

TRANSCRIPT OF PROCEEDINGS

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ORIGINAL

CASE NO: 2005-17325

IN RE: MAAT, INC.

HEARING

BEFORE: KAREN JENNEMANN,
U.S. BANKRUPTCY JUDGE

DATE: FEBRUARY 1, 2006

FILED

MAR 13 2006

CLERK U.S. BANKRUPTCY
COURT ORLANDO, FL

APPEARANCES:

ON BEHALF OF DR. FIFE: MAUREEN VITUCCI, ESQUIRE
AND JOHN ANTHONY, ESQUIRE

ON BEHALF OF DCP LIMITED: TODD HOEPKER, ESQUIRE

ON BEHALF OF NATIONAL
HERITAGE FOUNDATION (NHF): MICHAEL TESSITORE, ESQUIRE

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P R O C E E D I N G S

1
2 DEPUTY CLERK: ALL RISE. THE COURT IS BACK IN
3 SESSION. THE HONORABLE KAREN S. JENNEMANN PRESIDING.
4 YOU MAY BE SEATED.

5 CASE NO. 2005-17325, MAAT INCORPORATED.

6 ALL INTERESTED PARTIES PLEASE COME FORWARD AND
7 ENTER YOUR APPEARANCES.

8 MS. VITUCCI: GOOD AFTERNOON YOUR HONOR. MAUREEN
9 VITUCCI AND JOHN ANTHONY ON BEHALF OF DR. FIFE.

10 MR. HOEPKER: TODD HOEPKER ON BEHALF OF DCP
11 LIMITED.

12 MR. TESSITORE: MIKE TESSITORE ON BEHALF OF
13 NATIONAL HERITAGE FOUNDATION.

14 THE COURT: AND WE'RE HERE THIS AFTERNOON IN
15 CONNECTION WITH THE MOTION BY MR. FIFE TO COMPEL
16 DISCOVERY RESPONSES. MS. VITUCCI.

17 MS. VITUCCI: YES, YOUR HONOR. WE FILED THE
18 MOTION TO COMPEL BECAUSE NHF, NATIONAL HERITAGE
19 FOUNDATION, AND DCP, LIMITED, OBJECTED TO CERTAIN OF OUR
20 REQUESTS BASED UPON A COMMON INTEREST PRIVILEGE. WE
21 DON'T BELIEVE THAT THAT PRIVILEGE EXISTS, AT LEAST AS TO
22 THESE TWO PARTIES.

23 HOW IS IT POSSIBLE THAT AN UNSECURED
24 INVESTOR, WITH ABSOLUTELY NO LEVERAGE WHATSOEVER, IS
25 SUCCESSFUL IN OBTAINING A COLLATERAL ASSIGNMENT OF A

1 MORTGAGE FROM THE COMPANY IN WHICH IT INVESTED IT, MERELY
2 BECAUSE THE INVESTMENT WENT SOUTH?

3 HOW IS IT AGAIN POSSIBLE, THAT AFTER
4 ACCOMPLISHING THAT GREAT FEAT, THAT UNSECURED INVESTOR
5 WHO IS NOW SECURED, DOESN'T RECORD THE COLLATERAL
6 ASSIGNMENT FOR A YEAR?

7 NOW THIS DOESN'T HAPPEN ONCE, THIS HAPPENS
8 TWICE. BOTH NHF AND DCP CLAIM THAT THEY WERE INNOCENT
9 INVESTORS WHO LOST MONEY IN THE SCHEME THAT DR. FIFE LOST
10 HIS MONEY AS WELL AS THE OTHER PETITIONING CREDITORS.

11 WITH THIS SET OF FACTS, I DON'T BELIEVE THAT
12 NHF AND DCP CAN MEET THEIR BURDEN TO ESTABLISH THE BASIS
13 UPON WHICH THE PRIVILEGE IS BASED. BECAUSE, AS NHF AND
14 DCP BOTH HAVE COLLATERAL ASSIGNMENTS OF THE SAME
15 MORTGAGE, THEY'RE FIGHTING WITH EACH OTHER AS TO WHO HAS
16 THE ACTUAL SECURITY INTEREST.

17 NOW LET ME GIVE YOU A LITTLE BIT OF
18 BACKGROUND, HERE. THERE ARE TWO WAYS IN WHICH INVESTORS
19 WERE ABLE TO INVEST IN THESE WEALTH PRESERVATION
20 CERTIFICATES. ONE WAS THROUGH A DEFERRED COMPENSATION
21 PROGRAM THAT WAS CREATED BY DAVID TETTER USING AN
22 INTERNATIONAL EMPLOYEE LEASING PROGRAM. AND THE COURT
23 SHOULD BE FAMILIAR WITH THIS AS A RESULT OF THE IAS
24 BANKRUPTCY CASE. THROUGH THE INTERNATIONAL EMPLOYEE
25 LEASING PROGRAM, INDIVIDUAL'S COMPENSATION WAS DEFERRED

1 AND GIVEN TO A MONEY MANAGER. THAT MONEY MANAGER, BASED
2 UPON THE EVIDENCE TO DATE, INVESTED THE FUNDS SOLELY IN
3 WPC.

4 THE SECOND WAY IN WHICH THE INVESTORS COULD
5 INVEST THEIR MONEY, IS TO DIRECTLY PAY THE MONEY MANAGER
6 TO INVEST ITS MONEY IN WPC.

7 WE BELIEVE THAT NHF AND DCP WERE INVOLVED IN
8 THIS SCHEME, BECAUSE HOW ELSE COULD AN UNSECURED INVESTOR
9 WITH NO LEVERAGE WHATSOEVER, BE SUCCESSFUL IN OBTAINING A
10 COLLATERAL ASSIGNMENT OF A MORTGAGE? NOW, WITH THIS IN
11 MIND, LET'S GO TO THE ISSUE AT HAND WHICH IS THE COMMON
12 INTEREST PRIVILEGE.

13 THERE IS AN UNDERLYING STATE LAW CAUSE OF
14 ACTION OF FORECLOSURE IN WHICH NHF AND DCP INTERVENED.
15 NHF CLAIMED THAT THE PLAINTIFF IN THE CASE, WHICH IS
16 FCCC, IT HAD A SUPERIOR INTEREST AND THAT FCCC WAS NOT
17 ENTITLED TO FORECLOSE ON A PIECE OF PROPERTY. NOW, THIS
18 PIECE OF PROPERTY WAS THE DEBTOR'S REAL PROPERTY - IT WAS
19 A GOLF COURSE.

20 VERY SOON THEREAFTER, DCP INTERVENES AND
21 SAYS NO, I HAVE A SUPERIOR INTEREST. NHF, FCCC YOU CAN'T
22 FORECLOSE ON THE PROPERTY. DISCOVERY WENT ON AND AT THIS
23 POINT, THE GOLF OPERATIONS WERE LOSING MONEY. THE VALUE
24 OF THE PROPERTY WAS DECLINING. IN ORDER TO MAXIMIZE
25 THEIR INTERESTS, THESE PARTIES AGREED TO SELL THE

1 PROPERTY.

2 THIS IS NOT A COMMON INTEREST. THIS IS A
3 BUSINESS INTEREST, A COMMERCIAL INTEREST, A SELF
4 INTEREST. SO THE PARTIES, IN FACT, DID NOT SELL THE
5 PROPERTY DUE TO A PROBLEM OF JUDGMENTS AGAINST THE
6 PROPERTY, BUT FORECLOSED THE PROPERTY. THE PARTIES
7 AGREED THAT IT WOULD BE NHF THAT WOULD BE THE ENTITY THAT
8 FORECLOSES THE PROPERTY..

9 SO WE NOW HAVE A POT OF MONEY. AT THIS
10 POINT, NHF AND DCP WERE GOING TO GET READY TO ARGUE AS TO
11 WHO HAS THE SUPERIOR INTEREST. BUT, THE PETITIONING
12 CREDITORS FOUND OUT ABOUT THIS FORECLOSURE ACTION,
13 INTERVENED, AND FILED THE BANKRUPTCY CASE AT THE POINT
14 WHERE DCP AND NHF WERE GOING TO GET INTO THEIR FIGHT.

15 SO HERE, THERE ARE NO COMMON INTERESTS
16 BETWEEN THESE PARTIES. THE ONLY INTEREST WAS A SELF
17 INTEREST. SO WE DON'T BELIEVE THAT THERE IS A COMMON
18 INTEREST PRIVILEGE WHATSOEVER.

19 NONETHELESS, IF THE COURT FEELS THAT THERE
20 IS SOME SORT OF COMMON INTEREST HERE BETWEEN THE PARTIES,
21 THE PARTIES ALSO HAVE THE BURDEN TO PROVE THAT THERE IS
22 AN UNDERLYING ATTORNEY-CLIENT PRIVILEGE OR WORK PRODUCT
23 PRIVILEGE. NOW, DR. FIFE AND THE PETITIONING CREDITORS
24 ARE KIND OF WORKING AT A LOSS HERE. THE COMMON INTEREST
25 AGREEMENT WHICH I'VE BEEN TOLD EXISTS, HAS NOT BEEN

1 DISCLOSED. SO, WE DON'T KNOW THE DATE THAT THE AGREEMENT
2 WAS EXECUTED BY THE PARTIES, THE SCOPE OF THE AGREEMENT,
3 THE DURATION OF THE AGREEMENT. THERE'S ALSO NO PRIVILEGE
4 LOG. SO WE DON'T KNOW THE CONTENT OF THE COMMUNICATIONS,
5 THE PARTIES TO THE COMMUNICATIONS, THE DATES OF THE
6 COMMUNICATIONS, SO WE'RE KIND OF WORKING HERE IN THE
7 BLIND.

8 I UNDERSTAND THAT THE MAJORITY OF THE
9 COMMUNICATIONS, HOWEVER, ARE BETWEEN COUNSEL FOR DCP AND
10 COUNSEL FOR NHF. WHERE'S THE CLIENT? IF THEY'RE
11 CLAIMING THAT THERE'S AN ATTORNEY-CLIENT PRIVILEGE TO
12 THESE DOCUMENTS, TO THESE COMMUNICATION, THERE'S NO
13 CLIENT.

14 AN UNREPORTED FLORIDA DECISION, THE CITE IS
15 1995 WL 855421, WHICH IS CSX TRANSPORTATION, INC. V.
16 ADMIRAL INSURANCE COMPANY, STATES THAT IF THERE IS A
17 COMMUNICATION BETWEEN TWO ATTORNEYS AND THERE'S NO
18 CLIENT, THERE'S NO PRIVILEGE. NOW THIS MAKES SENSE EVEN
19 IN THE COMMON INTEREST CONTEXT.

20 THE COMMON INTEREST PRIVILEGE IS TO PROMOTE
21 FREE DISCUSSIONS AMONGST TWO CLIENTS THAT HAVE TWO LEGAL
22 INTERESTS. THE ATTORNEYS DON'T HAVE ANY LEGAL INTERESTS.
23 SO HERE, IF THESE ARE MERELY DISCUSSIONS BETWEEN COUNSEL,
24 THEY'RE NOT PROTECTED. THERE'S NO ATTORNEY-CLIENT
25 PRIVILEGE.

1 IT MAY BE THAT THE ATTORNEYS ARE REPRESENTING
2 COMMUNICATIONS FROM THEIR CLIENTS TO EACH OTHER, THAT MAY
3 ARGUABLY BE PRIVILEGED. HOWEVER, WE DON'T KNOW WHAT THE
4 COMMUNICATIONS ARE.

5 ALSO, THE COMMON INTEREST PRIVILEGE EXISTS
6 ONLY AT A POINT WHERE THE AGREEMENT IS MADE. HERE WE
7 DON'T KNOW IF THE AGREEMENT WAS MADE DURING THE
8 BANKRUPTCY CASE, DURING THE STATE COURT LITIGATION, MAYBE.
9 AT THE TIME THE GOLF COURSE WAS BEING SOLD, OR WHETHER IT
10 WAS BEFORE. NOW, ARGUABLY IT COULDN'T BE BEFORE WHEN THE
11 STATE COURT CASE WAS INITIATED BECAUSE THEY HAVE
12 COMPETING INTERESTS.

13 SO, IF THE COURT FINDS THAT THERE IS A
14 COMMON INTEREST, THEN DR. FIFE AND THE PETITIONING
15 CREDITORS SHOULD BE ABLE TO HAVE ACCESS TO DOCUMENTS THAT
16 WERE, COMMUNICATIONS THAT WERE MADE BEFORE THE COMMON
17 INTEREST PRIVILEGE WAS CREATED AS WELL AS SUBSEQUENT. WE
18 ALSO DON'T KNOW THE DURATION. WAS IT ONLY DURING THE
19 TIME WHEN THE GOLF COURSE WAS SOLD? OR WAS IT ONLY
20 DURING THE BANKRUPTCY PROCEEDING?

21 SO IF THE COURT FINDS THAT THERE IS A COMMON
22 PRIVILEGE, WHICH WE AGGRESSIVELY AND FERVENTLY DENY, WE
23 WOULD ASK THE COURT TO COMPEL NHF AND DCP TO PRODUCE A
24 PRIVILEGE LOG AS WELL AS TO PRODUCE THE AGREEMENT. IF
25 NOT TO US, THEN TO YOU, SO THAT THERE CAN BE A

1 DETERMINATION AS TO WHETHER EACH AND EVERY DOCUMENT IS IN
2 FACT PRIVILEGED BY THE COMMON INTEREST PRIVILEGE.

3 THE SAME APPLIES TO THE WORK PRODUCT. WE
4 DON'T KNOW IF THE COMMUNICATIONS ARE ATTORNEY'S MENTAL
5 IMPRESSIONS OR NOT. WE DON'T KNOW IF THE COMMUNICATIONS
6 ARE JUST DESCRIBING UNDERLYING FACTS, WHICH AREN'T
7 PRIVILEGED. SO AGAIN, EVEN WITH TO THE WORK PRODUCT
8 PRIVILEGE, WE WOULD ARGUE THAT THERE'S NO COMMON
9 INTEREST, THERE'S NO PROTECTION AFFORDED BY THE WORK
10 PRODUCT PRIVILEGE AND, IF THERE IS, THEN WE WOULD ASK THE
11 COURT TO MAKE THAT DETERMINATION IN CAMERA.

12 THE COURT: MR. HOEPKER.

13 MR. HOEPKER: YES, JUDGE. TODD HOEPKER
14 REPRESENTING DCP. I AM GOING TO TAKE THE LEAD FROM MY
15 END AND MR. TESSITORE'S END TO THE EXTENT I'M GOING TO
16 MAKE FACTUAL REPRESENTATIONS AND PROFFERING THOSE AS AN
17 OFFER TO THE COURT FOR YOUR HONOR AND MR. TESSITORE MAY
18 ALSO WANT TO MAKE ADDITIONAL ARGUMENT OR PROFFER HIS
19 STATEMENTS.

20 FIRST, LET ME TELL YOU WHAT WAS PRODUCED.
21 THESE REQUESTS ARE EXTREMELY BROAD. I PRODUCED, I THINK,
22 AT LEAST TWO BANKERS BOXES, MR. TESSITORE, IT IS MY
23 UNDERSTANDING, PRODUCED ABOUT 10 BINDERS. MS. VITUCCI
24 LOOKED AT MY DOCUMENTS FOR ABOUT FOUR TO FIVE HOURS AND
25 SAME GOES FOR MR. TESSITORE.

1 SECOND, THERE ARE NO COMMUNICATIONS BETWEEN
2 DCP AND NHF. THERE ARE NONE. SO, ALL WE'RE TALKING
3 ABOUT HERE IS EMAIL COMMUNICATIONS BETWEEN THE TWO
4 LAWYERS. AND THESE EMAILS ARE ABOUT VARIOUS MATTERS THAT
5 ARE INVOLVED IN THE STATE COURT CASES LEADING UP TO THIS
6 BANKRUPTCY AND I'LL GET TO THAT IN A MINUTE.

7 THIRD, I WANT TO UNEQUIVOCALLY STATE THAT
8 IT'S NOT OUR DESIRE OR INTENT TO THWART DR. FIFE'S OR THE
9 PETITIONING CREDITORS, TO ANY DISCOVERY THAT'S RELEVANT
10 TO THE ISSUES. WE'VE OBJECTED ON THE GROUNDS OF
11 ATTORNEY-CLIENT AND WORK PRODUCT AS EXTENDED BY THAT
12 COMMON INTEREST OR POOLED INFORMATION PRIVILEGE. AND
13 THOSE ARE WELL ESTABLISHED PRIVILEGES TO PROTECT THOSE
14 COMMUNICATIONS BETWEEN THE LAWYERS. AND, WE'RE ETHICALLY
15 BOUND TO ASSERT THEM, JUST AS IF DR. FIFE ASKED US TO
16 DIRECTLY DISCLOSE COMMUNICATIONS BETWEEN US AND OUR
17 CLIENTS OR DISCLOSE OUR NOTES, OUR STRATEGY, OUR
18 RESEARCH.

19 SO, THAT'S THE WAY IT'S COMING TO THIS
20 COURT. NOW, THE FACTUAL PRESENTATION I'M GOING TO
21 OUTLINE FOR YOUR HONOR, IS GOING TO SHOW YOU HOW THE
22 COMMON INTEREST AROSE. AND, IF I CAN APPROACH JUDGE, I
23 HAVE SOME CHARTS THAT KIND OF WILL GIVE YOU WHAT WAS
24 GOING ON AT THE TIME AND ILLUSTRATE THIS COMMON INTEREST.
25 THERE ARE THREE CHARTS, YOUR HONOR, AND HOPEFULLY THEY'LL

1 PUT THIS INTO THE RIGHT FACTUAL CONTEXT.

2 THE FIRST CHART IS THE MAGNOLIA PLANTATION
3 MORTGAGE FORECLOSURE. AND WHAT WAS GOING ON HERE WAS,
4 FIRST CREDIT WAS A LONE SERVICER FOR WPC, IT INSTITUTED A
5 FORECLOSURE ACTION ON THE MAGNOLIA PLANTATION GOLF
6 COURSE. MR. TESSITORE'S CLIENT, NHF, INTERVENED, SOUGHT
7 TO FORECLOSE ON ITS COLLATERAL ASSIGNMENT OF MORTGAGE,
8 AND SOUGHT A MONEY JUDGMENT AGAINST WPC.

9 MY CLIENT THEN RETAINED ME, I DID THE SAME
10 THING. I MOVED TO INTERVENE, I SUED TO FORECLOSE ON MY
11 COMPETING COLLATERAL ASSIGNMENT, AND I SOUGHT A MONEY
12 JUDGMENT AGAINST WPC. NOW, DURING THIS POINT IN TIME,
13 DCP AND NHF WERE ADVERSARIAL. I TRIED TO STOP THE
14 JUDGMENT FROM BEING ENTERED, THE MONEY JUDGMENT FROM
15 BEING ENTERED. AND I PRODUCED ANY CORRESPONDENCE THAT
16 RELATES TO THAT TIME PERIOD AND MR. TESSITORE CAN TELL
17 YOU WHETHER HE DID OR NOT.

18 NOW, I WAS UNSUCCESSFUL IN PREVENTING THAT
19 JUDGMENT FROM BEING RENDERED, AND SO NHF GOT A JUDGMENT,
20 GOT A WRIT ISSUED, SERVED THAT WRIT. I THEN GOT A
21 JUDGMENT, GOT A WRIT, SERVED THAT WRIT. NOW, ALSO IN
22 THAT FORECLOSURE PROCEEDING YOUR HONOR WILL SEE ON THE
23 CHART IS THAT THERE WAS A RECEIVER THAT HAD BEEN
24 APPOINTED BY JUDGE MCINTOSH, A GENTLEMAN NAMED DOUG
25 CRENSHAW. AT THAT SAME TIME HE WAS SEEKING RECEIVER FEES

1 AND THE LAW FIRM REPRESENTING HIM WAS SEEKING ATTORNEYS
2 FEES WHICH WE BELIEVE WERE EXORBITANT AND EXCESSIVE.

3 NOW, IF YOU TURN TO THE NEXT CHART WHICH IS
4 THE GARNISHMENT ACTIONS AGAINST FCC, AS OF THAT POINT IN
5 TIME, DCP AND NHF HAD THESE COMPETING WRITS OF
6 GARNISHMENT. THOSE WRITS HAD BEEN SERVED. UNSECURED
7 CREDITORS THAT WERE LESS DILIGENT THAN DCP AND NHF, MS.
8 JARVIS' CLIENTS, DR. FIFE, MR. MALCOLM'S CLIENTS, STARTED
9 COMING OUT OF THE WOODWORK. THEY FILED MOTIONS TO
10 INTERVENE IN THOSE GARNISHMENT ACTIONS, MOVED TO DISSOLVE
11 THOSE WRITS. AND THAT'S WHAT THIS CHART DEPICTS.

12 NOW, THE THIRD CHART SHOWS YOU ONE OTHER
13 IMPORTANT EVENT THAT WAS GOING ON AT THE SAME TIME.
14 FIRST CREDIT, FOR SOME REASON, DECIDED TO INSTITUTE AN
15 INTERPLEADER ACTION IN ORANGE COUNTY CIRCUIT COURT
16 SEEKING TO INTERPLEAD ALL OF THE ASSETS THAT IT HELD THAT
17 WE HAD ATTACHED BY VIRTUE OF THOSE GARNISHMENT WRITS.
18 THAT CASE WAS ASSIGNED TO JUDGE MIHOK. FIRST CREDIT IN
19 THAT LITIGATION SUED EVERYBODY THAT IT THOUGHT HAD A
20 CLAIM TO THOSE ASSETS.

21 NOW WE ASSERTED, DCP AND NHF, BOTH ASSERTED
22 THAT THAT INTERPLEADER ACTION WAS IMPROPER BECAUSE THE
23 SEMINOLE COUNTY COURT ALREADY HAD JURISDICTION OF ALL
24 THOSE ASSETS. AND, THERE WAS A PROCEDURE IN PLACE IN THE
25 GARNISHMENT STATUTE WHERE EVERYBODY COULD ASSERT THEIR

1 COMPETING INTEREST IN THE ASSETS AND HAVE THAT COURT
2 DETERMINE HOW THOSE ASSETS WERE GOING TO BE AWARDED.

3 SO, WITH ALL THIS GOING ON, MR. TESSITORE
4 AND I CAME TO THE OBVIOUS CONCLUSION THAT WE WERE FACING
5 AND WOULD CONTINUE TO FACE SIGNIFICANT OPPOSITION ON
6 NUMEROUS FRONTS. WE DETERMINED THAT WE HAD A MUTUALITY
7 OF INTERESTS ON THOSE FRONTS AND DESPITE OUR DIFFERENCES,
8 WE AGREED TO PURSUE THOSE COMMON INTERESTS. WE AGREED
9 THAT ANY SHARED INFORMATION WOULD BE KEPT CONFIDENTIAL,
10 VIS-À-VIS THIRD PARTIES.

11 AND, IF I COULD JUST SUM UP JUDGE, REAL
12 QUICK, WHAT THOSE COMMON INTERESTS ARE: MAXIMIZING
13 RECOVERY OF THE ASSETS, WHICH WAS THE GOLF COURSE
14 PROPERTY IN SEMINOLE COUNTY AND THE ASSETS HELD BY FIRST
15 CREDIT AND TO GET THOSE PROCEEDS AND GIVE THEM TO OUR
16 CLIENTS. AND IN THAT RESPECT, YOUR HONOR, THE GOLF
17 COURSE PROPERTY HAD ALMOST--OVER 180,000 DOLLARS IN BACK
18 TAXES THAT WE HAD TO FIGURE OUT A WAY TO TAKE CARE OF SO
19 THAT THAT PROPERTY WOULD NOT BE LOST AT A TAX DEED SALE
20 THAT WAS FAST APPROACHING.

21 THE OTHER INTEREST WE HAD WAS THAT WE HAD TO
22 FIGHT THE RECEIVER AND HIS ATTORNEY. AGAIN, WE BELIEVE
23 THAT THOSE FEES, WERE BOTH ATTORNEYS FEES AND THE
24 RECEIVER FEES, WERE EXCESSIVE AND IF THEY WERE
25 SUCCESSFUL, THAT WOULD OBVIOUSLY MINIMIZE THE NET RETURN

1 OF THOSE ASSETS.

2 THIRD BASIC GOAL - WE HAD TO MAXIMIZE THE
3 RECOVERY WE NEEDED TO RESOLVE THE GARNISHMENT LITIGATION,
4 SECURE OUR RIGHTS TO THOSE ASSETS BY VIRTUE OF THE
5 GARNISHMENT WRITS. WE KNEW WE WERE GOING TO BE FIGHTING
6 ALL OF THESE INTERVENING CREDITORS WHO HAD MOVED TO
7 DISSOLVE OUR WRITS.

8 AND THEN LASTLY, THAT INTERPLEADER ACTION
9 NEEDED TO BE TAKEN CARE OF. WE DIDN'T WANT THOSE
10 INTERVENING CREDITORS, WHO WERE LESS DILIGENT THAN DCP
11 AND NHF, TO GET A SECOND BITE AT THE APPLE IN A SEPARATE
12 ACTION THAT HAD BEEN INSTITUTED.

13 SO, WE HAD FOUR, AT LEAST FOUR, BASIC GOALS
14 OF INTEREST. WE HAD NUMEROUS COMMON LEGAL ISSUES AND WE
15 HAD NUMEROUS COMMON ADVERSARIES.

16 NOW, IF I CAN JUST OUTLINE THE LEGAL
17 ARGUMENT ON THIS COMMON INTEREST DOCTRINE. THIS ISN'T
18 ANYTHING NEW, JUDGE. I DON'T KNOW IF YOU'RE FAMILIAR
19 WITH IT, BUT IT'S BEEN AROUND SINCE 1871. IT'S LONG BEEN
20 RECOGNIZED IN THE UNITED STATES. IT--WHAT IT DOES IS IT
21 SIMPLY EXTENDS THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK
22 PRODUCT PRIVILEGES, TO MAKE AN EXCEPTION TO THE GENERAL
23 RULE THAT IF YOU DISCLOSE PRIVILEGED INFORMATION TO A
24 THIRD PARTY, YOU WAIVED IT. AND IT ALLOWS PARTIES TO
25 SHARE THOSE COMMON INTERESTS TO EXCHANGE PRIVILEGED

1 INFORMATION TO ADEQUATELY PREPARE THEIR CASES WITHOUT
2 LOOSING THE PROTECTION AFFORDED BY THE PRIVILEGES. IT
3 ALLOWS BOTH ATTORNEY-CLIENT PRIVILEGE INFORMATION AND
4 WORK PRODUCT TO BE USED AND EXCHANGED TO COORDINATE LEGAL
5 STRATEGIES.

6 I MEAN, I CAN JUST CITE THE CASES--I MEAN
7 THEY'RE--I DON'T KNOW IF DR. FIFE IS CLAIMING THAT THERE
8 IS NO COMMON INTEREST PRIVILEGE, BUT THERE CLEARLY IS.
9 WE BELIEVE THAT FEDERAL LAW APPLIES TO THIS ISSUE,
10 BECAUSE THE RULED DECISION ON A MOTION FOR RELIEF FROM
11 STAY AND A MOTION TO DISMISS IS GOING TO BE GOVERNED BY
12 FEDERAL LAW.

13 BUT, DR. FIFE'S MOTION KIND OF REFERENCES, I
14 THINK THAT FLORIDA LAW APPLIES. BUT EITHER WAY YOU CUT
15 IT, THERE'S A VERY ILLUSTRATIVE FLORIDA CASE CALLED
16 VISUAL SEEMS V. PILKINGTON BROTHERS, THE CITE JUDGE IS
17 508 SO.2D, I HAVE THE CASE FOR YOU, WHERE IT GOES THROUGH
18 THE PRIVILEGE. AND THERE--IT'S JUST BEEN RECOGNIZED IN
19 SEVERAL CASES INCLUDING--

20 THE COURT: WHAT DO YOU NEED TO ESTABLISH THE
21 COMMON INTEREST PRIVILEGE?

22 MR. HOEPKER: YOU NEED TO ESTABLISH THREE PRONGS,
23 JUDGE. AND, WE CLEARLY DO IN THIS CASE. A COMMUNICATION
24 OR INFORMATION MADE BY SEPARATE PARTIES IN PURSUIT OF A
25 COMMON INTEREST, DESIGN TO FURTHER THOSE INTERESTS, AND

1 NO WAIVER.

2 AND, IT DOESN'T REQUIRE A WRITTEN AGREEMENT.
3 THERE'S CASES THAT--AGAIN I CAN CITE THOSE TO YOU JUDGE,
4 IS A TENNESSEE CASE BOYD V. COMDATA NETWORK, 88 SW3RD,
5 203, TENNESSEE APPEAL 2002. ALSO JUDGE, JUST TO MENTION,
6 THE--A LOT OF FEDERAL COURTS RECOGNIZE THIS PRIVILEGE
7 INCLUDING A FIFTH CIRCUIT CASE THAT WAS RULED ON BEFORE
8 THE FORMATION OF THE ELEVENTH CIRCUIT.. SO IT CLEARLY
9 APPLIES HERE.

10 THE, I THINK MS. VITUCCI'S--THE PRIMARY
11 THRUST OF HER ARGUMENT IS THAT HOW COULD WE HAVE A COMMON
12 INTEREST? WE CLEARLY HAD THOSE FOUR COMMON LITIGATION
13 INTERESTS. THE INTERESTS DON'T HAVE TO BE IDENTICAL.
14 THERE ARE SEVERAL CASES WHICH PROVIDE THAT YOU CAN HAVE,
15 IN FACT, ADVERSARIAL ISSUES ON ONE HAND, BUT AS LONG AS
16 YOU HAVE COMMON INTERESTS ON THE OTHER, THE COMMON
17 INTEREST OR POOLED INFORMATION OR JOINT DEFENSE DOCTRINE,
18 STILL APPLIES.

19 AND, I CAN CITE THOSE CASES TO YOUR HONOR,
20 IF YOU'D LIKE. EISEN V. GANNON, 766 F.2D 770; UNITED
21 STATES V. MCPARTLIN, 595 F.2D 1321; HUNYDEE V. UNITED
22 STATES, 355 F.2D 183; IN RE LTV SECURITIES LITIGATION, 89
23 F.R.D. 595; IN RE: GRAND JURY SUBPOENA DUCES TECUM; 406
24 F.SUPP. 381. AND, IN FACT, IN THIS FLORIDA CASE COMING
25 OUT OF THE THIRD DCA AND THAT BY THE WAY, IN THAT CASE A

1 PLAINTIFF AND A DEFENDANT WERE RULED TO HAVE COMMON
2 INTEREST. SO, ON OPPOSITE SIDES ON ONE HAND, COMMON
3 INTEREST ON THE OTHER.

4 AND, IT'S ALSO GOING TO APPLY TO THE
5 BANKRUPTCY CONTEXT JUDGE. AND THE CITES ON THAT ARE IN
6 RE: MORTGAGE REALTY TRUST, 212 BANKR. 649; AND IN RE
7 KAISER STEEL CORP., 84 BANKR. 202. AND IT JUST HAS
8 ARISEN IN NUMEROUS FACTUAL CONTEXT.

9 SO, I DON'T THINK THAT THERE'S ANY DOUBT
10 THAT ALL THESE COMMUNICATIONS, EMAIL COMMUNICATIONS
11 BETWEEN MR. TESSITORE AND I ABOUT ALL THESE ISSUES THAT
12 I'VE DESCRIBED IN THE STATE COURT ACTION, ARE NOT SUBJECT
13 TO THAT PRIVILEGE. AND, I THINK IT'S ALSO IMPORTANT NOTE
14 THAT IF FOR SOME REASON THESE COMMUNICATIONS WOULD BE
15 DISCLOSED, THIS CASE OBVIOUSLY ISN'T OVER YET. THERE'S A
16 MOTION TO DISMISS PENDING--TWO MOTIONS TO DISMISS
17 PENDING, TWO MOTIONS FOR RELIEF THAT HAVE BEEN FILED, AND
18 IF FOR SOME REASON YOUR HONOR DISMISSES THESE CASES, WE
19 GO BACK TO STATE COURT AND ALL THOSE ISSUES THAT I'VE
20 DESCRIBED BEFORE ARE STILL IN PLAY AND THE DISCLOSURE OF
21 ALL OF THESE COMMUNICATIONS MAY IMPACT THOSE CASES AND
22 PREJUDICE OUR CLIENTS. SO, WE WOULD ASK THAT THE MOTIONS
23 IN THAT RESPECT BE DENIED.

24 THE COURT: WHAT IS YOUR POSITION ON THE
25 PREPARATION OF A PRIVILEGE LOG?

1 MR. HOEPKER: WELL, I DON'T THINK WE--WE WERE
2 GOING TO FILE MOTIONS FOR A PROTECTIVE ORDER BEFORE THIS
3 CAME ABOUT TO ASK THE COURT THAT WE DID NOT HAVE TO FILE
4 A PRIVILEGE LOG. MR.--AND I WAS NOT PRIVY TO THIS
5 ARRANGEMENT, BUT MR. TESSITORE AND MR. ANTHONY WORKED
6 OUT, I THINK, AN AGREEMENT SO WE DIDN'T HAVE TO FILE ONE
7 BEFORE THIS HEARING.

8 BUT, I CAN TELL YOU THAT THERE ARE A LOT OF,
9 LOT OF EMAILS AND I THINK THE GROUNDS FOR OUR PROTECTIVE
10 ORDER WERE GOING TO BE THAT IT WOULD BE OVERLY BURDENSOME
11 TO GO THROUGH ALL OF THOSE EMAILS AND DO THAT.

12 I ALSO THINK THAT BY REQUIRING US TO DO
13 THAT, WE ARE GOING TO, IN ESSENCE, BECAUSE SOME OF THEM
14 ARE GOING TO BE SHORT, WE WILL BE DISCLOSING EXACTLY
15 WHAT'S IN THE EMAIL ANYWAY.

16 ONE OTHER THING, AGAIN, THE JOINT DEFENSE
17 AGREEMENT IS NOT DISCOVERABLE. I CAN CITE YOU--

18 THE COURT: BUT IT'S NO DIFFERENT THAN THE
19 ATTORNEY-CLIENT OR WORK PRODUCT PRIVILEGE, IT JUST
20 EXTENDS FURTHER. IT'S THE SAME SCOPE, SO I DON'T
21 UNDERSTAND WHY YOU WOULDN'T HAVE A PRIVILEGE LOG.

22 MR. HOEPKER: WELL, AGAIN JUDGE, I BELIEVE THAT A
23 PRIVILEGE LOG WOULD TYPICALLY APPLY BUT IN THIS CASE WE
24 WERE GOING TO TAKE THE POSITION THAT IT WOULD BE
25 EXTREMELY BURDENSOME TO PREPARE ONE, BECAUSE OF THE VAST

1 NUMBER OF EMAILS THAT ARE THERE.

2 THE COURT: THANK YOU.

3 MR. HOEPKER: SURE.

4 THE COURT: MR. TESSITORE.

5 MR. TESSITORE: YOUR HONOR, I WOULD JUST LIKE TO
6 PROFFER AS MY TESTIMONY, THAT THE EMAILS WHICH ARE THE
7 SUBJECT OF THE MOTION AND THE SUBJECT OF THIS HEARING,
8 WERE PREPARED AND SENT AND RECEIVED FROM MR. HOEPKER AS
9 PART OF PURSUING THE COMMON INTEREST THAT HAS DESCRIBED
10 AND THAT ARE DESCRIBED IN THE CHARTS. THAT, THOSE EMAILS
11 WERE DESIGNED BY ME AND BY HIM AS I RECEIVED THEM, TO
12 FURTHER THAT COMMON INTEREST AND THEY HAVE NOT BEEN
13 WAIVED OR DISCLOSED TO THIRD PARTIES.

14 JUST A COUPLE OF POINTS, JUDGE, AND ONCE
15 AGAIN I PROFFER THIS AS MY TESTIMONY AS TO WHAT IS GOING
16 ON IN THE STATE COURT. THESE WERE NOT BUSINESS ISSUES,
17 THESE WERE LEGAL ISSUES WE WERE FACING. THIS WAS, IN
18 TERMS OF THE MAGNOLIA MORTGAGE FORECLOSURE ON CHART ONE,
19 THAT WAS A CONTESTED FORECLOSURE BY THE MORTGAGOR. THEY
20 HAD RAISED DEFENSES AND ALL THREE OF THE FORECLOSING
21 PLAINTIFFS SHARED A COMMON LEGAL INTEREST IN OVERCOMING
22 THOSE DEFENSES TO THE FORECLOSURES.

23 WITH REGARD TO DOUG KRENSHAW, THE RECEIVER'S
24 CLAIM FOR FEES, THERE WERE LEGAL ISSUES THAT WE WERE
25 STRATEGIZING ON AND FIGHTING WITH HIM ABOUT, AND THAT IS

1 WHAT IS A RECEIVER'S ENTITLEMENT TO FEES ON A FAILED GOLF
2 COURSE, WHEN THE MORTGAGEES, AS IT WERE, THE THREE
3 MORTGAGEES HAD NOT AGREED AND HAD NOT BEEN SUBJECT TO A
4 COURT ORDER TO PAY THOSE FEES. SO WE WERE DOING LEGAL
5 RESEARCH AND WE WERE HASHING THOSE ISSUES OUT--THOSE
6 LEGAL ISSUES OUT.

7 IN THE GARNISHMENT ACTIONS, OBVIOUSLY
8 THERE'S A BIG LEGAL ISSUE THERE THAT MR. HOEPKER AND I
9 SHARED IN COMMON, AND THAT IS HOW DO YOU KEEP CREDITORS
10 WHO COME LATER FROM INTERVENING AND TRYING TO DISSOLVE
11 YOUR WRITS OF GARNISHMENT. IT'S THE SAME ISSUE FOR BOTH
12 OF US AND WHETHER THAT'S PERMISSIBLE UNDER THE
13 GARNISHMENT STATUTE.

14 AND FINALLY, IN THE INTERPLEADER CASE, WE
15 DIDN'T WANT AN INTERPLEADER CASE, WE WANTED TO GET IT
16 DISMISSED. WE THOUGHT THE SEMINOLE COUNTY COURT HAD
17 JURISDICTION OVER THOSE ASSETS AND THEREFORE WE HAD A
18 COMMON INTEREST IN SEEING THAT THE INTERPLEADER WAS
19 DISMISSED AND STRATEGIZED VIA EMAIL AND OTHERWISE ABOUT
20 HOW TO DO THAT.

21 AND I WOULD JUST REITERATE THAT THESE ARE--A
22 LOT OF THESE ITEMS ARE STILL PENDING IN THE STATE COURT.

23 REGARDING THE PRIVILEGE LOG, I AGREE THAT
24 TYPICALLY WE WOULD PREPARE ONE. MY ONLY CONCERN HERE,
25 JUDGE, IS I LITERALLY HAVE 17 OR 18 VOLUMES OF

1 CORRESPONDENCE THAT I'VE ALREADY GONE THROUGH ONCE. AND,
2 IT LITERALLY TOOK ME TEN HOURS AND THAT'S JUST A LOT OF
3 ATTORNEY TIME AND FEES THAT MY CLIENT IS INCURRING ON
4 VERY FAR REACHING DISCOVERY THAT'S BEEN PROPOUNDED TO US.
5 AND, IT JUST SEEMS THAT THERE SHOULD BE SOMETHING TO
6 AMELIORATE THAT PAIN THAT MY CLIENT FEELS, WHETHER IT'S
7 SOME SHARING OF THE COST OF PARALEGAL TIME TO PREPARE
8 THAT PRIVILEGE LOG OR SOMETHING OF THAT NATURE. BUT, IT
9 IS TRULY BURDENSOME, ESPECIALLY SINCE MY CLIENT.

10 AND I KNOW MS. VITUCCI GOT INTO THE LITTLE
11 BIT OF THE BACKGROUND HERE WHICH REALLY ISN'T FACTS AND
12 WHAT I'M SAYING, I GUESS TECHNICALLY ISN'T FACTUAL PROOF.
13 BUT MY CLIENT CARRIED THE FREIGHT OF LITIGATING THIS CASE
14 FOR TWO AND A HALF YEARS IN STATE COURT. AND, LITIGATING
15 IT FIRST WITH MR. HOEPKER IN AN ADVERSARIAL WAY;
16 LITIGATING WITH MR. JOHNSON WHO'S IN THE COURTROOM TODAY,
17 AND HIS CLIENT, FIRST CREDIT, IN AN ADVERSARIAL WAY;
18 LITIGATING WITH THE RECEIVER; LITIGATING WITH THE
19 MORTGAGOR IN THE MORTGAGE FORECLOSURE; AND BRINGING US TO
20 THE POINT WHERE WE HAVE A POT OF ASSETS TODAY. THAT, YOU
21 KNOW, AND OUR POSITION IS THAT ARE NOT PROPERTY OF THE
22 STATE.

23 BUT, IT JUST, IT'LL BE ANOTHER REAL HAMMER
24 OF LEGAL EXPENSE THAT PRIVILEGE LOG, SO I WOULD ASK THE
25 COURT TO TAKE THAT INTO CONSIDERATION.

1 THE COURT: THANK YOU.

2 MR. TESSITORE: THANK YOU.

3 THE COURT: MS. VITUCCI.

4 MS. VITUCCI: AS TO THE ISSUE OF THE PRIVILEGE
5 LOG, THE AGREEMENT BETWEEN MR. ANTHONY AND MR. TESSITORE
6 AND I BELIEVE MR. ANTHONY CAN ATTEST TO THIS, WAS THAT
7 THE PARTIES DID NOT HAVE TO PRODUCE A PRIVILEGE LOG AT
8 THE TIME THAT THEY PRODUCED THEIR RESPONSES. WE AGREED
9 THAT THAT WOULD NOT CONSTITUTE A WAIVER.

10 WE DO NOT BELIEVE WE AGREED THAT WE WOULD
11 NEVER RECEIVE A PRIVILEGE LOG. AND, IT WOULD BE UNFAIR
12 TO NOT RECEIVE A PRIVILEGE LOG WHEN TWO PARTIES ARE
13 CLAIMING, APPARENTLY, A SIGNIFICANT AMOUNT OF DOCUMENTS
14 TO BE PROTECTED BY THE PRIVILEGE, BUT YET WE'RE NOT
15 PERMITTED TO KNOW THE UNDERLYING FACTS OF THAT PRIVILEGE
16 AND WHETHER IT APPLIES.

17 AND, IT MAY BE A LOT OF MAN HOURS TO PRODUCE
18 THE PRIVILEGE LOG, BUT IF YOU'RE CLAIMING IT'S
19 PRIVILEGED, THAT'S YOUR DUTY.

20 AS FOR THE FACT THAT THE MAJORITY OF THESE
21 DOCUMENTS ARE COMMUNICATIONS BETWEEN ATTORNEYS, NEITHER
22 DCP OR NHF HAS PROVIDED THE COURT WITH ANY AUTHORITY THAT
23 SAYS COMMUNICATIONS BETWEEN ATTORNEYS IN THE ABSENCE OF A
24 CLIENT, DOES NOT OR DOES RENDER THOSE COMMUNICATIONS
25 PRIVILEGED IN EITHER THE COMMON INTEREST DOCTRINE OR

1 UNDER THE ATTORNEY-CLIENT PRIVILEGE. I'VE INFORMED THE
2 COURT THAT THERE IS AUTHORITY TO SAY THAT COMMUNICATIONS
3 BETWEEN ATTORNEYS, OUTSIDE THE PRESENCE OF THEIR CLIENTS,
4 ARE NOT PROTECTED.

5 COUNSEL FOR DCP EVEN STATED THAT DCP AND NHF
6 HAD COMPETING INTERESTS IN THE BEGINNING OF THE STATE
7 COURT ACTIONS. BUT, BECAUSE THEY HAVE A COMMON INTEREST
8 IN MAXIMIZING RECOVERY OF THAT ASSETS, FIGHTING THE
9 RECEIVER AND THE ATTORNEY TO INSURE THE ASSETS ARE NOT
10 DIMINISHED, AND FIGHT INTERVENING CREDITORS TO MAKE SURE
11 THAT THE ASSETS AREN'T DIMINISHED, THAT'S A COMMERCIAL
12 INTEREST, THAT'S NOT A LEGAL INTEREST. AND, THERE'S
13 AUTHORITY, I CAN GIVE THE COURT CITES IF THEY WANT TO,
14 THAT SAYS A COMMERCIAL INTEREST IS NOT A LEGAL INTEREST,
15 THEREFORE THERE'S NO COMMON INTEREST.

16 THE FLORIDA CASE THAT COUNSEL FOR DCP SPOKE
17 TO THE COURT ABOUT, STATE LAW CASE. DOESN'T APPLY HERE.
18 I DO AGREE THAT FEDERAL LAW DOES APPLY. BUT, REGARDLESS
19 OF THAT FACT, THAT CASE IS THE MINORITY. THAT CASE DOES
20 BROADLY CONSTRUE THE COMMON INTEREST PRIVILEGE. IT'S THE
21 ONLY CASE THAT BROADLY CONSTRUES THE COMMON INTEREST
22 PRIVILEGE. SO, NOT ONLY DOES IT NOT APPLY, IT'S THE
23 MINORITY DECISION, IT'S NOT THE MAJORITY.

24 THE MAJORITY DECISION IS THAT LIKE THE
25 ATTORNEY-CLIENT PRIVILEGE, LIKE THE WORK PRODUCT

1 PRIVILEGE, THE COMMON INTEREST PRIVILEGE NEEDS TO BE
2 NARROWLY CONSTRUED.

3 AS FOR THE INTERPLEADER ACTION, IT'S
4 IRRELEVANT. OF COURSE, DCP AND NHF WANTED TO MAKE SURE
5 THAT THEY RECEIVED THEIR ASSETS. AND, THEY DIDN'T LIKE
6 THE FACT THAT OTHER PEOPLE WERE COMING IN. IT'S JUST
7 IRRELEVANT. THEY HAVE A COMMERCIAL INTEREST.

8 ALSO, IF THERE WAS AN AGREEMENT THAT
9 PROVIDED THAT A CERTAIN DATE THERE WAS A COMMON INTEREST,
10 IF THE COURT FINDS THAT THERE IS A COMMON INTEREST, THEN
11 WE'RE ENTITLED TO THE DOCUMENTS AND THE COMMUNICATIONS
12 THAT AROSE BEFORE THAT. SO, IT APPEARS AS IF THIS
13 AGREEMENT WAS CREATED AT THE TIME THE PROPERTY WAS GOING
14 TO BE SOLD. SO, AT A MINIMUM, DR. FIFE AND THE
15 PETITIONING CREDITORS, ARE PERMITTED ACCESS TO THE
16 DOCUMENTS AND THE COMMUNICATIONS THAT CAME BEFORE HAND.

17 AND ALSO, ALTHOUGH THERE IS A WRITTEN
18 AGREEMENT, THE WRITTEN AGREEMENT IS NOT DISPOSITIVE, BUT
19 THE WRITTEN AGREEMENT CANNOT CAUSE A PRIVILEGE TO BE
20 THERE THAT'S NOT THERE. THERE'S NO COMMON INTEREST. DR.
21 FIFE AND THE PETITIONING CREDITORS SHOULD BE ABLE TO
22 ACCESS THESE DOCUMENTS.

23 THERE WILL BE NO PREJUDICE IN THE STATE
24 COURT CASE. WE'RE INTENDING TO REMOVE THAT STATE COURT
25 CASE AND BRING IT INTO THE BANKRUPTCY COURT SO THAT ALL

1 OF THE ISSUES COULD BE RIGHTLY IN FRONT OF THE BANKRUPTCY
2 COURT AND THE ASSETS OF THE DEBTOR, A FRAUDULENT DEBTOR,
3 THAT CAN BE DISTRIBUTED EQUALLY AMONGST THE INNOCENT
4 INVESTORS THAT HAD NOTHING TO DO WITH ITS SCHEME.

5 THE COURT: ANY RESPONSE OR ANY FURTHER COMMENT?

6 MR. HOEPKER: YEA, JUST, I ALSO WANT TO GIVE YOU
7 THAT CITE JUDGE. I'M SORRY ABOUT NOT GIVING IT TO YOU
8 BEFORE.

9 THE COURT: THAT'S OKAY.

10 MR. HOEPKER: I DON'T KNOW IF IT MATTERS TO YOUR
11 HONOR, BUT--

12 THE COURT: 508 SO.2D--IT ACTUALLY, DON'T WORRY
13 ABOUT IT MR. HOEPKER BECAUSE I SORT OF KNOW WHERE I'M
14 GOING.

15 MR. HOEPKER: OKAY.

16 THE COURT: IS THERE ANY OTHER RESPONSE?

17 MR. HOEPKER: YEA I DO, JUST BRIEFLY JUDGE. MS.
18 VITUCCI'S ARGUMENT IS WELL ALL OF OUR INTERESTS IS
19 COMMERCIAL. WELL IF YOU TAKE THAT ARGUMENT TO ITS
20 LOGICAL CONCLUSION, EVERY LEGAL STRATEGY ENDS UP AS BEING
21 A COMMERCIAL INTEREST. BECAUSE, YOU'RE SERVING A CLIENT
22 GOAL AT THE END OF THE DAY WHICH OBVIOUSLY IS SOME SORT
23 OF BUSINESS OR COMMERCIAL INTEREST. THAT DOESN'T MAKE IT
24 SO THAT ALL OF THE STRATEGY AND ANY COMMUNICATIONS THAT
25 ARE DESIGNED TO ULTIMATELY BENEFIT THE ULTIMATE CLIENT

1 AREN'T PART OF A LEGAL INTEREST. SO, THAT'S MY RESPONSE.

2 THE COURT: THANK YOU. I NEED THE HELP OF THE
3 PARTIES FOR ONE FURTHER STEP BEFORE I CAN RULE ON THE
4 MOTION. BUT, LET ME GIVE YOU AN IDEA OF EXACTLY WHAT I'M
5 INTERESTED IN HAVING. AND, I DON'T NEED FORMAL
6 MEMORANDUMS--A LETTER, A SUMMARY, A LIST OF CASES WOULD
7 BE APPROPRIATE. BUT, I NEED YOUR HELP TO GET THERE
8 BECAUSE I'VE GOT OTHER THINGS THAT I'VE GOT OTHER PEOPLE
9 WORKING ON.

10 ONE IS, UNDER ANY SCENARIO AND IF SO, WHAT
11 LIMITATIONS, ARE COMMUNICATIONS BETWEEN ATTORNEYS
12 PROTECTED UNDER ANY PRIVILEGE? WHAT ARE THE LIMITS ON
13 THE COMMON INTEREST PRIVILEGE?

14 LET ME TELL YOU SOME THINGS YOU DON'T NEED
15 TO RESEARCH, ONE IS THE FEDERAL RULES OF EVIDENCE WILL
16 APPLY, INCLUDING THE PRIVILEGE RULES. THE SECOND THAT
17 THERE IS A COMMON INTEREST PRIVILEGE AND I AGREE, IT
18 EXISTS, I WILL ENFORCE IT.

19 WHAT I WANT YOU TO DO IS TO ARTICULATE FOR
20 ME LEGAL STANDARDS, WHAT IS THE LIMITS AND EXTENT OF THE
21 COMMON INTEREST PRIVILEGE? RECOGNIZING, AND I DON'T HEAR
22 ANY DISPUTES THAT THESE ARE THE PRIOR LITIGATIONS AND THE
23 COMMON INTEREST ASSERTED BY NHF AND DCP AS REFLECTED IN
24 THE CHARTS THAT WERE HANDED OUT. SO, THOSE ARE THE TWO
25 LEGAL ISSUES I NEED SOME ASSISTANCE ON.

1 THE OTHER THING IS THE PRIVILEGE LOG. YOU
2 GUYS NEED TO KNOW--IF YOU'RE CERTAIN OF PRIVILEGE, YOU'RE
3 GOING TO HAVE TO DO A LOG. THAT'S JUST NOT SOMETHING I'M
4 GOING TO MODIFY. SO, THAT YOU NEED TO RECOGNIZE THAT AS
5 YOU'RE CRAFTING THIS.

6 AND LASTLY, IF THERE IS A COMMON INTEREST
7 WRITTEN AGREEMENT OF ANY KIND, I WILL WANT THAT PRODUCED
8 IN CAMERA. I DON'T WANT TO LOOK AT THE SOURCE AND
9 CONTENT OF COMMUNICATIONS THAT THEY'RE GOING TO BE
10 PRIVILEGED, OTHER THAN IF THERE'S A WRITTEN COMMON
11 INTEREST AGREEMENT OF SOME TYPE. THAT I WILL SEE,
12 BECAUSE I DON'T WANT TO TAINT ANYTHING I MIGHT DO LATER
13 BY LOOKING AT SOMETHING I'M NOT ULTIMATELY GOING TO BE
14 CONSIDERING.

15 IN CIRCUMSTANCES WHERE I'VE ACTUALLY HAD TO
16 LOOK AT PRIVILEGED, ALLEGED PRIVILEGED DOCUMENTS,
17 TYPICALLY JUDGE BRISKMAN AND I WILL SWITCH OFF. HE'LL
18 LOOK AT THEM IN CAMERA AS OPPOSED TO ME. I DON'T THINK
19 THAT'S TRUE IF THERE IS A WRITTEN COMMON INTEREST
20 AGREEMENT, I THINK I CAN LOOK AT THAT. BUT, HAVING SAID
21 THAT, IF YOU THINK IT DIVULGES SOMETHING THAT I SHOULD
22 NOT CONSIDER BECAUSE I HAVE TO RULE ON THE OTHER ISSUES
23 IN THIS CASE, I WILL CERTAINLY DEFER AND JUDGE BRISKMAN
24 WILL GET IT INSTEAD OF ME.

25 SO, THOSE ARE THE FOUR THINGS I WANTED TO

1 SAY. IS THAT I NEED THE ADDITIONAL SUMMARIZATION,
2 RESEARCH, HOWEVER YOU WANT TO CRAFT IT AGAIN. I DON'T
3 WANT YOU TO SPEND A TON OF TIME AND MONEY BUT I NEED YOUR
4 HELP ON THOSE TWO LEGAL ISSUES. IF YOU'RE GOING TO
5 ASSERT THE PRIVILEGE, BETTER START THINKING ABOUT THE
6 LOG. AND, IF THERE'S A COMMON INTEREST AGREEMENT, THAT
7 NEEDS TO BE PRODUCED IN CAMERA.

8 .AND I'M CERTAIN YOU ALL ARE VERY
9 SOPHISTICATED AT THIS POINT, BUT YOU KNOW YOU CAN'T,
10 ANYTHING YOU FILE ELECTRONICALLY IS NO LONGER IN CAMERA,
11 SO DON'T DO IT THAT WAY. IT HAS TO BE PAPER.

12 MR. HOEPKER: I LEARNED THAT THE HARD WAY JUDGE.
13 I TRIED TO GET A PREJUDGMENT WRIT OF GARNISHMENT ISSUED
14 WITHOUT A NOTICE.

15 THE COURT: THERE ARE SOME FLAWS WITH ELECTRONIC
16 FILING AND THAT'S ONE OF THEM. SO, ONCE IT'S OUT THERE I
17 CAN'T TAKE IT BACK. SO, DON'T DO IT--FILE IT IN PAPER
18 FOR A MOTION TO REVIEW IN CAMERA.

19 MR. HOEPKER: JUDGE ARE YOU--IS THERE ANY TIME
20 DEADLINE YOU'RE IMPOSING FOR THE MEMORANDUM?

21 THE COURT: WHAT I WOULD LIKE--I WILL NOT GET TO
22 IT, AND REALLY I'LL GIVE YOU MORE TIME IF YOU NEED IT,
23 BUT, I'M NOT EVEN GOING TO REMOTELY GET TO IT UNTIL
24 FEBRUARY THE 13TH. SO, THAT'S JUST A WEEK AGO--THAT'S TEN
25 DAYS. I DON'T KNOW IF THAT GIVES YOU ENOUGH TIME OR NOT.

1 BECAUSE, AS I SAID, I'M NOT LOOKING FOR A FANCY
2 MEMORANDUM.

3 MR. HOEPKER: HOW'S THE FIFTEENTH SOUND JUDGE?

4 THE COURT: THAT'S FINE.

5 MR. HOEPKER: THAT'S A GOOD ROUND NUMBER.

6 THE COURT: SO THAT WOULD BE FINE. I'LL EXPECT
7 IT ALL FEBRUARY THE 15TH AND THAT WILL STILL GIVE YOU TIME
8 TO GATHER IT UP, THE ADDITIONAL ITEMS UP IF I REQUIRE THE
9 TURN OVER.

10 MR. VITUCCI: DOES YOUR HONOR WANT THE AGREEMENT
11 WITH THE MEMORANDUM FROM OUR SIDE?

12 THE COURT: YES.

13 MR. VITUCCI: OKAY.

14 THE COURT: I'M NOT INSISTING THAT YOU HAVE THE
15 PRIVILEGE LOG AT THIS POINT. I UNDERSTAND THAT WILL TAKE
16 MUCH MORE TIME.

17 MR. VITUCCI: OKAY. THAT WOULD FLOW OUT OF YOUR
18 ORDER, I'M ASSUMING.

19 THE COURT: I'M JUST TELLING YOU NOW--

20 MR. VITUCCI: GET READY FOR IT.

21 THE COURT: GET READY FOR IT. GET READY FOR IT.

22 MR. VITUCCI: GET THE FILES BACK OUT OF THE
23 CABINET.

24 THE COURT: IF YOU HAVE TO.

25 MR. VITUCCI: THE OTHER THING JUDGE, IS THE

1 PROCEDURE FOR SUBMITTING AN IN CAMERA--IS THAT JUST A HAND
2 DELIVERY TO YOUR HONOR IN AN ENVELOPE?

3 THE COURT: YOU CAN FILE IT UPSTAIRS OR BRING IT
4 TO CHAMBERS EITHER ONE. IF YOU FILE IT IN A SEALED
5 ENVELOPE IT'LL JUST GET TO ME DIRECTLY THAT WAY. IT
6 DOESN'T REALLY MATTER.

7 ANYTHING ELSE? ANY OTHER QUESTIONS?

8 I KNOW WE HAVE THE HEARING, THE STATUS
9 CONFERENCE OR THE HEARING COMING UP ON APRIL THE FOURTH.
10 I'LL GET THIS AND RULE UPON THIS. IS THERE ANYTHING ELSE
11 WE NEED TO DISCUSS TODAY?

12 MR. HOEPKER: WE HAVE A MEDIATION COMING UP NEXT
13 WEEK JUDGE.

14 THE COURT: GOOD. HOPEFULLY THAT'LL BE--I'M GLAD
15 TO HEAR YOU'VE GOT A DATE SET FOR THAT.

16 ANYTHING ELSE?

17 MR. HOEPKER: THANKS JUDGE.

18 MR. VITUCCI: THANK YOU, YOUR HONOR.

19 THE COURT: THANK YOU.

20 [WHEREUPON THIS CASE WAS ADJOURNED AT 2:14 P.M.]

21

CERTIFICATE OF OATH

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STATE OF FLORIDA:

COUNTY OF SEMINOLE:

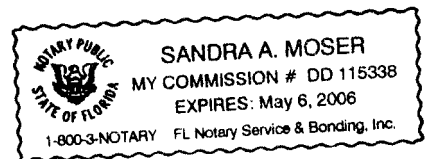
I, SANDRA A. MOSER, NOTARY PUBLIC, CERTIFY THAT I WAS AUTHORIZED TO AND DID TRANSCRIBE, FROM CD, THE FOREGOING PROCEEDINGS AND THAT THE TRANSCRIPT IS A TRUE RECORD.

I FURTHER CERTIFY THAT I AM NOT A RELATIVE, EMPLOYEE, ATTORNEY OF RECORD FOR ANY OF THE PARTIES, NOR AM I FINANCIALLY INTERESTED IN THE OUTCOME OF THIS MATTER.

DATED THIS FIRST DAY OF MARCH, 2006.

Sandra A Moser

SANDRA A. MOSER, NOTARY PUBLIC-
STATE OF FLORIDA



MY COMMISSION NO: DD115338

MY COMMISSION EXPIRES: MAY 6, 2006