

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JEFFREY S. WHITE, JUDGE,

ROBERT JACOBSEN,)

PLAINTIFF,)

VS.)

NO. C 06-1905 JSW

MATTHEW KATZER, ET AL.)

DEFENDANTS.)

SAN FRANCISCO, CALIFORNIA
FRIDAY, JANUARY 19, 2007

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF: VICTORIA K. HALL
ATTORNEY AT LAW
3 BETHESDA METRO
SUITE 700
BETHESDA, MD 20814

FOR DEFENDANT: FIELD & JERGER
610 SW ALDER
SUITE 910
PORTLAND, OREGON 97205
BY: ROBERT SCOTT JERGER
ATTORNEY AT LAW

REPORTED BY: JAMES YEOMANS, CSR 4039, RPR
OFFICIAL REPORTER

COMPUTERIZED TRANSCRIPTION BY ECLIPSE

1 FRIDAY, JANUARY 19, 2007

9:00 A.M.

2 (THE FOLLOWING PROCEEDINGS WERE HEARD IN OPEN COURT:)

3 THE CLERK: CASE C-06-1905, ROBERT JACOBSEN VERSUS
4 MATTHEW KATZER.

5 COUNSEL, PLEASE STEP FORWARD AND STATE YOUR
6 APPEARANCES.

7 MS. HALL: VICTORIA HALL COUNSEL FOR PLAINTIFF ROBERT
8 JACOBSEN.

9 THE COURT: ALL RIGHT. GOOD MORNING.

10 MR. JERGER: SCOTT JERGER COUNSEL FOR DEFENDANTS
11 MATTHEW KATZER AND KAMIND ASSOCIATES, INC.

12 THE COURT: GOOD MORNING, COUNSEL.

13 DID BOTH SIDES -- I ASSUME, BOTH SIDES RECEIVED THE
14 COURT'S QUESTIONS?

15 MS. HALL: YES.

16 MR. JERGER: YES.

17 THE COURT: AND THE COURT HAS LOOKED AT THE STATEMENT
18 OF ADDITIONAL AUTHORITIES THAT WERE FILED IN LIGHT OF THE
19 COURT'S QUESTIONS.

20 WHAT I WOULD LIKE THE PARTIES TO DO IS -- WHAT I WOULD
21 LIKE THE PARTIES TO DO, IS INCORPORATE INTO THEIR RESPONSES
22 WHERE THEIR AUTHORITIES FIT IN.

23 AND PLAINTIFFS WOULD -- FILED AT 9:00 O'CLOCK LAST
24 NIGHT, OBVIOUSLY, THE COURT COULDN'T FULLY DIGEST THEM, AND PIN
25 CITES WOULD BE VERY HELPFUL, AS WELL AS SPECIFIC PROVISION, AS

1 WELL AS A GENERAL CONCEPT I WOULD LIKE TO KNOW THAT AS WELL.

2 SO LET'S START RIGHT OUT WITH THE QUESTIONS. AND I'LL
3 START WITH PLAINTIFF'S COUNSEL WITH RESPECT TO QUESTION 1A.

4 MS. HALL: YES, YOUR HONOR. THE QUESTION IS, IN LIGHT
5 OF THE FACT THAT IMPOSED --

6 THE COURT: SLOW DOWN.

7 MS. HALL: -- ON THE USE OF THEIR FREE SOFTWARE, DOES
8 THIS CREATE A NON-EXCLUSIVE LICENSE?

9 AND OUR RESPONSE IS THAT THERE IS A LICENSE ONLY IF
10 THE CONDITIONS HAVE BEEN MET. IF A USER REJECTS THE CONDITIONS
11 HOW CAN HE SAY HE HAS PERMISSION TO USE THE SOFTWARE, HE CAN'T.

12 AND HERE WE'VE SEEN NO ATTEMPT WHATSOEVER THAT HE IS
13 INTERESTED IN ACCEPTING THE LICENSE, SO HE IS NOT INTERESTED IN
14 ACCEPTING THE BENEFITS OF THE LICENSE.

15 THE COURT: ALL RIGHT. SO WITH -- MOVING TO QUESTION
16 B. SO IF YOUR ANSWER IS YES, WHAT IS THE ESSENCE OF -- IS THE
17 ESSENCE OF SUCH A NON-EXCLUSIVE LICENSE THE PROMISE NOT TO SUE
18 FOR COPYRIGHT INFRINGEMENT?

19 MS. HALL: IF HE ACCEPTS THE CONDITIONS HE IS A
20 NON-EXCLUSIVE LICENSEE AND THERE'S A PROMISE NOT TO SUE FOR
21 COPYRIGHT INFRINGEMENT. AS LONG AS THE ACTIVITIES WITH -- ARE
22 IN THE SCOPE OF THE LICENSE AND THE LICENSE HAS NOT BEEN
23 REVOKED OR CONTRACT RESCINDED, ALONG THOSE LINES.

24 I THINK, IT'S IMPORTANT TO REMEMBER THAT A LICENSE
25 UNSUPPORTED BY CONSIDERATION MAYBE REVOKED AT ANY TIME. AND

1 THAT IF THERE IS FOUND TO BE A LICENSE HERE CERTAINLY HAS BEEN
2 REVOKED.

3 THE COURT: BEFORE I MOVE ONTO QUESTION C AND D,
4 BECAUSE I'M GOING TO PUT THOSE TO DEFENDANTS IN THE FIRST
5 INSTANCE, WHAT'S YOUR RESPONSE TO QUESTION 1A AND B?

6 MR. JERGER: SURE. IN REGARDS TO 1A, I THINK, THAT
7 THE CONDITIONS DO CREATE A NON-EXCLUSIVE LICENSE. AND I ALSO
8 THINK A NON-EXCLUSIVE LICENSE IS CREATED BY DEFINITION UNDER
9 SECTION 204A OF THE COPYRIGHT ACT, WHICH DECLINED A
10 NON-EXCLUSIVE LICENSE, ANY LICENSE, NO WRITTEN AGREEMENT
11 BETWEEN THE PARTIES SIGNED BY THE OWNER OF THE COPYRIGHT TO
12 CREATE AN EXCLUSIVE LICENSE.

13 THE COURT: ALRIGHT. RESPECT TO B, WHAT IS THE
14 ESSENCE OF THE NON-EXCLUSIVE LICENSE?

15 MR. JERGER: I AGREE WITH YOUR STATEMENT IN RE CFLC
16 CASE THE ESSENCE OF A NON-EXCLUSIVE LICENSE IS A PROMISE NOT TO
17 SUE FOR COPYRIGHT INFRINGEMENT.

18 AND THE ANSWER TO THE SECOND PART B IS A LITTLE MORE
19 COMPLICATED, I'LL GO INTO THAT NOW. IT SORT OF INFORMS MY
20 ANSWERS TO C AND D.

21 THE COURT: ALL RIGHT.

22 MR. JERGER: IN OUR VIEW, THERE'S THREE POTENTIAL
23 SCENARIOS HERE IN TERMS OF WHAT SORT OF LICENSE, IF ANY,
24 EXISTS.

25 ONE, IS -- AND WHEN I'M TALKING ABOUT THE LICENSE, I'M

1 REFERRING TO THE ARTISTIC LICENSE PLAINTIFF INTRODUCED WITH
2 THEIR MOVING PAPERS.

3 THE FIRST SCENARIO IS DEFENDANTS TOOK THE ALLEGED
4 PRODUCT PURSUANT TO THE ARTISTIC LICENSE, DIDN'T -- THIS IS
5 WHAT MS. HALL JUST ALLUDED TO -- DIDN'T MEET A CONDITION
6 PRECEDENT FOR THAT LICENSE VESTING, THEREFORE, THE LICENSE
7 NEVER VESTED, THEREFORE, DEFENDANTS WOULD BE LIABLE FOR
8 COPYRIGHT INFRINGEMENT IF THAT WERE THE CASE. THAT'S THE
9 SCENARIO MOST FAVORABLE TO THE PLAINTIFFS.

10 THE SECOND SCENARIO, THE MIDDLE CASE SCENARIO, WHICH
11 IS, DEFENDANT TOOK PURSUANT TO THE ARTISTIC LICENSE, THE TERMS
12 OF THE LICENSE ARE NOT CONDITIONS PRECEDENT, BUT RATHER
13 COVENANTS AND THAT ANY BREACH WOULD, THEREFORE, BE A BREACHED
14 OF CONTRACT. THAT'S WHERE WE GET TO THE ANSWER TO THIS
15 QUESTION.

16 **THE COURT:** MEANING THIS QUESTION, BEING YOUR CLIENT
17 CONTENTS PLAINTIFF CAN ONLY SUE FOR BREACH OF CONTRACT?
18 BECAUSE WE'RE TALKING -- THE LIMITATIONS ON THE USE ARE
19 COVENANTS NOT CONDITIONS PRECEDENT.

20 **MR. JERGER:** CORRECT. THAT IS -- THAT'S THE MIDDLE
21 SCENARIO. THAT IS WHAT OUR AUTHORITIES THAT WE SUBMIT LAST
22 NIGHT ALLUDE TO. CASES THAT FLESH OUT THE DISTINCTION BETWEEN
23 WHAT IS A CONDITION PRECEDENT AND WHAT IS A COVENANT IN A
24 CONTRACT.

25 THAT'S THE RT GRAPHICS CASE AND THE FANTASTIC CASE, AS

1 WE'VE, AS SOME OTHER CASES WE CITED IN OUR REPLY PAPERS.

2 THE THIRD SCENARIO IS THE SCENARIO MOST FAVORABLE TO
3 THE DEFENDANTS. WHICH IS, DEFENDANTS TOOK PURSUANT TO AN
4 APPLIED LICENSE, BASICALLY HAD NO TERMS; IN OTHER WORDS, THE
5 ARTISTIC LICENSE DOESN'T APPLY TO THIS TRANSACTION AT ALL.

6 IN THAT CASE THAT'S THE MOST SIMILAR TO THIS
7 NON-EXCLUSIVE LICENSE WHERE THERE ARE NO CONDITIONS.
8 PLAINTIFFS HAVE WAIVED THEIR RIGHT TO SUE FOR COPYRIGHT AND
9 DEFENDANTS AS WELL AS ANYONE WHO TOOK, PURSUANT TO AN IMPLIED
10 LICENSE WITH NO TERMS, COULD DO WHATEVER THEY WANT WITH THE
11 PRODUCT.

12 THE REASON WE WITHDREW OUR MOTION TO DISMISS THE
13 COPYRIGHT CLAIM WAS IN RESPONSE TO PLAINTIFFS INTRODUCTION OF
14 THE ARTISTIC LICENSE BECAUSE WE BELIEVE AT THIS -- DUE TO THAT,
15 WHICH WASN'T ALLEGED IN THE COMPLAINT, WE NOW HAVE TO INTRODUCE
16 EXTRINSIC EVIDENCE TO SHOW WHAT EXACTLY HAPPENED. HOW
17 DEFENDANTS CAME IN POSSESSION OF THE PRODUCT, WHETHER THE
18 ARTISTIC LICENSE IS INVOKED OR NOT.

19 AS PLAINTIFF MENTIONS IN HIS MOVING PAPERS THERE IS NO
20 CLING WRAP OR SHRINK WRAP AGREEMENT TO GET TO THE ARTISTIC
21 LICENSE, IT'S JUST OUT THERE ON THE INTERNET. AND WE BELIEVE
22 WE HAVE TO INTRODUCE EXTRINSIC EVIDENCE SHOW WHAT HAPPENED BACK
23 THEN, AND THAT'S NOT APPROPRIATE FOR THE 12(B)(6) MOTION.

24 TO PROMOTE EFFICIENCY, GET THIS CASE MOVING, WE'VE
25 WITHDRAWN THE MOTION AT THIS TIME.

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THE COURT: ALL RIGHT. WITH RESPECT, THOUGH. TO QUESTION, I'M NOT SURE YOU ANSWERED QUESTIONS 1C. I DON'T KNOW IF THAT IS YOUR MIDDLE SCENARIO.

WHERE THE CLAIM IS THAT YOUR CLIENT USED THE MATERIALS EXCEEDING THE SCOPE OF THE LICENSE, UNDER THE CASES CITED BY THE COURT WOULDN'T THAT YIELD COPYRIGHT LIABILITY?

MR. JERGER: I THINK, THAT'S THE FIRST SCENARIO. THAT'S THE CONDITIONS PRECEDENT TO THE LICENSE VESTING HAVEN'T BEEN MET. THE DEFENDANTS ARE WORKING WITHOUT A LICENSE OR THE LICENSE DIDN'T VEST, AND AT THAT POINT, I THINK, THAT'S EQUIVALENT TO WHAT YOU'RE REFERRING TO AS EXCEEDING THE SCOPE OF THE LICENSE.

IN OTHER WORDS, THEY'RE ACTING OUTSIDE THE AUTHORITY OF WHAT SHOULD HAVE BEEN A VALID LICENSE AND SHOULD HAVE TAKEN A PRODUCT PURSUANT TO. AND IN THAT SCENARIO I DO AGREE DEFENDANTS WOULD BE LIABLE FOR COPYRIGHT INFRINGEMENT.

JUST ONE MORE TWIST ON THIS I WANT TO MENTION NOW, SO I DON'T FORGET BECAUSE RELATES TO THE PRELIMINARY INJUNCTION MOTION. THESE QUESTIONS ALSO INFORM THE IRREPARABLE HARM PRESUMPTION.

THAT'S GENERALLY GIVEN IN -- WHEN YOU'RE DEALING WITH PRELIMINARY INJUNCTIONS AND COPYRIGHT INFRINGEMENT CASES THERE'S A PRESUMPTION OF IRREPARABLE HARM.

WE DISPUTE THAT IN OUR REPLY PAPERS, BUT IT'S IMPORTANT TO NOTE THAT IF THIS COURT FINDS THAT DEFENDANTS

1 TOOK, PURSUANT TO IMPLIED LICENSE WITH NO TERMS. THEN THERE IS
2 NO PRESUMPTION OF IRREPARABLE HARM BECAUSE THE COPYRIGHT
3 INFRINGEMENT CLAIM CAN'T BE BROUGHT.

4 AND WE'RE IN THE WORLD OF BREACH OF CONTRACT AND NOT
5 COPYRIGHT INFRINGEMENT.

6 THE COURT: WHAT'S YOUR CLIENT'S POSITION WITH RESPECT
7 TO D?

8 THAT IS, IF THERE IS NO LICENSE FOR WHATEVER REASON,
9 WHAT AUTHORITY GOVERNS YOUR CLIENT'S USE OF THE MATERIALS?

10 MR. JERGER: THAT'S THE THIRD SCENARIO, THAT'S THE
11 IMPLIED LICENSE WITH NO TERMS, BASICALLY. WHERE SOMEONE GOES
12 TO JMI WEB SITE DOWNLOADS THE PRODUCTS, NEVER SEE ANY LICENSE,
13 ARTISTIC LICENSE, ANY OTHER LICENSE, NO MEETING OF THE MIND, NO
14 CONTRACT IS FORMED, THEREFORE, JUST IMPLIED LICENSE WITH NO
15 TERMS SINCE IT HAS NO TERMS TO DO WHATEVER.

16 THE COURT: MS. HALL, RESPONSE?

17 MS. HALL: YES. I JUST WANT TO STEP BACK AND REDRESS
18 SOME OF THINGS HE SAID ABOUT THE THREE SCENARIOS.

19 THE SITUATION THAT WE'RE LOOKING AT IS NOT JUST
20 MERELY, OH, THEY DIDN'T COMPLY WITH ONE SMALL TERM, THEY DIDN'T
21 COMPLY WITH ANYTHING, ANYTHING WHATSOEVER IN THE ARTISTIC
22 LICENSE.

23 WE'RE LOOKING AT A SITUATION WHERE WE HAVE OUR OPEN
24 SOURCE GROUP WHICH SPENDS HUNDREDS, IF NOT THOUSANDS OF
25 YEARS -- OF HOURS OVER FIVE YEARS CREATING A PRODUCT WHICH IS

1 MEANT TO BE USED.

2 THE COURT: CAN YOU RESTATE THAT?

3 I DON'T KNOW I UNDERSTOOD WHAT YOU'RE SAYING. YOU
4 SAY, HUNDREDS OF HOURS OVER?

5 MS. HALL: OVER FIVE YEARS. COULD BE EASILY -- WE
6 HAVEN'T -- THOUSANDS -- WE HAVEN'T TOTALED IT UP, MORE THAN A
7 DOZEN PEOPLE WORKED ON THIS.

8 WHAT DEFENDANTS DID IS THEY TOOK THAT PRODUCT, STRIPED
9 OUT THE AUTHOR'S NAME AND THE COPYRIGHT HEADERS, CONVERTED IT
10 TO THEIR OWN FORMAT, THEN PRESENTED IT IN THEIR OWN AS THEIR
11 OWN PRODUCT.

12 THEY WERE FREE RIDING ON THE EFFORTS OF THIS OPEN
13 SOURCE GROUP. THESE GROUPS NEED THE PROTECTION OF COPYRIGHT
14 LAW, THAT'S THE REASON WHY WE HAVE A COPYRIGHT CLAIM IN THIS
15 AND IT'S THE REASON WHY WE'RE SEEKING THIS PRELIMINARY
16 INJUNCTION, WHICH I'LL GET INTO IT FURTHER.

17 WE BELIEVE THAT THE LANGUAGE HERE IS DIFFERENT THEN
18 THE LANGUAGE CITED IN THE CASES THAT DEFENDANT RELIES UPON.
19 DEFENDANTS -- THE LANGUAGE CITED ARE THINGS SUCH -- ARE PRETTY
20 CLEARLY COVENANTS, BUT HERE WHAT WE'RE LOOKING AT ARE TERMS,
21 THAT LANGUAGE THAT IS A CONDITION THAT HAS PROVIDED THAT AND WE
22 BELIEVE THAT CREATES A CONDITION PRECEDENT.

23 AND IN THE ALTERNATIVE WE BELIEVE THE INTERPRETATION
24 OF THE CONTRACT REQUIRES THAT REASONABLE MODIFICATIONS BE MADE,
25 NOT THE KIND OF WHOLESALE RIP-OFF THE DEFENDANTS DID.

1 **THE COURT:** WOULD YOU AGREE, JUST AS A GENERAL MATTER,
2 IF WE'RE TALKING ABOUT BREACH OF CONTRACT HERE AS OPPOSED TO
3 COPYRIGHT INFRINGEMENT, THAT YOUR CLIENT IS NOT ENTITLED TO AN
4 INJUNCTION?

5 LET'S ASSUME THERE'S NO BREACH OF CONTRACT, BREACH OF
6 COPYRIGHT INFRINGEMENT, ARE YOU STILL ENTITLED TO AN
7 INJUNCTION?

8 **MS. HALL:** PURELY NONE IN TERMS OF SOME OF THE
9 ELEMENTS OF COPYRIGHT INFRINGEMENT HAVEN'T BEEN MET, YES, I
10 WOULD AGREE WITH YOU. BUT THE ELEMENTS HAVE BEEN MET AND --

11 **THE COURT:** I UNDERSTAND.

12 **MS. HALL:** -- THE LICENSE HAS BEEN REVOKED.

13 **THE COURT:** I UNDERSTAND YOUR POSITION. AND THAT'S
14 ONE OF THE THINGS WE'RE DISCUSSING THIS MORNING AND THE COURT
15 HAS TO DECIDE.

16 BUT A STATEMENT WAS MADE, PUTTING ASIDE THE QUESTION
17 OF SHOWING OF IRREPARABLE HARM WHERE YOU'RE DEALING WITH
18 NON-EXCLUSIVE LICENSE, IF WE'RE NOT OUT OF THE WORLD IN
19 COPYRIGHT AND IN THE WORLD OF BREACH OF CONTRACT WE ALL SHOULD
20 AGREE, SHOULD WE NOT, PRELIMINARY INJUNCTION IS NOT
21 APPROPRIATE?

22 **MS. HALL:** PRELIMINARY INJUNCTION UNDER COPYRIGHT IS
23 NOT APPROPRIATE. HOWEVER, I THINK, MIGHT BE APPROPRIATE UNDER
24 17200.

25 **THE COURT:** CONTINUE YOUR RESPONSE WITH RESPECT TO

1 QUESTION ONE.

2 MS. HALL: DEFENDANTS ARE TRYING TO RELY UPON A
3 NON-EXCLUSIVE IMPLIED LICENSE. HOWEVER, THE REQUIREMENTS NEED
4 TO BE MADE IN ORDER TO BE ABLE TO TAKE ADVANTAGE OF IMPLIED
5 LICENSE.

6 THAT IS, THAT THERE NEEDS TO BE SOMETHING SPECIFIC,
7 SOME SPECIFIC EXCHANGE BETWEEN PLAINTIFF AND DEFENDANTS IN
8 ORDER TO BE ABLE TO GET THE BENEFIT OF AN IMPLIED LICENSE.
9 THAT'S SOMETHING THAT'S SAID IN THE CASE LAW.

10 IT'S, I BELIEVE, IN TAX ASSOCIATE AS WELL AS THE IAE
11 CASE, WHERE IS ANY KIND OF EVIDENCE WHATSOEVER THAT THEY HAD
12 ANY KIND OF SPECIFIC EXCHANGES BETWEEN -- WITH MR. JACOBSEN,
13 THERE IS NONE, AND CERTAINLY THEY COULD HAVE PRODUCED SOMETHING
14 IN THEIR PRELIMINARY INJUNCTION MOTION, I HAVEN'T SEEN IT.

15 THAT ADDRESSES THE COMMENTS THAT I HAD ABOUT WHAT
16 MR. JERGER WAS SAYING SPECIFICALLY OC, JUST AS I WAS SAYING
17 WE'RE ASSUMING THAT DEFENDANTS HAVE A LICENSE WHICH, OF COURSE,
18 WE DISPUTE.

19 AND WE ALSO BELIEVE THAT PER THE SOS DECISION, NINTH
20 CIRCUIT DECISION, THE LICENSE NEEDS TO BE NARROWLY CONSTRUED
21 AND BECAUSE OF THAT NARROW CONSTRUCTION THEIR ACTIVITIES ARE
22 OUTSIDE OF ANY LICENSE THAT THEY COULD POSSIBLY TAKE ADVANTAGE
23 OF.

24 THE COURT: ALL RIGHT.

25 MS. HALL: AS FOR D, WE BELIEVE IT WOULD BE COVERED BY

1 COPYRIGHT.

2 THE COURT: ALL RIGHT. ANYTHING YOU WANT TO SAY
3 FURTHER?

4 MR. JERGER: I'LL JUST RESPOND TO A COUPLE OF POINTS
5 SHE MADE.

6 IN REGARD TO SPECIFIC EXCHANGE BETWEEN PLAINTIFF AND
7 DEFENDANTS, THERE HAS BEEN AN EXCHANGE THAT PLAINTIFF PUT THE
8 SOFTWARE ON THE INTERNET AND THE DEFENDANTS ALLEGEDLY
9 DOWNLOADED THE SOFTWARE. THAT'S THE EXCHANGE.

10 IT'S A HIGHLY FACTUAL SITUATION, I THINK, THAT WE
11 WOULD -- UNFORTUNATELY GOING TO HAVE TO DELVE INTO AT SOME
12 POINT REGARDING WHAT LICENSE, IF ANY, VESTED.

13 ONE MORE QUICK POINT IN TERMS OF CONSTRUING THE
14 ARTISTIC LICENSE, AND THE PLAINTIFF CITES THE SOS DECISION,
15 STATING THE LICENSE SHOULD BE NARROWLY CONSTRUED.

16 I THINK, IT'S CLEAR UNDER CALIFORNIA CASE LAW THAT A
17 CONDITIONS PRECEDENT ARE DISFAVORED, IF WE WERE TO CONSTRUE
18 THAT LICENSE IT CONTAINS COVENANTS RATHER THAN CONDITIONS.

19 THE COURT: LET'S MOVE ONTO QUESTION ONE.

20 MS. HALL: JUST INTERJECT. WHAT THEY'RE SAYING, WHEN
21 IT COMES TO THE AVAILABILITY OF THE SOFTWARE ANYONE COULD TAKE
22 A LOOK AT IT, THEREFORE, THEY GET A LICENSE OR THEY'RE SUBJECT
23 TO IMPLIED LICENSE.

24 THE WORLD-WIDE CHURCH OF GOD DECISION SAYS IT CAN'T BE
25 SOMETHING SO BROAD AND SCATTER SHOT AS WHAT DEFENDANTS

1 DESCRIBE, IT NEEDS TO BE SOMETHING SPECIFIC.

2 THERE NEEDS TO BE SOME SORT OF EXCHANGES BETWEEN THEM,
3 THERE NEEDS TO BE SOMETHING WHERE THEY HAVE TOLD DEFENDANTS AND
4 THERE HAS BEEN A LACK OF OBJECTION OR A PERMISSION GIVEN
5 SPECIFICALLY BY MR. JACOBSEN, THAT'S NOT HERE.

6 THE COURT: THANK YOU. LET'S MOVE TO QUESTION ONE.
7 UNDER THE DEFENDANT'S MOTION TO DISMISS, AND I'M GOING TO
8 ADDRESS THIS TO THE --

9 MS. HALL: DID YOU WANT NUMBER TWO?

10 THE COURT: I'M SORRY, THANK YOU VERY MUCH. WHY DON'T
11 YOU MOVE TO QUESTION NUMBER TWO, UNDER GENERAL QUESTIONS.

12 MS. HALL: SHOULD I START?

13 THE COURT: YES, PLEASE.

14 MS. HALL: WHAT THE DIFFERENCE HERE IS THE DIFFERENCE
15 BETWEEN TRADEMARK AND THE PURPOSE OF TRADEMARK AND COPYRIGHT.
16 TRADEMARK IS VERY SPECIFIC IN THAT A TRADEMARK IS USED AS AN
17 IDENTIFIER OF SOURCE. IT IS USED --

18 THE COURT: BEFORE YOU GET TO THAT, ALTHOUGH THAT'S
19 CERTAINLY SUGGESTED BY THE SECOND SENTENCE OF THE SECOND
20 QUESTION. THIS IS A YES OR NO QUESTION, THEN YOU CAN EXPLAIN.

21 IS THERE ANY AUTHORITY IN THE COPYRIGHT CONTEXT ON THE
22 ISSUE OF ACCESSIBILITY TO A LICENSING OF OPEN SOURCE MATERIALS?
23 THIS IS SORT OF LIKE UNIX?

24 MS. HALL: SCO THING THAT'S GOING ON?

25 THE COURT: YES.

1 HAVE YOU FOUND ANY AUTHORITY ON THAT POINT?

2 MS. HALL: NO, I HAVE NOT. CAN I CHECK WITH A COUPLE
3 OF PEOPLE BACK HERE?

4 THE COURT: NO, COUNSEL, YOU CAN'T DO THAT. THAT'S
5 WHY I PUBLISH THESE IN ADVANCE. SO THE ANSWER FOR NOW IS NO?

6 MS. HALL: NO.

7 THE COURT: SO NOW YOU CAN CONTINUE YOUR ANSWER, ON
8 WHY THIS IS NOT AKIN TO AN ANALYSIS OF NAKED LICENSES IN THE
9 TRADEMARK AREA.

10 MS. HALL: TRADEMARK IS VERY DIFFERENT THEN COPYRIGHT,
11 IN THAT A TRADEMARK OWNER NEEDS TO POLICE THE MARK, A COPYRIGHT
12 OWNER DOES NOT HAVE TO DO THAT.

13 THE REASON IS BECAUSE THE ASSOCIATION OF THE TRADEMARK
14 WITH THE GOODS, THE ASSOCIATION OF A TRADEMARK REPRESENTING
15 QUALITY AND SOURCE OF GOODS.

16 SO TRADEMARK OWNER IS REQUIRED TO POLICE THAT MARK, IF
17 OTHER PEOPLE START USING IT THEY BEGIN TO LOSE THEIR RIGHTS TO
18 IT, IT MAY FALL BY THE WAYSIDE UNDER THE PRINCIPAL OF
19 GENERICIDE. COPYRIGHT DOESN'T HAVE ANY SUCH REQUIREMENT.

20 THE COURT: COUNSEL.

21 MR. JERGER: THE ANSWER --

22 THE COURT: HAVE YOU FOUND ANY AUTHORITY?

23 MR. JERGER: NO, I HAVE NOT FOUND ANY AUTHORITY.

24 IN REGARD TO THE SECOND QUESTION, I DO THINK THE
25 SITUATION IS AKIN TO THE NAKED LICENSE ISSUE IN THE TRADEMARK

1 CONTEXT AND, AGAIN, I GO BACK TO THE IMPLIED LICENSE IDEA.

2 IT'S A HIGHLY FACTUAL INQUIRY, I THINK, AND YOU NEED
3 TO TAKE A LOOK AT HOW A PERSON TOOK THE SOFTWARE. WHETHER, YOU
4 KNOW, IN THIS CASE THERE'S ARTISTIC LICENSE ON THE INTERNET,
5 BUT IT'S NOT READILY AVAILABLE, AND THAT RESULTS POTENTIALLY IN
6 AN IMPLIED LICENSE, I THINK, WOULD BE THE EQUIVALENT LEGALLY AS
7 THIS NAKED LICENSE IDEA IN THE TRADEMARK CONTEXT.

8 **THE COURT:** ALL RIGHT. LET'S MOVE ONTO THE
9 DEFENDANT'S MOTION TO DISMISS. AND I HAVE TO -- I'M GOING TO
10 ASK PLAINTIFF'S COUNSEL TO RESPOND IN THE FIRST INSTANCE,
11 BECAUSE THIS IS ONE OF THE MOST ARCANE ARGUMENTS I'VE EVER
12 SEEN.

13 IT MAY BE BRILLIANT, BUT IT'S ARCANE. AND I, FRANKLY,
14 DON'T UNDERSTAND IT. THAT'S WHAT REALLY GIVES BIRTH TO THESE
15 QUESTIONS.

16 SO IS THE COURT CORRECT IN ITS ASSESSMENT OF YOUR
17 CLAIM FOR UNJUST ENRICHMENT?

18 **MS. HALL:** I BELIEVE SO.

19 **THE COURT:** YOU WANT TO --

20 **MS. HALL:** IF I UNDERSTAND YOU RIGHT.

21 **THE COURT:** IF YOU UNDERSTAND YOUR CLAIM.

22 **MS. HALL:** IF I UNDERSTAND YOUR QUESTION AND WHERE
23 YOU'RE COMING FROM.

24 **THE COURT:** ALL RIGHT.

25 **MS. HALL:** I BELIEVE THAT IT IS. I BELIEVE, WHAT

1 WE'RE ASKING FOR IS SOMETHING DIFFERENT THEN WHAT REMEDY THAT
2 WOULD BE AVAILABLE UNDER COPYRIGHT LAW. THAT'S WHAT TAKES IT
3 OUT OF PREEMPTION.

4 THE COURT: IF THE COURT IS CORRECT, THEN WE GO TO THE
5 SECOND QUESTION, HOW WOULD THE PLAINTIFF HAVE BEEN ENTITLED TO
6 CLAIM SUCH A TAX ADVANTAGE SINCE HE OFFERED THE PRODUCT FOR
7 FREE?

8 MS. HALL: THE REASON I WOULD TELL YOU THAT IT IS
9 UNDER THE PRINCIPALS OF RESTITUTION, THAT HE'S REQUIRED, THAT
10 HE IS ENTITLED TO THAT BENEFIT.

11 SAY, IF MR. JACOBSEN HAD A \$50 WATCH AND, SAY, MR.
12 KATZER TOOK THAT \$50 WATCH AND PUT IT ON E-BAY AND SAID FOR
13 SALE, THIS IS TOM CRUISE'S OR BRAD PITT'S WATCH, I CAN GIVE YOU
14 A CERTIFICATE OF AUTHENTICITY, WHATEVER, IT SELLS FOR \$5,000.

15 WHAT MR. JACOBSEN WILL BE ENTITLED TO IS THE FULL
16 BENEFIT THAT MR. KATZER GOT FROM THAT. HE WOULDN'T BE ENTITLED
17 TO MERELY 50 BUCKS, HE WOULD BE ENTITLED TO THE FULL 5,000,
18 THAT'S A PRINCIPAL OF RESTITUTION.

19 THERE IS SOME DISCUSSION OF RESTITUTION THAT -- IN
20 SOME OF THE CASES I CITE, IN PARTICULAR KOREA SUPPLY AND ALSO
21 THE OLWELL CASE. OLWELL CASE ABOUT THE USE OF AN EGG WASHER OF
22 ALL THINGS AND KOREA SUPPLY -- DO YOU WANT A CITE?

23 THE COURT: NO, IT'S IN YOUR PAPERS, WE HAVE THE
24 CITATION.

25 MS. HALL: IT'S ONE OF THE NEW ONES.

1 **THE COURT:** COUNSEL. YOU, OBVIOUSLY, CAN'T COMMENT ON
2 WHAT PLAINTIFF'S CLAIM IS, AT LEAST, PLAINTIFF'S COUNSEL AGREED
3 THE COURT CORRECTLY CONSTRUED IT, WHAT ABOUT HER EGG WASHER
4 ANALOGY OR BRAD PITT ANALOGY?

5 **MR. JERGER:** WELL, I THINK, THE COURT HAS NAILED IT ON
6 THE HEAD WITH THE INFORMATION IN THE QUESTION. ONE
7 SPECIFICALLY -- WHAT'S GLARINGLY MISSING HERE FROM AN UNJUST
8 ENRICHMENT CLAIM IS RETENTION OF A BENEFIT AT THE EXPENSE OF
9 ANOTHER. UNDER NO POSSIBLE SCENARIO HAS THE PLAINTIFF LOST
10 SOME SORT OF BENEFIT OR SUFFERED SOME SORT OF EXPENSE.

11 TYPICAL UNJUST ENRICHMENT CLAIM, I AGREE TO PUT A NEW
12 ROOF ON YOUR HOUSE, I DO IT, YOU DON'T PAY ME, I'M ENTITLED,
13 EVEN IF WE DON'T HAVE A CONTRACT TO, A QUASI CONTRACT QUANTUM
14 MERIT EQUITABLE RECOVERY FOR THE VALUE OF THE ROOF THAT I
15 INSTALLED ON YOUR HOUSE.

16 THIS CASE I AGREE I DON'T UNDERSTAND THE CLAIM AND IT
17 DOESN'T MAKE SENSE TO ME BECAUSE -- IT JUST DOESN'T. IT'S
18 TRYING TO PUT A SQUARE PEG INTO A ROUND HOLE. THERE'S NO LOSS
19 OF GOODS OR SERVICES THAT THE PLAINTIFF HAS SUFFERED TO JUSTIFY
20 ANY KIND OF UNJUST ENRICHMENT THEORY.

21 **MS. HALL:** THE BENEFIT MR. JACOBSEN AND THE REST OF
22 THE JMRI GROUP CONFERRED UPON MR. KATZER IS THE BENEFIT OF
23 SAVED TIME AND THE BENEFIT OF A QUALITY PRODUCT.

24 WHAT THEY ASKED FOR IN RETURN WAS THAT THEY FOLLOW THE
25 TERMS OF THE LICENSE AND THAT THEY GIVE CREDIT AS WELL, THAT

1 WAS THE BENEFIT THAT WAS NOT GIVEN BACK.

2 SO WHAT WE'RE ASKING FOR, OKAY, YOU GOT THIS BENEFIT,
3 WE BELIEVE YOU TOOK SOME SORT OF TAX CREDIT FOR IT, SO THIS IS
4 PART OF THE RESTITUTION THAT WE WANT TO GET IF YOU'RE GOING TO
5 TAKE -- IF YOU'RE GOING TO BENEFIT FROM OUR WORK AND GET MONEY
6 FROM OUR WORK, THEN RETURN THAT MONEY TO US.

7 THE COURT: EVEN IF YOU'RE OFFERING THAT WORK FOR
8 FREE?

9 MS. HALL: FREE WITH RESTRICTIONS. KEY POINT.

10 THE COURT: FREE IS A RELATIVE TERM.

11 MS. HALL: ACTUALLY, THE ARTISTIC LICENSE IS SUCH IF
12 YOU MAKE MODIFICATIONS YOU CAN DO IT UNDER CERTAIN CONDITIONS
13 OR YOU CAN CONTRACT THE HEAD OF THE OPEN SOURCE GROUP AND SAY,
14 LET'S GO WORK OUT SOME SORT OF A DEAL.

15 THAT ACTUALLY OFFERS A POSSIBILITY THAT IF THERE WAS
16 SOMETHING THAT THIS PERSON WAS DOING THAT WOULD -- WAS NOT
17 NECESSARILY ACCEPTABLE, THERE MAYBE SOME NEGOTIATION FOR A
18 CHARGE.

19 THE COURT: ALL RIGHT. LET'S MOVE ONTO QUESTION
20 NUMBER -- ANYTHING FURTHER YOU WANT TO SAY?

21 OKAY. QUESTION TWO, MS. HALL.

22 MS. HALL: HOW ABOUT IF I JUST SAY, LET'S NOT GO FOR
23 DECODOPRO.COM BACK IN THIS LITIGATION. WE -- DECODOPRO.COM
24 BACK IN THIS LITIGATION.

25 IF THAT'S THE CASE I STATED A CLAIM FOR CYBER

1 SQUATTING, THE ELEMENTS OF CYBER SQUATTING LISTED IN THE BOSLEY
2 DECISION I CITED WITH THE STATUTORY DAMAGES AND ATTORNEY'S
3 FEES.

4 AND WHAT WE ALSO LIKE TO HAVE IS ATTORNEYS' FEES AND
5 COST FOR BRINGING AN IN REM ACTION IN EASTERN DISTRICT OF
6 VIRGINIA, WHICH IS ASSIGNED, PUT IN THE COURT'S CUSTODY IN
7 EASTERN DISTRICT OF VIRGINIA AND WE'LL TAKE IT FROM THERE.

8 AND THE OTHER TWO CASES CITED FOR IN REM ACTIONS ARE
9 THE HARRODS CASE AND THE PORSHA CARS CASE.

10 **THE COURT:** THAT MAYBE ALL WELL AND GOOD. THE ANSWER
11 TO QUESTION NUMBER TWO, ARE YOU IMPLICITLY SAYING THE COURT
12 CANNOT INVALIDATE A SETTLEMENT AGREEMENT, AT LEAST, IN ANOTHER
13 COURT?

14 **MS. HALL:** I OFFERED AN ALTERNATIVE, IF THAT'S NOT AN
15 ALTERNATIVE THE COURT WANTS TO PURSUE, THEN I THINK WE MAY BE
16 STUCK ON THAT POINT.

17 BUT IF -- IF -- IF WE DECIDE WE DO NOT WANT TO HAVE
18 THIS COURT ORDER THE RETURN OF DECODERPRO.COM WE'RE OUT OF THIS
19 AND JERRY BRITTON NO LONGER A REQUIRED PARTY.

20 THE ELEMENTS ARE MR. JACOBSEN HAS A VALID TRADEMARK
21 ENTITLED TO PROTECTION. THE MARK IS DISTINCTIVE. THE
22 DEFENDANT'S DOMAIN NAME IDENTICAL OR CONFUSINGLY SIMILAR TO THE
23 MARK, DEFENDANT USED, REGISTERED OR TRAFFIC IN THE DOMAIN --

24 **THE COURT:** SLOW DOWN.

25 **MS. HALL:** AND WITH BAD FAITH, INTENT TO PROFIT.

1 THERE IS NO REQUIREMENT FOR RETURN OF DECODERPRO.COM, WE CAN
2 SIMPLY SAY WE DON'T NECESSARILY WANT TO HAVE THAT BACK.

3 THE COURT: AND RESPONSE TO THE SECOND PART OF
4 QUESTION TWO, I TAKE IT, MR. -- IS IT BRETAN?

5 MS. HALL: MR. BRITTON.

6 THE COURT: DOES HE CONSENT TO THIS COURT'S
7 JURISDICTION?

8 MS. HALL: WE HAVEN'T ASKED HIM YET. IF YOU DID
9 REQUIRE -- IF -- IF -- I MEAN, IF WE SAY WE DON'T WANT TO HAVE
10 DECODOPRO.COM RETURN IN THIS LITIGATION, TO US I THINK THAT
11 MOOTS THAT QUESTION BECAUSE HE'S -- WE'RE NOT LOOKING AT
12 ATTACKING THE SETTLEMENT AGREEMENT ANY LONGER.

13 THE COURT: IS THAT YOUR POSITION?

14 MS. HALL: IF YOU ORDER ME TO JOIN MR. BRITTON IT IS
15 PROBABLY, BUT I NEED TO GO CHECK WITH MR. BRITTON SEE IF HE'S
16 WILLING TO SUBJECT HIM TO THE JURISDICTION OF THE COURT.

17 THE COURT: ANYTHING YOU GOT TO SAY ON THAT POINT?

18 MR. JERGER: I'M NOT SURE I UNDERSTAND THE PLAINTIFF'S
19 RESPONSE. I'M NOT SURE HOW TO RESPOND TO THAT, OTHER THAN TO
20 SAY, CITE WHAT -- THE ARGUMENT WE BROUGHT UP IN OUR REPLY
21 PAPERS.

22 THAT UNDER THE CLAYTON BABBITT CASE THIS COURT DOESN'T
23 HAVE JURISDICTION TO ATTACK A NEGOTIATED SETTLEMENT AGREEMENT
24 IN OREGON DISTRICT COURT.

5 THE COURT: I THINK, WE HAVE AN AGREEMENT ON THAT.

1 MR. JERGER: I DIDN'T QUITE FOLLOW WHAT HER ARGUMENT
2 WAS.

3 MS. HALL: MY ARGUMENT IS, THAT WE DON'T WANT TO --

4 THE COURT: COUNSEL, WAIT. THE COURT ASKS THE
5 QUESTIONS. IF COUNSEL DOESN'T UNDERSTAND AN ANSWER, HE DOESN'T
6 GET TO GET AN ANSWER FROM YOU UNLESS I ASK FOR IT.

7 I UNDERSTOOD YOUR ANSWER. AS FRIGHTENING AS THAT
8 MIGHT BE, I DID UNDERSTAND YOUR ANSWER.

9 QUESTION NUMBER THREE. THIS GOES TO PARAGRAPHS H AND
10 T, WHICH I READ A COUPLE OF TIMES AND I'M JUST AT A LOSS, I
11 HAVEN'T BEEN ABLE TO FIND ANY AUTHORITY THAT GIVES YOU THE
12 RELIEF. ONE IS, I THINK, T IS REFERRING THIS MATTER TO THE
13 U.S. ATTORNEY FOR SOME KIND OF PERJURY PROSECUTION, WHAT IS --
14 DO YOU HAVE ANY AUTHORITY?

15 MS. HALL: I RELIED UPON THE COURT'S INHERENT
16 AUTHORITY TO INVESTIGATE WRONGDOING BY THE PARTIES AND I'M
17 CITING CHAMBERS STANDARD ELECTRIC AND TIMES HERALD PRINTING
18 COMPANY.

19 TIMES HERALD PRINTING COMPANY INVOLVED A MOTION FROM
20 ONE OF THE PARTIES TO REFER A PERJURY MATTER FOR PROSECUTION TO
21 THE U.S. ATTORNEY'S OFFICE AND THE COURT IN THAT INSTANCE
22 DECIDED NOT TO DO IT, BUT IT DIDN'T SAY, SORRY, I DON'T HAVE
23 THAT POWER.

24 THE CONSOLATION PROCEEDINGS SOMETHING THE U.S.
25 ATTORNEY CAN DO, IT'S VERY RARE, BUT IT IS A POSSIBILITY, AND I

1 WANTED TO LEAVE THAT POSSIBILITY OPEN BECAUSE WE BELIEVE THAT
2 THE THEFT THAT HAS GONE ON BY DEFENDANTS IN THIS CASE THAT WE
3 HAVE SEEN IN COPYRIGHT AND SEEN ALSO IN THE CYBER SQUATTING
4 EXTENDS ALSO TO THE PATENTS, AND WHEN THE FULL FACTS ARE KNOWN
5 WE WANT TO PRESENT THAT AS A POSSIBILITY THAT THE COURT WILL
6 CONSIDER.

7 **THE COURT:** OKAY. CHAMBERS VERSUS NASCO HAS TO DO
8 WITH THE COURT'S INHERENT AUTHORITY TO SANCTION COUNSEL WHO
9 BASICALLY CONDUCT THEMSELVES IN BAD FAITH IN A PROCEEDING
10 BEFORE THE COURT.

11 **MS. HALL:** IT DISCUSSES THAT THERE ARE STATUTES, DO
12 NOT LIMIT THE COURT'S AUTHORITY TO BE ABLE TO PUNISH,
13 INVESTIGATE WRONGDOING OF PARTIES. AND SO I CITED THAT CASE
14 FOR THAT PROPOSITION THAT IT'S NOT MERELY LIMITED TO, SAY, RULE
15 11 OR 28 USC SECTION 1927. 28 USC 1927.

16 **THE COURT:** ANYTHING YOU WANT TO SAY?

17 **MR. JERGER:** WE'VE FOUND NO AUTHORITY EITHER TO
18 AUTHORIZE UNDER ANY FEDERAL OR STATE STATUTE THE RELIEF
19 REQUESTED IN PARAGRAPHS H AND T.

20 **THE COURT:** ALL RIGHT. LET'S MOVE ONTO PLAINTIFF'S
21 MOTION FOR PRELIMINARY INJUNCTION. AND FIRST QUESTION I'LL PUT
22 TO PLAINTIFF IN THE FIRST INSTANCE.

23 **MS. HALL:** PLAINTIFF IS ENTITLED TO A PRESUMPTION OF
24 IRREPARABLE HARM BECAUSE OF THE INFRINGEMENT, THAT'S ONE THINGS
25 THAT WE'RE RELYING UPON.

1 AND THE OTHER THING IS THAT WE DON'T HAVE ANY PROOF
2 WHATSOEVER THAT THEY HAVE COMPLIED WITH THE TERMS AND THAT
3 THERE IS -- THEY'VE OFFERED NO PROOF THAT -- THERE'S NO WAY
4 THAT THEY COULD RETURN TO THEIR OLD WAYS.

5 WE HAVE CD -- WE HAVE 307 RIGHT HERE, APPARENTLY A NEW
6 ONE CALLED 308, WHICH HAS NOT BEEN RECEIVED BY MY CLIENT, MY
7 CLIENT ENTITLED TO UPDATES, HE'S NOT SENT MY CLIENT THESE YET.

8 MY CLIENT HAS TRIED TO OPEN UP THE DATABASE TO FIND
9 OUT WHETHER OR NOT THE SAME SELECTION COMPILATION ORDERING
10 GROUPING THAT IS IMPORTANT IN THE DECODER DEFINITIONAL FILES IN
11 THAT STILL PRESENT, THAT WOULD INDICATE THAT OUR FILES WERE THE
12 SOURCE OF THOSE AND THERE'S A REASON TO THINK THAT IT MIGHT
13 VERY WELL BE.

14 HOW LONG DID IT TAKE FOR PLAINTIFF TO DEVELOP THESE
15 FILES? SAY, FIVE YEARS, HUNDREDS, THOUSANDS OF HOURS, DOZENS
16 OF THOUSANDS?

17 DEFENDANT SEEMS TO COME UP WITH OVERNIGHT A DATABASE
18 THAT HAS ALL THESE SAME THINGS, ALL THESE SAME THING THAT
19 PLAINTIFF NOW OFFERS, HOW COULD HE HAVE DONE THAT OVERNIGHT?

20 **THE COURT:** WHAT EVIDENCE IS BEFORE THE COURT THAT THE
21 DEFENDANTS HAVE NOT VOLUNTARILY COMPLIED WITH THE TERMS OF
22 THE -- YOUR DEMAND AND TO PROVE THAT THIS ALLEGED WRONGFUL
23 ACTIVITY CANNOT REASONABLY BE EXPECTED TO RECUR. YOU HAVE THE
24 BURDEN.

25 **MS. HALL:** ACTUALLY, WE PROVE THEY COMMITTED

1 INFRINGEMENT, IT'S THEIR JOB, THE BURDEN ACTUALLY SHIFTS TO
2 THEM TO SHOW THAT THEY ARE NO LONGER INFRINGING.

3 ALL WE HAVE A CONCLUSORY STATEMENT. WE HAVE NOTHING
4 FROM THIS CD, I GAVE THIS CD TO MR. JERGER AND SAY OPEN THIS UP
5 AND SHOW US WHAT IS ON THE CD AND IN THE DATABASE, AND THE
6 BURDEN IS ON THEM ONCE WE HAVE SHOWN THAT THEY HAVE INFRINGED
7 FOR THEM TO SHOW, NO, THEY DON'T AND, NO, THEY WILL NOT
8 CONTINUE.

9 THE COURT: ALL RIGHT.

10 MR. JERGER: JUST TO INITIALLY ADDRESS THAT. WE
11 DISAGREE THAT THE BURDEN IS ON US. PRELIMINARY INJUNCTION
12 EXTRAORDINARY REMEDY MEANT TO PRESERVE THE STATUS QUO.

13 WE SUBMITTED A DECLARATION THAT SHOWS WE ARE NOT DOING
14 ANYTHING AT ALL WHATSOEVER, AND THAT IN -- OUT OF ABUNDANCE OF
15 CAUTION WE HAVE RETOOLED EVERY POSSIBLE ALLEGEDLY INFRINGING
16 PIECE OF SOFTWARE AND THEY COME FORWARD WITH NO EVIDENCE THAT
17 WE ARE NOT, IN FACT, DOING THAT.

18 THEY ARE RESTING ON THIS PRESUMPTION OF IRREPARABLE
19 HARM, WHICH AS I STATED BEFORE, I DON'T THINK APPLIES. BUT
20 EVEN IF IT DOES APPLY, I THINK, DEFENDANTS HAVE EFFECTIVELY
21 REBUTTED THAT PRESUMPTION, A, BECAUSE THEY HAVEN'T ALLEGED ANY
22 HARM THEY HAVE, B, THEY HAVEN'T SHOWN THAT WE HAVE NOT COMPLIED
23 WITH THESE REQUESTS, C, THEIR CONDUCT WHICH I GO THROUGH IN MY
24 REPLY PAPERS WITH THE DELAY, THESE SORTS OF THINGS, AND SO
25 THAT'S MY RESPONSE TO HER IDEAS THERE.

1 NOW, I WANT TO JUMP BACK TO QUESTION NUMBER ONE. WHAT
2 HARM DOES PLAINTIFF SEEK TO PREVENT BY AN INJUNCTION THAT'S
3 ADDRESSED TO THE PLAINTIFF?

4 IS IT ABSOLUTELY CLEAR DEFENDANT'S ALLEGEDLY WRONGFUL
5 ACTIVITY CANNOT REASONABLY BE EXPECTED TO OCCUR, AND I WOULD
6 SAY, YES, IT IS ABSOLUTELY CLEAR WHAT WE'RE TALKING ABOUT HERE
7 IS A SPREAD SHEET OF DATA.

8 WHAT MY CLIENT HAS DONE IS COMPLETELY REPLACED THAT
9 WITH NEW DATA 100 PERCENT. IT SERVES THE SAME FUNCTIONALITY AS
10 THE DECODER DEFINITION FILES, THE PREVIOUS ALLEGED DECODER
11 DEFINITION FILES THAT WERE IN MY CLIENT'S SOFTWARE, 100 PERCENT
12 THE SAME FUNCTIONALITY.

13 IN OTHER WORDS, THE DECODER DEFINITION FILES IS NO
14 VALUE, THERE WOULD BE NO REASON MY CLIENT WOULD EVER REVERT TO
15 ANY OF THE ALLEGEDLY INFRINGING PRODUCT.

16 HE'S TAKEN EVERYTHING THAT'S -- THAT THEY ALLEGE
17 INFRINGES OFF HIS WEB SITE, HE SHIPS NEW PRODUCT. I HAVE THE
18 VERSION 308 WITH ME IF MS. HALL WOULD LIKE A COPY OF THAT. SO
19 THE NEW SOFTWARE AS IT'S GONE FORWARD HAS 100 PERCENT REPLACED
20 ALL THE ALLEGED INFRINGING PRODUCT.

21 I THINK, IT IS ABSOLUTELY CLEAR THAT ALL ALLEGEDLY
22 INFRINGING ACTIVITY CEASED AND THERE'S NO POSSIBILITY OF
23 RECURRENCE BECAUSE THERE'S NO REASON THAT DEFENDANTS WOULD EVER
24 GO BACK TO THE OLD ALLEGEDLY INFRINGING DATA WHEN THEY HAVE
25 THEIR OWN DATA WHICH IS SERVES A HUNDRED PERCENT OF THE

1 FUNCTIONALITY.

2 THE COURT: SO, LET THEM STOP YOU. WE HAVE A
3 DECLARATION TO THAT EFFECT. WHAT EVIDENCE IN THE RECORD
4 REFUTES THAT?

5 AND EVEN ASSUMING YOUR ANALYSIS OF PROCEDURAL POSTURE
6 IS CORRECT ON -- THE BURDEN SHIFTS BY VIRTUE OF THE DECLARATION
7 THAT THE DEFENDANTS SUBMITTED, IT HAS SHIFTED, YOU GOT A HIGH
8 ENERGY SITUATION.

9 MS. HALL: WHO CAN'T OPEN THIS DATABASE AND HE'S
10 CONSULTED WITH FRIENDS WHO ARE ALSO EXPERTS IN SOFTWARE AND
11 THEY CAN'T OPEN THE DATABASE EITHER. THEY HAD TWO MONTHS, WHY
12 COULDN'T THEY GIVE US THE SPREAD SHEET THEY TALK ABOUT? WE
13 COULD HAVE DONE OUR OWN ANALYSIS.

14 THE COURT: THE POINT IS, DO YOU HAVE ANY EVIDENCE
15 TO -- OTHER THAN WHAT YOU'RE SAYING HERE VERBALLY IN COURT, TO
16 REFUTE THE DECLARATION THAT THE DEFENDANTS SUBMITTED THEY
17 BASICALLY HAVE CEASED THE ACTIVITY THAT YOUR CLIENT IS
18 COMPLAINING ABOUT?

19 MS. HALL: THE EVIDENCE THAT I'VE DESCRIBED ALREADY,
20 THE EVIDENCE THAT -- THE STATEMENT THEY HAVE MADE IS
21 CONCLUSORY, DOESN'T OFFER ANY, YOU KNOW, WHERE'S THE SPREAD
22 SHEET? COULDN'T THEY HAVE INCLUDED THAT?

23 NO, THEY CAN'T. IT'S THEIR BURDEN TO BE ABLE TO SHOW
24 THEY HAVE STOPPED AND THAT THEY WILL NOT RETURN TO IT. 307
25 DOES NOT WORK.

1 THE COURT: HAVE YOU FILED AN OBJECTION?

2 MS. HALL: YES. I FILED A NUMBER OF OBJECTIONS, BUT I
3 FORGET EXACTLY -- I KNOW I MADE THAT ARGUMENT SOMEWHERE IN MY
4 PAPERS. THIS IS THE -- NECESSARY DON'T WORK.

5 IT'S IMPORTANT TO REMEMBER THAT THE BURDEN HERE ONCE
6 WE'VE SHOWN THAT IT IS ON THEM AND, SECOND, THAT UNDER W.T.
7 GRANT THE U.S. SUPREME COURT DECISION THE COURT SHOULD BE WARY
8 ANY ATTEMPT TO DEFEAT THE INJUNCTION BY PROTESTATION REPENTANCE
9 AND REFORM WHEN THE SENSATION TIME TO AVOID THE PRELIMINARY
10 INJUNCTION.

11 THE COURT: SLOW DOWN.

12 MS. HALL: THANK YOU.

13 THE COURT: START OVER AGAIN. TELL US EXACTLY WHERE
14 YOU'RE READING FROM.

15 MS. HALL: I'M READING FROM A QUOTE FROM W.T. GRANT
16 WHICH HAVE IN MY NOTES. THAT IS, THAT THE COURT SHOULD BE WARY
17 OF AN ATTEMPT TO DEFEAT INJUNCTION WHEN THE DEFENDANTS HAVE
18 BEEN MAKING THESE PROTESTATIONS OF REPENTANCE AND REFORM, AND
19 THESE PROTESTATIONS ARE TIMED TO AVOID THE PRELIMINARY
20 INJUNCTION, AND THEY HAVEN'T SHOWN THERE IS NO PROBABILITY OF
21 RECESSION, THE BURDEN ON THEM. AND THEY HAD TWO MONTHS TO GIVE
22 ME THIS SPREAD SHEET, WHERE IS IT? I DON'T KNOW.

23 THE COURT: I'LL GIVE YOU THE LAST WORD ON THIS POINT.

24 MR. JERGER: WELL, THREE QUICK POINTS. I THINK, I
25 ALREADY ADDRESSED THE MOOTNESS ARGUMENT SHE'S RECENTLY RAISING.

1 I THINK, THIS IS DISTINGUISHABLE FROM THE LGS CASE THAT YOU
2 CITE IN YOUR TENTATIVE RULING, IN THAT MY CLIENTS HAVE CEASED
3 ALL ACTIVITY, THERE'S NO POSSIBILITY OF REOCCURRENCE AND THERE
4 IS NO CERTAINTY WHETHER ANY INFRINGEMENT IS CURRENTLY ONGOING.

5 IN REGARD TO THESE CONTINUED ALLEGATIONS THEY CAN'T
6 GET THE PRODUCT TO WORK, I'LL JUST SAY, THAT MY UNDERSTANDING
7 FROM MY CLIENT IS THEY HAVEN'T REGISTERED WITH A NEW
8 REGISTRATION NUMBER AND THAT'S WHY -- THAT'S HIS THEORY ON WHY
9 THEIR VERSION ISN'T WORKING. THERE'S NO NEFARIOUS THINGS GOING
10 ON THERE.

11 THIRD, BACK TO THE BURDEN, WE VIGOROUSLY DISAGREE THAT
12 THEY HAVE MET ANY SORT OF BURDEN AND THAT BURDEN HAS SHIFTED TO
13 US. WE DISAGREE THAT THEY'VE SHOWN IN THEIR MOVING PAPERS THEY
14 WOULD, IN FACT, SUCCEED ON THE MERITS.

15 SIMPLE THINGS, FOR EXAMPLE, THE PLAINTIFF HASN'T EVEN
16 DEFINED HIS COPYRIGHT RIGHTS WHICH WOULD BE THE FIRST ELEMENT
17 OF A PRIMA FACIE CASE OF COPYRIGHT. WE DON'T KNOW -- OR WE DO
18 KNOW HE'S NOT THE OWNER OF THE -- ALL THE DECODER DEFINITION
19 FILES HE ALLEGES IN PARAGRAPH 41 OF THE AMENDED COMPLAINT.

20 WE ALSO KNOW HE'S NOT THE OWNER OF THE QSI MANUAL ONE
21 OF THE INFRINGING DATA PRODUCTS. BEFORE THOSE MERITS ISSUED
22 WOULD BE DECIDED MORE FACTUAL DISCOVERY WOULD BE NEEDED TO
23 DETERMINE THE EXTENT OF THE RIGHTS THE FOLKS HAVE.

24 THEY DIDN'T ASSIGN THEIR COPYRIGHT RIGHTS TO
25 MR. JACOBSEN, WHETHER THEY WORKED ON THE DECODER DEFINITIONS AS

1 A WHOLE OR WHETHER THEY WORKED ON DISCREET PARTS, AND IF THOSE
2 PARTS AREN'T ASSIGNED TO MR. JACOBSEN THEN THOSE AREN'T PART OF
3 ANY SORT OF PRELIMINARY INJUNCTION. HE'S NOT THE OWNER.

4 MS. HALL: I THINK, WE -- ASSIGNMENTS FROM ALL OF THEM
5 OR JUST ABOUT EVERYONE.

6 THE COURT: STOP. LET'S MOVE ONTO QUESTION TWO, AND
7 I'LL PUT THAT QUESTION TO YOU ABOUT DIRECT OR INDUCED
8 INDUCEMENT OF COPYRIGHT INFRINGEMENT.

9 MR. JERGER: SURE. UPON FURTHER REFLECTION WE AGREE
10 WITH THE COURT THAT DEFENDANTS WOULD BE LIABLE IN THAT
11 SCENARIO.

12 THE COURT: I ASSUME, YOU DON'T DISAGREE TODAY WE
13 THAT, MS. HALL?

14 MS. HALL: THE COURT IS CORRECT.

15 THE COURT: THANK YOU. ANYTHING FURTHER THE PARTIES
16 WISH TO ADDRESS AT THIS POINT THAT'S NOT IN THE QUESTIONS OR
17 NOT IN YOUR PAPERS?

18 MS. HALL?

19 MS. HALL: YES, I'D LIKE TO MAKE A POINT ABOUT THE
20 IRREPARABLE HARM HERE. THERE IS IRREPARABLE HARM, AN
21 INJUNCTION IS AN APPROPRIATE THING TO ISSUE BECAUSE OF THE
22 NATURE OF THE SOURCE GROUPS.

23 OPEN SOURCE GROUPS ARE DEFUSED GROUPS, THEY HAVE A FEW
24 LEADERS. THEY OFTEN DO NOT -- ACTUALLY, I THINK, THE PURPOSE
25 OF OPEN SOURCE NOT TO CHARGE ANYTHING FOR THE USE OF THE

1 SOFTWARE, AND THAT BASICALLY MEANS THERE WILL BE ALMOST NO
2 CHANCE FOR DAMAGES.

3 UNDER NORMAL CIRCUMSTANCES MAYBE SOME INSTANCES, AND
4 SO IN AN -- INSTANCES DAMAGES ARE NOT ADEQUATE INJUNCTION IS
5 THE REMEDY THAT WE SEEK. WE BELIEVE IT'S AN APPROPRIATE ONE.
6 IT'S ONE THAT'S GOING TO ALLOW THESE OPEN SOURCE GROUPS TO
7 CONTINUE TO FLOURISH. THEY WILL HAVE THIS REMEDY AVAILABLE TO
8 THEM TO BE ABLE TO STOP PEOPLE LIKE MR. KATZER AND HIS COMPANY
9 FROM INFRINGING.

10 AND ONE THING I ALSO LIKE TO POINT OUT. EVEN IF 307
11 AND 308 ARE NOT -- AREN'T FUNCTIONAL AND, AGAIN, AS I SAID, I
12 DON'T HAVE A SPREAD SHEET OR ANY INFORMATION ABOUT THAT,
13 DEFENDANTS HAVE NOT SHOWN THEY HAVE STOPPED.

14 THERE ARE OTHER VERSIONS THAT ARE PRESENT OUT THERE
15 AND MY CLIENT HAS DESCRIBED HOW -- IN HIS DECLARATION HOW
16 PEOPLE CAN USE THE OTHER VERSIONS AND CAN STILL USE THE
17 SOFTWARE TOOL.

18 MR. KATZER SAID THAT HE HAS FIXED IT SO THAT THE
19 SOFTWARE WILL NO LONGER BE FUNCTIONAL AFTER CERTAIN DATE.
20 WELL, THAT'S -- ONE OF THEM IS IN MARCH OF '07 THAT'S
21 CONTINUING HARM AND, AGAIN, MY CLIENT THROUGH HIS EXPERIMENTS
22 THAT IT DOESN'T STOP IN MARCH IT ACTUALLY WILL CONTINUE TO GO
23 ON, SO THERE IS CONTINUING HARM.

24 IT'S NOT BEEN STOPPED AND WE ASK THE COURT TO ISSUE A
25 PRELIMINARY INJUNCTION.

1 **THE COURT:** COUNSEL, LAST WORD.

2 **MR. JERGER:** AS MY CLIENT STATES IN HIS DECLARATION,
3 HE'S DONE EVERYTHING HUMANLY POSSIBLE HE CAN DO. ALL THE OLD
4 VERSIONS OUT, ALL REGISTERED USERS HAVE BEEN SENT NEW VERSIONS
5 WHICH DON'T CONTAIN ANY OF THE ALLEGEDLY INFRINGING PRODUCT,
6 EVERYTHING BEEN TAKEN OFF THE INTERNET.

7 THERE'S REALLY NOTHING ELSE HUMANLY POSSIBLE TO DO AND
8 WE, AGAIN, DISAGREE THAT PLAINTIFF ARTICULATED ANY IRREPARABLE
9 HARM, BUT RATHER REST ON A CONCLUSORY STATEMENT THAT HE HAS AND
10 WILL SUFFER IRREPARABLE HARM, AND THIS PRESUMPTION GENERALLY
11 APPLIES TO COPYRIGHT CASES.

12 **THE COURT:** LET'S -- MATTER SUBMITTED. I WANT TO MOVE
13 ONTO THE CASE MANAGEMENT CONFERENCE.

14 THE PARTIES HAVE SUBMITTED A JOINT STATEMENT. THE
15 FIRST THING GIVEN THE NATURE -- TO THE EXTENT THIS CASE
16 CONTINUES GIVEN THE NATURE OF THE, SHALL WE SAY, PENDING
17 DISCOVERY DISPUTES AND THE COMPLEXITY OF THEM, EVEN THOUGH THIS
18 COURT GENERALLY HANDLES ITS OWN DISCOVERY DISPUTES, THIS IS A
19 CASE WHERE I'M GOING TO EXERCISE MY DISCRETION TO REFER ALL
20 DISCOVERY MATTERS TO A RANDOMLY ASSIGNED MAGISTRATE JUDGE TO
21 RESOLVE ALL OF THOSE MATTERS AND I'M GOING TO ORDER THAT IN A
22 WRITTEN ORDER TODAY.

23 **MS. HALL:** I HAVE -- I WAS INTERN FOR JUDGE SPERO, I
24 THINK, MIGHT NOT BE A GOOD IDEA TO REFER TO IT TO JUDGE SPERO.
25 TO PUT THAT IN THE RECORD.

1 THE COURT: I UNDERSTAND THAT GIVEN COUNSEL IS
2 PLAINTIFF'S COUNSEL, THE FACT SHE WAS A EXTERN FOR JUDGE SPERO
3 WOULD BE INAPPROPRIATE. HE SHOULD BE EXCLUDED FROM THAT RANDOM
4 ASSIGNMENT.

5 I WOULD SAY, BASED UPON THE FILINGS HERE, THAT TO THE
6 EXTENT THIS CASE DOES CONTINUE, I THINK, IT WOULD BEHOOVE THE
7 PARTIES, THE PLAINTIFF HAS ALREADY STATED HIS POSITION, TO
8 CONSIDER A CONSENT TO A MAGISTRATE JUDGE FOR ALL PURPOSES.

9 THIS IS -- ONGOING DISPUTES IN THIS CASE, THIS COURT
10 HAS A HUGE DOCKET, AND AGAIN THE COURT DOES NOT INTEND TO,
11 CAN'T AND WON'T REQUIRE THE PARTIES TO SO CONSENT, BUT WE HAVE,
12 I THINK, SOME OF THE BEST MAGISTRATE JUDGES IN THE COUNTRY WHO
13 ARE TREATED LIKE DISTRICT JUDGES, ARTICLE 3 JUDGES. THEY HAVE
14 MORE TIME TO CONSIDER THESE MATTERS AND TO THE EXTENT YOUR
15 CLIENTS ARE LOOKING FOR EXPEDITIOUS RELIEF YOU'LL GET IT MORE
16 EXPEDITIOUSLY FROM A MAGISTRATE JUDGE.

17 SO IN A MATTER -- THIS IS A MATTER, I THINK, BOTH
18 PLAINTIFF HAS STATED HIS POSITION, DEFENDANTS HAVE STATED THEIR
19 POSITION, I'D LIKE YOU TO -- BOTH SIDES GO BACK TO THEIR
20 RESPECTIVE CLIENTS AND TO ADDRESS THIS ISSUE AND LET THE COURT
21 KNOW BY THE CLOSE OF BUSINESS NEXT WEEK AS A JOINT MATTER
22 WHETHER YOU'RE WILLING TO RECONSIDER.

23 AGAIN, NO ADVERSE CONSEQUENCES OTHER THAN WHAT I
24 MENTIONED, WHICH IS HAVING THE MATTER CONSIDERED BY MORE BUSIER
25 JUDGE WITH MORE CASES. IF YOU DECIDE NOT TO, BUT IN THE

1 MEANTIME, IN THE INTERIM I'M GOING TO ORDER THAT ALL DISCOVERY
2 MATTERS BE HANDLED BY RANDOMLY ASSIGNED MAGISTRATE JUDGE,
3 EXCEPT JUDGE SPERO.

4 NOW, BOTH SIDES, YOUR CLIENT HAS INDICATED HIS
5 WILLINGNESS TO CONSENT?

6 MS. HALL: I HAVEN'T FILED THE PAPERS, BUT.

7 THE COURT: YOU DON'T NEED TO. BUT WHAT I'M SAYING
8 IS, I WANT TO KEEP THIS, I'M NOT REALLY INTERESTED IN INKLING
9 OUT ONE SIDE OR THE OTHER IN TERMS OF WILLINGNESS OR
10 UNWILLINGNESS.

11 IF BOTH PARTIES DON'T CONSENT IT DOESN'T GO TO THE
12 MAGISTRATE JUDGE FOR ALL PURPOSES, IN LIGHT OF THE FACT I'M
13 GIVING A WEEK, IN LIGHT OF THE FACT THAT YOU AND YOUR CLIENT
14 HAD AN OPPORTUNITY TO OBSERVE THIS COURT, I'M GIVING YOU AN
15 OPPORTUNITY.

16 IN OTHER WORDS, YOU'RE NOT BOUND BY THAT DECISION. I
17 HOPE THAT YOUR CLIENT WOULD CONSIDER, CONTINUE TO CONSIDER THAT
18 CHOICE, BUT I'M GIVING BOTH SIDES, I WANT A JOINT FILING BY
19 NEXT WEEK INDICATING WHETHER THE PARTIES ARE INTERESTED IN
20 CONSENT.

21 AND IF YOU CAN MANIFEST THAT BY CONSENTING OR FILING
22 THE APPROPRIATE PAPERS BY CLOSE OF BUSINESS ON THE 26TH OF
23 JANUARY OR FILE A STATEMENT THAT SAYS THE PARTIES, ALL OF THE
24 PARTIES DO NOT CONSENT TO A MAGISTRATE JUDGE AND THAT WAY WE'LL
25 KNOW WHAT'S GOING ON.

1 BUT ON THE ASSUMPTION THAT WHOEVER HANDLES THIS CASE,
2 WHICHEVER JUDGE HANDLES THIS CASE, THERE ARE MATTERS THAT NEED
3 TO BE ADDRESSED TODAY.

4 THE FIRST ISSUE I WANT TO CONSIDER IS ON PAGE SIX OF
5 YOUR CASE MANAGEMENT CONFERENCE STATEMENT. YOU SAY THAT KAM
6 AND KATZER ANTICIPATE THAT NEW PARTIES WILL BE ADDED. JACOBSEN
7 MAY ALSO ADD PARTIES TO THE CLAIMS AND I WANT TO PUT A CAP ON
8 THIS.

9 I DON'T WANT TO HAVE AMENDMENTS ADDING PARTIES ON THE
10 EAVE OF TRIAL, FOR EXAMPLE. SO LET ME START WITH PLAINTIFF,
11 HOW SOON WILL YOU BE ABLE TO MAKE THAT DETERMINATION?

12 **MS. HALL:** THE PARTIES WOULD BE -- ADD BRITTON IF YOU
13 SO ORDERED, ASSUMING THAT YOU STILL WANT HIM IN, IF WE DECIDE
14 WE DON'T WANT TO DECODERPRO.COM, POSSIBLY ROBERT BOWENS AND
15 BOWENS ENGINEERING.

16 **THE COURT:** THAT'S A WHO, I WANT A WHEN.

17 **MS. HALL:** WHEN I WOULD FILE AN AMENDED COMPLAINT OR
18 MOTION FOR LEAVE TO FILE AMENDED COMPLAINT, THERE ARE A COUPLE
19 OF THINGS WE HAVE DISCOVERED.

20 **THE COURT:** I KNOW, I WANT A WHEN, NOW YOU'VE GIVEN ME
21 A WHY?

22 **MS. HALL:** IT REALLY DEPENDENT ON WHAT YOU DECIDE TO
23 RULE.

24 **THE COURT:** ONE SCENARIO IS YOU WILL HAVE TEN DAYS
25 FROM THE ISSUANCE OF AN ORDER RESOLVING THE CURRENT MOTIONS.

1 **MS. HALL:** IF YOU ARE DECIDING THAT YOU ARE DISMISSING
2 ANYTHING WITHOUT PREJUDICE.

3 **THE COURT:** ALL RIGHT. TEN DAYS FROM ISSUANCE OF THE
4 ORDER IN THE CASE OR 30 DAYS, WHICHEVER IS 30 DAYS FROM TODAY,
5 WHICHEVER IS LATER.

6 **MS. HALL:** OKAY.

7 **THE COURT:** SO IF THE COURT HAPPENS TO DELAY ISSUING
8 THE ORDER THEN YOU'LL HAVE MORE TIME.

9 WHAT ABOUT THE DEFENDANTS, CAN YOU MAKE THAT
10 DETERMINATION IN THAT PERIOD OF TIME?

11 **MR. JERGER:** WE CAN DO IT THEN OR WE CAN GUARANTEE IT
12 WILL BE IN OUR FIRST RESPONSIVE PLEADING, IF WE DO CHOSE TO ADD
13 ANY PARTIES.

14 **THE COURT:** WHICH WOULD BE DUE WHEN?

15 **MR. JERGER:** ACCORDING TO WHAT I CALCULATED HERE 20
16 DAYS AFTER THE WRITTEN RULING, ASSUMING THERE IS NO AMENDED
17 COMPLAINT, OR 20 DAYS AFTER THE AMENDED COMPLAINT WE WOULD
18 EITHER FILE A RESPONSIVE PLEADING OR ANOTHER MOTION TO DISMISS.

19 **THE COURT:** IN ORDER TO ACCOMMODATE BOTH SIDES THAT
20 WILL BE THE ORDER OF THE COURT. IN THE FIRST RESPONSIVE
21 PLEADING I WILL EXPECT THE ADDITION OF ANY ADDITIONAL PARTIES
22 AT THAT TIME AND THE PLAINTIFF WILL HAVE LIKE AMOUNT OF TIME.

23 SO THAT ACTUALLY GIVES YOU MORE TIME, AND SO I'M GOING
24 TO VACATE WHAT I SAID BEFORE AND INDICATE THAT WHEN THE
25 DEFENDANT IS REQUIRED TO FILE ITS FIRST AMENDED PLEADING, WHICH

1 IN TURN WILL BE TRIGGERED BY THIS COURT'S ORDER, THE ISSUANCE
2 OF THE COURT'S ORDER.

3 BY THAT TIME I EXPECT THE PARTIES TO ADD ANY
4 ADDITIONAL PARTIES THEY WISH TO ADD. SO THE MATTER, AT LEAST,
5 WILL PROGRESS TO THAT POINT. AND THAT ORDER BECAUSE THIS COURT
6 WILL ISSUE ITS ORDER, I GUESS, ONE THING I WANT TO SAY IS THIS.

7 THAT BY ASKING THE PARTIES TO CONSENT TO A MAGISTRATE
8 JUDGE, THAT DOESN'T MEAN THAT THIS COURT WILL NOT RESOLVE THE
9 MOTIONS BEFORE THE -- IT WILL BECAUSE IT WILL BE UNFAIR TO GIVE
10 THOSE DE NOVO TO A MAGISTRATE JUDGE, SO YOU CAN ASSURE YOUR
11 CLIENTS THE COURT WILL DO THAT.

12 THE PARTIES INDICATE THEY WILL FILE ANY MOTIONS FOR
13 COURT ORDERS RELATING TO OBTAINING FOREIGN DISCOVERY AND TAKING
14 FOREIGN DEPOSITION BY FEBRUARY 16TH, THAT'S THE PLAINTIFF'S
15 PROPOSAL, DOES DEFENDANTS DISAGREE WITH THAT?

16 MR. JERGER: YES.

17 THE COURT: STOP. THEN I'M GOING TO LEAVE THAT TO THE
18 MAGISTRATE JUDGE, EVEN IF YOU DON'T CONSENT, WILL DECIDE THAT.
19 SO IF THERE'S NOT AGREEMENT I'M NOT GOING TO DEAL WITH IT AT
20 THIS TIME.

21 WITH RESPECT TO THE DATES, THE DUELING SETS OF DATES,
22 THE ONE OTHER POINT WITH RESPECT TO NAMING OF NEW PARTIES, ONE
23 OF THE -- IF THERE ARE NEW PARTIES NAMED AND YOU HAVE
24 INFORMATION ABOUT ANY APPROPRIATE AFFILIATES OR THAT IF YOU
25 KNOW THEY HAVE COUNSEL YOU SHOULD LET THE COURT KNOW BECAUSE AS

1 THE PLAINTIFF POINTS OUT THE COURT WANTS TO KNOW THIS
2 INFORMATION, SO THAT ANY RECUSAL OR DISQUALIFICATION ISSUES
3 MIGHT BE ADDRESSED EARLY ON.

4 WITH RESPECT TO THE DUELING DATES I WANT TO SAY TWO
5 THINGS: THE FIRST THING IS, I WILL DEAL WITH THE -- BECAUSE
6 THE PARTIES DON'T AGREE I WILL BE SOLO NUMBER LIKE AND DECIDE
7 THE DATES AND PUT THEM IN MY ORDER WITH THE FOLLOWING
8 EXCEPTION, THAT WITH RESPECT TO THAT DETERMINATION WILL BE MADE
9 IN A LATER ORDER.

10 IN OTHER WORD, SHOULD THE COURT GET ITS ORDER OUT THIS
11 WEEK THE DATES, THE ACTUAL DATES FOR THE MANAGEMENT OF THIS
12 CASE ARE TO BE DONE BY THE JUDGE WHO'S GOING TO TRY THE CASE.
13 IF THE PARTIES CONSENT TO A MAGISTRATE JUDGE THE MAGISTRATE
14 JUDGE WILL DO THAT, WILL SELECT THOSE DATES.

15 AND I'M NOT GOING TO USURP THAT ABILITY TO MANAGE THE
16 CASE OF THE JUDGE WHO'S GOING TO HANDLE IT. IF MY ORDER IS
17 ISSUED BEFORE NEXT FRIDAY THEN I'LL DEAL -- AND THE PARTIES DO
18 NOT CONSENT TO A MAGISTRATE JUDGE, THEN I WILL ISSUE A SEPARATE
19 ORDER WITH THE DATES THAT WILL GOVERN THE COMPLETION OF
20 DISCOVERY AND PRETRIAL AND FILING OF DISPOSITIVE MOTIONS.

21 AND IN THE FUTURE WHETHER THE PARTIES ARE BEFORE THIS
22 COURT OR A MAGISTRATE JUDGE IT WOULD BEHOOVE THE PARTIES TO
23 MORE COMPLETELY AND ADEQUATELY AND EFFECTIVELY MEET AND CONFER
24 WITH RESPECT TO DATES BECAUSE IT'S NOT THE COURT'S JOB, USUALLY
25 NOT THE BEST MANAGEMENT TO BASICALLY PICK DATES WHEN THE

