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UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

LeMond Cycling, Inc.,

Plaintiff,

vs.

File No. 08-CV-1010

Trek Bicycle Corporation,

Defendant.

THE HONORABLE JANIE S. MAYERON

United States Magistrate Judge

* * *

TAPE-RECORDED HEARING

TRANSCRIPT OF PROCEEDINGS

* * *

Date: 5-26-09

Reporter: Lisa M. Thorsgaard

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APPEARANCES

MS. DENISE S. RAHNE AND MS. KATHERINE
K. BRUCE, Attorneys at Law, 800 LaSalle Avenue,
Suite 2800, Minneapolis, Minnesota 55402-2015,
appeared on behalf of Plaintiff.

MR. ERIK T. SALVESON, Attorney at Law,
Suite 600, 220 South Sixth Street, Minneapolis,
Minnesota 55402, appeared on behalf of Defendant.

MR. RALPH A. WEBER, Attorney at Law,
Suite 700, 309 North Water Street, Milwaukee,
Wisconsin 53202, appeared on behalf of Defendant.

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P R O C E E D I N G S

(NO REPORTER WAS PRESENT - the following transcript of proceedings was prepared from a COPY of the original court tape recording)

THE COURT: Good morning, everyone. I'm Magistrate Judge Mayeron and we're here this morning in connection with the matter of LeMond Cycling, Inc. versus Trek Bicycle Corporation versus Greg LeMond. This is Court File No. 08-010.

If the attorneys could identify themselves starting first with Plaintiff, LeMond Cycling.

MS. RAHNE: Good morning, Your Honor. Denise Rahne, Robins, Kaplan, Miller & Ciresi. And I have with me from our offices, Katie Bruce.

THE COURT: Kate, how do you spell your last name?

MS. BRUCE: B-R-U-C-E.

THE COURT: All right. And on behalf of -- and you're representing both LeMond Cycling and Greg LeMond?

1 MS. RAHNE: Correct, Your
2 Honor.

3 THE COURT: And on behalf of
4 the defendant?

5 MR. WEBER: Good morning, Your
6 Honor. Ralph Weber and Eric Salveson for Trek
7 Bicycle Corporation.

8 THE COURT: All right. We're
9 here this morning to entertain the motion by
10 Trek Bicycle Corporation for a protective
11 order.

12 I have reviewed the initial pleadings,
13 the response filed by LeMond Cycling and Greg
14 LeMond and the reply as well, so I'm prepared
15 to hear argument.

16 Who will be arguing?

17 MR. WEBER: I will, Judge.

18 THE COURT: All right.

19 MR. WEBER: Judge, in
20 recognition of the fact you've already read
21 the briefs, let me just summarize very
22 quickly, tell you what I think is the
23 essential legal foundation for our position
24 and I'll be happy to answer any questions you
25 might have.

1 On March 20, 2008 Trek was served with
2 a complaint by Mr. LeMond that had very little
3 to do with the parties' relationship and was
4 filled instead with sensationalized
5 allegations about third parties and relatively
6 few allegations about the purported best
7 efforts challenge that Mr. LeMond wanted to
8 bring.

9 At that time it was served under the
10 Minnesota procedure that provides for service
11 without filing that was pointed out in the
12 cover letter to Trek that the complaint was
13 not publicly available at that time, but at
14 the same time under Minnesota procedure and
15 federal procedure the clock was running on
16 removal.

17 Trek and its counsel, of course,
18 anticipated that the damage that was
19 threatened to Trek's reputation through this
20 sensationalized complaint and sought to
21 mitigate the damage that was threatened by
22 returning the proper focus of the dispute to
23 the parties' business relationship, what did
24 each side contend the other had done or failed
25 to do with respect to performing or not

1 performing under the contract, an objective
2 assessment of the parties' relationship quite
3 different from the threatened and served but
4 not filed lawsuit.

5 In that context there was a tremendous
6 overlap of litigation and public impact
7 potential. And in light of that, our firm
8 retained sophisticated consultants to assist
9 us in anticipating and mitigating the damage
10 that would be done to Trek's image and
11 business. That estimate our concerns have
12 turned out to have been corroborated by the
13 discovery that has been done to date in two
14 significant respects.

15 First, we deposed Mr. LeMond's former
16 business agent who confirmed that, yes, that
17 Greg had spoken to him about secret tape
18 recordings of Trek's CEO and the use that he
19 would make of those secret tape recordings to
20 leverage Trek should Trek ever wish to
21 terminate the business relationship. Spoke
22 expressly to his agent about that strategy.

23 Secondly, in the course of written
24 discovery we have now received an e-mail
25 between Mr. LeMond and a reporter for Sports

1 Illustrated in which Mr. LeMond referred to
2 those same secret recordings of the Trek CEO
3 as his trump card in a sick game of blackmail
4 and extortion.

5 Against that unfortunate background it,
6 of course, was necessary for us as Trek's
7 legal counsel to retain the services of
8 sophisticated media consultants. And I think
9 the context is well described and the legal
10 justification is well described in Judge
11 Kaplan's case out of the Southern District of
12 New York in 2003. The In Re: Grand Jury
13 Subpoena case in which confidential
14 communications between lawyers and public
15 relations consultants were protected by the
16 attorney-client privilege and work product
17 doctrines. And at page 330-331 of Judge
18 Kaplan's decision he explains the practical
19 realities of modern day litigation.

20 Judge Kaplan also pointed out that the
21 thinking of the courts in this area has
22 evolved over time. And some of the early
23 decisions from the '70s and '80s which were
24 less friendly to the position that Trek is
25 bringing before the Court today have been

1 superceded by more recent thinking including a
2 decision for four members of the court by
3 Justice Kennedy. That's discussed in, again,
4 Judge Kaplan's decision.

5 THE COURT: One of the things
6 I noted in not only Judge Kaplan's decision in
7 the In Re: Grand Jury but the other cases that
8 were cited by both sides is that as the court
9 went through the analysis to determine whether
10 the attorney-client privilege or work product
11 doctrine applied which was, my memory being
12 asserted, in tandem with each other.

13 MR. WEBER: Right.

14 THE COURT: Is, number one,
15 the court had before it a privilege log that
16 listed the documents that were being withheld;
17 and number two, from what I can tell also was
18 conducting an in-camera inspection of those
19 documents.

20 And what has become clear to me
21 particularly now having reviewed your reply is
22 that, in fact, none of the documents are
23 listed on the privilege log unless they happen
24 to be redacted documents that were produced
25 for other reasons to Mr. -- to plaintiff. And

1 obviously I don't have the documents in front
2 of me to do an in-camera inspection.

3 So in terms of the procedure that the
4 courts engaged in to evaluate the
5 appropriateness of the assertion of work
6 product or attorney client, apart from your
7 objection about relevancy seems to me I'm
8 lacking some of the pieces that I may need in
9 order to evaluate whether these privileges or
10 doctrines have been properly invoked.

11 MR. WEBER: Right. I
12 anticipated the Court might raise that because
13 I saw the same thing in the decisions.

14 The procedural context in which this
15 issue came up and thus the reason for our
16 protective order motion were questions that
17 were asked of Trek CEO, John Burke, at his
18 deposition which questions were objected to
19 and, thus, we came before the court in that
20 fairly narrow procedural context of could
21 Mr. Burke or should Mr. Burke answer questions
22 about meetings that were had in the days after
23 March 20 and before April 8 in which these
24 outside consultants were present along with
25 Trek's lawyers. So that's the narrow position

1 in which the issue was raised.

2 With respect to the broader question of
3 other documents that exist and so on, the
4 initial privilege log that was produced last
5 year or earlier this year, I forget, made a
6 note that it was stopping as of March 20, the
7 date of Mr. LeMond's service of the complaint.
8 And that was expressly made in the privilege
9 log.

10 The particular documents --

11 THE COURT: So it was your
12 position that to the extent any documents were
13 generated that would qualify for
14 attorney-client or work product after the
15 initiation of the state court suit, March 20,
16 when your client -- of 2008, when your client
17 was served, you weren't listing any of those
18 documents.

19 MR. WEBER: Right. Because
20 there was no genuine question I believed as to
21 that they were prepared in anticipation of
22 litigation and a contrary approach would call
23 for the creation of nonstop privilege logs
24 over the course of the litigation. And it has
25 been my experience that the parties agree that

1 once litigation starts, then there is not a
2 genuine issue about privilege logs thereafter.

3 THE COURT: So as a practical
4 matter, given the time line which is that the
5 public relation firm wasn't retained until
6 April 3 of 2008, after the commencement --
7 after the service of the state suit, your
8 position -- so that's why -- that's your
9 explanation as to why they --

10 MR. WEBER: Right.

11 THE COURT: -- don't show up
12 on any documentation reflecting communications
13 between client or attorney and that PR firm
14 are not on the privilege log except to the
15 extent that they got produced in a redacted
16 form.

17 MR. WEBER: Correct. And we
18 were careful to make that explicit point in
19 the privilege log.

20 THE COURT: How many -- if
21 indeed I were to determine that the
22 communications with the PR firm, let's say
23 from April 3, from retention until
24 commencement of the lawsuit in federal court
25 in Wisconsin I guess that would be which would

1 be the -- I don't know if it's state or --

2 MR. WEBER: April 8.

3 THE COURT: April 8.

4 MR. WEBER: Right.

5 THE COURT: How many -- if,
6 indeed you were going to have to identify
7 those on a privilege log and/or produce them
8 to me for an in-camera inspection, how many
9 documents or pages are we talking about?

10 MR. WEBER: You know, I
11 haven't collected them, Judge. There was a
12 document request that was due last Thursday
13 asking for those things.

14 THE COURT: Right.

15 MR. WEBER: But in light of
16 today's hearing, we indicated that we would
17 abide the Court's -- that we would raise the
18 objection and we would see what the Court
19 would do.

20 I would estimate it would be several
21 dozen. You know, a reasonable number.
22 Certainly not hundreds of documents.

23 THE COURT: All right.

24 MR. WEBER: But I have not
25 done that. I have not asked the client to

1 give me their set.

2 THE COURT: Okay.

3 MR. WEBER: So that is the
4 procedural -- and I appreciate where the Court
5 is coming from but that is -- so we were --
6 this was prompted by the fairly narrow
7 question at the CEO step as to essentially
8 what did you talk about at those meetings with
9 the public strategies people present. I
10 objected and hence we are here today.

11 THE COURT: Okay.

12 MR. WEBER: If the Court, of
13 course, wants a privilege log and in-camera
14 review, we, of course, will provide that.

15 THE COURT: I'm just trying to
16 recall -- let me make sure I understand.

17 The relief you are seeking with your
18 protective order it appears, number one,
19 you're -- so with your motion it appears that
20 you are seeking not only a protective order
21 from having to produce any documents
22 responsive to the document request but then a
23 protective order basically blessing, for lack
24 of a better word, your instruction to your
25 client that he not share any of the

1 communications with the PR firm --

2 MR. WEBER: Correct.

3 THE COURT: -- that were
4 objected to at the deposition.

5 MR. WEBER: Correct.

6 THE COURT: Okay.

7 MR. WEBER: And there is a --

8 THE COURT: So it's not
9 confined just to documents. It's also about
10 depositions.

11 MR. WEBER: That's correct.

12 And there is another deposition that was
13 noticed by plaintiff's counsel of a public
14 strategies employee, a gentleman by the name
15 of Bill Mashek and that was scheduled for -- I
16 forget the date but recently.

17 But counsel agreed that that likewise
18 would be put off because counsel said if I was
19 going to instruct Mr. Mashek at the deposition
20 not to talk about conversations of the kind
21 that Mr. Burke was instructed not to talk
22 about, that didn't make sense to go out to
23 D.C. and depose him until we had the chance to
24 talk to the Court.

25 THE COURT: Okay.

1 MR. WEBER: And so there is
2 that Mashek deposition which would be of the
3 same type. So Mashek, Burke, and the most
4 recent set of document requests.

5 THE COURT: And is it your --
6 again, now I'm doing this from memory but with
7 respect to Mr. Burke's deposition, is it your
8 position or understanding that to the extent
9 that Trek itself or employees were involved in
10 conversations with the PR firm that counsel --
11 was counsel present for all of those
12 communications either in person, by phone, or
13 e-mail?

14 MR. WEBER: Mr. Burke
15 testified that his general counsel, Bob
16 Burke -- Bob Burns, sorry -- was present at
17 all those meetings.

18 THE COURT: Okay. That's what
19 I --

20 MR. WEBER: It is my
21 recollection that I also was present at all
22 the meetings with Trek employees and public
23 strategies employees or someone from my firm.

24 THE COURT: Okay.

25 MR. WEBER: And I think as the

1 Court saw, the retention was done through our
2 firm and so on.

3 THE COURT: Okay.

4 MR. WEBER: We anticipated
5 that this might become an issue going down the
6 road.

7 THE COURT: Go ahead. I
8 obviously interrupted you with some questions
9 about the procedural posture that were in
10 here.

11 MR. WEBER: Right. Well, I
12 was just going to draw the Court's attention,
13 as you probably have already seen, page 330
14 and 331 of Judge Kaplan's decision where he
15 talks about nor such -- may such advocacy be
16 prudently be conducted in disregard of its
17 potential legal ramifications. Questions such
18 as whether the client should speak to the
19 media at all, whether to do so directly or
20 through representatives, whether and to what
21 extent to comment on specific allegations and
22 a host of others can be decided without
23 careful legal input only at the client's
24 extreme peril. That's the text accompanying
25 footnote 42.

1 He goes on to say, Dealing with the
2 media in a high profile case probably is not a
3 matter for amateurs. Target and her lawyers
4 cannot be faulted for concluding the
5 professional public relations advice was
6 needed.

7 And then Judge Kaplan goes on to list a
8 series of factors about why it was prudent for
9 lawyers to get the PR people involved and how
10 the work -- attorney-client work product
11 protections covered those kinds of
12 communications. Likewise in this case where
13 given the -- and I think you may recall that
14 we -- well, we discussed last time we were
15 here the prior lead up to the 2008 litigation
16 which was the service of a very similar
17 lawsuit by Mr. LeMond in 2004 when Trek had
18 given him a notice of breach and his threat to
19 go public with sensationalized allegations
20 about high profile athletes then and how Trek
21 at that time had concluded that they would, in
22 light of the threat, withdraw the notice of
23 breach and continue to do business with
24 LeMond.

25 So it had this backdrop together with

1 now, in March of '08, receiving the latest
2 version in which it was quite apparent, if you
3 look at his complaint, what his strategy is.

4 If Trek had not properly responded to
5 that public filing, anticipated public filing,
6 service of complaint, we would be hearing
7 arguments from LeMond that Trek had not
8 properly mitigated its damages. And indeed in
9 his answer to Trek's complaint, LeMond raised
10 the affirmative defense of Trek's failure to
11 mitigate.

12 So you have a --

13 THE COURT: So doesn't that at
14 least given it bears on the issue of
15 mitigation, doesn't that -- to the extent that
16 you have raised the issue of relevancy, it
17 seems to me that, at a minimum, while you may
18 not agree that it is relevant to the
19 substantive claims being made by Mr. LeMond,
20 meaning the breach of the covenant of good
21 faith and fair dealing and that Trek did not
22 engage in its best efforts to promote
23 Mr. LeMond, his company and the brand, seems
24 to me what you are saying is this is -- you
25 sought out this PR firm to address the issue

1 of mitigation of damages. It is pled. It
2 seems to me what you are saying is yes, if
3 nothing else, it's relevant to damages which
4 is one of the arguments defendant has made.

5 MR. WEBER: Right. As to the
6 public statements I would agree that what Trek
7 said to the public -- and if you look at
8 the -- if you read through the attachment
9 which has the Power Point presentation or if
10 you would have watched the 16-minute
11 presentation that Mr. Burke gave to the
12 employees, you will see it is carefully
13 structured to talk about the parties' business
14 relationship.

15 And as to those public statements, yes,
16 I would agree that those would be relevant to
17 the question of Trek's efforts to mitigate
18 against what Mr. LeMond was threatening.

19 But as to communications among counsel
20 and counsel's consultants that lay behind
21 those public statements, I don't believe that
22 those are relevant to the mitigation.

23 THE COURT: Okay.

24 MR. WEBER: And even if they
25 were, they would be sheltered.

1 THE COURT: I'm sorry, they
2 would be --

3 MR. WEBER: And even if they
4 were, they would be sheltered.

5 THE COURT: Okay.

6 MR. WEBER: By the privilege
7 doctrine.

8 THE COURT: Okay.

9 MR. WEBER: So while it isn't
10 a bright line, obviously, in the case law to
11 apply to this and admittedly it is an evolving
12 doctrine as acknowledged by the courts in this
13 area, I think given the facts of this case
14 with what Trek was faced with on March 20,
15 2008 and its lawyers' decision to retain
16 consultants to assist them in a lawsuit which
17 Mr. LeMond had already defined as an overlap
18 of litigation and public impact, that the
19 internal discussions among -- involving Trek,
20 its lawyers, and its lawyers' consultants
21 should be protected from disclosure.

22 THE COURT: And are you
23 still -- obviously your opening brief rests
24 on -- spends quite a bit of time talking about
25 the attorney-client privilege.

1 MR. WEBER: Yes.

2 THE COURT: Your reply focuses
3 on work product.

4 MR. WEBER: Right.

5 THE COURT: And I don't want
6 to read more into it than you intend but it
7 seems to me that you have, having seen the
8 response by LeMond, shifted gears from -- or
9 shifted focus from asserting the
10 attorney-client privilege to work product.

11 MR. WEBER: We think it is
12 both. And the case law I think, one,
13 highlights attorney-client privilege, another
14 work product so we didn't want to give short
15 shift to either. So we have -- we believe it
16 is protected by both in that the very meetings
17 Mr. Burke was asked about, ones involving
18 himself, his lawyers, other key Trek employees
19 and these consultants, those kinds of
20 communications would be covered by
21 attorney-client privilege.

22 There are different issues discussed in
23 the cases where materials are being sent to
24 consultants with or without the involvement of
25 lawyers in which the attorney-client privilege

1 was found not to apply but attorney work
2 product did.

3 So as to these communications which
4 bring us here today, these meetings, yes, I
5 believe both attorney-client privilege and
6 work product protect them.

7 THE COURT: And as to then the
8 communications, the documents that they're
9 seeking by way of their discovery, is it your
10 position that they're both covered by
11 attorney-client and work product or is it work
12 product?

13 MR. WEBER: I would have to go
14 document by document to see if there are
15 documents that by virtue to whom they were
16 sent and whether or not lawyers were involved
17 might be outside attorney-client privilege.
18 But work product, since they were all prepared
19 in anticipation of litigation, would apply to
20 them all.

21 THE COURT: Okay. Let me see
22 if I have any other questions.

23 I guess the last question I have is one
24 of the arguments I think that the plaintiff is
25 making is that part of his lawsuit is that

1 Trek wasn't engaged -- breached the covenant
2 of good faith and fair dealing and wasn't
3 engaged in its best efforts to promote
4 plaintiff and its branding company.

5 MR. WEBER: Right.

6 THE COURT: And that at least
7 events leading up to the formal termination of
8 the relationship which, as I understand,
9 they're saying basically notice of termination
10 is the lawsuit of April 8 of 2008, that at
11 least up until that time the company wasn't
12 engaged in its best efforts to promote it, to
13 promote the plaintiff.

14 Why wouldn't be it relevant to that
15 claim getting at -- apart from the issues of
16 privilege but in terms of relevancy --

17 MR. WEBER: Right.

18 THE COURT: -- why isn't
19 discussions with the PR firm relevant to that
20 claim of whether Trek was using its best
21 efforts to promote the LeMond product at least
22 up until the date of formal notice of the
23 termination?

24 MR. WEBER: Right. Because
25 Trek will tell you and as is laid out in the

1 Power Point presentation and in the videotaped
2 presentation to employees, that when it
3 received the lawsuit on March 20, which was
4 three days after the memorial service for
5 Mr. Burke's father, the founder of the
6 company, that when on the heels of that it had
7 received this latest salvo from Mr. LeMond,
8 and this was in the context of the prior fall
9 when Mr. LeMond and Mr. Burke, John Burke, the
10 son had met privately and Mr. LeMond had asked
11 what are Trek's plans over the next few years,
12 are you going to renew me after 2010, and he
13 was told no, we will -- Trek will continue the
14 contract under its current term which is 2010.
15 But after 2010 Trek is not going to exercise
16 its option to renew for another five years at
17 which time Mr. LeMond asked, well, could I go
18 out and seek other business partners and
19 perhaps end the deal early if I can transition
20 to someone else, to which Trek said of course
21 and we will provide you some confidential
22 information to assist you in doing that and if
23 we want to wrap this up early before 2010,
24 just let us know.

25 In the meantime, Trek continued

1 developing its products and marketing LeMond
2 bikes and doing everything in anticipation of
3 continuing the contract through 2010.
4 However, when on March 20 Mr. LeMond did what
5 he did, the show was over. The contract from
6 Trek's viewpoint was repudiated and terminated
7 as is laid out in Trek's lawsuit.

8 So there --

9 THE COURT: So your view --

10 MR. WEBER: So there is no
11 continuing relationship after March 20.

12 THE COURT: Okay.

13 MR. WEBER: And Trek will not
14 be contending at trial that, well, between
15 March 20 and April, some day in April, we
16 still viewed this as an ongoing relationship
17 and we were still out there exercising our
18 best efforts, rather Trek very soon after
19 March 20 went against the backdrop of
20 everything that was happening, Mr. LeMond did
21 what he did, trek had had enough and was
22 not -- was no longer going to tolerate the
23 sort -- being treated the way it was being
24 treated.

25 THE COURT: Okay. All right.

1 Thank you very much.

2 MR. WEBER: Thank you.

3 THE COURT: I will hear from
4 Mr. LeMond's counsel.

5 MS. RAHNE: Good morning, Your
6 Honor.

7 THE COURT: Good morning.

8
9 MS. RAHNE: I want to touch on
10 just a few things and then on a couple of
11 items -- your questions on relevance, I think,
12 have articulated our position better than I
13 could myself so I'm going to spend a brief
14 amount of time there.

15 And then what I'd like to do is just
16 provide a little bit of an explanation of how
17 we think the case law applies to the
18 questions. We're sort of flying blind. We've
19 been shooting moving targets a little bit
20 because we're not sure what's out there.

21 What we basically have is the end
22 result of a Power Point presentation that
23 originally we thought was created in house
24 from Trek based on the fact that the press
25 release that predated it was on a Trek media

1 release. And I think it's included in the
2 materials.

3 It wasn't until the deposition of John
4 Burke that we discovered that the individual
5 who was listed was actually a consultant for a
6 public -- for Public Strategies, Inc., which
7 is why we started that line of inquiry. We
8 had hoped and planned on simply getting the
9 information related to the creation of this
10 Power Point from Trek. So just a little bit
11 of a backdrop on that.

12 I want to point out just a few items
13 contextually before I go into my main points
14 starting with the meeting with John Burke,
15 between John Burke and Greg LeMond discussed
16 by Trek's counsel.

17 Just a couple of corrections. We don't
18 agree necessarily with the explanation for how
19 that meeting went and the outcome from it in
20 terms of the date and how that matters
21 regarding termination. It's very much our
22 position that --

23 THE COURT: Are we talking
24 about the November meeting?

25 MS. RAHNE: Correct.

1 THE COURT: Okay.

2 MS. RAHNE: It's very much our
3 position that that meeting certainly did
4 occur. There were discussions about where the
5 parties' relationship was going. There was
6 some information exchanged. It actually was
7 the result of receiving that information that
8 solidified the concerns regarding what Trek
9 was doing in the present with Mr. LeMond's
10 brand and which prompted, necessitated in our
11 view the filing of the complaint in the
12 context of the parties' -- terminating the
13 parties' relationship fairly.

14 It's very much our opinion that we were
15 intending and pled in our complaint that Trek
16 was to continue to promote its best efforts
17 and that it was to continue contractual
18 obligations to exercise and meet its covenant
19 of good faith and fair dealing.

20 It's further our position that what was
21 done to, and this leads to my relevance
22 discussion, what was done on April 8, 2008 is
23 contrary to best efforts. It's the contrary
24 of a covenant of good faith and fair dealing.

25 THE COURT: In other words,

1 what I understand happened on April 8 is,
2 number one, the suit is begun but with the
3 suit is the notice, formal -- basically is the
4 notice of termination.

5 MS. RAHNE: Correct. And we
6 actually -- it's our opinion, Your Honor, that
7 what Trek sought at that time, sought from a
8 judicial officer was the right to terminate
9 based on a breach.

10 In all honesty, Mr. LeMond, at the
11 guidance of his counsel, acted and behaved as
12 if he was still under contract until there was
13 a judicial determination of whether there was
14 a justifiable breach to if you have
15 termination.

16 So we're willing to concede that as of
17 March 20, Trek's -- you know, we know now --
18 decided to treat the contract as terminated.
19 But it was very much our intention with our
20 original lawsuit that we were asking for Trek
21 to continue its best efforts until September
22 of 2010.

23 THE COURT: Go ahead.

24 MS. RAHNE: On relevance I
25 just want to reiterate the point. And again,

1 I think your questions hit on what our belief
2 is in terms of why this is relevant.

3 On the creation of this Power Point,
4 the decisions about what went in, what went
5 out, what to say about the LeMond brand, what
6 not to say about the LeMond brand very much we
7 think speak to Trek's good faith or bad faith,
8 in our opinion, effort to treat the LeMond
9 brand fairly. So that's our point on
10 relevance. We think --

11 THE COURT: So when you're
12 saying -- given that as of March 20 when Trek
13 is served with your client's suit.

14 MS. RAHNE: Right.

15 THE COURT: And as you've
16 heard, Trek has said at that point they said
17 game is over, you know, from their perspective
18 and they weren't going to be engaging in any
19 efforts to continue to promote or comply with
20 the terms of the contract is the way I
21 understand it. So what they're saying is,
22 look, our best efforts, if we had an
23 obligation of good faith and fair dealing or
24 engage in best efforts, when that suit came on
25 March 20, that's over and done. So anything

1 that we're doing after that point in time
2 really doesn't go to the substance of the
3 lawsuit liability. What goes to the substance
4 of the lawsuit is what took place before
5 March 20.

6 So why -- and you've said the same
7 thing, you now --

8 MS. RAHNE: Yeah. I think I
9 use --

10 THE COURT: -- understand it's
11 March 20. So why is anything after March 20
12 in terms of liability relevant? I understand
13 on damages that's a different discussion we're
14 going to have but on liability.

15 MS. RAHNE: And I think I
16 misstated, Your Honor. What I meant was I
17 meant to say April 8. I understand now that
18 Trek -- we can recognize that as of April 8,
19 when Trek filed its lawsuit, we -- our
20 understanding was that they were seeking the
21 right to terminate based on a breach that had
22 not been proven in our opinion.

23 So in hindsight, we look back and we
24 can recognize that as a date at which to cut
25 off any liability. March 20, no, I misspoke.

1 I meant to say April 8.

2 We very much -- our filing was -- we
3 requested the relief that they continue to
4 perform through September of 2010. And so
5 short of any judicial determination that a
6 termination was appropriate, we believe they
7 were under obligation to continue their best
8 efforts.

9 This Power Point presentation happened
10 during that time. In our opinion it very much
11 speaks to Trek's lack of best efforts, lack of
12 meeting their covenant of good faith and fair
13 dealing in its treatment of the brand.

14 THE COURT: And then that goes
15 to the second piece which is Mr. Weber saying
16 that, yes, the public statement may be
17 relevant to maybe your theory or his theory on
18 mitigation of damages but the underlying
19 communications that led to that Power Point
20 presentation, that that -- that they are not
21 relevant. It's what was ultimately
22 communicated to the public that constitutes
23 whether there was good faith and fair dealing,
24 best efforts or mitigation of damages but that
25 the underlying communications leading to that

1 in terms of what the public didn't see really
2 have no bearing on it.

3 So what's the relevance of getting --
4 going behind the door?

5 MS. RAHNE: I think it's very
6 much relevant in terms of -- when we tried to
7 probe this with a Trek employee in a
8 deposition, what are the underlying facts that
9 you use to create this, who had the facts, who
10 made the determinations in terms of what went
11 in and what went out, did Trek have contrary
12 positive information that they could have used
13 to present a more balanced view, it's our
14 opinion there was a very biased, one-sided
15 telling of the relationship that has two sides
16 to the story, as most do, and their
17 determinations as to what to share with the
18 public and what to select.

19 I mean, there's a very inflammatory
20 e-mail that was selected to be put in there
21 calling Greg LeMond a commercial idiot.
22 That's a horrible statement to put out there
23 for somebody whose brand you're supposed to be
24 supporting or somebody whose name you're
25 supposed to be supporting. I think that the

1 determination of selecting that e-mail versus
2 something else very much bears on their
3 performance of their support of the brand or
4 lack of in my opinion.

5 THE COURT: And the Power
6 Point presentation was given when in
7 relation -- was it also publicized on April 8
8 or when was it --

9 MS. RAHNE: It was released on
10 Trek's web site the same morning that the
11 press conference was held. And then later
12 that day was the -- I don't know if the Power
13 Point but I know the Power Point with John
14 Burke speaking was also posted on YouTube.

15 THE COURT: And when -- was
16 this all the same day that the suit was filed?

17 MS. RAHNE: Correct, Your
18 Honor.

19 THE COURT: Okay. All right.

20 MS. RAHNE: I want to just
21 speak briefly to the mitigation point and then
22 talk very briefly about how I think the
23 contours of this law apply or don't apply to
24 Trek's claims.

25 I'm puzzled by the mitigation argument

1 right now. Trek stood in this courtroom on
2 January 15 and claimed that they would not be
3 quantifying any damages to Trek, that the only
4 place they were quantifying damages was as to
5 LeMond bikes.

6 So I fail to see, though I appreciate
7 the fact that it ties into relevance again, I
8 fail to see how this could be an effort to
9 mitigate anything except potentially their
10 public relations which will lead into my
11 discussion about work product and privilege.

12 If Trek is not going to quantify
13 damages as to Trek bikes, I'm not sure what
14 they're mitigating by this. If Trek is only
15 quantifying damages as to LeMond bikes, which
16 is what they've said in this courtroom, this
17 didn't mitigate. It caused more harm.

18 THE COURT: Go ahead.

19 MS. RAHNE: As to work product
20 and privilege.

21 THE COURT: Let's focus on the
22 work product piece of it.

23 MS. RAHNE: Absolutely.

24 THE COURT: What I understand,
25 time line is, again, March 20, 2008 your

1 client commenced its lawsuit.

2 MS. RAHNE: Correct.

3 THE COURT: This law firm
4 hires this PR firm on April 3. The
5 representation is they had no prior
6 relationship. Meaning Trek had no prior
7 relationship with this PR firm. In other
8 words, they were hired by the law firm to,
9 from the affidavits, to address the litigation
10 and the fallout and impact on relationship and
11 customer -- and reputation with the customers.
12 It's more -- it's certainly in anticipation of
13 their own litigation but your client's
14 litigation has already begun. The lawyers
15 are, according to Mr. Weber, in the room or
16 privy to all of the face-to-face or let's say
17 telephonic communications. Don't know yet
18 about e-mail and other documents.

19 Why isn't this work product?

20 MS. RAHNE: Your Honor, in
21 examination of these cases, I think it's clear
22 that there can be times when a consulting firm
23 could contribute to work product. I think the
24 really important bright line that has to be
25 drawn is it has to be for a litigation

1 purpose. We can't just call it a litigation
2 purpose based on a time line and then say,
3 therefore, it is.

4 The cases very much distinguish between
5 instances where it's a litigation purpose and
6 when it's a public relations purpose. This to
7 me is per se public relations. There was --
8 you know, Trek can say all day that they
9 needed to do this but from a legal
10 perspective, there absolutely was no need to
11 produce this. They could have answered their
12 complaint. It would have been as publicly
13 available as Mr. LeMond's complaint. You
14 know, there was no legal reason why there had
15 to be a Power Point presentation connected to
16 the filing of a lawsuit.

17 Now, as I indicated before, we're sort
18 of flying blind. I'm willing to concede that
19 there may be communications in there where
20 work product applies. I don't know that. I
21 don't have a privilege log. I don't have -- I
22 mean, I have no description of what the
23 documents are. It sounds like Mr. Weber
24 hasn't even reviewed them yet.

25 So I don't -- I mean, I think that

1 there are probably very likely documents
2 related to the creation of this that are not
3 going to be covered because it's not a
4 litigation purpose.

5 THE COURT: Well, when I talk
6 about a litigation purpose, let's assume that
7 law firm hires PR firm to address the PR from
8 this litigation. Law firm sits down. Lawyers
9 sit down, share their strategies, their
10 thinking, how they're going to answer the
11 complaint, what they know about the
12 relationship, why they think Greg LeMond is
13 wrong in terms of his allegations.

14 In other words, lawyers with the client
15 sharing all sorts of information that bears on
16 litigation that the PR consultant will be
17 using to make a decision about what to
18 ultimately put in the PR piece. And at the
19 same time the PR firm then sends it back to
20 the lawyer and says, look, can you live with
21 this in terms of the litigation because
22 anything we put out in the public is going to
23 come back to -- you know, could haunt your
24 client, is this consistent and gets the
25 lawyer's input back and forth.

1 Why isn't this quintessential work
2 product?

3

4 MS. RAHNE: I think two
5 reasons. First off, and again we --

6 THE COURT: And I'm making
7 this all up as you know.

8 MS. RAHNE: I think Your Honor
9 is going to be in the best position if -- and
10 I'm very amenable to the idea of an in-camera
11 review because I think you're going to be in a
12 position to get a better view of what's going
13 on. We can only hypothesize.

14 It's very much my belief, based on the
15 fact that this is what we have to work from,
16 that there was effort to create this and it
17 has a great deal of bearing on my client's
18 claims in terms of what Trek has done to
19 damage his brand.

20 If there are some documents where it's
21 focused more internally toward the litigation,
22 if there's discussions about the complaint, I
23 think that those might be work product. I
24 think to the degree that there were
25 discussions about the complaint and the focus

1 was on the creation of this, it's our
2 contention that Trek has actually waived it.

3 I don't know how, you know, you can
4 hire just anybody to come in and sit and sit
5 in on these meetings and then say, well, we
6 haven't waived it even though this was the
7 ultimate work product. This was the ultimate
8 thing that we created and we were calling it
9 part of our litigation when it's not. This is
10 quintessential public relations product, not
11 legal work product.

12 THE COURT: Okay.

13 MS. RAHNE: My only other
14 point, Your Honor, is under the work product
15 doctrine, there is the ability for a party to
16 get the discovery of non-opinion work product
17 which we believe this would be if there's
18 substantial need. I believe we have
19 substantial need. We have no other way to get
20 at the -- what was selected, what wasn't
21 selected, what was the -- you know, what went
22 in and what went out in terms of telling a
23 very biased story about a brand that was going
24 to become a future competitor of Trek and that
25 Trek was supposed to be supporting.

1 THE COURT: And the need to
2 know what went in and what went out or what
3 decisions were made as to what to include or
4 not include or how to say it, what's the
5 relevance of that to your suit?

6 MS. RAHNE: I think it speaks
7 directly to Trek's failure to meet their
8 covenant of good faith and fair dealing. They
9 were under contract when they created this.
10 And if they made intentional decisions to tell
11 a story that is as biased as this appears to
12 be just on a glance, I think that's a breach.
13 That's absolutely a breach of their covenant
14 of good faith and fair dealing.

15 THE COURT: Okay. Anything
16 else that you have?

17 MS. RAHNE: Not unless you
18 have any other questions, Your Honor.

19 THE COURT: Let me ask again,
20 we don't know what's been withheld because
21 we've now learned that what's on the privilege
22 log are only documents that were redacted and
23 were produced to your client in some form or
24 another.

25 MS. RAHNE: Correct.

1 THE COURT: Is it your
2 position, just so I'm clear, after April 8,
3 are you seeking any communications between the
4 PR firm and counsel and the client or are we
5 only talking about communications leading up
6 to April 8 and the service of the suit?

7 MS. RAHNE: Just leading up to
8 April 8, Your Honor.

9 THE COURT: All right. Those
10 are the only questions that I had.

11 MS. RAHNE: I have just one
12 other item that --

13 THE COURT: Yes.

14 MS. RAHNE: I agreed with
15 counsel for Trek that we would just let you
16 know and get on the record Trek is providing
17 us some international sales documents that
18 have not yet been produced and they have
19 bearing on our expert reports, obviously. We
20 have a sort of gentleperson's agreement that
21 we're going to reset the date for our exchange
22 of our initial expert reports once that
23 material has been received and our expert has
24 a chance to say how much time he needs.

25 THE COURT: Okay.

1 MS. RAHNE: So I just wanted
2 to let you know that.

3 THE COURT: I didn't bring the
4 scheduling order with me but let me just
5 remind you so that when you do present that to
6 me, you keep this in mind. Although let me
7 just look at the docket. It may very well
8 say.

9 MS. RAHNE: I think they would
10 have been due tomorrow.

11 THE COURT: Yes.

12 MS. RAHNE: Rebuttal reports
13 aren't until August 1, I believe.

14 THE COURT: Okay. And the --
15 all discovery deadline --

16 MS. RAHNE: June 8.

17 THE COURT: Let me just see
18 here. Discovery due by June 8, 2009 and then
19 there must be -- must have some time for --

20 MS. RAHNE: Expert discovery.

21 THE COURT: Expert discovery.

22 All right.

23 MS. RAHNE: Correct.

24 THE COURT: Let me just remind
25 you all when you -- if you're going to present

1 anything that is going to modify dates, happy
2 to look at it. Understand if anything you
3 propose will affect Judge Kyle's dates, his
4 dispositive motion deadline or his trial ready
5 date, he'll be the one deciding whether to
6 move those dates. In other words, he'll want
7 to look at your reasons and why -- what caused
8 the delay and why couldn't you have done it
9 sooner, et cetera.

10 So it's my way of saying to you if you
11 can come up with a stipulation that doesn't
12 affect him, you're only talking to me. If it
13 affects his dates, I'll be talking to him.

14 MS. RAHNE: That will be our
15 goal.

16 MR. WEBER: If I could just
17 weigh in, Judge.

18 THE COURT: Sure.

19 MR. WEBER: They had asked for
20 some international sales data that was due
21 last Thursday. Trek hasn't completed pulling
22 all that together but I expect it to be done
23 in a day or two. And I told counsel that we,
24 of course, would agree to a day-by-day
25 extension of the reports for every day that we

1 go beyond last Thursday --

2 THE COURT: I don't anticipate
3 it's --

4 MR. WEBER: A very short time
5 frame.

6 THE COURT: That's good. I
7 just want to give you a heads up that if
8 ultimately it affects his dates, I'll be
9 talking to him.

10 MS. RAHNE: And you might be
11 pleased to know that we're going to have our
12 own sort of motivation because we do have a
13 mediation scheduled and we have an agreement
14 that we want to have all this on the table
15 prior to mediation.

16 THE COURT: Great.

17 MS. RAHNE: For our own
18 purposes --

19 THE COURT: When is that
20 scheduled?

21 MS. RAHNE: June 16.

22 THE COURT: And who is your
23 mediator?

24 MS. RAHNE: Judge Stone in the
25 Northern District of California. Former Judge

1 Stone.

2 THE COURT: Yep. Okay.

3 Great. Wonderful. All right.

4 Mr. Weber, anything further in
5 connection with your motion?

6 MR. WEBER: Thanks, Judge.

7 Couple of things.

8 In listening to counsel, it seems as
9 though they want to make the April 8
10 presentation itself a trial over that
11 presentation. Why did you put this slide in
12 that was negative to Mr. LeMond and not this
13 other slide that might have been more
14 favorable to him as if the jury is going to be
15 deciding whether Trek's announcement of the
16 filing of the lawsuit and the reasons for the
17 filing of the lawsuit somehow itself is a
18 separate independent claim. That just doesn't
19 make sense to me.

20 The parties acted as they did up to
21 March 20 in a business relationship and then
22 it shifted to litigation. And this April 8
23 announcement, again if the Court will look at
24 it, it was an express explanation of here is
25 why the relationship is over and the need to

1 seek court assistance. So it doesn't make
2 sense to me that somehow the jury would be
3 weighing why did you put this slide in and not
4 that slide. It just doesn't -- I don't track.

5 Secondly, in terms of what Mr. LeMond's
6 represented reasons were and his desire for
7 this relationship to continue until 2010,
8 well, two additional things I can tell you
9 that in December after the meeting with
10 Mr. LeMond, Mr. Burke followed up by e-mail to
11 Mr. LeMond and said, well, what's up? Are we
12 going to end early or are we continuing to
13 2010. Mr. LeMond didn't respond to Mr. Burke.

14 In the meantime, however, he has all
15 sorts of e-mail traffic with third parties
16 telling them that he's going to be filing this
17 lawsuit and hurry up and order your bikes
18 because the relationship is going to be over.

19 And in fact, between March 20 and
20 April 8 there's an e-mail from Mr. LeMond that
21 says I have served notice on Trek -- not that
22 we're going to continue -- I have served
23 notice on Trek that either they buy me out,
24 they buy the brand or I go away, take my brand
25 back but with a price. So the option of

1 continuing Mr. LeMond knew was over by virtue
2 of what he did on March 20.

3 THE COURT: Address the issue
4 of mitigation. You raised that and then
5 counsel for LeMond said they don't understand
6 your mitigation argument given Trek's position
7 as they aren't seeking damages. So they
8 don't -- their response that you have a duty
9 to mitigate your damages is somewhat of a
10 surprise.

11 MR. WEBER: Yeah, I'm not
12 quite sure -- I mean, you recall we were here
13 previously and seeking defining of the
14 parameters of Trek's counterclaim and
15 quantification of damages. And she's correct
16 that the lost sales aspect of this is limited
17 to the LeMond bikes. We have not attempted to
18 show the extent to which Trek bike brand sales
19 were affected by Mr. LeMond's conduct although
20 we believe it was.

21 As to lost bike sales, it is correct
22 that it is the LeMond lost bike sales that
23 we're talking about.

24 In a broader sense, though,
25 particularly from Trek's perspective in the

1 time leading up to April 8, between March 20
2 and April 8, Trek wasn't sure where this was
3 going, that it had to anticipate Mr. LeMond
4 making quite a spectacle of the allegations
5 about third parties that he's laid out in his
6 complaint. And Trek anticipated that it would
7 damage its brand if he were to do that and
8 needed to mitigate those anticipated damages
9 by a very clear and simple explanation of the
10 business reasons that the contract was over
11 and litigation was being filed.

12 So the mitigation argument I'm talking
13 about is in that time period between March 20
14 and April 8. We have not gone to -- we have
15 not attempted to assess the dollar impact on
16 the Trek brand aside from the LeMond brand by
17 virtue of what Mr. LeMond has done over the
18 years.

19 THE COURT: Okay. You can be
20 seated. Thank you.

21 MR. WEBER: Thanks, Judge.

22 THE COURT: At least
23 preliminarily I'm satisfied that the documents
24 that are being sought by the discovery are
25 relevant to claims related to LeMond's theory

1 of liability and also on the issue of damages.
2 At least that's my preliminary sense based on
3 what the parties have presented to me.

4 That said, in order for me to determine
5 whether the invocation of attorney-client
6 privilege or work product is appropriate I am
7 going to need two things from Trek and,
8 therefore, I'll be taking the motion under
9 advisement.

10 I'm going to need a privilege log
11 identifying the documents involving
12 communications between the PR firm and either
13 your firm or the client that you are claiming
14 are protected either by attorney-client
15 privilege or work product. So we need a
16 privilege log that contains the appropriate
17 information of the to, from, copied on and the
18 nature of the -- the subject matter. In other
19 words, consistent with what you've done on
20 your other privilege log. So I'm going to
21 need that. That privilege log needs to be
22 served on LeMond's counsel.

23 And then I'm going to need the
24 documents themselves to do an in-camera
25 inspection so I can make a determination as to

1 whether any of them or all of them should be
2 withheld or under what circumstances.

3 So, Mr. Weber, when do you think you
4 can get the privilege log to me and the -- and
5 let me -- and also the documents but let me
6 ask again. The mediation is scheduled for
7 June when?

8 MR. WEBER: 15th.

9 MS. RAHNE: 15th.

10 MR. WEBER: Or 16th.

11 MS. RAHNE: 16th.

12 THE COURT: All right. As a
13 practical matter, then, let me ask because
14 obviously I don't want to be the one holding
15 up discovery here but I also don't want to
16 encourage the parties to have to incur
17 unnecessary expense if, in fact, this case is
18 going to get resolved. So if it makes sense
19 to wait and have that production -- creation
20 of the privilege log and the production after
21 the mediation so you can see if it's been
22 resolved, we can certainly do that. If that
23 doesn't make sense because you need to keep
24 moving on this and you have other things,
25 granted we're already towards the end of May,

1 then I'm going to ask that it get produced to
2 me before the mediation. But it does occur to
3 me that, you know, this takes time and money
4 to do it and I hate to have the parties incur
5 unnecessary expense if the case can get
6 resolved.

7 MS. RAHNE: Speaking from our
8 side, Your Honor, we would very much prefer
9 that we have them prior to the mediation under
10 the same theory under which we're
11 exchanging -- we had discussed
12 (unintelligible) potentially holding up on
13 full-fledged expert reports for similar
14 reasons and Trek had indicated that we want to
15 be able to, you know, have everything on the
16 table, so to speak.

17 I think under that same theory I would
18 very much like to have whatever discovery
19 we're entitled to so we can incorporate into
20 our mediation brief and/or share with the
21 mediator if it has bearing in the case which
22 we believe it does.

23 THE COURT: Mr. Weber.

24 MR. WEBER: I'm actually --
25 I'm happy to give the privilege log in short

1 order, Judge --

2 THE COURT: Okay.

3 MR. WEBER: -- so we can keep
4 this moving because if the Court were to
5 conclude that Trek is incorrect, then we would
6 need to proceed with the deposition of the
7 public strategies person that was previously
8 noticed and we want to do that and keep this
9 moving.

10 THE COURT: Okay. You know,
11 as a practical matter, I'll tell you given
12 that we're already at May 26 and your
13 settlement conference is set for June 15, I
14 don't know that we, again depending on when
15 you get this information to me, whether you're
16 going to have a decision in time or a -- and
17 even if you do, whether one or the other of
18 you, whoever loses, won't be appealing it to
19 Judge Kyle in any event. Meaning, I'm not
20 sure you're going to have an answer on these
21 documents before June 15. I just want to give
22 you a heads up.

23 MR. WEBER: Then I will need a
24 little bit of time to pull everything
25 together, make sure I've got it.

1 THE COURT: Okay.

2 MR. WEBER: But I'll be happy
3 to do that before June 15.

4 THE COURT: Well, can you get
5 the documents to me by a week from today with
6 the privilege log? Does that work?

7 MR. WEBER: I'm afraid because
8 we have more discovery in this case tomorrow,
9 I'm getting the expert reports turned
10 around --

11 THE COURT: Okay.

12 MR. WEBER: -- if we could
13 look, say, during the week of the 8th. Say
14 June 10th?

15 THE COURT: That's fine but
16 just so you know, you're not going to have an
17 answer by the mediation.

18 MR. WEBER: Right. But she'll
19 have the log, then.

20 THE COURT: She'll have the
21 log, then, and know the magnitude of the
22 communications. I mean, obviously you'll make
23 what assumptions you want to make which is
24 they had other good stuff and they didn't put
25 it in for whatever reasons because they wanted

1 to put the bad stuff in and we're going to
2 disagree with it. I have a feeling this
3 particular set of discovery will not drive the
4 outcome of your mediation but I say that not
5 knowing what the heck's in those documents.

6 MR. WEBER: I don't think so,
7 Judge.

8 THE COURT: All right. Well,
9 why don't we say June 10, then, the privilege
10 log and the documents to me if you can get it
11 sooner so that at least counsel will have an
12 opportunity to examine the privilege log well
13 in advance of your mediation. That would be
14 helpful for client consideration.

15 MR. WEBER: Thanks, Judge.

16 THE COURT: All right. Thank
17 you, very much.

18 MS. RAHNE: Thank you, Your
19 Honor.

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1 STATE OF MINNESOTA)
) ss.
2 COUNTY OF WASHINGTON)

3

4 BE IT KNOWN, that I transcribed the
5 electronic recording relative to the matter
6 contained herein;

7

8

9 That the proceedings were recorded
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12 record of the proceedings, to the best of my
13 ability;

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16 That I am not related to any of the
17 parties hereto nor interested in the outcome of
18 the action;

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20

21 IN EVIDENCE HEREOF, WITNESS MY HAND.

22

23

24

s:/ Lisa M.Thorsgaard

25