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APPEARANCES:  
FOR THE PLAINTIFF:

WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLP  
BY: BETSY C. MANIFOLD  
ATTORNEY AT LAW  
750 B STREET  
SUITE 2770  
SAN DIEGO, CALIFORNIA 92101

FOR THE DEFENDANT:

MUNGER TOLLES & OLSON LLP  
BY: MELINDA E. LEMOINE  
ADAM I. KAPLAN  
ATTORNEYS AT LAW  
355 SOUTH GRAND AVENUE  
35TH FLOOR  
LOS ANGELES, CALIFORNIA 90071

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I N D E X

CV 13-4460-GHK (MRWX)

JULY 9, 2014

PROCEEDINGS: TELEPHONIC CONFERENCE

1 LOS ANGELES, CALIFORNIA; WEDNESDAY, JULY 9, 2014; 10:08 A.M.

2 THE COURT: ALL RIGHT. GOOD MORNING, EVERYBODY.  
3 THIS IS JUDGE WILNER IN LOS ANGELES. AND IT IS THE GOOD  
4 MORNING TO YOU CASE -- GOOD MORNING TO YOU VERSUS WARNER  
5 CHAPPELL MUSIC, CV 13-4460-GHK(MRWX).

6 CAN I HAVE APPEARANCES FOR PLAINTIFF, PLEASE.

7 MS. MANIFOLD: GOOD MORNING, YOUR HONOR.

8 BETSY MANIFOLD, WOLF HALDENSTEIN, ON BEHALF OF THE  
9 PLAINTIFFS.

10 THE COURT: GOOD MORNING TO YOU.

11 AND FOR THE DEFENSE.

12 MS. LEMOINE: GOOD MORNING, YOUR HONOR.

13 MELINDA LEMOINE AND ADAM KAPLAN FROM MUNGER TOLLES  
14 AND OLSON ON BEHALF OF WARNER CHAPPELL.

15 THE COURT: AND GOOD MORNING TO YOU. THAT JOKE NEVER  
16 GETS OLD.

17 MS. LEMOINE: I'M NOT TIRED OF IT YET.

18 (LAUGHTER.)

19 THE COURT: AGAIN, I HOPE I DON'T INFRINGE, BUT I  
20 THINK I'VE GOT THE JUDICIAL PRIVILEGE ON THAT ONE.

21 MS. LEMOINE: YEP.

22 THE COURT: ALL RIGHT. THE MATTER IS ON. I WANTED  
23 TO GET YOU FOLKS ON FOR A DISCUSSION ABOUT THE APPLICATION TO  
24 TEE UP A DISCOVERY MOTION ON A PRIVILEGE CLAIM AFTER THE  
25 DISCOVERY CUT-OFF.

1 I LOOKED AT PLAINTIFF'S PAPERS. AND THEN I RECEIVED  
2 AN OPPOSITION FROM THE DEFENSE EARLIER THIS WEEK. I TOOK A  
3 LOOK AT THAT AS WELL.

4 AND IN DISCUSSIONS WITH JUDGE KING OVER THE WEEKEND,  
5 I WANTED TO BE CLEAR, HE WANTS ME TO HANDLE THIS MATTER IN ITS  
6 ENTIRETY.

7 SO, I SPENT A LOT OF TIME ON THIS. I LOOKED AT -- I  
8 SORT OF CREATED A LITTLE BIT OF A TIMELINE TO TRY AND FIGURE  
9 OUT WHAT'S BEEN GOING ON HERE. AND I HAVE A GENERAL  
10 UNDERSTANDING THAT THIS WAS SORT OF IN PARALLEL TO OUR PREVIOUS  
11 DISCUSSIONS REGARDING PRIVILEGE LOG AND MATERIALS INVOLVING THE  
12 SONG AND --

13 SO, YOU'VE GOT PAPERS. THE PLAINTIFFS GOT A  
14 PRODUCTION FROM ASCAP. AND WITHIN THE PRODUCTION FROM ASCAP  
15 WERE SOME MATERIALS THAT PERHAPS ORIGINATED WITH COUDERT  
16 BROTHERS, A NEW YORK LAW FIRM. THERE WAS A CLAW-BACK REQUEST  
17 AND AN ASSERTION OF PRIVILEGE IN LATE MAY FROM THE COMPANY --  
18 FROM WARNER. AND IN THE MEANTIME THERE WAS ADDITIONAL  
19 DISCOVERY GOING ON.

20 WE SAT DOWN AS I RECALL ON JUNE 6. AND SOMEBODY  
21 KINDLY ORDERED UP A COPY OF THE TRANSCRIPT. SO, I SPENT TIME  
22 LOOKING AT WHAT WE HAD TALKED ABOUT THAT TIME -- AT THAT TIME.  
23 AND THE ASCAP MATERIALS WERE NOT ON THE TABLE NOR WERE THEY ON  
24 THE LOG AT ISSUE AT THE TIME. AND SOME TIME HAS PASSED SINCE  
25 THEN.

1           AND, SO, I UNDERSTAND THAT PLAINTIFFS WANT TO GET A  
2 RULING ON A DISCOVERY ISSUE THAT HAS BEEN PERHAPS FERMENTING  
3 FOR A WHILE. AND IT INVOLVES THIS JOINT OR COMMON INTEREST  
4 PRIVILEGE OR EXCEPTION TO THE PRIVILEGE.

5           AND FROM THE COMPANY'S PERSPECTIVE THEIR CLAIM IS  
6 ESSENTIALLY, HEY, TIME IS TICKING OFF THE CLOCK. AND THIS WAS  
7 SOMETHING THAT COULD HAVE BEEN TAKEN UP EARLIER. AND IT'S NOT  
8 THE BASIS FOR EX PARTE OR EXPEDITED RELIEF HERE. AND I SAW THE  
9 WORDS "DELIBERATE" AND "TACTICAL" IN THE PAPERS HERE.

10           MS. MANIFOLD, LET ME HEAR FROM YOU ON THESE ISSUES --  
11 AND, IN PARTICULAR, ON THE TIMING ISSUE. I THINK THAT'S  
12 RELEVANT TO DISCUSS.

13           MS. MANIFOLD: I THINK THAT IS -- I THINK THAT IS THE  
14 POINT OF FACT HERE.

15           AND I THINK THERE SHOULD BE SOME CLEAR -- SOME  
16 CLARITY OR SOME DETAIL ADDED TO THE TIMELINE.

17           FIRST OF ALL, ASCAP PRODUCED DOCUMENTS MAY 9TH.

18           PLAINTIFFS CONTACTED ASCAP'S COUNSEL TO GET THE  
19 CONFIDENTIAL DESIGNATION REMOVED FROM CERTAIN DOCUMENTS ON MAY  
20 19TH.

21           THEN ON MAY 22ND ASCAP'S COUNSEL SENDS THE  
22 PLAINTIFF'S COUNSEL A LETTER SAYING THAT DEFENDANTS INTENDED TO  
23 ASSERT A PRIVILEGE CLAIM AS TO CERTAIN DOCUMENTS.

24           AND WE WERE ALSO IN THE MIDST OF A MEET AND CONFER ON  
25 THAT SAME DAY. AND DEFENDANTS RAISED THE ISSUE VERBALLY TO US

1 AS PART OF THAT MEET AND CONFER, EVEN THOUGH IT REALLY WASN'T  
2 TEE'D UP FOR THAT, QUITE FRANKLY. BUT WE GOT THE LETTER. AND  
3 THEN TEN SECONDS LATER WE WERE KIND OF ON A CALL IN ANOTHER  
4 ISSUE. SO, WE DID BRIEFLY DISCUSS IT.

5 THE SAME DAY PLAINTIFF'S COUNSEL SENT A LETTER TO  
6 ASCAP. AND AT THE SAME DAY WE NOTICED THE 30(B)(6) DEPOSITION  
7 -- AND WE SENT A SUBPOENA TO ASCAP. AND WE TOLD THE  
8 DEFENDANTS THAT WE WOULD SEQUESTER THE DOCUMENTS. THEN AT THE  
9 SAME TIME, LABOR DAY IS THEN MAY 26TH -- WE'RE STILL WORKING ON  
10 THE JOINT STIPULATION ON THE PRIVILEGE LOG.

11 AND AS THE COURT POINTED OUT, THE ASCAP DOCUMENTS ARE  
12 NOT ON THE PRIVILEGE LOG. IN FACT, THERE'S NOT A SINGLE ASCAP  
13 DOCUMENT ON THE PRIVILEGE LOG. SO, THE ISSUE OF COMMON  
14 INTEREST IN ASCAP WASN'T BRIEFED -- WASN'T ON THE TABLE AND  
15 HADN'T BEEN DISCUSSED BY THE PARTIES.

16 SO, THEN ON MAY 27TH WE SERVE OUR JOINT STIP, WHICH  
17 IS THE CONFERENCE CALL -- THE SERIES OF CONFERENCE CALLS THAT  
18 THE COURT REFERRED TO THAT DEALT WITH THE PRIVILEGE LOG WHICH  
19 HAS SINCE BEEN AMENDED TWICE AND STILL DOESN'T INCLUDE THE  
20 ASCAP DOCUMENTS. SO, IT WAS REALLY A PRIVILEGE LOG ISSUE THAT  
21 THE PARTIES WERE NEGOTIATING WITH REGARD TO THAT STIP.

22 AND THEN ON MAY 27TH ON THE SAME DAY THAT WE'VE  
23 SERVED OUR PART OF THE JOINT STIP TO THE PARTIES TO THE  
24 DEFENDANTS WE GET OBJECTIONS THAT THEY'RE NOT GOING TO PRODUCE  
25 A 30(B)(6) WITNESS WITH REGARD TO THE RELATIONSHIP WITH REGARDS

1 TO ASCAP.

2 AND I SHOULD ALSO NOTE THAT ON MAY 19TH THEY FINALLY  
3 RESPONDED TO A REQUEST FOR AN INTERROGATORY THAT DEALT WITH  
4 WHAT THEIR RELATIONSHIP WAS WITH REGARD TO ASCAP. BECAUSE  
5 PRIOR TO THIS IN DISCOVERY NEGOTIATIONS THEY HAD TAKEN THE  
6 POSITION THAT ASCAP WASN'T RELEVANT.

7 SO, FINALLY ON MAY 19TH WE GOT AN AMENDED  
8 INTERROGATORY WHICH DESCRIBED THE RELATIONSHIP BETWEEN ASCAP  
9 AND THE DEFENDANTS. AND, YOU KNOW, WE HAD BEEN MEETING AND  
10 CONFERRING ON THAT ISSUE WELL PRIOR TO THAT.

11 SO, THEN FINALLY -- FINALLY ON JUNE 2ND THE  
12 DEFENDANTS SEND US A LETTER SAYING, YOU KNOW, THIS IS OUR CLAIM  
13 OF PRIVILEGE. WE'RE ASSERTING THE CLAW-BACK. YOU KNOW,  
14 20(B)(5)(B). WE'VE SEQUESTERED THE DOCUMENTS. AND THEY'RE  
15 ASSERTING A COMMON-INTEREST ARGUMENT.

16 THEN, THE MEET AND CONFER IS HELD ON JUNE 16TH WITH  
17 REGARD TO THAT ISSUE, THE 30(B)(6) DEPOSITION, AND ANOTHER  
18 RELATED DEPOSITION, WHICH IS GOING TO NOW PROCEED TOMORROW  
19 AFTER A MEET-AND-CONFER PROCESS.

20 AND THEN AFTER THAT WE FILED A JOINT STIP ON JULY  
21 2ND. SO, I THINK THAT THE PLAINTIFFS ACTED EXPEDITIOUSLY  
22 THROUGHOUT THE PROCESS AND ACTED VERY DILIGENTLY. AND I THINK  
23 IT'S IMPORTANT TO KNOW THAT, AGAIN, THESE DOCUMENTS WERE NOT ON  
24 THE PRIVILEGE LOG. THERE WERE NO ASCAP DOCUMENTS ON THE  
25 PRIVILEGE LOG. AND THE FIRST TIME THAT THE DEFENDANTS SENT US

1 A WRITTEN CORRESPONDENCE WITH REGARD TO ASSERTING THAT  
2 PRIVILEGE WAS JUNE 2ND. OF COURSE, WHEN WE GOT THE NOTICE FROM  
3 ASCAP ON MAY 22ND, YOU KNOW, WE, OF COURSE, SEQUESTERED THE  
4 DOCUMENTS IMMEDIATELY. WE HAVEN'T USED THEM. WE HAVEN'T  
5 LOOKED AT THEM.

6 AND IN THE CASES THAT THE DEFENDANTS OFFERED, THEY  
7 WERE BASICALLY CASES WHERE THEY -- WHERE THE DEFENDANTS, THE  
8 PRODUCING PARTY WERE MOVING TO BAR THE USE OF THE DOCUMENT.

9 AND IN ONE OF THE SCHEDULING CASES, THE COURT NOTICED  
10 A DELAY OF, LIKE, 167 DAYS. THAT'S NOT HERE. I MEAN, IF  
11 THERE'S ANY DELAY HERE THERE'S A DAY HERE OR THERE. BUT IN  
12 ORDER TO MEET THE 37-2 PROCESS, YOU KNOW, WE HAD TO DO A  
13 TEN-DAY MEET AND CONFER. WE HAD TO -- YOU KNOW, IT JUST -- IT  
14 KIND OF SURPRISES ME A LITTLE BIT THAT THEY WOULD TAKE THE  
15 POSITION THAT WE DIDN'T WORK DILIGENTLY AND EXPEDITIOUSLY.

16 AND WE EVEN RESOLVED THE MOTION -- THE MOTION TO  
17 QUASH THAT WAS FILED BY ASCAP. AND THEN THE ASCAP DEPOSITION  
18 IS NOW GOING TO BE HEARD ON JULY 11TH, THE LAST DAY OF THE  
19 DISCOVERY PERIOD.

20 THE COURT: OKAY.

21 MS. MANIFOLD: SO, QUITE FRANKLY, YOUR HONOR, I'M NOT  
22 QUITE SURE WHAT MORE WE SHOULD OR COULD HAVE DONE.

23 THE COURT: ALL RIGHT. WELL, LET ME -- LET ME HEAR  
24 FROM THE DEFENSE.

25 I JUST WANT TO CORRECT ONE THING. ON JULY 2ND, WHAT

1 I UNDERSTAND IS THAT YOU FILED YOUR -- BASICALLY YOUR  
2 APPLICATION TO SHORTEN TIME AND MAYBE YOUR PORTION OF THE  
3 DISCOVERY MOTION. I DON'T THINK THAT IT'S FAIR TO CALL IT A  
4 JOINT FILING BECAUSE I DON'T THINK THE MUNGER FOLKS JOINED  
5 THAT.

6 AM I CORRECT?

7 MS. MANIFOLD: YOU ARE ABSOLUTELY CORRECT, YOUR  
8 HONOR. AND I TRIED TO REDACT BASICALLY ALMOST A LOT OF THE  
9 ARGUMENT AND FACTUAL INFORMATION OUT OF IT AND JUST BASICALLY  
10 LEAVE THE SET-UP TO THE DILIGENCE IN THE DISCOVERY PROCESS.

11 THE COURT: OKAY. THAT'S --

12 MS. MANIFOLD: AND YOU'RE RIGHT. THE FINAL JOINT  
13 STIPULATION WOULD NOT BE FILED UNTIL TODAY WITH THE COURT.

14 THE COURT: YES. ACTUALLY, I DON'T EVEN KNOW IF IT'S  
15 EVER A JOINT STIPULATION. IT'S A JOINT FILING, BUT. I DON'T  
16 THINK ANYBODY EVER AGREES THAT WE HAVE A DISCOVERY FIGHT.

17 ANYWAY, THAT'S JUST ANGELS ON THE HEAD OF A PIN.

18 ALL RIGHT. MS. LEMOINE, MR. KAPLAN, DID YOU WANT TO  
19 BE HEARD?

20 MS. LEMOINE: YES, YOUR HONOR, I DO.

21 I WOULD SAY THAT THE ONLY TIME THE FILING REALLY  
22 BECOMES JOINT IS WHEN YOU HAVE TO MERGE THE FORMATTING STYLES  
23 OF BOTH LAW FIRMS.

24 THE COURT: YEP.

25 MS. LEMOINE: AT THAT POINT IT'S PRETTY CLEAR YOU'RE

1 DOING SOMETHING TOGETHER.

2 MS. MANIFOLD: AND EVEN THAT'S HARD.

3 (LAUGHTER.)

4 MS. LEMOINE: SO, I DO WANT TO RESPOND --

5 THE COURT: I'VE DONE -- I'VE DONE IT MANY TIMES  
6 MYSELF. IT'S --

7 MS. LEMOINE: -- JUST BRIEFLY, YOUR HONOR.

8 I WANT TO SAY THAT IT IS OUR POSITION THAT AS OF MAY  
9 22ND, THE PARTIES KNEW THAT WARNER CHAPPELL'S PRIVILEGE WAS AT  
10 ISSUE. IT KNEW THERE WERE LEGAL MEMORANDA FROM THE COUDERT  
11 BROTHERS FIRM THAT WERE AT STAKE. IT KNEW -- AND AT THAT POINT  
12 THEY KNEW THAT FEDERAL RULE 26(B)(5)(B) IS IN EFFECT. THEY  
13 HAVE TO RAISE -- IF THEY HAVE A DISPUTE ABOUT A PRODUCED  
14 DOCUMENT AND ITS PRIVILEGED NATURE, THEY HAVE TO RAISE THAT  
15 WITH THE COURT PROMPTLY.

16 THEY DID NOT DO THAT AND, INSTEAD, BROUGHT A  
17 DIFFERENT MOTION. AND I WOULD TAKE ISSUE WITH MS. MANIFOLD'S  
18 CHARACTERIZATION OF THAT AS UNRELATED AND PERTAINING ONLY TO  
19 THE PRIVILEGE LOG. WHILE IT RELATED TO THE PRIVILEGE LOG, IT  
20 RAISED THE KEY LEGAL ISSUE THAT CURRENTLY IS BEING TEE'D UP FOR  
21 YOUR HONOR IF YOU GRANT THIS EX PARTE APPLICATION. AND THAT'S  
22 THE ISSUE OF WHAT IS THE COMMON INTEREST, THE COMMON LEGAL  
23 INTEREST BETWEEN ASCAP AND WARNER CHAPPELL, BETWEEN PERFORMING  
24 RIGHTS ORGANIZATIONS AND WARNER CHAPPELL. I THINK IF YOUR  
25 HONOR WOULD LOOK BACK AT THAT JOINT STIPULATION, YOU'LL SEE

1 THAT PLAINTIFFS RAISE THAT ISSUE IN THAT DOCUMENT.

2 SO, THAT WAS FILED BEFORE MEMORIAL DAY WEEKEND -- OR  
3 THAT WAS FILED RIGHT AFTER MEMORIAL DAY WEEKEND, RIGHT AROUND  
4 THERE. AND BY THAT TIME PLAINTIFF KNEW EVERYTHING THEY NEEDED  
5 TO KNOW TO BRING THIS MOTION THEN.

6 AND I THINK IT'S WORTH NOTING THAT YOUR HONOR DID NOT  
7 SORT OF PUT US THROUGH OUR PACES OF FORMALITY AND MAKE US WAIT  
8 FOR THE HEARING DATES AND ALL THAT STUFF. YOU CALLED US RIGHT  
9 AWAY SO WE COULD GET ON THE PHONE WITH YOU.

10 AND ON THE PHONE CALL THE ISSUE DIDN'T COME UP. AND  
11 I WAS EXPECTING THAT IT WOULD, BUT I DECIDED, WELL, OKAY.  
12 MAYBE THIS LEGAL ISSUE WE'RE GOING TO WORK THROUGH. MAYBE  
13 THAT'S THE STRATEGY CALL THAT PLAINTIFFS ARE MAKING.

14 BUT THEY PERSISTED IN SEEKING DISCOVERY REGARDING  
15 WHETHER THERE WAS A WAIVER. AND LET'S BE CLEAR, THE ISSUE  
16 REGARDING THE ASCAP RELATIONSHIP IS ALL ABOUT WHETHER THERE'S A  
17 WAIVER OF A DOCUMENT THAT WE ALL AGREE IS PRIVILEGED.  
18 ALL RIGHT.

19 FEDERAL RULE OF CIVIL PROCEDURE 26(B)(5)(B) AND THE  
20 CASES INTERPRETING IT DO NOT PERMIT THE PARTIES TO CONDUCT  
21 DISCOVERY INTO THE CLAIM OF PRIVILEGE. IT'S MEANT TO PROVIDE A  
22 PROCEDURE PURSUANT TO WHICH WE CAN RESOLVE THAT CLAIM QUICKLY.

23 WE WERE CLEAR THAT WE WOULD NOT PRESENT A WITNESS ON  
24 THE ISSUE OF WHETHER THE RELATIONSHIP WAS SUCH THAT THERE HAD  
25 BEEN A WAIVER. THAT WAS THE ONLY ISSUE THAT THEY WERE LOOKING

1 FOR IN THAT 30(B)(6) DEPOSITION. BUT THEY KNEW THAT IN LATE  
2 MAY.

3 SO, I THINK THAT WHAT HAPPENED HERE, LOOKING BACK, IS  
4 PLAINTIFFS DECIDED TO TRY TO BUILD A GOOD RECORD FOR THEMSELVES  
5 ON THIS ISSUE OF WAIVER OVER A DOCUMENT THAT WE ALL AGREE IS  
6 PRIVILEGED.

7 I ALSO --

8 THE COURT: CAN YOU STOP FOR JUST A -- STOP.

9 MS. LEMOINE --

10 MS. LEMOINE: -- WOULD LIKE TO JUST--

11 THE COURT: JUST STOP FOR ONE SECOND.

12 MS. LEMOINE: SURE.

13 THE COURT: MS. MANIFOLD, IS THAT ACTUALLY YOUR  
14 POSITION? ARE YOU CONTENDING THAT THIS DOCUMENT IS PRIVILEGED  
15 BUT THE PRIVILEGE HAS BEEN WAIVED, OR IS IT SOMETHING ELSE?  
16 BECAUSE I'D LIKE TO KNOW IF THAT'S AN ISSUE HERE.

17 MS. MANIFOLD: WELL, FIRST OF ALL, IT IS A WAIVER  
18 ISSUE, BUT THE WAIVER ISSUE IS RELATED TO WHETHER THERE'S A  
19 COMMON INTEREST. SO, IF THIS DOCUMENT IS PRODUCED TO A THIRD  
20 PARTY, WE ALL AGREE THAT THAT'S A WAIVER OF THE ATTORNEY-CLIENT  
21 PRIVILEGE.

22 THEY'RE ARGUING THAT THERE SHOULD BE AN EXCEPTION TO  
23 THAT WAIVER, WHICH WOULD BE COMMON INTEREST.

24 SO, THE ANALYSIS HAS TO GO TWO WAYS. IS THIS A THIRD  
25 PARTY. AND IF IT'S PRODUCED TO A THIRD PARTY, THERE'S A

1 WAIVER. OR IS THERE AN EXTENSION OF THE ATTORNEY-CLIENT  
2 PRIVILEGE AND THAT THERE'S A COMMON INTEREST. SO, THERE'S BOTH  
3 ISSUES AT STAKE.

4 SO, I MEAN, TO SAY THAT IT'S ONE OR THE OTHER, I  
5 THINK IS AN INCOMPLETE ANALYSIS OF THE ISSUE.

6 THE COURT: I HAVEN'T SEEN THE MATERIAL. IT HASN'T  
7 BEEN SUBMITTED TO ME. BUT AS DESCRIBED, IF A LETTER FROM A  
8 LAWYER AT COUDERT BROTHERS WAS SENT TO THE MUSICAL RIGHTS  
9 COMPANY OR WHATEVER -- SUMMY? AM I GETTING THE NAME --  
10 WARNER'S PREDECESSOR --

11 MS. LEMOINE: THAT'S CORRECT, YOUR HONOR.

12 THE COURT: YES.

13 I MEAN, THAT'S OBVIOUSLY GOING TO BE PRIVILEGED, AND  
14 I DON'T THINK THAT THERE'S ANY DISPUTE THAT AT ORIGINATION  
15 THAT'S -- THERE'S A PRIVILEGE ISSUE THERE.

16 AND, SO, IF THAT'S YOUR STARTING POINT, MS. LEMOINE,  
17 I'M TOTALLY WITH YOU.

18 IF THE CONTENTION IS THAT BY THIS DOCUMENT THROUGH  
19 WHATEVER MEANS -- AND I'M NOT FULLY INFORMED ABOUT THAT -- ENDS  
20 UP IN THE HANDS OF ASCAP FOR PURPOSES OF ENFORCING RIGHTS OR  
21 WHATEVER ASCAP IS GOING TO DO, IF YOUR CLAIM IS THAT IS STILL  
22 PRIVILEGE WITHOUT WAIVER, AND IF THE PLAINTIFF IS SAYING, NO,  
23 THAT IS THE WAIVER, YOU KNOW, I GET THAT. AND THAT'S AN ISSUE  
24 THAT IS VERY SIMILAR TO WHAT WE WERE TALKING ABOUT EARLY ON  
25 THAT WE, YES, SUCCESSFULLY DUCKED IN JUNE.

1 BUT IS THAT SORT OF THE STATE OF PLAY?

2 MS. MANIFOLD: IT'S PLAINTIFF'S POSITION THAT IT'S  
3 THE LATTER, THAT YOU HAVE TO LOOK AT WHETHER THERE'S A COMMON  
4 INTEREST BETWEEN ASCAP AND SUMMY AND WHAT THAT INTEREST IS.

5 AND PLAINTIFFS BELIEVE AND LOOKING AT U.S. VERSUS  
6 GONZALEZ THAT WE'RE ENTITLED TO, YOU KNOW, A DEPOSITION TO  
7 EXPLORE THE RELATIONSHIP BETWEEN THE TWO ENTITIES --

8 THE COURT: ALL RIGHT. LET ME -- LET ME -- LET ME --

9 MS. MANIFOLD: -- AND THE CONCEPT.

10 MS. LEMOINE: YOUR HONOR, IF I COULD RESPOND TO THAT  
11 BRIEFLY?

12 THE COURT: YES, PLEASE.

13 MS. LEMOINE: I THINK YOUR HONOR HAS THE ISSUE  
14 EXACTLY. WHETHER THERE'S BEEN A WAIVER AND WHETHER THE COMMON  
15 INTEREST DOCTRINE PROTECTS AGAINST THAT WAIVER ONLY COMES INTO  
16 PLAY IF, IN FACT, THE DOCUMENT IS PRIVILEGED.

17 WE ALL AGREE THE DOCUMENT IS PRIVILEGED FROM THE  
18 START. IT'S THE QUESTION OF WHAT WAS THE CONSEQUENCE OF IT  
19 HAVING BEEN SHARED WITH AFCAP -- ASCAP, PARDON ME.

20 THE COURT: RIGHT, RIGHT.

21 MS. LEMOINE: I THINK -- I DO WANT TO JUST POINT OUT  
22 THAT I WOULD LIKE YOUR HONOR TO READ THE CASE THAT MS. MANIFOLD  
23 JUST CITED TO YOU. BECAUSE WHAT ACTUALLY HAPPENED IN THAT CASE  
24 WAS THE NINTH CIRCUIT REVERSED A DISTRICT COURT'S DECISION TO  
25 ALLOW A DEPOSITION TO GO FORWARD AS TO A PRIVILEGE ISSUE.

1           SO, IT'S NOT IN THE -- I DON'T BELIEVE IT'S IN THE  
2 FEDERAL RULE 26(B)(5)(B) CONTEXT, BUT THE COURT REVERSED THAT  
3 AND, INSTEAD, HELD THAT AN EVIDENTIARY HEARING SHOULD BE HELD  
4 IN CAMERA.

5           SO, THAT IS NOT ADEQUATE AUTHORITY FOR THERE BEING  
6 DISCOVERY IN THIS CASE, IN PARTICULAR, SINCE WE'RE DEALING WITH  
7 A FEDERAL RULE 26(B)(5)(B) SITUATION.

8           MS. MANIFOLD: I DIS-- THE COURT CAN READ U.S.  
9 VERSUS GONZALEZ ON ITS OWN. I DISAGREE WITH MS. LEMOINE'S  
10 RECITATION OF THE CASE BECAUSE THE COURT THERE DECIDED WHETHER  
11 A DEPOSITION COULD GO AHEAD AND NOT AND WHETHER A MOTION TO  
12 QUASH WOULD BE GRANTED. IT DENIED THAT MOTION TO QUASH AND  
13 MADE CERTAIN RULINGS WITH REGARD TO THE EVIDENCE THAT IT HAD  
14 BEFORE IT. AND THEN IT WENT UP TO THE NINTH CIRCUIT. AND THE  
15 NINTH CIRCUIT SENT IT BACK ON WORK PRODUCT VERSUS  
16 ATTORNEY-CLIENT PRIVILEGE AND ASKED THE COURT TO DO A FURTHER  
17 EVIDENTIARY ANALYSIS TO DETERMINE WHEN THE JOINT DEFENSE AROSE,  
18 HOW A COMMON INTEREST AROSE, AND THE TIMING WITH REGARD TO THE  
19 DISCLOSURES.

20           SO, IT SENT THE COURT BACK FOR A FURTHER IN CAMERA  
21 EVIDENTIARY HEARING TO RESOLVE THESE ISSUES. BUT I DIDN'T SEE  
22 ANY DETERMINATION BY THE NINTH CIRCUIT THAT THE DEPOSITION AND  
23 EXPLORATION OF THESE ISSUES PRIOR TO THAT THAT WAS PERMITTED BY  
24 THE DISTRICT COURT WAS IMPROPER IN ANY WAY.

25           THE COURT: ALL RIGHT. WELL, I MEAN, I READ THE

1 POTATO CASE. I READ A BUNCH OF OTHER THINGS AND REVIEWED MY  
2 NOTES OF THE PREVIOUS HEARING.

3 I WILL TAKE A LOOK AT GONZALEZ IF IT'S RELEVANT HERE.  
4 I MEAN, THE POINT -- I UNDERSTAND -- I UNDERSTAND THE POINT  
5 ABOUT PLAINTIFF TAKING OR CONDUCTING DISCOVERY ABOUT THE  
6 RELATIONSHIP BETWEEN ASCAP AND SUMMY, SLASH, WARNER. I  
7 UNDERSTAND THAT.

8 I DON'T KNOW THAT -- I DON'T KNOW THAT I'M ON BOARD  
9 THAT THIS IS NECESSARILY USING THE DOCUMENTS IN VIOLATION OF  
10 RULE 26. IF THERE HAD BEEN REFERENCE MADE TO THEM, IF THERE  
11 HAD BEEN SOMETHING HAVING TO DO WITH THE CONTENTS OR THE  
12 GENERATION OF THEM, YOU KNOW, WE MIGHT GET A LITTLE BIT CLOSER.

13 I DON'T KNOW THAT I HEARD THAT THEY GOT THAT CLOSE TO  
14 THAT ISSUE. AND I'M LITTLE -- A LITTLE TURNED AROUND ON THE  
15 USE OF SOME STATEMENTS THAT ASCAP MADE IN TRYING TO QUASH THE  
16 SUBPOENA ABOUT ITS STATEMENTS ABOUT ITS RELATIONSHIP WITH  
17 WARNER HERE.

18 MS. LEMOINE, YOU WERE ON YOUR WAY ON THE TIMING  
19 ISSUE. AND I DIDN'T MEAN TO CUT YOU OFF, BUT I WANTED TO SORT  
20 OF MAKE SURE I UNDERSTAND REALLY WHERE THE DECISION POINT IS ON  
21 HERE.

22 DID YOU WANT TO KEEP GOING?

23 MS. LEMOINE: YES. I MEAN, I SEE, YOUR HONOR. I  
24 THINK I'VE MADE -- YOU KNOW, I BELIEVE THAT THE REASON THEY  
25 WERE LOOKING FROM ASCAP -- AND IF YOU LOOK AT THE 30(B)(6),

1 IT'S LIMITED TO WHETHER -- THE RELATIONSHIP IN THE -- TO WHERE  
2 THERE HAD BEEN A WAIVER. AND NOW THEY ARE TAKING A 90-MINUTE  
3 DEPOSITION OF ASCAP ON FRIDAY TO LOOK AT TWO THINGS.

4 ONE, WHAT WAS MR. REIMER'S STATE OF MIND WHEN HE  
5 PRODUCED THE DOCUMENT, AND, TWO, TO GET HIM TO -- I THINK GIVE  
6 SOME TESTIMONY REGARDING HIS DECLARATION JUST -- TO UNDERSCORE  
7 THESE POINTS. THE 30(B)(6) THEY SERVED ON US WAS THE SAME.

8 SO, MY CONCERN IS THAT IT WENT TO THE WAIVER ISSUE.  
9 AND I THINK THAT THERE ARE CASES THAT WE WILL CITE TO YOUR  
10 HONOR IN THE JOINT STIP IF YOUR HONOR GRANTS THE EX PARTE  
11 APPLICATION THAT YOU'LL SEE SORT OF DISCUSS WHETHER THAT'S  
12 APPROPRIATE FOR THE PARTIES THEMSELVES TO DO RATHER THAN FOR  
13 THE COURT TO DO.

14 I THINK THE COURT NEEDS TO MAKE IN OUR VIEW A FACTUAL  
15 DETERMINATION IN THE FIRST INSTANCE AS TO WHETHER THERE'S THE  
16 NEED TO GET INVOLVED IN THOSE DETAILS -- AFTER YOU DECIDE THE  
17 COMMON INTEREST LEGAL ISSUE.

18 IF YOU THINK YOU NEED MORE FACTS AT THAT POINT, WE  
19 WOULD SAY THAT THAT'S FOR THE COURT TO CONDUCT IN CAMERA TO  
20 INSURE THAT THE PRIVILEGE STAYS PROTECTED.

21 BECAUSE, AGAIN, NOBODY DISAGREES. WE ARE TALKING  
22 ABOUT A PRIVILEGED DOCUMENT. WE ARE ONLY TALKING ABOUT WHETHER  
23 THERE HAS BEEN A WAIVER. AND THAT'S WHERE WE ARE IN A POSITION  
24 WHERE WE HAVE TO BE EXTRAORDINARILY CAREFUL AND PROTECT IT  
25 BECAUSE WE VIEW THIS AS GOING TO THE HEART OF THE LEGAL ADVICE

1 THAT OUR PREDECESSOR OBTAINED.

2 THE COURT: YOU SEE, I'M WONDERING WHETHER THERE ARE  
3 TWO WAIVER ISSUES HERE, AND I WANT TO MAKE SURE I'M NOT  
4 CONFLATING THE TWO.

5 WHEN COUDERT ADVISED SUMMY, YOU KNOW, THAT'S THE  
6 ORIGINATION OF THE PRIVILEGE. NO QUESTION, RIGHT? I DON'T --  
7 WE DON'T NEED TO GO OVER THAT AGAIN. IT'S NOT AS IF JUST SOME  
8 GUY OFF THE STREET GAVE ADVICE. IT WAS A NEW YORK CITY LAW  
9 FIRM GAVE ADVICE TO SUMMY. I GOT IT.

10 AND, THEN, I THINK PART OF THE WAIVER ISSUE IS WHEN  
11 SUMMY GAVE THAT LETTER, LETTERS -- I'M GOING TO MISSTATE THE  
12 FACTS A LITTLE BIT -- TO ASCAP. I THINK THAT THERE'S KIND OF A  
13 BURIED WAIVER ISSUE THERE. IT MAY ALSO RAISE THE COMMON  
14 INTEREST ISSUE. BUT MY -- MY PERHAPS QUESTION IS WHETHER THERE  
15 IS PART OF THE WAIVER ARGUMENT THERE.

16 THEN, WE HAVE THE WAIVER THAT MAY HAVE OCCURRED IN  
17 MAY OF THIS YEAR WHEN THE MATERIAL WAS TURNED OVER IN RESPONSE  
18 TO A SUBPOENA BY ASCAP, EITHER ACTING AS AN AGENT OR IN A  
19 COMMON INTEREST WITH WARNER AND THEN THE CLAW-BACK ISSUE.

20 MS. LEMOINE: RIGHT.

21 THE COURT: AM I OFF BASE HERE?

22 MS. MANIFOLD: NO. YOUR HONOR, THIS IS BETSY  
23 MANIFOLD FOR THE PLAINTIFF.

24 I THINK THAT'S EXACTLY ACCURATE BECAUSE IF THERE IS A  
25 COMMON INTEREST, THE ANALYSIS WOULD GO -- YOU KNOW, BOTH

1 PARTIES HAVE TO WAIVE. AND, SO, THE ISSUE IS WAS THE AFCAP --  
2 NOW I'M DOING IT -- THE ASCAP WAIVER, WAS IT KNOWING AND  
3 INTENTIONAL. SO THIS WAY WE KNOW ASCAP HAS WAIVED THEIR PART  
4 OF THE JOINT INTEREST. NOW THE ISSUE IS WHETHER -- I ASSUME  
5 THAT THAT'S WHAT THE DEPOSITION -- I MEAN, I'M PRESUMING THAT  
6 THAT'S WHAT OUR DEPOSITION ON JULY 11TH WILL SHOW. AND IF  
7 THAT'S WHAT IT SHOWS, THEN, WE NOW WOULD TURN BACK TO SAY, YOU  
8 KNOW, YOU PRODUCED IT TO ASCAP. THERE'S THE WAIVER. AND THAT  
9 THERE'S NO COMMON INTEREST THAT WOULD NOW PROTECT WHATEVER  
10 PRIVILEGE EXISTED AT THE TIME THAT IT WAS PRODUCED.

11 SO, YOUR HONOR IS CORRECT, YOU HAVE TO HAVE WAIVERS  
12 ON BOTH SIDES. SO, THERE ARE TWO WAIVER ISSUES AND THEN YOU  
13 LOOK AT THE COMMON INTEREST.

14 THE COURT: SEE, I'M NOT --

15 MS. LEMOINE: YOUR HONOR, IF I --

16 THE COURT: GO AHEAD, MS. LEMOINE.

17 MS. LEMOINE: IF I COULD RESPOND TO THAT.

18 I MEAN, THAT'S SORT OF THE -- ONE OF THE CORE LEGAL  
19 ARGUMENTS WE'VE BEEN ASSERTING THIS WHOLE TIME AS TO WHY MR.  
20 REIMER'S STATE OF MIND DOESN'T REALLY MATTER HERE.

21 YOUR HONOR, IN THE JOINT STIP I'VE BEEN LOOKING AT,  
22 YOU KNOW, PLAINTIFFS DON'T RAISE WHETHER MR. REIMER WAIVED.  
23 BECAUSE THE LAW IN THE NINTH CIRCUIT IS THAT, AS MS. MANIFOLD  
24 STATED, ONE PARTY CAN'T WAIVE.

25 THE COURT: YES. I MEAN, IT'S CLEAR -- IT'S CLEAR

1 WARNER DIDN'T WAIVE.

2 MS. LEMOINE: EXACTLY.

3 THE COURT: OKAY. THAT'S --

4 MS. LEMOINE: OKAY. SO, IF WARNER DIDN'T WAIVE,  
5 WHETHER ASCAP DID OR NOT, DOESN'T MATTER.

6 THE COURT: I CERTAINLY GET THAT. AND -- SO THAT'S  
7 WHY I DON'T UNDERSTAND WHY ME LOOKING AT A PIECE OF PAPER IN  
8 CAMERA HELPS ANYTHING. I THINK WE ALL PRESUMED THAT THE  
9 ORIGINAL LEGAL ADVICE WHICH IS CONTAINED ON THE PIECES OF PAPER  
10 WAS AT SOME POINT IN THE 1900S PRIVILEGED.

11 MS. LEMOINE: YES.

12 AND, YOUR HONOR, I WOULD -- ONE OF THE THINGS I HAD  
13 ON MY LIST TO RAISE WITH YOU TODAY REGARDLESS OF WHAT THE  
14 DIRECTION THAT THIS COURT WENT, IS THAT THE JOINT STIP THAT I  
15 HAVE -- THE PORTION FROM PLAINTIFFS THAT I'VE BEEN WORKING ON  
16 OVER THE HOLIDAY WEEKEND AND TODAY --

17 THE COURT: HAPPY HOLIDAYS.

18 MS. LEMOINE: THANK YOU. IT'S A GREAT -- YOU KNOW,  
19 I'M LIVING THE DREAM, YOUR HONOR.

20 THE COURT: SO AM I.

21 GO AHEAD.

22 MS. LEMOINE: -- USES -- THAT USES THE -- IT ACTUALLY  
23 DOES USE THE DOCUMENT A GREAT DEAL. IT QUOTES FROM IT  
24 EXTENSIVELY. IT CHARACTERIZES IT.

25 MS. MANIFOLD SAID THIS MORNING THAT THEY HAVEN'T USED

1 THEM AND THEY HAVEN'T LOOKED AT THEM, THAT'S NOT CONSISTENT  
2 WITH THE DOCUMENT I HAVE.

3 THE COURT: OH, WHEN I SAW THE REDACTIONS I ASSUMED  
4 THAT THEY WERE MAKING REFERENCE TO IT.

5 MS. LEMOINE: YES. AND IN OUR VIEW THAT -- THAT  
6 CAN'T BE ANYTHING OTHER THAN USE.

7 NOW, WHEN THE ISSUE IS WAIVER, THERE IS NO REASON TO  
8 GO INTO WHAT THE DOCUMENT SAYS. BECAUSE WE UNDERSTAND ITS  
9 NATURE.

10 THE COURT: SEE, THIS IS -- THIS IS WHAT CONFUSES ME.  
11 BY THE WAY, I'M NOT BEING CRITICAL OF ANYBODY. YOU FOLKS ARE  
12 DOING A NICE JOB. THIS IS AN INTERESTING CASE, AND THERE'S  
13 SOME GOOD LAWYERING GOING ON HERE. AND WHEN WE WERE HAVING OUR  
14 DISCUSSION A FEW WEEKS AGO ABOUT, YOU KNOW, WHAT GOES ON A LOG,  
15 HOW THINGS GET PRODUCED -- AND I DON'T REMEMBER WHETHER ASCAP,  
16 BMI WERE COMING UP OR SORT OF THEIR SIBLING ORGANIZATIONS IN  
17 EUROPE. I MEAN, I REMEMBER HEARING A LOT ABOUT UK AND ITS  
18 FRENCH RIGHTS MANAGERMENTS FOR, YOU KNOW, BONJOUR A VOUS -- OH,  
19 THE TRANSCRIBER IS GOING TO LOVE THAT ONE.

20 AND ONE OF THE THINGS I THINK I RECALL TALKING WITH  
21 YOU ABOUT IS, YOU KNOW, FOR ME TO MAKE A DETERMINATION ON  
22 COMMON INTEREST EXCEPTION OR WAIVER IS -- THERE ARE FACTUAL  
23 ISSUES THERE REGARDING WHAT THE RELATIONSHIP IS BETWEEN  
24 COPYRIGHT OWNER AND RIGHTS MANAGEMENT COMPANY AND WHAT THOSE  
25 PARTIES ACTUALLY DO.

1           AND WHEN WE WERE TALKING ABOUT SUPPLEMENTAL FILINGS,  
2           THAT WAS KIND OF AN ISSUE ON THE TABLE. I DON'T -- I DON'T  
3           EXACTLY KNOW WHAT THIS FRENCH COMPANY IS AND WHAT IT WAS DOING  
4           AND WHAT THE RELATIONSHIP WAS GOING TO BE AND, ON THAT BASIS,  
5           MAKING A COMMON INTEREST DETERMINATION ONE WAY OR THE OTHER,  
6           YOU KNOW, EXTENDING AND PROTECTING THE PRIVILEGE OR FINDING THE  
7           PRIVILEGE TO BE A NONSTARTER REALLY KIND OF RELATED TO THAT.

8           MS. MANIFOLD: WELL, YOUR HONOR, AND THAT'S EXACTLY  
9           WHY THE PLAINTIFF SERVED A 30(B)(6) NOTICE AND SERVED THE  
10          SUBPOENA ON ASCAP -- TO GET EXACTLY THAT KIND OF FACTUAL  
11          BACKGROUND.

12          THE COURT: AND I'M NOT -- I'M NOT QUIBBLING ON THAT.  
13          I THEN HAVE QUESTIONS AS TO WHY I NEED TO KNOW ABOUT THE  
14          SUBSTANCE OF THE DOCUMENTS. IT REALLY DOESN'T MATTER WHAT TO  
15          SOME EXTENT THE DOCUMENTS ARE. AND, YOU KNOW, RULE 26 DOES SAY  
16          NO USE OF THEM. I DON'T KNOW THAT YOU'RE MAKING USE OF THEM IN  
17          EXPLORING THE RELATIONSHIP BETWEEN THE COMPANIES, ALTHOUGH, YOU  
18          KNOW, I'LL HEAR THAT IF THAT'S NECESSARY. CITING TO THEM IN  
19          ANY WAY MEANS THAT THEY HAVEN'T BEEN SEQUESTERED. IT MEANS  
20          THAT SOMEBODY HAS GOT THEM ON THEIR DESK AND THEY'RE LOOKING AT  
21          THEM. AND THERE MAY BE AN ISSUE THERE.

22          SO, MY THOUGHTS -- I'M GOING TO TAKE THIS IN SERIES.  
23          BECAUSE THAT'S MY RESPONSIBILITY HERE.

24          THE APPLICATION AND THE REQUEST IS TO SHORTEN TIME OR  
25          TO EXPEDITE THE PROCESS BY WHICH THE ISSUE OF WHETHER THESE

1 MATERIALS ARE PRIVILEGED AND WERE PROPERLY OR IMPROPERLY  
2 PRODUCED DEPENDS ON WHETHER THIS IS TIMELY, WHETHER WE GOT HERE  
3 IN THE RIGHT WAY AND IN THE RIGHT MANNER. I THINK THAT'S AN  
4 EQUITABLE DETERMINATION THAT I HAVE TO MAKE.

5 I WILL SAY THAT, YOU KNOW, GIVEN -- WHERE I WAS IN  
6 LATE MAY, EARLY JUNE WAS THAT THERE WAS AN ONGOING DISCUSSION.  
7 THESE ISSUES WERE COMING TO THE FOREFRONT. THE DEFENSE HAD HAD  
8 SOME DIFFICULTY IN MARSHALING MATERIALS, IN ADEQUATELY  
9 DESCRIBING THEM ON A PRIVILEGE LOG.

10 YOU FOLKS SPENT A LOT OF TIME ON THOSE ISSUES AND  
11 EVENTUALLY CAME TO A RESOLUTION, WHICH I'M GRATEFUL FOR. ON  
12 THOSE MATERIALS IT SEEMS LIKE YOU'VE BEEN ABLE TO LIVE WITH IT.

13 I ABSOLUTELY UNDERSTAND THE FRUSTRATION WITH SORT OF  
14 THE LATE REQUESTS TO MOVE FORWARD ON THIS ISSUE HERE, BUT --  
15 AND I'M VERY SKEPTICAL OF SORT OF LAST-MINUTE, EVE-OF-DEADLINE  
16 ISSUES. BUT GIVEN THAT IT WAS PARALLEL TO WHAT WAS ON THE  
17 TABLE AT THE TIME IN TERMS OF MATERIAL THAT THE COMPANY ITSELF  
18 WAS PRODUCING, WE HAD THE OVERLAY OF ANOTHER PARTY  
19 INADVERTENTLY PRODUCING AND THEN WITHDRAWING AND SOME OTHER  
20 FACTUALS HERE -- FACTUAL ISSUES HERE.

21 I'M INCLINED TO HEAR THE MERITS AND FIGURE OUT WHERE  
22 THINGS GO. I'M NOT SURE THAT THE DATE THAT YOU FOLKS HAVE  
23 SELECTED IS GOING TO BE FEASIBLE.

24 SO, I THINK -- I DON'T FIND THAT THE EX PARTE  
25 APPLICATION WAS TACTICAL. I'VE GOTTEN A DECENT RESPONSE FROM

1 THE PLAINTIFF AS TO THE ONGOING DILIGENCE THAT WAS GOING ON.  
2 YOU KNOW, THERE WAS AN ONGOING RESPONSE FROM THE DEFENSE ON  
3 SOME OF THESE ISSUES. SOME OF IT IMMEDIATE; SOME OF IT LATER.

4 I'M GOING TO BE HARD-PRESSED TO SAY THAT THE DELAY IN  
5 FILING THIS WAS DELIBERATE AND TACTICAL AS THE DEFENSE SAYS.  
6 BUT I ALSO RECOGNIZE THAT THERE'S A NEED TO EXPEDITE THESE  
7 THINGS.

8 SO, WHAT I'M INCLINED TO DO IS GRANT THE APPLICATION  
9 TO SHORTEN TIME AND TO HEAR THIS MOTION. BUT WE'RE GOING TO  
10 PICK UP THE PACE. THIS WAS ORIGINALLY SET FOR -- OR THE  
11 REQUEST WAS TO SET IT FOR -- WHEN?

12 MS. MANIFOLD: JULY 30TH.

13 AM I CORRECT, MS. LEMOINE?

14 MS. LEMOINE: YES, MS. MANIFOLD, THAT'S CORRECT.

15 THE COURT: AND I'M NOT AVAILABLE FOR THAT. YOU'RE  
16 DOING DISCOVERY ON THE RELATIONSHIP ISSUE THIS WEEK YOU SAY?

17 MS. LEMOINE: THAT'S CORRECT, YOUR HONOR.

18 THE COURT: I CAN HEAR THIS ANYTIME ON THE WEEK OF  
19 THE 21ST.

20 AND, MS. LEMOINE, I'D LIKE TO HEAR FROM YOU. SINCE  
21 YOU NEED TO RESPOND TO THE PAPERS. IT SOUNDS LIKE YOU'VE  
22 ALREADY TAKEN A RUN AT IT.

23 WHAT WORKS FOR YOUR SCHEDULE? AND, THEN, I'LL HEAR  
24 FROM MS. MANIFOLD.

25 MS. LEMOINE: SURE. LET ME GET MY CALENDAR UP, YOUR

1 HONOR.

2 THE COURT: OF COURSE.

3 MS. LEMOINE: I APPRECIATE YOUR HONOR'S CONSIDERING  
4 THIS ISSUE, AND I APPRECIATE YOUR RULING.

5 I WOULD ASK I THINK IF WE COULD -- YOU KNOW, IN ORDER  
6 TO HOLD TO THE JULY 30TH HEARING, MS. MANIFOLD AND I HAD AGREED  
7 THAT I WOULD GET MY PORTION TO HER BY END OF THE DAY TODAY.

8 I THINK THAT IF WE'RE GOING TO SORT OF AGREE ON A  
9 SCHEDULE, I'D LIKE A COUPLE OF EXTRA DAYS.

10 THE COURT: OH, NO. NO, NO, NO. YOU'RE GOING TO --  
11 WE'LL SET A SCHEDULE RIGHT HERE AND RIGHT NOW BECAUSE I THINK  
12 --

13 MS. LEMOINE: OKAY.

14 THE COURT: I THINK I WANT YOU TO HEAR ABOUT MY -- I  
15 WANTED YOU TO HEAR MY THOUGHTS ON THIS.

16 MS. LEMOINE: NO, I APPRECIATE IT. I APPRECIATE  
17 THAT. I UNDERSTAND YOUR HONOR'S VIEWS. SO --

18 THE COURT: AND IF THERE'S A NEED FOR A FURTHER  
19 RESPONSE FROM PLAINTIFF -- I MEAN, I'LL ACCEPT A SEPARATE  
20 SUBMISSION. THIS IS A BIG ISSUE, AND THIS IS IMPORTANT. WE'RE  
21 GOING TO DO THIS THE RIGHT WAY. I JUST HAPPEN NOT TO BE IN  
22 TOWN ON JULY 30. YOU DIDN'T KNOW THAT. LET'S PICK ANOTHER  
23 DATE AND A BETTER DATE.

24 MS. LEMOINE: SURE. WHEN IS YOUR HONOR AROUND THAT  
25 WEEK OF THE --

1 THE COURT: YOU CAN HAVE ME ON THE MORNING OF  
2 THURSDAY, THE 24TH. YOU COULD HAVE ME ANY TIME ON FRIDAY, THE  
3 25TH. YOU COULD HAVE ME ON THE AFTERNOON OF WEDNESDAY, THE  
4 23RD. SO, AFTERNOON, WEDNESDAY, THE 23RD; MORNING, THURSDAY,  
5 24TH; ANYTIME FRIDAY, 25TH.

6 MS. LEMOINE: I COULD DO ANY OF THOSE DAYS, BUT  
7 FRIDAY PROBABLY LOOKS BEST.

8 MS. MANIFOLD: I AGREE WITH MS. LEMOINE.

9 THE COURT: OKAY.

10 MS. MANIFOLD: AND I KNOW THE COURT LIKES TO HEAR  
11 THAT.

12 THE COURT: YES. YES, I DO.

13 WHY DON'T WE DO THIS. LET'S SET THE MOTION FOR  
14 HEARING ON FRIDAY, THE 25TH OF JULY, 9:30 A.M. THAT WILL BE  
15 HERE IN MY COURTROOM H ON THE NINTH FLOOR OF THE SPRING STREET  
16 COURTHOUSE.

17 NOW, MS. MANIFOLD HAS PRODUCED HER SIDE OF THE JOINT  
18 SUBMISSION -- SEE, I DON'T SAY STIPULATION.

19 MS. MANIFOLD: THANK YOU.

20 THE COURT: AND MS. LEMOINE AND MR. KAPLAN, YOU'RE  
21 GOING TO HAVE UNTIL NEXT TUESDAY, THE 15TH --

22 MS. LEMOINE: GREAT.

23 THE COURT: -- TO PROVIDE YOUR RESPONSE.

24 MS. MANIFOLD WILL BE RESPONSIBLE FOR FILING THAT.

25 HOWEVER, I WILL ACCEPT SUPPLEMENTAL BRIEFS FROM

1 EITHER SIDE BY OR BEFORE NOON ON TUESDAY, THE 22ND.

2 MS. LEMOINE: THANK YOU, YOUR HONOR.

3 THE COURT: OKAY. THAT'S GOING TO BE LESS THAN 10  
4 PAGES BECAUSE WE'RE GOING TO BE FOCUSED AND TIGHT.

5 MS. LEMOINE: YES, YOUR HONOR.

6 MS. MANIFOLD: THE 22ND? I APOLOGIZE, YOUR HONOR.

7 THE COURT: CORRECT, YES. YES.

8 SO, THE JOINT SUBMISSION FROM THE DEFENSE TO  
9 PLAINTIFF BY OR BEFORE TUESDAY, THE 15TH. AND, THEN, YOU'LL BE  
10 RESPONSIBLE FOR FILING THAT.

11 AND, THEN, ANY SUPPLEMENTAL SUBMISSION FROM EITHER  
12 SIDE, NOT TO EXCEED 10 PAGES, BY OR BEFORE TUESDAY, THE 22ND.

13 AND THE REASON I WANT TO SET -- YOU KNOW, IF THERE'S  
14 ANY RESPONSE, IF THERE'S ANYTHING ELSE THAT'S GOING ON IN  
15 DISCOVERY THAT I NEED TO KNOW ABOUT OR THAT YOU WERE OR WEREN'T  
16 ABLE TO GET IN -- AND, REALLY, I THINK WE'RE FOCUSING --  
17 HOPEFULLY THIS HAS BEEN HELPFUL TO FOCUS THINGS. I MEAN, I  
18 THINK THE FOCUS IS ON THIS COMMON INTEREST ISSUE THAT WE DANCED  
19 UP AGAINST A FEW WEEKS AGO BUT KIND OF GOT AWAY FROM.

20 I DON'T KNOW THAT I NEED TO HEAR TOO, TOO MUCH ABOUT  
21 ASCAP'S I'M CALLING IT INADVERTENT PRODUCTION IN MAY  
22 SINCE THERE WAS A CLAW-BACK REQUEST. I MEAN, MS. MANIFOLD, IF  
23 WE AGREE THAT THERE HASN'T BEEN A FULL WAIVER, DO I NEED TO  
24 HEAR TOO MUCH ABOUT ASCAP TURNED IT OVER?

25 MS. MANIFOLD: I WOULD NEED TO LOOK AT THE ISSUE,

1 YOUR HONOR. I'M NOT SURE I WANT TO COMMIT TO THAT.

2 THE COURT: OKAY.

3 MS. MANIFOLD: I THINK THE COURT'S RIGHT.

4 THE COURT: OKAY. OKAY.

5 MS. MANIFOLD: BUT --

6 THE COURT: NO, THAT'S -- THAT'S FINE. I DON'T MEAN  
7 TO PUT YOU ON THE SPOT. BUT, YOU KNOW, THE CLIENT HERE, YOU  
8 KNOW, ASSUMING WE'RE TALKING ABOUT AN AGENCY RELATIONSHIP, THE  
9 CLIENT MADE AN ASSERTION HERE. AND I THINK YOU WANT TO GIVE  
10 SOME REAL THOUGHT TO WHETHER YOU WANT TO RELY ON THE FACT THAT  
11 A LAWYER AT ASCAP, YOU KNOW, SHOVED IT IN AN ENVELOPE AND  
12 TURNED IT OVER TO YOU. AND, THEN, YOU HEARD WHAT YOU HEARD.

13 MS. MANIFOLD: UNDERSTOOD.

14 THE COURT: OKAY.

15 IS THAT FAIR, MS. LEMOINE?

16 MS. LEMOINE: THAT'S FAIR, YOUR HONOR.

17 THE COURT: I MEAN, I THINK -- I THINK THE ISSUE IS  
18 WHAT IS THE RELATIONSHIP BETWEEN WARNER OR ITS PREDECESSOR AND  
19 ASCAP AND WHETHER IT FITS WITHIN THIS DOCTRINE. I THINK THAT'S  
20 OF INTEREST. I MEAN, I SAW A LOT OF THINGS IN PLAINTIFF'S  
21 PAPERS THAT THE RELATIONSHIP MAY BE SOMETHING WITH AN EYE  
22 TOWARD LITIGATION. BUT I'M SURE THAT YOU WANT TO GIVE SOME  
23 THOUGHT AS TO WHETHER THE RELATIONSHIP HOLDS TRUE TO OTHER  
24 THINGS, INCLUDING RIGHTS MANAGEMENT AND RIGHTS ASSERTION, OR  
25 WHETHER THAT IS ITSELF SOMETHING WITH AN EYE TOWARDS

1 LITIGATION. BECAUSE I THINK -- THAT'S A REAL ISSUE. AND THEN  
2 SORT OF THE FUNCTIONAL RELATIONSHIP BETWEEN ASCAP AND ITS RIGHT  
3 HOLDERS.

4 MS. MANIFOLD: YOUR HONOR, WE HAVE THE DEPOSITION OF  
5 A SENIOR ADMINISTRATOR OF THE COPYRIGHT DEPARTMENT OF WARNER  
6 CHAPPELL TOMORROW. AND WOULD WE BE PERMITTED TO ASK ANY  
7 QUESTIONS WITH REGARD TO THE RELATIONSHIP BETWEEN ASCAP AND  
8 WARNER CHAPPELL AT THAT DEPOSITION SHOULD THE WITNESS BE  
9 KNOWLEDGEABLE?

10 THE COURT: MS. LEMOINE?

11 MS. LEMOINE: WELL, THAT IS SOMETHING THAT IN THE  
12 PAST I HAVE SAID I THINK TOUCHES REALLY CLOSELY TO THE WAIVER  
13 ISSUES. AND I UNDERSTAND YOUR HONOR'S NEED FOR FACTS ON THAT.  
14 AND I THINK WE WOULD -- AS TO THE RELATIONSHIP AND AS TO THE  
15 SORT OF FACTS ABOUT THE RELATIONSHIP THAT MR. BLIETZ KNOWS,  
16 THAT THAT WOULD NOT BE COVERED BY THE PRIVILEGE. WE CAN AGREE  
17 ON THAT.

18 THE COURT: OKAY.

19 MS. LEMOINE: MY CONCERN IS THAT WE ARE GOING TO GET  
20 KIND OF CLOSE TO THE LINE, AND I'M WONDERING IF YOUR HONOR IS  
21 AVAILABLE IN THE EVENT --

22 THE COURT: AHH, HERE WE GO. HERE WE GO. THE CALL.  
23 CAN WE HAVE A REFEREE CALLING ON THIS.

24 MS. LEMOINE: I KNOW. THIS IS SO -- THIS IS SO  
25 NEW YORK AND NOT CALIFORNIA, RIGHT? -- WHAT I'M DOING RIGHT

1 NOW.

2 THE COURT: IT'S --

3 MS. LEMOINE: BUT, YOU KNOW, IF NOT, THAT'S FINE TOO.

4 AND WE CAN JUST --

5 THE COURT: NO, NO, NO.

6 MS. LEMOINE: WE CAN TAKE IT QUESTION BY QUESTION.

7 THE COURT: NO, NO. THAT'S ENTIRELY LEGITIMATE.

8 LOOK, YOU BOTH HAVE YOUR EYES ON THE RIGHT THINGS HERE. AND I  
9 ADMIRE THAT. AND YOU'RE NOT FIGHTING FOR THE SAKE OF FIGHTING.

10 OBVIOUSLY QUESTIONS ABOUT SPECIFIC CIRCUMSTANCES,  
11 SPECIFIC RIGHTS FOR A SPECIFIC SONG ARE GOING TO BE POTENTIALLY  
12 PROBLEMATIC. GENERALLY WHAT IS IT THAT ASCAP DOES FOR CLIENTS.  
13 HOW DO CERTAIN SITUATIONS IN GENERAL GET HANDLED, YOU KNOW,  
14 RAISES LESS ISSUES. AND I THINK YOU'VE TOUCHED ON THAT RIGHT  
15 NOW.

16 WHAT TIME IS THE DEPOSITION SCHEDULED FOR?

17 MS. LEMOINE: TEN O'CLOCK TOMORROW, YOUR HONOR.

18 THE COURT: DIDN'T GET IT. WHAT TIME?

19 MS. MANIFOLD: 10:00.

20 THE COURT: 10:00 A.M.?

21 MS. LEMOINE: 10:00 A.M.

22 THE COURT: I CAN BE AVAILABLE IF NEED BE TO RULE ON  
23 SPECIFIC PRIVILEGE ISSUES. USE SOME JUDGMENT ON THAT. SEE IF  
24 YOU CAN AGREE ON SORT OF WHERE YOU'RE GOING. BUT IF THERE ARE  
25 ISSUES, I AM AVAILABLE IN THE LATE MORNING. YOU CAN CALL

1 MS. MC KAMIE AT (213) 894-5496. AND BECAUSE OF THE IMPORTANCE  
2 OF THESE ISSUES I CAN MAKE MYSELF AVAILABLE. YOU KNOW, SEE IF  
3 YOU CAN SORT OF -- YOU'VE DONE THESE THINGS BEFORE. IF YOU  
4 REACH AN IMPASSE ON SOMETHING, PUT A THUMBTRACK ON IT. HIT  
5 OTHER AREAS. SEE WHETHER THERE'S OTHER ISSUES.

6 MS. LEMOINE: RIGHT.

7 THE COURT: THEN WE CAN COME BACK AND TRY AND RESOLVE  
8 IT UNIFORMLY. BUT I THINK -- I THINK THIS MAY BE RELEVANT TO  
9 BOTH SIDES.

10 AND, MS. LEMOINE, I KNOW YOU'RE DEFENDING THIS. I  
11 KNOW YOU'RE ASSERTING THIS PRIVILEGE. THERE MAY BE ISSUES HERE  
12 THAT ARE OF BENEFIT TO YOU FACTUALLY THAT YOU WANT ME TO HAVE.

13 MS. LEMOINE: UNDERSTOOD.

14 THE COURT: AND YOU MAY WANT TO DEVELOP -- YOU MAY  
15 WANT TO DEVELOP THEM IN A CROSS THAT YOU WOULDN'T ORDINARILY  
16 TAKE.

17 MS. LEMOINE: I APPRECIATE THAT, YOUR HONOR.

18 THE COURT: YES.

19 MS. LEMOINE: AND THAT'S-- I MEAN, I'M STRUGGLING  
20 RIGHT NOW WITH SORT OF A QUESTION, AND I'LL JUST TALK IT  
21 THROUGH --

22 THE COURT: YES.

23 MS. LEMOINE: -- IF THAT'S ALL RIGHT.

24 THE COURT: PLEASE.

25 MS. LEMOINE: YOU KNOW, THIS DEPOSITION OF ASCAP IS

1 TO TAKE PLACE ON FRIDAY. IT IS AN EXPENSE FOR OUR CLIENT, FOR  
2 WARNER CHAPPELL TO SORT OF FLY A LAWYER OUT FOR A 90-MINUTE  
3 DEPOSITION OF ASCAP WHEN, AS YOUR HONOR HAS POINTED OUT,  
4 THERE'S NOT A LOT OF RELEVANCE TO WHAT HIS STATE OF MIND WAS.

5 BUT ON THE RELATIONSHIP ISSUES I DO SEE THE BENEFIT  
6 OF IT. SO, I'M SORT OF STRUGGLING WITH DO I ASK YOUR HONOR TO  
7 SAY LET'S NOT DO THAT TOMORROW -- OR, SORRY, FRIDAY, OR DO I,  
8 YOU KNOW, SORT OF -- DO WE SORT OF GET THROUGH IT AND SEE WHAT  
9 DEVELOPS IN THE NEXT COMING -- SUPPLEMENTAL BRIEFING.

10 MS. MANIFOLD: I'M SOMEWHAT STRUGGLING WITH THE  
11 ANALYSIS THAT NEW YORK IS INCONVENIENT BECAUSE WARNER CHAPPELL  
12 PRODUCED THEIR 30(B)(6) WITNESS IN NEW YORK AT THEIR -- AT  
13 THEIR REQUEST. SO --

14 MS. LEMOINE: I'LL --

15 MS. MANIFOLD: SO, WE TOOK THE DEPOSITION IN NEW YORK  
16 FOR THE BENEFIT OF WARNER CHAPPELL BECAUSE THAT'S WHAT THEY  
17 ASKED US TO DO. WE HAVE AN OFFICE THERE SO IT WASN'T AN  
18 INCONVENIENCE FOR US.

19 THE COURT: OKAY.

20 MS. MANIFOLD: AND I THINK THE MOTION TO QUASH WAS  
21 RESOLVED BY ASCAP AND PLAINTIFFS. AND YOU CERTAINLY COULD --  
22 THE DEFENDANTS COULD HAVE WEIGHED IN AT THAT POINT. I DON'T --  
23 I THINK IT WOULD BE INAPPROPRIATE TO ASK FOR ANY SORT OF STAY  
24 OF THAT DEPOSITION AT THIS POINT BASED ON THIS RECORD.

25 THE COURT: I DON'T THINK SHE'S ASKED THAT. I THINK

1 THAT HER POINT REGARDING THE INTENT OF ASCAP'S REPRESENTATIVE  
2 INADVERTENTLY PRODUCING MATERIALS MAY HAVE LIMITED RELEVANCE TO  
3 WHERE WE'RE GOING. AND THAT WAS THE ISSUE I WAS PUTTING TO YOU  
4 AND YOU MAY WANT TO GIVE SOME FURTHER THOUGHT TO IT.

5 MS. MANIFOLD: OKAY.

6 THE COURT: I THINK YOU KNOW WHERE I AM ON SOME OF  
7 THESE ISSUES.

8 MS. MANIFOLD: I DO, YOUR HONOR.

9 THE COURT: OKAY.

10 MS. MANIFOLD: THANK YOU.

11 MS. LEMOINE: YOUR HONOR, IF I COULD SUGGEST -- I  
12 KNOW YOU'VE BEEN GENEROUS WITH YOUR TIME THIS MORNING. I  
13 APPRECIATE IT. IF I COULD JUST DO ONE MORE THING BEFORE WE --  
14 IT SOUNDS LIKE WE'RE WRAPPING UP.

15 THE COURT: GO AHEAD.

16 MS. LEMOINE: I DO WANT TO BE CLEAR ABOUT WHEN WE PUT  
17 IN THE JOINT STIPULATION, WOULD YOUR HONOR AGREE THAT IT SHOULD  
18 NOT INCLUDE ANY REFERENCE OR CHARACTERIZATION TO THE DOCUMENT?  
19 AND WOULD YOUR HONOR JUST -- COULD WE LEAVE THE DOCUMENT OUT AT  
20 THIS POINT.

21 MS. MANIFOLD: I THINK WE PUT AN APPLICATION TO FILE  
22 IT UNDER SEAL. AND I THINK THAT 26(B)(5)(B) CLEARLY SAYS THAT  
23 THE INFORMATION MAY BE PROVIDED TO THE COURT UNDER SEAL FOR A  
24 DETERMINATION OF THE CLAIMS. SO, YOU KNOW, WE HAVE TO PROVIDE  
25 THE DOCUMENTS TO THE COURT UNDER SEAL AND DISCUSS WHAT THEY

1 ARE.

2 THE COURT: WELL--

3 MS. MANIFOLD: AND I THINK THERE -- I DON'T HAVE THE  
4 DOCUMENTS IN FRONT OF ME RIGHT NOW BECAUSE THEY'RE SEQUESTERED.  
5 BUT, YOU KNOW, I DO THINK THERE MAY BE RELEVANCE TO WHAT THE  
6 RELATIONSHIP IS BETWEEN THE TWO. I MEAN, I CERTAINLY WILL TAKE  
7 INTO CONSIDERATION, BUT WE'RE FILING AN APPLICATION TO FILE  
8 UNDER SEAL. WE'RE FILING THE DOCUMENTS BOTH IN A REDACTED AND  
9 UNREDACTED VERSION, BOTH OF WHICH I'VE PROVIDED TO THE  
10 DEFENDANTS. THEY'RE WELCOME TO GO THROUGH AND REDACT FURTHER  
11 IF THEY FEEL THAT THE REDACTED VERSION THAT WOULD BE PUBLICLY  
12 FILED SHOULD BE FURTHER REMOVED.

13 BUT I THINK THE COURT HAS TO HAVE A FULL PICTURE.  
14 AND THE COURT'S GOING TO GET THE DOCUMENTS ANYWAY BECAUSE THE  
15 RULE REQUIRES THAT I PROVIDE THEM TO THE COURT UNDER SEAL.

16 THE COURT: NO, IT DOESN'T ACTUALLY. I'M LOOKING AT  
17 IT AND I SEE -- I'M LOOKING AT 26(B)(5)(B). AND THERE ARE SOME  
18 "MUSTS." YOU ARE REQUIRED TO RETURN OR SEQUESTER. YOU MUST  
19 RETRIEVE. AND THE RULE SAYS THAT YOU MAY PRESENT THE  
20 INFORMATION TO THE COURT UNDER SEAL FOR A DETERMINATION OF THE  
21 CLAIM.

22 I DON'T -- IT'S HARD FOR ME TO SAY THAT I HAVE TO SEE  
23 THE DOCUMENT WHEN I HAVEN'T SEEN THE DOCUMENT AND I DON'T  
24 REALLY KNOW WHAT IT SAYS.

25 IF THERE ARE ASPECTS OF -- AND I JUST PRESUME IT'S A

1 LETTER FROM COUDERT TO SUMMY TALKING ABOUT THE COPYRIGHT FOR  
2 "HAPPY BIRTHDAY," "GOOD MORNING" OR MAYBE OTHER THINGS. I CAN  
3 JUST PRESUME THAT. OKAY. I DON'T THINK THERE'S A CHALLENGE  
4 THAT THERE WAS LEGAL ADVICE CLAIMED.

5 IF THERE IS SOMETHING ABOUT THE LETTER THAT RELATES  
6 TO ITS DISSEMINATION TO THIRD PARTIES, THAT RELATES TO ASCAP'S  
7 ROLE HERE AND TO THE COMMON INTEREST COMPONENT OF REALLY WHAT'S  
8 AT ISSUE, THEN, MAYBE I NEED TO SEE IT. AND IT MIGHT BE IN  
9 BOTH PARTIES' INTERESTS FOR ME TO SEE IT.

10 HOWEVER, IF IT'S JUST SORT OF GENERALIZED LEGAL  
11 INFORMATION THAT IS IRRELEVANT TO THE ACTUAL ISSUE THAT I NEED  
12 TO DETERMINE, THEN, I'M NOT SURE I SEE THE RELEVANCE. BUT,  
13 AGAIN, I'M TALKING ABOUT A DOCUMENT I HAVEN'T SEEN AND I DON'T  
14 KNOW ANYTHING ABOUT. AND I THINK THAT YOU FOLKS MAY WANT TO  
15 FRANKLY DISCUSS IT.

16 I UNDERSTOOD YOU -- I UNDERSTAND THAT YOU WROTE IT --  
17 YOU WROTE YOUR SECTION OF THE MOTION WITH, YOU KNOW, YOUR  
18 UNDERSTANDING AS TO WHAT THE ISSUES WERE IN DISPUTE.

19 IT MAY BE THAT THE ISSUES HAVE NARROWED,  
20 MS. MANIFOLD. IT MAY BE THAT IT'S NOT NECESSARY. IT'S HARD  
21 FOR ME TO GIVE YOU KIND OF AN ADVISORY DETERMINATION WHEN I  
22 DON'T REALLY KNOW WHAT'S GOING ON.

23 DOES THAT -- DOES THAT HELP?

24 MS. MANIFOLD: I THINK I MIGHT BE A BIT CONFUSED. MY  
25 APOLOGIES, YOUR HONOR.

1 THE COURT: OKAY.

2 I PRESUME THAT THE FOUR CORNERS OF THE LETTER INCLUDE  
3 PRIVILEGED INFORMATION.

4 YOU AGREED WITH ME AWHILE AGO?

5 MS. MANIFOLD: YES. NO, THERE'S NO -- THERE'S NO  
6 DOUBT THAT COUDERT BROTHERS ARE ATTORNEYS, AND THERE'S NO DOUBT  
7 THAT THEY WERE PROVIDING LEGAL ADVICE.

8 THE COURT: BINGO.

9 AND, SO, THE QUESTION IS WHETHER THERE WAS SOMETHING  
10 WITHIN THE FOUR CORNERS OF THAT LETTER AND ITS TRANSMITTAL TO  
11 ASCAP THAT RELATE TO THE COMMON INTEREST EXCEPTION TO THE  
12 WAIVER OF THE PRIVILEGE, WHICH SEEMS LIKE IT'S THE DIRECTION  
13 WHERE BOTH PARTIES ARE GOING.

14 SO, I DON'T AS A MATTER OF THE RULE HAVE A  
15 REQUIREMENT TO SEE THOSE MATERIALS. I COULD RULE ON THEM IN  
16 THE ABSTRACT. UNLESS THERE IS SOMETHING NECESSARY ABOUT THEM  
17 THAT IS RELEVANT TO THE DETERMINATION OF THE CLAIM, WHICH IS  
18 THE LANGUAGE OF THE RULE.

19 MS. LEMOINE: COULD I --

20 THE COURT: BECAUSE THAT PART OF THE RULE IS  
21 PERMISSIVE.

22 MS. MANIFOLD: IT SAYS THAT THE PARTY MAY. IT SEEMS  
23 -- IT'S THE MOVING PARTY'S OPTION AS TO WHETHER TO PROVIDE THE  
24 INFORMATION OR NOT.

25 THE COURT: THAT'S --

1 MS. MANIFOLD: I DON'T -- I THINK -- I THINK IT WOULD  
2 BE INAPPROPRIATE FOR THE COURT TO RULE IN ADVANCE AS TO WHETHER  
3 THEY DO OR DON'T WANT TO REVIEW THE INFORMATION. I MEAN, I  
4 DON'T -- I DON'T THINK THAT THE DEFENDANTS HAVE A RIGHT TO  
5 REQUEST AT THIS POINT THAT WE NOT ATTACH THE LETTERS WHEN WE'RE  
6 ENTITLED TO DO SO.

7 MS. LEMOINE: YOUR HONOR, IF I COULD RESPOND TO THAT?

8 THE COURT: SURE.

9 MS. LEMOINE: I THINK IN LIGHT OF THE FACT THAT WE  
10 ALL AGREE IT'S PRIVILEGED, THE STANDARD FOR IN CAMERA REVIEW IS  
11 VERY, VERY HIGH AS YOUR HONOR IS AWARE. I DON'T HAVE TO TELL  
12 YOU ABOUT IT. YOU KNOW, THERE HAS TO BE SORT OF A PRIMA FACIE  
13 SHOWING THAT THERE'S GOING TO BE SOMETHING ABOUT THE LETTER  
14 THAT'S GOING TO SHED SOME LIGHT ON THIS -- WHETHER IT'S -- YOU  
15 KNOW, IF A CRIME FRAUD EXCEPTION, THAT'S THE APPLICABLE LAW.

16 I THINK THAT MS. MANIFOLD AND I WOULD AGREE THAT THE  
17 CONTENT OF THE MEMORANDA DOES NOT RELATE TO THE COMMON INTEREST  
18 ISSUE THE COURT IS GOING TO DECIDE. AND IN THAT CASE IT'S MY  
19 OBLIGATION I THINK TO ASK THE COURT TO RECEIVE THESE PAPERS IN  
20 THE FIRST INSTANCE WITHOUT THIS DOCUMENT BEING QUOTED AND  
21 WITHOUT THIS DOCUMENT BEING ATTACHED.

22 NOW TO BE CLEAR, I'M NOT SAYING THEY CAN'T SAY THE  
23 DOCUMENT WAS SENT WITH A LETTER AND CHARACTERIZE IT AT WHAT THE  
24 LETTER LOOKED LIKE. YOU KNOW, IF THERE ARE THINGS THEY WANT TO  
25 SAY ABOUT THAT, I UNDERSTAND. IF THEY WANT TO CHARACTERIZE HOW

1     THEY THOUGHT THE SUBMISSION WAS MADE BACK IN 1979 BY SUMMY TO  
2     ASCAP, THAT'S FINE. I'M TALKING ABOUT THE CONTENT OF THE  
3     COMMUNICATION SHOULD NOT BE SHARED EVEN WITH THE COURT IN  
4     CAMERA, FRANKLY, UNLESS IT'S ABSOLUTELY NECESSARY.

5             THE COURT: WELL, I --

6             MS. MANIFOLD: I DISAGREE. I THINK WE HAVE A RIGHT  
7     TO HAVE THE LETTER PLACED IN FRONT OF THE COURT FOR IN CAMERA  
8     REVIEW. AND THAT'S WHY A MAGISTRATE JUDGE IS DOING IT AND NOT  
9     JUDGE KING. AND THAT'S WHY THE TRIAL WILL BE CONDUCTED AND  
10    SUMMARY JUDGMENT WILL BE DECIDED BY JUDGE KING AND NOT BY  
11    MAGISTRATE WILNER.

12            AND TO THE EXTENT -- I MEAN, I'D HAVE TO REVIEW MORE  
13    CAREFULLY WITH THE COURT'S GUIDANCE AND THIS ARGUMENT IN MIND,  
14    BUT IT'S NOT CLEAR TO ME THAT THAT LETTER DOES NOT TOUCH ON IN  
15    SOME WAY THE COMMON INTEREST, THE RELATIONSHIP, AND WHY THE  
16    LETTER WAS SENT. BECAUSE FOR SOME REASON, THIS INFORMATION WAS  
17    SENT TO ASCAP. IT WASN'T DONE IN A VACUUM. IT DIDN'T  
18    ACCIDENTALLY GO TO ASCAP.

19            SO, THE NUANCE OF HAVING SENT THAT LETTER TO ASCAP  
20    FOR A REASON WITH THIS INFORMATION IS RELEVANT TO THE NATURE OF  
21    THE RELATIONSHIP AND WHY IT WAS SENT.

22            SO, I THINK IN ORDER TO MAKE -- TO RESOLVE THE ISSUE  
23    OF WHETHER THE PRIVILEGE TRAVELED, WHETHER THERE IS A COMMON  
24    INTEREST, WHETHER THERE WAS A WAIVER IN THE INTENTIONAL SENDING  
25    OF THE LETTER, I THINK THAT THE COURT CAN ONLY DO THAT BY

1 REVIEWING THE LETTER.

2 THE COURT: I CAN'T -- I CAN'T RULE ON SOMETHING THAT  
3 I DON'T HAVE IN FRONT OF ME. YOU FOLKS HAVE SEEN THIS  
4 MATERIAL. I HAVEN'T. I MEAN, CERTAINLY 26(B)(5)(B) AND  
5 SUBMISSION TO THE COURT FOR A DETERMINATION OF THE CLAIM OF  
6 PRIVILEGE UNDER SEAL WOULD SEEM TO ME IN THE ORDINARY COURSE BE  
7 TO SAY, HEY, JUDGE, WAS THIS REALLY A LETTER OR MATERIAL  
8 BETWEEN A CLIENT AND A LAWYER FOR PROVISION OF LEGAL ADVICE.

9 AND, YOU KNOW, YES, NO, MAYBE SO -- LOOKING AT IT  
10 MIGHT ON ITS FACE WITHOUT ASSISTANCE BE OF IMPORTANCE TO THE  
11 COURT.

12 I THINK THERE IS AN AGREEMENT BETWEEN THE PARTIES  
13 THAT THERE IS A PRIVILEGE THAT WAS ORIGINALLY RELEVANT TO THIS  
14 LETTER.

15 MS. MANIFOLD: IT'S A MEMO ATTACHED TO A LETTER.

16 THE COURT: FAIR ENOUGH. THE MATERIALS, YES.

17 AND, SO, YOU KNOW, I CAN'T -- I CAN'T TELL YOU THAT I  
18 KNOW THE RELEVANCE OF LOOKING AT THIS MATERIAL IN RESPECT TO A  
19 RELATED CLAIM WHICH IS WHETHER THAT PRIVILEGE HAS BEEN  
20 DISSIPATED THROUGH SUBSEQUENT USE. AND, YOU KNOW, QUERY  
21 WHETHER EVEN LOOKING AT THE SOURCE OF THOSE MATERIALS FOR  
22 MAKING A DETERMINATION ABOUT THAT, WHETHER THAT'S APPROPRIATE.

23 TYPICALLY IN A CRIME FRAUD EXCEPTION APPLICATION  
24 REFERENCE TO THE PUTATIVELY PROTECTED MATERIALS IS GENERALLY  
25 NOT APPROPRIATE. THAT IS, YOU CAN'T USE THE MATERIALS

1 THEMSELVES TO REFUTE A CLAIM OF PRIVILEGE.

2 BUT I CAN'T PREJUDGE ANYTHING HERE. I CAN'T.

3 SO, MAYBE YOU JUST BOTH TAKE ANOTHER LOOK AT THIS.  
4 CONSIDER WHAT IT IS THAT I NEED TO RESOLVE.

5 YOU KNOW, I UNDERSTAND MS. MANIFOLD'S POINT THAT,  
6 HEY, WE HAVE A PRIVILEGE ISSUE. IT'S PRUDENT FOR THE COURT TO  
7 SEE THE DOCUMENT TO MAKE SURE IT'S PRIVILEGED.

8 IF YOU FOLKS AGREE IT'S PRIVILEGED, AND THEN WE HAVE  
9 OTHER ISSUES AT PLAY, I JUST ASK YOU TO TAKE A LOOK AND GIVE  
10 CONSIDERATION AS TO WHETHER IF THAT ORIGINAL GROUND LEVEL ISSUE  
11 HAS BEEN RESOLVED WHETHER I NEED TO GO FURTHER ON IT AND WHAT  
12 USE, IF ANY, THE PARTIES MAKE OF IT IN THE FILING.

13 I WILL IN ADVANCE RELIEVE YOU OF YOUR OBLIGATION TO  
14 SUBMIT AN APPLICATION TO FILE THE MATTER UNDER SEAL.

15 MS. LEMOINE: THANK YOU, YOUR HONOR.

16 THE COURT: YOU CAN PUT ON THE FACE OF THE REDACTED  
17 -- EXCUSE ME, ON THE UNREDACTED VERSION THAT IT'S UNDER SEAL  
18 PURSUANT TO JUDGE WILNER'S ORDER OF THIS DAY. AND YOU CAN MAKE  
19 YOUR DETERMINATIONS CONSISTENT WITH YOUR OBLIGATIONS.

20 OKAY. SO, WE HAVE A WAY FORWARD HERE.

21 THE JOINT FILING NEXT TUESDAY.

22 SUPPLEMENTAL BY THE FOLLOWING TUESDAY.

23 AND WE HAVE A GREAT SIT-DOWN ON FRIDAY MORNING.

24 MS. LEMOINE: THAT'S GREAT. THANK YOU VERY MUCH,  
25 YOUR HONOR.

1 MS. MANIFOLD: THANK YOU, YOUR HONOR, FOR YOUR TIME  
2 AND INTEREST.

3 THE COURT: THANK YOU.

4 GOOD LUCK.

5 MS. LEMOINE: THANK YOU.

6 MS. MANIFOLD: THANK YOU.

7 THE COURT: BYE.

8 (TELEPHONIC CONFERENCE CONCLUDES 10:57 A.M.)  
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C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT  
FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE  
ABOVE-ENTITLED MATTER.

/S/ DOROTHY BABYKIN

JULY 13, 2014

\_\_\_\_\_  
FEDERALLY CERTIFIED TRANSCRIBER  
DOROTHY BABYKIN

\_\_\_\_\_  
DATED

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