF THERE'S EVIDENCE OF A PARTLY ORAL OR AN ORAL
5 CONTRACT.

02:24PM

6 THE COURT: I THOUGHT THAT WAS THE ESSENCE OF
7 THEIR CROSS-COMPLAINT.

8 MR. EMANUEL: NO. I THOUGHT THE ESSENCE OF
9 THEIR CROSS-COMPLAINT WAS THAT THERE WAS AN AGREEMENT,
10 AN ORAL AGREEMENT, TO A WRITTEN CONTRACT. AN ORAL
11 ACCEPTANCE OF A WRITING.

02:24PM

12 MR. HELM: NOT EXACTLY RIGHT.

13 MR. EMANUEL: WELL, THEN, IF THAT'S THE CASE,
14 WE SHOULD LOOK AT THIS INSTRUCTION, GIVE THIS
15 INSTRUCTION --

02:24PM

16 THE COURT: I WILL SAY ON BOTH SIDES THE
17 CLAIMS HAVE BEEN A LITTLE NEBULOUS AND KIND OF HARD TO
18 GET YOUR ARMS AROUND.

19 WHETHER IT'S BREACH OF ORAL CONTRACT OR
20 IT'S A CONTRACT, I THOUGHT THAT THERE WAS A CLAIM. AND
21 I WENT BACK AND LOOKED AT YOUR COMPLAINT, BUT IT WAS --
22 THE CROSS-COMPLAINT, THAT IT WAS A -- A WRITTEN -- THE
23 CONTRACT ACCEPTED BY PERFORMANCE.

02:24PM

24 WHICH IS -- I DON'T THINK AN ORAL
25 CONTRACT -- I THINK THAT'S CHARACTERIZED AS A WRITTEN
26 CONTRACT. AND I'M NOT SURE JUST HOW THIS COMES OUT.

02:24PM

27 MR. HELM: YOUR HONOR, WE HAVEN'T PUT ON OUR
28 CASE YET. BUT I THINK THAT THERE ARE ELEMENTS OF

1 WRITTEN, ELEMENTS OF ORAL, AND ELEMENTS OF PERFORMANCE
2 THAT PART OF WHAT WAS WRITTEN, THERE WERE E-MAILS AND
3 SPREADSHEETS EXCHANGED.

4 PART OF THE ACCEPTANCE WAS THERE WAS A
5 MEETING AND A HANDSHAKE. AND THAT WAS AN ORAL
6 ACCEPTANCE OF WHAT HAD BEEN EXCHANGED. THERE THEN WAS
7 PERFORMANCE.

02:25PM

8 SO, WE THINK SAYING IT CAN BE WRITTEN OR
9 ORAL, AND PARTLY WRITTEN OR PARTLY ORAL REALLY ACTUALLY
10 CAPTURES WHAT WE'RE TALKING ABOUT.

02:25PM

11 THE COURT: THIS IS NOT A MODIFICATION OF
12 BAJI. THIS IS JUST THE BAJI.

13 MR. HELM: STRAIGHT BAJI.

14 THE COURT: GOOD ENOUGH FOR ME.

15 MR. HELM: SO WOULD THAT BE OVERRULED?

02:25PM

16 THE COURT: YES.

17 MR. HELM: 305, AS I UNDERSTAND, THERE WAS NO
18 OBJECTION TO CACI 305, IF THEY GAVE 306. I THINK IS
19 WHAT --

20 MR. EMANUEL: MY NOTE SAYS, YOUR HONOR, 305
21 AND 306 PARTIES ARE TO WORK TOGETHER. AND I BELIEVE
22 THE PARTIES ARE IN AGREEMENT THAT 305 AND 306 ARE TO BE
23 GIVEN.

02:26PM

24 MR. HELM: NO, I DON'T THINK.

25 MR. EMANUEL: WELL, THEN WE STILL NEED TO WORK
26 TOGETHER.

02:26PM

27 THE COURT: ALL RIGHT. JUST HOLD ON.

28

1 (PAUSE) +

2 THE COURT: THE OBJECTIONS TO 305 IS
3 WITHDRAWN, IS THAT CORRECT, MR. EMANUEL?

4 MR. EMANUEL: NOT QUITE.

5 THE COURT: SUBJECT -- PROVIDED 306 IS GIVEN,
6 IS THAT WHAT YOU'RE SAYING? 02:26PM

7 MR. EMANUEL: YES. AS I UNDERSTAND IT, 306 IS
8 TO BE GIVEN, UNDER THAT SCENARIO, YES --

9 THE COURT: DO I HAVE A COPY OF 306?

10 MR. EMANUEL: YES, THAT WAS PREVIOUSLY RULED
11 ON. 02:27PM

12 THE COURT: I SAID THAT WAS GOING TO BE GIVEN.
13 THAT WAS EARLIER.

14 MR. EMANUEL: YOU SAID OVERRULE. BUT I HAVE A
15 NOTATION TO WORK TOGETHER. I CAN'T REMEMBER NOW WHAT
16 CLARIFYING LANGUAGE WAS ASKED FOR. 02:27PM

17 THE COURT: WELL, WHAT IS 306?

18 MR. EMANUEL: UNFORMALIZED AGREEMENTS.

19 MS. STEIN: MAY I APPROACH AND SHOW YOU?

20 THE COURT: TELL ME THE PAGE. 02:27PM

21 MR. HELM: PAGE 81.

22 THE COURT: OKAY.

23 MR. HELM: MY NOTES SAY, MR. EMANUEL, WAS THAT
24 MR. EMANUEL WILL MODIFY.

25 THE PROBLEM WE HAD WITH IT -- DOES
26 THE COURT HAVE IT IN FRONT OF IT? 02:27PM

27 THE COURT: YES.

28 MR. HELM: IT SAYS TCW CONTENDS THE PARTIES

1 DID NOT ENTER INTO A CONTRACT BECAUSE IT WAS NEVER
2 WRITTEN AND SIGNED.

3 WELL, THAT'S NOT ACCURATE. THEY CONTEND
4 THERE WAS A CONTRACT ENTERED INTO AS CONCERNED
5 COMPENSATION.

02:27PM

6 AND SO, THAT'S BEEN OUR OBJECTION TO
7 306.

8 THE COURT: WHY WOULD YOU NOT, IN 306, TAKE
9 OUT -- ALL YOU REALLY ARE SAYING, MR. EMANUEL, IS IT
10 WAS NEVER SIGNED. WE KNOW IT WAS WRITTEN. THERE WAS A
11 WRITTEN DRAFT. THERE WERE TWO DRAFTS.

02:28PM

12 MR. EMANUEL: YOU'RE RIGHT. YOU'RE RIGHT.

13 THE COURT: SO YOU'RE SAYING -- YOU CONTEND
14 THEY DIDN'T ENTER INTO CONTRACT BECAUSE IT WAS NEVER
15 SIGNED.

02:28PM

16 AND TO OVERCOME THE CONTENTION, GUNDLACH
17 MUST PROVE BOTH OF THE FOLLOWING: PARTIES UNDERSTOOD
18 AND AGREED THE TERMS OF THE AGREEMENT, AND THAT THE
19 PARTIES AGREED TO BE BOUND WITHOUT A WRITTEN AGREEMENT.

20 MR. HELM: HERE IS MY PROBLEM WITH THAT.

02:28PM

21 THE COURT: WHAT?

22 MR. HELM: THE FIRST PART OF THE SENTENCE,
23 THEY CONTEND THE PARTIES DID NOT ENTER INTO A CONTRACT.

24 NOW, REMEMBER, THEY'VE BEEN TRYING TO
25 KEEP US OUT OF A QUANTUM MERUIT RECOVERY BECAUSE THEY
26 SAY THERE IS A CONTRACT. SO I DO NOT THINK IT'S
27 ACCURATE TO SAY TCW CONTENDS THERE WAS NO CONTRACT.

02:28PM

28 WHAT THEY'RE CONTENDING IS THERE WAS A

1 CONTRACT, BUT IT DIDN'T CONTAIN EVERYTHING THAT
2 MR. GUNDLACH SAYS IT INCLUDES, AND THAT I THINK IS AN
3 EXTREMELY IMPORTANT DISTINCTION --

4 THE COURT: RIGHT. RIGHT.

5 MR. HELM: -- AND WHY THE FIRST SENTENCE
6 SHOULD NOT BE GIVEN.

02:29PM

7 MR. EMANUEL: I AGREE, IT DOES REQUIRE THAT
8 CLARIFICATION. AND I GO FURTHER TO ARGUE WHAT'S GOOD
9 FOR THE GOOSE IS GOOD FOR THE GANDER. THEY CANNOT
10 SAY -- SIMPLY CANNOT SAY CONTRACT.

02:29PM

11 THEY HAVE TO DISTINGUISH WHICH ONES
12 THEY'RE TALKING ABOUT. COMPENSATION? OR THE OTHER
13 TERMS OF EMPLOYMENT?

14 MR. HELM: I'M NOT SURE I FOLLOW THAT.

15 THE COURT: HOLD ON A MINUTE. I GOT, FAIR --
16 AS USUAL, I THINK I GOT A FAIRLY SIMPLE SOLUTION.

02:29PM

17 MS. STEIN: GOOD.

18 (PAUSE) +

19
20 THE COURT: WHY WOULDN'T SOME INSTRUCTION OR
21 MODIFICATION OF 306 MIN CONJUNCTION WITH 305, THAT
22 SAID: IT IS THE JURY'S RESPONSIBILITY TO DETERMINE
23 WHAT THE TERMS OF THE CONTRACT BETWEEN THE PARTIES
24 WERE, FROM THE EVIDENCE THAT YOU'VE HEARD IN THIS CASE?

02:29PM

25 THAT'S WHAT WE'RE REALLY SAYING.
26 BECAUSE I MADE THIS COMMENT EARLIER ON. WHEN PLAINTIFF
27 WANTS TO TAKE EXHIBIT A AND SAY THAT'S THE AGREEMENT
28 FOR COMPENSATION, IT IMPLIES THERE WAS AN AGREEMENT AND

02:30PM

1 SOME KIND OF CONTRACT FOR COMPENSATION AT THAT RATE.

2 DEFENDANT WANTS TO SAY, WE DON'T
3 DISAGREE WITH THAT, BUT WE THINK THE REST OF THE
4 AGREEMENT WAS AN AGREEMENT ALSO.

5 AND THAT BY PERFORMANCE OR BY HANDSHAKE
6 OR BY AN ORAL AGREEMENT, WE AGREE TO BE BOUND BY THE
7 TERMS OF THAT.

02:30PM

8 IT'S ULTIMATELY UP TO THE JURY TO
9 DETERMINE WHAT THE TERMS AND PROVISIONS OF THE CONTRACT
10 THAT WAS AGREED TO BY THE PARTIES ARE. AND IT'S A
11 DISPUTED POINT.

02:30PM

12 IT'S A FACTUAL POINT. THEY'RE GOING TO
13 HAVE ALL THE EVIDENCE IN FRONT OF THEM.

14 MR. MADISON: THE PROBLEM IN THIS CASE,
15 THOUGH, YOUR HONOR, IS THERE WAS NO CONTRACT. THERE
16 JUST WAS NONE. I MEAN, THERE WAS, BUT MR. GUNDLACH
17 REFUSED TO SIGN IT.

02:30PM

18 AND WHAT THE PARTIES THEN DID IS THEY
19 AGREED ON WHAT THE COMPENSATION WAS FOR THIS AT-WILL
20 EMPLOYEE.

02:31PM

21 THE COURT: ISN'T -- WAIT A MINUTE. ISN'T
22 THERE A RESOLUTION OF THE BOARD APPROVING THE CONTRACT?

23 MR. MADISON: A WRITTEN CONTRACT TO -- THEY
24 AUTHORIZED THE STAFF OF THE CORPORATION TO SIGN A
25 WRITTEN CONTRACT THAT MR. GUNDLACH WAS -- ABSOLUTELY.

02:31PM

26 THE COURT: I KNOW YOUR PARTY LINE, AND I KNOW
27 YOUR ARGUMENT. BUT I'M SAYING THE BOTTOM LINE IS THE
28 JURY HAS TO DECIDE THIS.

1 MR. MADISON: YES.

2 THE COURT: THEY HAVE TO DECIDE WHETHER
3 MR. GUNDLACH HAD AN AGREEMENT ONLY TO THE EXTENT OF THE
4 TERMS OF HIS EXPRESSED COMPENSATION, OR WHETHER THERE
5 WAS A BROADER AGREEMENT THAT HE WOULDN'T BE TERMINATED
6 OTHER THAN FOR CAUSE. 02:31PM

7 AND ALL THE OTHER BELLS AND WHISTLES IN
8 THE WRITTEN AGREEMENT, EITHER IMPLIED BY THE PARTIES
9 CONDUCT, AGREED TO BY PERFORMANCE, OR ANY NUMBER OF
10 THINGS, BUT THERE'S GOING TO BE EVIDENCE ON BOTH SIDES
11 OF THAT. 02:32PM

12 MR. MADISON: YES. MY ONLY QUIBBLE, BUT IT'S
13 IMPORTANT BECAUSE IF ONE TELLS THE JURY THERE WAS A
14 CONTRACT, THAT IS DIFFERENT FROM WHAT OUR EVIDENCE IS.

15 OUR EVIDENCE IS -- 02:32PM

16 THE COURT: YOUR EVIDENCE IS IT'S A MATTER OF
17 SEMANTICS, MR. MADISON. YOU WANT TO SAY THERE'S AN
18 AGREEMENT FOR COMPENSATION, BUT NO CONTRACT.

19 WHAT'S AN AGREEMENT, IF NOT A CONTRACT?

20 MR. MADISON: WELL, IN THIS CONTEXT, IT'S
21 QUITE CLEAR WHAT IT IS. 02:32PM

22 IT'S AN AT-WILL EMPLOYMENT. AND OUR
23 FEAR IS THAT IF WE TELL THE JURY THERE IS A CONTRACT,
24 AND NOW YOU JUST HAVE TO DECIDE WHAT THE TERMS ARE,
25 THAT THAT GETS THEM TOO FAR DOWN THE ROAD ON DECIDING
26 WHICH SIDE'S CONTENTION IS CORRECT. 02:32PM

27 MR. HELM: YOUR HONOR --

28 MR. MADISON: WE WOULD SAY, AGAIN, FOLLOW CACI

1 AND TELL THEM YOU HAVE TO DECIDE IF THERE WAS A
2 CONTRACT. YOU'VE HEARD ALL THIS EVIDENCE ABOUT THAT.

3 AND IF YOU DECIDE THERE WAS A CONTRACT,
4 YOU HAVE TO DECIDE WHAT THE TERMS ARE.

5 MR. HELM: YOUR HONOR --

02:33PM

6 MR. MADISON: AND THE LAWYERS CAN ARGUE. THIS
7 IS -- YOU KNOW, I SAID ON THE FIRST DAY WE TALKED ABOUT
8 INSTRUCTIONS, LAWYERS TRY TO DO TOO MUCH WITH JURY
9 INSTRUCTIONS.

10 THE COURT: YOU'VE DONE TOO MUCH HERE, BUT
11 WE'LL GET IT PARED DOWN.

02:33PM

12 MR. MADISON: YEAH.

13 LET THEM ARGUE. WE SAY THERE'S AN
14 AGREEMENT AND THAT'S A CONTRACT, AND THEREFORE, AND
15 WE'LL ARGUE OUR POINT. BUT WE'D BE TROUBLED BY
16 THE COURT TELLING THE JURY THERE IS A CONTRACT; NOW THE
17 ONLY QUESTION IS WHAT THE TERMS ARE.

02:33PM

18 THE COURT: WHAT IF YOU SAID, YOU KNOW,
19 LOOKING AT 306 --

20 JUST A MINUTE.

02:33PM

21 MR. HELM?

22 MR. HELM: GO AHEAD.

23 THE COURT: TCW CONTENDS THE PARTIES DID NOT
24 ENTER INTO A CONTRACT BECAUSE THE AGREEMENT WAS NOT
25 SIGNED.

02:33PM

26 DEFENDANT JEFFREY GUNDLACH CONTENDS
27 THERE WAS A CONTRACT IF HIS -- FOR HIS SERVICES. AND
28 YOU MUST ESTABLISH THAT, WHETHER THERE WAS A CONTRACT

1 AND WHAT THE TERMS WERE.

2 MR. HELM: YOUR HONOR, I THINK YOUR HONOR GOT
3 IT EXACTLY RIGHT IN JUST WHAT YOU SAID BEFORE
4 MR. MADISON SPOKE. THERE'S NO DIFFERENCE BETWEEN A
5 CONTRACT AND AN AGREEMENT.

02:34PM

6 IT'S THE SAME THING. THEY SAY THERE WAS
7 AN AGREEMENT ON COMPENSATION.

8 THE COURT: I KNOW YOU'RE IN A DIFFERENT
9 BUSINESS THAN I AM. YOU'RE TRYING TO KEEP YOUR PARTY
10 LINE. HE'S TRYING TO KEEP HIS PARTY LINE. I'M IN THE
11 MIDDLE HERE, AND I'M TRYING TO FIND A WAY TO GET BOTH
12 OF YOU ON TRACK.

02:34PM

13 MS. STEIN: PART OF THE PROBLEM, YOUR HONOR,
14 IS IF THERE IS NO CONTRACT, OR AGREEMENT, OR HOWEVER
15 WE'RE GOING TO CALL IT, THEN WE SHOULD BE ABLE TO GET
16 QUANTUM MERUIT INSTRUCTIONS.

02:34PM

17 AND TCW CANNOT HAVE IT BOTH WAYS. THEY
18 CANNOT SAY THERE WAS NO AGREEMENT. BUT WE GET NO
19 QUANTUM MERUIT INSTRUCTION, AND THEN SAY THERE WAS AN
20 AGREEMENT, BUT IT ONLY WENT TO COMPENSATION. THAT'S
21 OUR DILEMMA HERE.

02:34PM

22 THE COURT: YOU CAN STILL BE AT-WILL EMPLOYEE
23 WITH THE AGREEMENT OF AMOUNT OF COMPENSATION.

24 MR. HELM: EXACTLY.

25 MR. MADISON: THAT'S MY POINT. THAT'S THE
26 SOURCE OF CONFUSION HERE.

02:34PM

27 MR. HELM: IT'S NOT THAT CONFUSING.

28 THE COURT: IT'S NOT.

1 MR. MADISON: OUR POSITION IS CONSISTENT.
2 JUST LIKE ANY NUMBER OF FOLKS, YOU KNOW YOUR PAY. IT'S
3 NOT A SURPRISE WHEN YOU OPEN THE PAY ENVELOPE.

4 BUT THAT DOESN'T MEAN YOU HAVE A
5 CONTRACT. IT JUST MEANS YOU'VE AGREED, YOU'RE GOING TO
6 GET PAID X, Y OR Z FOR THE WORK YOU DO.

02:35PM

7 MR. HELM: UNDER WHAT THEY'RE SAYING -- THEY
8 DON'T WANT TO SAY THE WORD "CONTRACT," BUT WHAT THEY
9 ARE SAYING IS THERE WAS A BINDING AGREEMENT AS TO THE
10 AMOUNT OF COMPENSATION HE WOULD BE PAID FOR WHEN HE
11 WORKED THERE.

02:35PM

12 THEY SAY THE AGREEMENT DIDN'T GO
13 FURTHER, TO SAY HE COULDN'T BE FIRED, BUT THEY'RE
14 SAYING THERE WAS AN AGREEMENT, THERE WAS A CONTRACT.

15 SO I THINK IT IS NOT ACCURATE TO SAY TCW
16 CONTENDS THE PARTIES DID NOT ENTER INTO A CONTRACT
17 BECAUSE IT WASN'T SIGNED. THEY DON'T CONTEND TO IT.

02:35PM

18 THE COURT: I LIKE 305 AND 306.

19 TAKE OUT THE "NEVER WRITTEN" LANGUAGE,
20 AND THOSE TWO WILL BE GIVEN, AND YOU CAN ARGUE ALL YOU
21 WANT ABOUT THEM.

02:35PM

22 I'LL SAY THE OBJECTION'S OVERRULED. THIS IS
23 AS TO 305. INSTRUCTION WILL BE GIVEN WITH CACI 306 AS
24 MODIFIED.

25 MR. EMANUEL: THANK YOU, YOUR HONOR.

02:36PM

26 MR. MADISON: YES, YOUR HONOR.

27 THE COURT: NOW WE'RE ON DEFENDANTS' SPECIAL
28 JURY INSTRUCTIONS, 61.

1 HOW CLOSE IS THIS TO THE CACI
2 INSTRUCTION ON IMPLIED CONTRACT? AND WHY DO WE NEED
3 MORE?

4 MR. HELM: IT'S EXPLAINING THE DIFFERENCE
5 BETWEEN AN EXPRESS AND AN IMPLIED CONTRACT.

02:37PM

6 AND IT'S MAKING THE POINT THAT THERE'S
7 NO DIFFERENCE IN THE LEGAL EFFECT BETWEEN -- THEY'RE
8 BOTH BINDING. IT ALL COMES FROM THE CIVIL CODE.

9 MS. STEIN: THE CACI DISCUSSES THE NO
10 DIFFERENCE BETWEEN IMPLIED AND WRITTEN, BUT DOES NOT --

02:37PM

11 THE COURT: WHAT IS THE CORRESPONDING CACI
12 INSTRUCTION? WAS IT DISPUTED OR WAS IT AN AGREED
13 INSTRUCTION?

14 MR. HELM: I THINK IT WAS 305 WE WERE JUST
15 TALKING ABOUT.

02:37PM

16 THE COURT: WAS IT?

17 MS. STEIN: YES.

18 MR. EMANUEL: YOUR HONOR, THE PRECEDING
19 INSTRUCTION TELLS THE COURT -- TELLS -- I MEAN TELLS
20 THE JURY, IMPLIED IN FACT CONTRACT IS AN ENFORCEABLE
21 CONTRACT.

02:37PM

22 THE COURT: RIGHT.

23 MR. EMANUEL: TO ME THIS IS PILING ON SAYING
24 THE SAME THING IN DIFFERENT WORDS AND A LOT MORE WORDS.
25 BECAUSE IT'S NOT LIMITED TO JUST IMPLIED CONTRACT.

02:38PM

26 THERE'S SPOKEN, WRITTEN. THERE'S NO
27 POINT IN GOING INTO EXPRESS CONTRACT WHEN WE ALREADY
28 TALKED ABOUT ORAL, WE TALKED ABOUT WRITTEN, AND WE

1 TALKED ABOUT IMPLIED.

2 I DON'T KNOW IF THERE'S ANY OTHER
3 CONTRACT TO TALK ABOUT.

4 MR. HELM: 305 TALKS ABOUT CONDUCT.

5 OUR SPECIAL ALSO SAYS AN AGREEMENT CAN
6 BE SHOWN BY THE DIRECT WORDS OF THE PARTIES.

02:38PM

7 THEN IT'S EXPRESS. IF IT CAN ONLY BE
8 SHOWN BY THE ACTS AND CONDUCT, IT'S IMPLIED, AND
9 THERE'S NO DIFFERENCE BETWEEN THEM.

10 MR. EMANUEL: MY POINT, YOUR HONOR, THERE'S NO
11 POINT IN TELLING THE JURY THAT --

02:38PM

12 THE COURT: THE LAST SENTENCE, I THINK, JUST
13 LOOKING AT THIS, IT MAY COME FROM THE CODE, BUT I THINK
14 IT EXPANDS ON 305.

15 AND THE LAST SENTENCE TENDS TO EMPHASIZE
16 THE DEFENDANTS' THEORY OF THE CASE.

02:39PM

17 MR. HELM: THE LAST SENTENCE OF 61?

18 THE COURT: YEAH.

19 MR. HELM: THE INTENTION TO MAKE A PROMISE?

20 THE COURT: WELL, JUST -- NO, THE WHOLE LAST
21 PARAGRAPH I GUESS I WAS LOOKING.

02:39PM

22 THERE'S NO DIFFERENCE IN LEGAL EFFECT
23 BETWEEN EXPRESS AND IMPLIED AGREEMENTS.

24 DIDN'T WE SAY THAT IN --

25 MR. HELM: SO IS THE THOUGHT TO GET RID OF
26 THAT PARAGRAPH?

02:39PM

27 THE COURT: THE THOUGHT AT THIS POINT IS TO
28 GET RID OF THE WHOLE INSTRUCTION, BUT --

1 MR. EMANUEL: IF I MAY, YOUR HONOR.

2 IT'S ALSO, FIRST OF ALL, PARTLY
3 ACADEMIC. WHY? BECAUSE DOES THE JURY NEED INSTRUCTION
4 ON WHETHER IT'S IMPLIED OR EXPRESS?

5 SECOND, THERE'S A FLAT OUT ERROR ALL
6 CONTRACTS MAY BE WRITTEN OR ORAL. I MIGHT BE WILLING
7 TO GO ALONG WITH IT, OF COURSE, WE KNOW THERE ARE
8 IMPLIED CONTRACTS AS WELL.

02:40PM

9 IT'S NOT ACCURATE OR NECESSARY, SIMPLY
10 EMPHASIZING THE DEFENDANTS' THEORY AND MAKING THE CASE
11 MORE COMPLICATED.

02:40PM

12 THE COURT: IS THERE GOING TO BE AN
13 INSTRUCTION ON BASIC BREACH OF CONTRACT INSTRUCTION?

14 MR. EMANUEL: YES.

15 I BELIEVE THAT'S COMING UP.

02:40PM

16 MS. STEIN: YES, YOUR HONOR.

17 THE COURT: WE GOT 305.

18 61. UNDER 619, THE ONLY OPTIONS ARE AN
19 EXPRESSED OR IMPLIED CONTRACT, RIGHT, THOSE ARE THE
20 ONLY TWO KINDS YOU CAN HAVE?

02:41PM

21 MS. STEIN: RIGHT, YOUR HONOR.

22 MR. HELM: YES.

23 MR. EMANUEL: YEAH.

24 THE COURT: AND 305 IS AN IMPLIED IN FACT
25 CONTRACT.

02:41PM

26 MR. EMANUEL: RIGHT. SO NOW WE'VE COVERED --

27 THE COURT: IMPLIED?

28 MR. EMANUEL: YEAH.

1 THE COURT: WHERE'S THE INSTRUCTION ON
2 EXPRESS?

3 MR. EMANUEL: BECAUSE THAT'S ORAL OR WRITTEN.
4 THAT WAS 300 -- THAT WAS --

5 THE COURT: 306?

02:41PM

6 MR. EMANUEL: NO, NO, THAT WAS THE FIRST ONE.

7 MR. HELM: 304.

8 MS. STEIN: 304, IT DOESN'T USE THAT
9 TERMINOLOGY, YOUR HONOR.

10 MR. EMANUEL: NO, WE JUST -- 304, CONTRACTS
11 MAY BE WRITTEN OR ORAL, PARTLY WRITTEN, PARTLY ORAL.
12 ORAL CONTRACTS ARE JUST AS VALID AS WRITTEN CONTRACTS.

02:42PM

13 THAT'S 304.

14 THE COURT: OKAY.

15 MR. EMANUEL: WE'VE ALREADY -- COURT'S RULED
16 ON IT, SO --

02:42PM

17 THE COURT: WELL, SHOULD IT BE -- LET ME JUST
18 SUGGEST SOMETHING HERE TO TRY TO HAVE SOME CONTINUITY.

19 SHOULD 304 HAVE, IN THE FIRST LINE:
20 EXPRESS CONTRACTS MAYBE WRITTEN OR ORAL?

02:42PM

21 THEN YOU GO ON, MAYBE PARTLY WRITTEN OR
22 PARTLY ORAL, WHATEVER.

23 THEN YOU HAVE IMPLIED IN FACT CONTRACTS,
24 WHICH ARE DISTINGUISHED FROM EXPRESS CONTRACTS.

25 ISN'T THAT RIGHT?

02:42PM

26 MR. EMANUEL: OKAY. YEAH.

27 THE COURT: AND, YOU KNOW, I'M NOT SCHOLAR OR
28 HERE SO -- SCHOLAR HERE, SO CORRECT ME IF I'M MISSING

1 THE POINT.

2 304 HAS GOT TO HAVE EXPRESS CONTRACTS
3 THAT ARE WRITTEN OR ORAL. AND THAT'S WHERE IT'S TO THE
4 TO BE -- IMPLIED IN FACT CONTRACTS.

5 ON THE OTHER HAND, CAN BE DETERMINED BY
6 THE CONDUCT OF THE PARTIES WITHOUT SPOKEN OR WRITTEN
7 WORDS, SO NOT ORAL OR NOT WRITTEN.

02:43PM

8 DOESN'T THAT MAKE SENSE?

9 MR. EMANUEL: YES. IN OTHER WORDS, ADD
10 EXPRESS TO INSTRUCTION 304.

02:43PM

11 THE COURT: RIGHT.

12 MR. EMANUEL: WE TAKE CARE OF THAT.

13 THE COURT: AND WE TAKE 305.

14 MR. EMANUEL: VERY WELL.

15 MS. STEIN: AND ADD IMPLIED IN FACT IN THE
16 SECOND PARAGRAPH, CORRECT?

02:43PM

17 MR. HELM: I'M FOLLOWING THE COURT.

18 THE COURT: IN THE SECOND PARAGRAPH OF WHAT?

19 MS. STEIN: 305.

20 THE COURT: WHERE WE INSERTED EXPRESS WE'LL
21 PUT IN FRONT OF THE FIRST WORD IN THE SECOND PARAGRAPH
22 OF 305: IMPLIED IN FACT CONTRACTS CAN BE CREATED BY
23 THE CONDUCT OF THE PARTIES.

02:43PM

24 THAT MAKES SENSE?

25 MS. STEIN: MAKES SENSE TO ME, YOUR HONOR.

02:44PM

26 THE COURT: MR. EMANUEL?

27 MR. EMANUEL: YES IT DOES, YOUR HONOR.

28 THE COURT: OKAY.

1 MR. HELM: HAVING SAID EXPRESS CONTRACTS AND
2 IMPLIED CONTRACTS, SHOULDN'T WE THEN SAY THERE'S NO
3 DIFFERENCE IN LEGAL EFFECT BETWEEN IMPLIED OR EXPRESS
4 AGREEMENTS? WHICH IS ONE OF THE SENTENCES IN 61.

5 THE COURT: YEAH, IF THAT'S THE ONLY SENTENCE
6 YOU REALLY WANT FROM 61, I'LL GIVE YOU THAT. 02:44PM

7 MR. EMANUEL: I THINK IT SHOULD BE
8 INCORPORATED INTO 306.

9 THE COURT: EITHER ONE. YOU COULD PUT THE
10 SAME LINE AT THE BOTTOM OF 304 AND AT THE BOTTOM OF
11 305. 02:44PM

12 MR. HELM: HOW ABOUT IF WE DO THIS --

13 THE COURT: HOWEVER --

14 MR. HELM: -- I HOPE THE COURT THINKS THIS IS
15 A FRIENDLY AMENDMENT. 02:44PM

16 BEFORE 304, HOW ABOUT IF YOU DID THE
17 FOLLOWING TWO SENTENCES FROM 61: UNDER CALIFORNIA LAW
18 CONTRACT IS EITHER EXPRESS OR IMPLIED, THEN THERE IS NO
19 DIFFERENCE IN LEGAL EFFECT BETWEEN EXPRESS OR IMPLIED
20 AGREEMENTS. 02:44PM

21 THEN WE SAY: EXPRESS CONTRACTS MAY BE
22 ORAL, IN 304.

23 AND THEN WE SAY IMPLIED IN FACT
24 CONTRACTS --

25 THE COURT: PUT IT IN ONE INSTRUCTION. 02:45PM

26 MR. HELM: OKAY.

27 THE COURT: OKAY.

28 MR. EMANUEL: YES, THANK YOU, YOUR HONOR.

1 THE COURT: THE FIRST LINE OF IT WILL SAY:
2 CONTRACTS MAY BE EXPRESS OR IMPLIED IN FACT.

3 THEN YOU'LL HAVE A LITTLE PART ABOUT
4 EXPRESS CONTRACTS AND THE PART ABOUT IMPLIED IN FACT
5 CONTRACTS.

02:45PM

6 AND THEN WE CAN GET RID OF 61.

7 MR. HELM: ALL RIGHT.

8 MS. STEIN: FINE, YOUR HONOR. THAT WORKS.

9 MR. HELM: I THINK WE CAN WORK WITH IT. OKAY.

10 THE COURT: SO ON 61 I'LL SAY THE OBJECTION'S
11 SUSTAINED, SUBJECT TO MODIFICATION OF CACI 304 AND 305.
12 AND I'M NOT GOING INTO THE SPECIFICS. I TRUST YOU ALL
13 HAVE TAKEN NOTES. YOU'LL GET IT.

02:45PM

14 MR. EMANUEL: YES.

15 MS. STEIN: YES.

02:45PM

16 THE COURT: ALL RIGHT. 62.

17 MS. STEIN: THERE'S A TYPOGRAPHICAL ERROR IN
18 THIS.

19 THE COURT: THEN LET'S SUSTAIN THE OBJECTION
20 AND MOVE ON.

02:46PM

21 (PAUSE) +

22
23 THE COURT: I DON'T THINK WE NEED IT. THE
24 SIMPLE INSTRUCTION WE JUST GAVE THEM GIVES THEM ALL YOU
25 NEED TO LISTEN TO YOUR ARGUMENTS AND MAKE A DECISION.

02:46PM

26 MR. HELM: VERY WELL, YOUR HONOR.

27 MS. STEIN: JUST TO COMPLICATE THINGS, YOUR
28 HONOR, MY NOTES ON THIS WITH 62 SAID: COMBINE WITH

1 TCW'S 14. COMBINE 62 WITH 64, WITH TCW'S 14.

2 THE COURT: THAT'S ONE WE WENT OVER BEFORE?

3 MS. STEIN: YES.

4 THE COURT: HAVE YOU DONE THAT?

5 MR. HELM: THIS IS COMING BACK TO ME NOW.

02:47PM

6 THIS IS FROM THE BANNER CASE.

7 THE COURT: FROM OUR FIRST SESSION?

8 MR. HELM: WHICH ONE DID YOU SAY?

9 MS. STEIN: 14.

10 THE COURT: LET ME GO BACK. I THOUGHT WE HAD
11 SOME NOTES.

02:47PM

12 MR. EMANUEL: LET'S SEE WHAT THAT WAS.

13 MR. HELM: YES, I REMEMBER THIS.

14 THIS WAS WHAT THE COURT SAID THIS IS A
15 SITUATION WHERE THERE WERE, I THINK THERE ARE THREE
16 SENTENCES IN BANNER; THEY TOOK ONE OF THEM, WE TOOK
17 ANOTHER ONE, AND ONE OF THEM I THINK WAS LEFT OUT.

02:47PM

18 I THINK -- THEY HAVE NOT AGREED TO THIS,
19 BUT IN MY MIND I CONCEIVE OF A WAY WE CAN ACTUALLY DO
20 IT THAT THEY MAY AGREE TO.

02:47PM

21 THAT'S WHAT THE COURT DISCUSSED LAST
22 TIME.

23 THE COURT: I OVERRULED THE OBJECTION TO
24 PLAINTIFFS' 14.

25 AND I SAID ULTIMATELY THE JURY WILL HAVE
26 TO DETERMINE THE INTENT OF THE PARTIES. AND OTHER
27 INSTRUCTIONS ON THE EXISTENCE OF AN ORAL AGREEMENT WILL
28 PLACE THIS INSTRUCTION IN CONTEXT.

02:48PM

1 PARTIES TO COMBINE PLAINTIFFS SJI NO. 14
2 WITH DEFENDANT'S 62 THROUGH 64.

3 MS. STEIN: RIGHT.

4 THE COURT: THAT'S FROM OUR FIRST CONFERENCE.

5 MR. EMANUEL: YES, YOUR HONOR. 02:48PM

6 THE COURT: GO BACK TO THE DRAWING BOARD.

7 MR. HELM: WE WILL DO THAT.

8 THE COURT: OKAY.

9 THAT'S 62 THROUGH 64.

10 ALL RIGHT. 65. THAT'S A LITTLE DICEY. 02:48PM
11 I UNDERSTAND WHERE THE DEFENDANT WANTS THAT
12 INSTRUCTION.

13 IT SEEMS TO ME, YOU KNOW, IT PRESUPPOSES
14 THAT THERE'S NOT A DISPUTE AS THERE IS HERE BETWEEN THE
15 BENEFITS AND BURDENS OF THE TRANSACTION. AND HERE 02:50PM
16 THOSE ARE VERY MUCH IN DISPUTE BECAUSE EACH SIDE SAYS
17 THEY'RE VERY DIFFERENT.

18 MR. HELM: I'M NOT EXACTLY SURE WHAT THE COURT
19 MEANS BY THE BENEFITS AND THE BURDENS.

20 THE COURT: WELL, THIS INSTRUCTION READS: 02:50PM

21 VOLUNTARY ACCEPTANCE OF THE BENEFIT
22 OF A TRANSACTION IS EQUIVALENT TO
23 CONSENT OF ALL THE OBLIGATIONS
24 ARISING FROM IT.

25 PLAINTIFF SAYS HE'S AN AT-WILL EMPLOYEE, AND 02:50PM
26 WE AGREE TO PAY HIM X, AND WE PAY HIM X, AND THERE'S NO
27 OBLIGATIONS ARISING BEYOND THAT OF OBLIGATIONS TO
28 AT-WILL EMPLOYEE.

1 DEFENDANT SAYS, WE AGREED TO A LOT MORE
2 THAN JUST HOW MUCH YOU'RE GOING TO PAY US. THERE ARE A
3 LOT OF OTHER TERMS ASSOCIATED WITH THIS. WE GOT AN
4 EXPRESS OR IMPLIED CONTRACT HERE WITH LOTS OF TERMS.

5 MR. HELM: WELL, WHICH IS WHY WE SUBMIT TO THE 02:50PM
6 JURY TO DECIDE WHAT WERE THE OBLIGATIONS ARISING FROM
7 IT. THIS IS A CRITICAL INSTRUCTION FOR US.

8 THEY -- FOR TWO YEARS, THEY ACCEPTED THE
9 BENEFITS OF THE PERFORMANCE THAT MR. GUNDLACH PROVIDED.
10 AND THAT IS A CRITICAL COMPONENT OF WHY WE THINK A 02:51PM
11 CONTRACT WAS FORMED. AND THIS IS A CORRECT STATEMENT
12 OF THE LAW. IT COMES STRAIGHT FROM THE CIVIL CODE.

13 AND THEY CAN ARGUE, THESE WERE NOT THE
14 OBLIGATIONS ARISING FROM IT. THE FACTS THAT WERE KNOWN
15 OR NOT TO BE KNOWN TO THEM OR -- OR FROM THE PERSON 02:51PM
16 ACCEPTING, WERE DIFFERENT.

17 BUT THE JURY NEEDS TO KNOW THE LEGAL
18 CONSTRUCT SO WE CAN THEN ARGUE HOW THE FACTS FIT IN.

19 MR. MADISON: OUR THEORY IS -- THE PROBLEM IS,
20 WE DID TELL MR. GUNDLACH WHAT WE'D PAY HIM. 02:51PM

21 SO THIS IS NOT A CASE WHERE OUR
22 ACCEPTANCE OF THE BENEFITS OF HIS AT-WILL EMPLOYMENT IN
23 EXCHANGE FOR THE COMPENSATION THAT WE HAD DISCLOSED TO
24 HIM SHOULD BE SOMETHING THAT -- CAN BE USED TO INFER
25 ANYTHING. 02:51PM

26 AND THIS INSTRUCTION IS INTENDED FOR AN
27 ENTIRELY DIFFERENT SITUATION. WHERE SOMEONE -- YOU
28 COME HOME FROM WORK EVERY DAY AND SOMEONE'S PAINTING

1 YOUR HOUSE, AND YOU NOD AND PICK COLORS AND YOU GIVE
2 THEM THE THUMBS UP.

3 AND LATER YOU SAY, WHAT DO YOU MEAN I
4 OWE YOU FOR PAINTING MY HOUSE? HERE IT WAS CRYSTAL
5 CLEAR WHAT WE WERE PAYING HIM.

02:52PM

6 MR. HELM: BUT THEY DIDN'T PAY HIM. FROM
7 SEPTEMBER TO DECEMBER, HE SHOWED UP EVERY DAY, YOU
8 KNOW -- IN '09 THEY SAID, GREAT, KEEP GOING, BRING US
9 THE PPIP AND KEEP WORKING ON FUNDS.

02:52PM

10 THE END OF THE QUARTER, SAME. AND THEY
11 FIRED HIM AND DIDN'T PAY HIM FOR THE LAST QUARTER.
12 THEY ACCEPTED THE BENEFITS FROM THE LAST PERFORMANCE.

13 MR. MADISON: THAT'S A DIFFERENT CLAIM.

14 HE HAS A WAGE CLAIM.

15 THE COURT: THAT'S NOT A WAGE CLAIM. THIS
16 IS -- THE INTERPRETATION OF THE EXHIBIT A AND THE
17 REFERENCE IN THE BODY OF THE CONTRACT TO -- TO THE TWO
18 INCONSISTENT PROVISIONS, IF YOU WILL. AND EACH SIDE
19 TAKES THE ONE THEY LIKE THE MOST.

02:52PM

20 MR. HELM: RIGHT. IT'S ALSO THAT, YOUR HONOR,
21 THIS IS A SETTLED PRINCIPLE OF LAW. WE SHOULD BE ABLE
22 TO ARGUE TO THE JURY THAT BY ACCEPTING THE BENEFITS OF
23 HIS PERFORMANCE, THEY AGREED TO -- THAT IS DEEMED
24 CONSENT TO THE OBLIGATIONS THAT ARISE FROM THAT.

02:52PM

25 WE CAN ARGUE WHAT THOSE OBLIGATIONS
26 WERE, BUT IT'S IMPORTANT TO LET THE JURY KNOW,
27 ACCEPTANCE OF A BENEFIT CAN CONSTITUTE CONSENT.

02:53PM

28 MR. EMANUEL: NO --

1 MR. MADISON: OUR POINT IS, ABSOLUTELY, THEY
2 CAN MAKE THAT ARGUMENT; IT'S NOT A LEGAL RULING.

3 THE COURT: I DON'T KNOW THAT IT'S -- I'LL
4 SUSTAIN THE OBJECTION, SUBJECT AND WITHOUT PREJUDICE TO
5 FURTHER ARGUMENT FOLLOWING PRESENTATION OF DEFENDANTS'
6 CASE. I WANT TO SEE WHAT ALL THE EVIDENCE IS ON THIS.

02:53PM

7 AS I SEE IT, IT'S AN ARGUMENT AND IT
8 CERTAINLY WILL BE MADE, BUT I THINK -- IT'S A PROBLEM,
9 POTENTIALLY COULD BE MISINTERPRETED BY THE JURY, IT
10 SEEMS TO ME.

02:53PM

11 MR. HELM: WELL, IF YOUR HONOR WILL GIVE US
12 ANOTHER SHOT AT IT, THEN WE'LL --

13 THE COURT: I'LL GIVE YOU ANOTHER SHOT.
14 HOPEFULLY, IT WON'T BE THIS MUCH ON THE TABLE WHEN WE
15 COME BACK.

02:54PM

16 I THINK THAT'S A TRUE STATEMENT OF THE
17 LAW.

18 MR. EMANUEL: I'M SORRY?

19 THE COURT: WE'RE ON 66.

20 I SUPPOSE THE GREATER CONSTRUCT, ONE
21 MUST, IF REASONABLY PRACTICAL, GIVE FORCE AND EFFECT TO
22 EVERY PROVISION AND AVOID AN INTERPRETATION THAT
23 RENDERS SOME CLAUSES INOPERATIVE OR MEANINGLESS.

02:54PM

24 AND THAT'S A LITTLE DIFFERENT FROM WHAT
25 THEIR INSTRUCTION IS.

02:55PM

26 MR. EMANUEL: YES.

27 MR. HELM: WE WOULD BE AGREEABLE TO ADDING "IF
28 REASONABLY PRACTICAL" TO THE INSTRUCTION, YOUR HONOR.

1 MR. MADISON: THIS IS FOR A WRITTEN CONTRACT.

2 THE COURT: NO. A CONTRACT. CONTRACT IS NOT
3 JUST WRITTEN.

4 MR. MADISON: BUT WHAT PROVISIONS?

5 THE COURT: WELL, WE HAVE A WRITING,
6 EVIDENCING WHAT PLAINTIFFS -- OR DEFENDANTS CONCERNED
7 IS THEIR CONTRACT.

02:55PM

8 AND YOU HAVE A -- YOU'RE TAKING
9 EXHIBIT A WHICH, BY REFERENCE, REFERENCES -- I GUESS
10 THE REFERENCE IS IN THE BODY OF THE CONTRACT TO
11 EXHIBIT A.

02:55PM

12 MR. MADISON: RIGHT.

13 THE COURT: BUT AN INTERPRETIVE CLAUSE WAS
14 8-A -- I DON'T REMEMBER THE NUMBER.

15 MR. HELM: MIGHT HAVE BEEN 6-B. IT VARIES.

02:55PM

16 THE COURT: WHATEVER IT IS, THERE SHOULD BE --
17 WHETHER THEY SHOULD BE TAKEN TOGETHER AND INTERPRETING
18 WHAT IT MEANS, I THINK IS A LEGITIMATE ISSUE.

19 MR. EMANUEL: BUT, YOUR HONOR, THERE IS A
20 CACI 317 ON THIS POINT. I DON'T KNOW WHY WE ARE
21 CRAFTING OUR OWN.

02:56PM

22 THE COURT: HAVE WE GOT THAT IN THE MIX?

23 MR. EMANUEL: NO. WE'D LIKE TO SUBMIT THAT.

24 THE COURT: NOBODY'S SUBMITTED IT.

25 MR. MADISON: WE DID. IN OUR OBJECTION WE
26 POINTED OUT IF THE COURT WERE INCLINED, IT SHOULD USE
27 CACI, NOT THE --

02:56PM

28 THE COURT: I DON'T HAVE A PROBLEM WITH THAT.

1 HAVE YOU LOOKED AT THAT, MR. HELM?

2 MS. STEIN: YOUR HONOR, CACI 317 IS SLIGHTLY
3 DIFFERENT. IT SAYS, IN DECIDING WHAT THE WORDS OF A
4 CONTRACT MEAN TO THE PARTIES, YOU SHOULD CONSIDER THE
5 WHOLE CONTRACT, NOT JUST ISOLATED PARTS.

02:56PM

6 THIS SPECIAL INSTRUCTION WE PROPOSED IS
7 MORE NUANCED. THAT THE JURY'S TO GIVE FORCE AND EFFECT
8 TO ADDED PROVISION AND AVOID AN INTERPRETATION THAT
9 RENDERS SOME CLAUSES INOPERATIVE.

02:56PM

10 THEY'RE DIFFERENT.

11 MR. MADISON: IT'S THE -- THIS IS WHERE THE
12 DEFENSE WANTS TO HAVE IT BOTH WAYS. THEY WANT TO
13 PRETEND THE CONTRACT WAS SIGNED, SO THEY GET THE
14 BENEFIT OF THESE KINDS OF LEGAL PROVISIONS.

15 BUT THEY HAVE TO CONCEDE IT WASN'T
16 SIGNED. THIS IS FOR A WRITTEN CONTRACT.

02:56PM

17 THE COURT: IS THERE A USE NOTE THAT SAYS
18 THAT?

19 MR. MADISON: WELL, WORDS, OR, I SUPPOSE, AN
20 ORAL CONTRACT WHERE THE WORDS ARE EXPRESSED. BUT I
21 HAVEN'T HEARD THAT HAPPENED HERE YET, EITHER.

02:57PM

22 MR. EMANUEL: MORE GENERALLY, 317 SAYS
23 CONSIDER THE THING AS A WHOLE. WHICH IS A STANDARD
24 CONTRACT INTERPRETATION -- LOOK AT THE WHOLE THING.

25 YOU KNOW, YOU'RE NOT LOOKING AT ISOLATED
26 PARTS.

02:57PM

27 MR. HELM: THIS GOES MORE DIRECTLY TO OUR --
28 THE POINT WE'RE TRYING TO MAKE, WHICH IS, I THINK WE'RE

1 ENTITLED TO HAVE A SUPPORTING INSTRUCTION FOR THEM.
2 WHICH IS, IF WE -- IF YOU READ EXHIBIT A THE WAY THEY
3 SAID IT SHOULD BE READ.

4 IT WOULD RENDER INOPERATIVE THE CLAUSE
5 ABOUT THE ACCRUED TO TIME OF TERMINATION THAT HAD BEEN 02:57PM
6 IN MR. GUNDLACH'S CONTRACT SINCE 1989. AND THE PARTIES
7 HAD AN UNDERSTANDING THAT THAT HAD MEANING, AND THEY'D
8 ALWAYS AGREED TO IT --

9 THE COURT: AS A FUNDAMENTAL ELEMENT OF THE
10 CROSS-COMPLAINT, YOU HAVE TO ESTABLISH THE TERMS OF THE 02:58PM
11 CONTRACT THAT YOU SAY CONTROLS THE RELATIONSHIP.

12 AND YOU HAVE TO ESTABLISH, EITHER BY
13 IMPLIED IN FACT OR BY PERFORMANCE OR BY ORAL AGREEMENT,
14 THAT THOSE CARRYOVER PROVISIONS FROM EARLIER CONTRACTS
15 OR IN THE DRAFT AGREEMENT THAT WAS NEVER SIGNED ARE 02:58PM
16 PART OF THE AGREEMENT.

17 MR. HELM: UNDERSTOOD, YOUR HONOR. I AGREE
18 WITH THAT.

19 THE COURT: ONCE YOU ESTABLISH THAT, THEN I
20 THINK CACI 17 -- 317 IS APPROPRIATE. AND, YOU KNOW, 02:58PM
21 MAYBE SOME MELDING OF IT WITH WHAT YOU GOT IN 66 IS
22 APPROPRIATE. I'LL GIVE IT. THEN I'LL GIVE IT.

23 BUT YOU CAN'T HAVE A PRECONCEPTION OR
24 PRE -- AN ASSUMPTION THAT THERE IS AN AGREEMENT BECAUSE
25 THESE ARE THE THINGS YOU HAVE TO PROVE. 02:58PM

26 MR. HELM: OKAY. I UNDERSTAND.

27 MS. STEIN: WE'LL WORK ON THAT, YOUR HONOR.

28 THE COURT: ALL RIGHT.

1 I'LL SAY THE PARTIES WILL REDRAFT OR
2 MODIFY CACI 317, ON NO. 66. ALL RIGHT.

3 MR. EMANUEL: VERY WELL.

4 THE COURT: WE'LL TAKE 15.

02:59PM

5
6 (RECESS) +

7
8 THE COURT: WE'RE ON THE 68. OKAY MR. HELM.

9 MR. HELM: WE DO HAVE ARGUMENTS BECAUSE THIS
10 WAS PART OF HIS HISTORICAL -- WHEN THE PARTIES WENT
11 FORWARD WITH THIS NEW ARRANGEMENT IN '07 THAT THEY
12 IMPLIEDLY, OR EXPRESSLY AGREED TO THIS TERM ABOUT
13 ACCRUED, THE TIME OF TERMINATION.

03:21PM

14 THAT'S ONE ARGUMENT WE HAD. THIS IS
15 MAKING A DIFFERENT ARGUMENT. AND THAT IS THAT IN THE
16 2003 AGREEMENT, IT WAS SIGNED. AND IT WAS PERFORMED
17 FOR MANY YEARS. IT CONTAINED THIS ACCRUED TO
18 TERMINATION PROVISION.

03:21PM

19 WE BELIEVE THAT THE ONLY SENSIBLE WAY TO
20 READ THAT PROVISION IS THAT IT APPLIES TO A TERMINATION
21 DURING THE TERM OF THE CONTRACT OR AFTER THE TERM OF
22 THE CONTRACT.

03:21PM

23 SO, FOR EXAMPLE, BECAUSE OTHERWISE IT
24 MAKES NO SENSE, IF THEY FIRE HIM A MONTH BEFORE THE
25 EXPIRATION OF THE CONTRACT, HE THEN GETS ALL HIS
26 ACCRUED FEES UP TO THE TIME OF TERMINATION.

03:21PM

27 IF THEY THEN GO TO THE END OF THE TERM,
28 THE CONTRACT EXPIRES AND THEY TERMINATE HIM FOR THAT

1 REASON, IT MAKES NO SENSE TO SAY, WELL, NOW HE DOESN'T
2 GET ANY ACCRUED COMPENSATION. ONLY IF THEY FIRED HIM
3 FOR A GROSS MISCONDUCT A MONTH BEFORE.

4 SO WE THINK THE ONLY SENSIBLE WAY TO
5 READ THE CONTRACT IS WHEN IT SAYS YOU GET PAID THE
6 COMPENSATION ACCRUED TO THE TIME OF TERMINATION.

03:22PM

7 THAT THAT WOULD INCLUDE A TERMINATION
8 UPON THE EXPIRATION OF THE CONTRACT OR IF THEY
9 CONTINUED MONTH TO MONTH THEREAFTER. AND HE WAS
10 ULTIMATELY TERMINATED THREE MONTHS LATER THAT YOU'D
11 HAVE TO A PAY THE ACCRUED COMPENSATION UP TO -- TILL
12 THAT TIME, TOO.

03:22PM

13 OTHERWISE, YOU HAVE THE ANOMALY OF
14 YOU'RE BETTER OFF HAVING BEEN FIRED FOR GROSS
15 MISCONDUCT THAN YOU ARE FOR BEING LET GO AT THE END OF
16 A TERM OF ILLUSTRIOUS SERVICE. AND THAT -- THAT CAN'T
17 -- SERVICE BEING THE INTENTION OF THE PARTIES.

03:22PM

18 THE COURT: YOU'RE ASSUMING THERE'S SOME
19 HOLD-OVER PROVISION AS IN THE CONSPIRACY CLAIM IN A
20 LANDLORD TENANT ARRANGEMENT. AND I'M NOT SURE IF THE
21 LAW HAS THAT PROVISION IN THE EMPLOYER, EMPLOYEE
22 CONTEXT. IF IT DOES, THEN WE HAVE TO LOOK AT THAT.

03:23PM

23 MR. HELM: ALL RIGHT.

24 WELL, THIS MAYBE, ISN'T EXACTLY THE TIME
25 TO ARGUE THIS. WOULD IT BE APPROPRIATE FOR US TO MAKE
26 SOME KIND OF A PRESENTATION AT THIS POINT MAYBE A SHORT
27 BRIEF ON THIS ISSUE?

03:23PM

28 THE COURT: HOLD ON JUST A MINUTE.

1 (PAUSE) +

2

3 THE COURT: I'LL SUSTAIN THE OBJECTION TO THIS
4 INSTRUCTION AT THIS POINT. I'M NOT PREPARED TO MAKE A
5 DETERMINATION AS A MATTER OF LAW THAT THE PROVISION IN
6 THE 2003 AGREEMENT WHICH HAD EXPIRED GOVERNED HIS
7 RIGHTS AS OF TERMINATION IN 2009. AND THAT WOULD TAKE
8 SOME BRIEFING.

03:23PM

9 AND, YOU KNOW SOME, I'D HAVE TO GO QUITE
10 A WAYS BEFORE I DO THAT. KNOWING WHAT I KNOW NOW.

03:24PM

11 MR. HELM: WILL YOU SUSTAIN WITHOUT PREJUDICE
12 TO US BRIEFING THE ISSUE? BECAUSE THIS IS -- THERE IS
13 A CONTRACT THAT WAS ENTERED INTO.

14 THE COURT: THIS ISSUE HAS NEVER COME UP IN
15 ANY PRETRIAL --

03:24PM

16 MR. HELM: IT WAS IN OUR SUMMARY JUDGMENT
17 OPPOSITION, YOUR HONOR. WE BRIEFED THIS VERY ISSUE.
18 THAT WAS ONE OF THE BASES THAT WE INCLUDED FOR WHY IT
19 WAS THAT THERE WAS AN ACCRUED TO TERMINATION --

20 THE COURT: I REJECTED IT THEN.

03:24PM

21 MR. HELM: NO, YOUR HONOR. YOU SIDED WITH US
22 AND RULED AGAINST SUMMARY JUDGMENT. YOU SUSTAINED US
23 GOING FORWARD.

24 NOW, THE COURT DIDN'T HAVE TO
25 PARTICULARLY RULE ON THAT ARGUMENT. BUT WE HAVE MADE
26 THAT ARGUMENT AS A BASIS FOR WHY THERE SHOULDN'T BE
27 SUMMARY JUDGMENT AGAINST US. THIS IS AN ARGUMENT THAT
28 WE THINK IS --

03:24PM

1 THE COURT: I'LL LOOK AT IT. I NEED SOME
2 AUTHORITY. OR CARRY OVER CONCEPT IN THE EMPLOYMENT
3 ARENA.

4 MR. HELM: OF COURSE.

5 THE COURT: IT'S A STATUTORY RIGHT IN THE
6 LESSOR, LESSEE SITUATION. I'M JUST NOT FAMILIAR WITH
7 IT. BUT I'M HAPPY TO LOOK AT THAT TIME.

03:25PM

8 MR. EMANUEL: WHILE THEY'RE BRIEFING IT, I
9 WOULD LIKE TO KNOW HOW IT IS THEY CAN SUE TO RECOVER
10 FROM BREACH OF 2000 AGREEMENT WHEN IT WASN'T PLEADED IN
11 THEIR COMPLAINT.

03:25PM

12 THE COURT: I DON'T KNOW?

13 MR. EMANUEL: I DON'T KNOW, IF THEY'RE GOING
14 TO ASK THE COURT TO RULE AS A MATTER OF LAW I THINK
15 THEY SHOULD AT LEAST POINT OUT WHERE IT WAS FRAMED.

03:25PM

16 THE COURT: THERE ARE ALL SORTS OF
17 COMPLICATIONS THAT COME INTO THIS. IT'S A TANGLED WEB
18 YOU ALL WEAVE.

19 BUT IF YOU WANT TO INSIST AND ARGUE THAT
20 THE TERMS OF THE 2003 AGREEMENT CARRIED OVER, THEN HOW
21 DO YOU GET THE AGREED TERMS ON THE COMPENSATION THAT
22 WAS SIGNIFICANTLY DIFFERENT THAN THAT? AND MAYBE IT
23 WAS MODIFIED, BUT EXCEPT AS MODIFIED, YOUR ARGUMENT IS
24 THE 2003 PROVISIONS IN THEIR ENTIRETY CONTROL. I DON'T
25 KNOW?

03:25PM

03:26PM

26 THOSE ARE LEGAL ISSUES THAT YOU CANNOT
27 CONTINUE TO BRING IN BRIEFS EVERY DAY THAT SOMETHING
28 ELSE COMES UP. AND TRY TO ARGUE THIS, BUT YOU WANT TO

1 FILE A BRIEF ON IT, FILE IT, YOU BETTER DO IT SOONER
2 THAN LATER. I'M NOT INSTRUCTING ON THINGS I HAVEN'T
3 HAD A CHANCE TO LOOK AT.

4 MR. HELM: WE UNDERSTAND, YOUR HONOR. WE
5 THOUGHT THE APPROPRIATE WAY TO RAISE IT WAS WITH A JURY
6 INSTRUCTION. THIS WAS SUBMITTED AT THE TIME OF JURY
7 INSTRUCTIONS. WE REALIZE IT MAY REQUIRE ADDITIONAL
8 BRIEFING AND WE WILL HONOR THE COURT'S REQUEST TO DO
9 TARGETED BRIEFING ON THE ISSUES YOU'VE RAISED.

03:26PM

10 THE COURT: ALL RIGHT. ON 69.

03:26PM

11 (PAUSE) +

12
13 THE COURT: I'M NOT SURE I SHOULD BE
14 INSTRUCTING ON WHAT -- WHAT THE JURY'S GOING TO HAVE TO
15 DETERMINE. IT'S A DISPUTED FACT WHAT ACCRUED
16 COMPENSATION IS. THE PLAINTIFFS HAVE AN ARGUMENT THAT
17 IT'S ACCRUED TO THE DATE OF TERMINATION.

03:27PM

18 AND THAT BY DEFINITION, UNPAID FEES
19 CANNOT HAVE ACCRUED BECAUSE IN THE PERFORMANCE FEES
20 THAT ARE NOT PAYABLE TILL PAID.

03:27PM

21 SO I MEAN WE GOT SOME SIGNIFICANT
22 DISPUTES HERE. THAT'S THE 40 MILLION FOR THE END OF
23 THE YEAR I GUESS. OR THE 4TH QUARTER OF 2009.

24 MR. HELM: 60 MILLION.

25 THE COURT: 40 TO 60, WHAT'S A FEW BUCKS.

03:28PM

26 MS. STEIN: THE WAY I HEARD THE EVIDENCE, YOUR
27 HONOR, I THOUGHT THERE REALLY WASN'T QUARREL OVER THE
28 WORD "ACCRUED" AND WHAT IT MIGHT MEAN. BUT THAT TCW

1 WAS ARGUING THAT IN EXHIBIT A TO THE 2007 IT SAID
2 ACCRUED AND PAID TO THAT CONTRACT.

3 IT ADDED A SECOND ELEMENT. THIS MERELY
4 DEFINES THE TERM ACCRUED. AND DOESN'T CONFLICT WITH
5 TCW'S SUBMISSION OF THEIR CASE.

03:28PM

6 MR. SURPRENANT: YOUR HONOR, IT'S DISPUTED.
7 THIS IS A \$42 MILLION MOTION FOR DIRECTED VERDICT.

8 WE OBVIOUSLY DISAGREE, ACCRUED
9 COMPENSATION OF PARAGRAPH 6 OF THE DRAFT COMPLAINT
10 MEANS THAT. IT USES PROFIT SHARING AS A DEFINED TERM
11 LEADING -- SO TO INTERPRET IT YOU HAVE TO GO TO THE
12 DEFINED TERM WHICH IS EXHIBIT A.

03:28PM

13 THE COURT: YOU HAVE TO INTERPRET THE TWO IN A
14 MANNER THAT IS CONSISTENT.

15 MR. SURPRENANT: THAT'S CORRECT, YOUR HONOR.

03:29PM

16 THE COURT: THAT'S THE TERMINATION FOR CAUSE
17 PROVISION AS WELL. I'M NOT GOING TO GIVE THIS
18 INSTRUCTION. NUMBER 70.

19 THE OBJECTION'S SUSTAINED TO NUMBER 70.
20 71.

03:29PM

21 (PAUSE) +

22
23 THE COURT: I THINK THIS GOES TO -- SEEKS TO
24 INSTRUCT ON DISPUTED FACTS. AND, I MEAN WHICH CONTRACT
25 WOULD YOU BE SUGGESTING, MR. HELM, IS BEING CHANGED
26 WITHOUT NOTICE?

03:30PM

27 MR. HELM: WELL, HE HAD A CONTRACT 2007, WHICH
28 CONTAINED VARIOUS TERMS. --

1 THE COURT: WAIT A MINUTE. THE 2003 CONTRACT,
2 YOU'RE REFERRING TO?

3 MR. HELM: YES. THE 2003 CONTRACT WAS IN
4 EFFECT.

5 BEFORE THE END OF THE TERM THERE WERE 03:31PM
6 MODIFICATIONS MADE. THE EXTENT OF THE MODIFICATIONS
7 ARE SOMEWHAT DISPUTED, EVERYONE SEEMS TO AGREE THEY
8 CHANGED THE COMPENSATION METHOD.

9 AND SO IT ISN'T PRINCIPLE OF LAW THAT IF
10 THEY THEN WANT TO SAY GOING FORWARD, BY THE WAY YOU 03:31PM
11 DON'T HAVE ANY PROTECTION AGAINST TERMINATION FOR
12 CAUSE. WE NO LONGER WILL PAY YOUR ACCRUED COMPENSATION
13 TO THE TIME OF TERMINATION.

14 THAT'S FINE, THEY CAN DO THAT. THEY
15 HAVE TO GIVE THE EMPLOYEE NOTICE, WE'VE CHANGED THE 03:31PM
16 TERMS NOW.

17 THE COURT: YOU SOUND LIKE MR. MADISON AND
18 MR. QUINN, AND MR. SURPRENANT.

19 MR. HELM: PLEASE DON'T SAY THAT, YOUR HONOR.

20 THE COURT: BOTH OF YOU WANT TO PICK AND 03:31PM
21 CHOOSE WHAT YOU LIKE OUT OF THE CONTRACT AND REJECT THE
22 REST. IF THAT WERE THE CONCEPT, AND THERE WERE NO
23 AGREEMENT, MAYBE YOU OUGHT TO GO BACK TO THE
24 COMPENSATION THAT WAS DUE UNDER THE 2003 CONTRACT.

25 AND HOW MUCH IS THAT GOING TO BE FOR THE 03:31PM
26 FOURTH QUARTER. SUBSTANTIALLY LESS THAN WHAT WAS DUE
27 UNDER THE NEW AGREEMENT, RIGHT?

28 MR. HELM: I THINK IT WILL STILL PROBABLY BE

1 SUBSTANTIAL. I THINK WE HAVE AGREEMENT THAT THE
2 COMPENSATION TERM WAS CHANGED. AND I MEAN THAT'S --

3 THE COURT: NO, THEY DON'T AGREE IT WAS
4 CHANGED. THEY AGREE THAT THE CONTRACT EXPIRED. YOU'RE
5 AN AT-WILL EMPLOYEE AND WE AGREED TO PAY YOU X GOING
6 FORWARD, PERIOD. NO OTHER AGREEMENT, NOTHING. "NADA."

03:32PM

7 MR. HELM: WELL, WE ARE RELYING ON A LEGAL
8 PRINCIPLE, YOUR HONOR, THAT SAYS IF YOU CHANGE A TERM
9 THAT YOU CAN DO IT ONLY ON REASONABLE NOTICE TO THE
10 EMPLOYEE.

03:32PM

11 THE COURT: I'LL SUSTAIN THE OBJECTION.

12 SAME ISSUE, 72. ALL OF THESE IN MY VIEW
13 SEEK TO IN EFFECT USURP THE JURY'S RESPONSIBILITY TO
14 DETERMINE WHAT, IF ANYTHING, WAS THE AGREEMENT BETWEEN
15 THE PARTIES. AND THAT'S WITHIN THEIR PURVIEW. THEY
16 SHOULDN'T BE INSTRUCTED IN A MANNER THAT PRESUPPOSES A
17 CERTAIN FINDING BY THEM. AND THAT'S WHAT ALL OF THESE
18 SEEM TO DO.

03:33PM

19 MS. STEIN: YOUR HONOR, WHAT IF WE MODIFY TO
20 SAY IF THERE IS AN EMPLOYMENT CONTRACT THAT PROVIDES
21 FOR NOTICE AND CURE --

03:33PM

22 THE COURT: I'M NOT SURE YOU NEED IT, QUITE
23 FRANKLY. THAT MIGHT BE OKAY. THEY'RE GOING TO
24 DETERMINE, IF THEY BUY THE ARGUMENT THAT THE TERMS OF
25 THE DRAFT AGREEMENT ARE AN IMPLIED-IN-FACT AGREEMENT OR
26 AN ORAL AGREEMENT YOU GOT ALL THOSE PROVISIONS.

03:33PM

27 MS. STEIN: BUT THIS EXPLAINS TO THE JURY WHAT
28 A NOTICE AND CURE PERIOD LEGALLY MEANS. IT MEANS TO

1 INSTRUCT THEM ON THE LAW WHAT A NOTICE -- WHAT THE
2 RAMIFICATIONS OF HAVING A NOTICE AND CURE, WHAT THE
3 RAMIFICATIONS ARE --

4 THE COURT: THAT DOESN'T COME INTO PLAY
5 BECAUSE ARGUABLY THE TCW ARGUMENT IS IT WAS A
6 TERMINATION FOR CAUSE, GROSS MISCONDUCT.

03:33PM

7 AND THERE'S NO NOTICE AND CURE PERIOD
8 FOR THAT.

9 MS. STEIN: TRUE, IF THEY ARE GOING TO ARGUE
10 TO THE JURY IT WAS A MATERIAL, BREACH OF MATERIAL JOB
11 RESPONSIBILITIES, WHICH IS AN ALTERNATIVE PROVISION FOR
12 TERMINATION INTO THAT 2007 CONTRACT, THAT MATERIAL
13 BREACH REQUIRES A NOTICE AND CURE PERIOD.

03:34PM

14 THE COURT: THEY MADE NO ARGUMENT AND THEY'VE
15 OFFERED NO EVIDENCE OF ANY MATERIAL BREACH OF DUTIES
16 AND RESPONSIBILITIES, WHAT THEY'RE ARGUING IS IT'S A
17 BREACH OF HIS FIDUCIARY DUTY AND GROSS MISCONDUCT.

03:34PM

18 THEY'RE NOT SAYING HE DIDN'T MANAGE THE
19 MONEY WELL OR DO HIS JOB.

20 MR. HELM: WELL, YOUR HONOR THERE WAS --

03:34PM

21 THE COURT: GO AHEAD.

22 MR. HELM: I DIDN'T MEAN TO INTERRUPT. I
23 APOLOGIZE.

24 THEY DID MAKE THE ARGUMENT IN THEIR
25 SUMMARY JUDGMENT MOTION THAT ONE OF THE BASES FOR
26 TERMINATING HIM WAS HE FAILED TO COMPLY WITH PERSONNEL
27 POLICIES, AND VARIOUS THINGS OF THAT NATURE.

03:34PM

28 WHICH WOULD BE SUBJECT -- WOULDN'T BE

1 GROSS MISCONDUCT IN OUR VIEW. BUT WOULD ONLY BE
2 GROUNDS FOR TERMINATION IF IT WERE A MATERIAL BREACH OF
3 MATERIAL JOB RESPONSIBILITIES. AND IF A NOTICE AND
4 CURE PERIOD WERE PROVIDED.

5 THE COURT: I JUST CAN'T IMAGINE.

03:35PM

6 I'LL WAIT, AND I'LL SAY, THE OBJECTION'S
7 SUSTAINED WITHOUT PREJUDICE. AND WAIT FOR ALL OF THE
8 EVIDENCE, AWAIT ALL THE EVIDENCE.

9 I CAN'T IMAGINE THAT ARGUMENT FOCUS OF
10 THE PLAINTIFF'S CASE REALLY BEING ON PERFORMANCE ISSUES
11 AS MUCH AS THE REST OF THEIR CASE. BUT IF IT IS, MAYBE
12 THE INSTRUCTIONS OKAY.

03:35PM

13 MR. HELM: WE WERE RESPONDING TO WHAT WAS IN
14 THEIR SUMMARY JUDGMENT.

15 THE COURT: YOU'RE BOXING SHADOWS. JUDGMENTS
16 ARE ALL BEHIND US. WE'RE IN THE REAL WORLD NOW. WE'RE
17 MOVING ON. DON'T READ THEM AGAIN.

03:35PM

18 MR. EMANUEL: DON'T LIVE IN THE PAST.

19 MR. HELM: WE HAVEN'T PUT ON OUR CASE WE DON'T
20 KNOW WHAT THEY'RE GOING TO SAY. THAT'S WHAT I'M
21 ANTICIPATING.

03:36PM

22 THE COURT: CACI 2420.

23 I DON'T HAVE ANY PROBLEM WITH THAT.
24 WHAT IS IT THAT THE PLAINTIFFS DON'T LIKE ABOUT THAT?
25 OTHER THAN THEY DON'T THINK IT'S PART OF THE CASE.

03:36PM

26 MR. EMANUEL: THEY SHOULD TRACK IT CLOSER.
27 THEY ADDED IN SEEKING DAMAGE FOR FUTURE COMPENSATION.
28 THAT'S NOT THE CASE IN -- CACI INSTRUCTION, NOT

1 NECESSARY. GUNDLACH CLAIMS THAT'S WHAT THE
2 INSTRUCTION, CACI INSTRUCTION, SAYS.

3 YOU KNOW, CACI DOES NOT PROVIDE FOR
4 PUTTING IN TCW ACCUSATIONS ABOUT TCW, THIS IS -- SHOULD
5 BE GUNDLACH CLAIM. TCW AND GUNDLACH HAD A CONTRACT FOR
6 A SPECIFIED TERM TO ESTABLISH THIS CLAIM AGAIN, I DON'T
7 THINK FOR DAMAGES IS PART OF CACI. GUNDLACH MUST PROVE
8 ALL OF THE FOLLOWING.

9 THE COURT: OKAY.

10 MR. EMANUEL: THE AUTHORITY'S 2420, I'M ASKING
11 YOU TO FOLLOW 2420.

12 THE COURT: OKAY. I DIDN'T GO BACK AND LOOK
13 AT THE ACTUAL CACI. MODIFICATIONS AREN'T NECESSARY ON
14 A BASIC BREACH OF CONTRACT. IT SEEMS TO ME IT OUGHT TO
15 BE STRAIGHTFORWARD, FOLLOW CACI.

16 DO YOU WANT TO GO THROUGH IT WORD FOR
17 WORD NOW. AND WE CAN DECIDE WHERE IT IS THAT THINGS
18 SHOULD BE TAKEN OUT OR PUT IN?

19 MS. STEIN: MIGHT BE EASIER, YOUR HONOR.

20 THE COURT: JUST GET IT DONE.

21 ARE YOU SAYING THAT IN SEEKING DAMAGES
22 FOR FUTURE COMPENSATION, THE BRACKETED PART IS NOT PART
23 OF THE CACI?

24 MR. EMANUEL: THAT FIRST PART IN SEEKING
25 DAMAGES FOR FUTURE COMPENSATION IS NOT PART OF CACI,
26 SHOULDN'T BE THERE.

27 MR. HELM: MAY I EXPLAIN WHY WE PUT IT IN
28 THERE, YOUR HONOR.

03:37PM

03:37PM

03:37PM

03:37PM

03:37PM

1 THERE'S A CACI FOR BREACH OF A CONTRACT
2 WITH A SPECIFIED TERM. AND THEN THERE'S A CACI FOR
3 BREACH OF A CONTRACT WITH AN UNSPECIFIED TERM.

4 MR. GUNDLACH ACTUALLY HAS CLAIMS IN BOTH
5 CATEGORIES, HIS BIG CLAIM IS THAT THERE WAS A TERM,
6 THAT IT WENT TO THE END OF 2011. AND SO HIS CLAIM FOR
7 FUTURE COMPENSATION, THAT IS AS OPPOSED FOR THE FOURTH
8 QUARTER, IS -- RESTS ON A CLAIM THAT HE COULDN'T BE
9 TERMINATED FOR A PERIOD OF TIME WITHOUT THAT.

10 AND SO, IN ORDER TO SAY -- TO REFER TO
11 THE PART OF HIS CLAIM THAT THIS INSTRUCTION APPLIES TO,
12 WE SAID IN SEEKING FUTURE COMPENSATION.

13 WHEN WE THEN TALK ABOUT THE OTHER CACI
14 WE TALK ABOUT THE, IN SEEKING COMPENSATION FOR THE TIME
15 HE ALREADY SERVED. THAT'S A DIFFERENT SET OF
16 INSTRUCTIONS.

17 THE COURT: WHERE IS THAT INSTRUCTION?

18 MR. HELM: WHICH ONE IS THAT?

19 MS. STEIN: THAT INSTRUCTION HAS BEEN AGREED
20 TO AND IT'S IT'S IN A DIFFERENT NOTEBOOK.

21 THE COURT: WHAT'S THE AGREED INSTRUCTION
22 NUMBER?

23 MR. EMANUEL: I THINK THAT WAS 24 -- 2421.

24 MS. STEIN: CACI 2401.

25 MR. EMANUEL: OH, 2401.

26 YES, BUT THIS RAISES ANOTHER POINT, YOUR
27 HONOR. PERHAPS WE OUGHT TO HOLD ON THIS FOR A MOMENT
28 UNTIL WE HEAR CROSS-COMPLAINANT'S THEORY.

1 IF THEY'RE SAYING THEY HAVE TWO
2 DIFFERENT AGREEMENTS ONE FOR SPECIFIED TERM AND ONE FOR
3 UNSPECIFIED TERM, I DIDN'T KNOW THAT WHEN I DRAFTED
4 OBJECTIONS -- AND THAT MIGHT INFLUENCE MY DECISION ON
5 WHICH INSTRUCTION IS THE RIGHT ONE TO USE.

03:39PM

6 BECAUSE TYPICALLY WHEN YOU DO THESE
7 THINGS, THE PLAINTIFF, WHO SAYS HE HAS A CONTRACT, SAYS
8 THESE ARE THE TERMS OF MY CONTRACT.

9 THIS IS A NEW ONE FOR ME TO SAY I HAVE
10 ALTERNATIVE CONTRACTS. UNSPECIFIED TERM AND ONE
11 SPECIFIED TERM. IF THE CASE GOES IN THAT WAY I THINK
12 WE OUGHT TO LOOK AT THE INSTRUCTION THAT'S APPROPRIATE
13 AT THAT TIME. RIGHT NOW I'M KIND OF GOING BLIND HERE.

03:39PM

14 MR. HELM: THERE'S NOTHING WRONG WITH HAVING
15 ALTERNATIVE CLAIMS, YOUR HONOR. WE HAVE THE BIG CLAIM
16 AND IF IN THE ALTERNATIVE IF WE LOSE THE BIG CLAIM WE
17 HAVE THE LESSER CLAIM -- AT LEAST HE WAS --

03:39PM

18 THE COURT: YOU HAVE TO PUT ON A CREDIBLE
19 CASE. AND YOU HAVE TO ASK THE JURY TO MAKE CERTAIN
20 FINDINGS AND DETERMINATIONS.

03:40PM

21 MR. HELM: YES, YOUR HONOR.

22 THE COURT: SO IT WOULD SEEM TO ME PROBABLY
23 2401 AND CACI 2420 SHOULD BE IN SOME MANNER BE COMBINED
24 TO REFLECT THE CLAIMS ASSERTED BY PLAINTIFF. IF IT
25 ISN'T ENTIRELY CLEAR TODAY WHAT THOSE CLAIMS ARE, I
26 HAVE A PRETTY GOOD IDEA OF THEM.

03:40PM

27 BUT THERE ARE STILL SOME -- MOVEMENT IN
28 TERMS OF EXACTLY WHAT YOU'RE GOING TO PUT ON. ONCE

1 IT'S PUT IN WE'LL DO THAT. YOU SHOULD CONFER.

2 MR. EMANUEL: VERY WELL, YOUR HONOR. I THINK
3 THAT WOULD MAKE THE MOST SENSE AND MAKING IT EFFICIENT,
4 TOO.

5 THE COURT: I'LL SAY PARTIES TO CONFER TO
6 COMBINE 2401 AND 2420 TO CONFORM TO PROOF. AND
7 WHATEVER THE CASE IS THAT'S PUT ON, IS WHAT WE'LL
8 INSTRUCT ON.

03:40PM

9 ON 2423, MR. EMANUEL, YOU HAVE ISSUES
10 WITH THE MODIFICATION? IMPLIED COVENANT OF GOOD FAITH
11 AND FAIR DEALING.

03:41PM

12 MR. EMANUEL: IT'S A COVENANT, IT'S A PROMISE.
13 WHAT IS IT THAT THE EMPLOYER HAS TO DO PURSUANT TO THIS
14 COVENANT.

15 IF YOU LOOK AT IT, IT SAYS HERE WE
16 TERMINATED WITHOUT COMPENSATING GUNDLACH FOR THE WORK
17 HE PERFORMED PRIOR TO HIS TERMINATION WITHOUT PROBABLE
18 CAUSE.

03:42PM

19 THAT'S NOT IMPLIED COVENANT CLAIM.
20 THAT'S SIMPLY NOT AN IMPLIED COVENANT CLAIM. EITHER
21 YOU HAVE A CONTRACT, IN WHICH CASE WE OUGHT TO ENFORCE
22 THAT SUE FOR BREACH. OR AT-WILL, IT MEANS IMPLIED
23 COVENANT DOESN'T MAKE IT LESS THAN AT-WILL.

03:42PM

24 UNDER THE FACTS PRESENT BY OPPOSING
25 PARTIES AS I UNDERSTAND, WE SAY AT-WILL, THEY SAY NO
26 IT'S EXPRESS CONTRACT OR AN IMPLIED CONTRACT. NEITHER,
27 SO FAR, AT THIS POINT IN THE PROCEEDINGS, YOUR HONOR, I
28 DON'T THINK THERE IS A BASIS FOR INSTRUCTING THE JURY

03:42PM

1 ON SOME IMPLIED COVENANT.

2 THAT ISN'T OTHERWISE SUPERFLUOUS IN THE
3 WORDS OF THE SUPREME COURT, TO THE OTHER PROVISIONS THE
4 PARTIES ARE ARGUING ABOUT.

5 THE COURT: DON'T THEY HAVE SEPARATE CAUSE OF
6 ACTION FOR THE BREACH OF THE IMPLIED COVENANT, IN
7 BREACH OF GOOD FAITH AND FAIR DEALING. THIS
8 INSTRUCTION SEEMS PLANNED IN TERMS OF MY INSTRUCTION
9 THAT NEEDS TO BE PROVED OUT THE -- IS THIS OUT OF BAJI?

03:42PM

10 MS. STEIN: IT HAS NOT BEEN MODIFIED.

03:43PM

11 MR. HELM: WELL, THE BRACKETS.

12 MS. STEIN: JUST OF THE PARTIES' NAMES, THAT'S
13 IT.

14 THE COURT: NO OTHER MODIFICATION. IF THEY
15 HAVE A CAUSE OF ACTION FOR BREACH OF THE IMPLIED
16 COVENANT THEY'RE ENTITLED TO INSTRUCTION ON IT.

03:43PM

17 MR. EMANUEL: NOT QUITE. HALFWAY THERE. THEY
18 HAVE A CAUSE OF ACTION, AND PUT ON EVIDENCE THAT WOULD
19 SUPPORT INSTRUCTING THE JURY, YOUR HONOR, I DON'T
20 DISAGREE WITH YOU.

03:43PM

21 AND THIS INSTRUCTION SHOULD BE GIVEN.
22 I'M ONLY ASKING AT THIS POINT WHATEVER THE RULING BE
23 WITHOUT PREJUDICE TO LOOK AT, AT THE CLOSE OF THE --
24 CLOSE OF THE CROSS-COMPLAINANT'S CASE IN CHIEF TO SEE
25 IF THERE'S IMPLIED COVENANT ISSUE FOR THE JURY TO
26 DECIDE. AS OPPOSED TO THE EXPRESS OR OTHERWISE.

03:43PM

27 THE COURT: ALL RIGHT.

28 THE OBJECTION'S OVERRULED.

1 I UNDERSTAND WHAT YOU'RE ARGUING. BUT I
2 THINK IF THE JURY WERE TO CONCLUDE THAT MR. GUNDLACH'S
3 FIRING WAS LONG PLANNED, THE CAUSE ALLEGED WAS
4 PROTECTORAL, IT WOULDN'T BE A GREAT LEAP TO PROVE THAT
5 THEY BREACHED AN IMPLIED COVENANT OF GOOD FAITH AND
6 FAIR DEALING.

03:44PM

7 MR. EMANUEL: I UNDERSTAND. THAT'S
8 SUPERFLUOUS. YOU DON'T GET DIFFERENT DAMAGES FOR
9 BREACH OF THE CONTRACT.

03:44PM

10 THE COURT: YOU GET PUNITIVE DAMAGES.

11 MR. EMANUEL: NO ABSOLUTELY NOT. THERE ARE NO
12 TORT DAMAGES FOR THE IMPLIED COVENANT CLAIM IN THE
13 IMPLIED CON --

14 THE COURT: IS THAT RIGHT?

15 MR. EMANUEL: YOU'RE THINKING OF INSURANCE.

03:44PM

16 THE COURT: YOU'RE RIGHT. WAS THAT THE
17 AIRLINE CASE?

18 WELL, I DON'T KNOW.

19 YOU'RE SAYING MEASURE OF DAMAGES IS NO
20 DIFFERENCE, IT DOESN'T MAKE ANY DIFFERENCE ON WHAT
21 BASIS IF THEY RECOVER.

03:44PM

22 MR. EMANUEL: EXACTLY.

23 THE COURT: WHAT DO YOU THINK OF THAT,
24 MR. HELM?

25 MR. HELM: I DON'T KNOW IF WE HAVE ANY EXTRA
26 DAMAGES FOR IT. BUT WE HAVE A BASIS FOR ASSERTING IT,
27 AND IT'S IN THE CASE. THERE HAS BEEN NO MOTION. THEY
28 MOVED FOR SUMMARY JUDGMENT TO GET RID OF IT, IT WAS

03:44PM

1 DENIED.

2 THE JURY NEEDS TO BE INSTRUCTED.

3 THE COURT: I'LL INSTRUCT THEM.

4 GENERALLY, THE BREACH OF THE COVENANT
5 CARRIES WITH IT SOME EXTRA CONTRACTUAL DAMAGES.

03:45PM

6 MR. EMANUEL: USED TO, BUT NOT IN THE
7 EMPLOYMENT CONTEXT AND NOT IN COMMERCIAL CONTRACT
8 ANYMORE.

9 THE COURT: I'LL TAKE YOUR WORD FOR IT. YOU
10 SOUND VERY CONFIDENT ABOUT IT.

03:45PM

11 MS. STEIN: I THINK IT WAS TAMMANY.

12 THE COURT: VERSUS AMERICAN AIRLINES?

13 MS. STEIN: ATLANTIC RICHFIELD, I THINK.

14 THE COURT: OKAY.

15 MR. EMANUEL: IT USED TO BE, CORRECT. YOUR
16 HONOR IS CORRECT. IT USED TO BE THE RULE.

03:45PM

17 THE COURT: I LIVE IN THE PAST.

18 MR. EMANUEL: I HAD AN UNCLE, YOUR HONOR, SAID
19 I SEEN A LOT OF CHANGES IN MY LIFETIME; I WAS AGAINST
20 EVERY ONE.

03:45PM

21 THE COURT: I'M NOT THAT BAD.

22 NEXT ONE. 73.

23 MS. STEIN: WHAT WE TRIED TO DO IN THIS ONE IS
24 WHAT YOU SUGGESTED WE ARE NOW GOING TO DO WITH BREACH
25 OF CONTRACT ELEMENTS WHICH IS COMBINE OUR ALTERNATIVE
26 THEORIES INTO ONE DAMAGES INSTRUCTION.

03:47PM

27 THE COURT: IT WOULD BE COMBINED WITH 2422.

28 MS. STEIN: NO, NO, THIS WOULD BE THE DAMAGES

1 INSTRUCTION THAT COMBINES OUR ALTERNATIVE THEORIES.

2 THE COURT: ALL RIGHT. ARE YOU SAYING THAT
3 YOU PROPOSED TO DO SOME MODIFICATION ON THIS?

4 MS. STEIN: NO, NO, I'M SORRY. THIS IS WHY WE
5 DRAFTED THE INSTRUCTION THIS WAY, WE HAVE A THEORY THAT
6 IF HE HAD A CONTRACT FOR A TERM, THERE ARE CERTAIN
7 DAMAGES.

03:47PM

8 AND IF THE JURY FINDS THERE WAS NO TERM
9 OF YEARS, BUT HE WAS -- BUT IT WAS A BREACH
10 NONETHELESS, THEN THERE ARE OTHER DAMAGES. AND THIS
11 INSTRUCTION TRIED TO ENCOMPASS BOTH TYPES ALTERNATIVE
12 TYPES OF DAMAGES.

03:47PM

13 AND GAVE THEM AN ALTERNATIVE.

14 THE COURT: WHICH MAKES SENSE. I GUESS MY
15 QUESTION IS, IS THERE A PROBLEM WITH INSTRUCTING ON THE
16 DAMAGES IN THE ALTERNATIVE? I THINK IT SHOULD
17 CORRESPONDENCE TO THE FINDINGS WE'LL HAVE IN THE
18 SPECIAL VERDICT.

03:47PM

19 IF YOU FIND ONE WAY DAMAGES ARE AS
20 FOLLOWS. IF YOU FIND THE OTHER -- I MEAN DON'T WE HAVE
21 A QUESTION IN THE SPECIAL VERDICT FORM THAT ADDRESSES
22 THESE ISSUES?

03:48PM

23 MS. STEIN: NO.

24 MR. HELM: WE'VE SUBMITTED A SPECIAL VERDICT
25 FORM. I DON'T THINK PLAINTIFF HAS SUBMITTED ONE YET
26 YOUR HONOR.

03:48PM

27 THE COURT: I THOUGHT WE HAD A JOINT ONE.

28 MS. STEIN: I DON'T BELIEVE SO.

1 MR. EMANUEL: I THOUGHT WE COMMENTED ON IT. I
2 THOUGHT WE TRIED TO DO A JOINT, JOINT SUBMISSION ON IT.

3 THE COURT: I WOULDN'T BE A POSED TO SOMETHING
4 ALONG THOSE LINES, A JOINT SUBMISSION.

5 MR. EMANUEL: YOUR HONOR, I GUESS WHAT I WOULD
6 ASK, I DON'T THINK I FULLY APPRECIATED AT THE TIME THAT
7 THIS WAS SUPPOSED TO DO, TWO ALTERNATIVE. BECAUSE IT
8 SOUNDED TO ME CUMULATIVE: IF YOU DO THIS, AND THEN TWO
9 IS WHETHER OR NOT, WHATEVER YOU CAN DECIDE, THEN ONE.

03:48PM

10 I REALLY -- I LIKE THE OPPORTUNITY TO
11 THINK ABOUT THIS SOME MORE AS TO HOW YOU SET UP AN
12 ALTERNATIVE DIRECTIONS FOR DETERMINING DAMAGES.

03:49PM

13 I DON'T THINK THIS CLEARLY INFORMS THE
14 JURY, YOU DO ONE OR YOU DO THE OTHER. THIS SEEMS TO
15 SAY YOU DO BOTH.

03:49PM

16 THE COURT: IT SEEMS A LITTLE CONFUSING. MY
17 READING OF IT, IT WASN'T ENTIRELY CLEAR. YOU MUST
18 CONSIDER THE FOLLOWING, IT SEEMS TO ME. IT MUST IN THE
19 ALTERNATIVE CONSIDER ONE OF THE FOLLOWING. ALL
20 INTERPRETIVES BASED ON YOUR FINDINGS.

03:49PM

21 MR. HELM: IT'S ACTUALLY BOTH, YOUR HONOR.
22 IT'S NOT -- THERE'S ONE THAT TALKS ABOUT THE FUTURE
23 COMPENSATION.

24 THE COURT: RIGHT.

25 MR. HELM: AND THEN THE OTHER ONE TALKS ABOUT
26 THE PAST COMPENSATION AND THEY'RE INDEPENDENT. YOU
27 COULD WIN OR LOSE THE FIRST ONE AND STILL NEED TO DO
28 THE SECOND ONE.

03:49PM

1 THE COURT: RIGHT. I UNDERSTAND THAT.

2 MR. HELM: OKAY.

3 THE COURT: I'M JUST SAYING MY NOTE, PARTIES
4 TO CONFER IN REFERENCE TO SPECIAL VERDICT FINDINGS AND
5 CLARIFICATION OF THE ALTERNATIVE NATURE OF THE
6 INSTRUCTION.

03:50PM

7 I MEAN THAT'S GOT TO BE CLARIFIED. AS
8 IT IS NOW, I'M NOT SURE IT IS THAT CLEAR.

9 MR. HELM: OKAY.

10 THE COURT: IT MIGHT LEAD TO MORE CONFUSION.

03:50PM

11 MR. EMANUEL: OKAY.

12 THE COURT: 75. ARE WE GETTING TO YOURS,
13 MR. SURPRENANT?

14 MR. SURPRENANT: 83 AND 84, YOUR HONOR. THE
15 LAST ONES. I'M HERE TO ASSIST MR. EMANUEL.

03:50PM

16 MR. EMANUEL: THANK YOU, DOMINIC.

17 MR. SURPRENANT: WHO WAS BORN ON A FARM, YOUR
18 HONOR.

19 MR. EMANUEL: APPARENTLY THAT'S A RUNNING
20 JOKE, YOUR HONOR.

03:50PM

21 THE COURT: IT IS A GOOD JOKE.

22 ARE THIRD-PARTY BENEFICIARY THEORIES
23 JUST ON BEHALF OF MAYBERRY.

24 MR. HELM: YES, THE NON-GUNDLACH INDIVIDUALS,
25 YOUR HONOR.

03:51PM

26 THE COURT: IS THAT ACTUALLY BEING PURSUED?
27 YOU KNOW IT WOULD SEEM TO ME THAT IT'S COMPLICATED
28 ENOUGH.

1 AND AT THE END OF THE DAY, IF THE
2 CONTRACT CLAIMS PREVAIL, AND YOU'RE AWARDED ON THEM, AS
3 AMONG PEOPLE ON THAT SIDE, I'M SURE THEY'D WORK THINGS
4 OUT.

5 MR. HELM: HERE IS THE ONLY REASON WE HAVE IT
6 IN, YOUR HONOR. AND YOUR HONOR DID ASK ME TO THINK
7 ABOUT IT. AND I TOOK THAT SERIOUSLY, WE DID GIVE IT
8 SOME CONSIDERATION.

03:51PM

9 THE COURT: YOU'RE NOT CONSISTENT. I DIDN'T
10 REMEMBER YOU ASKING ME --

03:51PM

11 MR. HELM: WELL, THE THE COURT DID POSE THAT
12 QUESTION. HERE IS THE PROBLEM, THEY ARE MAKING THE
13 ARGUMENT THAT MR. GUNDLACH MAY ONLY RECOVER FOR THE
14 FOURTH QUARTER EARNINGS THE AMOUNT THAT HE WOULD HAVE
15 KEPT FOR HIMSELF. NOT THE AMOUNT THAT HE WOULD HAVE
16 GIVEN TO OTHER PEOPLE.

03:51PM

17 WE THINK THAT'S TOTALLY WRONG, WE -- WE
18 WILL JUMP UP AND DOWN AND SCREAM A MILLION REASONS WHY
19 THAT SHOULDN'T BE THE CASE.

20 BUT IF THEY WERE TO PREVAIL ON THAT
21 BEFORE THE JURY WE THINK THEN IT'S IMPORTANT THAT THE
22 OTHER THREE BE ABLE TO SUE FOR THEIR SHARE OF IT.

03:52PM

23 THEY ARE PERFECTLY HAPPY TO RIDE ON
24 MR. GUNDLACH'S COATTAILS, ALLOW HIM TO RECOVER THE
25 WHOLE AMOUNT, THEY WILL THEN TAKE UP WITH HIM WHAT
26 THEIR SHARE SHOULD BE.

03:52PM

27 BUT IF TCW WERE TO PREVAIL THEN HE CAN
28 ONLY GET THE PART THAT HE ULTIMATELY WOULD HAVE KEPT

1 FOR HIMSELF. THEN THEY NEED TO HAVE A REMEDY --

2 THE COURT: I'M NOT VERY RECEPTIVE TO THAT
3 ARGUMENT, ON THE TCW SIDE. SO AT SOME POINT YOU MIGHT
4 TALK AMONG YOURSELVES AND SEE HOW YOU WORK THAT OUT.

5 MR. SURPRENANT: YOUR HONOR, MAY I SEEK
6 CLARIFICATION. I HEARD YOUR HONOR PREVIOUSLY, THAT
7 WITH RESPECT TO THE FOURTH QUARTER OF '09, YOU'RE NOT
8 RECEPTIVE TO THAT ARGUMENT. BUT IT CHANGES QUITE A BIT
9 GOING FORWARD IN 2010 AND 2011.

03:52PM

10 THE COURT: YEAH, WELL, I'VE SAID I'M NOT -- I
11 DON'T KNOW WHERE THIS IS ALL GOING TO COME OUT. THAT'S
12 WHY WE HAVE A JURY AND THEY'RE GOING TO TELL US.

03:53PM

13 BUT ON A GOING-FORWARD BASIS IT SEEMS TO
14 ME IT BECOMES MORE PROBLEMATIC AND MORE SPECULATIVE AS
15 TO THE RIGHTS OF, YOU KNOW, WHO WOULD HAVE GOT SHARES
16 OF THE MONEY. BECAUSE WE GOT A LOT OF PEOPLE THAT WENT
17 TO DOUBLE LINE. WE GOT A LOT OF PEOPLE THAT STAYED AT
18 TCW.

03:53PM

19 AND SO, IT'S A LOT EASIER TO INSTRUCT ON
20 THE 4TH QUARTER.

03:53PM

21 MR. HELM: WELL, OBVIOUSLY, YOUR HONOR, AS FOR
22 THE FUTURE DAMAGES THE JURY CAN DECIDE WHAT THEY
23 DECIDE. JUST TO CLARIFY, THOUGH, THE NON-GUNDLACH
24 DEFENDANTS, ARE ONLY SUING FOR THE FOURTH QUARTER
25 EARNINGS.

03:53PM

26 THEY ARE NOT SUING FOR A SHARE OF
27 SOMETHING THAT WOULD HAPPEN IN THE FUTURE. AND SO IT'S
28 ONLY FOR THE FOURTH QUARTER THEY WOULD BE SUING.

1 MR. SURPRENANT: YOUR HONOR, I DON'T BELIEVE
2 THAT IS CORRECT.

3 WHEN MR. HELM MADE THAT COMMENT LAST
4 TIME, I LOOKED AT THEIR EXPERT MR. WALLACE'S -- AND HE
5 CALCULATES FUTURE DAMAGES FOR MR. MAYBERRY,
6 MR. SANTA ANA AND MS. VANEVERY.

03:54PM

7 MR. HELM: WELL, THE REASON FOR THAT IS NOT
8 THAT THOSE INDIVIDUALS HAVE A CLAIM FOR IT.

9 THE REASON IS THAT THEY ARE CONTENDING
10 HE CAN ONLY COLLECT THE PART THAT HE WOULD HAVE KEPT.
11 SO NOW, AGAIN, MR. WALLACE'S VIEW IS, THE PROPER
12 MEASURE OF DAMAGES IS THE FULL AMOUNT THAT HE WOULD
13 HAVE GOT FOR THE GROUP.

03:54PM

14 BECAUSE THAT WAS THE BENEFIT OF THE
15 BARGAIN FOR HIM WAS HE GOT THE WHOLE AMOUNT TO
16 DISTRIBUTE AS HE SAW FIT. AND THAT THE ONLY WAY TO
17 MAKE HIM WHOLE IS TO GIVE HIM THE WHOLE AMOUNT.

03:54PM

18 HOWEVER, BECAUSE THEIR EXPERT CLAIMS YOU
19 DON'T GET THE FULL AMOUNT, YOU SHOULD OFFSET IT FOR
20 WHAT HE WOULD HAVE GIVEN TO OTHERS. AS A FALLBACK HE
21 JUST CALCULATES WHAT THAT AMOUNT WOULD BE. BUT IT'S
22 NOT BECAUSE MAYBERRY, SANTA ANA AND VAN EVERY ARE
23 SEEKING AS PART OF THEIR CONTRACT CLAIM THAT SHARE OF
24 FUTURE DAMAGES.

03:54PM

25 SO I HOPE THAT'S --

03:55PM

26 THE COURT: WE NEED TO GET A STIPULATION AND
27 CLARIFY THAT. AND THEN WE CAN INSTRUCT. IT WOULD BE
28 MUCH EASIER TO INSTRUCT ON ISSUES RELATED TO THE FOURTH

1 QUARTER CLAIM.

2 AND MAKE IT CLEAR THAT NO CLAIM IS MADE
3 BY VAN EVERY, SANTA ANA, AND MAYBERRY AS TO RECOVERIES
4 BEYOND 12-31-09 OR FOR ANY MONEYS THAT WOULD HAVE
5 ACCRUED UNDER THE TERMS OF THE CONTRACT.

03:55PM

6 AND TO THE EXTENT YOU HEAR EVIDENCE
7 ABOUT WHAT THEY MIGHT HAVE BEEN COMPENSATED, IT ONLY
8 GOES TO THE DETERMINATION OF MR. GUNDLACH'S DAMAGES
9 UNDER HIS CONTRACT. IS THAT ALL RIGHT?

10 MR. HELM: WE CAN DISCUSS THAT.

03:55PM

11 MR. SURPRENANT: WE CAN DISCUSS THAT, YOUR
12 HONOR. WE OBVIOUSLY DISAGREE. I'VE BEEN TAKING
13 MR. WALLACE'S DEPOSITION REPEATEDLY. HE KEEPS FILING
14 NEW REPORTS AND THE LAST TIME I TALKED TO HIM, HE
15 ADMITTED THAT -- THAT PAYMENT TO MR. GUNDLACH OF ONLY
16 THE MONEY HE WOULD HAVE KEPT, WOULD MAKE HIM WHOLE AS A
17 CASH MATTER.

03:55PM

18 BUT HE HAD SOME CLAIM -- I THINK IS JUST
19 INCOMPETENT AS A MATTER OF LAW THAT IT WOULD MAKE HIM
20 WHOLE AS NON-CASH MATTERS. THE PARTIES' VIEW OF THE
21 ADMISSIBILITY OF TESTIMONY -- OF HIS TESTIMONY IS QUITE
22 OPPOSED.

03:56PM

23 MR. HELM: WE MAY NOT SURPRISE THE COURT, WE
24 DON'T SEE EYE TO EYE ON THAT.

25 THE COURT: WHAT DO YOU WANT ME TO DO ABOUT
26 THIS INSTRUCTION?

03:56PM

27 MR. HELM: I THINK IT PROPERLY STATES WHAT THE
28 THIRD-PARTY BENEFICIARY LAW IS, THAT WOULD BE THE BASIS

1 UPON WHICH THE NON-GUNDLACH FOLKS WOULD BE CLAIMING
2 RIGHTS FOR THAT FOURTH QUARTER.

3 MR. EMANUEL: YOUR HONOR, SUBJECT TO THE
4 STIPULATION I DON'T KNOW IF THE COURT NEEDS TO MAKE A
5 RULING RIGHT NOW. BUT IF THERE IS GOING TO BE
6 INSTRUCTIONS ON THIRD-PARTY BENEFICIARIES I'D LIKE TO
7 HEAR WHY THE STANDARD CACI ISN'T ADEQUATE. CACI 301.

03:56PM

8 MS. STEIN: CACI 301, YOUR HONOR, DESCRIBES TO
9 THE JURY THAT PARTIES MAY BE THIRD-PARTY BENEFICIARIES,
10 DOES NOT INSTRUCT THEM HOW TO MEASURE THOSE DAMAGES OR
11 MAKE A DETERMINATION AS TO THOSE DAMAGES. OR HOW ONE
12 DETERMINES WHETHER ONE IS A THIRD-PARTY BENEFICIARY.
13 THIS INSTRUCTION GOES THAT NEXT STEP IN DETERMINING THE
14 PARTIES INTENT TO BE A THIRD-PARTY BENEFICIARY.

03:57PM

15 THE COURT: THE OBJECTION'S OVERRULED SUBJECT
16 TO CLARIFICATION OF THE SCOPE AND EXTENT OF THE CLAIMS
17 BEING MADE BY SANTA ANA, MAYBERRY AND VAN EVERY.

03:57PM

18 AND AN APPROPRIATE INSTRUCTION TO
19 CLARIFY -- SO WE KNOW WHAT IT IS. YOU KNOW, IF WE'RE
20 GOING TO HAVE A THIRD-PARTY BENEFICIARY CLAIM AND
21 THERE'S A LEGITIMATE ONE IN PLAY, I'LL GIVE THE
22 INSTRUCTION.

03:57PM

23 CACI 2423.

24 MS. STEIN: THIS INSTRUCTION IS FOR PURPOSES
25 OF THE OTHER INDIVIDUALS.

03:58PM

26 THE COURT: WE JUST DID 75.

27 MS. STEIN: AS TO MR. GUNDLACH RIGHT. AND WE
28 DID BREACH OF THE COVENANT OF GOOD FAITH AND FAIR

1 DEALING AS TO MR. GUNDLACH.

2 THE COURT: IN MY BOOK I GO FROM 73 OR --
3 EXCUSE ME, 75 TO CACI 2423. AND I ALSO SHOW 77 AND 78.

4 ARE THOSE WITHDRAWN?

5 MS. STEIN: NO, THAT'S CORRECT, YOUR HONOR. 03:58PM

6 THE COURT: THEY'RE COMING UP.

7 THIS WOULD BE THE SAME RULING AS THE
8 EARLIER CACI? WHAT WAS THE EARLIER CACI OR INSTRUCTION
9 ON THIS?

10 MS. STEIN: YES, YOUR HONOR, IT'S FOR
11 DIFFERENT INDIVIDUALS. 03:59PM

12 MR. EMANUEL: ONCE AGAIN THE PLAINTIFF
13 POSITION IS THE IMPLIED COVENANT OF GOOD FAITH AND FAIR
14 DEALING IS SUPERFLUOUS, REDUNDANT AND EITHER THEY HAVE
15 A CONTRACT AND IT'S BREACHED OR THEY DON'T. 03:59PM

16 IMPLIED COVENANT DOES NOT ADD ANY TERM
17 OR CHANGE ANY TERM.

18 THE COURT: WHAT WAS THE EARLIER ONE. THE
19 NUMBER ON THE OTHER ONE?

20 MR. HELM: IT WAS ALSO 2423, BUT WHERE IT
21 CAME -- IT WAS ON PAGE 319 OF THE JOINT STATEMENT. 03:59PM

22 THE COURT: OKAY.

23 THE OBJECTION'S OVERRULED. IF THERE'S
24 NO EVIDENCE TO SUPPORT IT OR THERE'S NO REASON FOR THEM
25 TO CONSIDER IT, I DON'T KNOW WHY WE BOTHER WITH IT. WE
26 CAN LOOK AT THAT AND MAKE THE ARGUMENT YOU WANT. AND
27 WE CAN GET READY AND YOU GOT ALL THE EVIDENCE IN. 04:00PM

28 NOW WE GO TO 77.

1 MR. HELM: WE ACTUALLY, IN RESPONSE TO SOME
2 CONCERNS THEY HAD, SUGGESTED SOME MODIFICATIONS TO
3 THIS.

4 THE COURT: OKAY.

5 MR. HELM: THE SECOND LINE IT SAYS: DETERMINE
6 WHETHER TCW BREACHED, INSTEAD OF SAYING THEIR
7 EMPLOYMENT AGREEMENTS. WE WOULD BE HAPPY TO ADD, ITS
8 AGREEMENTS WITH THEM.

04:00PM

9 BECAUSE THEY SEEM TO THINK EMPLOYMENT
10 AGREEMENT IS NOT THE RIGHT WAY TO DO IT. AND WE DON'T
11 REALLY CARE WHAT YOU CALL IT.

04:00PM

12 IT SAYS: PERFORM PRIOR TO THEIR
13 DISCHARGE. THEY THINK THAT'S A LOADED TERM. WE'D BE
14 HAPPY TO SAY TERMINATION. AND SIMPLY TO -- IN THE
15 SECOND LINE OF THE SECOND PARAGRAPH CHANGE DISCHARGE TO
16 TERMINATION.

04:01PM

17 THE COURT: MR. EMANUEL, WITH THOSE CHANGES
18 ARE YOU WITHDRAWING YOUR OBJECTION?

19 MR. EMANUEL: I'LL SUBMIT, YOUR HONOR.

20 MR. SURPRENANT: THAT WAS A THOUGHTFUL
21 "SUBMITTED," YOUR HONOR.

04:01PM

22 THE COURT: THE OBJECTION'S OVERRULED.

23 MR. HELM: AS MODIFIED?

24 THE COURT: SUBJECT TO THE MODIFICATIONS
25 OFFERED BY THE DEFENDANTS.

04:01PM

26 MR. HELM: THANK YOU, YOUR HONOR.

27 THE COURT: OKAY.

28 MR. HELM: YOUR HONOR, THIS NEXT ONE.

1 THE COURT: OKAY.

2 MR. HELM: I'LL WAIT.

3 IT WAS DISCUSSED IN CONJUNCTION WITH
4 THEIR SPECIAL NO. 19, I THINK WHAT WE WERE SUPPOSED TO
5 DO. I'M SURE WE WILL. WE DIDN'T GET TO IT YET -- AND
6 SEE IF YOU DISAGREE WITH THIS MR. EMANUEL -- WE WERE
7 GOING TO COMBINE THIS WITH THEIR 19. AND ALSO POSSIBLY
8 OUR 79 WITH THEIR 19.

04:02PM

9 DO YOU REMEMBER THAT?

10 MR. EMANUEL: YES.

04:02PM

11 I DO, AND THERE SEEM TO BE REASONS THE
12 PARTIES COULD AGREE ON THIS, IF WE APPLY OURSELVES.

13 MR. HELM: WE APOLOGIZE, YOUR HONOR, WHAT WE
14 GOT TO LAST WEEKEND WAS THE HOLDS. AND A FEW OF THE
15 ONES WE'VE GONE THROUGH, WE HAVE NOT MADE IT THROUGH
16 EVERYTHING WE NEED TO. BUT WE WILL TRY TO BE DILIGENT.

04:02PM

17 THE COURT: THAT'S ALL RIGHT.

18 SO, TO BE REVISED TO COMBINE WITH
19 PLAINTIFF'S SPECIAL JURY INSTRUCTION NO. 19 AND
20 DEFENDANT'S SPECIAL JURY INSTRUCTION 79.

04:03PM

21 MR. EMANUEL: 78 AND 79.

22 THE COURT: I'M TALKING ABOUT 78. AND IT WILL
23 BE REVISED WITH 19 AND 79, HOPEFULLY.

24 YOU KNOW, YOU CAN'T GET THESE RESOLVED,
25 I'LL GET A MUCH SMALLER LITTLE BOOK BACK. AND WE'LL
26 HAVE TO GO THROUGH THEM AGAIN.

04:03PM

27 MR. EMANUEL: YEAH.

28 THE COURT: NO. 80.

1 I THINK THAT'S AN ACCURATE STATEMENT OF
2 THE LAW. I DON'T KNOW IT'S AN ISSUE.

3 MR. EMANUEL: IT'S ARGUMENTATIVE IN THE SENSE
4 THAT THE POINT IS IT'S NOT PAID AT ALL. IT'S NOT AN
5 ISSUE UNDER 201 WHERE YOU DELAYED IN PAYING IT OR YOU
6 DIDN'T PAY IT IMMEDIATELY. 04:03PM

7 WE DIDN'T PAY IT. THAT'S WHAT THE JURY
8 SHOULD BE DECIDING. THIS IS A DISTRACTION.

9 THE COURT: I DON'T THINK IT'S NECESSARY, IT'S
10 CLEAR YOU'RE MAKING YOUR CLAIM. IF YOU GET IT YOU'LL
11 GET ACCRUED INTEREST. AND YOU'LL GET CERTAIN PENALTIES
12 UNDER THE CODE. BUT THIS STATEMENT DOESN'T ENHANCE
13 WHAT YOU'RE ASKING FOR ANY MORE THAN -- 04:04PM

14 MS. STEIN: ONLY TO THE EXTENT THERE'S BEEN
15 ARGUMENT THAT MR. GUNDLACH'S ALLEGED BREACH OF
16 FIDUCIARY DUTY SOMEHOW ENTITLED TCW TO WITHHOLD HIS
17 WAGES. 04:04PM

18 AND UNDER THE LABOR CODE THAT'S NOT
19 PROPER. AND WE SUBMITTED THIS INSTRUCTION IN PART TO
20 MAKE THAT CLEAR. 04:04PM

21 MR. EMANUEL: NO, YOUR HONOR, BUT I UNDERSTAND
22 THAT ARGUMENT, THAT'S NOT WHAT THIS INSTRUCTION GOES
23 TO. IT DOESN'T SAY THAT WE COULDN'T OFFSET OR WHATEVER
24 IT IS UNDER THE BREACH OF FIDUCIARY DUTY THEORY.

25 THE COURT: I DON'T THINK YOU CAN SETOFF OR
26 OFFSET FOR CLAIMS YOU HAVE. IF THERE'S A LEGITIMATE
27 DISPUTE, THAT'S THE KEY TO LABOR CODE 201 -- THE
28 CLAIMS. AND AN HONEST DISPUTE YOU CAN DEFER PAYMENT. 04:04PM

1 MS. STEIN: NO.

2 THE COURT: I HEAR THERE'S AN HONEST DISPUTE.

3 MR. HELM: THIS IS A DIFFERENT POINT ACTUALLY,
4 YOUR HONOR. THERE'S NO CACI ON THE LABOR CODE. THE
5 JURY NEEDS TO BE TOLD WHAT IS A WAGE CLAIM. WELL, IT'S
6 BASED ON THE FACT YOU'RE DISCHARGED AND YOU ARE OWED
7 YOUR WAGES. THAT'S ALL THIS IS SAYING.

04:05PM

04:05PM

04:05PM

04:05PM

04:06PM

8 THERE'S NO OTHER -- THERE'S NO OTHER
9 INSTRUCTION THAT SORT OF SAYS WHAT IS THE BASIS FOR THE
10 WAGE CLAIM. WELL, THIS IS THE BASIS. THE BASIS IS
11 YOU'RE OWED WAGES WHEN YOU'RE DISCHARGED. AND YOU'RE
12 OWED THEM AT THE TIME OF YOUR DISCHARGE. WE THINK IT'S
13 INAPPROPRIATE INSTRUCTION.

14 MS. STEIN: OTHERWISE, THEY'LL HAVE SOMETHING
15 ON THE VERDICT FORM WITHOUT ANY INSTRUCTION AS TO WHAT
16 THAT MEANS.

17 THE COURT: LET ME TELL YOU, THIS JURY IS NOT
18 LOOKING AT THESE AS WAGES. AND THE WHOLE CONCEPT OF
19 WAGES AND THE CONTEXT OF THE EVIDENCE THEY'RE SITTING
20 THROUGH IS -- A TOTAL DISCONNECT. BUT I'LL GIVE THE
21 INSTRUCTION.

22 81.

23 MR. EMANUEL: BEFORE WE LEAVE 80, IT'S NOT
24 NECESSARILY TO CITE TO THE AUTHORITY, THAT'S VERY
25 UNTYPICAL. IN THE JURY INSTRUCTION IT SHOULD JUST
26 START WITH --

27 THE COURT: WHEN AN EMPLOYEE DISCHARGES OR
28 TERMINATES AN EMPLOYEE, WAGES THAT ARE UNPAID AT THE

1 TIME ARE DUE AND PAYABLE.

2 MR. HELM: NO OBJECTION TO THAT CHANGE, YOUR
3 HONOR.

4 THE COURT: OKAY. THESE ALL HAVE TO BE
5 REDRAWN BY SOMEBODY WITH THE -- ON THE PULL APARTS
6 WITHOUT THE AUTHORITY AT THE BOTTOM.

04:06PM

7 MS. STEIN: OF COURSE, YOUR HONOR. AND NO
8 TITLE AS WELL, CORRECT.

9 THE COURT: RIGHT. THE TITLE'S ALWAYS ON THE
10 TOP. SO WHEN YOU PULL IT OFF, YOU HAVE JUST THE BOX.

04:06PM

11 MS. STEIN: OF COURSE, YOUR HONOR.

12 THE COURT: NOW WE'RE MOVING TO 81.

13 YOU HAVE TO TAKE OUT UNDER CALIFORNIA
14 LAW, AND I GUESS I WOULD SAY I'D OVERRULE THE OBJECTION
15 SUBJECT TO THERE BEING SOME EVIDENCE TO SUPPORT THE
16 GIVING OF THE INSTRUCTION.

04:07PM

17 I'M NOT SURE THAT THERE'S BEEN ANY
18 EVIDENCE THAT MONEYS HAVE BEEN WITHHELD. MONEYS HAVE
19 BEEN WITHHELD ON A CLAIM OF DEBT TO THE EMPLOYER --
20 HAVE THERE BEEN?

04:07PM

21 MR. EMANUEL: NO, YOUR HONOR.

22 MS. STEIN: THERE --

23 MR. HELM: WELL, MAYBE WHY DON'T WE SEE? I
24 THINK BECAUSE THERE WAS A BREACH OF FIDUCIARY DUTIES,
25 THAT THEY WERE WITHHOLDING IT TO OFFSET THE CLAIM.
26 THEY THOUGHT THEY MIGHT GET ON THAT.

04:07PM

27 THE COURT: I DON'T THINK THAT'S WHAT THEY'VE
28 SAID. THEY'VE SAID ALL ALONG, IF YOU'RE TERMINATED FOR

1 BREACH OF A FIDUCIARY DUTY YOU'RE RELIEVED OF THE
2 OBLIGATION TO PAY ANY FURTHER COMPENSATION.

3 MR. HELM: RIGHT THAT'S NOT TRUE FOR WAGES.

4 THE COURT: WELL, YEAH -- THE WAGES IS ONLY
5 250,000 A YEAR, RIGHT?

04:08PM

6 MR. HELM: NO, YOUR HONOR. THE AGREEMENTS
7 THAT WE'RE REVISING, GO TO FEE SHARING AND INCENTIVE
8 COMPENSATION IS ALL WAGES UNDER THE CALIFORNIA LABOR
9 CODE WHICH IS VERY CLEAR.

10 THE COURT: OKAY. ALL RIGHT.

04:08PM

11 MR. EMANUEL: I THINK IT'S CORRECT, YOUR
12 HONOR, SUBJECT TO EVIDENCE THAT THIS APPLIES. PERHAPS
13 IT SHOULD BE GIVEN, BUT I'M NOT CONVINCED THAT WE'RE
14 THERE YET.

15 MR. HELM: WE CAN --

04:08PM

16 THE COURT: IT'S OKAY.

17 MR. HELM: WE CAN LISTEN TO REASON.

18 THE COURT: THE OBJECTION'S OVERRULED SUBJECT
19 TO THE EVIDENTIARY BASIS FOR THE INSTRUCTION. IT'S
20 OKAY.

04:08PM

21 82. I DON'T KNOW WHY WE NEED THAT,
22 QUITE FRANKLY? OR WHAT IT DOES?

23 MR. HELM: WE MAY NOT NEED IT, YOUR HONOR.

24 THE COURT: WANT TO SAY WITHDRAWN OR OBJECTION
25 OVERRULED, WHAT SOUNDS BETTER?

04:09PM

26 MR. SURPRENANT: OVERRULED --

27 MR. EMANUEL: NO, SUSTAINED.

28 MR. SURPRENANT: SUSTAINED.

1 I'M SORRY, NEURONS ARE SLEEPING THIS
2 AFTERNOON.

3 THE COURT: OBJECTION'S SUSTAINED. THAT
4 PRESERVES YOUR ARGUMENT.

5 83.

04:09PM

6 MR. HELM: ON 83, YOUR HONOR, THIS IS STILL IN
7 THE CATEGORY OF THINGS, I THINK STILL NEED FURTHER
8 DISCUSSION. BOTH SIDES I THINK ARE IN AGREEMENT THAT
9 THE ASSESSMENT OF THE PENALTY FOR --

10 THE COURT: THAT'S FOR THE COURT.

04:09PM

11 MR. HELM: IS FOR THE COURT --

12 WHAT WE'RE TRYING TO DISCUSS IS THERE A
13 PREDICATE FACT THAT THE JURY SHOULD DECIDE?

14 AND WE ARE STILL DISCUSSING THAT. SO I
15 THINK AT THIS POINT WE WOULD TAKE IT OFF YOUR HONOR'S
16 PLATE FOR FURTHER DISCUSSIONS BY THE PARTIES.

04:09PM

17 THE COURT: I'LL SAY THE OBJECTION'S SUSTAINED
18 SUBJECT TO FURTHER DISCUSSION BY THE PARTIES. BUT YOU
19 KNOW I'M NOT GIVING THIS AT THIS POINT UNLESS I HAVE
20 SOME GOOD REASON OR AN AGREED WAY TO APPROACH IT. I
21 DON'T THINK THE JURY NEEDS TO BE INVOLVED IN THAT AT
22 ALL.

04:10PM

23 MR. HELM: THAT'S FINE, YOUR HONOR.

24 THE COURT: THAT WAS 83, WE'RE GOING TO 84.

25 I'LL STILL RESERVE A RULING, I'M NOT
26 SURE THERE IS A -- THERE BE A QUANTUM MERUIT
27 INSTRUCTION OR WHETHER IT'S APPROPRIATE. I GOT THE
28 OTHER ISSUE WITH THE EXPERT.

04:11PM

1 MR. SURPRENANT: I THINK THAT'S ENTIRELY
2 CORRECT, YOUR HONOR. WE'LL KNOW MORE WHEN THE EVIDENCE
3 IS CLOSE.

4 MR. HELM: THAT'S FINE, YOUR HONOR.

5 THE COURT: WHAT WAS 85. THAT'S WHAT YOU'VE
6 BEEN WAITING FOR ALL DAY. 04:11PM

7 MR. SURPRENANT: 85 IS ANOTHER QUANTUM MERUIT.
8 AND THE SAME RESOLUTION WOULD BE APPROPRIATE.

9 THE COURT: WE COULD HAVE DONE THAT A LOT
10 EARLIER. 04:11PM

11 MR. EMANUEL: HE HAD TO STAY HERE AND HELP ME.

12 MR. HELM: HE WOULD HAVE WRITTEN ANOTHER BRIEF
13 TO RESPOND TO.

14 MR. SURPRENANT: ACTUALLY, I WANT TO GO HOME
15 AND SLEEP. 04:11PM

16 THE COURT: YOU GUYS HAVEN'T BEEN WORKING ON
17 THE WEEKENDS, HAVE YOU?

18 MR. SURPRENANT: WE SCHEDULED A CONFERENCE
19 CALL TO REACH RESOLUTION ON AN ISSUE FOR SOME REASON AT
20 6:00 P.M. ON SUNDAY WHICH MIGHT HAVE DELAYED -- 04:12PM

21 THE COURT: WE CAN GO OFF THE RECORD. THANK
22 YOU ALL FOR YOUR PATIENCE TO GET THROUGH THIS.

23 MR. SURPRENANT: THANK YOU, YOUR HONOR.

24 MS. STEIN: THANK YOU, YOUR HONOR.

25
26 (AT 4:15 P.M., AN ADJOURNMENT WAS
27 TAKEN UNTIL 8-23-11 AT 10:00 A.M.)
28