

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MORALES ,) CV-06-219-JF
) CV-06-1793-JF/RS
 PLAINTIFF ,)
) SAN JOSE , CALIFORNIA
 VS .)
)
 CATE , ET AL ,) NOVEMBER 16 , 2010
)
 DEFENDANT .)
) PAGES 1-28

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEREMY FOGEL
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S :

FOR THE PLAINTIFF : MCBREEN & SENIOR
BY: DAVID SENIOR
2029 CENTURY PARK EAST , 3RD FL
LOS ANGELES , CA 90067

FOR THE DEFENDANT : OFFICE OF THE ATTORNEY GENERAL
BY: MICHAEL QUINN
455 GOLDEN GATE AVENUE
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SAN FRANCISCO , CA 94102

(APPEARANCES CONTINUED ON THE NEXT PAGE)

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1 FOR THE PLAINTIFF : LAW OFFICE OF JOHN R. GRELE
2 BY: JOHN GRELE
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4 FOR THE PLAINTIFF : KEKER & VAN NEST LLP
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SAN JOSE , CALIFORNIA

NOVEMBER 16 , 2010

P R O C E E D I N G S

(WHEREUPON , COURT CONVENED AND THE
FOLLOWING PROCEEDINGS WERE HELD :)

THE COURT : THIS IS THE MATTER OF MORALES
AND BROWN VERSUS CATE , AND ALSO THE PNS MATTER .

CAN I GET APPEARANCES , PLEASE .

MR . GRELE : GOOD AFTERNOON , YOUR HONOR .
JOHN GRELE AND DAVID SENIOR ON BEHALF OF
MR . MORALES AND MR . BROWN .

MR . KRISHNAN : GOOD AFTERNOON ,
YOUR HONOR . AJAY KRISHNAN ON BEHALF OF THE
PLAINTIFF , PACIFIC NEWS SERVICE .

MR . GOLDMAN : GOOD AFTERNOON , YOUR HONOR .
JAY GOLDMAN AND MICHAEL QUINN ON BEHALF OF
DEFENDANTS .

THE COURT : GOOD AFTERNOON , COUNSEL .

WHY DON ' T YOU ALL HAVE A SEAT .

I THINK WE ' VE GOT LESS WORK TO DO THAN I
THOUGHT . WITH REGARD TO THE DISCOVERY STAY , I JUST
WANT TO GET A CLARIFICATION FROM THE STATE , AND I
THINK IF I HAVE UNDERSTOOD THE STATE ' S POSITION
CORRECTLY THEN THERE SHOULDN ' T BE ANY PROBLEM .

WHAT I READ IN THE LATEST PAPERS FILED BY
THE STATE IS THAT THE ATTORNEY GENERAL ' S OFFICE IS

1 NOT GOING TO REQUEST ANY EXECUTION DATES UNTIL
2 EITHER THE COURT HAS DETERMINED THIS MATTER OR
3 UNTIL THE CONCLUSION OF THE EVIDENTIARY HEARING AND
4 THERE ARE TIME FRAMES THAT ARE ATTACHED TO THOSE .

5 AND THE CAVEAT , WHICH IS SIMPLY A
6 STATEMENT OF THE LAW , IS YOU CAN 'T CONTROL WHAT
7 LOCAL DISTRICT ATTORNEY 'S DO . BUT I TOOK FROM THE
8 FILING THAT THERE WILL BE SOME CONVERSATION ABOUT
9 THAT , THAT THE STATE WILL NOT -- WE DON 'T HAVE A
10 REPEAT OF THE SITUATION WE HAVE WITH MR . BROWN IF
11 IT 'S AT ALL AVOIDABLE .

12 IS THAT A FAIR READING OF WHERE THE STATE
13 IS ?

14 MR . GOLDMAN : WELL , THAT 'S CORRECT IN
15 THAT WE ARE MAKING THIS REPRESENTATION IN ORDER TO
16 COMPORT WITH THE COURT 'S EXPECTATIONS .

17 AND SO THAT IS INDEED WHAT HAPPENED . IF
18 A D.A. FOR SOME REASON WITH NO NOTICE TO ANYBODY
19 WENT OFF -- I MEAN , THE FACT IS ALL THESE THINGS ,
20 THERE HAS TO BE COORDINATION WITH THE ATTORNEY
21 GENERAL 'S OFFICE IN THEIR ROLE AS THE PEOPLE , AND
22 OF COURSE WITH THE DEFENDANTS , IF ANY EXECUTION WAS
23 TO BE CARRIED OUT .

24 THE COURT : SO YOU ARE ON RECORD , ALL THE
25 EXPECTATIONS ARE CLEAR .

1 AND AGAIN , I DON 'T HAVE ANY PROBLEM WITH
2 WHAT HAPPENED BEFORE IN THE SENSE THAT I THINK
3 EVERYONE ACTED IN GOOD FAITH . I TAKE MR. MATTHIAS
4 AT THEIR WORDS THAT THEY PROCEEDED ACCORDING TO
5 WHAT THEY BELIEVE THEY REPRESENTED . I FULLY
6 BELIEVED THAT PLAINTIFF 'S COUNSEL HAD DIFFERENT
7 EXPECTATIONS , BUT I 'VE SAID WHAT I HAD TO SAY ABOUT
8 THAT IN THE LAST ORDER I ISSUED . I DON 'T THINK
9 ANYBODY TRIED TO DECEIVE ANYONE .

10 AND I 'M GLAD WE ARE JUST AIRING THIS OUT .
11 I JUST WANT TO AVOID ANY MISUNDERSTANDINGS GOING
12 FORWARD THAT THE COURT AND THE A.G. AND THE
13 PLAINTIFFS HAVE THE SAME GAME PLAN AT THIS POINT
14 WHICH IS WE WANT TO FINISH THIS PROCESS , THIS
15 EVIDENTIARY HEARING , AND THEN AT THE CONCLUSION OF
16 THAT , PEOPLE WILL PURSUE WHATEVER REMEDIES THEY
17 CHOOSE TO PURSUE .

18 IS THAT FAIR FROM THE STATE 'S POINT OF
19 VIEW ?

20 MR. GOLDMAN : YES , I BELIEVE THAT 'S
21 CORRECT .

22 THE COURT : ARE PLAINTIFFS SATISFIED WITH
23 THAT ?

24 MR. GRELE : YOUR HONOR , I JUST HAVE A
25 COUPLE THOUGHTS ABOUT THIS THAT I WANTED TO

1 EXPRESS . AND I'M GLAD WE ARE COMING CLOSE TO WHERE
2 WE NEED TO BE ON THIS BECAUSE , AS THE COURT
3 EXPRESSED , I DON'T THINK WE WANT THE SITUATION WE
4 ENDED UP IN A MONTH AND A HALF AGO .

5 BUT AS I UNDERSTAND DEFENDANT 'S
6 REPRESENTATIONS IT'S THAT THEY , AS THE
7 REPRESENTATIVES OF THE STATE OF CALIFORNIA , THEIR
8 EXPECTATION S AND ASSURANCES ARE THERE WON'T BE THAT
9 KIND OF EFFORT UNTIL 30 DAYS AFTER THE CONCLUSION
10 OF THE EVIDENTIARY HEARING IN THIS CASE .

11 THE COURT : THAT WAS ONE ALTERNATIVE .
12 THEN THERE WAS A SECOND ONE HAVING TO DO WITH IF
13 THE COURT ISSUES AN ORDER . IF IT WAS COUCHED IN
14 THE PAPERS -- I DON'T HAVE THE PAPERS IN FRONT OF
15 ME --

16 MR. GOLDMAN : TO BE PERFECTLY CLEAR IT
17 WAS 30 DAYS AFTER AN EVIDENTIARY HEARING , THAT IS
18 MIRRORING THE EXACT TERMS THAT THE COURT LAID OUT
19 IN A SCHEDULING ORDER , IS ITS UNDERSTANDING .

20 BUT WE DID ADD THIS OTHER PROVISION WHICH
21 WAS THAT , OR IF THERE 'S A JUDGMENT IN THIS CASE ,
22 WHICHEVER WOULD BE SOONER --

23 THE COURT : RIGHT . THAT 'S WHAT I
24 UNDERSTOOD .

25 MR. GOLDMAN : IF FOR SOME REASON THERE 'S

1 A JUDGMENT BEFORE AN EVIDENTIARY HEARING , OBVIOUSLY
2 THAT WOULD BE OPERATIVE OF THAT .

3 THE COURT : WHAT I TRIED TO DO IN THE
4 SCHEDULING ORDER WAS SAY THESE ARE THE COURT 'S
5 EXPECTATIONS GOING FORWARD .

6 SO THE MOST LIKELY SCENARIO IS WE WILL
7 HAVE AN EVIDENTIARY HEARING HOPEFULLY SOONER RATHER
8 THAN LATER .

9 THE COURT WILL EXPEDITIOUSLY TRY TO GET
10 OUT AN ORDER FOLLOWING THAT HEARING . THERE MAY BE
11 A JUDGMENT IN SOME OTHER WAY , SHAPE OR FORM , I
12 CAN 'T QUITE SEE WHAT THAT WOULD BE AT THIS POINT ,
13 BUT I THINK IT'S ALL IN THERE .

14 I 'M SATISFIED I JUST WANT TO MAKE SURE
15 THAT EVERYBODY UNDERSTANDS THE SAME THING BECAUSE
16 IF THAT 'S THE PLAN , THEN I THINK THE ISSUE OF THE
17 DISCOVERY STAY LARGELY GOES AWAY , AT LEAST FOR
18 TODAY .

19 AND I THINK THAT 'S WHAT I WAS HOPING WE
20 COULD GET TO .

21 SO YES , MR . GRELE .

22 MR . GRELE : THE REASON I RAISED THAT
23 YOUR HONOR IS BECAUSE , YOU KNOW , THERE IS A
24 POSSIBILITY GIVEN THE EVENTS IN THIS CASE AS IT HAS
25 GONE ON , THAT A MATTER COMES UP THROUGH THE

1 DISCOVERY OR THE HEARING PROCESS THAT THE COURT
2 FEELS THAT THE DEFENDANTS NEED TO PAY ATTENTION TO
3 BEFORE THEY CAN PROCEED WITH EXECUTIONS AFTER
4 IT'S -- MUCH IN THE SAME WAY THE COURT DID IN THE
5 MEMORANDUM OF INTENDED DECISION ON DECEMBER 15TH.

6 THEN ON THE INTENDED SCENARIO THEY COULD
7 THEN START THINKING ABOUT EXECUTION DATES BEFORE
8 THAT --

9 THE COURT : WELL , THEY COULD BUT OF
10 COURSE THE COURT MIGHT HAVE SOMETHING TO SAY ABOUT
11 THAT .

12 IF YOU WANT TO SPIN THOSE HYPOTHETICALS
13 OUT A LITTLE BIT . I HAVE NO IDEA WHAT THE COURT
14 WOULD SAY BUT IF THE COURT WOULD SAY YES , BUT THESE
15 TWEAKS HAVE TO BE DONE OR THESE CHANGES HAVE TO BE
16 MADE AND THEN THE STATE TRIES TO GO AHEAD BEFORE
17 THAT MATTER IS RESOLVED THEN THAT PREVENTS A
18 SITUATION THE COURT IS GOING TO HAVE TO ADDRESS .

19 BUT I THINK THAT 'S GETTING AHEAD OF
20 OURSELVES . I THINK WHAT WE NEED TO LOOK AT RIGHT
21 NOW IS THE TIME BETWEEN TODAY AND THE HEARING ON
22 THE MOTION TO DISMISS . THAT 'S REALLY ALL WE ARE
23 TALKING ABOUT . THAT 'S THE DELTA TODAY .

24 AND I 'M SATISFIED BASED ON WHAT
25 MR . GOLDMAN SAID THAT WE DON 'T NEED TO WORRY ABOUT

1 A DISRUPTION OF THAT SCHEDULE , WE CAN PROCEED AND
2 HAVE AN ORDERLY HEARING ON THE MOTION TO DISMISS .

3 SO THAT BEING SAID , WE NEED TO TALK ABOUT
4 ANY , IF WHAT DISCOVERY , OUGHT TO TAKE PLACE BETWEEN
5 NOW AND THEN . I DO WANT TO TALK ABOUT THAT BUT I
6 THINK THAT 'S A MUCH SMALLER PROBLEM THAN WE MIGHT
7 OTHERWISE HAVE .

8 MR . GRELE : YOUR HONOR , WE ARE NOT THE
9 ONLY OTHER PEOPLE LOOKING AT THIS CASE . THERE ARE
10 SEVEN OTHER INDIVIDUALS THAT LOOK PRETTY CLOSELY AT
11 THIS AND READ AS MANY TEA LEAVES AS THEY CAN ABOUT
12 WHAT 'S HAPPENING IN THIS COURTROOM REGARDING
13 EXECUTION DATES .

14 AND YOU KNOW , I WOULD LIKE TO SAY THAT
15 THE ASSURANCES THAT ARE MADE ARE ASSURANCES THAT
16 CAN BE TAKEN BY THOSE INDIVIDUALS .

17 BUT THAT 'S WHAT I WANT IS SOME CLARITY ON
18 THIS SO THAT OTHER PEOPLE CAN MAKE DECISIONS .

19 THE COURT : WELL , LET ME BE COMPLETELY
20 FRANK . WHEN I SAW THE STATE 'S FIRST RESPONSE ON
21 THIS POINT I SAID WELL , THIS IS GOOD , THE ONLY
22 AMBIGUITY IN IT IS DOES IT JUST APPLY TO MR . BROWN
23 AND MR . MORALES OR DOES IT APPLY TO EXECUTION S IN
24 GENERAL ?

25 THE LATEST FILINGS BY THE STATE , AS I

1 READ IT , APPLIES TO THE EXECUTIONS IN GENERAL , WITH
2 THE OBSERVATIONS THAT MR . GOLDMAN JUST MADE .

3 MR . GRELE : OKAY .

4 MR . GOLDMAN : AND YOUR HONOR --

5 THE COURT : YES .

6 MR . GOLDMAN : I DIDN 'T MEAN TO INTERRUPT ,
7 BUT I THINK IT 'S VERY PLAINLY STATED IN OUR REPLY
8 PAPERS , IT 'S PAPER AS WELL AS OF COURSE THERE 'S A
9 TRANSCRIPT HERE TODAY .

10 SO THOSE INDIVIDUALS WHO I ASSUME MY
11 COLLEAGUE IS REFERRING TO ARE INDIVIDUALS WHOSE
12 CRIMINAL AVENUES OF APPEAL ARE EXHAUSTED .

13 THE COURT : THEY ARE ELIGIBLE , YEAH .

14 MR . GOLDMAN : THEY AND THEIR COUNSEL CAN
15 READ THAT REPLY AND THEY CAN READ THIS TRANSCRIPT .

16 THE COURT : I 'M SATISFIED , MR . GOLDMAN , I
17 JUST WANT TO MAKE SURE MR . GRELE IS .

18 MR . GRELE : WELL , THANK YOU , YOUR HONOR .

19 AND THE OTHER POINT I WANTED TO RAISE
20 WITH THE COURT AND MAYBE WITH COUNSEL IS I WOULD
21 IMAGINE THAT THE NINTH CIRCUIT IS GOING TO WANT TO
22 TAKE A LOOK AT THIS CASE WHEN IT 'S DONE .

23 THE COURT : WELL , THERE 'S NO QUESTION
24 ABOUT THAT BUT THEN YOU GET INTO A STAY PENDING
25 APPEAL TYPE POSTURE AND THAT 'S WHY I DON 'T WANT TO

1 SAY THINGS . IT WOULD BE IMPROPER FOR ME TO DO
2 THAT , GIVING AN ADVISORY OPINION . I DON 'T KNOW
3 WHAT KIND OF FINDINGS I 'M GOING TO MAKE .

4 SO I THINK WHAT WE SHOULD DO IS TRY TO
5 DEAL WITH THIS IN PIECES THAT ARE MANAGEABLE . THE
6 PIECE WE HAVE RIGHT NOW IS A PIECE OF SEVERAL WEEKS
7 HAVING TO DO WITH THE STATUS OF DISCOVERY .

8 I WANT TO TALK ABOUT THE SCOPE OF THE
9 MOTION TO DISMISS , AND THERE 'S A COUPLE OF PIECES
10 OF THAT WE NEED TO TALK ABOUT , BUT AS FAR AS THE
11 STATE 'S REQUEST THAT WE NOT HAVE DEPOSITIONS OF THE
12 GOVERNOR OR PEOPLE LIKE THAT WHILE THE MOTION TO
13 DISMISS IS PENDING , I THINK THAT ISSUE HAS BEEN
14 MOOTED BY THE REPRESENTATIONS THE STATE JUST MADE .

15 YES , MR . KRISHNAN .

16 MR . KRISHNAN : SO YOUR HONOR , I THINK
17 THERE 'S STILL AN OUTSTANDING ISSUE WITH REGARD TO
18 PACIFIC NEWS SERVICE . THE REPRESENTATION THAT WAS
19 MADE BY THE STATE HERE WOULD APPLY UP UNTIL THE END
20 OF THE EVIDENTIARY HEARING IN THE MORALES /BROWN
21 MATTER . AT THAT POINT THE PACIFIC NEWS SERVICE
22 MATTER MAY WELL STILL BE PENDING .

23 THE STATE HAS TAKEN THE POSITION THAT
24 PACIFIC NEWS SERVICE DOES NOT HAVE AN INDEPENDENT
25 RIGHT TO DISCOVERY WHILE THE DISCOVERY PHASE IS

1 GOING FORWARD IN THE MORALES CASE .

2 AND REALLY , THE CONCERN IS THAT IF WE ARE
3 TO KEEP AN EYE ON A CONSOLIDATED APPEAL WHICH IS
4 OUR UNDERSTANDING OF SOMETHING THAT WAS BOTH IN THE
5 COURT 'S INTEREST AND IN THE PARTY 'S INTEREST , WE
6 MAY ARRIVE AT A POINT AT THE END OF THE MORALES
7 EVIDENTIARY HEARING WHERE THE PACIFIC NEWS
8 SERVICE --

9 THE COURT : WELL , I'M GLAD -- THIS IS A
10 GOOD POINT . MAYBE WHAT WE OUGHT TO DO IS WHEN WE
11 TAKE UP THE MOTION TO DISMISS WE OUGHT TO TALK
12 ABOUT WHATEVER BRIEFING WE WANT TO DO IN THE PNS
13 CASE .

14 I KNOW THE STATE REQUESTED MANY , MANY
15 MONTHS AGO THAT THE COURT DO NOTHING WITH THE PNS
16 CASE . AND THAT 'S WHY IT'S IN THE STATUS THAT IT'S
17 IN . THE COURT WAS ASKED ESSENTIALLY TO ABATE THAT
18 CASE PENDING MORALES .

19 I THINK THAT PROBABLY OUGHT TO GET LOOKED
20 AT AGAIN AND WE DON'T HAVE TO FIGURE IT OUT TODAY .
21 MAYBE WE OUGHT TO LOOK AT IT AGAIN WHEN WE HAVE THE
22 HEARING ON THE MOTION TO DISMISS SO THAT WE CAN
23 GET -- THE COURT HASN'T -- AS I UNDERSTAND WHERE WE
24 ARE PROCEDURALLY WITH THE PNS CASE , THERE ISN'T
25 EVEN AN OPERATIVE PLEADING , THAT THE COURT

1 UNDERSTANDS WHAT THE CLAIM IS , BUT I DON'T BELIEVE
2 THERE 'S BEEN A TEST OF THE CLAIM .

3 THE COURT HAS NEVER OPINED THAT 'S A
4 VIABLE CLAIM OR IT'S NOT A VIABLE CLAIM . THAT 'S
5 WHAT I SAY WHEN I'M NOT -- THERE 'S A COMPLAINT BUT
6 THAT COMPLAINT HAS NOT BEEN THE SUBJECT OF A
7 12(B)(6) MOTION THAT WAS ACTUALLY DECIDED .

8 AND THAT 'S SOMETHING WE MAY NOT NEED TO
9 FIGURE IN WHEN WE GAME PLAN THE REST OF THE CASE .

10 MR. GOLDMAN , DO YOU WANT TO BE HEARD ON
11 THAT , OR MR. QUINN ?

12 MR. QUINN : NO , I MEAN , IF IT'S THE
13 COURT 'S VIEW THAT THIS SHOULD BE HELD OVER UNTIL
14 THE DECEMBER 2ND HEARING DATE , THAT 'S FINE .

15 THE COURT : I THINK UNTIL DECEMBER 2ND ,
16 YES . I THINK UNTIL SOME INDEFINITE DATE IN THE
17 NEAR DISTANT FUTURE , NO .

18 I THINK IN ORDER FOR EVERYBODY 'S INTEREST
19 TO BE MET HERE , AND WHAT I'M COMMITTED TO IS
20 GETTING THE CHALLENGES TO THE LETHAL INJECTION
21 PRACTICES IN CALIFORNIA RESOLVED SOON , WITHIN THE
22 NEXT FEW MONTHS . AND THAT WOULD INCLUDE SOME TYPE
23 OF RESOLUTION OF THE PNS CASE . BECAUSE OTHERWISE
24 YOU DO HAVE THAT HANGING OUT THERE .

25 SO PERHAPS WHAT WE COULD DO IS COUNSEL

1 COULD TALK TO EACH OTHER AND WE COULD WORK OUT SOME
2 SORT OF A BRIEFING SCHEDULE .

3 THIS MAY BE SOMETHING THE STATE WANTS TO
4 ADDRESS IN THE RENEWED MOTION TO DISMISS . THERE
5 HAS BEEN A LOT OF -- THERE HAVE BEEN DEVELOPMENTS
6 IN THE CASE LAW SINCE WE LAST TALKED ABOUT THIS .

7 MR. QUINN : WE HAVE FILED A MOTION TO
8 DISMISS THE SECOND AMENDED COMPLAINT IN THE PNS --

9 THE COURT : WHEN WAS THAT FILED -- I'M
10 SORRY .

11 MR. GOLDMAN : OCTOBER 25TH .

12 THE COURT : I'M SORRY . I HAVE BEEN
13 ENGAGED IN MY OTHER CAPITAL CASE AND I MISSED THAT .

14 MR. GOLDMAN : THEY ARE BOTH SET FOR THE
15 SAME --

16 THE COURT : THEN IGNORE EVERYTHING I JUST
17 SAID . WE WILL JUST TAKE IT UP ON DECEMBER 2ND . I
18 APOLOGIZE FOR NOT KNOWING THAT BUT IT WAS NOT ON MY
19 RADAR .

20 MR. KRISHNAN : THANK YOU , YOUR HONOR .

21 THE COURT : SO WITH REGARD TO THE
22 DISCOVERY MOTION , THE ONLY QUESTION I HAD WAS THE
23 WAY THE STATE HAS FRAMED THE 12(B)(6) MOTION , IT
24 ONLY APPLIES TO THE CLAIM BASED ON THE FACIAL
25 CHALLENGE TO THE NEW PROTOCOL , AND THE THIRD CLAIM

1 WHICH IS THE FAILURE TO ADOPT A VIABLE AND READILY
2 AVAILABLE ALTERNATIVE . AND SO THE AS APPLIED
3 CHALLENGE IS STILL OUT THERE AND IS NOT THE SUBJECT
4 OF THE MOTION TO DISMISS .

5 SOME DISCOVERY , SEEMS TO ME , INEVITABLY
6 WILL RELATE TO THE AS APPLIED CLAIM .

7 SO I'M WONDERING WHAT THE UTILITY IS OF A
8 BLANKET STAY . I UNDERSTAND WHY THE STATE WANTS TO
9 STAY CERTAIN THINGS , BUT MR . GOLDMAN ?

10 MR . GOLDMAN : I WOULD BE HAPPY TO ADDRESS
11 THAT .

12 AND FIRST , JUST VERY , VERY BRIEFLY LET ME
13 PUT IN THE CONTEXT . THE STAY WE ARE TALKING ABOUT
14 IS RELATED , YOU KNOW , EVEN THOUGH THE AS APPLIED
15 CLAIM IS NOT PART OF THE MOTION TO DISMISS IT'S ALL
16 KEY , TIME WISE , TO THAT MOTION TO DISMISS WHICH IS
17 SET FOR HEARING ONLY TWO WEEKS AFTER THANKS GIVING .

18 THE COURT : RIGHT .

19 MR . GOLDMAN : SO WE ARE NOT TALKING ABOUT
20 PUTTING THAT CLAIM ON ICE FOR A LONG , LONG PERIOD
21 OF TIME .

22 IN TERMS OF DISCOVERY ON THAT , YOU KNOW ,
23 THERE 'S -- WHEN WE LOOK AT THE TRADITIONAL FACTORS
24 WE ARE SUPPOSED TO LOOK AT THE EARLY COURSE OF
25 JUSTICE EQUITIES AND HARDSHIP . IT MAKES A LOT OF

1 SENSE TO PUT EVERYTHING OVER UNTIL AFTER THERE 'S
2 BEEN A DECISION ON THE MOTION TO DISMISS .

3 I WILL GIVE YOU , FOR EXAMPLE , THERE 'S
4 BEEN NUMEROUS DEPOSITIONS NOTICED . I CERTAINLY
5 DON 'T THINK IT MAKES ANY SENSE ECONOMICALLY OR IS
6 IT FAIR TO MY CLIENTS THAT THEY WOULD COME IN AND
7 BE DEPOSED AS TO JUST ONE ASPECT OF THEIR CLAIMS .
8 AND EVEN IF ALL THE PARTIES ARE FORTUNATE AND
9 THERE 'S NO DISPUTES ABOUT WHERE THAT BORDER LINE
10 IS --

11 THE COURT : YEAH .

12 MR . GOLDMAN : THEN WHAT HAPPENS IS IF A
13 MOTION TO DISMISS IS NOT GRANTED , THEN THEY WANT TO
14 COME BACK AS TO THE OTHER ASPECTS .

15 THE COURT : NO , I FOLLOW YOU .

16 I THINK THERE 'S GOING TO BE A FAIRLY
17 SMALL UNIVERSE OF DISCOVERY THAT 'S CLEARLY JUST
18 ABOUT THE AS APPLIED CLAIM . I WAS WONDERING IF
19 EVERYTHING IS LIKE THAT OR WHETHER EVERYTHING
20 TOUCHES ON EVERYTHING ELSE .

21 I UNDERSTAND EXACTLY THE PROBLEM YOU ARE
22 TALKING ABOUT .

23 MR . GOLDMAN : AS YOUR HONOR KNOWS , I
24 HAVEN 'T BEEN IN THIS PARTICULAR CASE VERY LONG , BUT
25 FROM WHAT I 'VE SEEN , I THINK UNFORTUNATELY IT COULD

1 BE VERY DIFFICULT FOR THE PARTIES TO AGREE ON WHERE
2 THAT BORDER LINE IS. I WISH THAT WASN'T SO, BUT YOU
3 KNOW, I'M USUALLY NOT PESSIMISTIC ABOUT TRYING TO
4 WORK --

5 THE COURT: WELL, LET ME JUST ASK --

6 MR. GOLDMAN: I THINK WE WOULD WIND UP
7 BACK HERE AT LEAST ONCE, IF NOT MULTIPLE TIMES,
8 RATHER THAN JUST WAITING A FEW MORE WEEKS.

9 THE COURT: THE SHORTNESS OF THE TIME IS
10 THE MOST PERSUASIVE THING TO ME. BUT I JUST WANTED
11 TO MAKE SURE WE WERE VETTING ALL THE ISSUES.

12 I MEAN, IT SEEMS TO ME IN THE AS APPLIED
13 CHALLENGE THE SELECTION OF THE EXECUTION TEAM, THE
14 TRAINING, THAT KIND OF THING, THAT GOES TO THE --
15 THE REGS SAY WHAT THEY SAY ABOUT THAT.

16 SO THE QUESTION IS WHETHER THAT'S WHAT
17 THE STATE IS ACTUALLY DOING.

18 THAT'S A PRETTY DISCREET AREA. AND
19 CLEARLY, IT ONLY HAS TO DO WITH THE AS APPLIED
20 CHALLENGE.

21 BUT IF YOU WANT TO WAIT, I'M OKAY WITH
22 THAT TOO BECAUSE I THINK IT WILL MINIMIZE THE
23 DISPUTES.

24 MR. GOLDMAN: I THINK ALL PARTIES WOULD
25 SAVE A LOT OF TIME AND EXPENSE AND THE COURT'S

1 TIME --

2 THE COURT : OKAY .

3 MR. GOLDMAN : -- IF WE JUST DID THAT .

4 THE COURT : ALL RIGHT .

5 LET ME JUST GET THE PLAINTIFF 'S
6 PERSPECTIVE BEFORE I DISPOSE OF THIS .

7 MR. GRELE : YOUR HONOR , I SHARE THE
8 COURT 'S SENTIMENT ABOUT THIS . AND ON MY WAY DOWN
9 HERE I WAS THINKING , WHAT WOULD I STAND UP AND
10 MENTION TO THE COURT AS PARTICULARLY SALIENT OF
11 FUTURE DISCOVERY THAT ARE OBVIOUSLY GOING TO BE
12 REQUIRED NO MATTER WHAT SCENARIO PLAYS OUT ON THE
13 MOTION TO DISMISS .

14 AND QUITE FRANKLY , IT SEEMS LIKE IT WOULD
15 BE IN THE STATE 'S INTEREST TO GET THAT STUFF
16 DISCLOSED AND FORWARDED NOW RATHER THAN HAVE TO
17 CONTINUE TO WAIT ON IT AND THEN PROBABLY IT SHOULD
18 HAVE BEEN DISCLOSE D IN OCTOBER , BECAUSE IT'S PRETTY
19 MUCH PART OF WHAT WAS PREVIOUSLY ASKED FOR .

20 SO YOU KNOW , THEY COME INTO COURT AND
21 THEY SAY THEY WANT TO MOVE FORWARD EXPEDITIOUSLY ,
22 THE COURT SAYS THEY WANT TO MOVE FORWARD
23 EXPEDITIOUSLY .

24 AND WE ALWAYS HEAR THAT EXPEDITIOUSLY .
25 AND IF THEY WANTED TO , THEY WOULD HAVE DONE THAT .

1 ONE IS WHO IS ON THE TEAM . THAT INTERROGATORY HAS
2 BEEN PART OF THIS CASE FOR FOUR YEARS . WE HAVE A
3 METHOD WHERE THEY DO THAT , THEY SAY HERE 'S THE
4 NUMBER , HERE THEY ARE , HERE 'S THEIR ROLE ,
5 ET CETERA .

6 THE COURT : CAN YOU IDENTIFY --

7 MR . GOLDMAN : WELL --

8 THE COURT : EXCUSE ME . I DON 'T WANT THIS
9 TO SPIRAL OUT OF CONTROL .

10 I THINK THE EASIEST THING FOR ME TO DO
11 WOULD BE LET 'S WAIT THREE WEEKS AND FORGET ALL THIS
12 STUFF .

13 I 'M JUST TRYING TO THINK IF THERE 'S SOME
14 WAY WE CAN -- THERE ARE CERTAIN REQUESTS THAT ARE
15 OUTSTANDING SINCE 2006 AND THEY ARE GERMANE TO THE
16 AS APPLIED CLAIM .

17 AND SO WE DON 'T HAVE TO SPECULATE AS TO
18 WHAT THEY ARE AND WE DON 'T HAVE TO SPECULATE AS TO
19 WHAT SIDE OF THE DIVIDING LINE THEY FALL ON .

20 THAT PARTICULAR TYPE OF CLAIM , WHO IS ON
21 THE TEAM , COULD ONLY RELATE TO AN AS APPLIED
22 CHALLENGE . IT DOESN 'T -- WE ALREADY KNOW WHAT THE
23 REGS SAY AND IT DOESN 'T HAVE ANYTHING TO DO WITH
24 WHETHER YOU USE ONE DRUG OR NOT .

25 AND SO I 'M JUST WONDERING IF THERE 'S AN

1 EASY LIST OF THINGS . IF IT ISN'T AND THERE 'S AN
2 ARGUMENT ABOUT WHAT 'S ON THE LIST THEN WE 'LL JUST
3 MOVE ON .

4 MR . GRELE : THE BEST I CAN DO IS PUT THAT
5 EASY LIST OF FIVE OR SIX ITEMS TOGETHER AND GIVE IT
6 TO THE DEFENDANTS .

7 MR . GOLDMAN : WELL , IF I MAY , YOUR HONOR .

8 THE COURT : YEAH , GO AHEAD .

9 MR . GOLDMAN : YOU KNOW , FIRST OF ALL ,
10 AGAIN , LET ME PUT THIS IN CONTEXT .

11 THE DISCOVERY STAY THAT WE 'VE PROPOSED
12 WOULD HAVE A SPECIFIC FINITE DATE . IT WOULD APPLY
13 TO ALL THE WRITTEN DISCOVERY EVERYBODY HAS
14 OUTSTANDING WHICH INCLUDES THE DISCOVERY OWED BY
15 THE PLAINTIFFS .

16 SO IT 'S EVENHANDED AND FAIR , AND WE ARE
17 NOT TRYING TO DIG UP STUFF DURING THE THANKSGIVING
18 HOLIDAY , WE ARE NOT TRYING TO SEE WHAT THEIR
19 EXPECTATIONS ARE .

20 WE HAVE ASKED THEM , FOR EXAMPLE , ON THEIR
21 OLD DISCOVERY REQUESTS , NOT JUST AS THE AS APPLIED
22 BUT THE OLD DISCOVERY REQUESTS , TO SPECIFY WHETHER
23 IN LIGHT OF BAZE , IN LIGHT OF THE NEW REGULATION S
24 AND THE CHANGES , IF THERE IS ANY OF THOSE REQUESTS
25 THAT THEY VIEWED AS BEING AS -- COULDN 'T GET A

1 RESPONSE .

2 SO I FORESEE , AND I DON 'T MEAN TO BE A
3 PESSI MIST , MORE ACRIMONY --

4 THE COURT : TIME OUT , COUNSEL .

5 MR. GRELE : I JUST HAVE TO SAY , IF I MAY
6 YOUR HONOR , WE GOT THAT REQUEST YESTERDAY AFTERNOON
7 AT 4 : 30 , 5 : 00 .

8 THE COURT : YEAH .

9 MR. GRELE : YOU KNOW , YOUR HONOR , THIS IS
10 SOMETHING WE HAVE BEEN ASKING THEM FOR FOR TWO
11 MONTHS .

12 MR. GOLDMAN : WELL , I CAN --

13 THE COURT : IN A WAY THIS IS SORT OF
14 PROVING MR. GOLDMAN 'S POINT IN ONE WAY . AND IN THE
15 OTHER WAY IT 'S SORT OF CREATING EXACTLY THE
16 SCENARIO THAT I DID NOT WANT TO HAVE THE HAPPEN
17 THIS AFTERNOON .

18 IF IT 'S GOING TO BE EASIER TO WAIT THREE
19 WEEKS , WE WILL WAIT THREE WEEKS .

20 I WAS JUST HOPING , AND I THINK PROBABLY
21 THE ORDER THAT IS GOING TO COME OUT IS THERE WILL
22 BE A STAY ON ANY COMPEL DISCOVERY , AND IF THE
23 PARTIES CAN AGREE ON THE EXCHANGE OF ANY
24 INFORMATION , THAT THEY SHOULD SO AGREE AND THEY
25 SHOULD TALK TO EACH OTHER .

1 BUT IF IT DOESN 'T HAPPEN , THEN WE 'LL DEAL
2 WITH IT IN DECEMBER . SO I THINK THAT 'S PROBABLY
3 THE CLEANEST WAY TO DEAL WITH IT.

4 LET ME TAKE UP ONE OTHER FAIRLY
5 TROUBLE SOME POINT AND I THINK WE WILL BE DONE FOR
6 TODAY .

7 THE REQUEST THAT WAS MADE BY THE
8 PLAINTIFFS FOR DEFAULT ON THE AS APPLIED CLAIM , I
9 JUST HAVE TO ADMIT I WAS COMPLETELY PERPLEXED BY
10 THAT .

11 I HAVE BEEN DOING CIVIL MOTIONS IN ONE
12 FORM OR ANOTHER FOR 29 YEARS AND THAT IS NOT AN
13 EXAGGERATION , IN FACT IT'S BEEN A LITTLE BIT LONGER
14 THAN THAT , AND THIS IS THE FIRST TIME I'VE EVER
15 SEEN A MOTION LIKE THAT .

16 I'VE SEEN PRO SE LITIGANTS MAKE A MOTION
17 LIKE THAT BECAUSE THEY DIDN 'T UNDERSTAND THE RULES ,
18 BUT IT'S ALWAYS BEEN MY UNDERSTANDING THAT WHEN A
19 PARTY FILES A MOTION TO DISMISS , EVEN THOUGH IT'S
20 ONLY DIRECTED TO SOME OF THE CLAIMS , THAT THAT IS
21 NOT AN EVENT THAT WILL PRODUCE A REQUEST FOR
22 DEFAULT .

23 SO -- AND CERTAINLY TO SAY THE STATE HAS
24 NOT ENGAGED IN RESPONDING TO THIS ACTION IS NOT
25 TRUE .

1 SO I GUESS IN THE INTEREST OF FAIRNESS I
2 NEED TO UNDERSTAND WHERE THAT 'S COMING FROM BECAUSE
3 MY REACTION TO IT WAS THIS HAD TO BE A MISTAKE .
4 AND IF THERE IS AN EXPLANATION FOR IT , I NEED TO
5 KNOW WHAT IT IS .

6 MR . SENIOR : I CAN ADDRESS THE COURT 'S
7 QUESTIONS ON THAT . WE HAVE A 60 -DAY WINDOW TO GET
8 EVERYTHING ACCOMPLISHED . AND IN THAT WE HAVE BEEN
9 REQUESTED TO DRAFT AN AMENDED COMPLAINT WHICH WE
10 WENT TO GREAT LENGTHS TO DO .

11 THERE 'S A LOT OF VERY SPECIFIC FACTUAL
12 ALLEGATIONS IN THERE . WE COME BACK WITH A PARTIAL
13 MOTION TO DISMISS THE COMPLAINT AND NO RESPONSE TO
14 ALL OF THE ALLEGATIONS THAT ARE IN THERE . AND THEN
15 WE ARE GETTING STIFF ARMED ON SUPPLEMENTAL
16 RESPONSES , PAPER DISCOVERY , DEPOSITION NOTICES , AND
17 EVERYTHING ELSE .

18 AND I THINK WE MADE PLAINTIFF 'S POSITION
19 CLEAR THAT IT SEEMED THAT THE MOTION FOR A STAY WAS
20 A LONG TIME COMING IN A VERY SHORT WINDOW TO GET
21 THE CASE PREPARED FROM A TO Z .

22 AND THAT 'S BASICALLY IT .

23 THE COURT : WELL , WHAT YOU ARE SAYING
24 MR . SENIOR , AND I THINK WHAT I INFERRED BECAUSE YOU
25 KNOW WE 'VE WORKED TOGETHER A LONG TIME AND I KNOW

1 THAT YOU'RE PASSIONATE ABOUT YOUR POSITIONS HERE ,
2 IT WAS A REFLECTION OF SOME FRUSTRATION ON THE PART
3 OF THE PLAINTIFF 'S TEAM THAT THE RESPONSES FROM THE
4 STATE WERE NOT CONSISTENT WITH -- FROM YOUR
5 PERSPECTIVE WERE NOT CONSISTENT WITH AN EXPEDITIOUS
6 RESOLUTION OF THE CASE .

7 OKAY . THE STATE HAD A RIGHT TO RESPOND
8 IN THE WAY IT DID . IT HAD A RIGHT TO RESPOND BY
9 FILING A 12(B)(6) MOTION . AND IT MAY WELL BE THAT
10 THE 12(B)(6) MOTION WILL NARROW THE CASE ENOUGH SO
11 IT ULTIMATELY WILL MAKE IT EASIER TO DISPOSE OF .

12 SO I DON'T MEAN TO -- I MEAN , I DON'T
13 HAVE TO LITIGATE , I JUST HAVE TO WATCH THE
14 LITIGATION AND MAKE DECISIONS . SO I DON'T KNOW
15 WHAT'S GOING ON IN THE CLINCHES , AND I CERTAINLY
16 GET THAT PEOPLE GET FRUSTRATED AND THAT PEOPLE FEEL
17 THAT THEIR LEGITIMATE OBJECTIVES ARE SOMETIMES
18 BLOCKED BY THE OTHER SIDE .

19 BUT WHAT WE'VE MANAGED TO AVOID IN THIS
20 CASE FOR THE MOST PART IS THE KIND OF -- LET ME
21 JUST TRY TO SAY THIS AS NEUTRAL AS I CAN . WE
22 HAVEN'T HAD A LOT OF MOTIONS LIKE THIS .

23 IN OTHER WORDS , WE'VE HAD VERY SPIRITED
24 DISAGREEMENTS , WE'VE HAD VERY PASSIONATE ARGUMENT ,
25 WE HAVEN'T HAD A LOT OF MAKE-WORK KIND OF STUFF .

1 IT'S BEEN FOCUSED ON THE ISSUES , AND I AM SURE THAT
2 PEOPLE ON BOTH SIDES HAVE GOTTEN FRUSTRATED WITH
3 THE OTHER SIDE .

4 BUT THIS IS A BIG ENOUGH PROBLEM -- THIS
5 IS A SERIOUS ENOUGH MATTER , I MEAN , WE ARE
6 LITERALLY TALKING ABOUT ISSUES OF CONSTITUTIONAL
7 DIMENSION OF LIFE AND DEATH AND THERE JUST ISN'T
8 ROOM FOR THAT .

9 I EXPECT PEOPLE TO ACT PROFESSIONALLY AND
10 AVOID PERSONAL ATTACKS AND AVOID PETTINESS AND
11 AVOID TIT FOR TAT MOTION PRACTICE .

12 AND YOU KNOW , PEOPLE ARE ENTITLED TO
13 WHATEVER PERCEPTIONS THEY WANT TO HAVE , WHY DID THE
14 STATE ON ONE HAND SAY , WE WANT TO EXPEDITE THE
15 MATTER THEN FILE A 12(B)(6) MOTION ? THAT'S A
16 JUDGMENT THAT THE STATE MADE .

17 I DO NOT , IN MY HONEST ASSESSMENT OF IT ,
18 DEEM THAT TO BE OUTSIDE THE BOUNDS OF RATIONAL
19 ADVOCACY . I CAN SEE WHY THEY DID IT . AND WE WILL
20 SEE WHAT THE MERITS OF THAT MOTION ARE AT THE
21 APPROPRIATE TIME .

22 BUT I JUST DON'T WANT US TO DESCEND INTO
23 A SITUATION WHERE THE MATTERS WHICH ARE VERY
24 DIFFICULT TO DEAL WITH INHERENTLY GET WORSE BECAUSE
25 OF BAD RELATIONS BETWEEN COUNSEL . I THINK THAT'S

1 WHAT I WANTED TO PUT A STOP TO .

2 THERE 'S SIMPLY NO WAY THAT THE STATE
3 WOULD GET DEFAULTED IN THIS SITUATION . THERE 'S
4 ZERO CHANCE OF THAT HAPPENING .

5 SO THAT 'S REALLY ALL I HAVE TO SAY ABOUT
6 THAT . I MEAN , I UNDERSTAND WHERE YOU ARE COMING
7 FROM , I ACCEPT YOUR EXPLANATION , I 'M JUST SAYING ,
8 LET 'S TRY TO MOVE ON TO A MORE POSITIVE INTERACTION
9 FROM HERE ON OUT .

10 MR . SENIOR : OKAY .

11 THE COURT : OKAY .

12 ALL RIGHT . ANYTHING ELSE FOR TODAY ?

13 ALL RIGHT .

14 MR . GRELE : IF YOUR HONOR --

15 THE COURT : YES , MR . GRELE --

16 MR . GRELE : YOUR HONOR , WE ARE FINE ,
17 THANK YOU .

18 THE COURT : OKAY . AND WE WILL SEE YOU
19 DECEMBER 2ND .

20 AND THE -- I 'LL ISSUE A VERY BRIEF ORDER
21 JUST GRANTING THE STATE 'S MOTION FOR STAY AND THAT
22 IS -- DOES NOT PREVENT COUNSEL FROM VOLUNTARY
23 AGREEMENT S . AND I ENCOURAGE YOU TO ENTER INTO AS
24 MANY OF THEM AS POSSIBLE .

25 MR . GRELE : THANK YOU .

1 MR. GOLDMAN : THANK YOU , YOUR HONOR .

2 MR. QUINN : THANK YOU , YOUR HONOR .

3 MR. SENIOR : THANK YOU , YOUR HONOR .

4 (WHEREUPON , THE PROCEEDINGS IN THIS
5 MATTER WERE CONCLUDED .)

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CERTIFICATE OF REPORTER

I , THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA , 280 SOUTH
FIRST STREET , SAN JOSE , CALIFORNIA , DO HEREBY
CERTIFY :

THAT THE FOREGOING TRANSCRIPT ,
CERTIFICATE INCLUSIVE , CONSTITUTES A TRUE , FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER -AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY .

SUMMER A. FISHER , CSR , CRR
CERTIFICATE NUMBER 13185