

I N V O I C E

JENNIFER L. SCOTT, CSR NO. 9218
OFFICIAL COURT REPORTER
EIN# 26-2242341
DEPARTMENT CX103
751 W. SANTA ANA BOULEVARD
SANTA ANA, CA 92701

JUNE 25, 2009

JEFFREY BENICE, ESQ.

CHARTON V. NATIONAL FINANCIAL

CASE NO. 2008 00114401

ONE COPY -- LAW & MOTION PROCEEDINGS
DATE: JUNE 22, 2009

AMOUNT DUE C.O.D.: \$35.00

GOVT. CODE 69954(D): ANY COURT, PARTY, OR PERSON WHO HAS
PURCHASED A TRANSCRIPT MAY, WITHOUT PAYING A FURTHER FEE
TO THE REPORTER, REPRODUCE A COPY OR PORTION THEREOF AS
AN EXHIBIT PURSUANT TO COURT ORDER OR RULE, OR FOR
INTERNAL USE, BUT SHALL NOT OTHERWISE PROVIDE OR SELL A
COPY OR COPIES TO ANY OTHER PARTY OR PERSON.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE, COMPLEX JUSTICE CENTER
DEPARTMENT CX103

LLOYD CHARTON, AS TRUSTEE ON)
BEHALF OF THE LLOYD AND STELLA)
CHARTON 1999 TRUST, ETC., ET AL.,)

PLAINTIFFS,)

VS.)

NATIONAL FINANCIAL LENDING, LLC,)
ET AL.,)

DEFENDANTS.)

COPIES

NO. 30 2008 00114401

HONORABLE RONALD L. BAUER, JUDGE PRESIDING

REPORTER'S TRANSCRIPT

JUNE 22, 2009

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFFS: GRANT, GENOVESE & BARATTA
BY: DAVID C. GRANT, ESQ.

FOR THE DEFENDANTS: LAW OFFICES OF JEFFREY S. BENICE
BY: JEFFREY S. BENICE, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

1 SANTA ANA, CALIFORNIA - MONDAY, JUNE 22, 2009

2 AFTERNOON SESSION

3 * * * * *

4 (THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN
5 COURT:)

6 THE COURT: CHARTON CASE IS NEXT, PLEASE. THAT'S
7 NUMBER FIVE ON OUR CALENDAR.

8 DO YOU HAVE A COLLEAGUE IN THE HALLWAY,
9 PERHAPS?

10 MR. GRANT: MY COLLEAGUE HAD SUSHI AT MCCORMICK &
11 SCHMICK'S AT MAINPLACE AND DASHED BACK --

12 THE COURT: AND DID NOT RESPOND WELL?

13 MR. GRANT: HE DID NOT RESPOND WELL. HE DASHED BACK.
14 BUT THE LATEST IS THAT MY COLLEAGUE MAY BE COMING BACK.
15 HE ASKED IF I COULD STAY UNTIL 3:00 OR THEREABOUTS. I
16 SAID OF COURSE I WILL.

17 I THINK HE'S ON HIS WAY BACK. HIS GENERAL
18 COUNSEL IS OUT IN THE HALLWAY.

19 THE COURT: DID HE HAVE TO GET HIS STOMACH PUMPED?

20 MR. GRANT: I DIDN'T REALLY WANT TO INTERPRET WHAT HE
21 WAS TELLING US WAS THE DEAL.

22 THIS IS GENERAL COUNSEL AND THE CLIENT.

23 ONE THING WE WERE GOING TO DO IS PUT ON THE
24 RECORD A COUPLE OF THINGS, CLARIFICATIONS. AND I'LL WAIT
25 AS LONG AS I CAN; BUT SINCE IT'S A PRELIMINARY INJUNCTION
26 HEARING, I CERTAINLY WOULD LIKE TO -- IF WE CAN'T DO IT

1 THIS AFTERNOON, IF THE COURT COULD SLIDE US IN SOME DATE
2 THIS WEEK SO WE DON'T HAVE TO WAIT UNTIL MONDAY.

3 THE COURT: I'M HERE ALL DAY. LET'S SEE WHAT WE
4 LEARN FROM COUNSEL.

5 UNIDENTIFIED SPEAKER: WE EXPECT MR. BENICE TO BE
6 HERE WITHIN THE NEXT TEN, 15 MINUTES.

7 THE COURT: WE'LL WAIT.

8 MR. GRANT: THAT'S FINE.

9 (RECESS TAKEN.)

10 THE COURT: COUNSEL, GOOD AFTERNOON.

11 WE'RE HERE ON THE CHARTON VERSUS NATIONAL
12 FINANCIAL LENDING CASE.

13 YOUR APPEARANCES, PLEASE.

14 MR. GRANT: DAVID GRANT OF GRANT, GENOVESE & BARATTA
15 ON BEHALF OF THE PLAINTIFFS.

16 MR. BENICE: GOOD AFTERNOON, YOUR HONOR.

17 JEFF BENICE, B-E-N-I-C-E, ON BEHALF OF
18 DEFENDANTS.

19 THE COURT: GOOD AFTERNOON TO EACH OF YOU.

20 MR. BENICE, MR. GRANT WAS KIND ENOUGH TO TELL
21 US THAT YOU WERE DISADVANTAGED DURING LUNCH. AND SO MY
22 QUESTION TO YOU IS WHETHER YOU'RE PREPARED TO PROCEED.
23 WE CAN POSTPONE THIS A DAY OR TWO OR TO ANY TIME OF YOUR
24 CONVENIENCE AND COMFORT.

25 MR. BENICE: I'M READY TO GO, YOUR HONOR.

26 THE COURT: YOUR MOTION, MR. GRANT. WHAT WOULD YOU

1 LIKE TO TELL US?

2 MR. GRANT: THANK YOU, YOUR HONOR.

3 THE COURT: YOU TOLD US BEFORE LUNCH THAT WE'RE DOWN
4 TO ONE MOTION AND THAT'S YOUR REQUEST FOR A PRELIMINARY
5 INJUNCTION.

6 MR. GRANT: YES, YOUR HONOR.

7 I WOULD LIKE TO CLARIFY SOMETHING FOR THE COURT
8 WITH RESPECT TO THE PETITION TO ARBITRATE --

9 THE COURT: YES.

10 MR. GRANT: -- AND THE PETITION TO STAY.

11 IT'S MY UNDERSTANDING, FROM DISCUSSION WITH
12 COUNSEL AND IN-HOUSE COUNSEL, THAT ARBITRATION IS WAIVED.
13 WE'RE NOT GOING TO LOOK AT THAT PETITION AGAIN. AND I
14 THINK THE WORD WAS "WITHDRAW," AND AT THE TIME OF THE
15 HEARING; BUT I JUST WANT TO CONFIRM WITH COUNSEL HERE
16 THAT THAT IS CORRECT.

17 MR. BENICE: THAT IS CORRECT, YOUR HONOR.

18 THE COURT: THANK YOU, MR. BENICE.

19 LET ME POSE THIS QUESTION TO YOU BEFORE YOU
20 START YOUR COMMENTS, MR. GRANT.

21 A GREAT DEAL OF DISCUSSION HERE HAS BEEN
22 DIRECTED TO LIKELIHOOD OF SUCCESS, ONE OF THE THINGS THAT
23 THE COURT IS SUPPOSED TO CONSIDER IN THE GRANTING OF A
24 PRELIMINARY INJUNCTION. AND THE LIKELIHOOD OF SUCCESS
25 THAT HAS BEEN DISCUSSED BY BOTH SIDES HAS, IN SUBSTANTIAL
26 MEASURE, BEEN THE QUESTION ABOUT WHETHER THERE WAS OR MAY

1 BE SOME USE OF INVESTMENT FUNDS OR SOME USE OF INVESTMENT
2 PROCEEDS FOR DEFENSE EXPENSES, AND SO ON AND SO FORTH.

3 I'M WONDERING IF WE SHOULDN'T BE DISCUSSING A
4 PRELIMINARY SHOWING OF LIKELIHOOD, AND THAT IS SOME
5 SHOWING THAT THE DEFENDANTS HAVE DONE ANYTHING WRONG IN
6 INVESTING OR PAYING THEMSELVES MANAGEMENT FEES. AND I
7 DON'T KNOW THAT THE EVIDENCE HAS EVEN A PENNY'S WORTH OF
8 DEFALCATION IN THE MOVING PARTY'S PAPERS.

9 AND I THINK THAT IF WE START FROM THE CURRENT
10 STATE OF THE RECORD, WHICH I BELIEVE IS NO EVIDENCE OF
11 ANY MISMANAGEMENT IN TERMS OF LIES, FRAUD IN THE
12 INVESTMENT, STEALING FROM THE COMPANY, OR EXAGGERATED
13 MANAGEMENT FEES, THEN THAT MIGHT LEAD US TO THE
14 CONCLUSION THAT THE PLAINTIFF LOSES THE CASE.

15 YOUR THOUGHTS.

16 MR. GRANT: INTERESTING OBSERVATIONS AT THIS POINT,
17 YOUR HONOR.

18 WHEN WE BROUGHT THE MOTION, WE BROUGHT IT WITH
19 ONE HAND TIED BEHIND OUR BACK BECAUSE WE WERE TRYING TO
20 GET DEPOSITIONS TO FERRET OUT EVIDENCE, ET CETERA. AND
21 THAT IS ONE OF THE MOTIONS THAT WE'VE AGREED ON.

22 SO WE WENT IN WITH OUR -- AND I'LL SAY -- I'M
23 RIGHT-HANDED. IT WAS NOT MY RIGHT HAND. IT WAS MY LEFT
24 HAND THAT WAS A WEE BIT BEHIND MY BACK.

25 BUT THAT'S NOT THE CORRECT FOCUS THAT THE
26 COURTS LOOKED AT BECAUSE A COMPLAINT ISN'T EVIDENCE. WE

1 KNOW THAT. A VERIFIED COMPLAINT COULD, ON CERTAIN
2 APPLICATIONS, PERHAPS, SUFFICE IF THE ALLEGATIONS ARE
3 ADMISSIBLE. BUT, OF COURSE, THE COMPLAINT IS NOT. WE
4 HAVE A 236-PAGE COMPLAINT, 92 CAUSES OF ACTION. WE'RE
5 JUST LAUNCHING INTO THIS CASE.

6 AND SO, NO, IF THAT IS THE PREMISE, IF THAT'S
7 THE DINING TABLE THAT NEEDS TO BE SET, THAT WE NEED TO
8 PROVE TO A LIKELIHOOD OF SUCCESS STANDARD THE UNDERLYING
9 ALLEGATIONS, WE'RE NOT HERE ON THAT BASIS.

10 BUT THAT ISN'T THE RIGHT STANDARD, AND HERE'S
11 WHY: THE STANDARD IS ARE THEY USING INVESTOR FUNDS?
12 THAT'S ONE. ARE THEY USING INVESTOR FUNDS AND CAN THEY
13 USE WHEN THERE ARE ALLEGATIONS AND CLAIMS AGAINST THEM?
14 THAT'S IT. THAT IS ALL WE'RE ADDRESSING.

15 THE CLAIMS COULD BE FROM MARS, VENUS, PLUTO.
16 THEY COULD BE FROM IRAQ OR IRAN. ARE THEY USING INVESTOR
17 FUNDS TO DEFEND THEMSELVES ON 92 CAUSES OF ACTION WHEN
18 ONLY SOME OF THE CAUSES OF ACTION ARISE FROM TWO
19 AGREEMENTS IDENTIFIED THAT HAVE SOME INDEMNIFICATION
20 PROVISIONS?

21 AND I WOULD CERTAINLY UNDERSTAND IF THE COURT
22 HAS NOT READ THE ENTIRE COMPLAINT; BUT, AS MANY CAUSES OF
23 ACTION ADDRESS, THERE ARE LIMITED LIABILITY COMPANIES
24 THAT HAVE BEEN SET UP. THEY DO NOT HAVE INDEMNIFICATION
25 PROVISIONS. THE CORPORATIONS CODE DOES NOT ALLOW
26 INDEMNIFICATION FOR LLC'S, UNLESS THERE IS A PROVISION IN

1 THE OPERATING AGREEMENT. THAT'S 17155 AND 17153. AND,
2 IN ANY EVENT, IT DOES NOT ALLOW INDEMNIFICATION FOR
3 BREACH OF FIDUCIARY OBLIGATION CLAIMS.

4 SO LET ME GET BACK UP TO THE COURT'S INITIAL
5 COMMENTS. WHAT THE REASONABLE PROBABILITY OF SUCCESS
6 STANDARD FOR THIS INJUNCTION IS ARE DEFENDANTS USING
7 INVESTOR FUNDS TO DEFEND THEMSELVES FROM CLAIMS BY THE
8 INVESTORS AND, IF SO, ARE THEY PROPERLY DOING SO WITHOUT
9 A COURT ORDER OR WITHOUT A PROPER UNDERTAKING?

10 THERE ARE TWO PREMISES. THERE ARE TWO NOTCHES
11 THAT HAVE TO BE MET UNDER SOME OF THE CAUSES OF ACTION.
12 WHAT'S INTERESTING IS DEFENDANTS ARE DEFENDING THEMSELVES
13 ON ALL 92 CAUSES OF ACTION. AND, ADDRESSING THE POINTS
14 THAT THE COURT RAISED, THEY ARE USING INVESTOR FUNDS.

15 WHY DO I SAY THAT? THEY ADMITTED THEY ARE.
16 THEY ADMITTED IN THE OPPOSITION, "YES, WE ARE."

17 BUT WE, NOTWITHSTANDING THE LACK OF DISCOVERY,
18 PROVIDED THE COURT WITH THREE SIGNIFICANT LETTERS WRITTEN
19 BY THE DEFENDANTS. LETTER ONE, WHICH IS EXHIBIT "A" TO
20 THE LOUIE DECLARATION -- EXCUSE ME.

21 EXHIBIT "B" SAYS, "WE'RE USING INVESTOR FUNDS.
22 MR. CHARTON'S CAUSED IT. YOU ARE GOING TO GET LESS IN
23 RETURN." SO THEY ADMITTED THAT. THAT WAS ONE OF THE
24 REASONS WE BROUGHT IT.

25 EXHIBIT "A" TO THE BRENEMAN DECLARATION AND
26 EXHIBIT "C" AND "D" TO THE BRENEMAN DECLARATIONS ALSO ARE

1 LETTERS FROM DEFENDANTS, "WE ARE USING INVESTOR FUNDS."

2 WELL, WE DIDN'T HAVE DEPOS. WE HAD THOSE
3 LETTERS. THAT'S ACROSS THE BOARD "WE'RE USING INVESTOR
4 FUNDS TO DEFEND OURSELVES." SO WE BROUGHT THE MOTION.

5 AND, THANK YOU, IN OPPOSITION THEY ADMITTED,
6 "YES, WE'RE USING FUNDS OF THE ENTITIES TO DEFEND ALL OF
7 THE CLAIMS." BUT THEY CAME UP WITH A NICE LITTLE TAG.
8 IT WAS CALLED "OPERATIONAL FUNDS." THOSE ARE INVESTOR
9 FUNDS. ANY WAY YOU LOOK AT IT, THOSE ARE THE FUNDS,
10 OPERATIONAL FUNDS. NOT THEIR PERSONAL FUNDS, NOT FROM
11 FEES PAID THEM, BUT OPERATIONAL FUNDS OUT OF THE
12 INVESTMENTS.

13 SO WE HAVE THESE PREMISES. WE HAVE EVIDENCE
14 THAT THEY'RE USING INVESTOR FUNDS. IN THE EXHIBITS
15 IDENTIFIED AND IN THE ADMISSIONS IN THEIR OPPOSING
16 PAPERS, THEY ARE USING FUNDS OF THE INVESTMENTS.

17 THEY DIDN'T SAY TO DEFEND SOME OF THE CLAIMS.
18 THEY'RE GOING TO USE THEM FOR SECURITY VIOLATIONS WHERE
19 ONE OF THE INDEMNIFICATION PROVISIONS BLANKLY SAYS YOU
20 CAN'T DO IT. THAT'S THE OFFERING CIRCULAR OF THE N.F.L.
21 IT'S NOT FOR SECURITIES VIOLATIONS.

22 THEY HAVEN'T PROVIDED A PROPER UNDERTAKING --
23 AND I WILL ADDRESS THAT SEPARATELY -- AND THEY HAVEN'T
24 GOT A COURT ORDER,

25 SO THAT IS THE DINING TABLE ON WHICH WE BELIEVE
26 THE COURT CAN ORDER AN INJUNCTION, A NICE PLATTER

1 INJUNCTION, TO SAY, "HEY, STOP USING INVESTOR FUNDS
2 UNTIL, ONE, YOU SHOW IN WHAT CAUSES OF ACTION YOU'RE
3 USING THEM. AND IF IT'S AN N.F.L. CAUSE OF ACTION, THEN
4 LET'S GET A PROPER UNDERTAKING, NOT A SHALLOW, HOLLOW
5 PROMISE TO PAY, WHICH YOU'RE ALREADY OBLIGATED TO DO IN
6 THE FIRST PLACE."

7 THE COURT: THAT'S WHAT THE CONTRACT REQUIRES, ISN'T
8 IT?

9 MR. GRANT: IT DOES -- BOY, I'M RIGHT THERE WITH THE
10 COURT. IT DOES SAY A WRITTEN UNDERTAKING IF THEY DEFEND
11 THE MANAGER IN LAWSUITS BROUGHT BY THE INVESTORS. YES.
12 IT SAYS A WRITTEN UNDERTAKING BY THE MANAGER. IT DOES
13 SAY THAT.

14 THE COURT: YOUR SUGGESTION NOW IS THAT THAT CONTRACT
15 WASN'T WORTH THE PAPER IT'S PRINTED ON. BUT THAT'S STILL
16 THE DEAL.

17 MR. GRANT: I'M NOT POOH-POOHING THOSE WORDS. WHAT
18 I'M SAYING IS THAT'S AN ABSURD INTERPRETATION IF ALL
19 EIGHT TIMES THERE IS ANOTHER PIECE OF PAPER WHERE BY LAW
20 HE'S ALREADY OBLIGATED TO INDEMNIFY, IF WE HAVE. AND WE
21 POINTED THIS OUT. THAT'S UNDER N.F.L.

22 UNDER FUND I, YOU CAN'T DO IT WITHOUT A COURT
23 ORDER. AND WE ALL KNOW THIS COURT, NOR NO OTHER COURT,
24 HAS ISSUED AN ORDER AUTHORIZING INVESTOR FUNDS TO BE USED
25 FOR DEFENSE.

26 NOW, THOSE ARE CLAIMS INVOLVING N.F.L. AND

1 FUND I. THE COMPLAINT IS REplete WITH CAUSES OF ACTION
2 THAT DON'T ARISE FROM N.F.L. OR FUND I. AND BUT THEY'VE
3 BLUNDER BUSSED ACROSS THE BOARD AND SAID, "WE'RE USING
4 INVESTOR FUNDS. THAT'S IT."

5 WE'RE SAYING, "NO, NO, NO, NO, NO. YOU CAN'T
6 DO THAT."

7 NOW, WOULD DISCOVERY HAVE HELPED TO PARE THAT
8 DOWN A BIT? PROBABLY.

9 SO, AGAIN, MY LEFT HAND WAS STILL A LITTLE BIT
10 TIED BACK. WE CAME IN TO ADDRESS THIS ISSUE WITH THE
11 COURT. WE BELIEVE THE CONTRACT REQUIRES A COURT ORDER
12 AND REQUIRES A PROPER WRITTEN UNDERTAKING.

13 IF THE COURT IS AT THIS POINT IN TIME READY TO
14 SAY THAT WRITTEN UNDERTAKING MEANS YOU TAKE A PIECE OF
15 STATIONERY OR PIECE OF TOILET PAPER, WRITE DOWN "I
16 PROMISE TO PAY BACK," OKAY, THAT'S -- THEN I'M GOING TO
17 BE STUCK A BIT, OR THE PLAINTIFFS WILL FOR A WEE BIT, ON
18 A PRELIMINARY BASIS I'M SURE, WITH THAT INTERPRETATION.

19 THOSE ARE THE WORDS: A WRITTEN UNDERTAKING.

20 WE POINTED OUT -- AND I THOUGHT IN A FAIRLY
21 LOGICAL WAY -- AND I REGRET IT -- THAT IT CAN'T MEAN
22 THAT. IT HAS TO MEAN SOMETHING MORE LOGICAL, SOME KIND
23 OF UNDERTAKING -- AS WE KNOW, A BOND OR UNDERTAKING --
24 THAT OBLIGATES THEM AND OBLIGATES A THIRD PARTY TO PAY
25 BACK THOSE FEES ONCE THEY GET WHACKED, YOU KNOW, WITH A
26 FINDING OF LIABILITY.

1 HOW SILLY IS THAT? WHAT A PYRRHIC VICTORY THAT
2 WOULD BE. YOU KNOW, MILLIONS OF DOLLARS TO DEFEND THEM.
3 "OH, YEAH, I'M GUILTY NOT ONLY OF WHAT YOU CLAIM, BUT I
4 ALSO HAVE TO PAY BACK A FEW MORE MILLION DOLLARS. GUESS
5 WHAT? AIN'T GOT IT." WOW.

6 INVESTOR FUNDS WENT OUT AND DON'T COME BACK.
7 THERE IS NO REAL WRITTEN UNDERTAKING. IS THAT A
8 FIDUCIARY INTERPRETATION? I DON'T THINK SO. A FIDUCIARY
9 SHOULDN'T BE DOING THAT.

10 WHY WE'RE HERE IS, WOW, THEY TOLD THE
11 INVESTORS, "GUESS WHAT? THIS GUY AT CHARTON AND THE
12 OTHER PLAINTIFFS HAVE SUED YOU. YOU'RE GOING TO GET LESS
13 MONEY BECAUSE WE'RE USING YOUR MONEY TO DEFEND
14 OURSELVES."

15 AND THREE TIMES THEY'VE TOLD THE INVESTORS
16 THAT. AND WE WENT, "WELL, WAIT A MINUTE." WE TRIED TO
17 GET SOME DISCOVERY. WE DIDN'T GET THAT. WE ASSUME IT'S
18 ACROSS THE BOARD AND NOT LIMITED TO MAYBE N.F.L.-RELATED
19 CLAIMS.

20 AND LET ME ALSO POINT OUT SOMETHING ON THE
21 UNDERTAKING. I'M BITING A LOT OFF IN RESPONSE TO YOUR
22 QUESTION, YOUR HONOR.

23 BUT THE UNDERTAKING THAT, QUOTE, WAS FILED, THE
24 WRITTEN PROMISE BY MR. HARKEY, WAS SIGNED BY POINT CENTER
25 ONLY ON BEHALF OF -- MR. HARKEY ON BEHALF OF POINT
26 CENTER. AND IT INDEMNIFIES ALL THE DEFENDANTS. IT

1 INDEMNIFIES AND AS WELL REPRESENTATIVES, AGENTS,
2 OFFICERS, ET CETERA. THE CONTRACT DOESN'T SAY THAT.

3 WHAT'S THE CONSIDERATION FOR THAT? IT DOESN'T
4 SAY, "HOW ARE THEY GOING TO PAY IT BACK?" IT SAYS,
5 "POINT CENTER IS GOING TO PAY BACK FEES ADVANCED TO
6 DEFEND EVERYBODY."

7 SO THAT UNDERTAKING IS NO GOOD. THAT CAN'T BE
8 WHAT THE CONTRACT SAYS, BECAUSE THE CONTRACT SAYS BY THE
9 MANAGER, IN DEFENSE OF THE MANAGER, AND THAT'S POINT
10 CENTER, ARISING UNDER N.F.L.

11 SO TO BACKTRACK REAL QUICK, TO SUM IT UP, THE
12 REASONABLE PROBABILITY OF SUCCESS CAN ONLY BE IS THERE A
13 PROPER INDEMNIFICATION?

14 ONE, IS THERE A PROPER RIGHT TO PAY DEFENSE
15 COSTS WITH INVESTOR MONIES? IF THERE IS, UNDER EACH
16 CAUSE OF ACTION, WHAT DO THE AGREEMENTS SAY? N.F.L. SAYS
17 GET A COURT ORDER. THEY DIDN'T DO THAT.

18 EXCUSE ME, YOUR HONOR. FUND I SAYS THAT.

19 N.F.L. SAYS WRITTEN UNDERTAKING BY THE MANAGER.
20 I'VE READ IT 80 TIMES. IF IT MEANS WHAT THE COURT SAYS,
21 THEN GREAT. WE SAY, NO, IN A FIDUCIARY CONTEXT, IT MUST
22 MEAN SOMETHING A LITTLE MORE SIGNIFICANT THAN JUST THAT
23 PROMISE.

24 AND WE'RE ADVANCING FUNDS FOR ALL OF THE
25 DEFENDANTS. THEY AREN'T THE MANAGER. THERE IS ONLY AN
26 ADVANCE FOR THE MANAGER. NOW WE'RE ADVANCING FUNDS FOR

1 ALL OF THE DEFENDANTS.

2 SO WE'RE HERE TO ADDRESS THIS. I KNOW WE'RE
3 GOING TO HAVE SOME DISCOVERY ON THESE ISSUES. AND I'LL
4 RESPOND TO ANY OTHER POINTS THE COURT HAS. THAT WAS A
5 GOOD QUESTION THOUGH.

6 THE COURT: THANK YOU VERY MUCH.

7 LET ME HEAR FROM MR. BENICE.

8 MR. BENICE: THANK YOU, YOUR HONOR.

9 THE COURT'S QUESTION IS RIGHT ON POINT, AND
10 IT'S ON POINT ON TWO LEVELS. ONE, THERE IS NOT ONE IOTA
11 OF EVIDENCE PRESENTED ABOUT ANYTHING THAT ANY OF THE
12 DEFENDANTS -- N.F.L., POINT CENTER, OR THE EXECUTIVES
13 THAT WERE NAMED. MR. GRANT IS TALKING ABOUT A WHOLE
14 BUNCH OF EMPLOYEES. THE PARTIES THAT WERE NAMED ARE
15 MR. HARKEY, WHO IS HERE IN COURT TODAY -- HE'S THE
16 PRESIDENT; GWEN MELANSON, WHO IS THE C.F.O.; AND THEN
17 MR. HARKEY'S WIFE, DIANE HARKEY.

18 IT IS TRUE THAT UNDER CALIFORNIA LAW EMPLOYEES
19 ARE ENTITLED TO INDEMNITY. THAT'S WHY THERE IS AN
20 INDEMNITY PROVISION, AND THAT'S WHY THE WRITTEN
21 UNDERTAKING TALKS ABOUT INDEMNIFYING ALL THE DEFENDANTS.

22 BUT, MOVING ON, THE PRIMARY CLAIMS IN THE
23 COMPLAINT THERE IS NO EVIDENCE AT ALL PRESENTED ABOUT.
24 SO THEY WOULD FAIL IF THAT WERE THE TEST.

25 BUT TAKING IT A STEP FURTHER AND ACCEPTING
26 MR. GRANT'S SUGGESTION, WELL, WHAT WE REALLY HAVE TO LOOK

1 AT IS A PROBABILITY OF SUCCESS ON THE MERITS AS TO
2 WHETHER OR NOT THE DEFENDANTS ARE ENTITLED TO USE THE
3 VARIOUS INDEMNITY AGREEMENTS. THEY OFFER UTTERLY NO
4 EVIDENCE ON THOSE POINTS AS WELL, YOUR HONOR.

5 THERE ARE TWO PRIMARY INDEMNITY AGREEMENTS. I
6 KNOW THE PAPER -- YOU KNOW, I'VE GOT IT ALL OVER MY DESK
7 HERE AND I'M SURE IT'S DIFFICULT TO LOOK THROUGH. BUT
8 THERE IS REALLY TWO PRIMARY INDEMNITY AGREEMENTS. ONE IS
9 THE N.F.L. AGREEMENT, PARAGRAPH 5.6, AND THE SECOND IS
10 THE MORTGAGE FUND I AGREEMENT.

11 MR. GRANT HAS SUGGESTED, TALKING ABOUT MORTGAGE
12 FUND I -- SO IT'S CLEAR TO THE COURT, OUT OF ALL THE
13 PLAINTIFFS, THERE IS ONLY TWO WHO ARE MEMBERS OF MORTGAGE
14 FUND I. MORTGAGE FUND I SAYS THAT THE REQUIREMENT OF
15 COURT APPROVAL ONLY ARISES WHEN AN ACTION IS INITIATED
16 INVOLVING A MEMBER OF THE ACTION. THEN POINT CENTER HAS
17 TO COME IN AND GET COURT APPROVAL. WHEN IT'S NOT A
18 MEMBER OF LITIGATION, THERE IS NO OBLIGATION FOR COURT
19 APPROVAL.

20 IN THIS CASE THE GREAT MAJORITY OF THE
21 PLAINTIFFS ARE NOT A MEMBER OF MORTGAGE FUND I. THIS IS
22 LITIGATION AS THOUGH IT WERE JUST A STRANGER TO N.F.L. OR
23 POINT CENTER WHO IS SUING. THERE IS NO OBLIGATION FOR
24 COURT APPROVAL.

25 BUT SO IT'S REAL CLEAR, THERE IS ONLY TWO
26 PARTIES WHO WOULD HAVE ANY RIGHT, ANY STANDING TO EVEN

1 RAISE THAT PROVISION.

2 THE TRULY RELEVANT PROVISION IS THE N.F.L.
3 PROVISION, AND THAT'S BECAUSE THE VAST MAJORITY OF THE
4 PLAINTIFFS ARE A MEMBER OF N.F.L. IN OUR REPLY WE
5 POINTED THAT OUT TO THE COURT BECAUSE, IN THE PLAINTIFF'S
6 SECOND AMENDED COMPLAINT FILED ON JUNE 8, THEY HAVE A
7 PARAGRAPH IN THEIR COMPLAINT IDENTIFYING ALL THE
8 PLAINTIFFS WHO ARE N.F.L. MEMBERS.

9 THE N.F.L. INDEMNITY AGREEMENT IS VERY SIMPLE.
10 FIRST, IT SAYS IN SIMPLE ENGLISH THAT THERE HAS TO BE A
11 WRITTEN UNDERTAKING PREPARED, NOT FILED. THERE IS NO
12 FILING WITH THE COURT. PLAINTIFFS WANT TO CONFUSE THE
13 PHRASE "WRITTEN UNDERTAKING" WITH THE REQUIREMENT OF
14 OBTAINING A COURT BOND. THAT'S NOT WHAT'S REQUIRED.
15 IT'S A WRITTEN UNDERTAKING. AND THAT'S PRECISELY WHAT
16 POINT CENTER, THE MANAGER, PREPARED. THAT'S WHAT'S PART
17 OF THE RECORD.

18 NOW, I SUPPOSE IT COULD BE POTENTIALLY A
19 LEGITIMATE CLAIM, GETTING PAST THE REQUIREMENT OF SHOWING
20 IRREPARABLE INJURY. MR. GRANT SAID, "WELL, IT'S NOT
21 WORTH THE PAPER IT'S WRITTEN ON." WELL, THERE IS NO
22 EVIDENCE ABOUT THAT EITHER. WHAT THE EVIDENCE IS, THERE
23 IS A BINDING INDEMNITY AGREEMENT. THERE IS NO EVIDENCE
24 BEFORE THIS COURT THAT WHATEVER THAT OBLIGATION IS IN THE
25 FUTURE CAN'T BE MET. THERE'S NOTHING BEFORE THE COURT.
26 IT'S A LEGITIMATE OBLIGATION, AND IT MEETS WITH PRECISION

1 THE REQUIREMENT OF THE N.F.L. AGREEMENT.

2 BUT THE PROBABILITY OF SUCCESS ISSUE, IF THAT'S
3 WHAT THE PLAINTIFFS WANT TO DIRECT THEMSELVES TO,
4 REQUIRES IN N.F.L. THAT THERE IS NO INDEMNITY. AND POINT
5 CENTER WOULD NOT BE ENTITLED TO INDEMNITY ARISING FROM
6 CLAIMS INVOLVING N.F.L. IF IT IS ADJUDGED LIABLE FOR
7 BREACH OF FIDUCIARY DUTY. AND THAT'S WHY THERE IS THE
8 WRITTEN UNDERTAKING.

9 SO IF, AT THE END OF THE LITIGATION, POINT
10 CENTER IS DETERMINED TO BE LIABLE FOR BREACH OF FIDUCIARY
11 DUTY, THEN POINT CENTER WOULD HAVE TO REIMBURSE N.F.L.
12 THERE IS NO EVIDENCE BEFORE THE COURT TALKING ABOUT WHAT
13 POINT CENTER DID TO BREACH ITS FIDUCIARY DUTIES.

14 AND THAT IS WHY THE DEFENDANTS WENT TO JUST
15 SOME LIMITED PRESENTATION OF WHAT IN FACT THE EVIDENCE
16 IS, BECAUSE THE PLAINTIFF'S MOTION SUGGESTS THAT THEY'VE
17 BEEN RENDERED PENNILESS AND THAT THE DEFENDANTS LOOTED
18 THEM.

19 WELL, IN FACT, THE PLAINTIFF SAYS -- THE
20 OPPOSITION POINT -- I HAVE RECEIVED MILLIONS OF DOLLARS
21 OF RETURN ON THEIR INVESTMENT. THEY HAVE THEIR
22 INVESTMENTS TODAY, WHICH ARE SECURED TRUST DEEDS. AND
23 THERE IS NO UTTERLY EVIDENCE THAT HAS BEEN PRESENTED BY
24 ANY ONE PLAINTIFF ABOUT ONE PENNY OF LOSS.

25 SO IF YOU WANT TO IN A MORE SELECTIVE FASHION
26 LOOK AT THE ISSUE OF PROBABILITY OF SUCCESS AND FOCUS IT

1 JUST ON THE INDEMNITY PROVISION, IN THAT VEIN TOO THE
2 PLAINTIFFS HAVE FAILED. THEY PRESENTED NO EVIDENCE THAT
3 SUGGESTS ANYTHING, ANY MISCONDUCT BY THE DEFENDANTS.

4 NOW, THE MORE CORE ISSUE THAT THE PLAINTIFFS
5 HAVE RAISED A HUMAN CRY ABOUT IS THE SUGGESTION THAT
6 POINT CENTER IS USING INVESTOR FUNDS TO PAY DEFENSE. AND
7 IN THE OPPOSITION, THERE IS NO ADMISSION THAT INVESTOR
8 FUNDS WERE USED. IT'S JUST TO THE CONTRARY. WE COULD GO
9 THROUGH AN ANALYSIS. THESE AREN'T INVESTOR FUNDS. THESE
10 ARE OPERATIONAL FUNDS, WHICH UNDER THE OPERATING
11 AGREEMENT OF N.F.L., WHICH IS AN EXHIBIT TO THE SECOND
12 AMENDED COMPLAINT AND IT'S AN EXHIBIT TO MS. BRENNEMAN'S
13 DECLARATION, ARE PERFECTLY PERMISSIBLE.

14 AND, OF COURSE, THEY WOULD BE. THIS IS AN
15 OPERATING ENTITY. THE PLAINTIFF SUED AN OPERATING ENTITY
16 THAT THEY HAVE AN INTEREST IN, BUT THEY SUED THE ENTITY.
17 IT'S AN LLC. AND THE OPERATING AGREEMENT, THAT ALL THE
18 PLAINTIFFS WHO ARE MEMBERS OF N.F.L. SIGNED, SPECIFICALLY
19 SAYS JUST ABOVE -- PARAGRAPH 5.6 OF THE OPERATING
20 AGREEMENT, AT PAGE 14 IS THE INDEMNIFICATION PROVISION
21 THAT WE'VE TALKED ABOUT. JUST ABOVE THAT IS THE
22 PROVISION INVOLVING THE MANAGEMENT'S ACTUAL OPERATION OF
23 THE ENTITY.

24 AND PARAGRAPH FIVE IS VERY CLEAR:
25 REIMBURSEMENT OF ORGANIZATION EXPENSES.

26 PARAGRAPH SIX: REIMBURSEMENT OF BUSINESS

1 EXPENSES. AND IT SAYS, "THE COMPANY," BEING N.F.L.,
2 "SHALL PAY ITS OWN GENERAL ADMINISTRATIVE AND OPERATING
3 EXPENSES. IT SHALL REIMBURSE THE MANAGER" -- THAT'S
4 POINT CENTER -- "FOR ANY EXPENSES INCURRED BY THE MANAGER
5 THAT ARE PROPERLY CONSIDERED ORDINARY AND REASONABLE
6 BUSINESS EXPENSES OF THE COMPANY, INCLUDING, WITHOUT
7 LIMITING THE GENERALITY OF THE FOREGOING, STATIONERY,
8 OFFICE SUPPLIES, POSTAGE, ACCOUNTING, AND LEGAL FEES
9 RELATED TO THE COMPANY'S BUSINESS."

10 THOSE ARE DIRECT IDENTIFIED OPERATIONAL
11 EXPENSES. SO THE PLAINTIFF'S CONTENTION THAT THEY DON'T
12 EXIST OR THEY CAN'T BE OPERATING EXPENSES DEFIES THE
13 CLEAR LANGUAGE OF THE VERY DOCUMENT THE PLAINTIFF SIGNED.

14 THE FINAL AND, FROM THE DEFENSE PERSPECTIVE,
15 MOST SIGNIFICANT ISSUE IS THAT THESE PLAINTIFFS REPRESENT
16 NO MORE THAN APPROXIMATELY FOUR PERCENT OF ALL THE
17 EXISTING INVESTORS IN THE N.F.L. FUNDS AND THE POOL FUNDS
18 AND THE POINT CENTER MANAGED FUNDS. AND THERE WERE SOME
19 DECLARATIONS -- I BELIEVE, FOUR OR FIVE -- SUBMITTED BY
20 NONPLAINTIFF INVESTORS WHO ARE FULLY AWARE OF THE
21 LITIGATION, FULLY AGREE TO ALLOW POINT CENTER TO
22 INDEMNIFY ITSELF, IF THAT'S WHAT IT'S DOING.

23 AND, JUST SO THE RECORD IS CLEAR TODAY, THAT IS
24 NOT WHAT FEES ARE BEING PAID PURSUANT TO. WE'RE ENTITLED
25 TO DO THAT, IF NEED BE. IT HASN'T ARISEN. IT'S
26 OPERATING EXPENSES.

1 BUT THE VAST MAJORITY, 95-96 PERCENT OF THE
2 INVESTORS, ARE NOT A PARTY TO THIS ACTION; AND THEY, IN
3 FACT, SUPPORT POINT CENTER'S POSITION IN THE ACTION,
4 RIGHTLY OR WRONGLY.

5 SO, IN SHORT, THERE IS SIMPLY NO EVIDENCE
6 BEFORE THE COURT, EITHER IN A BROAD-BRUSHED PICTURE OF
7 THE COMPLAINT OR JUST THE NARROW ISSUE OF THE VALIDITY OF
8 THE INDEMNITY PROVISIONS, TO ESTABLISH THAT THE
9 PLAINTIFFS HAVE A PROBABILITY OF SUCCESS ON THE MERITS.
10 THEY JUST HAVEN'T PRESENTED ANYTHING TO THE COURT. THEY
11 HAVEN'T SHOWN ONE PENNY BEING USED BY THE DEFENDANTS.

12 THE LETTERS THEY ATTACH WE ADDRESS IN THE
13 OPPOSITION. ONE, THEY TALK ABOUT USE OF MONIES IN THIS
14 PETTRO LITIGATION. NONE OF THE PLAINTIFFS HAVE ANY FUNDS
15 IN THAT PARTICULAR ITEM. ALL THEIR MONIES WERE GIVEN
16 BACK TO THEM.

17 NUMBER TWO, YOUR HONOR, IS THE CORRESPONDENCE
18 IN WHICH POINT CENTER IS SAYING YOU ULTIMATELY WILL BE
19 GETTING LESS MONEY. THESE ARE CASH CALL LETTERS. I
20 MEAN, THE PLAINTIFFS MIGHT NOT LIKE IT; BUT, BELIEVE IT
21 OR NOT, PLAINTIFFS HAVE TO ACCEPT THE FACT THAT OTHER
22 INVESTORS KNOWINGLY AGREE TO HONOR CASH CALLS THAT POINT
23 CENTER IS THE MANAGER OF N.F.L. AND THE OTHER FUNDS MAKE
24 AND THOSE NONPARTY INVESTORS SEND MONEY TO POINT CENTER
25 FOR OPERATIONS.

26 THERE IS NOTHING WRONG WITH THAT, BECAUSE THEY

1 UNDERSTAND THEY HAVE AN OBLIGATION UNDER THE OPERATING
2 AGREEMENT TO DO THAT. AND THEY ALSO UNDERSTAND THAT BOTH
3 N.F.L. AND POINT CENTER HAVE THE RIGHT TO PAY AND INCUR
4 NORMAL BUSINESS EXPENSES OUT OF THE FUND'S OPERATIONS.

5 SO, IN SHORT, ON THE PROBABILITY OF SUCCESS
6 STANDARD, LINKED WITH THE REAL PARTY IN INTEREST STANDING
7 ISSUE, PLAINTIFFS HAVEN'T DEMONSTRATED ANY EVIDENCE TO
8 SUGGEST THE ISSUANCE OF PRELIMINARY INJUNCTION IS
9 APPROPRIATE.

10 WE HAVEN'T TALKED ABOUT IRREPARABLE INJURY.
11 I'VE DEALT WITH IT IN THE PAPERS.

12 THERE IS NOTHING THAT'S BEFORE THE COURT THAT
13 SUGGESTS, EVEN AT THE END OF THE LINE, THERE WAS SOME
14 ARGUABLE BASIS FOR THE PLAINTIFFS TO CLAIM, IF THE
15 DEFENDANTS EVER SOUGHT TO EXERCISE THEIR INDEMNITY
16 RIGHTS, THAT SOME MONIES WERE TO GO BACK TO THEM, THAT
17 THEY DON'T HAVE A LEGAL REMEDY IN DAMAGES TO REMEDY THAT
18 CLAIM.

19 THERE IS NOTHING BEFORE THE COURT TO SUPPORT
20 THE ISSUANCE OF PRELIMINARY INJUNCTION.

21 THE COURT: THANK YOU, MR. BENICE.

22 MR. GRANT?

23 MR. GRANT: I'LL JUST SUM UP WITH A COUPLE OF POINTS.

24 I HAVE EXPLAINED OUR POSITION ON THE
25 PROBABILITY OF SUCCESS AND WHAT WE NEED TO ESTABLISH.
26 CALLING WHITE BLACK AND BLACK WHITE DOESN'T REALLY WORK.

1 AND I APPRECIATE WHAT COUNSEL SAID, BUT THE
2 LETTERS ARE VERY CLEAR. THE DEFENDANTS ARE USING
3 INVESTOR FUNDS.

4 LET ME JUST POINT OUT THIS EXAMPLE. YOU'VE GOT
5 A TRUST AND A TRUSTEE AND THEY'RE IN THE SAME POSITION OF
6 FIDUCIARY. AND THE TRUSTEE IS SUED FOR DEFALCATIONS AND
7 HIRES A VERY FINE LAW FIRM AND A LOT OF LAWYERS AND
8 STARTS USING THE TRUST FUNDS TO PAY HIMSELF. THAT'S WHY
9 WE'RE HERE TODAY.

10 THE FUNDS ARE BEING PAID. THEY ADMITTED THEY
11 ARE BEING USED TO PAY DEFENSE COSTS. THEY ADMIT IT.
12 THEY TOLD THE OTHER INVESTORS, "YOU WATCH HOW LITTLE
13 MONEY YOU'RE GOING TO GET BACK BECAUSE CHARTON SUED US."
14 THOSE ARE THE LETTERS WE'RE TALKING ABOUT.

15 THEY DO SAY THEY'RE USING OPERATIONAL FUNDS.
16 THEY'RE NOT DEFINED ANYWHERE. AND THEY'RE NOT ENTITLED
17 TO PAY LEGAL COSTS UNLESS THEY MEET THE STANDARDS ON THE
18 PARTICULAR CAUSES OF ACTION AND UNDER THE PARTICULAR
19 AGREEMENTS.

20 I'M NOT GOING TO GO BACK TO THE N.F.L. WE'VE
21 ARGUED THAT. BUT UNDER FUND I, THERE HAS TO BE A COURT
22 ORDER. THERE HASN'T BEEN A COURT ORDER. NO CONDITION
23 PRECEDENT. THERE HAS BEEN NO COURT ORDER. WE HAVE
24 STANDING -- THERE ARE NAMED PLAINTIFFS IN THAT FUND --
25 HAVE STANDING TO BRING UP THAT CLAIM.

26 I WOULD SUGGEST THAT -- OBVIOUSLY, WE'RE GOING

1 TO MOVE ON WITH DISCOVERY; BUT THEY CAN'T BE USING
2 INVESTOR FUNDS FOR ALL OF THESE CAUSES OF ACTION.
3 THEY'RE SAYING THEY'RE USING OPERATIONAL FUNDS. I CAN'T
4 TELL EXACTLY WHAT THEY'RE TALKING ABOUT, OTHER THAN I
5 THINK IT'S A TYPO. I THINK THEY MEAN INVESTOR FUNDS, BUT
6 THEY'RE SAYING OPERATIONAL FUNDS.

7 THEY'RE NOT USING THEIR FUNDS. THEY'RE NOT
8 USING THEIR MONIES. THEY'RE NOT DEFENDING THEMSELVES OUT
9 OF THEIR POCKET. AND UNTIL THESE PREDICATES ARE MET,
10 THEY'RE NOT SUPPOSED TO DO THAT.

11 NOW, THE CORPORATIONS CODE 17153 SAYS YOU CAN'T
12 INDEMNIFY A MANAGER FOR BREACH OF FIDUCIARY OBLIGATIONS,
13 BECAUSE 17155 SAYS, EXCEPT FOR WHAT'S STATED IN 17153, IF
14 AN LLC AGREEMENT HAS AN INDEMNIFICATION CLAUSE, IT'S
15 OKAY, EXCEPT FOR BREACH OF FIDUCIARY OBLIGATIONS. AND
16 THAT'S WHAT WE'RE TALKING ABOUT HERE.

17 SO THE TRUSTEE IS USING INVESTOR FUNDS TO PAY
18 HIS DEFENSE PENDENTE LITE. HAVE WE GOT TO THE MERITS OF
19 THE CASE YET? NO. HAVE THEY PRODUCED ANY EVIDENCE ONE
20 WAY OR THE OTHER? NO.

21 BUT IF WE'RE TALKING ABOUT THE MERITS, YOUR
22 HONOR, I UNDERSTAND THAT'S OUR BURDEN. WE'RE GOING TO
23 SATISFY THAT BURDEN. WE ARE GOING TO SATISFY THE BURDEN
24 ON THE MERITS OF THE UNDERLYING CASE. BUT THAT'S NOT
25 WHAT WE'RE HERE FOR TODAY. TODAY IS SETTING THE TABLE ON
26 ARE YOU USING FUNDS OF INVESTORS OR NOT? YOU'RE BEING

1 SUED. ALLEGATIONS ARE THERE. THEY'RE EXTENSIVE. YOU'VE
2 TOLD THE INVESTORS, "BOY, YOU GUYS ARE GOING TO REGRET
3 THE DAY THAT CHARTON AND THOSE BOYS SUED, OBVIOUSLY TRY
4 NOT TO GET THEM IN, PERHAPS, BECAUSE WE ARE USING YOUR
5 MONEY, YOU ARE GOING TO GET LESS BACK."

6 THAT'S WHAT THOSE LETTERS HAVE QUOTED. THAT'S
7 THE EVIDENCE BEFORE THE COURT. THAT IS THE EVIDENCE.
8 THEY HAVE MADE THAT THREAT.

9 THEY'RE A TRUSTEE AND THEY'RE A FIDUCIARY.
10 THAT'S A NO-NO. IT DOESN'T PASS THE SMELL TEST THERE.
11 JUST DOESN'T SOUND RIGHT. "GUYS, WE'RE GOING TO BE USING
12 YOUR FUNDS BECAUSE CHARTON SUED US -- CHARTON, ET AL."

13 AND THERE'S 50 PLAINTIFFS THAT ARE NAMED. AND,
14 AGAIN, THEY'RE USING ALL THESE FUNDS TO PAY ALL THESE
15 CAUSES OF ACTION.

16 WE WILL BE GOING INTO THAT THROUGH THE
17 DISCOVERY PROCESS THAT WE'VE RESOLVED INFORMALLY THIS
18 MORNING. AND I WOULD LIKE THE OPPORTUNITY, IF THE COURT
19 ISN'T INCLINED -- AND I HOPE THE COURT IS INCLINED TO
20 GRANT THE INJUNCTION TODAY -- BUT TO ALLOW US TO COME
21 BACK ONCE WE FIND OUT EXACTLY WHAT FUNDS ARE GOING WHERE,
22 ET CETERA.

23 BUT WE THINK WE HAVE AMPLE EVIDENCE. THEY SAID
24 THEY'RE USING OUR FUNDS. THAT'S ALL WE NEED. YOU CAN'T
25 DO IT AND THEY DIDN'T GET A COURT ORDER.

26 AND, AGAIN, WE HAVE THAT PROVERBIAL MYSTERY OF

1 WRITTEN UNDERTAKING BY THE MANAGER. THE COURT KNOWS OUR
2 INTERPRETATION.

3 THE COURT: MR. GRANT, YOU'VE SUGGESTED EARLIER IN A
4 WAY THAT I UNDERSTAND VERY WELL, BECAUSE I OFTEN USE SUCH
5 ABSURD ANALOGIES, THAT YOU CAN HAVE A CASE FROM PLUTO, OR
6 SOME SURVIVING PLANET, AND YOU WOULD HAVE THE SAME RIGHT
7 TO ASSERT THIS SORT OF REQUEST FOR PRELIMINARY
8 INJUNCTION.

9 I THINK I PROBABLY DISAGREE WITH THAT. IF YOUR
10 UNDERLYING CASE WERE FROM PLUTO, WRITTEN IN CRAYON ON
11 TOILET PAPER, AND SHIPPED HERE FROM ATASKADERO, I DON'T
12 THINK YOU WOULD HAVE ESTABLISHED A LIKELIHOOD OF SUCCESS
13 THAT IS NECESSARY FOR THE RELIEF YOU SEEK.

14 AND I'LL ASK YOU THIS QUESTION: LET'S ASSUME
15 FOR THE MOMENT, FOR THE PURPOSE OF DISCUSSION, THAT THE
16 PLAINTIFF'S CASE GOES DOWN IN FLAMES. 92 CAUSES OF
17 ACTION, 92 ADVERSE RESULTS.

18 WHAT REMEDY DO YOU THEN HAVE TO IMPEDE
19 REIMBURSEMENT FOR DEFENSE EXPENSES?

20 MR. GRANT: THEY'RE ENTITLED TO THOSE.

21 AND, BY THE WAY, I WAS ASSUMING THERE WERE
22 INVESTORS ON PLUTO.

23 THE COURT: YES. THEY'VE JUST BEEN DOWNGRADED.

24 MR. GRANT: AND NOT NECESSARILY IN ATASKADERO,
25 KNOWING WHAT THAT IS. BUT THERE COULD BE AN ATASKADERO
26 INVESTOR AS WELL.

1 BUT, NO, THEN THEY'RE ENTITLED TO INDEMNITY.
2 AND THAT'S UNDER THE CODE AND UNDER THE AGREEMENTS. THE
3 ENTITIES WILL INDEMNIFY THEM FOR ANYTHING ADVANCED.

4 OH, ABSOLUTELY, THEY'RE ENTITLED TO INDEMNITY
5 IF PLAINTIFF SHOULD LOSE.

6 THE COURT: AS WE STAND NOW, PLAINTIFF LOSES. RIGHT
7 NOW. IN THE FACTS OF THIS CASE, AS THEY EXIST ON MY
8 BENCH, PLAINTIFF LOSES BECAUSE YOU HAVE NO EVIDENCE.

9 MR. GRANT: WELL, I DON'T THINK THE COURT MEANS TO
10 SAY THAT. WE DO HAVE EVIDENCE. WE HAVEN'T PRESENTED IT
11 TO THE COURT.

12 THE COURT: I ABSOLUTELY TAKE THAT WORD BACK.

13 MR. GRANT: THANK YOU, YOUR HONOR.

14 THE COURT: YES.

15 MR. GRANT: AND, TWO, IF THAT WERE THE STANDARD, WE
16 WOULD HAVE PRESENTED THE EVIDENCE AND WE HAVE ROOMFULS OF
17 IT. BUT WE DON'T BELIEVE THAT'S THE STANDARD TO STOP
18 THEM FROM ADVANCING WITHOUT GETTING A COURT ORDER OR A
19 PROPER UNDERTAKING OR ADVANCING FOR SECURITIES
20 VIOLATIONS, THE RESCISSION CLAIMS, THE CLAIMS INVOLVING
21 LLC'S AND ADVANCING FUNDS TO THE WORLD.

22 SPECIFICALLY, WITH RESPECT TO THE WRITTEN
23 UNDERTAKING, I UNDERSTAND, YOU KNOW, FLIP A COIN ON THAT
24 ONE. IT SAYS WHAT IT SAYS. I DON'T THINK WHEN WE'RE
25 THROUGH WITH THIS A FIDUCIARY INTERPRETATION, A LOGICAL
26 INTERPRETATION LOSES OVER AN ABSURD INTERPRETATION,

1 BUT --

2 THE COURT: A COUPLE OTHER REASONS WHY I'LL DENY THIS
3 REQUEST. THESE ARE MORE PROCEDURAL, PERHAPS, AND LESS
4 VITAL; BUT HAVING SAID THAT, I INTERPRET SOME OF THE
5 THINGS YOU'VE SAID, MR. GRANT, AS A SUGGESTION THAT THESE
6 92 CAUSES OF ACTION HAVE DIFFERENT -- WE KNOW THEY HAVE
7 DIFFERENT CONTRACTS AS THEIR BASIS, WE HAVE DIFFERENT
8 CLAIMS, AND SO FORTH, AND YET YOUR REQUEST IS FOR A
9 SWEEPING ORDER DENYING ANY ACTIVITY BY ANY DEFENDANT IN
10 ANY FASHION. AND I'M WONDERING IF IT SHOULDN'T HAVE BEEN
11 MORE PARTICULARIZED. JUST A QUESTION. THAT'S NOT AN
12 ANSWER; THAT'S A QUESTION.

13 A COUPLE OF OTHER POINTS. IF IT EVER COMES TO
14 THIS, I THINK SOME MORE CARE AND ANALYSIS HAS TO GO INTO
15 QUESTIONS ABOUT BOND. I DON'T MEAN UNDERTAKING, BUT I
16 MEAN THE STATUTORY BOND REQUIRED IN THE EVENT THE COURT
17 SHOULD ENTER A PRELIMINARY INJUNCTION.

18 YOU HAVE AN ORDER THAT YOU'VE TENDERED TO THE
19 COURT WHICH JUST KIND OF IN A OFFHAND WAY SAYS "WE'LL
20 POST A \$5,000 BOND." THAT'S PROBABLY NOT GOING TO DO THE
21 TRICK.

22 ON THE OTHER HAND, YOU HAVE SUGGESTED IN SOME
23 OF YOUR PAPERS THAT THE DEFENDANT SHOULD BE REQUIRED TO
24 POST A \$100,000 BOND. AND I DON'T KNOW THAT THERE IS ANY
25 EVIDENCE THAT JUSTIFIES THAT.

26 SO THOSE BONDING AMOUNTS STRIKE ME AS BEING

1 DRAWN WITHOUT MUCH SUBSTANCE BEHIND THEM.

2 AND A FINAL THOUGHT, WHICH HAS ESCAPED ME FOR A
3 MINUTE. GIVE ME A SECOND.

4 IT COULD NOT HAVE BEEN IMPORTANT. I CAN'T
5 REMEMBER IT.

6 MOTION DENIED.

7 MR. GRANT: YOUR HONOR, MAY WE HAVE THAT WITHOUT
8 PREJUDICE BECAUSE OF THE ONGOING DISCOVERY?

9 THE COURT: I THINK THAT WOULD BE A TRUE STATEMENT.

10 MR. GRANT: THANK YOU, YOUR HONOR.

11 THE COURT: YOU'RE WELCOME.

12 MR. BENICE, IF YOU WOULD GIVE NOTICE, PLEASE.

13 MR. BENICE: YES, I WILL YOUR HONOR.

14 THANK YOU.

15 (PROCEEDINGS CONCLUDED.)

16 * * * * *

17

18

19

20

21

22

23

24

25

26

