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| Description | Diversified Control, Inc. v. Corning Cable System, LLC, 05-CV-277A | | |
| Date | 09/17/2009 | Location | Magistrate Judge McCarthy |
| Time | Speaker | Note | |
| <u>11:26:24 AM</u> | | ORAL ARGUMENT re: parties' cross motions for sanctions (Doc. #126 and #156 by Pltf against Pltf by Deft): | |
| <u>2:02:15 PM</u> | | | |
| <u>2:03:04 PM</u> | | | |
| <u>2:03:41 PM</u> | | case called. | |
| <u>2:03:47 PM</u> | Court | I have read your papers and I will give everybody the opportunity to argue and say what you want, I do have some questions in areas that I would like to focus in on at various times, and given that its Corning's initial motion and then Diversified's cross motions, later filed motion, Ms. Roney are you going to argue on behalf of corning? (Roney: Yes I am) | |
| <u>2:04:22 PM</u> | Court | I would like to start out by focusing on the issue of the emails. If I understand correctly, your motion is principally based on two grounds, first the belated production of emails and secondly the alleged misrepresentations as to the capacity of Diversified's computer system for downloading various information, correct? (Roney: That's correct) | |
| <u>2:05:04 PM</u> | Court | Now, and I think you said in one of your affidavits, probably actually in response to Diversified's motion but it seems to me that this is in fact the case that the stipulation and order which we all entered into in May 2008 was intended and understood by everybody to resolve all outstanding discovery issues up to that point, is that correct? | |
| <u>2:05:31 PM</u> | Roney | At least as to the subjects that were discussed within it | |
| <u>2:05:36 PM</u> | Court | I think what you said in your | |
| <u>2:05:46 PM</u> | Roney | At that point we had had a number of motions and cross motions and discovery demands and we did try and make a global resolution of everything that was in | |

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| | | dispute at that point in time |
| <u>2:06:01 PM</u> | Court | I am not trying to sandbag anyone here, there are a number of filings obviously and maybe somebody has a photographic memory, I certainly don't. It was in your affidavit that you filed |
| <u>2:06:19 PM</u> | | Dkt #165, filed under seal in response to Diversified's motion, but paragraph 132(i) says and I quote "it was both parties intent that the May 2008 stipulated order would resolve all outstanding discovery matters between the parties". That certainly seems to be my recollection at the time too. Mr. Manna, do you agree? |
| <u>2:06:42 PM</u> | Manna | You know Judge I thought that was the case and then we are here - they are talking about things that preceded May 16, 2008 |
| <u>2:06:48 PM</u> | Court | I understand that and certainly that is one of the issues but right now I am just trying to focus on where we all were in May 2008. It is my recollection and I believe it was Ms. Roney's recollection, and I am just asking for confirmation that it was your recollection that that stipulated order was a global resolution of outstanding discovery issues as of that time |
| <u>2:07:18 PM</u> | Manna | The - Ms. Roney has qualified her answer in saying that they were the issues discussed at the time - |
| <u>2:07:31 PM</u> | Court | What she said and again it was both parties intent that the May 2008 stipulated order would resolve all outstanding discovery matters between the parties. So that was my understanding as well, whether that stipulation was honored or violated is a different question but I am just trying focus in on where everybody's heads were at as of May 2008. Was it also your understanding that as of that time, with the entry of stipulation which I then so ordered, that was the resolution of all outstanding discovery issues up to that time? |
| <u>2:08:19 PM</u> | Manna | That's what I thought |
| <u>2:08:25 PM</u> | Court | We're making progress. |
| <u>2:08:31 PM</u> | Court | Now, can't remember if it is the first or second component of Corning's motion but one of the two components is that thereafter Diversified produced |

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| | | approximately 10,000 emails. I believe those were produced in Feb of this year or thereabouts, is that correct? |
| <u>2:08:52 PM</u> | Manna | Actually it was January |
| <u>2:08:55 PM</u> | Roney | Actually, it was January, March and two weeks ago. And the number is now more than 10,000. We have almost 50,000 pages of documents and over 16,000 email communications including about 1600 of these call reports so the production really, I think, we are still reviewing it but we understand that it was just completed two weeks ago and the magnitude is much more than |
| <u>2:09:43 PM</u> | Court | One at a time -- Ms. Roney, in a perfect world, had Diversified produced all of the emails say within a week or two of the date of that stipulation and order, would Corning |
| <u>2:09:48 PM</u> | Court | be moving for sanctions? |
| <u>2:10:09 PM</u> | Roney | No, I don't believe so - there would be no basis for that |
| <u>2:10:13 PM</u> | Court | I know there are references in the papers to emails having originally been demanded in the first document request and Mr. Mann's response was well there was a reference to emails but it was in the definitionally section, be that as it may a lot of water passed under the bridge until we get to May 2008. By that time it is clear and the parties have agreed that irrespective of whether emails had been demanded in the past, they are now considered demanded and they will be produced, correct? |
| <u>2:10:53 PM</u> | Roney | Correct |
| <u>2:10:59 PM</u> | Court | Now have any depositions as to which these emails - the emails produced since that time, have any depositions occurred between May 2008 and now as to which these emails would arguably be relevant? |
| <u>2:11:11 PM</u> | Roney | Not that have been conducted yet. We have recently advised counsel for plaintiff that we intend to take the deposition of another, going to their former sales representatives, a Mr. Schmoeger but we have not noticed/conducted any of those depositions with regard to those emails since May 2008 |

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| <u>2:11:48 PM</u> | Manna | Schmoeger |
| <u>2:12:20 PM</u> | Court | Ms. Roney, you made reference to emails that were produced in the early part of this year and now you just told that there were some additional emails produced, what two weeks ago? (Roney: Yes). Who were those from? What was the source of those emails? |
| <u>2:12:31 PM</u> | Roney | The source of those emails, I believe, way back I think in January when we got the first production. There were two issues that were ongoing. One was issues relating to the production of attachments to emails but another issue had to do with what records of Diversified Control had been searched in order to produce the emails and one very large lacking search was that of Mr. Temingstein, who is their chief sales representative. So we repeatedly asked that Mr. Temingstein's emails be searched and produced as well as any other employees because they had only produced those of Mr. James and Ms. Morga. So we had been asking for that all along - |
| <u>2:13:19 PM</u> | Court | Are those the emails that you then recently received? |
| <u>2:13:27 PM</u> | Roney | It is my understanding based on a declaration that came along with them that we now have all of the documents that they were able to find from Mr. Temingstein. I will alert the court that there is still an issue that we just haven't had an opportunity to even discuss yet because it appears that Mr. Schmoeger's emails have been destroyed or are just no longer available and we don't know exactly what that is. So, and also they had, there were issues with recapturing some of the attachments and we have worked through those and those were also included in this most recent production. |
| <u>2:14:02 PM</u> | Court | I know there was a lot of discussions about attachments and that Ms. Roberts thought they were attached and when they got to you then didn't seem to be attached and various technical glitches, have those been worked out now? |
| <u>2:14:21 PM</u> | Roney | We have received what I understand to be the complete production of the attachments but we had gone through and tried to par down the attachments that we really needed. I think there is going to be |

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| | | some ongoing issues with regard to some claims of privilege. But for the most part I believe based on the information provided to us that we have now been provided with the email attachments that were requested |
| <u>2:14:48 PM</u> | Court | Mr. Mann, let me ask you or Ms. Roberts, even Mr. Reina, if you want to - I will hear from anybody but the order was entered in May 2008, why was it that the emails from Mr. James and his assistant Ms. Morga, it wasn't until January when those were produced, why did it take so long? |
| <u>2:15:18 PM</u> | Manna | There is a whole intervening period there, from May all the way to January. We are working on a whole bunch of other issues that are related to the software, ability of software, and to quite candid with you Judge, we had produced hard copy emails that we had in our possession not only from Mr. Termingstein but to the extent that we had some from Mr. James and it kinda fell through the cracks. Now it took us 8 months to produce those documents which I will concede is quite a period of time but please don't lose sight of the fact that after this May 16, 2008 order was entered, most of which obligated Corning to do a whole bunch of things, they dumped on us on October 27 almost 38,000 documents. So it did take us a little bit longer, we were here before Your Honor, you asked me, I think it was in November, perhaps early December whether everything was done. Whether we had produced everything and I searched my memory at the time and to be honest with the court and to be accurate I remembered that there might have been this issue that we have not gotten to yet, because of all the other e-discovery related problems with emails so that is what I told the court, I think there is an issue with emails, that still needs to be done and that is in fact when we realized that was in fact correct, we went back |
| <u>2:17:05 PM</u> | Court | When we produced....Ms. Roney I will hear from you again in that regard, when you produced the first batch of emails, when was the search of Mr. Termingstein's computer done? |
| <u>2:17:23 PM</u> | Manna | That was done, I wasn't really too involved with the emails, I am going to have to ask Ms. Roberts if she |

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| | | knows |
| <u>2:17:31 PM</u> | Roberts | Initially we were told that there were no emails on his laptop, he had made a practice of deleting them. Then we had an issue because he is out of state, he works out of Florida? |
| <u>2:17:48 PM</u> | Court | But he is still an employee? |
| <u>2:17:54 PM</u> | Roberts | Yes he is. We had to make arrangements, because that is how he does his work, it is done for the most part over the phone, largely by emails because he is communicating with people all over the country. So arrangements had to be made to get him something else to use during that period of time with the programs and everything on it that he needed for his work. Once that was done, then we find out that things may have been deleted, frankly we had to get a forensic expert to go in and get those. The stuff that we produced to them, the pages we produced, were things that had to be forensically recovered to the extent they could be recovered off of the laptop that he works day to day off of so that took some time |
| <u>2:18:34 PM</u> | Court | Let me see if I understand so originally he represents that he did not keep any emails? |
| <u>2:18:42 PM</u> | Roberts | Apparently he didn't, that is why we had to go through the process, he writes and deletes, apparently he sends things out and goes right in and deletes it to keep his computer clean. |
| <u>2:18:49 PM</u> | Court | So you are saying that is what he honestly thought? I have not seen any affidavit. |
| <u>2:18:55 PM</u> | Robert | It is what he honestly thought, it is apparently what happened because that is why we had to get a forensic expert to go in and do whatever to recover whatever they could recover off of that laptop |
| <u>2:19:08 PM</u> | Court | Ms. Roney, you want to speak only to email issue right now. |
| <u>2:19:14 PM</u> | Roney | I don't know anything about that because there is nothing in record. In fact what is not in the record is any trail of due diligence with regard to producing the email communications. There is just nothing. The only indication is that Diversified's President Mr. James was asked for the very first time in December 2008 to |

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| | | even start looking for the email communications. In fact, I think it is Mr. Manna's correspondence to the court or in his declaration where he says that they are now compiling the information, that was around Christmas time. So between May of 2008 and Christmas of 2008, there is absolutely no effort at all by Diversified Control to even begin the search for any of these documents that were part of the May 2008 order |
| <u>2:20:10 PM</u> | Court | My own recollection from prior meetings with everyone and discussions is that there were other areas of dispute ongoing in that interim including the whether or not Diversified computer system was capable of being searched, etc. There were disputes involving experts and looking at their system - |
| <u>2:20:43 PM</u> | Roney | There were ongoing issues with regard to the database |
| <u>2:20:46 PM</u> | Court | Whether that is an excuse or not is another issue but I just want to confirm, I think Mr. Manna alluded to it and that is my recollection that there were a number of meetings and disputed issues relative to the capability of system to produce, which actually is the second aspect of your motion but those were going on in that time frame as well, right? |
| <u>2:21:13 PM</u> | Roney | They were going on. In fact, it was in sort of conjunction with that because at one point Mr. Manna offered to produce or give Corning access to Diversified database in exchange for our agreement that by doing so we would agree that they had produced everything and had no further discovery obligations. We obviously could not agree to that and that is when we brought the motion to compel in the fall of 2008, and specifically again asked for the email communications. So that was specifically brought up again -- |
| <u>2:21:49 PM</u> | Court | You brought that motion and then I believe it was November that I issued another order requiring Diversified to certify that they had produced and is that what then Mr. Manna got reminded you or whatever? |
| <u>2:22:02 PM</u> | Manna | No Judge, if you think back and take a look at.....you asked me in court if we had produced everything and |

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| | | that is when I searched my memory and thought there would be this issue of outstanding emails - |
| <u>2:22:23 PM</u> | Court | That's what I just said - was that what prompted you to go back to the issue of the emails? |
| <u>2:22:27 PM</u> | Manna | Yea but your order on that came out after I said well I think there could be outstanding emails and that is when you required us to certified - |
| <u>2:22:39 PM</u> | Court | When did you find, this is directed to you or Diane, when did you find out that Mr. Termingstein's computer in fact did have some emails albeit in deleted form? |
| <u>2:23:04 PM</u> | Manna | Not until very recently Judge. They sent -- Ms. Roney or Mr. Smith, I am not sure, sent a followup asking about whether Termingstein's had been produced, it was our understanding that if Mr. Termingstein had an email communication, that it would be copied to Mr. James or Ms. Morga so we thought that we had the whole world of Termingstein emails had been produced. I don't know whether that is true or not Judge but to be cautious and forthcoming, we went, we got this laptop, we sent it to forensic expert, so all these documents that Ms. Roney is talking about, I don't know if we are talking about duplicates or if these are all original emails - I don't know |
| <u>2:23:59 PM</u> | Roberts | I would note at time of Mr. Termingstein's deposition, we did produce a large stack of hard copies of emails that he had printed out at some point in time. They were his emails to Ms. Morga, Morga printed them out in New York to produced and those were handed over. In fact, Mr. Smith questioned extensively off of those emails at the time. At that point until recently, it was out understanding that Ms. Morga had a copy of everything and had printed things out for us at the time of the deposition |
| <u>2:24:41 PM</u> | Court | Ms. Roney |
| <u>2:24:43 PM</u> | Roney | I think there are about 100 hard copy of documents and they were for a narrow period of time. That was what sort of started the communication going because it was Mr. Termingstein at his deposition who testified that these reports and emails were, that he used emails, and email reporting for several years |

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| | | <p>at any time he had a customer issue. That is what actually sparked it so it should have not been any surprise to anybody following Mr. Terminstein's deposition in December 2007 that he would be natural depository for any of the responsive documents. The obligations of the Federal rules require that not just the president of the company's records be searched but anybody who is likely to have these documents and Mr. Termingstein was the sales guy. It was his testimony who said that he had been using email recording for years and that any time a customer was lost or complained about something, he would create this email record and that in the record. Apparently to this day, Mr. Smoeger's records were never preserved and we don't know, the declaration we got said we don't know where they are, I don't know if there is follow up on that or not</p> |
| <u>2:26:10 PM</u> | Court | That declaration has not been filed? |
| <u>2:26:18 PM</u> | Roney | <p>Not yet. No, I just mean we just got it and we, think we will have to take Mr. Smoeger's deposition to find out if maybe he's got the records. I suppose that is possible but regard to Mr. Termingstein, nobody ever searched his record, I don't know why and nobody ever searched any records until December 2008 and certainly not until, not only was the motion to compel made but then the court's order requiring the certification and even then on the eve of certification that a letter went to the court saying -- we are now compiling emails and then in January we get an incomplete production -- in March we get a certification but everybody admits and acknowledges that production is still incomplete, and we continue to still keep going back and forth and trying to get these documents until two weeks ago when we got the last installment</p> |
| <u>2:27:20 PM</u> | Court | <p>Aside from the issue of sanctions, Mr. Manna or Ms. Roberts, what would be the drop dead date for Diversified to certify that they had produced everything in their possession on these subjects. I recognize that when you have multiple employees and so forth, things can fall through the cracks but it does seem to me that at some point the hammer has to drop. My question is, I thought we had prior deadlines, what would be the final deadline to say OK</p> |

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| | | this is it? |
| <u>2:27:58 PM</u> | Manna | I guess I don't quite understand your question and I don't want to be evasive. I do want to point this out, this email reporting that Ms. Roney is talking about, was email reporting to Mr. James. We produced everything under the sun that we had from Mr. James - |
| <u>2:28:20 PM</u> | Court | I understand what you say in that regard and it makes some sense, but on the other hand you have now found that in fact Mr. Termingstein's computer did have some other emails, albeit deleted. Are you saying or can anybody tell me are these all emails that were already furnished to Mr. James so that there is nothing new under the sun? |
| <u>2:28:46 PM</u> | Manna | That was my understanding - now I have not gone and nobody from my office has gone through each and every one of these emails |
| <u>2:28:52 PM</u> | Court | Let me ask Ms. Roney or Mr. Smith, do you know? |
| <u>2:28:55 PM</u> | Roney | I don't have any reason to think they are all duplicates, in December 2007 Diversified produced 330 pages. Back up one moment, there is two components to what we have been calling the email production. One of which is email communications. I write to you, you write back to me, Mr. Termingstein writes to a customer, the customer writes to him, the normal email communications. The other component of documents that are in this global email production are what we have called call reports. It is, my best way to explain it, that it is a form of reporting that Mr. Termingstein, the sales person, would use to produce a report of customer encounter and he did that as part of his emails. So from what we have seen, the three components of the email production are email messages, email attachments and email call reports. |
| <u>2:30:08 PM</u> | Roney | In December 2007, before Mr. Termingstein's deposition or in conjunction with it, we received 330 pages of these call reports for period Sept 06 to Dec. 07 |
| <u>2:30:26 PM</u> | Roney | That was what we received. Then in July 2008 we rec'd another 570 pages of these call reports. It wasn't until Jan 2009, that we ever rec'd the email |

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| | | <p>messages or email attachments. So we never had those and in that production in Jan which was 16,221 emails and almost 50,000 pages of documents, there were an additional 1600 of these call reports plus all of these emails and attachments and everything else. Then again in March and more recently we have gotten thousands more documents. So I don't think there is any way that any of us can could ever say that they are all duplicative, and in fact the point is that most, the overwhelming production, thousands and thousands of documents that have been produced are not these Termingstein call reports that he testified to at his deposition, but they are all these email messages, and they go back and forth between anybody. There is no reason to think that Mr. Termingstein was only communicating with Mr. James, that would make no sense at all. He was the customer sales person so his would be including customer communications that Mr. James may or may not have been a part of.</p> |
| <u>2:32:09 PM</u> | Court | Mr. Manna, whatever Termingstein emails are still in existence or can be retrieved, have those now been produced? |
| <u>2:32:15 PM</u> | Manna | Yes |
| <u>2:32:18 PM</u> | Court | Is there, I take it then that his deletion of emails was something that he did in the ordinary course, not in response to the fact that this litigation was pending? |
| <u>2:32:34 PM</u> | Manna | Not at all. That was the way, when an email came in, he deleted it. Regardless of the location, was how he conducted his affairs |
| <u>2:32:46 PM</u> | Roney | This action has been pending since 05, there are no reasons why these emails from either Mr. Smoerger or Mr. Termingstein should have been deleted after the commencement of this action to the extent that they involve customer communications. Diversified is seeking damages for the years 2005 and 2006. I don't understand or believe it is any excuse to say emails were deleted in the face of the obligations to preserve relevant evidence. |
| <u>2:33:15 PM</u> | Manna | First there has to be a request for that Judge. There has to be a request for preservation of emails. Now did we think when we commenced this action that |

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| | | every single email to every single employee is going to be relevant to this suit, the answer is absolutely not. They never sent a request to preserve, our client continued to act in accordance with his ordinary business practice, we produced what we have - |
| <u>2:33:48 PM</u> | Court | Does anybody have anything else they want to say on the subject of emails? |
| <u>2:33:57 PM</u> | Roberts | Mr. Smoerger has not been with the company since sometime in 2006. He took his computer with him. We don't have access to it. We don't have it and any emails he would have sent to Mr. James are part of the Mr. James production. |
| <u>2:34:20 PM</u> | Court | Did he leave on good terms or not? I ask only because |
| <u>2:34:32 PM</u> | Manna | I don't think it was on bad terms. (Court: Is it possible to get his laptop?) If he has got this laptop, it has been 9 years, I am sorry 3 years/3-4 years |
| <u>2:34:44 PM</u> | Roney | Until this recent production, we didn't have a single page of Mr. Smoerger's (Manna: Neither did we) |
| <u>2:34:56 PM</u> | Roney | So they are not duplicative, and #2, it is not my understanding of the obligation of the Fed. R. Civ. P. to let employee who has relevant evidence regarding an ongoing litigation dispute for the periods of years that are in question to leave and take relevant evidence with him |
| <u>2:35:26 PM</u> | Court | Let's talk. If we have exhausted the subject of emails for now, the second aspect of the motion which is the alleged misrepresentation about the capabilities of the computer system and the there are expert affidavits on both sides of question. There is a Mr. James declaration/aff'd says that he himself or his expert asked him for this information so that she could use it for the benefit of Diversified and he told her we cant do this. Now whether or not something more diligent should have been done, that seems to be at least subjectively what his belief was at the time. But in any event, where we stand now is that the experts have weighed in on both sides and do I understand correctly that now the extent that system is searchable, search away, is that the way things work? |

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| <u>2:36:42 PM</u> | Roney | As of court ordered inspection, our experts have been able to get the data printed, sort, download, use it... |
| <u>2:36:58 PM</u> | Court | Between the day of the global resolution, back in May 2008 and now, it is my understanding that no additional depositions have been taken, right? |
| <u>2:37:19 PM</u> | Roney | Correct |
| <u>2:37:24 PM</u> | Court | So |
| <u>2:37:26 PM</u> | Roney | Mr. Martin's deposition was taken during that time period but nothing relating to the computer data |
| <u>2:37:33 PM</u> | Court | How I intend to proceed here. I have spent considerable time going over your papers, I have in mind what I want to do and I intend to announce my decision from bench. If anybody wants to take an appeal, I'll do a written decision so you can have that. |
| <u>2:38:15 PM</u> | | But I just think this case has, for whatever reason, the pace of this case has slowed to an intolerable level and it has got to stop |
| <u>2:38:30 PM</u> | | With respect to Cornings' sanctions motion, what we have is delay in producing emails and I think honestly that the delay is not inexcusable but is close to inexcusable. I do not expect to see it happen it again. Nonetheless I do accept the explanations for why the delay occurred. I am influenced by the fact that in the interim no depositions between May of 2008 and now have been taken which would have to be retaken based on belatedly produced information. So the harm to Corning, there has been some harm, but that harm is in terms of delay and I don't find that under those circumstances sanctions are warranted. I similarly don't find for many of the same reasons that sanctions are warranted with respect to the computer downloading issue. I see how it could be perceived that somebody had deliberately misrepresented the capabilities of the system but having reviewed Mr. James' deposition in particular and the other expert depositions, I think what you have basically is a dispute between experts and in a perfect world somebody would have realized earlier on, that the system could be operated such that information could properly tracked, sorted and searched. That didn't happen initially, it now has happened so we have |

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| | | some further delay but I don't think under the circumstances that it should warrant the imposition of sanctions. I think in general the parties have been working in good faith on this issue but I don't want there to be |
| <u>2:40:52 PM</u> | | any misunderstanding but my patience is wearing thin. If there are further aspects of delay without an exceedingly good excuse, I may well take a different view next time around. |
| <u>2:41:14 PM</u> | | Now if you want argue Diversified's motion, you are free to do so or I can tell you what I intend to do with respect to that. |
| <u>2:41:25 PM</u> | Manna | I would like to hear decision |
| <u>2:41:31 PM</u> | Court | It is pretty clear to me that Diversified's motion would not have been brought but for the fact that Corning's motion was brought. It has been characterized as retaliatory by Ms. Roney. That is a view that could be taken, but I do find that notwithstanding that the subject matter of that motion all predated the May 2008 (global resolution). There is some basis for dissatisfaction by Diversified as to Corning's performance. I do not find, the accusations that witnesses lied, I do not find have been borne out by the facts of Ms. Roney's declaration which goes into considerable detail as to how when placed in context, there may have been misunderstandings, but there weren't lies and moreover I think if in fact there were lies, this would have been brought to my attention much sooner. For all of those reasons, and the belated production which Diversified complains of by Corning: a) much of that predated May 2008 decision to the extent that production was belated beyond the date of that decision, some of that at least had to do with need to ascertain/releases of 3rd party confidentiality concerns and that was specifically addressed as a possibility in the May 2008 stipulated order. In sum, I think there is some room for dissatisfaction, some basis for dissatisfaction on both sides |
| <u>2:43:29 PM</u> | | but I don't find that the misconduct of either side to date warrants imposition of sanctions but what it does warrant is that everybody should be aware that I will be watching this ever more closely and I will have |

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| | | ever less patience going forward |
| <u>2:43:58 PM</u> | | We really need to move this on and that is what everybody seems to want to do but let me say again, if anybody wants me to issue a written decision so that they can appeal, I will be happy to do that. |
| <u>2:44:14 PM</u> | | It seems to me that the imposition of sanctions, as you all know, is within my discretion, I am exercising my discretion in the interest of moving the case forward. I don't want sanctions to become an end in itself and those will be my rulings. I will issue a TEXT ORDER TO THAT AFFECT. Again you can advise me if you want me to issue a written decision or go forward on that basis. |
| <u>2:44:39 PM</u> | | Let me say beyond that, when I was in private practice I did engage in sanction motions on occasion, not often, and I know neither of you do, you attorneys particularly Roney/Manna, I know you don't engage in it often. I believe that both of you brought these motions because you felt you had to but I am |
| <u>2:45:21 PM</u> | | really disappointed in the way this dispute is becoming personalized. I can't tell you to go have a beer with each other. If I were President I could have you all in and all have a beer but I can't do that. I strongly encourage both of you and also Mr. Smith, Ms. Roberts, Mr. Reina - you too try to get this back on track. |
| <u>2:45:55 PM</u> | | It seems it has a little more, I would have decided the motions much earlier, parties wanted Judge Arcara resolve the issue of the emails which he did and as I indicated, I think those emails are somewhat unfortunate but I understand the context in which they were, I accept the explanation for the context for which they were issued and they would not affect my decision in any regard. That's going to be my admonition, that is my decision. We need now to revisit the issue of the CMO and get new deadlines which will mean what they say. |
| <u>2:47:01 PM</u> | | I don't want to do that today because I thinknone of you knew that issue would come up but I want you to talk to each other over the next ten days, two weeks and submit to me a joint final CMO? Does that work for people? |

| | | |
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| <u>2:47:24 PM</u> | Manna | Yes |
| <u>2:47:27 PM</u> | Court | Issue of settlement discussions and I think somebody owes settlement papers at the end of this month and we will see where we go on that front too. |
| <u>2:47:44 PM</u> | Roney | I don't know if plaintiff's counsel has submitted their settlement submission -- |
| <u>2:48:01 PM</u> | Roney | Goes back to the CMO, we have been trying to work out some other discovery disputes to relevant time periods and things like that. The last communication we had Mr. Manna suggested that we await the outcome of any further settlement discussions before we try and come to terms with regard to what is still in play for discovery. The only reason I am raising that is because that will certainly impact the any proposed CMO because depending upon which way we come out in terms of further documents and issues to be resolved, there could either be a lot more discovery or no more discovery. |
| <u>2:48:48 PM</u> | Court | So you want to have the settlement discussion before you do that |
| <u>2:48:59 PM</u> | Court | this is progress.... |
| <u>2:49:06 PM</u> | Court | Joe you may have submitted....lot of papers come in, have not looked at them |
| <u>2:49:19 PM</u> | Manna | in the mail [#] |
| <u>2:49:23 PM</u> | Matt | will double check |
| <u>2:49:27 PM</u> | Court | Susan yours are due |
| <u>2:49:32 PM</u> | Roney | In a couple of weeks, my only point really was about the timing on CMO |
| <u>2:49:34 PM</u> | Manna | Wait on CMO? |
| <u>2:49:39 PM</u> | Court | As long as you want to, I plan to take it up as soon as I get the papers. Me or somebody else? |
| <u>2:50:04 PM</u> | Manna | Sit w/you ^{Report} |
| <u>2:50:07 PM</u> | Roney | We will talk about deposition, consult w/client, if client reqs written decision and get back |
| <u>2:50:25 PM</u> | Court | Intend to issue text order indicating my ruling with the reasons stated, basically that both motions are |

| | | |
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| | | denied and a written decision will be furnished if requested by the parties - ten day rule |
| <u>2:50:48 PM</u> | Smith | Until your decision |
| <u>2:50:50 PM</u> | Court | If nobody appeals, not going to appeal a non-issue |
| <u>2:51:02 PM</u> | Smith | Stay until we get back to you |
| <u>2:51:05 PM</u> | Court | Tell me within a week |
| <u>2:51:14 PM</u> | Roney | yes |
| <u>2:51:18 PM</u> | Court | Take it from there....anything further |
| <u>2:51:25 PM</u> | Manna | Thanks |
| <u>2:51:28 PM</u> | Roney | Thank you |
| <u>2:51:31 PM</u> | Reina | Thank you your honor |
| <u>2:51:35 PM</u> | end | |

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