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45
46 BE IT REMEMBERED that upon this the 6th day of
47 August, 2010 the above-styled and numbered cause came
48 on for Hearing before the Honorable Lawrence "Larry"
49 Weiman, Judge Presiding of the 80th Civil District Court
50 in Harris County, Texas; and all preliminary matters
51 having been disposed of, the following proceedings were
52 had, viz:

53

1 P R O C E E D I N G S:

2 August 6, 2010

3 THE COURT: Cause No. 2008-24181, Virgie
4 Arthur vs. Howard K. Stern, et al. We have
5 several motions pending.

6 MR. MCCABE: Neil McCabe for plaintiff.

7 MR. WOOD: Lin Wood of Bryan Cave LLP for
8 defendant, Howard K. Stern.

9 MR. LANTTA: Luke Lantta with Bryan Cave for
10 the defendant, Howard K. Stern.

11 MR. HARRINGTON: Walter Herring for Howard K.
12 Stern.

13 MS. HAMILTON: Nancy Hamilton on behalf of
14 Art Harris. And with me is Mary Lou Flynn-DuPart
15 and Kathy Adair. And Mr. Babcock, Charles
16 Babcock is on the phone.

17 MS. MARSHAL: Diana Marshal, Larry Birkhead's
18 attorney.

19 THE COURT: And counsel on the phone, if you
20 want to state your appearances.

21 MR. BABCOCK: Yes, Your Honor. It's Charles
22 Babcock representing Art Harris, I'm on the
23 telephone.

24 MS. TURNER: And Nelda Rose Turner, defendant
25 pro se on the telephone.

1 THE COURT: Okay. Thank you. Let's proceed,
2 Mr. Babcock.

3 MR. BABCOCK: Yes, Your Honor. There are two
4 specific motions that relate to Mr. Harris. One
5 is a Motion to Compel that we filed on July 1 and
6 set fore commission with your but we got a call
7 from the clerk earlier this week that said that
8 you wanted argument on it. And I'm prepared to
9 do that.

10 The second motion that relates directly to
11 Mr. Harris is his emergency motion to seal under
12 Rule 76(a)(5), or and I should say to
13 de-designate excerpts of the deposition of Virgie
14 Arthur which he has used in support of his motion
15 for summary judgment which was filed earlier this
16 week.

17 Mr. Harris is also interested in the
18 plaintiff's motion to continue and we filed a
19 written opposition, but I'm prepared to address
20 that as well. And I'm prepared to go forward
21 with the Motion to Compel or any other order that
22 the Court wishes.

23 THE COURT: Take them whichever order you
24 feel would be most expedient.

25 MR. BABCOCK: All right, Your Honor. I feel

1 I can do all of these in fairly short order.

2 With respect to the Motion to Compel, as I
3 said, it was filed on July 1 and it's styled
4 Motion to Compel production of documents
5 responsive to Harris' second request for
6 production. And it's directed of course at the
7 plaintiff Virgie Arthur. There are eight sort of
8 categories that I have lumped together to address
9 this. And they are lumped that way based on the
10 response that we got from Ms. Arthur to our
11 motion.

12 The first is with respect to request No. 2
13 and 6. Based on the fact that the plaintiff has
14 limited what is now at issue is the claim
15 defamation to two categories. One, whether there
16 was sex with her step-brother which is now I
17 guess out of the case in light of your summary
18 judgment for TMZ. And then secondly, that she
19 was a bad mother as a young child, when Anna
20 Nicole Smith was a young child.

21 As the Court knows, there were a number of
22 additional claims of defamations against Art
23 Harris which would have nothing to do with either
24 of those two categories. But based on the fact
25 that the plaintiff has now limited the claimed

1 defamation, we will withdraw our request for
2 document No. 2 and No. 6 is based on the
3 representations made in the plaintiff's response.

4 So that takes us to the next category that I
5 have sort of put together which are requests No.
6 1, No. 8 and No. 9. And with respect to each of
7 those requests the plaintiff is says that she has
8 no documents. If that is so, then we merely ask
9 that the objections be overruled, although
10 approximate with respect to No. 9, that is
11 payments made to any of the parties or certain
12 witnesses, we know that the plaintiff has
13 documents of that because Ms. Turner in her
14 deposition indicated that the plaintiff had made
15 are paid for her hotel room at the time she was
16 deposed seen of even though she only lives twelve
17 miles away from were the deposition was taken.
18 So we want those documents. But with respect to
19 1, 8 and 9 we would like the objections
20 overruled.

21 THE COURT: Response.

22 MR. MCCABE: I have no objection to having
23 the objection overruled for president things that
24 we don't have any responsive documents for. And
25 we'll find a receipt for the hotel room and

1 supply that.

2 THE COURT: Then the objections to request
3 for productions 1, 8 and 9 are overruled.

4 MR. BABCOCK: Thank you, Your Honor.

5 The third category I have is request No. 3,
6 No. 4 and No. 7. And these requests all deal
7 with the public figure status of the plaintiff.
8 And they ask for documents relating to publicists
9 and PR firms and ad agencies, contacts with the
10 media, media activities surrounding the events
11 that we're all familiar with regarding the
12 plaintiff's daughter Anna Nicole Smith.

13 The plaintiff has apparently resisted these
14 document requests on the basis that we have
15 confused what the test is for public figure. But
16 whether we have or not, and we don't think we
17 have, that's an issue that you're going to
18 confront at the time you consider Mr. Harris'
19 motion for summary judgment.

20 Judge Rosenthal in the federal case had
21 already determined that Ms. Arthur was a public
22 figure, but apparently she is still contesting
23 her status in this case; and therefore, we think
24 we are entitled to these documents that determine
25 -- make perhaps a different argument from the one

1 we've already made in our summary judgment as to
2 her public figure status.

3 I would add that based on the information we
4 have, we have argued that Ms. Harris is a --
5 Ms. Arthur is a limited purpose public figure,
6 and if she is that would trigger the actual
7 malice requirement that she prove actual malice.

8 But these documents may reveal that she is an
9 all-purpose public figure and we are entitled to
10 obtain those documents to determine whether we
11 wish to expand upon our argument in the summary
12 judgment that she's a limited purpose public
13 figure. So that's our argument with respect to
14 3, 4 and 7.

15 THE COURT: Response, Mr. McCabe.

16 MR. MCCABE: For some reason I don't have
17 that in front of me, Your Honor, I apologize, so
18 I'm a little hazy on exactly what's being asked
19 for. I have two big binders here, but I don't
20 have the document that shows our response that
21 he's referring to.

22 So Mr. Babcock, could you do me a favor and
23 explain a little more clearly what the documents
24 are that you're asking for?

25 MR. BABCOCK: Well, Your Honor, I'm happy to

1 read the request if that would be of assistance
2 to you --

3 THE COURT: I've got it in front of me on the
4 screen. Because we're paperless I'm not easily
5 to able show it, but I don't mind if you read
6 that to Mr. McCabe or tell him what it
7 encompasses.

8 MR. BABCOCK: Sure. No. 3, and I'll just
9 read it here. All contracts, documents showing
10 payments and communications with publicists,
11 public relations firms or individuals,
12 advertising agencies, television programs,
13 magazines or newspapers regarding referring to
14 you for the years 2005 through January 1, 2009.
15 And the objection is that it's vague, overly
16 broad and not limited in time or scope. And
17 calls for documents that are not relevant to the
18 case. So that's No. 3.

19 Number 4 would be all communications between
20 you, paren, including your agents and
21 representatives, counsel and their employees, and
22 independent contractors, paren, and any member of
23 the media regarding any defendant in this
24 lawsuit.

25 And the objection is that it's vague, overly

1 broad, not reasonably limited to time and scope
2 and et cetera, et cetera, same objection I read
3 before.

4 And then number 7, all documents evidencing
5 or relating to payments made to you or made on
6 your behalf for your expenses, treatments,
7 travel, meals, lodging and compensation of any
8 kind relating to Daniel Smith's death, his
9 burial, the inquest into his death, Anna Nicole
10 Smith, Anna Nicole Smith's burial proceedings in
11 Florida in 2007, and your trips to the Bahamas in
12 2006-2007. And the objection there is more
13 limited, and it is that it's overly broad and
14 unduly burdensome and not relevant or reasonably
15 calculated to lead to the discovery of admissible
16 evidence.

17 So those are the three ones that relate to
18 public figure status.

19 MR. MCCABE: Thank you, Mr. Babcock, for
20 reading those to me. I apologize again for not
21 having that document among all these that I do
22 have.

23 I'll take them in reverse order. The last
24 one has to do apparently with our law firm paying
25 for our own client's travel and accommodations

1 when she goes to one place or another for
2 litigation. And I don't believe that those
3 relate to her status as a public figure
4 whatsoever, or that the other side is entitled to
5 those in any way. And it is unduly burdensome,
6 merely for harassment.

7 The one before that, I don't believe we have
8 anything responsive to that request.

9 As to payments from publicists, I have not
10 been able to find that, but I know that we should
11 be able to and I will endeavor to accomplish
12 that. My understanding from the deposition we
13 took of Mr. David Lee in the federal case is that
14 Virgie doesn't know, that she has an arrangement
15 with Splash for pictures and things like that to
16 be licensed. They take care of everything and
17 something gets deposited into her bank account,
18 it should be possible to get her bank records
19 that would show what's being deposited. So we
20 will undertake to do that.

21 As for communications with her publicist, my
22 understanding is that Virgie doesn't do e-mail or
23 letters, and that when she's had communications
24 with Mr. Lee it's been telephone conversations
25 and that's not possible to produce those. So, I

1 believe that the response to that part of that
2 request would be that we don't have any.

3 THE COURT: So, that notwithstanding, because
4 obviously you don't have to produce documents
5 that don't exist, you don't have to create them,
6 and you're only responsible for producing
7 documents that are within her possession, custody
8 or control.

9 That being said, then it doesn't sound like
10 you're further asserting the objections to number
11 3 or number 4, is that correct?

12 MR. MCCABE: That's correct, Your Honor.

13 THE COURT: So just for the record, I'll
14 overrule the objections to 3 and 4.

15 And on 7, Mr. Babcock, if you would address
16 Mr. McCabe's raising the issue that apparently --
17 are you seeking documentation of expenses paid by
18 Mr. McCabe's firm for Ms. Arthur?

19 MR. BABCOCK: Not unless, Your Honor, they
20 were reimbursed by the publicist, this Splash
21 agency or some other media entity. But if it's
22 merely a law firm paying for their client to go
23 somewhere, that's fine. But we have had
24 deposition testimony in the federal case that
25 suggested that the media was paying either

1 directly to Ms. Arthur or indirectly some other
2 way for her to attend various events such as the
3 burial of her grandson Daniel.

4 So, I might suggest with that friendly
5 amendment if the objections to No. 7 were also
6 overruled, then I would be satisfied with that.

7 THE COURT: We also have another attorney
8 that would like to be heard on this.

9 MS. HAMILTON: Your Honor, Nancy Hamilton.
10 If I may just add that these documents, one of
11 the issues that Mr. Babcock was just addressing
12 about these, there is an allegation that Art
13 Harris defamed Mrs. Arthur in the website where
14 he raised the question about whether or not she
15 was being paid to attend the inquest of her
16 grandson. So, a lot of the -- and whether her
17 expenses have been paid. So they have put these
18 documents and these expenses at issue to the
19 degree that they relate to other media payments
20 or other people supporting them, they would also
21 go to the truth of the complained of statements.
22 And another issue, too, more broadly speaking
23 is that these documents, I think, all go
24 certainly to the communications with publicists
25 and payments would also go to damages.

1 THE COURT: Okay. What the ruling will be,
2 it will be sustained in part and overruled in
3 part; sustained as to any payments made by the
4 O'Quinn Law Firm that were not reimbursed, but
5 overruled to the extent that any of those
6 expenses were paid by the media or third parties
7 or reimbursed to the O'Quinn firm for Ms.
8 Arthur's benefit for those travel expenses.

9 MR. MCCABE: Your Honor, may I suggest that
10 the plaintiff is willing at this time to withdraw
11 the allegation of defamation to which Ms.
12 Hamilton just referred. I thought we had already
13 been held to that limited defamatory -- or
14 allegations of defamation to the step-brother
15 story which you have granted a summary judgment
16 on, and to the prison interview broadcast.

17 Mr. Babcock certainly indicated he took our
18 responses to discovery requests to limit our
19 allegations of defamation to those. So, we no
20 longer are trying to maintain an allegation that
21 Mr. Harris on his website said that Virgie was
22 being paid to attend the inquest in the Bahamas.

23 An in light of that, if the request is for
24 anyone paying Virgie Arthur's expenses to go to
25 the inquest, then I would think that the issue is

1 moot now.

2 THE COURT: Any response?

3 MR. BABCOCK: Yes, Your Honor. I wouldn't
4 totally agree with that. It's certainly true
5 that the additional relevance of these documents
6 that Ms. Hamilton suggested would be cured by the
7 withdrawal of the claims. But, the public figure
8 status of the plaintiff remains with respect to
9 the remaining allegations against Mr. Harris, and
10 these documents go to that issue which remains in
11 the case. So, I think your ruling that you just
12 indicated would take care of us from our
13 perspective.

14 MR. MCCABE: Public figure analysis has
15 nothing to do with whether someone is being paid,
16 it has to do with whether they thrust themselves
17 in the forefront of a public controversy to
18 influence the outcome thereof. Whether your
19 expenses are paid to go to be a party or
20 participant at an inquest, anything like that,
21 has nothing to do with public figure.

22 That being said, I understand the interest of
23 Mr. Harris and his counsel in finding out whether
24 a media entity paid for any of Virgie Arthur's
25 travel to any of these events. Some of them,

1 however, would have been perhaps after the
2 defamation was made which would make them
3 irrelevant for public figure analysis. But we
4 will endeavor to find if there are records of
5 such payments for travel expenses and so on
6 before the date of the defamatory utterances.
7 Because nothing that happens after that is
8 relevant to the issue of public figure analysis.

9 THE COURT: Okay. Let's move on to the next
10 item.

11 MR. BABCOCK: Thank you, Your Honor. The
12 next category, the fourth category would be
13 numbers 9, 10, 11, 12 and 13. We've already
14 talked about 9 briefly, they said they didn't
15 have any documents but now they've agreed to
16 produce documents with respect to Ms. Turner.

17 And number 10 and their item, they deal with
18 people like Ms. Baker and Kenneth Turner and
19 Nelda Turner and others that the plaintiff has
20 indicated have relevant knowledge in this case.
21 And we're asking for documents relating to
22 communications with those people.

23 I would add that it is particularly important
24 with respect to Mr. and Mrs. Turner because we
25 have said before with respect to other motions

1 that she has been colluding with the plaintiff to
2 join to designate responsible third parties, thus
3 permitting Mr. McCabe, at least so far, to add
4 these additional parties. CBS as you know was
5 one of those, although they're gone by summary
6 judgment now. But we want to see those documents
7 relating to those people, Baker, Waddell, Nelda
8 Turner and Ken Turner.

9 THE COURT: Response.

10 MR. MCCABE: Well, certainly Virgie Arthur
11 has no communication with those persons, so what
12 he's trying to do is get into my file as an
13 attorney, and I object on that basis.

14 If he wants to get the discovery from Ms.
15 Turner, she's been very forthcoming with
16 discovery. So there are communications with
17 Ms. Turner, I'm sure she can produce them. She's
18 produced many, many gigabytes of communications
19 between my law firm and her. And the proper way
20 to go would be to seek discovery from those
21 persons, not from my law firm and my file.

22 MR. BABCOCK: Your Honor, if I may briefly
23 respond to that argument.

24 THE COURT: Yes.

25 MR. BABCOCK: If it's true that there are no

1 documents other than perhaps work product
2 documents, I would have expected, as with other
3 requests, that the response would have been we
4 don't have any documents.

5 But with respect to these requests, 9 through
6 13, that was -- other than 9 that was not the
7 indication. On 10, 11, 12 and 13 there was just
8 an objection. And so, what I would suggest is
9 that the objections be overruled and we'll take
10 up work product, I suppose, at some additional
11 time. But there was no work product objection
12 made to these requests either.

13 THE COURT: And if there was anything subject
14 to work product or privilege, of course, that can
15 be addressed in the form of a privilege log where
16 you identify any documents that you believe is a
17 privilege that applies to. And just by giving a
18 sufficient description, then counsel can take
19 that up if they believe that it's something that
20 is discoverable.

21 But I'm looking at the objection here with
22 regard to number 9, it seems if there's a
23 document pertaining to any type of potential
24 settlement or compensation of a witness, that
25 could be discoverable for purposes of either

1 credibility or potential settlement that a party
2 has a right to discover. So I'm just trying to
3 see a basis why if you do have such documents
4 responsive to number 9 that it would be
5 objectionable.

6 MR. MCCABE: Well, Your Honor, we already did
7 produce a settlement agreement with Ms. Turner
8 and that's the only one that exists and that one
9 has already been vitiated by both parties to
10 that.

11 THE COURT: Do you have any documents that
12 may be responsive but would be subject to one of
13 these objections that you've asserted in number
14 9?

15 MR. MCCABE: I don't believe we asserted work
16 product, I'm --

17 THE COURT: You didn't. You didn't. I mean,
18 basically your objection to 9 was that it was
19 overly broad, unduly burdensome, neither relevant
20 or reasonably calculated to lead to discovery of
21 admissible evidence, et cetera. Number 9
22 requests all documents evidencing or relating to
23 payments, compensation of any kind or
24 remuneration due or made by you or made on your
25 behalf in connection with any witness, witnesses

1 in this lawsuit, including but not limited to
2 Crystal Ann Baker, Yvonne Waddell and/or Nelda
3 Rose Turner. Just seems if there was
4 compensation or payment it could be relevant for
5 the issue of credibility and things like that.

6 MR. MCCABE: I believe we have answered in
7 another request for production that there are no
8 --

9 THE COURT: What I'll do is I'll overrule the
10 objection and you can just answer accordingly if
11 you have no responsive documents. So the
12 objection to number 9 is overruled. Number 10,
13 communications between you, your agents, your
14 attorneys or anyone acting on your behalf with
15 Crystal Ann Baker. Is there any reason why you
16 would have a valid objection to producing any
17 such communications?

18 MR. MCCABE: It's work product.

19 THE COURT: Response, Mr. Babcock?

20 MR. BABCOCK: We'll ask him to produce a log.

21 THE COURT: Why don't we do that, then.

22 MR. BABCOCK: But I would like the objections
23 overruled so that if Ms. Arthur or somebody's got
24 documents, then we're --

25 THE COURT: What I'm going to do is, I will

1 overrule the objection subject to the claim of
2 attorney work product privilege if you can
3 support that with a privilege log and then
4 address it if it's challenged; otherwise, I'll
5 overrule the other objections. Of course, it
6 doesn't waive your work product if you can show
7 that.

8 MR. MCCABE: Yes, Your Honor. It would be
9 the same thing with Yvonne Waddell is another
10 one. There's no communication between these
11 people and Virgie Arthur. She doesn't do e-mail.

12 THE COURT: Okay. So you have a ruling on
13 10. Is it the same situation on 11 or -- number
14 11 is all documents -- all communications by you,
15 your agents, your attorneys or anyone acting on
16 your behalf with Kenneth Turner. So it sounds
17 like the same thing.

18 MR. MCCABE: That's the same thing I believe
19 are none, even with --

20 THE COURT: Okay. So I'll overrule the
21 objection subject to any claim of attorney/client
22 privilege, which if you are claiming you will
23 need to produce a privilege log.

24 MR. MCCABE: Yes, Your Honor.

25 THE COURT: And let's get a time frame on

1 that when you will produce a privilege log if
2 you're withholding such documents on the basis of
3 that privilege.

4 MR. MCCABE: We're just starting a three-week
5 trial --

6 THE COURT: No, I just want to have something
7 out there. What do you propose?

8 MR. MCCABE: A month, 30 days.

9 THE COURT: Is that agreeable?

10 MR. BABCOCK: That's agreeable to us, Your
11 Honor.

12 THE COURT: So within 30 days produce a
13 privilege log for any documents you're holding
14 under such privilege.

15 MR. MCCABE: Yes, Your Honor.

16 THE COURT: Then we've got number 12, looks
17 like the same thing, this pertains to Yvonne
18 Waddell. And number 13 for Nelda Rose Turner.
19 So, it will be the same ruling, the objection is
20 overruled subject to any attorney/client
21 privilege claims which will be referenced in the
22 log that you will submit within 30 days.

23 MR. MCCABE: Yes, Your Honor.

24 THE COURT: Anything else, Mr. Babcock?

25 MR. BABCOCK: Not on that set, although I

1 think that the claim of privilege that's being
2 asserted is work product, not attorney/client.

3 THE COURT: I'm sorry. If I said that I
4 meant work product.

5 MR. BABCOCK: That's what I thought.

6 THE COURT: I may have inadvertently said
7 that. So yes, relating to the work product
8 privilege that's being asserted.

9 MR. MCCABE: Yes, Your Honor.

10 MS. TURNER: Your Honor, may I say something
11 here?

12 THE COURT: Yes.

13 MS. TURNER: I have said over and over again
14 and I'm more than happy to do this, if Mr.
15 Harris' counsel will issue a request for
16 production of any document I have or my husband
17 has, we have always cooperated and would at this
18 time also.

19 THE COURT: Okay. That's noted. I guess I
20 don't hear a response, I guess they will take
21 that into consideration if they wish to do that.

22 MR. BABCOCK: Yes, Your Honor. We'll do
23 that.

24 The gist of our eight -- the sort of
25 groupings that I've done relates to the

1 plaintiff's claim that damages and our request
2 number 14, 22, 23 and 24. And with respect to
3 these requests the plaintiff has made objections,
4 but in addition has pointed to the production of
5 other parties, like TMZ. And they have pointed
6 to just generically their summary judgment
7 response to the TMZ motion for summary judgment.
8 And they have pointed to an expert report of Dr.
9 Axelrad.

10 And then at least with respect to 14 they say
11 we will supplement when discovery is concluded.
12 Well, if they have documents -- if the plaintiff
13 has documents relating to the damages it's no
14 answer to say that hey, you've gotten some stuff
15 from other parties, or you can go hunt for it in
16 these voluminous papers that have been filed, or
17 you can look for it in our expert's report.

18 If there were additional things we think they
19 ought to be produced and the objections
20 overruled. So that's our position with respect
21 to 14, 22, 23 and 24.

22 THE COURT: Well, looking at 24, the request
23 seems very broad. It says all documents relating
24 or referring to your alleged damages in this
25 lawsuit. I know that the objection states that

1 your request for production is invalid as it
2 fails to specify documents by individual item or
3 by category and describe with reasonable
4 particularity each item and category as required
5 by Rule 196.1(b), and it goes on.

6 I mean, it's the Court's understanding that
7 requests have to be fairly specific or narrowly
8 tailored to request a specific document or type
9 of document, and this does seem to be extremely
10 broad.

11 MR. BABCOCK: Your Honor, I think your point
12 probably is well-taken. I think there are other
13 -- 23 and 22 I think are more limited to sub-set
14 -- would be a sub-set of what damages; 23 being
15 emotional distress, 22 being personal or
16 professional reputation. Those are -- if the
17 case were to proceed to trial the plaintiff would
18 likely advocate for two separate damage lines,
19 one being reputation and the other one being
20 emotional distress.

21 THE COURT: I'm going to sustain the
22 objection to 14. Let me take a look at 22.

23 Again, I think the problem is number 22 does
24 not seem to request a specific document. It puts
25 the responding party in a position of trying to

1 determine what documents you're asking for
2 relating to their claim. I just don't know that
3 that's specific enough either. It doesn't ask
4 for a particular type or class of document. It
5 just -- on number 22 it states: Any and all
6 documents evidencing or relating to your
7 allegation that your personal and/or professional
8 reputation will be and has been damaged as a
9 result of the publications at issue in this
10 lawsuit. And the way that request is stated, I
11 don't think it's specific enough, so I'm going to
12 sustain the objection on that one, too.

13 Do we have the same situation on 23 and 24?

14 MR. BABCOCK: I think we do, Your Honor.

15 THE COURT: Let me take a look at 23.

16 23: Any and all documents that evidence or
17 relate or show that you suffered emotional
18 distress as a result of the publications at issue
19 in this lawsuit, including but not limited to the
20 records of any medical professional and/or
21 psychologist. I believe that is a little more
22 specific. I mean, it does refer to medical
23 records or psychological records that may show
24 treatment or anything like that. Any response to
25 that, Mr. McCabe?

1 MR. MCCABE: Yes, Your Honor. Arthur's
2 response is that we've produced the documents we
3 have in that regard.

4 THE COURT: So I think what I'm going to do
5 then -- and as a matter of fact, I'm actually
6 looking at that, while you did mention that, but
7 I don't think there was even -- I see there was
8 an objection.

9 So I'm going to overrule the objection on
10 that one. And if you've produced all responsive
11 documents then I guess you've covered it.

12 MR. MCCABE: And insofar as Ms. Arthur goes
13 back for more treatment, of course, we'll produce
14 those documents at that time.

15 THE COURT: Okay. So the objection to 23 is
16 overruled.

17 MS. HAMILTON: I just had a point of
18 clarification and that is, I know we've received
19 Dr. Axelrad's report, but I'm not aware of having
20 received any underlying documents relating to her
21 treatments, or if we have we've done some but not
22 all have been received. I just want a
23 clarification of that, if we're due more if there
24 are more out there, then they should be produced.

25 MR. MCCABE: If the request is for whatever

1 documents out there that Dr. Axelrad has relied
2 on, I believe they've been produced. I'll check
3 and see, and if they haven't been we'll produce
4 them.

5 THE COURT: Or you can produce a release if
6 you will obtain the records.

7 MS. HAMILTON: Right, Your Honor. But that
8 is not limited to the documents that he relied
9 on, I don't believe. It says includes records of
10 any medical professional and/or psychologist that
11 would show that she suffered from emotional
12 distress. So it's conceivably outside the
13 documents that Dr. Axelrad relied upon.

14 THE COURT: Again, the plaintiff could
15 produce it if they have it, if they don't they
16 can produce a release, or you just may want a
17 release and then you can obtain the records.

18 MS. HAMILTON: Thank you, Your Honor.

19 MR. MCCABE: I believe Axelrad is it for
20 that, but I'll check again. And if the
21 defendants have not been given the underlying
22 document or whatever relevant documents are I'll
23 find it.

24 THE COURT: So the objection to 23 is
25 overruled. Let's look at 24. Maybe there were

1 two labeled 23, maybe?

2 MR. BABCOCK: I think that's what it was,
3 Your Honor.

4 THE COURT: Okay. So actually, in the one
5 that is the first 23, I don't think there was an
6 objection to that one, it was just a response.
7 So there was no objection to 23.

8 24, which is labeled incorrectly as 23
9 states: Any and all documents that evidence,
10 relate or show that you suffered any damages as a
11 result of the conduct at issue in this lawsuit.
12 And then it's the same objection, that the
13 request is invalid because it fails to specify
14 documents by individual item or by category and
15 describe with reasonable particularity each item
16 and category as required by Rule 196.1(b). It
17 does appear that that is overly broad, does not
18 comply with the rules. So, is there any further
19 response to that, Mr. Babcock?

20 MR. BABCOCK: No, Your Honor.

21 THE COURT: So I'm going to sustain the
22 objection to 23. And if you want to send a more
23 tailored request -- I guess, I know the discovery
24 period I believe has about another week or
25 something, doesn't it? It goes to the 17th I

1 think, actually.

2 MR. BABCOCK: I believe that's right.

3 MR. MCCABE: But the plaintiff is asking for
4 a continuance and pushing off those dates, so we
5 obviously have no objection --

6 THE COURT: Okay. We'll address that later.

7 MR. BABCOCK: Your Honor, I think you said
8 23, it's really been mislabeled by somebody and
9 it should be 24.

10 THE COURT: Right. So the one that would be
11 24 which is shown as the second 23, the objection
12 on that is overruled. So the first one that's
13 labeled 23 there was no objection asserted, so
14 there was nothing for me to overrule on the first
15 23, it is overruled on the second 23, which is
16 really request number 24.

17 MR. BABCOCK: That's correct, Your Honor. If
18 the Court would like to move on to the sixth of
19 the eight categories, unless somebody else has
20 something to say.

21 MS. HAMILTON: There's just one more on the
22 marriage licenses on No. 25.

23 THE COURT: Number 25? Okay. The request is
24 for a copy of your marriage licenses and divorce
25 decrees. The objection is, plaintiff objects to

1 this request because the information requested is
2 part of a public record and is equally available
3 to use subject to without waiving the foregoing
4 objection the plaintiff responds as follows, and
5 it lists a marriage license and it lists a
6 judgment and divorce decree. Ms. Hamilton.

7 MS. HAMILTON: I don't understand why there's
8 an objection there, but that we would ask the
9 objection be overruled.

10 THE COURT: Any reason why you want to stand
11 behind the objection?

12 MR. MCCABE: Your Honor, we should make our
13 response, we've produced what we have and leave
14 it at that.

15 THE COURT: So, if that's the case then I'll
16 go ahead and overrule the objection and you can
17 amend your response that's all you've got.
18 Actually, you don't need to, if that's all you
19 have and you've stated your answer.

20 So that addresses the objections on the
21 requests for production. Who's going to prepare
22 the order, by the way, on the rulings on this?

23 MR. BABCOCK: Your Honor, we will do that.
24 But there are three more categories, I've been
25 sort of jumping around because I'm trying to

1 group them so we can talk about them together.
2 And we've got seven more requests to talk about
3 real briefly if the Court has time.

4 THE COURT: Okay. Go ahead.

5 MR. BABCOCK: The next group is 17, 18 and 19
6 and that relates to communications that the
7 plaintiff has had regarding the publications; in
8 other words, the articles and news broadcasts
9 that are at issue in this lawsuit. And there
10 were objections made to each of these 17, 18 and
11 19.

12 THE COURT: I guess since Mr. McCabe doesn't
13 have a copy handy, do you want to read the
14 request.

15 MR. BABCOCK: Certainly, Your Honor.

16 Number 17: Any and all documents or
17 electronic communications you, meaning the
18 plaintiff, received from or exchanged with any
19 persons, paren, other than your counsel, paren,
20 relating to the publications at issue in this
21 lawsuit. And of course, publications is the
22 defined term earlier. That's number 17. The
23 objection is it's overly broad, unduly burdensome
24 and not relevant.

25 Request number 18 is: Any and all documents

1 that evidence or relate to communications between
2 you, Arthur, and any defendant relating to the
3 publications at issue in this lawsuit, the same
4 objection.

5 And then request for production number 19:
6 Any and all documents, including any handwritten
7 notes, evidencing or relating to the publications
8 at issue in this lawsuit. And it's the same
9 objection, overly broad, unduly burdensome and
10 not relevant or reasonably calculated. And even
11 though there were those objections in the
12 response to our motion here, there was no
13 description of why that was burdensome.

14 THE COURT: Response.

15 MR. MCCABE: I'll change my response then.
16 Virgie Arthur doesn't have any of the documents
17 that he's talking about.

18 THE COURT: Okay. I'll go ahead and I'll
19 overrule the objection then to -- that was 17, 18
20 and 19, is that correct, Mr. Babcock?

21 MR. BABCOCK: 17, 18 and 19, correct, Your
22 Honor.

23 THE COURT: Okay. So those objections are
24 overruled.

25 MR. BABCOCK: I have two more categories to

1 go through and I appreciate the Court's patience
2 with this.

3 THE COURT: Sure.

4 MR. BABCOCK: They are requests number 15, 20
5 and 21 relating to the allegations of falsity,
6 one of the elements that the plaintiff has to
7 prove in a case like this, and conspiracy.

8 Fifteen being: All communications or
9 documents that evidence, relate or relate to or
10 support your allegations of conspiracy against
11 defendant, Art Harris.

12 And 20 is: Any and all documents evidencing
13 or relating to your allegations that the
14 publications at issue in this lawsuit are false.

15 And 21: Any and all documents evidencing or
16 relating to your allegations that the complained
17 of statements at issue in this lawsuit are false;
18 and again defined terms.

19 And with respect to all of these requests,
20 15, 20 and 21, you can see the lengthy objections
21 and response pointing out to other documents like
22 this and saying there will be a supplement when
23 discovery is concluded.

24 MR. MCCABE: Well, I stand on that response
25 and those objections. We have produced and

1 documents have been produced by other persons in
2 this case that are thousands of pages. And we
3 have pointed to them repeatedly which ones show
4 conspiracy. No point in going back and producing
5 all of that again.

6 And of course, we have not gotten the
7 discovery which we've been seeking from Mr.
8 Harris at great expense all this time, they're
9 still up in the appellate court on that. He
10 turned over his hard drives to the special master
11 for forensic examination, that's under dispute.
12 But it's not disputed that the master turned back
13 over to Mr. Harris 30,000 pieces of data which
14 were described as responsive to our request for
15 production. We've seen none of those. If we get
16 to the point where we've seen those we'll be
17 happy to point out which ones of those show
18 conspiracy.

19 THE COURT: Okay. Mr. Babcock, which is the
20 first number of this group?

21 MR. BABCOCK: Fifteen, Your Honor.

22 THE COURT: Okay. I'm looking at the
23 objections asserted, and again, I think we have
24 an issue here with failure to specify specific
25 documents by item or category or reasonably --

1 with reasonable particularity to describe each
2 item and category sought under Rule 196.1(b)
3 which also the case law on that seems to hold
4 that a party cannot be required to marshal all of
5 its evidence. You have to ask for specific
6 documents or categories. So I'm going to sustain
7 the objections to -- that was 15 -- was it 20 and
8 --

9 MR. BABCOCK: And 21, Your Honor.

10 THE COURT: 15, 20 and 21, I'm going to
11 sustain the objections on those.

12 MR. BABCOCK: Thank you, Your Honor.

13 Last one on the Motion to Compel, request for
14 production number 16, and it's a very short one.
15 All settlement communications with any defendant
16 in this lawsuit.

17 And Mr. McCabe alluded to this earlier, that
18 he had produced a settlement agreement with Nelda
19 Turner, a defendant in the case, and that's true,
20 although we thought the production was a little
21 late. But in any event, he did produce it.

22 However, the cases which we've cited to the
23 Court and which I don't think the plaintiff
24 quarrels with require production of all the
25 communications regarding settlement. And we've

1 been told that he has attempted settlement with
2 another defendant, it's been alluded to in the
3 Turner deposition testimony.

4 And so, we're happy we got the one settlement
5 agreement which apparently has been abrogated, or
6 at least that's what they say, but we think there
7 are additional documents. And his objection that
8 it's overly broad, unduly burdensome and not
9 relevant we think is not a good objection under
10 the case law we've cited.

11 MR. MCCABE: It has been abrogated. If we
12 say it has, then it has. And both sides have
13 said so.

14 I don't know who this other defendant is to
15 which she's referring. If you will name the
16 defendant for me that we supposedly had
17 settlement negotiations with I would be happy to
18 look into that. But I think I would have that in
19 my head.

20 THE COURT: Right now Mr. Babcock is
21 requesting a ruling on the objections, so I'm
22 just trying to see if there's a basis under which
23 you're asserting the -- or continuing to assert
24 the objection under request for production number
25 16. I mean, as far as the objection, what is

1 your response to whether or not that's
2 discoverable or not?

3 MR. MCCABE: I believe the settlement
4 documents themselves are discoverable, I don't
5 agree that any communication which could be
6 construed as talking about settlement is
7 discoverable.

8 THE COURT: Well, I mean, a settlement
9 agreement, those are clearly discoverable
10 involving a party. Does anyone have any
11 authority or guidance on whether the actual
12 settlement communications are discoverable or
13 not?

14 MR. BABCOCK: Your Honor, I believe we cited
15 to the Court a number of cases which the
16 plaintiff really didn't seem to take any quarrel
17 with. And they were the GTE Communications
18 Systems Corp vs. Tanner case, a Texas Supreme
19 Court case. And the discussion there was -- I
20 may be wrong about that, hang on for a second.
21 No, that's not the right case, I'm sorry, Your
22 Honor.

23 There are a couple of cases that we've cited
24 and I'll get to them in a minute, as soon as I --
25 I'm sorry, it was the In Re Univar USA, and the

1 Bristol-Myers vs. Gonzalez cases.

2 And those are the ones that we're relying on.
3 And I apologize because I've not read them,
4 certainly recently, but I thought that they were
5 broad enough to support our claim that we should
6 not only get the agreement itself, but
7 communications relating to the agreement.

8 THE COURT: That's what we're looking at now
9 to see if there's any distinguishing between the
10 actual settlement agreement and the
11 communications regarding the settlement
12 agreement. And it sounds like no one has it.

13 MS. HAMILTON: I have the case cites if you
14 would like them.

15 THE COURT: Do you actually have the copies
16 of the cases handy? Anyone have the actual
17 cases? Let's see if anyone has a copy. I'm
18 reviewing it right now.

19 MS. HAMILTON: Your Honor, in the Univar case
20 at page 5, asterisk 5, my reference is that at
21 that point they're granting conditional mandamus
22 for the trial court to deny discovery of
23 settlement agreements and offers.

24 THE COURT: What part of the page is that on?
25 I see the star 180, is it after that -- do you

1 want to come up and take a look?

2 And Mr. Babcock, in looking at the
3 Bristol-Myers vs. Gonzalez, I'm looking through
4 the opinion, let me know, please, if you know
5 where in the opinion it addressed whether the
6 settlement negotiations are discoverable.

7 MR. BABCOCK: Thank you, Your Honor. I'm
8 afraid I'm going to have to rely on Ms. Hamilton.

9 MS. HAMILTON: It's 805, Your Honor.

10 THE COURT: This seems to relate, though, or
11 discuss the settlement agreement, not a
12 communication regarding the settlement agreements
13 -- or settlement communications. Looks like it
14 would address an actual agreement.

15 MS. HAMILTON: This references settlement
16 agreements and offers which I would take to be an
17 offer of a communication.

18 THE COURT: I'm looking at the Univar case
19 again. Well, it does state in the Univar case,
20 it says on Page 182 with respect to witness bias,
21 and this is the Texas Supreme Court, I believe --
22 no, Court of Appeals-Beaumont on this case,
23 stating that, we note that settlement agreements
24 and offers may be discoverable for purposes other
25 than to establish liability such as to

1 demonstrate bias or prejudice of a party or
2 witness or to establish the existence of a
3 promise or agreement made by non-parties to the
4 said lawsuit. So, it seems like even if you
5 don't have an agreement an offer is also
6 discoverable.

7 MR. MCCABE: Yes, but that, of course, means
8 that there's an offer out there that has not been
9 accepted but it's hanging out there, that's what
10 would show bias. They're not talking about every
11 communication that went back and forth that led
12 up to an agreement, and that's what the
13 defendants are seeking.

14 MR. BABCOCK: And frankly, Your Honor, I
15 think -- I don't agree with Mr. McCabe on that.
16 I think you could show bias by a party holding
17 out for more, you know, I want this, I want this,
18 et cetera, et cetera, and especially in light of
19 the abrogated settlement agreement that we've
20 heard about today. We'd like to see what the
21 communications are on that.

22 MR. MCCABE: That's not what Univar stands
23 for if that's their authority.

24 THE COURT: What would be any authority that
25 you have, Mr. McCabe, as to why this type of a

1 settlement communication, being that Mary Carter
2 Agreements are discoverable, why wouldn't this
3 type of an offer of settlement communication be
4 discoverable in this situation?

5 MR. MCCABE: The only authority I have is a
6 lack of authority. I did research the subject
7 when they sent me these cases and I saw the cases
8 for what they are, which is that they don't stand
9 for the proposition that all communications going
10 back and forth leading up to a settlement which
11 is actually consummated are discoverable.
12 Settlements are discoverable, and if there is an
13 offer out there that hasn't been accepted or
14 rejected, that's discoverable. But there are no
15 cases that say, or at least I've found none and
16 they've found none that say all communications
17 leading up to a settlement that's been
18 consummated are discoverable.

19 THE COURT: Okay. Not seeing any authority
20 -- then again, there's a big difference also
21 between admissibility and discoverability. While
22 they may not be admissible except for the purpose
23 of showing bias or prejudice for discovery
24 purposes I'm going to go ahead and overrule the
25 objection on that since offers are even allowed,

1 and that infers that even when you don't have a
2 final settlement agreement that it's still
3 discoverable; again, only under limited
4 conditions even be admissible. But I'm going to
5 go ahead and overrule the objection to number 16.

6 MR. BABCOCK: Thank you, Your Honor. And
7 that would conclude the Motion to Compel and we
8 will prepare an order and circulate it to Mr.
9 McCabe and the other parties to the lawsuit and
10 then submit it to the court.

11 THE COURT: Okay. Very well. What is the
12 next matter that we need to take up?

13 MR. BABCOCK: The next one hopefully, Your
14 Honor, will be short, but it is defendant Harris'
15 Emergency Motion to Seal pursuant to Rule 76
16 A(5), and Motion to De-Designate information
17 designated by plaintiff as confidential. It was
18 filed on August 2nd of 2010. And it relates to
19 deposition excerpts of Ms. Arthur.

20 These deposition excerpts were taken in the
21 federal case and the entire deposition of
22 Ms. Arthur was designated by Mr. McCabe as
23 confidential. So they were subject to the
24 federal court protective order. When that case
25 was dismissed with prejudice, CBS moved to be

1 permitted to have this deposition of Virgie
2 Arthur and some unrelated discovery material used
3 in this case.

4 And the Judge, Judge Rosenthal, granted that
5 motion and said, quote: The deposition of Virgie
6 Arthur may be used and referred to in Cause No.
7 2008-24181, which of course is this case. And
8 she went on to explain that she was granting it
9 because it was based on the continued presence of
10 defendants who worked with CBS, and that, of
11 course, would be Mr. Harris. And the fact that
12 CBS broadcasts are at issue in that case. In
13 other words, the state case that we're in here
14 now.

15 She also said that henceforth the Arthur
16 deposition would be subject to the protective
17 order in the state case. So, when we -- when Mr.
18 Harris wished to use portions of Ms. Arthur's
19 deposition in support of his summary judgment
20 motion I called up Mr. McCabe and asked him
21 whether he would consent to some or all of those
22 designations, and his position was that only CBS
23 should have been able to use that deposition and
24 not Mr. Harris, and that he was opposed to Mr.
25 Harris using any of the excerpts.

1 That, I told Mr. McCabe and believe, was not
2 accurate since at the time Judge Rosenthal issued
3 her order CBS wasn't even a party in the state
4 case and there wasn't even anything pending to
5 make CBS a party, so it could only have referred
6 to Mr. Harris. And so, of course, he had a right
7 to use these excerpts.

8 And we did file them on Monday but, of
9 course, not wishing to violate the protective
10 order in this case, and also hamstrung a little
11 bit by the representations that one has to make
12 under Rule 76 A, and not believing any of these
13 excerpts to be confidential, we filed this motion
14 to temporarily seal pending a hearing, pending
15 this hearing and to de-designate the references
16 as confidential.

17 The protective order that has been entered in
18 this case specifically contemplates the
19 de-designation procedure, and states that once
20 that has been done then the party advocating
21 sealing has the burden of showing why the
22 material is confidential. That, of course, would
23 be the burden of anybody attempting to comply
24 with Rule 76 A.

25 It is Harris' position that none of the

1 excerpts that we seek to use in support of his
2 summary judgment motion are confidential. But we
3 don't wish to get into that fight, really. It's
4 Ms. Arthur and her counsel that have to
5 demonstrate the confidentiality of the deposition
6 excerpts. All we want is to be certain that we
7 have complied with the protective order, with
8 Rule 76 A, and that the Court has the benefit of
9 looking at these excerpts where Ms. Arthur makes
10 many admissions regarding her allegations in this
11 case. We want to be sure that the Court has the
12 benefit of reviewing that. So that's our
13 position with respect to this motion.

14 THE COURT: Response.

15 MR. MCCABE: First, I would like to know how
16 it is Mr. Harris even has the document. He's not
17 entitled to have that deposition. He was not a
18 party in the federal case.

19 The order from Judge Rosenthal did not
20 authorize CBS to hand out copies of that
21 deposition to other people. And now we have the
22 same counsel for Mr. Harris who is counsel for
23 CBS not only filing them in camera with this
24 court, but distributing the deposition of Virgie
25 Arthur to people in this case who have no right

1 to see it until, unless and until this Court
2 authorizes it.

3 Second, I have tremendous respect for Judge
4 Rosenthal, but she has no authority to decide
5 what can be used in this case. The only
6 authority Judge Rosenthal had was to release the
7 document from the confidential designation that
8 it had in the case in her court.

9 So, for her to say that it can be used in
10 this court is beyond her authority. And for them
11 to premise their emergency motion on that
12 nonexistent authority is entirely inappropriate.

13 Next, where is the emergency? There is none.
14 They've waited until it was coming up to be the
15 deadline for summary judgment to be filed and
16 created an emergency in order to come to this
17 court with this issue.

18 Next, they've not complied with Rule 76 A (5)
19 and this is not a 76 A (5) case. Even under 76 A
20 (5) you're going to have to have a public
21 hearing. You have to have public notice. It's
22 got to be in the order. So, they're completely
23 off track on this.

24 Our objection to what they've done is on
25 those several levels. And we're perfectly

1 willing to talk about, under proper procedure,
2 whether the portions of the deposition that they
3 wish to use really should continue to be
4 confidential. We've been in negotiations, and
5 Mr. Babcock and I both have been, with other
6 parties who had confidential depositions taken.
7 He's been successful in getting part of a
8 deposition de-designated and so have I for use in
9 this case.

10 But that's the way to go about it, not these
11 fake emergency motions at the last minute. So we
12 object to every aspect of this emergency motion,
13 Your Honor.

14 THE COURT: And also before I have you reply,
15 Mr. Babcock, I'm looking at Rule 76 A(5) and it
16 doesn't appear from my review that the motion
17 even meets all the requirements to get a
18 temporary sealing order. Can you address that
19 also, please.

20 MR. BABCOCK: I'd be delighted to, Your
21 Honor. Let me start with that.

22 We filed the excerpts in camera and under
23 seal pursuant to your protective order. If Mr.
24 McCabe demonstrates that the deposition excerpts
25 should be sealed, then your order today should

1 set out the time for a full 76 A hearing, and
2 because as you know a full hearing requires not
3 less than 14 days notice.

4 And in your temporary order which you enter
5 today it would have all the bells and whistles
6 about the people we've got to put on notice and
7 when the full hearing is going to be, and I think
8 we have to file something with the Texas Supreme
9 Court, all those things.

10 But, the filing that we made Monday was
11 pursuant to the protective order and 76 A; and
12 frankly, that's the way the cases suggest is how
13 you have to do it so that you don't run afoul of
14 some protective order from the court.

15 In fact, I think we did provide evidence in
16 the form of the affidavit of Ms. Linda Park which
17 would support what we did in terms of Mr. Harris
18 not being able to do anything other than what he
19 did do. So I think that's, hopefully, the answer
20 to your question.

21 THE COURT: Well, I'm looking at Rule 76
22 A(5), temporary sealing order which the first
23 part of it states: A temporary sealing order may
24 issue upon motion and notice to any parties who
25 have answered in the case pursuant to Rules 21

1 and 21-A upon a showing of compelling need from
2 specific facts shown by affidavit or by verified
3 petition that immediate and irreparable injury
4 will result to a specific interest of the
5 applicant before notice can be posted and the
6 hearing held as otherwise provided herein.

7 I don't see that the affidavit addresses
8 that.

9 MR. BABCOCK: I think it does, Your Honor.
10 The compelling need was that we had to file this
11 in support of his summary judgment, Harris'
12 summary judgment which under your scheduling
13 order had to be filed Monday if we wanted a
14 submission date prior to the deadline that your
15 scheduling order, the agreed scheduling order
16 created for the filing of motions. So we had to
17 file it.

18 Could he file it in the public record?
19 There's an argument under the protective order
20 that he could. Because it says that you can use
21 any confidential information at a trial. And
22 summary judgment is a trial. But I talked to Mr.
23 McCabe and he suggested that the prudent thing to
24 do was to file it under seal under the protective
25 order, which I agreed to do. And I do think that

1 was the prudent thing to do.

2 But the sealing order, if Mr. McCabe who
3 bears the burden, the sealing order will be
4 today. Today is when you'll seal it. And I
5 don't think it should be sealed. I think it
6 should be de-designated under the protective
7 order.

8 And the protective order is quite clear that
9 once the confidential designation has been
10 challenged, then it becomes the burden of the
11 person who was advocating secrecy,
12 confidentiality, to come forward and show why it
13 should be treated as confidential. And the
14 response that we got from the plaintiff, there's
15 no effort whatsoever to demonstrate that any of
16 this is confidential.

17 So, really what I think should happen is that
18 there should not be a sealing order today, I
19 think that it ought to be de-designated and then
20 it will be in a public record and we can go
21 forward. There's nothing in this deposition that
22 is confidential. It is pure factual information
23 about the very claims that are made in this
24 lawsuit.

25 And if I can just point to paragraph 13 of

1 the protective order, it quite clearly says: Any
2 party designating information as confidential
3 shall bear the burden of demonstrating that the
4 information so designated is in fact confidential
5 information and that good cause exists for the
6 information to be subject of this protective
7 order.

8 So, what we think ought to happen is the
9 Court ought to enter an order de-designating it
10 unless Mr. McCabe comes forward with some
11 evidence to the contrary. And if he does, then
12 we'll have to go through the full 76 A
13 procedures.

14 THE COURT: Mr. McCabe, what about the
15 suggestion or obviously the request to have to
16 de-designate that information?

17 MR. MCCABE: Your Honor, I'm not about to
18 agree to that or consent to that given the
19 circumstances of which this document must have
20 been obtained illegally, submitted to the court
21 improperly under a fake 76 A emergency motion
22 without any compelling need whatsoever.

23 To get to the last part where we talk about
24 de-designating is completely improper. It jumps
25 through all the steps that should be taken and we

1 don't agree to any of that. There's no
2 compelling need whatsoever and our suggestion is
3 the Court should simply deny the emergency
4 motion.

5 THE COURT: Okay. Now, if the Court denies
6 the emergency motion the effect of that is that
7 Mr. Harris would not be able to supply
8 information necessary for the summary judgment
9 consideration, isn't that correct?

10 MR. MCCABE: He would not be able to use that
11 particular thing he wants to use unless the Court
12 gives leave to file the motion later, after we've
13 gone through a proper procedure to de-designate.

14 THE COURT: That may be another way of
15 addressing it. It certainly wouldn't be fair to
16 Mr. Harris to not be able to use information that
17 your client is trying to maintain the
18 confidentiality of and say that, you know, if he
19 were -- if the Court didn't seal it so he can use
20 it in response to a summary judgment, if he did
21 he would be violating potentially another order
22 in the case.

23 So, Mr. Babcock, what are your thoughts on
24 possibly just continuing or resetting the summary
25 judgment until the issue can be determined at a

1 hearing of whether or not it's subject either to
2 proper sealing under 76 A or whether it should be
3 de-designated?

4 MR. BABCOCK: Well, Your Honor, if that's the
5 way the Court wants to go that's fine with me.
6 But either way, the plaintiff is going to have to
7 come up with some reason why this information
8 should be sealed. And I don't know if the Court
9 has looked at it or not, but I can't believe in
10 good faith they're going to be able to come up
11 with a reason why it should be sealed.

12 THE COURT: So in fairness we don't have that
13 pending in front of us today, that's why I don't
14 want to get too far into that issue because it's
15 not set on the Rule 76 A hearing or on the motion
16 to de-designate. Or is it?

17 MS. HAMILTON: Your Honor, it is set, I'm
18 sorry, on the issue of de-designating it as
19 confidential is what I believe we had set.

20 THE COURT: This is set for today, okay.

21 MS. HAMILTON: And if I may, one other thing
22 on this issue about Mr. Harris' obtaining the
23 deposition. It's certainly a deposition, whether
24 it's in this proceeding or another proceeding, it
25 would also qualify as a witness statement. And

1 it's most surely discoverable by the parties in
2 this case, and I don't understand Mr. McCabe's
3 reluctance to comply with Rule 194.

4 THE COURT: I'm just looking to see -- is
5 that correct, Mr. McCabe, that it is set on the
6 motion to de-designate for today? I don't see it
7 in my listing.

8 MR. MCCABE: I'm not sure, Your Honor. But
9 whether it's set or not, if it's set it's
10 improperly set is our position.

11 And whether Mr. Harris gets to use this
12 document at all in the manner he's trying to use
13 it under the circumstances in which he's obtained
14 it is something we intend to go back to Judge
15 Rosenthal on for clarification.

16 MS. HAMILTON: May I show -- Your Honor, it's
17 in the caption of the pleadings as well as in the
18 first paragraph in the motion to de-designate.

19 THE COURT: It appears that, after hearing
20 Mr. Babcock's argument, reviewing that affidavit
21 again, it does seem to show immediate irreparable
22 injury. If they're going to be put in a position
23 where the only way they can properly respond to
24 the motion for summary judgment is to use that,
25 the only way they can use it apparently without

1 potentially violating another order is if it was
2 temporarily sealed.

3 Well, it does appear set in motion to
4 de-designate information designated. But seems
5 like that's set, I guess let's go forward and
6 hear evidence on that also.

7 MR. BABCOCK: Thank you, Your Honor. I'll be
8 very brief on that. Because as I've said, on the
9 motion to de-designate under the protective order
10 that's in place, and it's paragraph I believe
11 it's 13, quite clearly says that if Mr. McCabe
12 wants to maintain the confidential designation,
13 then he bears the burden of, quote, demonstrating
14 that the information so designated is in fact
15 confidential information and that good cause
16 exists for the information to be subject to this
17 protective order, end quote. That's paragraph
18 13.

19 And I might add that at the time CBS asked
20 Judge Rosenthal to allow Mr. Harris to use the
21 confidentially designated Virgie Arthur
22 deposition along with some other material, Mr.
23 McCabe himself moved Judge Rosenthal to be
24 allowed to use some CBS designated confidential
25 information in this proceeding. And that

1 resulted in the orders, one of which is attached
2 to this -- to our motion to de-designate which
3 says that the deposition of Virgie Arthur and
4 other people may be used and referred to as Cause
5 No. 2008-24181 pending in -- at that time it was
6 the 280th, now it's the 80th. And Mr. McCabe did
7 not designate -- did not object at the time to
8 that language, and in fact sought similarly from
9 Judge Rosenthal and there was no objection from
10 us and that standpoint.

11 So right now we tender the deposition
12 excerpts and it's up to Mr. McCabe to show why
13 some or all of it should continue to be treated
14 as confidential.

15 MR. MCCABE: Not true. We vigorously
16 objected to the attempt by CBS to modify the
17 protective order in the federal court, saying it
18 was no good reason for it. So that
19 representation that we had no objection is false.
20 We lost that argument, but we in no way
21 acquiesced in the Judge designating as usable in
22 this case the document that was marked as
23 confidential in the federal case. And we stand
24 on that objection today.

25 Having lost the argument, we naturally asked

1 the Judge for sauce for the goose being sauce for
2 the gander for the same kind of thing if we could
3 get it; that is, the ability to use some
4 confidentially designated documents in the
5 federal case in this case, and the Judge did
6 grant that. That in no way vitiates our
7 objection to what the Judge's order was for CBS
8 and we still stand on that objection.

9 Now, as for the actual pieces of the
10 deposition that CBS wishes to use, we no longer
11 maintain that they must remain confidential in
12 light of the Court's decision to go ahead with
13 the de-designation issue today.

14 THE COURT: Well, looking at the protective
15 order it does state, and I assume the parties
16 have used good faith efforts to try to resolve
17 this first, it does state that in number 13 that
18 the parties shall first try to resolve such
19 dispute in good faith on an informal basis such
20 as production of redacted copies. Have y'all
21 discussed that and try to see if you can work out
22 an agreement?

23 MR. MCCABE: We had a discussion, Mr. Babcock
24 mentioned that earlier, and I stood on the
25 objection that he should not even have the

1 document rather than maintaining that the
2 portions that he wished to use should remain
3 confidential.

4 THE COURT: Okay. Well, it says that
5 designations of information as confidential
6 should be made in good faith, and any party
7 designating information as confidential
8 information shall bear the burden of
9 demonstrating that the information so designated
10 is in fact confidential information and that good
11 cause exist for the information to be subject to
12 this protective order.

13 So it appears they're raising the issue,
14 they're challenging whether this should be
15 designated as confidential, so it does appear it
16 is your burden of demonstrating that, so if you
17 wish to go forward on that.

18 MR. MCCABE: No, Your Honor. As I previously
19 stated, since the Court has decided to go to and
20 decide the issue of de-designation, we no longer
21 are trying to maintain the position that the
22 portions Mr. Babcock wishes to use shall continue
23 to be considered confidential.

24 THE COURT: Okay. So, you are de-designating
25 those?

1 MR. MCCABE: I guess I could have said it
2 much easier than that.

3 THE COURT: Okay, then. Does that resolve
4 the issue, Mr. Babcock?

5 MR. BABCOCK: It does, Your Honor. Thank
6 you.

7 MR. MCCABE: But Your Honor, for
8 clarification, we're not doing any sealing, 76
9 A --

10 THE COURT: Right. Because you de-designated
11 it, so it's not -- so it appears it's mooted that
12 temporary sealing order based on the
13 de-designation. Do you agree, Mr. Babcock?

14 MR. BABCOCK: I do, Your Honor.

15 MR. MCCABE: My concern is that there doesn't
16 need to be a public notice and a public hearing
17 and all that, drawing attention to it that that
18 would bring.

19 THE COURT: So if need be, if we need an
20 order on it it would just be -- based on the
21 de-designation it would be denied as moot.

22 MR. BABCOCK: And we will prepare such an
23 order, Your Honor.

24 THE COURT: Okay. Do we have anything else,
25 Mr. Babcock, from your side?

1 MR. BABCOCK: The only other thing that Mr.
2 Harris has an interest in is the plaintiff's
3 motion for continuance, and there is a written
4 opposition. And I don't want to steal
5 everybody's thunder, so with the Court's
6 indulgence, if I could be permitted to stay on
7 the telephone and speak when spoken to regarding
8 the plaintiff's motion for continuance I would
9 appreciate it.

10 THE COURT: Okay. Certainly. What do we
11 have next to address, what would you suggest?

12 MR. MCCABE: Well, maybe the motion for
13 continuance of the trial. We also have
14 Mr. Stern's special appearance that he set. We
15 have the issue that the Court brought up to begin
16 with, which is whether the Rule 11 agreement
17 should be clarified or addressed --

18 THE COURT: I think that should be addressed
19 before we address the special appearance, seems
20 like one is dependent upon the other one to some
21 extent. You want to ask for a ruling first on
22 the motion for continuance?

23 MR. MCCABE: Yes, Your Honor. And as set out
24 in our motion, it's unopposed in principle, at
25 least by Mr. Stern since he's in trial in

1 California for some period of time, we don't know
2 how long, maybe three months. But other than
3 that there's not an agreement on details.

4 There have been expressions in the past by
5 both Harris and others that they believe the
6 trial needs to be put off, but we don't, again,
7 have agreement on pretrial deadlines and other
8 particulars in that.

9 Some of the defendants even suggested that
10 the trial should be put off longer than what the
11 plaintiff is suggesting, because they have trial
12 dates coming up some other later times that that
13 would interfere with.

14 But our position is, we still are trying to
15 get the discovery that's been court-ordered, and
16 has been the subject of mandamuses, and is still
17 up on mandamus, and now on re-hearings. We've
18 had one motion for rehearing in Harris' mandamus
19 which resulted in the original opinion being
20 withdrawn, another opinion being issued. Now
21 we're seeking on Bach [sic] a rehearing because
22 that opinion we believe is flawed still. We've
23 had an opinion in Mr. Stern's case in his favor,
24 and it's obviously flawed.

25 There are 30 references in both of our

1 briefing to a hearing and the court does not
2 recognize it took place, for example. So they'll
3 withdraw that opinion, they may issue another one
4 in his favor, maybe not. But again, the issue is
5 still up there.

6 And we believe that if we come back down here
7 on the issue, all that means is that we'll be
8 here before this court and with the burden of
9 following Weekley Homes, the case that had not
10 yet come out when Judge Lindsay issued the
11 orders, except on Mr. Harris' case, it came out
12 on that day. It was not addressed in the trial
13 court on its merits, so it has never been fully
14 addressed here.

15 We believe that if we get to that point we
16 will need to go through the Weekley Homes
17 analysis, we will need certain discovery, which
18 neither Mr. Harris nor Mr. Stern has provided to
19 us, that is really required to be given without
20 request for production under Weekley Homes, and
21 we will be back here trying to satisfy Weekley
22 Homes.

23 We think we can, we think there needs to be
24 computer examination. Then we get some paper or
25 electronic discovery we need, we get closer to

1 trial. But that's where we are. We still don't
2 have what we have vigorously sought at great
3 expense, the discovery we believe we're entitled
4 to, and obviously they don't think we're entitled
5 to that discovery.

6 But I think the trump card is Mr. Stern is in
7 trial, he needs to be at his trial. And he needs
8 to be at this trial as a defendant when we get to
9 trial. So, we have a fundamental conflict in
10 timing.

11 THE COURT: And of course, the trial date
12 currently is September 27th and it's expected
13 that Mr. Stern will be in the other proceeding in
14 California well past this date?

15 MR. WOOD: He is, Your Honor.

16 THE COURT: Okay. So does anyone have any
17 objection to the continuance?

18 MR. WOOD: We do not have any objection to
19 continuance of the trial date. We obviously
20 would like to get a clear understanding of a new
21 discovery deadline date. But we adopt the
22 position that's been asserted by the other
23 defendants that certain other dates in the
24 scheduling order should not be changed, such as
25 dates for adding witnesses or adding defendants,

1 et cetera.

2 THE COURT: Okay. Any further comments?

3 MR. MCCABE: Well, I believe the Court has
4 just signed an order designating -- allowing
5 designation of Busystreet Productions as a
6 responsible third-party. Under the statutes
7 we're entitled to -- we would ask leave of court
8 to add them as a defendant, and then we need to
9 have discovery from them. And we believe that
10 Busystreet is the one, if anybody has money on
11 Mr. Harris' side it's going to be his company,
12 he's told us he doesn't have insurance. So
13 that's an important part of the case.

14 Now that someone with resources like TMZ has
15 been granted summary judgment by the Court it
16 becomes even more important.

17 THE COURT: Is this something that you
18 believe you might be able to work out a Rule 11
19 on this issue or not?

20 MR. BABCOCK: Your Honor, this is Charles
21 Babcock again. We believe we have a Rule 11
22 agreement.

23 As you may recall at the last motion for
24 continuance hearing you took great pains to have
25 all of the representative parties to sign the

1 scheduling order. And at the very top of that
2 scheduling order signed by Mr. McCabe on behalf
3 of Ms. Arthur, signed by Ms. Hamilton and
4 Mr. Wood with permission, and Ms. Turner was on
5 the phone, it says, "No new parties." And we
6 don't think that that deadline should be
7 abrogated.

8 So that now that Ms. Turner has designated
9 Busystreet Productions, which is a corporate
10 entity related to Mr. Harris years after the
11 fact, that Mr. McCabe can now join Busystreet as
12 a new defendant in this case having agreed to an
13 order that said no new parties.

14 MS. TURNER: Your Honor, may I address this?

15 THE COURT: Yes.

16 MS. TURNER: I was not given the number on
17 May the 7th to call in, although I sent e-mails.
18 Even today I had to call the court clerk even
19 after receiving an e-mail asking if there was
20 going to be anyone by phone.

21 As I told them in my deposition, if I had
22 been present on May the 7th, I already knew that
23 there was hundreds of hours of audio and
24 videotape and hundreds of pages of witness
25 statements that Mr. Harris claims is owned by

1 Busystreet Productions that is necessary to this
2 case. And I would have stated that had anyone
3 bothered to send me an e-mail, like Mr. Wood
4 appeared by phone, Your Honor did ask has
5 everyone been notified to appear by phone, and
6 no, sir, I was not sent an e-mail. If you have a
7 copy of it, send it to me. It doesn't exist.

8 Now I've learned the hard way that I have to
9 take up your clerk's time in order to call
10 independently of the attorneys and say, you know,
11 how do I do this. So, and even today I had to
12 call the clerk and get the number myself even
13 after sending an e-mail out early this morning.

14 THE COURT: Okay. And so you were not a
15 party to the Rule 11 agreement?

16 MS. TURNER: I was not a party, sir, to not
17 adding any additional parties. Because as I told
18 Ms. Hamilton during the May 12th deposition, if I
19 had been present May 7th I could have told the
20 Court exactly what I told her over and over
21 again, and that is Busystreet Productions is Art
22 Harris' company. And all of the videos, all of
23 the audios and extensive witness statements,
24 including a very extensive one by Larry Dalhart
25 that goes to the interview here, it maintains

1 that its owned by Busystreet Productions. And
2 now I have witnesses that will come forward and
3 talk about what Mr. Harris has said.

4 They've also agreed to allow me for my
5 discovery to do interrogatories by questions
6 because they all live out of state and I have
7 limited resources. So I actually have witnesses
8 now ready to come forward and explain how Art
9 Harris did this in order to basically snub his
10 nose at Texas jurisdiction.

11 MR. BABCOCK: Your Honor, this is Charles
12 Babcock again. Ms. Turner, because she's not a
13 lawyer, perhaps does not realize that the no new
14 parties means joinder, that's what it says right
15 next to it. She's filed a motion to designate
16 responsible third parties, which Your Honor has
17 granted. That doesn't mean that the party is
18 going to be joined. And Ms. Turner surely has no
19 claim against Busystreet Productions, it's Mr.
20 McCabe who wishes to join Busystreet Productions,
21 and he agreed not to. So that's the Rule 11
22 agreement that we're attempting to enforce.

23 MR. MCCABE: Okay. Let me respond.

24 If the Court would look at the docket control
25 order that they're talking about, it's included

1 in Harris' opposition and response to plaintiff's
2 motion for continuance as Exhibit A.

3 THE COURT: Okay. Let me try to pull it up
4 here.

5 MR. MCCABE: I can hand a copy to the Court.

6 The important thing is, looking at number
7 one, no new parties, joinder, you'd have to look
8 at the sentence before that which says that if
9 there's no date attached to the entry then you
10 just go by the rules of civil procedure. And
11 there's no date attached to the entry, so it's
12 meaningless. It's not an agreement as to
13 anything.

14 THE COURT: And that's what it says. Again,
15 because of the fact that this case is going to
16 apparently have to be continued anyway, the Court
17 would consider a motion for leave to add that
18 party, since the Court found that it was proper
19 to allow the designation of them as a responsible
20 third-party. I don't think I have that pending
21 before the Court right now.

22 MR. MCCABE: No.

23 THE COURT: What else do we have then that's
24 pending? With regard to the continuance, the
25 continuance will be granted. And what we're

1 going to need to do is try to set up another
2 date.

3 When is the soonest that y'all believe that
4 it would be feasible to schedule a new trial
5 date?

6 MR. MCCABE: I had 120 days extension but
7 some of the defendants wanted more if the
8 continuance were granted.

9 MR. WOOD: Your Honor, I thought there was
10 some general consensus that a March or April date
11 of next year would be at least as we sit here
12 today looking forward more feasible because of --

13 MR. MCCABE: May I interrupt? It was TMZ
14 Harvey Levin who suggested that end of March,
15 beginning of April might work better for them.
16 Correct me if I'm wrong, Ms. Hamilton, I thought
17 that y'all were saying maybe February, but it was
18 TMZ and Harvey Levin who wanted it even later.

19 MS. HAMILTON: March is not good for us.

20 THE COURT: When would you request it?

21 MS. HAMILTON: Your Honor, we just had
22 suggested the end of February.

23 MR. MCCABE: And it was TMZ and Levin who
24 were trying to push it back farther. So end of
25 February would be okay with the plaintiff.

1 THE COURT: Okay. If you wouldn't mind
2 checking with Mr. Garrett, our coordinator, check
3 back on Monday and call Mr. Garrett, you can tell
4 him I'm fine with scheduling it for February if
5 you can find a good spot on the docket.

6 How long do you estimate that the trial will
7 take approximately -- from anyone?

8 MR. WOOD: There's only one defamatory -- as
9 I understand it, even though we're not in the
10 merits part, there's only one defamatory or
11 alleged defamatory publication that's now at
12 issue, and that relates to the interview in the
13 prison, which I understand is the subject matter
14 of Mr. Harris' recently filed motion for summary
15 judgment.

16 And we believe that at the time the Court
17 rules on that motion, consistent with your prior
18 rulings, there's not going to be a trial of this
19 case because I think that case is going out on
20 summary judgment also.

21 Having said that, if that's the only
22 allegation and Mr. Stern is still in this case,
23 which we submit he should not be, I think the
24 case could be tried in a matter of, maximum,
25 seven to ten days. I can't imagine it being

1 longer.

2 THE COURT: Well, why don't you, Mr. McCabe,
3 check with Mr. Garrett on Monday with regard to
4 getting a trial date so we have one on the books
5 then.

6 MR. MCCABE: Yes, sir.

7 MR. WOOD: And Your Honor, will you also
8 adjust the discovery cutoff date, which may be
9 adjusted somewhat by the fact that there's going
10 to be a new defendant added, but I want to make
11 sure that we're not -- somebody's not claiming
12 that August 17th has come and gone, and there's
13 no discovery from the defendants who are in the
14 case now.

15 MR. MCCABE: We certainly wouldn't claim that
16 and we're still trying to get our discovery.

17 THE COURT: What are the proposals for a new
18 discovery cutoff date?

19 MR. MCCABE: I believe Harris has some, I
20 don't agree with them. My contemplation was that
21 when the trial date is set then you get his
22 computer settings of the other dates.

23 MS. HAMILTON: Your Honor, if I may. I had
24 suggested that there be a written discovery
25 cutoff by August 17th. Depositions, perhaps with

1 the exception of Mr. Stern, by November 17th.
2 And then move the dispositive motions deadline to
3 December 20th for everything to have been heard.
4 Mr. McCabe has rejected that and he's not come up
5 with any dates as suggested alternatives.

6 MR. MCCABE: Naturally. Because we're still
7 trying to get our written discovery -- electronic
8 really, discovery from Mr. Harris and Mr. Stern
9 and when it's still up in the appellate courts.

10 THE COURT: So seems until that's resolved
11 it's hard to have a date locked in before it's
12 determined what they can do in that regard.

13 MR. WOOD: If Your Honor is looking at, at
14 least for present purposes, a trial date at the
15 end of February, and under, again, the
16 assumption, which I would for reasons we'll
17 articulate later disagree with as being a correct
18 decision, if Mr. Stern is found to be subject to
19 the jurisdiction of this court, the decision will
20 have to be made whether he would appeal that, he
21 has the right to appeal.

22 If he is deemed, as we believe correctly, not
23 to be subject to the jurisdiction of the court,
24 Mr. McCabe has already indicated he will appeal
25 that. I think we're all familiar with the time

1 that that could take up in terms of getting final
2 resolution from the appellate courts.

3 But under the assumption that we are to move
4 forward without appeals, given where Mr. Stern is
5 in California and what they're telling him the
6 trial could last two or three months, I would
7 think that at least he would need through the end
8 of December to give him at least some 60-day time
9 period to engage in merits discovery before a
10 trial at the end of February.

11 Having said that, and again, without in any
12 way prejudicing our position on the
13 jurisdictional motion, if Mr. Stern is found to
14 be subject to jurisdiction of the court, I expect
15 that it is likely that he will file in short
16 order a motion for summary judgment himself on
17 the one remaining alleged defamatory article.

18 THE COURT: So you're suggesting based on
19 those circumstances the end of December?

20 MR. WOOD: Based on the best case scenario,
21 late February trial, I would suggest discovery
22 end of December.

23 THE COURT: Is there anyone that would object
24 to that?

25 MR. MCCABE: Plaintiff does not object with

1 the understanding that we're still hostage to the
2 appellate court.

3 THE COURT: Let's keep in mind, subject to
4 rulings that may come down from the appellate
5 court or other factors that may develop, if you
6 can't reach agreement based on a change in
7 circumstances, the Court can always reconsider
8 the deadline needing to be adjusted again. But
9 for the time being, to have a deadline why don't
10 we set it for the 31st of December -- what day of
11 the week that falls on -- that would be Friday,
12 December 31st. Why don't you just make it --
13 that will be the deadline for the time being,
14 absent any objection.

15 MR. MCCABE: State the date again?

16 THE COURT: December 31st.

17 MS. HAMILTON: Counsel, would all be in
18 agreement that the dispositive motion deadline
19 would likewise be pushed back to some time after
20 the discovery cutoff, to mid-January?

21 THE COURT: What are you proposing on that?

22 MS. HAMILTON: Mid-January.

23 THE COURT: The way I'd like it, it will be
24 the dispositive motion deadline will require that
25 any dispositive motions be filed and set where

1 they can be heard at least 30 days before trial.

2 MS. HAMILTON: By February 1 --

3 THE COURT: Well, we don't have a trial date.
4 Whatever the trial date is going to be it needs
5 to be heard at least 30 days before trial.

6 And one other thing, with regard to the
7 December 31st deadline for written discovery, it
8 would seem that that would require that the
9 discovery request be sent out sufficiently in
10 advance so the responses would be due no later
11 than December 31st. That doesn't mean you would
12 serve them on New Year's Eve and there would be
13 another 30 days.

14 MR. MCCABE: Yes, Your Honor.

15 THE COURT: Okay. So, do you have an order
16 granting a continuance or will you submit one on
17 that?

18 MR. MCCABE: I'll have to check and see what
19 I've got.

20 THE COURT: If not you can submit it next
21 week.

22 MR. MCCABE: Yes, Your Honor. Thank you.

23 THE COURT: Okay. Mr. Babcock, I guess you
24 were still then -- that was the only other thing
25 that I think you wanted to be heard on, right?

1 MR. BABCOCK: Yes, Your Honor. And while
2 we're still on that briefly before we leave, the
3 expert designation period has passed. I don't
4 know if anybody is advocating extending that.
5 The pleading deadline has passed under the old
6 order, the ADR deadline has passed. We just
7 ought to have some clarity about whether those
8 deadlines are extended as well.

9 THE COURT: Well, let me ask this, counsel,
10 let's see if you can reach a Rule 11 agreement
11 with regard to new docket control deadlines; for
12 example, things like ADR and -- either that or
13 speak now or forever hold your peace as they say.

14 MR. MCCABE: Your Honor, I think that the
15 days of reaching a Rule 11 agreements are pretty
16 well past, maybe I'm wrong, but --

17 THE COURT: Let's set proposals on dates,
18 then. Does anyone have any -- is anyone making
19 requests to extend or of the expert designation
20 deadline or do we want to stick with the deadline
21 we have now?

22 MR. MCCABE: Plaintiff is not requesting an
23 extension of the expert designation deadline.

24 MR. BABCOCK: Harris is not.

25 MR. WOOD: I'm in a little bit of a different

1 situation.

2 THE COURT: Just pending determination. For
3 everyone else it will remain the current
4 deadline. To the extent that the Court has not
5 yet ruled on Howard K. Stern's special
6 appearance, pending ruling on that. If you need
7 to make a motion regarding extension of deadline
8 the Court will consider it.

9 MS. MARSHALL: Your Honor, I'm for Larry
10 Birkhead, in the same basic position, and we
11 would like to reserve any right, assuming that we
12 aren't able to resolve the situation.

13 Mr. Birkhead, we're solely being accused of
14 participating in the defamation involving the
15 step-brother. So, my only interest today really
16 would be -- I think we've kind of been
17 eliminated, so I'm trying to take a back seat. I
18 do think that an ADR deadline, just from my
19 perspective, maybe as the dust has settled that
20 perhaps that really ought to be sorted out and
21 maybe a mediation deadline.

22 THE COURT: I think it's always advisable to
23 not have anyone's hands tied where you're past a
24 deadline to mediate if the parties, you know,
25 have that opportunity. So what would be a good

1 proposal for a deadline on ADR, certainly you
2 would want it sufficiently in time in advance of
3 the trial date so before people are doing their
4 final trial preparations. So, any suggestions on
5 that?

6 MR. MCCABE: Our view is, always has been, in
7 order to intelligently engage in alternative
8 dispute resolution you've got to have your
9 discovery. So it's going to be, in my view,
10 sometime after the written discovery deadline.

11 THE COURT: Okay. So, sometime in January --
12 so why don't we make that also 30 days before the
13 trial date.

14 MR. MCCABE: Yes, Your Honor.

15 THE COURT: Not hearing any objection to
16 that, the ADR deadline will be moved to 30 days
17 before trial.

18 In that regard, though, even though if that's
19 the deadline to mediate, I'd want to have a
20 deadline earlier just to either agree on a --
21 either agree on a mediator or if someone has an
22 objection to mediation to have that heard. So
23 any objections to mediation, or in the absence of
24 an agreement on a mediator, let's have that 90
25 days before trial. Because even if you agree on

1 a mediator it will take time to schedule it and
2 all that.

3 Anything else? Mr. Babcock, do you have
4 anything further?

5 MR. BABCOCK: No, Your Honor, other than to
6 thank you and counsel for permitting me to do it
7 this way in light of our family situation.

8 THE COURT: Sure. Sure. And I also
9 appreciate counsel's cooperation in that regard,
10 too, in extending you that courtesy, and the
11 Court is glad to do that, too.

12 What's the next matter we've got?

13 MR. WOOD: Your Honor indicated that you
14 wanted to address the issue of the clarification
15 of the setting aside the Rule 11.

16 THE COURT: Let's address the Rule 11 and
17 then we can address the other matter. Go ahead.

18 MR. WOOD: Your Honor, our grounds to have
19 that agreement, we believe, set aside, if
20 necessary clarified consistent with Judge
21 Lindsay's view of it, and I think proper view of
22 it, the one point that I think is dispositive
23 that I will admit was not made in our briefing
24 papers is the clarification, if not at least for
25 the first time a clear statement by the Court of

1 Appeals with respect to Rule 120 A(3).

2 And it is the Court of Appeals' decision in
3 In Re Stern that I believe renders as a matter of
4 law the Rule 11 agreement unenforceable as being
5 either unlawful or in contravention to 120 A(3).

6 The Court of Appeals in In Re Stern ruled,
7 and I'll read this verbatim, Your Honor, but it's
8 found at page 9 of the opinion.

9 Rule 120 A(3) does not authorize postponement
10 of a special appearance hearing to obtain
11 discovery without the filing of an affidavit by
12 the party opposing the special appearance.
13 Stating the reasons discovery is needed to
14 establish facts essential to justify the
15 opposition.

16 That part of the decision will be applicable
17 to our position on the motion filed for
18 continuance and special appearance today.

19 This is what's applicable to the question of
20 the Rule 11 agreement in issue, because the court
21 went on to state: Nor does it, referring to 120
22 A(3), nor does it permit discovery that is
23 unnecessary or irrelevant to the establishment of
24 jurisdictional facts prior to the Court's ruling
25 on the special appearance.

1 120 A(3) only allows the Court to order
2 discovery on jurisdiction prior to -- or to
3 permit discovery on jurisdiction prior to hearing
4 the special appearance.

5 Your Honor, I know, looked at the Rule 11
6 agreement I know on May the 7th we had a brief
7 discussion about it at the end of the telephone
8 hearing -- at least the telephone from my end --
9 the Rule 11 agreement is drafted by Mr. McCabe I
10 believe and signed by Jay Patton of my firm,
11 violates 120 A(3). Because it in fact purports
12 to be an agreement that you would not have the
13 special appearance we submitted on November 21
14 until Mr. Stern was deposed on both jurisdiction
15 and merits. Therefore, that Rule 11 agreement
16 cannot be enforced by a court without being in
17 direct violation of the authority of the court
18 under 120 A(3). For that reason alone we believe
19 the Rule 11 agreement is unenforceable and
20 invalid.

21 Just briefly, because it's been a long
22 afternoon and there's much more to do, I'm
23 afraid, we made our points I believe in our
24 briefs that that issue aside, which I do believe
25 is dispositive, we go back to our other positions

1 briefly that this was intended to be, if
2 enforceable, if valid, a Rule 11 agreement that
3 applied to the November 21 hearing.

4 If Mr. McCabe didn't pursue the discovery
5 that he wanted and then set the deposition of Mr.
6 Stern, then this matter set down by the court
7 came up for hearing, it was Mr. McCabe's
8 responsibility to seek another Rule 11 agreement
9 if he could get one.

10 We didn't agree at the time to give Mr.
11 McCabe the unilateral control over the timing of
12 Mr. Stern's special appearance, and yet that is
13 exactly what he attempted to do. We didn't ask
14 for the matter to be set down in March, Judge
15 Lindsay asked for it to be done. And candidly,
16 when Mr. McCabe asked me would I oppose his
17 motion for continuance, I said no, because March
18 the 20th is when I go on spring break with my
19 family. And yet Judge Lindsay said I want you
20 here and I want the hearing to go forward. And
21 we were there, I told her we were ready to move
22 forward, and then she, for reasons based upon
23 Mr. McCabe's representations, decided to give him
24 additional discovery time period, a violation of
25 the rule that was set forth in In Re Stern.

1 Because at no time prior to this last motion for
2 continuance he's never filed the required
3 affidavit under 120 A(3).

4 I didn't set this down for hearing when it
5 came back up in I believe May -- I'm sorry, came
6 up March the 20th and it came back up after that
7 in May 22nd, 2009 the Court set it down for
8 hearing.

9 The fact is, we have tried in good faith
10 repeatedly to give Mr. McCabe dates for
11 Mr. Stern's deposition. I gave him almost a
12 carte blanche in July 2009 when the last
13 correspondence by e-mail was that if the July 9
14 date doesn't work, Mr. McCabe, what do you
15 suggest we do. And I never heard a word back
16 from him. The next thing I heard from him was
17 when we finally set this down for a June hearing
18 and I was told that by doing so my client would
19 be sued, and my client was frivolously sued for
20 alleged violation of what we believe is an
21 unenforceable agreement, or at best for Mr.
22 McCabe, an inapplicable, irrelevant agreement as
23 Judge Lindsay noted when she looked at it in
24 March and said this is irrelevant, it only
25 applied to November 21.

1 The bottom line is even then in May I gave
2 him options and options and options to try to
3 depose Mr. Stern. And he chose, although once
4 saying he would come to Georgia, he chose a very
5 inappropriate office in south Georgia, for some
6 reason came up with a I didn't provide him with
7 southern hospitality in my office in Atlanta,
8 which I believe is not borne out by the folks
9 that were there, Ms. Hamilton was one of them
10 that was there that day.

11 The point is it's unenforceable, the point is
12 to try to rely on it now expands it improperly
13 even if it is enforceable; and last but not
14 least, he's had every opportunity and he ought to
15 be estopped from now claiming that that Rule 11
16 agreement applies, because we have I think in
17 good faith if it did apply and was enforceable,
18 we've given him every opportunity to take the
19 deposition and he's failed to do so.

20 For those reasons we believe the Rule 11
21 agreement, Your Honor, should not be enforced at
22 this time. Thank you.

23 THE COURT: Mr. McCabe.

24 MR. MCCABE: In Re Stern will be withdrawn.
25 It is completely flawed, it says that there never

1 was a hearing when there was a hearing. And as I
2 said earlier in this session, the hearing that's
3 cited 30 times in the combined briefing by
4 Mr. Stern's counsel and me, they withdraw that
5 opinion, so he can forget about that opinion.

6 They also when they wrote that opinion did
7 not have briefing on the issue that he's talking
8 about. None. It was never brought up by
9 Mr. Stern's counsel in the mandamus.

10 Standing there in Mr. Harris' oral argument
11 the center Judge started asking questions about
12 Mr. Stern's case, which was not before her. And
13 she actually said, well, we probably should have
14 had oral argument on that today. She started
15 asking questions about jurisdiction.

16 And so afterwards I supplied a couple of
17 cases, they were actually the Court's own cases,
18 First Court of Appeals' own cases, and it talks
19 about whether a defendant facing a special
20 appearance -- with a special appearance can do
21 discovery that actually goes over into the merits
22 without waiving special appearance. And they
23 wrote on that In Re Stern, and made some new law
24 on that In Re Stern, but without the benefit of
25 briefing from two sides. So they never knew

1 about the Rule 11 agreement. Had no idea that
2 when we showed up on November 21st, 2008 for the
3 first setting of Mr. Stern's special appearance
4 it was passed by agreement, by the Rule 11
5 agreement.

6 When we showed up next, and this is in my
7 briefing in response to the motion to clarify,
8 when we showed up next on December 11th, Mr. Wood
9 here agreed on the record that we had an
10 agreement not to have the special appearance
11 heard until we worked out discovery, he said I
12 owe Mr. McCabe some discovery and we want to get
13 that deposition taken.

14 So, again, the Court of Appeals was unaware
15 of all this, that there were these agreements on
16 the record, sometimes in writing, sometimes
17 orally.

18 Then on March 20th, as Mr. Wood has said, the
19 Court set another hearing on the Rule 11
20 agreement. And as he has admitted, Mr. Wood
21 showed up and agreed to have it put off. It's
22 nothing in the Court of Appeals' opinion about
23 that and the ability of the parties to put off a
24 hearing, because they had no idea that it even
25 happened.

1 And then again, we have a special appearance
2 set for May 22nd, but by then Mr. Stern had
3 already gone up on mandamus, and as long as it
4 was up on mandamus the Court wasn't actually
5 going to consider special appearances when the
6 discovery was pending.

7 Judge Lindsay did make an offhand comment,
8 she was very perturbed about the fact that we had
9 an agreement to put off the special appearance,
10 and she was pushing the case, pushing the case,
11 pushing me hard to get the case to trial instead
12 of having it lag. And she was very unhappy, it
13 was clear on the record she was unhappy with the
14 Rule 11 agreement.

15 She even said at one point, so the parties
16 can just agree to put off the trial forever and
17 the Judge can't say anything about it. I didn't
18 endorse that position or take that position, but
19 the truth is there is an agreement. And as far
20 as it was written by me, no, there were writings
21 back and forth between the two offices and then
22 signed off by both sides, there were changes made
23 by Mr. Stern's counsel's office.

24 So, In Re Stern is so off-base and will be
25 withdrawn, it doesn't have anything to do with a

1 rule that we cannot by agreement put off a
2 special appearance. And the reason why I have
3 more than once asked the Court to put off a
4 special appearance hearing is for the same reason
5 articulated time and again, we haven't gotten the
6 discovery that we should have in order to be able
7 to respond effectively to the special appearance.

8 Now, we do believe we got a bunch of evidence
9 on special appearance and I've marshaled it as
10 best I can. In fact, we had another filing today
11 that's not in front of the Court, just filed with
12 the court's clerk, it's been served on parties
13 here by hand, and I'll go ahead and give it to
14 the Court in case the Court were to move on to
15 the actual merits of the special appearance today
16 instead of continuing it.

17 We've put a huge load of more evidence in
18 front of the court, and my apologies for that, I
19 think it overloaded the electronic system last
20 Friday and we had to come back and file --

21 THE COURT: Is that why you weren't able
22 electronically, because I noticed that we had
23 about 1800 pages on one response, so it's very
24 difficult for the clerks and all --

25 MR. MCCABE: We had to apologize to the

1 clerk's office, and we had to come down and give
2 it again manually.

3 THE COURT: It wouldn't take it
4 electronically?

5 MR. MCCABE: We did try to do it
6 electronically and it was too much for the
7 system.

8 The point is, that the special appearance has
9 been put off always by agreement, and it's just
10 not true that we have violated Rule 120 A in any
11 way. We are entitled to get our discovery.
12 Unless and until there's a ruling that says we
13 can't get the discovery we want, then it's
14 inappropriate to go to the special appearance.

15 I'll give you one example without belaboring
16 it too much, of the kind of discovery that we
17 believe we're entitled to, and to some extent is
18 shown by the file today --

19 MR. WOOD: If I might, Your Honor, because
20 that's a whole separate issue that would come up
21 on the motion for continuance, not to question
22 the validity of the Rule 11 agreement. It might
23 save time --

24 MR. MCCABE: I don't agree with that because
25 the Rule 11 agreement specifically talks about

1 our getting the discovery that we're trying to
2 get, not just Mr. Stern's deposition.

3 But now that he's brought that up, let me
4 point out that in that Rule 11 agreement it says
5 that he is agreeing, Mr. Stern is agreeing, to a
6 single deposition on jurisdiction and merits.
7 And that's what he's getting. That's the benefit
8 he's getting.

9 We agreed that since we had already deposed
10 him on jurisdiction in the federal case we ought
11 to be able to get by with one deposition on
12 jurisdiction and merits. That's what he wanted.
13 So to argue that I can't get merits discovery
14 even under a Rule 11 agreement because In Re
15 Stern says I can't is incredible to me.

16 What I got in return was we put off the
17 special appearance until I get that discovery.
18 Still haven't gotten it. Still fighting over it.

19 Yes, we've had disagreements about the
20 deposition, the place of the depositions and so
21 forth. They wanted me to come to Georgia back to
22 his office, I didn't like how I was treated
23 there. I don't care what anybody else says about
24 it, I'm not going back to those offices. I
25 proposed another office, I thought it was very

1 congenial, they had objections to that. I think
2 they're pursuing that person as it turns out, and
3 they're now in a personal lawsuit. Hadn't at
4 that time but they now have. I understand that.

5 Couldn't get them to come here, I didn't want
6 to go to Los Angeles, and so we're in front of
7 the court today on that very issue as well, where
8 is that deposition going to take place and under
9 what circumstances. I suggest it can't be
10 happening now during the trial that he's in in
11 California. Anyway --

12 THE COURT: Is In Re Stern currently set for
13 re-hearing, you talk about withdrawing the
14 opinion --

15 MR. MCCABE: They don't do that, Your honor.
16 What happens is I file a motion for re-hearing
17 and then they do what they're going to do.
18 Typically they will do what they've done in
19 Harris. You find out no more argument or
20 anything, your opinion gets withdrawn, a new
21 opinion gets issued, and then they say we deny
22 your re-hearing but we're issuing a substitute
23 opinion, and then they don't admit any fault.
24 That's what happens.

25 THE COURT: So you got a motion for rehearing

1 pending?

2 MR. MCCABE: Yes, we do.

3 MR. WOOD: And we have not received any
4 request from the Court of Appeals that they would
5 like for us to brief that as of this date, I
6 think it's been pending about ten or eleven days.
7 But if I might if you're done --

8 MR. MCCABE: Go ahead.

9 THE COURT: Before you begin, just one
10 question I have. Mr. McCabe mentioned that the
11 Court of Appeals, when they made the ruling in In
12 Re Stern, when they heard that they didn't know
13 about the Rule 11 agreement?

14 MR. WOOD: Absolutely not true. They had the
15 entire transcripts from the hearings before Judge
16 Lindsay where in fact the Rule 11 agreement was
17 discussed. So they did know about it. Whether
18 they chose to make specific mention of it or not
19 is not the point. They had that in the record.

20 And in fact, they make reference at page --
21 pardon me, I think it's still page 9, they make
22 reference to it. The fact Arthur filed no
23 affidavit stating reasons that she was unable to
24 present facts essential to justify our opposition
25 to Stern's special appearance. Rather, without

1 complying with Rule 120 A(3) over Stern's
2 objections and despite Stern's agreement to limit
3 the discovery.

4 So I think they clearly understood -- I don't
5 know what's funny, but I didn't intend to be
6 funny, Your Honor. But they clearly were aware
7 of the record and it is a misrepresentation to
8 state otherwise.

9 I just don't know how, and maybe Mr. McCabe
10 has some crystal ball, but to stand up here and
11 to ask you not to rule consistent with the law
12 enunciated by the Court of Appeals in In Re Stern
13 because he believes or he thinks he can predict
14 with certainty that it shall be withdrawn, I just
15 think that's foolishness.

16 THE COURT: When is the timetable when we'd
17 know whether or not --

18 MR. WOOD: I don't know. But on the grounds
19 that it has been asserted, this idea that they
20 did not make mention of the hearing on a Motion
21 to Compel the production of Mr. Stern's computer,
22 which they did not mention, that had absolutely
23 nothing to do with the rulings in the case.
24 Because they said very clearly, and what Mr.
25 McCabe's problem has been from day one is, is

1 he's never respected 120 A(3), and he asked for
2 information discovery-wise while he was trying to
3 delay taking Mr. Stern's deposition that the
4 Court of Appeals recognized, much of which bore
5 no stated relevance, either to the jurisdictional
6 facts or to the merits.

7 He complains about all the trouble he's had
8 trying to get this discovery. The biggest
9 problem he's had, is he hasn't played by the
10 rules and asked for the discovery in proper form
11 and fashion. First jurisdiction only as to
12 Mr. Stern, and then as to the other defendants,
13 and eventually, potentially I guess Mr. Stern,
14 it's got to be limited to the issues in the case,
15 relevant to the issues and the claims and
16 defenses. And that's where he went off, that's
17 not our fault.

18 THE COURT: Let's focus on why wouldn't the
19 parties be allowed to enter into a Rule 11
20 agreement to modify the requirements under 120
21 (3)A; in other words, I'm looking to see where it
22 prohibits a Rule 11 agreement that states what
23 this Rule 11 agreement states.

24 MR. WOOD: It simply says under the holding
25 that under 120 A(3) it does not permit discovery

1 that is unnecessary, and merits discovery to be
2 unnecessary, or irrelevant to the establishment
3 of jurisdictional facts prior to the Court's
4 ruling on special appearances.

5 And clearly I think that that rule would
6 contemplate that the special appearances are
7 going to be heard promptly. And if you've got to
8 have discovery it's got to be based solely on
9 jurisdiction, and it's got to be necessary to the
10 establishment of jurisdiction.

11 THE COURT: I understand that. In the
12 absence of a Rule 11 it would -- obviously that
13 is the case and they would have to show that --
14 can't the party for various considerations make a
15 Rule 11 agreement in writing which both parties
16 agree that, again, that the -- without waiving as
17 this Rule 11 said, the issues of jurisdiction,
18 that the motion would not be heard until -- in
19 other words, this Rule 11 passed one particular
20 is setting, but it also says and agreed not to
21 urge that issue until after Mr. Stern's
22 deposition has been taken.

23 I mean, that's -- as counsel y'all have
24 agreed to that in writing. So I'm trying to
25 understand why you wouldn't be allowed -- it sort

1 of seems that to make that agreement and then
2 argue then when you've made the agreement it was
3 unlawful for you to make the agreement. I'm
4 trying to --

5 MR. WOOD: I understand the Court's concern
6 in that regard. We made the agreement because we
7 were willing to allow Mr. Stern to be deposed on
8 jurisdictional issues. Your Honor noted I think
9 on the May 7th hearing when we came up at the
10 very end when you suggested strongly that we
11 could do this by telephone because it would be
12 pretty short. And we said we'd be glad to do
13 that. Mr. McCabe came up with a reason to avoid
14 that deposition.

15 We anticipated at the time that this would be
16 a very brief deposition on the issues of
17 jurisdiction because he had already deposed him
18 all day long in Atlanta, Georgia at my office.

19 And most, if not all of the questions he
20 could have possibly asked him about
21 jurisdictional issues relating to Texas he asked
22 him in that federal court jurisdictional
23 deposition.

24 And I in return did not want to subject
25 Mr. Stern -- Mr. Stern has limited resources.

1 And I made the decision that if we were going to
2 give him that deposition I wanted it all done in
3 one deposition at that time.

4 Now, I clearly expected that that deposition
5 would take place within a matter of no more than
6 two or three months. I thought he would proceed
7 with his written discovery and that we would then
8 be able to get the deposition taken, and the idea
9 that this was ever going to be prolonged beyond
10 two or three months never crossed my mind.

11 THE COURT: And that's a whole other issue I
12 want to address also. And I do recall a
13 discussion about taking the deposition by
14 telephone, and that's something that you were
15 still willing to do or no?

16 MR. WOOD: Now he says he doesn't trust me
17 because I brought the issue up with you that day
18 without giving him notice.

19 MR. MCCABE: No, there's more than that. You
20 can't trust Howard Stern and you can't trust
21 Mr. Wood and his handling of Howard Stern if I'm
22 not able to see them in person.

23 MR. WOOD: I didn't come to Texas to be
24 insulted by this lawyer --

25 THE COURT: First of all, address the Court.

1 And let me just say that we don't need any
2 unnecessary sidebar or any type of personal
3 attacks on counsel or the client. This is a
4 professional matter, let's leave it that way and
5 not get in any attacks.

6 MR. MCCABE: Yes, Your Honor. I understand
7 that and I appreciate that concern. And I have
8 documented the reasons why I make this statement.
9 This is not something I'm doing off the top of my
10 head --

11 THE COURT: You can do it in an unoffensive
12 manner. I can understand you raising an issue
13 that you want to be able to see the witness or be
14 present, that's different from making statements
15 regarding their lack of honesty or
16 trustworthiness. I think that's necessary at
17 this type of a hearing. There could be valid
18 reasons why you want to be present without
19 attacking counsel or his client.

20 So regardless, are you seeking to take the
21 deposition only on jurisdictional issues or
22 evidence regarding the special appearance, or you
23 want to take it on the entire merits of the case?

24 MR. MCCABE: Your Honor, if the deal is off,
25 the deal for him was that he gets one deposition

1 for -- that is Mr. Stern, for jurisdiction and
2 merits, he doesn't have to give two depositions
3 if the Court denies his special appearance and we
4 move on to the merits.

5 If the deal is off, then I'll take one
6 deposition for jurisdiction. But that's not the
7 deal. And I don't agree to cancel the deal. And
8 I don't believe that the Court is in position to
9 cancel the deal.

10 THE COURT: Why didn't you take the
11 deposition before this time?

12 MR. MCCABE: Your Honor, we had a number of
13 issues come up. One thing that came up was the
14 entire case was changed when Nelda Turner, who's
15 on the phone here, began to cooperate with the
16 defense and turned over large amounts of
17 electronic communications, putting a completely
18 different face on the case.

19 A lot of them were communications from Mr.
20 Stern forwarded to her by Mr. Stern's sister, and
21 showing all kind of activities that we were not
22 aware of in the first place. Therefore, since we
23 were beginning to get a court order for
24 electronic discovery from the other defendants,
25 we were in a position to show the Court that we

1 obviously had not gotten production from
2 Mr. Stern that we should have gotten. And it's
3 being copied to other people and sent to us, but
4 not from Mr. Stern. We needed to get access to
5 his computer on behalf of a forensic examiner,
6 and so we began seeking that. And that's the
7 reason why, because the entire case changed its
8 complexion.

9 THE COURT: The Court recognizes that
10 Mr. Stern is entitled to have a special
11 appearance heard as soon as is practical. On the
12 other hand, the Rule 11 agreements are
13 enforceable. I haven't heard anything yet as to
14 why the Rule 11 agreement is not enforceable.
15 I'm trying to understand that.

16 MR. WOOD: Well, Your Honor, I believe that
17 the Court properly should have looked over the
18 November hearing date and said, I appreciate your
19 Rule 11 agreement, gentlemen, but you can't go
20 about that under the law in Texas that way.
21 Because all 120 A(3) allows you to agree to
22 anything would be a Rule 11 agreement on
23 jurisdictional discovery. And we believe that's
24 what the Court should have done.

25 We also believe and we know now from In Re

1 Stern that the Court should have done one other
2 thing. The Court should have said, regardless of
3 your Rule 11 agreement, I'm not going to continue
4 this hearing because I don't have the requisite
5 affidavit from the plaintiff that establishes the
6 reasons why there has to be additional discovery
7 in order to obtain facts, not just relevant to
8 jurisdiction, but essential to establishing
9 jurisdiction, which we still have never had until
10 just very recently from Mr. McCabe.

11 Beyond that, Your Honor, if it's viewed as a
12 contract, I think as we've set forth in our
13 brief, that the agreement would have to be
14 rendered vague and ambiguous.

15 And third, I believe as I've tried to state
16 earlier, it clearly was not contemplated by the
17 parties that this was going to be the basis for
18 and -- now and forever more give Mr. McCabe
19 control of when the special -- under Mr. McCabe's
20 theory of that Rule 11 agreement, it would be so
21 broad that he could refuse to take Mr. Stern's
22 deposition, decline to do so which he's been
23 doing repeatedly when we've offered it to him,
24 push this case up to a trial date, and under his
25 theory Mr. Stern would be put on trial here in

1 Texas because the condition precedent to his
2 special appearance has never occurred. That
3 simply cannot be an enforceable agreement under
4 his interpretation, Your Honor.

5 THE COURT: Because again, looking at 120
6 A(3), I understand there are certain requirements
7 involving an affidavit served seven days before,
8 et cetera. But it does appear that parties of
9 various considerations can waive a right they
10 have under a rule and basically reach a
11 stipulation which appears to be the effect of
12 this Rule 11 agreement.

13 That being said, that doesn't mean that this
14 would go on indefinitely. And it does -- I'm
15 really having difficulty finding why even the
16 requirements of 120 A cannot be -- in other
17 words, the protection that you might have cannot
18 be either partially waived or modified under a
19 stipulation or Rule 11 agreement because there
20 could be various considerations why -- if you
21 hadn't entered into that agreement, arguably Mr.
22 McCabe might have said okay, we'll just comply
23 with the requirements of 120 A(3) and provide the
24 required affidavits and whatever else we need to
25 do; instead it looks like a Rule 11 agreement was

1 reached.

2 That being said, I don't think this should
3 drag on, I believe that there needs to be -- if
4 the deposition is going to be taken it should be
5 done as promptly as possible to allow the special
6 appearance to be heard so that Mr. Stern, if it's
7 determined that the special appearance is
8 meritorious, is not kept in the litigation any
9 longer than is necessary.

10 MR. WOOD: But here is the problem, Your
11 Honor. Contrary to what Mr. McCabe has stated to
12 the Court, on this list of dates where he claims
13 we always consented to a continuance, we did not
14 consent to a continuous. Judge Lindsay simply
15 continued the case.

16 And the Court of Appeals in In Re Stern has
17 ruled that that was a clear abuse to grant those
18 continuances because she never got the required
19 affidavit from the plaintiff.

20 And now the suggestion is well, because we
21 got this vague and ambiguous I believe at best
22 Rule 11 agreement, which even Judge Lindsay
23 thought applied only to the November 21 hearing,
24 now somehow we're looking at a situation where
25 it's suggested that well, even though the Court

1 has been found to have abused its discretion in
2 continuing the special appearance in November of
3 2008, and then each and every time thereafter an
4 abuse of discretion under the Court's rationale,
5 I think under that, Your Honor, to sit here now
6 and suggest that Mr. Stern should once again be
7 told well, come back and sit for a deposition
8 even though we continued your right to the
9 special appearance repeatedly, and an abuse of
10 discretion in so doing is itself improper and
11 abuse --

12 THE COURT: Well, the only thing I'm
13 concerned about is apparently it's not a final
14 ruling until they deny the motion for rehearing.
15 Right now it's possible, I don't know how this
16 would go, but what if the Court of Appeals were
17 to withdraw its opinion on it.

18 MR. WOOD: Then whatever stage of the
19 litigation we find ourselves in at that point in
20 time, I'm sure Mr. McCabe will assert the
21 necessary positions to make his positions clear
22 as to impact of some potential revision or, as he
23 claims, withdrawal of that opinion.

24 The opinion in Harris was withdrawn and a new
25 opinion was entered, stronger than the first one.

1 If anyone, Your Honor, believes that they can
2 read those two opinions and not clearly discern
3 how the Court of Appeals feels about this case, I
4 think simply need to go back to law school 101.

5 It is very clear how the Court of Appeals
6 feels about this case. I suggest that the Court
7 of Appeals went out of its way on the
8 jurisdictional argument in In Re Stern because it
9 strongly suggests that there is no jurisdiction
10 over Mr. Stern in Texas because they narrowly --

11 THE COURT: You have a copy?

12 MR. WOOD: It's marked up --

13 THE COURT: I'd like to look at the opinion.

14 MR. WOOD: If I may approach, Your Honor.

15 And the Court of Appeals made clear that the
16 only jurisdictional issue, because he's wedged in
17 the discovery on jurisdiction, based on how he
18 pled jurisdiction in his complaint. And he does
19 the same thing each time. He just did it to Your
20 Honor today, and he did it in his affidavit that
21 he filed recently.

22 He talks about the one theory of jurisdiction
23 in Texas over Mr. Stern other than his arguments
24 about waiver and certain specific acts which are
25 not disputed that have occurred where

1 no discovery is needed, it's the indirect act of
2 Mr. Stern allegedly using his sister Bonnie to
3 communicate with Nelda Turner, a Texas resident.
4 And the Court makes it clear that that's the
5 issue.

6 And Mr. McCabe, when he claims they didn't
7 read these transcripts, you will see at page 10
8 that they literally go through the transcript,
9 the December 11, 2008 hearing and they give a
10 quote that tracks just what he's up here saying
11 today; well, we got these e-mails that went from
12 Bonnie Stern to Nelda Turner. And they looked
13 over and said there's no indication in these
14 representations of counsel that Arthur had cause
15 to believe that any significant number of e-mails
16 from Stern to Turner existed, or were necessary
17 to establish jurisdiction, nor would Stern's
18 e-mails to co-defendant Bonnie Stern, Larry
19 Birkhead or Art Harris, none of them Texas
20 residents, be relevant to the establishment of
21 the Texas court's jurisdiction over Stern.

22 Nor would the representation that such
23 discovery was essential to Arthur's opposition to
24 Stern's special appearance comport with Arthur's
25 pleading of the jurisdictional facts.

1 Because what they did as they said it,
2 whether the Texas courts have personal
3 jurisdiction over Stern, thus turns on whether
4 Stern, in direct communications with Turner in
5 Texas, through his sister Bonnie Stern are
6 sufficient to establish jurisdiction over him on
7 a conspiracy theory of personal jurisdiction.
8 That's it.

9 If you were called upon to decide today that
10 the special appearance of Mr. Stern, you don't
11 need any discovery. And the truth is he doesn't
12 need it. Because he has already obtained each
13 and every e-mail that Bonnie Stern ever sent to
14 Nelda Turner.

15 Ms. Turner has stated under oath that she
16 provided Mr. McCabe with two DVD's, and I'm
17 quoting from page 59 of her deposition of April
18 2nd, 2010 where she states: I have turned over
19 multiple DVD's that have every e-mail I've ever
20 had forwarded to me, every e-mail between me and
21 Bonnie Stern and Crystal Bart, one of Mr. Stern's
22 co-counsel.

23 So, this is all a subterfuge, Your Honor.
24 And I don't expand the Rule 11, but my client has
25 incurred attorney's fees and expenses that are

1 approximating a million dollars in this case and
2 he has yet to have his special appearance heard.
3 And he has been drug through irrelevant,
4 immaterial discovery, now he's threatened with
5 more discovery. Now insisting for the first time
6 -- I assume he will actually try to schedule it,
7 maybe not -- he's got to sit through some
8 depositions when he knows he can't do that for
9 the next two or three months, and in the meantime
10 he's going to start filing all this other
11 discovery when he already has everything he needs
12 under his pled allegations of the theory of
13 personal jurisdiction over Mr. Stern.

14 Your issue will be simple. There will be
15 other undisputed facts that he will argue, either
16 establish a waiver, but your issue will only be
17 with respect to discovery materials, whether the
18 indirect communications we admit occurred,
19 although we challenge the substance of them in
20 terms of their intent would establish personal
21 jurisdiction as a matter of law.

22 THE COURT: Okay. This is the first
23 opportunity -- I haven't had an opportunity to
24 read this opinion, so I'm trying to take a look
25 at this. I'm hearing your argument on that.

1 Let me ask you, Mr. McCabe, what is the
2 reasoning -- if based on what I'm hearing, what
3 type of discovery, what basis do you believe
4 based on the facts in this case would you be able
5 to determine from taking Mr. Stern's deposition
6 that you would need to depose him on to be able
7 to respond to the special appearance?

8 MR. MCCABE: Your Honor, first of all, we
9 want to know about his communications with his
10 sister. We have communications between Mr. Stern
11 and his sister that were forwarded to Nelda
12 Turner, but only ones that were forwarded to
13 Nelda Turner. We don't have all of those
14 communications that must have gone between them
15 that weren't forwarded to Nelda Turner and he
16 hasn't produced them.

17 One reason why we're seeking discovery into
18 the computer that he says he still has, the one
19 that he shares with his mother and father, he has
20 represented that he discarded incredibly, the
21 computer that he had for the period of time
22 that's relevant to most of this case. It's back
23 in October of 2007, coincidentally when we first
24 filed suit against him he says around that time,
25 before that sometime he says he discarded that

1 computer. No lawyer discards their computer,
2 Your Honor. You save the hard drive, you
3 transfer what you can to your new computer.

4 So we're still trying to get discovery into
5 that computer into the kinds of communications
6 between him and his sister that are
7 conspiratorial in nature, some of which are
8 directed, again, by being forwarded to Nelda
9 Turner, some of which are not. We don't have
10 those.

11 As for his representations that we never, and
12 for the Court of Appeals' representations that we
13 never did a verified motion for continuance on a
14 special appearance is simply wrong. And it's
15 wrong because they didn't call for briefing, they
16 didn't have a record provided on the issue. They
17 just decided the issue on what they already had
18 before them on other issues.

19 As we say in our response to Mr. Stern's
20 motion to clarify on page 2, and we point to the
21 document in the court's record, there was a
22 verified motion on one of the special
23 appearances. And he agreed to it as well.

24 There's no authority for the proposition that
25 In Re Stern is not authority for the proposition

1 that one cannot have a Rule 11 agreement to
2 postpone the special appearance. It's not an
3 authority for that because there is no
4 recognition of the Rule 11 agreement.

5 THE COURT: Let me do this because we're
6 getting near the end of the day, what I would
7 like to have you show me is in this opinion, In
8 Re Stern where it specifically addresses that the
9 Rule 11 agreement in this case is not
10 enforceable, if you could show me that.

11 MR. WOOD: It does not specifically address
12 the Rule 11 agreement in this case being
13 unenforceable, what it does is it very clearly
14 sets forth the parameters of what discovery the
15 Court may permit prior to conducting a special
16 appearance period. And that's at page, I
17 believe, 8 -- actually 9. It would be on page 8
18 of the copy we gave you. Also, what's titled
19 page 9 of 16.

20 MR. MCCABE: And Your Honor, of course,
21 they're not talking about what can be done by
22 agreement because they're not aware of any
23 agreement. There was agreement again and again
24 and again --

25 THE COURT: If you could show me where it

1 even refers to the Rule 11 agreement or shows
2 that they were even in this opinion.

3 MR. WOOD: I'm sorry?

4 THE COURT: Does it reflect the Rule 11
5 anywhere in here?

6 MR. WOOD: It does make reference further
7 down to Stern's agreement to limited discovery.

8 THE COURT: What page are you on?

9 MR. WOOD: If I can approach, Your Honor.

10 THE COURT: Sure.

11 MR. WOOD: If you have page 9 of 16 at the
12 top.

13 THE COURT: Right here.

14 MR. MCCABE: What they're talking about is
15 that Mr. Wood stood up in the hearing on December
16 11th and said we would agree to certain kinds of
17 limited discovery. It's not talking at all about
18 the Rule 11 agreement because they didn't know
19 about it because the issue was never brought up
20 to them and never briefed to them. It's a whole
21 different meaning to Mr. Stern has agreed to
22 limited discovery. Those were the oral
23 representations by Mr. Wood, which were quoted at
24 length in the opinion from the December 11th
25 hearing where we said we would agree to this, we

1 would agree to that, we would agree and I guess
2 maybe we don't have an issue. But, of course, I
3 didn't agree.

4 THE COURT: Okay. This opinion is the
5 opinion that still deals with the issue of
6 whether the hard drive not being --

7 MR. WOOD: It does, Your Honor, among other
8 things. It dealt with five different issues that
9 Mr. Stern and they ruled in Mr. Stern's favor in
10 each and every issue.

11 Let me suggest this, Your Honor. Since Mr.
12 McCabe is so sure that he knows what the Court of
13 Appeals is going to do, and even is so confident
14 that he knows what they mean and what they say,
15 why don't we wait and let the Court of Appeals
16 rule on this motion for re-hearing.

17 I'm sure he'll file a motion for an In Bach
18 [sic] hearing after that, there will be further
19 delay and further delay, but if that's going to
20 be the case and we need to revisit this after we
21 get a final ruling, I believe, will be in
22 Mr. Stern's favor, then we can come back and
23 address these issues.

24 But in the meantime, Your Honor, I would ask
25 that in fairness to Mr. Stern, that as to

1 Mr. Stern this case be stayed in its entirety,
2 pending an opportunity to get a final ruling on
3 In Re Stern from the appellate courts, and then
4 to come back and to have this discussion and to
5 take these same issues up with Your Honor where
6 you then have -- no one can sit there and predict
7 what the Court of Appeals will do, we'll know
8 what they've done.

9 THE COURT: What do you say?

10 MR. MCCABE: I appreciate the concern. I was
11 right last time about the Courts of Appeals
12 withdrawing the opinion, I'm right this time.
13 Not because I have a crystal ball, but because
14 the Court of Appeals cannot allow such a flawed
15 opinion --

16 THE COURT: And you're raising the issues you
17 believe they didn't consider the first time,
18 including Rule 11 agreement?

19 MR. MCCABE: Such as the Rule 11 agreement.

20 THE COURT: Again, since this very Rule 11
21 agreement that's being addressed here today
22 apparently has been brought to the attention of
23 the Court of Appeals with regard to its previous
24 ruling, it does seem appropriate, because again,
25 the Court of Appeals may come back and they may

1 deny on Mr. McCabe's motion, or they may withdraw
2 it. And if they do, apparently they would be
3 doing it in large part on the basis of a Rule 11
4 agreement.

5 So it seems like that's already pending
6 before the Court of Appeals we should wait and
7 see what their final word is on that.

8 MR. WOOD: Again, Your Honor, I made the
9 suggestion, I would like it clear that in
10 fairness to Mr. Stern that all matters as to this
11 case be stayed until we get that final decision.

12 THE COURT: It seems appropriate, because
13 again, giving you the benefit of seeing whether
14 or not the Court of Appeals is going to withdraw
15 its opinion based on consideration of the Rule 11
16 agreement or whatever else you've submitted, but
17 in the event that that doesn't occur and to the
18 extent that Mr. Stern's special appearance -- and
19 the Court is keeping an open mind with regard to
20 that, I haven't heard your special appearance and
21 your response, but in the event that if Mr. Stern
22 were to prevail it would seem unfair at this
23 juncture to expose him to unfair cost until I can
24 rule.

25 MR. MCCABE: Suggestion then the entire case

1 be stayed --

2 MR. WOOD: As to Mr. Stern.

3 THE COURT: Only with regard to Mr. Stern.

4 MR. MCCABE: We have no objection to that, we
5 were not planning to do anything with Mr. Stern
6 because he had already notified us that he was in
7 trial for three months.

8 THE COURT: Anyone else have any problem with
9 that?

10 MR. WOOD: Again --

11 THE COURT: The Court will grant you that
12 that protection. By the way, since you're flying
13 in from Atlanta, and if you need to be present
14 for future hearings until resolved by telephone
15 even with regard to the special appearance
16 itself, I mean, it's your or to keep your
17 client's expense down, the Court would allow you
18 that, and I don't think there would be any
19 objection to counsel appearing by telephone.

20 MR. MCCABE: No objection. Mr. Wood has
21 raised a Motion to Compel against Mr. Stern. The
22 Court may recall we had a motion to compel
23 against Mr. Harris some of which we put off with
24 the contemplation we would wait for the Court of
25 Appeals I certainly think we should do the same

1 thing regarding Mr. Stern's.

2 MR. WOOD: Done deal because if we stay the
3 whole matter --

4 THE COURT: Right. We'll stay that also
5 then.

6 MR. WOOD: If we receive notice from the
7 Court of Appeals they would like for us to brief
8 the issue, because I believe Mr. McCabe is trying
9 to point out several new things to them saying
10 you didn't address this in the opinion. I expect
11 that if they are going to address them they will
12 likely ask us to brief the issue also. If we
13 receive such a notice we'll advise the Court.

14 THE COURT: Okay. Whoever prevails on it,
15 again, if it's withdrawn I assume Mr. McCabe will
16 let the Court know. And if it's not, becomes a
17 final ruling on it, then Mr. Wood, if you will
18 let the Court know. And if need be we can either
19 reset it for oral hearing where you're present or
20 be present by telephone and I can address it at
21 that time.

22 MR. MCCABE: The Court will not grant
23 rehearing without asking for briefing from
24 Mr. Stern's side.

25 THE COURT: Okay. Is there anything else we

1 need to address on the record today? We're
2 adjourned for today.

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1 THE STATE OF TEXAS

2 COUNTY OF HARRIS

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4 I, Michelle Tucker, Official Court Reporter in
5 and for the 80th District Court of Harris County, State
6 of Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested in
9 writing by counsel for the parties to be included in
10 this volume of the Reporter's Record in the above-styled
11 and -numbered cause, all of which occurred in open court
12 or in chambers and were reported by me.

13 WITNESS MY OFFICIAL HAND this the 12th day of
14 August, 2010.

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