

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE, WEST JUSTICE CENTER  
DEPARTMENT W7

TRAVEL AMERICA, INC., A DELAWARE )  
CORPORATION, ET AL., )  
 )  
PLAINTIFFS, )  
 )  
VS. ) CASE NO. 789743  
 )  
CAMP COAST TO COAST, INC., A DELAWARE )  
CORPORATION, ET AL., )  
 )  
DEFENDANTS. )  
\_\_\_\_\_ )

THE HONORABLE JOHN H. SMITH, JR., JUDGE PRESIDING

REPORTER'S TRANSCRIPT

JULY 17, 2000

APPEARANCES:

FOR THE PLAINTIFFS:

GERALD M. SHAW  
ATTORNEY AT LAW

TERRY M. MOSHENKO  
ATTORNEY AT LAW

FOR THE DEFENDANTS:

ALSCHULER, GROSSMAN, STEIN & KAHAN  
BY: MICHAEL A. SHERMAN, ESQ.

RUTAN & TUCKER  
BY: IRA G. RIVIN, ESQ.

HEIDI K. STEWART, CSR #6058  
OFFICIAL COURT REPORTER

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WITNESSES FOR THE PLAINTIFFS:

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ROBERT THOMPSON					
BY MR. MOSHENKO:	5962		6066		
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I N D E X

EXHIBIT	IN EVIDENCE
EXHIBIT NO. 2150, TRAVEL AMERICA LETTER, TRAVEL AMERICA LETTERHEAD, DATED AUGUST 27, 1997	6056

1 WESTMINSTER, CALIFORNIA - MONDAY, JULY 17, 2000

2 MORNING SESSION

3 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN  
4 COURT OUT OF THE PRESENCE OF THE JURY:)

5 THE COURT: PROCEED.

6 MR. SHAW: YES, YOUR HONOR.

7 ON BEHALF OF THE PLAINTIFFS, I HEREBY  
8 FORMALLY MAKE AN ORAL MOTION FOR A MISTRIAL BASED ON THE  
9 FOLLOWING GROUNDS: LAST FRIDAY WE TOOK THE DEPOSITION OF  
10 MR. -- MR. MOSHENKO TOOK THE DEPOSITION OF JERRY BERAN.

11 THE COURT: OF WHO?

12 MR. SHAW: JERRY BERAN.

13 THE COURT: ALL RIGHT.

14 MR. SHAW: I BELIEVE IT FOR THE RECORD IS  
15 B-E-R-R-A-N.

16 AND AS THE COURT MAY RECALL, AT THE TIME  
17 MR. SHERMAN STOOD AT THE PODIUM AND POINTED TO MR. BERAN IN  
18 THE GALLERY. THE PLAINTIFFS OBJECTED NOT ONLY AFTER THE  
19 SESSION IN CHAMBERS, BUT WHEN WE CAME BACK ONTO THE RECORD  
20 AT 1:30 THAT THE TESTIMONY WAS -- AND QUESTIONS WERE  
21 IMPROPER.

22 AND I ASKED ON THE RECORD, SPECIFICALLY,  
23 YOUR HONOR, AT PAGE 5222 ON THURSDAY, JUNE 29TH, AND ASKED  
24 FOR THE DEPOSITION OF MR. BERAN. AND I TOLD THE COURT THAT  
25 IF IT BECOMES EVIDENT FROM MR. BERAN'S DEPOSITION THAT  
26 THOSE QUESTIONS BY MR. SHERMAN WERE IMPROPER, MISLEADING

1 AND NO FOUNDATION, THAT WE WOULD BE BACK HERE ASKING THIS  
2 COURT FOR A MISTRIAL.

3 I HAVE TWO OTHER GROUNDS. ONE IS THE  
4 SEVEN-BOX ISSUE, NOW THAT WE'VE HAD A CHANCE TO REVIEW WHAT  
5 WAS IN THOSE SEVEN BOXES THAT MR. SHERMAN HANDED TO US.  
6 AND FINALLY ONE LAST, BUT LET ME STATE -- THOSE ARE THE  
7 THREE. BUT THERE WILL BE THREE GROUNDS.

8 THE FIRST GROUND, THE QUESTIONS THAT WERE  
9 ASKED OF MR. BERAN -- AND I'M SORRY, YOUR HONOR. THE COURT  
10 RECORD SPELLS IT B-E-R-A-N-S. AT PAGE 5209 OF THE  
11 TRANSCRIPT, LINE 1, MR. SHERMAN BEGAN ASKING THE FOLLOWING  
12 QUESTIONS:

13 "DID YOU ASK THE BERANS  
14 TO COME IN COURT AND LIE FOR  
15 YOU?"

16 AT LINE 18.

17 "YOU TOLD MR. BERAN THAT  
18 YOU WANTED HIM TO COME INTO THE  
19 COURT AND TELL THE JURY THAT  
20 YOUR PAYMENT HISTORY ON THIS  
21 PARK HAD BEEN SPOTLESS UNTIL  
22 AFTER THE COAST LETTERS WERE  
23 SENT?"

24 I MIGHT ALSO INDICATE FOR THE RECORD THAT  
25 MR. SHERMAN WAS POINTING AT MR. BERAN IN THE GALLERY AT THE  
26 TIME.

1 CONTINUING ON LINE 5209, LINE 23:

2 "YOU TOLD MR. BERAN THAT  
3 YOU WANT HIM TO SAY THAT SO THAT  
4 IT WOULD COINCIDE WITH COAST'S  
5 LETTERS BEING SENT?"

6 PAGE 5210, LINE 2:

7 "SO THAT YOU COULD BLAME  
8 COAST?"

9 QUESTION AT LINE 5:

10 "AND MR. BERAN TOLD YOU  
11 THAT AS FAR AS HE WAS CONCERNED,  
12 LETTERS IN 1997 HAD NOTHING TO  
13 DO WITH BOUNCED CHECKS IN 1996?"

14 QUESTION AT LINE 15:

15 "AND MR. MOSHENKO  
16 ACCOMPANIED YOU TO THIS MEETING;  
17 CORRECT?"

18 YOUR HONOR, ON FRIDAY AFTERNOON WE TOOK THE  
19 DEPOSITION OF MR. BERAN, AND THOSE QUESTIONS HAD NO BASIS  
20 IN FACT. THOSE QUESTIONS THAT INFERRED A FELONY BEING  
21 COMMITTED TO BUY SOMEBODY'S TESTIMONY AND SPECIFICALLY  
22 ASKING "DID YOU ASK MR. BERAN TO COME TO THIS COURT AND LIE  
23 FOR YOU," WERE ALL FALSE.

24 AND THE CASE LAW IN CALIFORNIA SAYS THAT THE  
25 FACTORS TO BE CONSIDERED FOR A MISTRIAL WOULD BE MISCONDUCT  
26 BY COUNSEL. AND THE CASE OF PEOPLE VERSUS CHOJNACKY,

1 C-H-O-J-N-A-C-K-Y, 1973, 8 C.3D 759 AT 766 SAYS THAT  
2 "ATTORNEY MISCONDUCT DURING TRIAL MEANS PURPOSEFUL  
3 DISREGARD FOR THE RULES OF EVIDENCE OR PROCEDURE IN AN  
4 ATTEMPT TO PREJUDICE THE ADVERSE PARTY'S CASE."

5 IT IMPLIES, A, IN QUOTES, DISHONEST ACT OR  
6 ATTEMPT TO PERSUADE THE JURY BY USING DECEPTIVE OR  
7 REPREHENSIBLE METHODS. DECEPTIVE -- AND NOW I'M NOT  
8 QUOTING FROM THE CASE, BUT I'M QUOTING FROM CALIFORNIA RULE  
9 OF PROFESSIONAL CONDUCT 5-200 WHERE IT SAYS THAT DECEPTIVE  
10 OR REPREHENSIBLE JURY PERSUASION METHODS ALSO VIOLATES  
11 RULES OF PROFESSIONAL CONDUCT.

12 AND I QUOTE FROM CALIFORNIA RULE,  
13 PROFESSIONAL CONDUCT, 5-200, IN QUOTES, "IN PRESENTING A  
14 MATTER TO A TRIBUNAL, A MEMBER SHALL EMPLOY FOR THE PURPOSE  
15 OF MAINTAINING THE CAUSES CONFIDED TO THE MEMBER SUCH MEANS  
16 ONLY AS ARE CONSISTENT WITH THE TRUTH."

17 HERE WE HAVE A SITUATION WHERE OVER  
18 OBJECTION A FELONY CONVICTION WAS ALLOWED TO COME IN OF  
19 MR. NOVELLI. THEN I HAVE POINTING AT MR. BERAN --

20 THE COURT: EXCUSE ME JUST A MINUTE. THAT'S NOT  
21 ONE OF THE REASONS YOU'RE STATING FOR MISTRIAL, IS IT?

22 MR. SHAW: NO, YOUR HONOR. BUT I'M TYING TOGETHER  
23 THE REASONS WHY THIS WAS A DISHONEST ACT OR ATTEMPT TO  
24 PERSUADE THE JURY BY USING DECEPTIVE OR REPREHENSIBLE  
25 METHODS.

26 CONNECTING MR. NOVELLI'S 27-YEAR PAST,

1 SOMETHING THAT HAPPENED 27 YEARS AGO, POINTING AT MR. BERAN  
2 AND SAYING, "DID YOU LIE? DID YOU ASK HIM TO COME INTO  
3 COURT AND LIE FOR YOU?" WHICH IS A FELONY, WHEN HE HAS  
4 ABSOLUTELY NO EVIDENCE.

5 AND WHY, YOUR HONOR, DO I SAY THERE'S NO  
6 EVIDENCE? THE COURT RULED THAT IF A WITNESS IS NOT ON THE  
7 WITNESS LIST IN THIS CASE, HE SHALL NOT COME TO COURT TO  
8 TESTIFY. MR. BERAN, EITHER THE FATHER OR THE SON, ARE NOT  
9 ON THE WITNESS LIST IN THIS CASE.

10 SO MR. SHERMAN STOOD HERE ON JUNE 29TH -- I  
11 BELIEVE THAT WAS THE DAY -- STOOD HERE ON JUNE 29TH AND  
12 ASKED MR. NOVELLI QUESTIONS OVER MY OBJECTION THAT HE KNEW  
13 HE COULDN'T GET INTO EVIDENCE.

14 EVEN IF WHAT THE QUESTIONS HE ASKED HAD ANY  
15 GRAIN OF TRUTH TO THEM, HE KNEW HE COULDN'T GET INTO  
16 EVIDENCE BECAUSE MR. BERAN WAS NOT ON THE WITNESS LIST.  
17 THAT'S NUMBER ONE.

18 NUMBER TWO -- AND MR. MOSHENKO WILL ADDRESS  
19 THIS -- THE DEPOSITION OF MR. BERAN WAS TAKEN ON FRIDAY.  
20 MR. BERAN DID NOT TESTIFY ABOUT ANY SUCH REQUEST BY  
21 MR. NOVELLI THAT HE WANTED HIM TO COME TO COURT AND SAY  
22 WHAT PAYMENT HISTORIES WERE. MR. BERAN DIDN'T SAY THAT THE  
23 LETTERS IN 1997 HAD NOTHING TO DO WITH BOUNCED CHECKS.

24 THE COURT: IS BERAN STILL AVAILABLE?

25 MR. MOSHENKO: IS HE AVAILABLE?

26 THE COURT: YES.

1           MR. MOSHENKO: HE WAS AVAILABLE FRIDAY. HE SAID HE  
2 WAS LEAVING FOR EUROPE. I DON'T KNOW WHEN. PERHAPS  
3 MR. SHERMAN CAN REMIND US.

4           MR. SHERMAN: I BELIEVE HE IS AVAILABLE UNTIL  
5 WEDNESDAY.

6           THE COURT: WHY DON'T YOU CALL HIM?

7           MR. MOSHENKO: FOR YOUR HONOR OR FOR THE JURY?

8           THE COURT: NO. FOR THE JURY. I'LL ALLOW IT.

9           MR. MOSHENKO: WE DON'T WANT HIM TO COME BEFORE THE  
10 JURY, YOUR HONOR. WE DON'T WANT HIM TO COME BEFORE THE  
11 JURY. WE THINK THAT THIS WAS A PLOY TO TRY TO ADD A  
12 WITNESS TO THE WITNESS LIST.

13           THE COURT: HAVE HIM DENY IT UNDER OATH IN FRONT OF  
14 THE JURY.

15           MR. MOSHENKO: YOUR HONOR, WE HAVE TAKEN HIS  
16 DEPOSITION. HE HAS DENIED IT UNDER OATH. HE SAID IN THE  
17 DEPOSITION HE NEVER -- HE WAS NEVER ASKED BY MR. NOVELLI TO  
18 COME TO COURT. I ASKED HIM SPECIFICALLY, "DID MR. NOVELLI  
19 EVER ASK YOU TO COME TO COURT?"

20                        "I WAS NEVER ASKED."

21           I ASKED HIM SPECIFICALLY, "DID THE WORD  
22 'LIE' AT ALL COME UP IN THE CONVERSATION?"

23                        HE SAID, "THE WORD 'LIE' WAS NOT MENTIONED  
24 IN THE CONVERSATION."

25           I ASKED HIM, "DID YOU TELL MR. SHERMAN THAT  
26 SOMEBODY TALKED ABOUT 'LIE' OR THE WORD 'LIE' WAS EVER USED

1 IN THE CONVERSATION?

2 "NO. HOW COULD I DO THAT? THE WORD 'LIE'  
3 WAS NEVER USED IN THE CONVERSATION."

4 I ASKED HIM, "DID YOU TELL MR. SHERMAN THAT  
5 I ATTENDED THE MEETING; THAT I WAS PART" -- YOUR HONOR IS  
6 ON RECORD AT TWO PLACES SAYING YOUR UNDERSTANDING OF THE  
7 QUESTION THAT WAS ASKED WAS THAT I WAS THERE AT THE  
8 MEETING; ALBEIT, I KNOW YOUR HONOR SAID YOU DIDN'T  
9 INTERPRET IT AS I WAS PARTICIPATING IN THIS ALLEGED FELONY  
10 ACT.

11 I ASKED HIM THE FACTS -- FOR FACTS THAT  
12 WOULD SUGGEST OR COULD CAUSE THE CONCLUSION I WAS THERE.  
13 WHAT HE SAID WAS THAT HE SAW MR. NOVELLI AND ME DRIVE UP IN  
14 A CAR, AND WE SPOKE FOR A FEW MINUTES IN MY CAR. AND THEN  
15 MR. NOVELLI GOT OUT, AND I BACKED UP AND LEFT. AND THEN HE  
16 HAD A CONVERSATION WITH MR. NOVELLI.

17 YOUR HONOR'S INTERPRETATION IS NOT AN  
18 UNREASONABLE ONE. IT'S A CLEAR -- I INTERPRETED IT  
19 STRONGER, THAT I WAS A PART OF THE MEETING, AND I WAS  
20 PARTICIPATING IN THE MEETING.

21 YOUR HONOR INTERPRETED I WAS THERE FOR THE  
22 MEETING AND -- PART OF THE MEETING. THERE'S NO REASONABLE  
23 WAY THAT THE FACT THAT I DROVE AWAY BEFORE THE MEETING  
24 STARTED COULD CONSTITUTE OR SUPPORT THE SUGGESTION --

25 THE COURT: WHY DID YOU TAKE HIS DEPOSITION?

26 MR. MOSHENKO: WHY DID WE?

1 THE COURT: WHY?

2 MR. MOSHENKO: BECAUSE MR. SHERMAN WALKED IN AND  
3 SAID, "I WANT TO PUT HIM ON THE WITNESS STAND."

4 WE WANT TO TAKE HIS DEPOSITION AND FIND OUT  
5 THE DISTORTIONS THAT WE KNEW WERE TRUE -- I KNEW I DID NOT  
6 PARTICIPATE IN SUCH A MEETING, BUT I WANTED TO HEAR IT FROM  
7 MR. BERAN BECAUSE MR. SHERMAN WAS ALLEGEDLY RELYING --

8 THE COURT: I DON'T UNDERSTAND WHY YOU DON'T WANT  
9 HIM CALLED.

10 MR. SHERMAN: HERE IS AN EASY ANSWER.

11 MR. SHAW: YOUR HONOR, I'M SORRY. MAY I COMPLETE?  
12 BECAUSE MR. SHERMAN IS GOING TO GO OFF ON SOME TANGENT, AND  
13 I WANT TO BE ABLE TO FINISH.

14 THE COURT: I HAVE A QUESTION PENDING.

15 MR. SHERMAN: I NOTICED MR. BERAN'S DEPOSITION, AND  
16 I SERVED HIM WITH A SUBPOENA. AND I DID TAKE HIS  
17 DEPOSITION. I COMMENCED THE QUESTIONING ON FRIDAY. WE  
18 SHOULD HAVE THE TRANSCRIPT TODAY.

19 AND AFTER I CONCLUDED MY QUESTIONING,  
20 MR. MOSHENKO QUESTIONED MR. BERAN.

21 LET ME APPRISE THE COURT OF WHAT MR. BERAN  
22 DID TESTIFY TO.

23 WHAT MR. BERAN DID TESTIFY TO WAS THE  
24 FOLLOWING: THAT IN THE YEAR 2000 HE HAD HAD SEVERAL  
25 DISCUSSIONS WITH MR. NOVELLI IN WHICH MR. NOVELLI MENTIONED  
26 THIS LAWSUIT TO MR. BERAN; THAT IN THOSE CONVERSATIONS

1 MR. NOVELLI TOLD MR. BERAN THAT COAST HAD ALLEGEDLY WROTE  
2 AND/OR MISINFORMED COAST'S MEMBERS THAT -- TO THE EFFECT  
3 THAT THESE PEOPLE WOULD HAVE NO IDEA WHO THEY WERE MAKING  
4 THEIR PAYMENTS TO.

5                    THAT ON MARCH 21ST OF 2000 MR. BERAN AND HIS  
6 FATHER BOTH WENT TO MR. NOVELLI'S OFFICES IN IRVINE FOR THE  
7 PURPOSE OF TAKING CARE OF SOME BUSINESS THAT HAD BEEN  
8 LINGERING FOR -- SOME MESS WITH MR. NOVELLI, THAT  
9 MR. NOVELLI WAS NOT TAKEN CARE OF, AS FAR AS RESPECTS TO  
10 CYPRESS PARK. THAT AT THAT TIME THEY WERE WAITING FOR  
11 MR. NOVELLI FOR QUITE SOME TIME IN THE FRONT OF THE  
12 BUILDING IN THE LOBBY AREA; WERE TOLD THAT MR. NOVELLI WAS  
13 IN A COURT HEARING AND THAT HE WOULD BE ARRIVING SOON.

14                    AT SOME POINT IN THE LATE AFTERNOON, EARLY  
15 EVENING, MR. NOVELLI DROVE UP WITH MR. MOSHENKO. MR. BERAN  
16 AND HIS FATHER WERE STANDING BETWEEN 20 TO 30 FEET AWAY  
17 FROM THE AUTOMOBILE, MR. MOSHENKO'S AUTOMOBILE. HE  
18 WITNESSED THE TWO MEN, THAT IS, MR. NOVELLI AND  
19 MR. MOSHENKO, SPEAKING TO ONE ANOTHER IN THE CAR. THEY SAW  
20 THEM FOR ABOUT FIVE TO 10 MINUTES; THAT MR. BERAN THEN GOT  
21 OUT OF THE CAR -- EXCUSE ME -- MR. NOVELLI THEN GOT OUT OF  
22 THE CAR AND THEY -- THE THREE OF THEM, THE TWO BERANS AND  
23 MR. NOVELLI, THEN SPOKE. IT WAS A RELATIVELY BRIEF,  
24 PROBABLY 10-, 15-MINUTE CONVERSATION; THAT IN THAT  
25 CONVERSATION IT WAS SOON ANNOUNCED TO MR. -- THE BERANS BY  
26 MR. NOVELLI THE FOLLOWING WORDS -- INCIDENTALLY, I WANT TO

1 BACK UP.

2 AND MR. BERAN SAID THAT WHAT HE UNDERSTOOD  
3 MR. NOVELLI TO BE TELLING HIM BY THAT -- AND THIS IS ALL IN  
4 THE TRANSCRIPT, YOUR HONOR -- WAS THAT IN MR. BERAN'S  
5 OPINION HE, MR. NOVELLI, STARTED TO PREPARE ME FOR  
6 TESTIFYING.

7 MR. BERAN'S REACTION WAS THAT THAT PERSON,  
8 MR. NOVELLI, HAD GUTS TO ASK US TO BACK HIM UP IN SOMETHING  
9 HE KNOWS ISN'T TRUTH. HE FELT IT WAS PECULIAR THAT  
10 MR. NOVELLI WOULD BE ASKING HIM THESE QUESTIONS AND THAT HE  
11 WAS LEADING HIM UP TO IT.

12 AND MR. BERAN WENT ON TO SAY IT WAS ABSOLUTE  
13 NONSENSE THAT COAST TO COAST CAUSED HIM TO LOSE THE PARK  
14 BECAUSE COAST TO COAST IN 1993 AND IN THE LATER YEARS HAD  
15 NOTHING TO DO WITH MR. NOVELLI NOT PAYING THE BILLS.

16 THAT IS WHAT MR. BERAN HAS TESTIFIED TO, IN  
17 ADDITION TO THE FACT THAT OVER THE PAST FIVE YEARS OR SO  
18 MR. NOVELLI HAS CONSISTENTLY BOUNCED CHECKS, HAS  
19 CONSISTENTLY MISSED PAYMENTS. AND, IN FACT, AS MR. BERAN  
20 WENT ON TO SAY AND TESTIFY IN 1996, BECAUSE OF ALL THE  
21 MISSED PAYMENTS WITH RESPECT TO THE CYPRESS PARK, THE  
22 BERANS WENT TO FORECLOSE ON THE CYPRESS PARK. THE  
23 FORECLOSURE WAS ONLY STAYED.

24 MR. SHAW: YOUR HONOR --

25 THE COURT: I'VE HEARD ENOUGH.

26 MR. SHAW: YOUR HONOR, NONE OF THOSE WERE THE

1 QUESTIONS THAT WERE ASKED.

2 THE COURT: LET'S GET BACK TO YOUR POINTS.

3 MR. SHAW: NONE OF THOSE WERE THE QUESTIONS THAT  
4 WERE ASKED.

5 THE COURT: WE'LL HAVE THE TRANSCRIPT.

6 MR. SHAW: MR. BERAN'S STATE OF MIND WEREN'T THE  
7 QUESTIONS THAT WERE ASKED HERE IN THIS COURTROOM. WHAT WAS  
8 ASKED WAS WHAT IS DECEPTIVE AND A LIE -- MR. SHERMAN CAME  
9 TO THIS COURT AND LIED TO THE COURT. WHAT WAS ASKED WAS:  
10 "YOU TOLD MR. BERAN THAT YOU WANTED HIM TO COME TO COURT.  
11 YOU TOLD MR. BERAN THAT YOU WANTED HIM TO LIE. YOU TOLD  
12 MR. BERAN THAT YOU WANTED HIM TO SAY THAT THEY WOULD  
13 COINCIDE WITH THE COAST LETTERS."

14 MR. SHERMAN GOES OFF ON SOME RATTLE ABOUT  
15 WHAT MR. SHERMAN'S -- WHAT MR. BERAN'S STATE OF MIND WAS.  
16 THAT'S NOT WHAT HE ASKED IN THIS COURTROOM IN FRONT OF THIS  
17 JURY. HE ASKED HIM, "DID YOU TELL HIM TO LIE? DID YOU  
18 TELL HIM." THAT'S WHAT WAS ASKED. AND THERE'S NO  
19 FOUNDATION FOR THAT.

20 BUT LET'S ASSUME THAT WHAT HE JUST RATTLED  
21 ON WITH HAS ANY RELEVANCE AT ALL, YOUR HONOR. HE KNOWS HE  
22 CAN'T GET THAT INTO EVIDENCE BECAUSE MR. BERAN IS NOT ON  
23 THE WITNESS LIST.

24 THE COURT: YOU DON'T WANT MR. BERAN TO TESTIFY?

25 MR. SHAW: WELL, YOUR HONOR, THE REASON WHY WE  
26 DON'T, IT PLAYS RIGHT INTO THEIR GAME. IT PLAYS RIGHT --

1 HE'S NOT ON THE WITNESS LIST. WHAT I AM REQUIRED TO ASK --  
2 YOUR HONOR, I WANT A MISTRIAL.

3                   WHAT I AM REQUIRED TO ASK -- AND THE CASE  
4 LAW REQUIRES ME TO MAKE THIS REQUEST OR ELSE WE'VE WAIVED  
5 FOR APPEAL PURPOSES, AND SO I'M GOING TO ASK IT. I THINK  
6 IT'S IRREVERSIBLE. BUT THE CASE LAW ASKS FOR AN  
7 ADMONISHMENT OF THE JURY, NOT MR. BERAN COMING TO TESTIFY;  
8 BUT FOR THIS COURT -- AND I'M CITING THE COURT TO THE CASE  
9 OF HART, H-A-R-T, VERSUS WIELT, W-I-E-L-T, 1970,  
10 4 CAL.APP.3D 224 AT 234. AND BARLIN, B-A-R-L-I-N, VERSUS  
11 BARLIN, 1957, 156 CAL.APP.2D 143. AND IT SAYS, "TO  
12 PRESERVE THE ISSUE FOR APPELLATE REVIEW, THE OBJECTION AND  
13 MOTION HAS TO BE COUPLED WITH THE REQUEST TO THE JUDGE TO  
14 REMEDY THE MISCONDUCT."

15                   AND OUR REQUEST FOR REMEDY IS FOR YOUR HONOR  
16 TO STATE TO THE JURY THAT THE QUESTIONS ASKED -- AND I  
17 WOULD ASK THE COURT TO READ THE QUESTIONS. THE QUESTIONS  
18 ASKED BY MR. SHERMAN HAVE NO FOUNDATION IN FACT, AND THAT  
19 MR. NOVELLI NEVER SAID THESE THINGS TO HIM. THAT NOW IS  
20 THE -- IS THE STATE OF THE EVIDENCE, AND TO ASK THE JURY TO  
21 DISREGARD ANY QUESTIONS ASKED BY MR. SHERMAN AS NOT BEING  
22 EVIDENCE IN THIS CASE.

23                   NOW, WHY DO I THINK THAT THAT -- THAT THIS  
24 IS INCURABLE PREJUDICE? THE CASE LAW REQUIRES THAT I ASK  
25 THE COURT OF THIS. BUT I BELIEVE THE PREJUDICE THAT HAS  
26 HAPPENED TO THE JURY IS SO SEVERE -- AND IT'S NOT JUST THIS

1 ONE. I'VE GOT TWO OTHER REASONS. BUT NOT JUST THIS ONE.  
2 BUT IT'S SO SEVERE, IT'S AN INCURABLE PREJUDICE. AND IT  
3 WOULD BE FUTILE FOR THE COURT TO MAKE THIS STATEMENT, BASED  
4 ON WHAT MR. SHERMAN HAS DONE TO THIS COURT.

5 THE SECOND THING I WOULD ASK FOR ARE  
6 SANCTIONS, MONETARY SANCTIONS. MR. MOSHENKO HAD TO GO TO  
7 LOS ANGELES FOR SIX HOURS ON FRIDAY AFTERNOON. ONLY  
8 BECAUSE OF WHAT MR. SHERMAN CAUSED IN THIS COURTROOM.

9 AND I WOULD ASK FOR SANCTIONS ON THE  
10 MISTRIAL; THAT WE'RE 30 DAYS OR SO INTO TRIAL; THAT THE  
11 DEFENDANTS PAY FOR THE COSTS OF PROSECUTING THIS CASE,  
12 ATTORNEY'S FEES AND COSTS FOR THE FACT THAT AFTER 30 DAYS  
13 OF TRIAL, THEY BY THEIR OWN ACTIONS HAVE CAUSED A MISTRIAL.  
14 SO THAT'S NUMBER ONE.

15 NUMBER TWO, YOUR HONOR, ARE THE BOXES, THE  
16 INFAMOUS SEVEN BOXES. ANOTHER GROUND FOR MISTRIAL IS  
17 BRINGING INADMISSIBLE EVIDENCE BEFORE THE JURY.

18 NOW, WHEN THEY BROUGHT THESE SEVEN BOXES, WE  
19 DIDN'T GET A CHANCE TO LOOK AT THEM. MR. SHERMAN THREW  
20 THEM ON OUR TABLE A COUPLE OF DAYS LATER AND SAID, "THIS IS  
21 WHAT WAS IN THOSE SEVEN BOXES," AND INVITED US TO TAKE A  
22 LOOK AT IT. NOW WE HAVE -- AND IT BECOMES EVEN MORE CLEAR  
23 THAT THAT STUNT THAT WAS PULLED IS GROUNDS FOR A MISTRIAL.

24 SO THE CASE LAW SAYS THAT IT'S IMPROPER FOR  
25 COUNSEL TO BRING INADMISSIBLE EVIDENCE BEFORE THE JURY IN  
26 AN ATTEMPT TO INFLUENCE THE VERDICT.

1 THE TWO CASES THAT ARE CITED ARE COTE,  
2 C-O-T-E, VERSUS ROGERS, 1962, 201 CAL.APP.2D 138, WHICH IN  
3 THAT CASE A NEWSPAPER -- THE LAWYER SHOWED A NEWSPAPER  
4 REPORTER EVIDENCE WHICH THE COURT HAD RULED WAS  
5 INADMISSIBLE, KNOWING THAT THE JURORS WOULD BE LIKELY TO  
6 SEE THE NEWSPAPER PUBLICATION DURING TRIAL.

7 NOW, WHAT HAPPENED IN OUR CASE? THE COURT  
8 RULED THAT NOTHING ON THAT -- THAT WASN'T ON THE EXHIBIT  
9 LIST WAS NOT GOING TO COME INTO EVIDENCE IN THIS CASE.  
10 NONE OF THOSE SEVEN BOXES WERE ON THAT WITNESS LIST -- ON  
11 THAT EXHIBIT LIST. HE KNEW WHEN HE ROLLED THOSE SEVEN  
12 BOXES UP HERE THAT NONE OF THAT WAS GOING TO BE ABLE TO  
13 COME INTO EVIDENCE. BUT YET HE ROLLED IT ANYWAY.

14 AND THEN I RECALL -- AND I WANT TO BE  
15 CAREFUL ABOUT THIS BECAUSE IT'S JUST MY RECOLLECTION --  
16 THAT HE MADE A STATEMENT TO ME AND MR. MOSHENKO IN FRONT OF  
17 THE JURY THAT "YOU TAKE A LOOK AT THOSE SEVEN BOXES. I  
18 INVITE YOU TO LOOK AT THOSE SEVEN BOXES," KNOWING THAT HE  
19 COULDN'T GET IT INTO EVIDENCE.

20 SO THAT'S THE COTE CASE.

21 THE SECOND CASE IS PEOPLE VERSUS HERNANDEZ,  
22 1997 -- I'M SORRY. LET ME START AGAIN. PEOPLE VERSUS  
23 HERNANDEZ H-E-R-N-A-N-D-E-Z, 1977, 70 CAL.APP.3D 271 AT  
24 281. A PROSECUTOR -- AND I REALIZE THIS IS A CRIMINAL  
25 CASE, BUT A PROSECUTOR WAIVED IN FRONT OF A WITNESS A RAP  
26 SHEET THAT WAS INADMISSIBLE EVIDENCE, HAD BEEN RULED

1 INADMISSIBLE, BUT HE WAIVED IT IN FRONT OF THE WITNESS,  
2 AND IN FRONT OF THE JURY, WHILE ARGUING AN OBJECTION AND  
3 ASKING QUESTIONS. THAT'S EXACTLY WHAT HAPPENED IN  
4 PEOPLE VERSUS HERNANDEZ HAPPENED RIGHT IN THIS COURTROOM.  
5 HE WHEELED SEVEN BOXES IN THAT HAD ON THE SIDE THAT WAS  
6 FACING THE JURY -- NOT FACING US -- WHAT WAS IN THOSE  
7 BOXES. ATTORNEY GENERAL COMPLAINTS. SEVEN BOXES.

8 AND THEN HE ASKED MR. NOVELLI QUESTIONS  
9 ABOUT THOSE SEVEN BOXES THAT HE KNEW COULDN'T GET INTO  
10 EVIDENCE. THAT'S THE COTE CASE. THE WAIVING OF THE  
11 NEWSPAPER ARTICLE AND THE WAIVING OF THE RAP SHEET IN  
12 PEOPLE VERSUS HERNANDEZ.

13 BRINGING INADMISSIBLE EVIDENCE BEFORE THE  
14 JURORS IS PREJUDICIAL. AND I WOULD ASK THE COURT -- NOW  
15 IT'S MY DUTY UNDER THE CASE LAW TO ASK THE COURT FOR AN  
16 ADMONISHMENT TO THE JURY THAT THOSE SEVEN BOXES -- THERE IS  
17 NO ADMISSIBLE EVIDENCE, AND TO INSTRUCT THE JURY.

18 I WOULD ARGUE TO THE COURT THAT IT'S  
19 INCURABLE BASED ON WHAT'S HAPPENED IN THIS TRIAL.

20 SO YOU PUT MR. BERAN TOGETHER AND YOU PUT  
21 THE SEVEN BOXES TOGETHER.

22 AND FINALLY, YOUR HONOR, THE IMPROPER  
23 COMMUNICATIONS WITH THE JURORS BY MR. SHERMAN. IT PAINS ME  
24 TO SAY THIS BECAUSE WE BROUGHT IT TO THE COURT'S  
25 ATTENTION. AND I TRIED NOT TO DO IT ON THE RECORD.

26 MR. SHERMAN MAKING EYE CONTACT WITH THE

1 JURORS THROUGHOUT THE TRIAL. THE JUDGE ASKED US TO STOP  
2 ANYTHING IN THAT REGARD FOR BOTH SIDES. IT'S CONTINUED,  
3 AND IT IS MISCONDUCT.

4 AND THIS IS THE THIRD PRONG: IT'S  
5 MISCONDUCT FOR ANY ATTORNEY TO COMMUNICATE WITH JURORS  
6 DIRECTLY OR INDIRECTLY IN AN ATTEMPT TO INFLUENCE THE  
7 JURORS IN THE COURSE OF TRIAL. THAT'S CALIFORNIA RULE OF  
8 PROFESSIONAL CONDUCT 5-320(B). THAT'S BEEN GOING ON DURING  
9 THIS TRIAL, AND IT CONTINUES TO GO ON DURING THIS TRIAL.

10 SO FOR THOSE REASONS, YOUR HONOR -- AND I  
11 MIGHT JUST FINISH.

12 THE COURT'S -- THOSE ARE THE THREE PRONGS:  
13 BERAN TESTIMONY, THE SEVEN BOXES TESTIMONY, AND THE CASE  
14 LAW UNDER PEOPLE VERSUS WARD 1968 266, CAL.APP.2D 241 SAYS  
15 THAT THE JUDGE HAS TO MAKE THE FOLLOWING DECISIONS: ONE,  
16 HOW FAR THE TRIAL HAS PROGRESSED; TWO, WHETHER THE CONDUCT  
17 WAS AN ISOLATED ACT OR REPEATED.

18 I'VE SHOWN THE COURT THAT THIS IS NOT AN  
19 ISOLATED ACT. MR. BERAN WAS ONE ACT. THE SEVEN BOXES WAS  
20 ANOTHER ACT. THE COMMUNICATIONS WITH THE JURORS IS THE  
21 OTHER ACT.

22 NUMBER THREE, WHETHER THE MISCONDUCT APPEARS  
23 TO HAVE BEEN PURPOSEFUL.

24 YOUR HONOR, AFTER TAKING MR. BERAN'S  
25 DEPOSITION AND THIS PAP ABOUT THE FACT THAT HE TESTIFIED  
26 WHAT WAS IN HIS STATE OF MIND, MR. BERAN'S STATE OF MIND,

1 WHEN MR. SHERMAN KNEW HE COULDN'T BRING HIM AS A WITNESS;  
2 AND NUMBER TWO, HE KNEW THAT THOSE WEREN'T THE QUESTIONS  
3 THAT WERE ASKED OF THIS COURT. HE ASKED SPECIFIC, "DID YOU  
4 SAY," AND HE KNEW THAT WASN'T TRUE.

5 AND NUMBER FOUR, THE EXTENT OF PREJUDICE  
6 LIKELY TO HAVE BEEN CAUSED THEREBY. THE PREJUDICE IS  
7 EXTREME AND INCURABLE IN THIS CASE. AND, FINALLY, WHETHER  
8 APPROPRIATE ADMONITIONS TO THE JURY OR REPRIMANDING COUNSEL  
9 WILL REMEDY THE MISCONDUCT OR WHETHER IT'S IMPOSSIBLE TO  
10 UNRING THE BELL.

11 I BELIEVE IN THIS CASE IT'S IMPOSSIBLE TO  
12 UNRING THE BELL.

13 FINALLY, THE TIMELINESS OF US BRINGING THIS  
14 MOTION. I SAID TO THE COURT -- AND I READ FROM PAGE  
15 5222 -- IF I FOUND EVIDENCE AFTER TAKING MR. BERAN'S  
16 DEPOSITION THAT WHAT MR. SHERMAN DID IN THIS COURTROOM WAS  
17 A STUNT AND ASKING QUESTIONS BASED ON FACTS THAT HE HAD NO  
18 BASIS, IT'S CLEAR THAT HE HAD NO BASIS FOR THOSE FACTS.  
19 MR. BERAN IS NOT EVEN ON THE WITNESS LIST.

20 IT'S CLEAR THAT THOSE SEVEN BOXES, THERE IS  
21 NO BASIS IN FACT BECAUSE HE COULDN'T GET THEM INTO  
22 EVIDENCE. THAT'S INADMISSIBLE EVIDENCE PER THE COURT'S  
23 RULING. IT IS INTENTIONAL. IT'S A REPEATED PATTERN. IT'S  
24 CAUSED PREJUDICE IN THIS CASE. WE CANNOT UNRING THE BELL  
25 NO MATTER WHAT THE ADMONITIONS ARE.

26 AND, YOUR HONOR, I REQUEST A MISTRIAL WITH

1 THE DEFENSE PAYING THE COST OF THE TRIAL UP TO THIS DATE.

2 THE COURT: THANK YOU. RESPONSE?

3 MR. SHERMAN: YES, YOUR HONOR.

4 LET ME SUGGEST THAT I WILL KEEP MY REMARKS  
5 NOW BRIEF WITH THE EXPECTATION THAT I'LL SHARE WITH THE  
6 COURT THAT THERE MAY WELL BE SOME WRITTEN PAPERS FILED IN  
7 CONNECTION WITH THIS AND FURTHER HEARINGS.

8 I LIKEN THESE EFFORTS AS DESPERATE MOVES ON  
9 BEHALF OF DESPERATE PARTIES, BECAUSE WHAT WE'VE HEARD ARE  
10 CRIES OF DESPERATION.

11 JERRY BERAN'S TESTIMONY UNDER OATH SHOWS  
12 EFFORTS TO INFLUENCE WITNESS TESTIMONY BY RAYMOND NOVELLI.  
13 I INVITE THE COURT AND WOULD LODGE WITH THE COURT  
14 MR. BERAN'S DEPOSITION, BECAUSE THE PORTIONS THAT COUNSEL  
15 DID NOT REFERENCE AT ALL IN THEIR REMARKS INSTEAD  
16 RIDICULING IT AS RATTLE ARE IN FACT TESTIMONY GIVEN BY  
17 MR. BERAN AND WHICH SHOW THE EFFORTS IMPROPERLY INFLUENCED  
18 WITNESS TESTIMONY IN THIS CASE.

19 FOR THAT REASON THERE WAS A BASIS AND THERE  
20 WAS A FOUNDATION FOR THE QUESTIONS THAT WERE ASKED, AND  
21 THERE WAS A GOOD FAITH FOUNDATION.

22 WE WOULD LIKE TO SEE MR. BERAN TESTIFY IN  
23 THIS CASE BECAUSE IN FACT MR. BERAN SHOWS A REPEATED  
24 PATTERN BY MR. NOVELLI OF STIFFING DEVELOPERS, AVOIDING ITS  
25 OBLIGATIONS, AND MISUSING THE JUDICIAL PROCESS.

26 MR. BERAN IS AND WAS APPROPRIATELY AN

1 IMPEACHMENT WITNESS; AN IMPEACHMENT WITNESS FOR THE REASON  
2 THAT MR. NOVELLI HAS DENIED -- AND DENIED ON THIS WITNESS  
3 STAND THE ESSENTIAL FACTS WITH RESPECT TO THE FACT THAT THE  
4 CYPRESS PARK WAS ANOTHER ONE OF THE NOVELLI DISASTERS.  
5 AND, IN FACT, MR. BERAN, THROUGH HIS TESTIMONY, PROVES  
6 THOSE FACTS.

7                   ON THE SUBJECT OF THE SEVEN BOXES, I HAVE A  
8 LOGISTICAL QUESTION OR ISSUE IN MY MIND, WHICH IS, TO MY  
9 KNOWLEDGE PLAINTIFFS NEVER COPIED THE CONTENTS OF THOSE  
10 SEVEN BOXES. PERHAPS THEY DID, BUT I WAS CERTAINLY UNAWARE  
11 OF THEM EVER HAVING COPIED THE CONTENTS OF THOSE SEVEN  
12 BOXES. THE SEVEN BOXES HAVE BEEN IN OUR CUSTODY AT ALL  
13 TIMES SINCE THEY WERE IN COURT LAST WEEK. I INVITED  
14 COUNSEL TO REVIEW THEM. THEY DENIED OUR INVITATION.

15                   AS I ADVISED THE COURT ON WEDNESDAY OF THIS  
16 LAST WEEK, WE HAD GONE THROUGH THE BOXES. AND I DID SHOW  
17 TO YOUR HONOR AND PROVIDE TO COUNSEL SOME EXCERPTS OF WHAT  
18 WAS FOUND IN JUST ONE OR TWO OF THE BOXES. AND THE  
19 EXCERPTS FROM WHAT'S IN THOSE BOXES IS REMARKABLY RELEVANT  
20 TO THIS VERY CASE REFERENCING, AMONG OTHER THINGS, ALL  
21 SEASONS, REFERENCING PONDEROSA, REFERENCING RAY NOVELLI,  
22 REFERENCING TRAVEL AMERICA.

23                   THE FACT IS THAT THE SEVEN BOXES WERE LISTED  
24 IN THE MATERIAL THAT OUR EXPERT WITNESS, BLAINE NYE, HAD  
25 CONSIDERED IN CONNECTION WITH HIS EXPERT TESTIMONY IN THIS  
26 CASE. IT'S THERE IN BLACK AND WHITE. PLAINTIFFS JUST

1 REFUSED TO CONSIDER IT. THEY IGNORED IT.

2                   AND MR. NYE, IT IS MY EXPECTATION THAT WHEN  
3 MR. NYE TESTIFIES, HE WILL IN FACT TESTIFY WITH RESPECT TO  
4 HIS REASONABLE RELIANCE UPON THE ATTORNEY GENERAL  
5 INVESTIGATIONS AND INQUIRIES AND LETTERS TO ATTORNEYS  
6 GENERAL AND THE LIKE.

7                   SO THE SEVEN BOXES IS ALSO, I THINK,  
8 MISDIRECTED.

9                   AS FAR AS THE IMPROPER COMMUNICATIONS TO THE  
10 JURY IS CONCERNED, I FIND IT DISTRESSING THAT COUNSEL WOULD  
11 ATTEMPT TO MAKE A RECORD OF WHAT HAD HAPPENED BEFORE IN  
12 CHAMBERS, WHICH WAS NOT ON THE RECORD AT THAT POINT IN  
13 TIME, BY SUGGESTING THAT YOUR HONOR TOLD US TO STOP  
14 COMMUNICATING WITH JURORS. IN FACT, THE CONVERSATION AS I  
15 RECOLLECT WAS YOUR HONOR WAS SURPRISED OF THE ASSERTION  
16 WHEN IT WAS MADE. IT AROSE IN THE CONTEXT OF ONE OF  
17 PLAINTIFFS' EMPLOYEES HAVING DIRECTLY COMMUNICATED WITH  
18 JURORS THAT I BROUGHT TO MR. SHAW'S ATTENTION, AND THEN  
19 ULTIMATELY WE HAD TO BRING TO THE COURT'S ATTENTION.

20                   BUT, IN FACT, THERE ARE NO IMPROPER  
21 COMMUNICATIONS WITH JURORS.

22                   THE SAME AMOUNT OF EYE CONTACT AND LOOKING  
23 IN -- I'M POINTING TO THE JURY BOX. I DON'T KNOW WHAT  
24 DIRECTION THAT IS, EAST, WEST, NORTH, SOUTH -- IN THAT  
25 DIRECTION AS BEING MADE BY THE DEFENSE COUNSEL AS IT'S  
26 BEING MADE BY PLAINTIFFS' COUNSEL.

1                   PLAINTIFFS OBVIOUSLY SPENT ALL WEEKEND  
2 PREPARING REMARKS REplete WITH CASE CITATIONS AND THE  
3 LIKE. OF COURSE THEY DON'T HAVE THE TRANSCRIPT OF  
4 MR. BERANS WHICH I SUBMIT IS PRETTY POWERFUL EVIDENCE OF  
5 ATTEMPTS BY MR. NOVELLI TO INFLUENCE WITNESS TESTIMONY IN  
6 THIS CASE, WHICH IS REMARKABLE IN ITS ABSENCE ITSELF,  
7 BECAUSE I HAVE IT. AND CERTAINLY THEY COULD HAVE IT, AS  
8 WELL, IF THEY WANTED IT.

9                   BUT I THINK THAT THE APPROPRIATE PROCEDURE  
10 TO BE FOLLOWED NOW, YOUR HONOR, IS THAT PLAINTIFFS SHOULD  
11 PUT THEIR MOTION -- REDUCE THEIR MOTION TO WRITING, GIVE US  
12 THE OPPORTUNITY TO RESPOND TO IT, AND THEN SUBMIT TO THE  
13 COURT FOR A RULING.

14                  THE COURT: ALL RIGHT.

15                  MR. SHAW: JUST TWO POINTS, YOUR HONOR. ONE,  
16 MR. BERAN'S TESTIMONY. MR. SHERMAN LIKES TO TALK ABOUT  
17 WHAT MR. BERAN THOUGHT OR WHAT MR. BERAN UNDERSTOOD, BUT  
18 THE ISSUE IS WHAT DID MR. BERAN TELL MR. SHERMAN THAT LED  
19 MR. SHERMAN TO ASK THESE QUESTIONS.

20                  AND MR. -- I WASN'T THERE. MR. MOSHENKO  
21 ASKED THE QUESTIONS, "DID YOU TELL MR. SHERMAN THAT  
22 MR. NOVELLI TOLD YOU TO COME HERE TO THIS COURT AND LIE?"  
23 NO. HE NEVER TOLD MR. SHERMAN THE QUESTIONS THAT HE ASKED  
24 IN THIS COURT.

25                  "DID YOU ASK MR. BERAN TO COME INTO THIS  
26 COURT AND LIE FOR YOU?" THAT IS WHAT THE TRANSCRIPT SAYS.

1                   SO THAT'S THE ISSUE; WHAT DID MR. BERAN TELL  
2 MR. SHERMAN? THERE'S NOTHING IN THAT DEPOSITION TRANSCRIPT  
3 ABOUT MR. BERAN TELLING MR. SHERMAN THAT MR. NOVELLI TOLD  
4 HIM TO LIE FOR HIM, TO COME TO COURT AND CONCOCT SOME STORY  
5 AND COMMIT A FELONY. BUT, YET, THAT'S WHAT MR. SHERMAN  
6 ASKED OF THIS COURT. THAT'S NUMBER ONE.

7                   NUMBER TWO, IMPEACHMENT WITNESS. THERE'S AN  
8 ORDER OF PROOF THAT THE TRIAL FOLLOWS. IF HE WANTED TO  
9 CALL MR. BERAN AS AN IMPEACHMENT WITNESS, THAT FALLS UNDER  
10 A DIFFERENT EVIDENCE CODE SECTION. AND ASKING QUESTIONS  
11 THAT HE HAS GOT NO BASIS IN FACT, THAT ARE PREJUDICIAL,  
12 THAT THE ONLY REASON, I SUBMIT, HE ASKED THEM -- HE KNEW  
13 THEY WOULD BE PREJUDICIAL, AND HE DID. AND IT LOOKS LIKE  
14 HE IS GOING TO GET AWAY WITH IT.

15                   THE BOXES, JUST BECAUSE MR. NYE RELIES ON  
16 SOME BOXES FOR HIS EXPERT WITNESS TESTIMONY DOESN'T MEAN  
17 THEY'RE ADMISSIBLE AT TRIAL. THE ISSUE UNDER THE PEOPLE  
18 VERSUS HERNANDEZ CASE AND THE COTE, C-O-T-E, CASE IS DOES  
19 THE TRIAL COUNSEL KNOW THAT THESE EXHIBITS ARE INADMISSIBLE  
20 AND CAN'T GET INTO EVIDENCE? HE KNEW THAT, BECAUSE THE  
21 COURT RULED THEY COULDN'T GET INTO EVIDENCE.

22                   AND HE KNOWS THAT, I SUBMIT, THAT AS AN  
23 EXPERT WITNESS TESTIFYING THAT HE REVIEWED SOME DOCUMENTS  
24 DOESN'T MEAN THAT THE SEVEN BOXES COME INTO EVIDENCE. IT  
25 JUST DOESN'T HAPPEN THAT WAY.

26                   AND, YOUR HONOR, AS FAR AS AN ORAL AS

1 OPPOSED TO A WRITTEN MOTION, THE CASE LAW REQUIRES AN ORAL  
2 MOTION AT THE EARLIEST POINT IN TIME. AND THE DEPOSITION  
3 CONCLUDED IN CENTURY CITY LATE FRIDAY AFTERNOON. THIS IS  
4 THE TIME THAT THE CASE LAW SAYS WE HAVE TO MAKE THE  
5 MOTION. AND SO WE ARE MAKING IT ORALLY.

6 THE COURT: THANK YOU.

7 SUBMIT?

8 MR. MOSHENKO: COULD I JUST MAKE ONE LAST POINT?

9 THE COURT: SURE.

10 MR. MOSHENKO: I NOTE THAT MR. SHERMAN AND HIS  
11 RECITATION OF HIS VERSION OF WHAT HAPPENED AT THE  
12 DEPOSITION COMPLETELY OMITTED A WRENCH TO HIS QUESTION  
13 THAT -- AND MR. MOSHENKO WAS THERE AT THE MEETING OR  
14 WHATEVER THE WORDS WERE. AND THE OBVIOUS REASON IS BECAUSE  
15 THAT'S A FALSE STATEMENT, AND MR. BERAN CONFIRMS THAT I WAS  
16 NOT THERE DURING THAT CONVERSATION OR THAT MEETING.

17 BUT WHAT MR. SHERMAN HAS DONE IS IMPLICATED  
18 ME PERSONALLY AND PUT ME IN A POSITION WHERE I HAVE TO TAKE  
19 THE STAND, OR MAY HAVE TO TAKE THE STAND AND TESTIFY. AND  
20 THAT OF COURSE IT'S -- CREATES ALL KINDS OF PROBLEMS THE  
21 COURT IS AWARE OF, COUNSEL, NOT BEING A WITNESS IF THEY'RE  
22 AN ADVOCATE.

23 AND, FURTHERMORE, I WILL TELL YOU THAT THE  
24 ALLEGATION IS IN A -- THIS INCIDENT OCCURRED ON MARCH 21,  
25 2000. AND I ALLEGEDLY DROVE UP WITH MR. NOVELLI AT 7:00 IN  
26 THE EVENING ON THAT DATE. WELL, YOUR HONOR, I WAS NOT WITH

1 MR. NOVELLI ON MARCH 21 OF THAT DATE. I WAS NOT WITH HIM  
2 IN COURT ON THAT DATE. I DIDN'T DRIVE UP AT 7:00. AND MY  
3 TIME RECORDS PROVE WHERE I WAS.

4 AND SO NOT ONLY DID MR. BERAN NOT SAY IT TO  
5 MR. SHERMAN, MR. SHERMAN DID NOT HAVE A FACTUAL BASIS TO  
6 SAY THAT IT WAS SAID. IT'S A FALSE STATEMENT THAT PUTS ME  
7 IN A POSITION, IF I WERE TO PROTECT MYSELF ON THE RECORD  
8 AND MY REPUTATION, I'M FORCED TO CONSIDER HAVING TO TAKE  
9 THE STAND.

10 MR. SHERMAN: YOUR HONOR, ONE ITEM I KNOW I DID SAY  
11 WE SUBMITTED, BUT I THINK THAT MR. MOSHENKO PROVES THE  
12 POINT THAT THIS COURT IS NOT IN THE POSITION RIGHT NOW TO  
13 CONSIDER THESE ARGUMENTS WITHOUT CONSIDERING WRITTEN  
14 PAPERS, INCLUDING THE DEPOSITION OF MR. BERAN, WHICH WE  
15 WOULD BE ABLE TO MAKE AVAILABLE TO THE COURT LATER TODAY.

16 THE COURT: NOW YOU'VE BOTH SUBMITTED?

17 MR. SHAW: YES, YOUR HONOR.

18 THE COURT: WELL, I DON'T SEE ANY PURPOSE IN  
19 SUBMITTING A MOTION IN WRITING OR RESPONSE IN WRITING.  
20 I'LL TELL YOU, RIGHT NOW I'M NOT GOING TO GRANT YOUR MOTION  
21 FOR A MISTRIAL.

22 I WILL -- I'M KIND OF CURIOUS AS WHAT YOU  
23 WOULD SUGGEST THE ADMONISHMENT BE TO THE JURY WITH --  
24 REGARDING THE SEVEN BOXES. I THINK THAT TO BRING THEM UP  
25 KIND OF FOCUSES ON THEM AGAIN. AND IF YOU WANT ME TO, I'LL  
26 TELL THE JURY THAT THE SEVEN BOXES ARE NOT ADMISSIBLE IN

1 EVIDENCE. BUT I DON'T THINK THAT HELPS YOU VERY MUCH.

2 MR. SHAW: WELL, YOUR HONOR, ON THAT SUGGESTION --  
3 BECAUSE I KNOW WE'VE GOT A JURY WAITING -- COULD I MAYBE  
4 TRY TO WRITE SOMETHING OUT OR TYPE IT OUT --

5 THE COURT: YES.

6 MR. SHAW: -- AND THEN PASS IT BY MR. SHERMAN --

7 THE COURT: YES.

8 MR. SHAW: -- SO WE CAN LOOK AT IT, AND THEN THE  
9 COURT CAN DECIDE?

10 THE COURT: I'M NOT PROMISING YOU I'M GOING TO GIVE  
11 ANY KIND OF AN ADMONITION.

12 MR. SHAW: I UNDERSTAND. BUT YOUR HONOR ASKED ME  
13 WHAT WOULD I WANT THE COURT TO SAY.

14 THE COURT: YES.

15 MR. SHAW: AND I THOUGHT THAT MAYBE IF I COULD JUST  
16 REDUCE IT, MEMORIALIZE IT IN SOME FASHION, AND THEN RUN IT  
17 BY MR. SHERMAN -- AND I'M SURE THERE WILL BE OBJECTIONS --  
18 AND THEN THE COURT CAN DECIDE WHAT THEY WANT TO DO.

19 MR. SHERMAN: YOUR HONOR HAS ALREADY PROVIDED SOME  
20 ADMONITION TO THE JURY ON THE SUBJECT OF THE SEVEN BOXES,  
21 AND I SUSPECT THAT PRIOR TO THE TIME THAT OUR EXPERT  
22 WITNESS, BLAINE NYE, TESTIFIES IN THIS CASE RELATIVE TO  
23 CAUSATION ISSUES AND CAUSATION MATTERS, WE'LL REVISIT THIS  
24 POINT.

25 THE FACT IS, AS THE RECORD WILL SHOW, WE  
26 WERE NOT SEEKING TO MOVE THE BOXES INTO EVIDENCE AT THAT

1 TIME. MR. SHAW WANTED TO KNOW WHETHER THEY SHOULD BE MOVED  
2 INTO EVIDENCE. AND WE WOULD SIMPLY SUGGEST PRIOR TO THE  
3 TIME THAT MR. NYE TESTIFIES THAT WE REVISIT THE ISSUE OF  
4 HOW TO DEAL WITH THE SEVEN BOXES AT THAT TIME. AND TAKE IT  
5 FROM THERE.

6 THE COURT: LET'S BRING THE JURY IN.

7 MR. RIVIN: YOUR HONOR, ONE OTHER MATTER I MIGHT  
8 ASK.

9 IN CHAMBERS BEFORE PLAINTIFFS BROUGHT THIS  
10 MISTRIAL MOTION, WE TALKED ABOUT THE PLAINTIFFS' NEXT  
11 WITNESS, WHO IS ROBERT THOMPSON, WHO I ASSUME IS GOING TO  
12 TESTIFY AS TO PERCIPIENT MATTERS. HE HAS ALSO BEEN  
13 DESIGNATED AS AN EXPERT ON VERY SIMILAR MATTERS AS WERE  
14 TESTIFIED TO BY ROBERT MITCHELL, ALSO, TO SOME EXTENT BY  
15 WILLIAM DAWSON.

16 WE BELIEVE THERE'S NOT A PROPER FOUNDATION  
17 FOR ANY OPINIONS HE MADE TO BE OFFERING, AND WE'D ASK THE  
18 COURT JUST AS WE DID WITH ROBERT MITCHELL AND OTHER EXPERTS  
19 THAT THE COURT REQUIRE THE PLAINTIFFS TO ESTABLISH THE  
20 FOUNDATION FOR ANY OPINIONS EXPRESSED BY MR. THOMPSON  
21 BEFORE HE EXPRESSES ANY OPINION. AND THAT REQUEST IS MADE  
22 UNDER EVIDENCE CODE SECTION 802.

23 THE COURT: THANK YOU.

24 I THINK PROBABLY DEPENDING UPON HOW OUR TIME  
25 GOES TODAY, WE'LL PROBABLY EXCUSE THE JURY AND GO FORWARD  
26 WITH THE 802 HEARING.

1 MR. RIVIN: OR A 402 HEARING WITH RESPECT TO  
2 CALVIN BIERLEY.

3 THE COURT: YES. BRING THEM IN.

4 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN  
5 COURT IN THE PRESENCE OF THE JURY:)

6 THE COURT: GOOD MORNING, LADIES AND GENTLEMEN.

7 THE JURY: GOOD MORNING.

8 THE COURT: WHILE YOU WERE ALL HAVING FUN OUT IN  
9 THE HALLWAY, THESE GUYS WERE WEARING ME DOWN SINCE 8:30.

10 JUROR 18: THEN IT'S TIME FOR BREAK; RIGHT?

11 THE COURT: I'M TIRED.

12 ALL RIGHT. CALL YOUR NEXT WITNESS FOR THE  
13 PLAINTIFF.

14 MR. MOSHENKO: ROBERT THOMPSON.

15 ROBERT THOMPSON,

16 CALLED AS A WITNESS ON BEHALF OF THE PLAINTIFFS, HAVING  
17 BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS  
18 FOLLOWS:

19 THE CLERK: TAKE A SEAT AT THE WITNESS STAND,  
20 PLEASE.

21 STATE YOUR FULL NAME FOR THE RECORD. SPELL  
22 YOUR LAST NAME, PLEASE.

23 THE WITNESS: MY NAME IS ROBERT W. THOMPSON.  
24 T-H-O-M-P-S-O-N.

25 THE CLERK: THANK YOU.

26 ///

1 DIRECT EXAMINATION

2 BY MR. MOSHENKO: Q MR. THOMPSON, YOU ARE A  
3 CONSULTANT IN THE MEMBERSHIP CAMPGROUND RESORT INDUSTRY?

4 A YES, SIR.

5 Q AND YOU'RE A STATISTICAL DATA ANALYST?

6 A YES, SIR.

7 Q OVER HOW MANY YEARS HAVE YOU BEEN ACTIVE AS  
8 A PARTICIPANT WHICH ULTIMATELY CAUSED YOU TO BECOME A  
9 CONSULTANT IN THE MEMBERSHIP RESORT INDUSTRY?

10 A I STARTED WORKING IN THE RECREATION BUSINESS  
11 IN 1971.

12 Q AND OVER HOW MANY YEARS HAVE YOU BEEN  
13 PROFESSIONALLY INVOLVED IN STATISTICAL DATA ANALYSIS?

14 A WELL, IN THE EARLY YEARS I USED THE LIMITED  
15 KNOWLEDGE THAT I HAD. AND OBVIOUSLY OVER THE YEARS, THE  
16 KNOWLEDGE HOPEFULLY HAS GROWN SUBSTANTIALLY.

17 SO FROM THE VERY BEGINNING, I APPLIED WHAT  
18 KNOWLEDGE I HAD WITH REGARDS TO SALES, MARKETING AND  
19 SERVICES. SO I'VE TRIED TO APPLY IT MY ENTIRE TIME FROM  
20 1971 FORWARD.

21 Q HOW ABOUT BEFORE 1970, WERE YOU INVOLVED IN  
22 AN OCCUPATION OR PROFESSION THAT REQUIRED -- INVOLVED  
23 YOURSELF IN DATA ANALYSIS?

24 A WHEN I WAS IN THE MILITARY THERE WERE THINGS  
25 THAT YOU HAD TO QUANTIFY WITH REGARDS TO MOVEMENT AND  
26 THINGS OF THIS NATURE, BUT NOT AS MUCH AS HAS COME ABOUT IN

1 LATER YEARS.

2 Q LET'S GO BACK.

3 WHERE DID YOU HAVE YOUR EDUCATION?

4 A I GRADUATED FROM BLYTHEVILLE HIGH SCHOOL IN  
5 ARKANSAS. I ATTENDED ARKANSAS STATE UNIVERSITY -- LET'S  
6 SEE -- FROM 1961 THROUGH 1966 THE FIRST TIME. AND THEN  
7 LATER ON, GRADUATED FROM ARKANSAS STATE UNIVERSITY AND ALSO  
8 STAYED ON AND GOT A MASTER'S DEGREE.

9 Q WHAT WAS YOUR UNDERGRADUATE DEGREE?

10 A EDUCATION.

11 Q WHAT WAS YOUR MASTER'S DEGREE?

12 A EDUCATION.

13 Q AND WHEN DID YOU GET -- WHEN DID YOU

14 COMPLETE YOUR EDUCATION AND GO IN THE ARMED FORCES?

15 A WHEN I GRADUATED FROM -- ACTUALLY, I JOINED  
16 THE ARMY PRIOR TO GRADUATION. I JOINED THE RESERVES IN  
17 1963 AND THEN I ATTENDED THE R.O.T.C. PROGRAM AT ARKANSAS  
18 STATE AND GRADUATED IN 19 -- I'M WORST ON THE YEARS, BUT  
19 1965. I STAYED ON. I RECEIVED A COMMISSION THROUGH THE  
20 R.O.T.C. PROGRAM, AND I STAYED ON AS A GRADUATE ASSISTANT  
21 AND GOT A MASTER'S DEGREE THE NEXT YEAR. SO I GRADUATED  
22 AGAIN IN 1966.

23 Q ALL RIGHT. YOU WERE IN THE UNITED STATES

24 ARMY?

25 A YES.

26 Q DURING WHAT YEARS?

1 A FROM 1963 THROUGH 1970 -- OR TO 1970.

2 Q AND WHAT -- WHAT WAS YOUR ULTIMATE  
3 ASSIGNMENT WHILE IN THE ARMED FORCES? WHERE WERE YOU  
4 STATIONED? WHAT DID YOU DO?

5 A YOU MEAN WHEN I GOT OUT OR --

6 Q BEFORE YOU GOT OUT; YOU WERE IN.

7 A I'M SORRY.

8 Q AND WHILE YOU'RE IN, DID YOU GO TO VIETNAM?

9 A YES.

10 Q WHAT WAS YOUR RANK?

11 A I STARTED OUT AS A PRIVATE; AND WHEN I GOT  
12 OUT, I WAS A -- THROUGH THE R.O.T.C. PROGRAM I WAS  
13 COMMISSIONED A SECOND LIEUTENANT. AND THEN SUBSEQUENTLY  
14 WHEN I GOT OUT I WAS A CAPTAIN.

15 Q OKAY. AND WHERE WERE YOU ASSIGNED?

16 A OVER THE YEARS I WAS ASSIGNED FIRST AS A  
17 COMPANY ADVISOR AT ARKANSAS STATE, AND THEN AS A TANK  
18 COMPANY COMMANDER IN GERMANY, AND THEN ON THE STAFF --  
19 EXCUSE ME -- AS AN S4 AT FT. RILEY, KANSAS. AND THEN  
20 VIETNAM, WORKED ON THE STAFF THERE. AND BACK TO FT. KNOX,  
21 KENTUCKY AS A SCHOOL BRIGADE COMMANDER -- EXCUSE ME --  
22 SCHOOL COMPANY COMMANDER IN THE SCHOOL BRIGADE. AND THAT  
23 WAS THE END.

24 Q WHAT'S AN S4? WE DON'T KNOW WHAT THAT IS.

25 A I'M SORRY. AN S4 IS A LOGISTICAL OFFICER  
26 RESPONSIBLE FOR THE GENERAL MAINTENANCE OF COMPANIES OR

1 ORGANIZATIONS.

2 Q AND WHAT WERE YOUR JOB DUTIES WHILE IN  
3 VIETNAM?

4 A MY MILITARY OCCUPATIONAL SPECIALTY, MY  
5 M.O.S., WAS A FIELD REPORTER. BUT WHAT BASICALLY IT MEANT  
6 WAS WE -- THE BRANCH THAT I WAS IN DID A COMPILATION OF THE  
7 WAR IN VIETNAM, THEY COMMONLY CALLED THE HISTORY OF THE WAR  
8 IN VIETNAM FOR 1968, '69. AND MY JOB WAS A WRITER AND A  
9 CONTROLLER OF DOCUMENTS AND PRODUCTION CONTROL OFFICER FOR  
10 THAT PARTICULAR PRODUCTION.

11 Q AND YOU WORKED IN A SECTION THAT WAS  
12 DIRECTLY WHERE THE COMMANDING POST FOR THE VIETNAM  
13 OPERATION WAS LOCATED; RIGHT?

14 A YES, I WAS LOCATED IN SAIGON.

15 Q LET'S GO ON TO YOUR WORK EXPERIENCE.  
16 NOW, YOU SAID YOU STARTED IN THE RESORT  
17 INDUSTRY -- WAS IT 1970?

18 A ACTUALLY JUST LIMITED IN '70, AND THEN IT  
19 BEGAN TRULY IN 1971.

20 Q ALL RIGHT. AND WHAT DID YOU DO WHEN YOU  
21 FIRST STARTED?

22 A THE FIRST THING THAT I DID WAS I WORKED AS A  
23 SALESMAN AT A PLACE CALLED "HILLTOP, TEXAS. WE SOLD  
24 RECREATIONAL LAND.

25 Q AND SO AFTER YOU -- HOW LONG DID YOU DO THAT?

26 A ABOUT EIGHT MONTHS. AND THEN I APPLIED FOR

1 A POSITION OF ASSISTANT MARKETING DIRECTOR. AND I GOT TO  
2 PARTICIPATE IN THE GENERAL PLANNING AND ADVERTISING  
3 MATERIALS. THE PRODUCT DEVELOPMENT AND PRODUCT FULFILLMENT  
4 I CALL IT.

5 Q THE PRODUCT IS WHAT PRODUCT?

6 A THE USE OF THAT PARTICULAR LOCATION, THE  
7 ACTIVITY PROGRAMS ASSOCIATED WITH BECOMING INVOLVED AT  
8 HILLTOP.

9 Q WAS THERE A COAST TO COAST IN 1971?

10 A NOT IN 1971.

11 Q YOU WERE BEFORE ACE AND DENY BROWN EVEN HAD  
12 THE IDEA?

13 A I DON'T KNOW WHEN THEY HAD THE IDEA,  
14 MR. MOSHENKO, BUT I WAS THERE BEFORE -- I WAS SELLING  
15 BEFORE THERE WAS A COAST TO COAST.

16 Q OKAY. ALL RIGHT. WHAT DID YOU DO -- HOW  
17 LONG WERE YOU INVOLVED IN YOUR MARKETING, PLANNING,  
18 ADVERTISING AND PRODUCT DEVELOPMENT OCCUPATION?

19 A OFF AND ON FOR -- EVER SINCE THAT TIME.  
20 AGAIN, JUST LIKE ANYONE ELSE, THE SKILLS THAT YOU GAIN ARE  
21 THE THINGS THAT YOU ENJOY, YOU CONTINUE TO DO IF AT ALL  
22 POSSIBLE.

23 Q SO DOWN THROUGH TODAY, YOU'RE DEALING WITH  
24 ISSUES RELATING TO MARKETING PLANNING, RESORTS, ADVERTISING  
25 AND DEVELOPMENT OF PRODUCT IN THE INDUSTRY; RIGHT?

26 A YES.

1 Q WELL, WHO DID YOU GO -- THE NAME OF THE  
2 COMPANY YOU WERE WORKING FOR AS ASSISTANT MARKETING  
3 DIRECTOR WAS WHAT AGAIN?

4 A HILLTOP LAKES.

5 Q WHAT DID YOU WORK FOR AFTER HILLTOP?

6 A I WORKED FOR GENERAL -- NATIONAL HOMES AS  
7 NATIONAL HOMES OUT OF LAFAYETTE, INDIANA. THEY BUILT --

8 Q WHAT DID YOU DO THERE?

9 A THEY BUILT MODULAR-TYPE HOMES. THE TITLE  
10 WAS GENERAL -- REGIONAL MANAGER, SOMETHING LIKE THAT.  
11 BASICALLY WHAT IT AMOUNTED TO WAS YOU CALLED ON BUILDERS  
12 AND DEVELOPERS. AND I TRIED TO INTEREST THEM IN THE  
13 PRODUCTS THAT THAT COMPANY HAD TO OFFER, AND TO SEE IF THEY  
14 WOULD FIT WHAT THEY WERE DOING.

15 Q HOW LONG WERE YOU WITH NATIONAL HOME?

16 A ABOUT A YEAR.

17 Q WHERE DID YOU GO AFTER THAT?

18 A I THINK AT THAT POINT IN TIME, THAT'S -- I  
19 TOOK FIVE YEARS, AND I BECAME A SCHOOL TEACHER, TAUGHT  
20 10TH, 11TH AND 12TH GRADE. AND ALSO TWO OF THE FIVE YEARS,  
21 THE LAST TWO YEARS, I WAS A K THROUGH 9 PRINCIPAL. AND  
22 ALSO DURING THE SUMMER MONTHS AND I ALSO WORKED --  
23 CONTINUED TO WORK IN THE RECREATIONAL BUSINESS.

24 Q OKAY. SO THE FIVE YEARS WOULD BE, WHAT,  
25 LIKE 1972 OR 3 TO --

26 A I BELIEVE IT WAS '73 THROUGH '78.

1 Q AND WHILE CONTINUING IN THE RESORT INDUSTRY,  
2 WHAT WERE YOU DOING IN THAT INDUSTRY?

3 A THE SAME BASIC THING I HAD BEEN DOING, WHICH  
4 WOULD BE TO DESIGN ADVERTISING PIECES, PROMOTIONAL  
5 PRODUCTS, TRY TO WORK ON COMMUNICATION LINKS AND SYSTEMS.  
6 IT WAS THE EARLY DAYS THAT EVERYONE KNOWS OF COMPUTERS AND  
7 WHAT I CALL THE ELECTRONIC MANIPULATION OF INFORMATION.  
8 AND I WAS IN THE PROCESS OF TRYING TO LEARN THOSE TYPE OF  
9 THINGS AND SEE IF THEY COULD BE APPLIED IN OUR -- IN THE  
10 RECREATIONAL INDUSTRY.

11 Q AS A RESULT OF THAT BACKGROUND AND  
12 EXPERIENCE, YOU FORMED YOUR OWN COMPANY; CORRECT?

13 A YES. I'VE HAD TWO COMPANIES.

14 Q THE NAME OF THE FIRST COMPANY WAS?

15 A EL DORADO MARKETING.

16 Q AND WHAT DID EL DORADO MARKETING DO?

17 A I'M GOING TO BE VERY REPETITIOUS, BUT THE  
18 SALES, MARKETING, DESIGN OF ADVERTISING PIECES, THE  
19 ATTEMPTS TO COMMUNICATE WITH CLIENTS QUICKER AND MORE  
20 RESPONSIVELY THROUGH APPLICATION OF DATABASE MANAGEMENT.

21 Q OKAY. AND THE CLIENTS YOU'RE REFERRING TO  
22 WERE ACTUAL OR POTENTIAL MEMBERS IN A MEMBERSHIP RESORT?

23 A YES. MY -- MY CLIENTS WERE ACTUALLY THE  
24 CAMPGROUND OWNERS, AND THEN THEIR CLIENTS WOULD HAVE BEEN  
25 THE MEMBERS, OR PEOPLE TO WHOM THEY SOLD PRODUCTS.

26 Q SO DID EL DORADO MARKETING DO WORK RELATING

1 TO MARKETING AND SALES OF MEMBERSHIPS TO MEMBERS OF THE  
2 PUBLIC?

3 A IT WAS ASSOCIATED WITH IT, YES.

4 Q DID IT DO COUNSELING OR CONSULTING AND WORK  
5 RELATING TO DESIGNING PUBLIC AND MEMBER COMMUNICATIONS?

6 A YES.

7 Q MEMBER RELATIONS?

8 A YES.

9 Q AND DEVELOPMENT OF MEMBER PRODUCTS AND  
10 MEMBER SERVICES?

11 A YES, IT DID.

12 Q HOW LONG DID EL DORADO MARKETING DO THAT  
13 WITH YOU AS ITS OWNER AND CONTROLLER?

14 A WELL, WE JUMPED A PERIOD OF TIME. BUT  
15 PROBABLY A COUPLE OF YEARS WITH EL DORADO; AND THEN PRIOR  
16 TO THAT, A NUMBER OF YEARS THROUGH EITHER INDEPENDENT  
17 CONSULTING OR OUTSIDE CONTRACTING. BUT FROM '78 THROUGH  
18 THE PRESENT.

19 Q YOU MENTIONED THERE WAS -- THERE WERE TWO  
20 COMPANIES YOU STARTED. WHAT WAS THE OTHER ONE?

21 A COMPANY KNOWN AS "PUBLIC RELATIONS  
22 CORPORATION."

23 Q AND WHAT DID IT DO?

24 A AGAIN, VERY REPETITIOUS. THE SAME TYPE OF  
25 THING. THE APPLICATION OF DATABASE MANAGEMENT PRINCIPLES  
26 TO ADVERTISING, MARKETING, SALES, DESIGNING AND DEVELOPMENT

1 OF PRODUCTS AND SERVICING THEREIN.

2 Q YOU OWNED, CONTROLLED, AND OPERATED THAT  
3 COMPANY FROM APPROXIMATELY 1984 TO 1990?

4 A WELL, YES. I THINK '90, '92.

5 Q AND THAT COMPANY PROVIDED SERVICES TO  
6 CLIENTS IN THE MEMBERSHIP RESORT INDUSTRY?

7 A YES.

8 Q THE SAME KINDS OF SERVICES THAT YOU  
9 TESTIFIED TO A LITTLE WHILE AGO RELATING TO MEMBER PLANNING  
10 AND DESIGNING MEMBER AND PUBLIC COMMUNICATION?

11 A YES, BUT IT BECAME MORE -- A LITTLE BIT MORE  
12 SPECIFIC IN THE ELECTRONIC COLLECTION OF EMPLOYMENT  
13 INFORMATION AND USAGE. SO IT BECAME MORE NARROW DURING  
14 THAT -- LATTER PHASES.

15 Q BUT YOU HELD YOURSELF OUT AS AN EXPERT IN  
16 THE FIELD OF RESORT MEMBERSHIP MEMBER COMMUNICATIONS AND  
17 RELATIONS; CORRECT?

18 A WELL, I HOPE SO, YES.

19 Q NAME CLIENTS THAT YOU AND YOUR COMPANIES  
20 SERVICED IN, LET'S SAY, 1980'S.

21 A THE COMMON NAME IS YOGI BEAR. YOGI BEAR  
22 SYSTEM HAD A NUMBER OF COMMERCIAL CAMPGROUNDS THAT WERE  
23 CONVERTED TO EITHER MEMBERSHIP OR MEMBERSHIP-TYPE USAGE.  
24 THAT WOULD BE ONE CLIENT.

25 A COMPANY KNOWN AS ACI PARKS AND RESORTS OUT  
26 OF SEATTLE, AMERICAN ADVENTURE OUT OF SEATTLE, A NUMBER

1 OF -- THERE'S BEEN 30 OR 40 OTHER ACROSS THE COUNTRY. IT'S  
2 DIFFICULT FOR ME TO REMEMBER EACH NAME.

3 Q WAS ONE OF THOSE OTHERS ALL SEASONS RESORTS?

4 A YES.

5 Q AND DURING WHAT YEARS DID YOU PROVIDE  
6 CONSULTING EXPERT SERVICES TO ALL SEASONS RESORTS?

7 A WELL, THERE'S BEEN TWO PHASES WITH ALL  
8 SEASONS. THE FIRST PHASE WAS -- WHEN ALL SEASONS WAS FIRST  
9 BEGINNING, I HAD MOVED TO SEATTLE. AND ALL SEASONS WAS A  
10 STARTUP COMPANY IN '82 OR '83. AND THEN '83, '84, THEY GOT  
11 OFF THE GROUND. SO I WORKED WITH THEM IN THE  
12 COMPUTERIZATION AREA OF THE COMPANY TO BEGIN WITH AND THEN  
13 LATER ON IN THEIR SALES AND MARKETING EFFORT.

14 Q NOW, YOU SAID THERE WERE TWO PHASES. WHAT  
15 YOU'VE JUST DESCRIBED THERE IS BEFORE RAYMOND NOVELLI IS  
16 ASSOCIATED WITH ALL SEASONS RESORTS?

17 A YES.

18 Q AND AFTER RAYMOND NOVELLI, DID YOU GO TO  
19 WORK OR PROVIDE PROFESSIONAL SERVICES TO ALL SEASONS  
20 RESORTS?

21 A I BECAME AN EMPLOYEE OF ALL SEASONS WITH  
22 MR. NOVELLI IN 1986.

23 Q AND WHAT WAS YOUR JOB ASSIGNMENT AND DUTY  
24 THEN?

25 A I WORKED IN MANY DIFFERENT PHASES OF THE  
26 COMPANY, WORKED WITH EACH DEPARTMENT. THE ALL SEASONS HAD

1 MOVED FROM SEATTLE TO CALIFORNIA, AND THEY HAD NEW  
2 PERSONNEL; HOWEVER, SOME HAD COME FROM SEATTLE WITH THEM.

3 BUT MY GENERAL ROLE AT THAT TIME WAS THE  
4 FAMILIARIZATION OF THE VARIOUS DEPARTMENTS, THE PEOPLE THAT  
5 WORKED IN THE DEPARTMENTS WITH THE COMPANY. I HELPED  
6 TRAIN, DESIGN MATERIALS TO TRY TO CODIFY THE OPERATIONAL  
7 PROCEDURES AND JUST ABOUT IN EVERY PHASE, MR. MOSHENKO,  
8 WHATEVER I WAS ASKED TO DO.

9 Q YOU WORKED IN A UPPER-LEVEL-MANAGEMENT-TYPE  
10 POSITION; IS THAT CORRECT?

11 A YES.

12 Q AND YOU WORKED CLOSELY WITH RAYMOND NOVELLI,  
13 OBVIOUSLY?

14 A YES.

15 Q DURING YOUR CAREER DID YOU EVER PROVIDE  
16 CONSULTATION SERVICES FOR CAMP COAST TO COAST, AFFINITY  
17 GROUP?

18 A WELL, FOR COAST TO COAST, YES.

19 Q AND WHAT WAS THAT?

20 WHEN WAS THAT? LET'S START WITH THAT.

21 A I BELIEVE THAT WAS -- IT WAS EITHER THE LATE  
22 '80'S OR EARLY '90'S.

23 Q WHILE YOU WERE WITH ALL SEASONS RESORTS, YOU  
24 WERE PROVIDING SERVICES FOR -- LET'S SEE. PAT BUTLER WAS  
25 THE PRESIDENT?

26 A YES. MR. BUTLER WAS THE PRESIDENT.

1 Q SO DID YOU WORK DIRECTLY WITH PAT BUTLER?

2 A YES.

3 Q AND WHAT WAS IT THAT YOU DID FOR CAMP COAST  
4 TO COAST?

5 A THEY WERE DESIGNING AN ADVERTISING PROGRAM  
6 AT THAT PARTICULAR TIME, AND I WORKED WITH -- PRIMARILY  
7 WITH THEIR -- I'VE FORGOTTEN THE GENTLEMAN'S NAME. BUT A  
8 SPECIALIST THAT THEY HAD BROUGHT IN TO COLLECT  
9 CAMPGROUND -- R.V. OWNERSHIP INFORMATION, CAMPGROUND  
10 INFORMATION AND SUBSEQUENTLY TO DISTRIBUTE THAT TO THE  
11 VARIOUS AFFILIATES THAT THEY HAD IN THE INDUSTRY. THAT WAS  
12 THE OBJECTIVE.

13 Q SO A PLANNING AND PROMOTION OF NATIONAL  
14 ADVERTISING FOR MEMBERSHIP LEADS?

15 A YES.

16 Q AND HOW LONG WERE YOU WITH CAMP COAST TO  
17 COAST -- OR NOT WITH THEM -- OR PROVIDE SERVICES?

18 A IT WAS VERY BRIEF. I WOULD SAY -- AND I  
19 DON'T REMEMBER EXACTLY BECAUSE I WAS DOING IT BOTH THERE  
20 AND THEN BY PHONE. BUT I WOULD SAY PROBABLY TWO OR THREE  
21 MONTHS.

22 Q NOW, BACK TO WHILE WITH ALL SEASONS RESORTS,  
23 YOU INDICATED TRAINING -- YOU DID TRAINING OF PERSONNEL,  
24 YOU DESIGNED MATERIAL AND YOU DID OPERATIONAL PROCEDURES.

25 ARE YOU EXPERIENCED IN THE DESIGNING OF  
26 MATERIALS THAT ARE USED IN THE RESORT INDUSTRY?

1           A        YES.

2           Q        GIVE ME SOME EXAMPLES OF THE KINDS OF  
3 MATERIALS THAT YOU DESIGN AND DRAFTED FOR USE IN THE  
4 INDUSTRY.

5           A        WELL, GENERALLY, YOU KNOW, WHEN YOU'RE  
6 DRAFTING SOMETHING OR WHEN YOU'RE WORKING ON ADVERTISING  
7 MATERIALS OR ANYTHING, IT'S A GROUP PROCESS.

8                    SO SOMETIMES YOU LEAD, SOMETIMES TO FOLLOW.  
9 AND SOMETIMES IT ROTATES BACK AND FORTH. BUT IT COULD GO  
10 ANYWHERE FROM ACTUAL CONTRACTS THAT WERE USED FOR SALES,  
11 LITERATURE THAT WAS USED TO ATTRACT PEOPLE TO COME TO A  
12 FACILITY AND LOOK AT IT. IT COULD BE FULFILLMENT  
13 MATERIALS. BY THAT I MEAN YOU HAVE ALREADY BECOME A PART  
14 OF AN ORGANIZATION, OR YOU BELONG TO SOMETHING. AND THE  
15 PRODUCTION OF MAGAZINES, DIRECTORIES.

16                    JUST -- I KNOW EVERYONE DOESN'T KNOW WHAT I  
17 MEAN BY JUST EVERYTHING INVOLVED IN THE BUSINESS. BUT IF  
18 IT'S PRINTED GENERALLY AT ONE TIME OR ANOTHER I GOT  
19 INVOLVED IN IT.

20           Q        SO DID YOU DRAFT MANUALS AND OPERATIONAL  
21 PROCEDURES?

22           A        I WORKED WITH PEOPLE TO DO THAT, YES.

23           Q        DID YOU DRAFT AND PUBLISH NEWSLETTERS AND  
24 MAGAZINES?

25           A        YES.

26           Q        WERE YOU INVOLVED IN SETUPS FOR BILLING

1 MATERIALS AND BILLING OF MEMBERS?

2 A YES.

3 Q HOW ABOUT DID YOU DO ANY CONTRACT WORK,  
4 DRAFTING AND DESIGNING CONTRACTS FOR USE IN THE INDUSTRY?

5 A YES.

6 Q AND DO DIRECT HANDS-ON COMMUNICATIONS WITH  
7 MEMBERS?

8 A YES. THAT'S THE BEST PART.

9 Q DID YOU PARTICIPATE IN ACTUAL SALES AND  
10 MARKETING ACTIVITIES THAT WERE DONE BY ALL SEASONS RESORTS  
11 IN THE '80'S AND '90'S?

12 A IF YOU MEAN DID I SELL, I DID NOT SELL. BUT  
13 I DESIGNED, COORDINATED, MONITORED THROUGH THE COMPUTERS  
14 THE PROCESS.

15 Q BUT DID YOU ATTEND SALES PRESENTATIONS AND  
16 MEETINGS WHERE PEOPLE CAME TO ALL SEASONS RESORTS --

17 A YES.

18 Q -- CAMPGROUNDS TO CONSIDER MEMBERSHIP  
19 PURCHASES?

20 A YES.

21 Q NOW, IT KIND OF FEELS LIKE THAT'S WHAT YOU  
22 WERE DOING IN THE '80'S AND '90'S.

23 BUT HOW DID YOU CONDUCT YOURSELF; HOW DID  
24 YOUR JOB CHANGE, IF IT CHANGED, AS YOU GOT INTO THE EARLY  
25 '90'S AND THE MIDDLE '90'S, AS FAR AS ALL SEASONS RESORTS  
26 IS CONCERNED?

1           A           AGAIN, IT'S SORT OF LIKE A BROKEN RECORD.  
2 THE PROCESS CONTINUED. BUT ALSO BECAME INVOLVED IN THE  
3 MANAGEMENT AND OPERATION OF SOME OF THE COMPANIES THAT WE  
4 TOOK OVER, PURCHASED, OR WHATEVER TERM YOU WANT TO USE.

5                       WITH REGARDS TO CONDUCTING THE BANKRUPTCY  
6 PROCEEDINGS AND THINGS OF THAT NATURE, THAT WAS A MAJOR  
7 CHANGE FOR ME.

8           Q           OKAY. SO MANAGEMENT AND OPERATION, YOU WERE  
9 INVOLVED IN MANAGEMENT OF ACTUAL CORPORATIONS AND  
10 COMPANIES; CORRECT?

11          A           YES.

12          Q           WERE YOU INVOLVED IN BUSINESS PLANNING AND  
13 STRATEGICAL PLANNING FOR WHAT WE'VE BEEN REFERRING TO AS  
14 THE NOVELLI RESORTS?

15          A           YES.

16          Q           AND, AGAIN, YOU WORKED CLOSELY WITH  
17 RAYMOND NOVELLI DURING ALL THESE YEARS?

18          A           YES.

19          Q           DO YOU CONSIDER RAYMOND NOVELLI TO BE A  
20 FRIEND OF YOURS?

21          A           I'VE ANSWERED THAT A COUPLE OF TIMES IN THE  
22 DEPOSITION. I'M VERY FRIENDLY WITH MR. NOVELLI.  
23 MR. NOVELLI IS THE PERSON WHO IS THE BOSS, AND I SORT OF  
24 HAVE A STAND-OFFISH ATTITUDE WITH THAT REGARD. WE DON'T  
25 SOCIALIZE, BUT I LIKE MR. NOVELLI.

26          Q           HAVE YOU ALWAYS DONE THIS -- THESE SERVICES

1 AS AN EMPLOYEE OF A COMPANY, ONE OF THE NOVELLI COMPANIES,  
2 OR HAVE YOU ALSO ACTED AS AN INDEPENDENT?

3 A DEPENDING ON THE SITUATION. I'VE BEEN AN  
4 EMPLOYEE. I'VE BEEN CONSIDERED TO BE AN OUTSIDE AGENT.  
5 I'VE BEEN CONSIDERED TO BE A CONSULTANT. BUT ALL IN ALL,  
6 I'VE PERFORMED THE WORK FOR WHAT I THINK IS BEING CALLED  
7 HERE THE NOVELLI COMPANIES.

8 Q LET'S FAST-FORWARD NOW TO 1997.

9 AS A PART OF YOUR ROLE IN BUSINESS AND  
10 STRATEGIC PLANNING IN THE NOVELLI ORGANIZATION, DID YOU  
11 PARTICIPATE IN THE CIRCUMSTANCE THAT LED TO THE ULTIMATE  
12 FORMATION OF TRAVEL AMERICA?

13 A YES, I DID.

14 Q YOU ATTENDED THE MEETINGS THAT HAD BEEN  
15 TESTIFIED TO THAT TOOK PLACE AT THE TOMMY CLOUD RANCH?

16 A YES, I ATTENDED THAT MEETING.

17 Q AND YOU CONFERRED AND CONSULTED WITH  
18 MR. NOVELLI ABOUT THE DECISION-MAKING PROCESS THAT LED UP  
19 TO THE FORMATION OF THE TRAVEL AMERICA SYSTEM?

20 A I'M SORRY. SAY THAT AGAIN.

21 Q THAT'S ALL RIGHT. YOU PARTICIPATED WITH  
22 MR. NOVELLI IN THE MEETINGS AND PLANNING AND STRATEGY  
23 SESSIONS THAT LED UP TO THE FORMATION OF THE TRAVEL AMERICA  
24 SYSTEM?

25 A THE DISCUSSIONS, YES.

26 Q SO TO MAKE SURE IT'S FORMALLY IN THE RECORD,

1 MR. THOMPSON, YOU'VE DONE WORK AND SERVICES FOR TRAVEL  
2 AMERICA, INC.; IS THAT CORRECT?

3 A YES.

4 Q FOR FIRST NATIONWIDE RESORTS MANAGEMENT,  
5 INCORPORATED, DBA DEER RUN PARK?

6 A YES.

7 Q FOR CYPRESS PARK?

8 A YES.

9 Q FOR AMERICAN HOLIDAYS RESORTS?

10 A YES.

11 Q FOR REVCON MOTORCOACH DBA TWO SPRINGS?

12 A YES.

13 Q FOR HANS SCHULZ TRUSTEE FOR THE SCHULZ  
14 FAMILY TRUST D.B.A. DELTA ISLE RESORTS?

15 A DELTA ISLE, YES.

16 Q FOR HIDDEN SPRINGS CORPORATION?

17 A YES.

18 Q FOR PONDEROSA PARKS RESORTS, INCORPORATED?

19 A YES.

20 Q FOR ADVENTURE RESORTS OF AMERICA,  
21 INCORPORATED?

22 A YES.

23 Q FOR THE APOLLO GROUP?

24 A YES.

25 Q FOR THOUSAND ADVENTURES, INCORPORATED, OF  
26 OHIO, THAT WOULD BE AFTER MR. NOVELLI ACQUIRED AN

1 INTEREST -- ACQUIRED IT?

2 A WHICH --

3 Q THOUSAND ADVENTURES, INCORPORATED, OHIO.

4 A YES.

5 Q AND FOR THOUSAND ADVENTURES, INCORPORATED,  
6 ALABAMA, AGAIN, AFTER MR. NOVELLI ACQUIRED IT?

7 A YES.

8 Q NOW, IN YOUR NORMAL JOB OR WORKING DAY,  
9 THESE COMPANIES AREN'T SEGREGATED AS I HAVE LISTED THEM IN  
10 MY QUESTIONS AND ANSWERS; IS THAT CORRECT?

11 A WELL, THEY'RE CORPORATIONS, BUT EVERYTHING  
12 REVOLVES DAILY.

13 Q WE'VE HEARD REFERENCE TO WHAT'S CALLED THE  
14 NOVELLI SYSTEM OR THE TRAVEL AMERICA SYSTEM. AND THAT IS  
15 KIND OF A GENERALIZED REFERENCE TO ALL OF THESE COMPANIES  
16 AND ALL OF THEIR RESORTS TOGETHER; IS THAT CORRECT?

17 A YES.

18 Q AND YOU PROVIDED SERVICES FOR THEM AS A  
19 GENERALIZED SYSTEM ALBEIT RECOGNIZED IN THEIR SEPARATE  
20 INDEPENDENT ENTITIES?

21 A YES, I'VE DONE MANY DIFFERENT THINGS.

22 Q SO WHAT ROLE DID YOU PLAY IN THE ACTUAL  
23 ACQUISITION OF THE THOUSAND ADVENTURES RESORTS THAT LED TO  
24 THE MERGER WITH ALL SEASONS RESORTS AND FIRST NATIONWIDE?

25 A THE FIRST THING WAS TO ATTEND A MEETING IN  
26 TEXAS IN 1997, AROUND APRIL OR MAY. MR. NOVELLI ASKED ME

1 WOULD I GO DOWN TO TEXAS WITH HIM, AND THAT IT WAS A  
2 MEETING GOING TO BE HELD WITH MR. VOPNFORD OF THOUSAND  
3 ADVENTURES. AND I WENT TO THAT PARTICULAR MEETING AND  
4 LISTENED TO THE DISCUSSIONS.

5 THEN SUBSEQUENT TO THAT TIME, TRAVEL AMERICA  
6 WAS FORMED, AND I BEGAN TO WORK IN THE FORMATION OF THAT  
7 COMPANY. THE THING THAT I DID THE MOST DURING THAT TIME, I  
8 GUESS, WAS BEGIN TO LOOK AT THE INFORMATION. YOU HAVE TWO  
9 LARGE COMPANIES TRYING TO MELD THEIR SYSTEMS TOGETHER. SO  
10 I WOULD DO -- I WOULD TAKE THE DATA THAT WAS AVAILABLE AND  
11 TRY TO LOOK AT THE DIFFERENT RESORTS AND DIFFERENT  
12 CAMPGROUNDS AND SEE WHICH ONES MIGHT FIT INTO THIS NEW  
13 SYSTEM. THAT WAS A MAJOR PART OF IT.

14 AND THEN FROM THE DESIGNING DISCUSSIONS OF  
15 THE METHODOLOGY OF CONTACTING THE PEOPLE TO LET THEM KNOW  
16 WHAT WAS GOING TO HAPPEN, THE FORMAT THAT THE INFORMATION  
17 WOULD BE IN.

18 SO, IN GENERAL, ANYTHING THAT ONE WOULD DO  
19 TO SEE HOW TWO ORGANIZATIONS MIGHT COME TOGETHER.

20 Q THE MEETING AT THE CLOUD RANCH WAS  
21 PRECIPITATED BY TO YOUR KNOWLEDGE THAT MR. NOVELLI GO THERE  
22 TO SEE IF HE WAS INTERESTED IN ACQUIRING THOUSAND  
23 ADVENTURES; IS THAT YOUR UNDERSTANDING?

24 A THAT'S MY UNDERSTANDING.

25 Q AND IT WAS A GROUP OF LENDERS THAT YOU MET  
26 WITH ALONG WITH MR. VOPNFORD IN TEXAS; CORRECT?

1           A       YES.

2           Q       AND HAVE YOU IN YOUR EXPERIENCE WITH  
3 MR. NOVELLI AND HIS ORGANIZATION SEEN OTHER INSTANCES WHERE  
4 LENDERS APPROACHED MR. NOVELLI ASKING HIM TO ACCEPT  
5 RESPONSIBILITY FOR RESORTS THAT WERE HAVING FINANCIAL  
6 DIFFICULTIES?

7           A       YES.

8           Q       WHEN YOU WENT THERE, YOU KNEW THAT THE  
9 THOUSAND ADVENTURES RESORTS WERE HAVING FINANCIAL  
10 DIFFICULTIES; IS THAT CORRECT?

11          A       WELL, THE ANSWER IS, I WAS TOLD THAT THEY  
12 WERE. TO SAY THAT I KNEW -- I HAD JUST HEARD THAT IT WAS.

13          Q       ALL RIGHT. BUT AFTER IT TURNED OUT THAT  
14 YOU -- AFTER YOU GOT MORE INVOLVED WITH THOUSAND ADVENTURES  
15 AND WENT FORWARD WITH THE PROJECT, DID YOU LEARN WHETHER OR  
16 NOT IT HAD HAD FINANCIAL DIFFICULTIES WHENEVER YOU WENT TO  
17 THE CLOUD RANCH?

18          A       IT CERTAINLY DID.

19          Q       IN YOUR EXPERIENCE HAVE ANY OF THE OTHER  
20 COMPANIES THAT MR. NOVELLI ACQUIRED BEEN HAVING FINANCIAL  
21 DIFFICULTIES BEFORE HE ACQUIRED THEM?

22          A       AGAIN, IN EARLIER DEPOSITIONS I WAS ASKED  
23 THAT. I DON'T KNOW OF ANY THAT DIDN'T HAVE FINANCIAL  
24 DIFFICULTY PRIOR.

25          Q       AND YOU TESTIFIED THAT IN THE 1990'S YOU  
26 BEGAN TO BECOME INVOLVED IN SOME MATTERS RELATING TO

1 BANKRUPTCIES?

2           A           WELL, THAT WASN'T THE FIRST TIME. ALL  
3 SEASONS HAD A BANKRUPTCY IN 1987, AND OBVIOUSLY I WAS THERE  
4 WHEN THAT WAS TAKING PLACE AND WAS FAMILIAR WITH IT. AND  
5 THEN -- I BELIEVE IT WAS 1988 -- CUTTY'S WAS PURCHASED, AND  
6 IT HAD FINANCIAL DIFFICULTY. AND I ACTUALLY WENT TO IOWA  
7 AND SERVED AS THE PRESIDENT OF CUTTY'S DURING A  
8 REORGANIZATION PROCESS. THAT WAS ACTUALLY MY FIRST TIME.  
9 SO A LITTLE BIT BEFORE 1990.

10           Q           AND AS YOU CONTINUED INTO THE 1990'S, YOU  
11 SAID BASICALLY EVERYONE OF THE COMPANIES ACQUIRED WERE  
12 ACQUIRED WHILE IN FINANCIAL DIFFICULTY?

13           A           I BELIEVE SO. I MEAN -- I THINK SO.

14           Q           WERE YOU INVOLVED IN THE DECISION-MAKING  
15 PROCESS TO ACQUIRE THESE FINANCIALLY DISTRESSED COMPANIES?

16           A           I LOOKED AT THEM -- THE ANSWER IS I  
17 PARTICIPATED IN GIVING INFORMATION AND DISSECTING  
18 INFORMATION AND THEN TRYING TO PUT IT INTO FORMATS  
19 DECISIONS COULD BE BASED ON.

20           Q           DID YOU MAKE RECOMMENDATIONS AS TO WHETHER  
21 OR NOT THE ACQUISITIONS SHOULD GO FORWARD IN SPITE OF THE  
22 FINANCIAL PROBLEMS?

23           A           GENERALLY, YES.

24           Q           AND WHAT WAS THE PHILOSOPHY OR REASON WHY  
25 MR. NOVELLI, BASED ON YOUR PERSONAL KNOWLEDGE AND  
26 BACKGROUND AND RECOMMENDATIONS, WAS BEING TOLD BY YOU THAT

1 IT WAS DESIRABLE OR THERE WAS GOOD REASON TO BECOME  
2 INVOLVED WITH COMPANIES THAT ARE HAVING FINANCIAL  
3 DIFFICULTIES?

4 MR. RIVIN: THE QUESTION IS VAGUE AND AMBIGUOUS.  
5 ALSO CALLS FOR HEARSAY.

6 THE COURT: SUSTAINED.

7 BY MR. MOSHENKO: Q DID YOU RECOMMEND THAT HE  
8 ACQUIRED INTEREST IN THESE FINANCIALLY STRAPPED COMPANIES?

9 A SOME, YES. AND AS I RECALL, A COUPLE NO.

10 Q WHO WERE THE NOES?

11 A I KNEW THAT WAS THE NEXT QUESTION, BUT I'M  
12 SITTING HERE TRYING TO REMEMBER. I BELIEVE THAT I DIDN'T  
13 LIKE -- WHAT WAS KNOWN AS FIESTA PHILIPPINE VILLAGE WAS ONE  
14 THAT I DIDN'T CARE FOR.

15 Q THE FIESTA FIASCO?

16 A IT WAS CALLED THAT ON OCCASION.

17 Q WHAT OTHER ONE DID YOU RECOMMEND AGAINST?

18 A I WASN'T OVERJOYED WITH PONDEROSA PARK AND  
19 THE LANDING. BUT THOSE WERE TWO THAT I QUESTIONED.

20 Q ALL RIGHT. WITH RESPECT TO THE ONES THAT  
21 YOU DID RECOMMEND HE ACQUIRE, WHY -- GIVEN THE FACT THAT  
22 THEY'RE IN FINANCIAL DIFFICULTIES, WHY WOULD YOU MAKE THE  
23 RECOMMENDATIONS THAT HE GO FORWARD AND ACQUIRE TO MAKE --

24 A WHEN YOU LOOK AT A GROUP OF COMPANIES THAT  
25 ARE VERY SIMILAR, WHAT YOU WOULD FIND OUT IN OUR BUSINESS,  
26 AND PROBABLY IN MANY OTHER TYPES OF BUSINESSES, IS THAT

1 COMPANIES HAVE FIELD LEVEL OPERATIONS. IN OTHER WORDS, THE  
2 CAMPGROUNDS, THEY'RE OPERATED OBVIOUSLY AWAY FROM CORPORATE  
3 HEADQUARTERS. BUT EVERYONE OF THOSE CAMPGROUNDS HAD A  
4 CORPORATE STRUCTURE ABOVE IT, EITHER ONE OR TWO PEOPLE,  
5 MANY TIMES JUST LIKE THE ARMY. THERE'S PROBABLY JUST AS  
6 MANY -- ACTUALLY I THINK THREE OR FOUR MANY PEOPLE BEHIND  
7 THE LINES AS THERE ARE ON THE FRONT LINES, AND THE SAME WAS  
8 TRUE WITH THE CAMPGROUND.

9                   AND YOU COULD TAKE THOSE CORPORATE  
10 OVERHEADS, IF YOU WILL, AND DO AWAY WITH THEM THROUGH THE  
11 COMPUTER AND OTHER METHODS, CONSOLIDATE THEM, IF YOU WILL,  
12 AND SAVE ENOUGH TO MAKE A PROFIT. SO IF THEY MET THAT  
13 CRITERIA, IT WAS A GOOD OPPORTUNITY.

14           Q       ALL RIGHT. BESIDES COST SAVINGS THROUGH  
15 CONSOLIDATION, WHAT OTHER REASONS DID YOU HAVE FOR THE  
16 BUSINESS PHILOSOPHY OF ACQUIRING AND CONSOLIDATING  
17 DISTRESSED COMPANIES?

18           A       ALONG WITH, YOU PICK UP A GROUP OF PEOPLE --  
19 LET'S SAY THAT YOU WANT TO HAVE -- ONE OF THE THINGS WE DID  
20 OVER THE YEARS, WE HAD CARAVANS, AND WE HAD RALLIES. AND  
21 IN THE EARLY YEARS, IT WAS DIFFICULT TO GET ENOUGH PEOPLE  
22 TO PARTICIPATE. YOU MAY HAVE WHAT YOU THOUGHT WAS THE  
23 GREATEST PARTY IN THE WORLD GOING ON. BUT LET'S SAY THAT  
24 YOU LEARN OVER A PERIOD OF TIME -- I'M JUST GOING TO USE  
25 THIS AS AN EXAMPLE. THIS IS NOT NECESSARILY TRUE THIS WAY.

26                   BUT THERE'S A THOUSAND PEOPLE, AND YOU SEND

1 OUT A THOUSAND INVITATIONS TO A CARAVAN OR A RALLY. AND  
2 LET'S SAY THE AVERAGE RESPONSE RATE IS 10 PERCENT, OR LET'S  
3 MAKE IT EVEN WORSE, 1 PERCENT. SO OUT OF A THOUSAND  
4 PEOPLE, YOU'RE GOING TO GET 10. IF YOU HAD 20,000 PEOPLE  
5 TO SEND THAT INVITATION OUT TO, AND THE 1 PERCENT RESPONSE,  
6 YOU GOT ENOUGH TO CONDUCT A CARAVAN AT THAT POINT IN TIME.

7 SO AS A RESULT, YOU GREW IN YOUR ABILITY TO  
8 PROVIDE SERVICES PROVIDED, YOU KNOW, YOUR FINANCES WERE  
9 OKAY. THE FIRST PHASE WAS TO BE SURE THAT YOU COULD MAKE A  
10 PROFIT OR HOPE THAT YOU DID. AND THEN THE SECOND PHASE IS  
11 THE SERVICES THAT YOU PROVIDE, AND THE HAPPIER THE MEMBER,  
12 OBVIOUSLY, THE LONGER THEY'RE GOING TO STAY WITH YOU AND  
13 THE MORE THEY'RE GOING TO PARTICIPATE.

14 Q BETTER SERVICES EQUAL HAPPIER MEMBERS EQUAL  
15 MORE PROFITS?

16 A YES.

17 Q WHAT ABOUT MARKETING, WERE THERE ANY  
18 BENEFITS RELATING TO MARKETING MEMBERSHIPS?

19 A WELL, THE SAME BASIC THING. IF YOU HAVE --  
20 YOU CAN SPREAD YOUR COSTS MORE. BUT IT'S A DOUBLE-EDGE  
21 SWORD. YOUR SPECIAL -- YOUR PRIMARY ACCOUNTING, I CALL IT,  
22 WAS JUST AS EXPENSIVE FOR ONE LOCATION AS IT IS FOR 10  
23 LOCATIONS. BUT IF YOU HAVE HAPPY MEMBERS WHO WILL TURN  
24 AROUND AND GIVE YOU REFERRALS, A REFERRAL IS A MORE  
25 COST-EFFECTIVE SALE THAN AN INITIAL SALE. SO YOU BENEFIT  
26 THAT WAY.

1 Q ALL RIGHT. AND HOW DOES THE FACT THAT THERE  
2 ARE MULTIPLE RESORTS AND A LARGER SYSTEM BENEFIT MARKETING?

3 A THE MULTIPLE RESORTS FOR THOSE WHO TRAVEL,  
4 THE PEOPLE THAT HAVE AN INTEREST IN THAT -- AND THERE'S A  
5 CERTAIN PERCENTAGE THAT DO AND CERTAIN PERCENTAGE WHO  
6 DON'T. BUT FOR THOSE WHO TRAVEL, THE ABILITY TO TRAVEL AND  
7 HAVE WHAT I CALL A HOME RESORT OR WHAT'S VERNACULARLY  
8 CALLED A HOME RESORT SYSTEM IS VERY ATTRACTIVE BECAUSE THEY  
9 CAN GO FROM ONE LOCATION TO ANOTHER. THEY CAN SPEND TWO  
10 WEEKS HERE, TWO WEEKS HERE, TWO WEEKS HERE, TWO WEEKS HERE,  
11 GO BACK, DO IT AGAIN. SO IT GIVES MORE VALUE TO THEIR  
12 PRODUCT.

13 WE CALL MEMBERSHIPS IN OUR BUSINESS A  
14 PRODUCT JUST LIKE YOU GET BREAD AT A STORE. OUR PRODUCT IS  
15 A MEMBERSHIP.

16 Q WE'VE HAD, OH, REFERENCE ON AN EXHIBIT THAT  
17 CALLED THE TRAVEL AMERICA SYSTEM A RECIPROCAL SYSTEM. IN  
18 WHAT SENSE DOES MULTIPLE RESORTS AND A LARGER SYSTEM  
19 CONSTITUTE A RECIPROCAL SYSTEM?

20 MR. RIVIN: YOUR HONOR, THIS IS CUMULATIVE.

21 THE COURT: SUSTAINED.

22 BY MR. MOSHENKO: Q OKAY. NOW, ALL OF THE RESORTS  
23 THAT WERE ACQUIRED, ALBEIT ALL OF THEM -- I THINK YOU SAID  
24 NEARLY ALL OF THEM WERE IN FINANCIAL DIFFICULTY. OF ALL OF  
25 THEM -- THEY DIDN'T ALL MAKE IT, DID THEY?

26 A NO.

1 Q SO WHAT DOES -- WHAT OCCURRED IN YOUR  
2 EXPERIENCE TO MEMBERS AND MEMBER BENEFITS WHERE THE MEMBERS  
3 WERE ASSIGNED TO A HOME RESORT THAT DIDN'T MAKE IT WITHIN  
4 THE NOVELLI SYSTEM?

5 A OKAY. I'D SAY THEY DIFFER IN DIFFERENT  
6 PARTS OF THE WORLD IN DIFFERENT WAYS. BUT WHEN YOU HAVE A  
7 SYSTEM LIKE THAT, YOU HAVE THE OPPORTUNITY IN -- WITH THE  
8 MEMBERS TO TRANSFER THEM TO A DIFFERENT LOCATION. SO THEY  
9 WOULD TRANSFER IN THE SYSTEM AND RETAIN THE SAME BENEFITS  
10 THAT THEY HAD BEFORE.

11 Q ALL RIGHT. AND SO DID THE SYSTEM -- DID THE  
12 NOVELLI SYSTEM WORK BETTER BECAUSE THERE WERE MULTIPLE  
13 RESORTS WITHIN WHICH MEMBERS COULD BE TRANSFERRED?

14 A I WOULD SAY OVERALL, YES.

15 Q AND, NOW, WAS THE -- CAN YOU GIVE US AN  
16 ESTIMATE OF -- STRIKE THAT.

17 I'LL START OVER.

18 IN THE RESORT INDUSTRY, IN THE 1980'S AND  
19 1990'S, WERE THERE A LOT OF BANKRUPTCIES BEING FILED BY A  
20 LOT OF RESORTS?

21 MR. RIVIN: OBJECTION. THIS IS CUMULATIVE.

22 THE COURT: SUSTAINED.

23 BY MR. MOSHENKO: Q ALL RIGHT. WELL, HAVE YOU  
24 DONE A STUDY AND ANALYSIS OF THE PRECISE OR NEARLY PRECISE  
25 NUMBER OF RESORTS IN THE INDUSTRY THAT HAVE GONE INTO A  
26 BANKRUPTCY AND GONE OUT OF BUSINESS BETWEEN THE LATE '80'S

1 AND 1997?

2 A I KEPT UP WITH IT OVER THE YEARS, YES. SOME  
3 WENT INTO BANKRUPTCY, WENT OUT OF BUSINESS, SOME DIDN'T.

4 Q OKAY. WAS -- CAN YOU GIVE US AN ESTIMATE OF  
5 HOW MANY RESORTS HAVE FILED BANKRUPTCIES IN THE INDUSTRY IN  
6 THE LAST 10 YEARS, PRIOR TO 1997?

7 MR. RIVIN: OBJECTION, YOUR HONOR. LACK OF  
8 FOUNDATION. CUMULATIVE. IRRELEVANT.

9 THE COURT: SUSTAINED.

10 MR. MOSHENKO: NO ONE HAS GIVEN A NUMBER, YOUR  
11 HONOR, SPECIFIC NUMBER, INDUSTRY-WIDE. AND THIS IS NEW  
12 INFORMATION THE JURY HAS NEVER --

13 THE COURT: FOR OTHER GROUNDS, SUSTAIN THE  
14 OBJECTION.

15 MR. MOSHENKO: THE OTHER GROUNDS WERE, WHAT, LACKS  
16 FOUNDATION?

17 THE COURT: YES.

18 BY MR. MOSHENKO: Q DO YOU HAVE A FOUNDATION OF  
19 INFORMATION UPON WHICH YOU CAN GO TO TO ANSWER THE QUESTION  
20 ABOUT WHAT ARE THE NUMBERS OF -- APPROXIMATE NUMBERS OF  
21 RESORTS THAT HAVE FILED OR GONE INTO BANKRUPTCY IN THE LAST  
22 DECADE?

23 A YES. AS I SAID, I'VE KEPT UP WITH THAT SORT  
24 OF THING, ALONG WITH MANY OTHER THINGS OVER THE YEARS, THE  
25 GOOD NEWS AND THE BAD NEWS. I'VE TRIED TO KEEP UP WITH IT  
26 SO I KNOW.

1 Q WHAT METHOD DID YOU USE TO KEEP UP WITH IT?

2 A JUST READ AND KEPT NOTES AS TO WHAT PEOPLE  
3 HAVE BEEN IN AND OUT.

4 Q DID YOU ACTUALLY ACCUMULATE LISTS OVER THE  
5 YEARS?

6 A YOU SAY LISTS. I DON'T KNOW WHAT YOU MEAN.

7 Q OR MAKE DATA ENTRY OF SOME SORT INDICATING  
8 WHAT YOU'VE READ AND KEPT NOTES OF?

9 A I HAVE THROWN THE STUFF IN FILES. AND ON  
10 OCCASION, I WOULD WRITE DOWN HOW MANY AND SO ON. SO I HAVE  
11 A GENERAL KNOWLEDGE OF HOW MANY THERE WERE.

12 Q ALL RIGHT. SO YOU MAY NOT HAVE ALL OF THEM --

13 A OH, I DON'T THINK I HAVE ALL OF THEM.

14 Q BUT YOUR OPINION AS TO WHAT PERCENTAGE OF  
15 ACCURACY YOU HAVE AS TO THE TOTAL IS WHAT?

16 A WELL, AGAIN, THE NUMBER THAT I BELIEVE --  
17 THAT I KNOW OF, THAT I READ EITHER IN NEWSPAPERS OR  
18 QUANTIFY -- HOW I KNOW ABOUT IT, YOU GET COPIES OF THINGS  
19 PEOPLE SEND YOU; YOU READ ABOUT THEM IN NEWSPAPERS; YOU  
20 VISIT THE DIFFERENT CAMPGROUNDS. I SPENT HALF MY LIFE ON  
21 THE CAMPGROUNDS. SO THERE ARE ABOUT FORTY-SOME-ODD  
22 CORPORATIONS.

23 MR. RIVIN: YOUR HONOR, IF I MAY, STILL LACKS  
24 FOUNDATION.

25 THE COURT: OBJECTION IS SUSTAINED.

26 MR. RIVIN: IS THE ANSWER -- MOVE TO STRIKE THE

1 ANSWER.

2 THE COURT: STRICKEN.

3 BY MR. MOSHENKO: Q HAS IT BEEN UNUSUAL IN THE  
4 DECADE OF THE '90'S FOR THE RESORTS TO FILE BANKRUPTCY?

5 A NO.

6 Q ARE THERE SOME REASONS, BUSINESS REASONS,  
7 WHY THE DECADE OF THE '90'S HAS CREATED AN ENVIRONMENT  
8 WHERE MANY RESORTS HAVE GONE INTO BANKRUPTCIES?

9 A YES.

10 Q WHAT REASON?

11 A THEY BEGAN IN THE '80'S, THOUGH.

12 Q OKAY. WHAT REASONS?

13 A THE REASONS ARE MANY. BUT THE PRIMARY  
14 REASONS ARE THAT -- IN MY OPINION IS THAT WE HAD TOO MANY  
15 PEOPLE GO INTO THE BUSINESS THAT DIDN'T KNOW WHAT THEY WERE  
16 DOING AND ALSO OVERSATURATED THE MARKET. THE MARKETING  
17 METHODS THAT ARE USED OR WERE USED IN THE EARLY DAYS OF THE  
18 BUSINESS LITERALLY OUTSTRETCHED THEMSELVES. THERE WERE  
19 MANY SO MANY NAMES, ADDRESSES, PHONE NUMBERS, POTENTIAL  
20 CLIENTS, IF YOU WILL. AND WHEN PEOPLE WENT INTO THE  
21 BUSINESS AND DIDN'T UNDERSTAND THAT, THEY HIT WHAT I CALL A  
22 WALL. DID NOT HAVE THE SOPHISTICATION OR THE KNOWLEDGE  
23 REQUIRED TO CONTINUE TO GET ENOUGH MEMBERS TO SUSTAIN THE  
24 RESORT.

25 AND I USE A BENCHMARK USUALLY, AND IT VARIES  
26 BY RESORT. IF YOU DON'T HAVE AT LEAST A THOUSAND MEMBERS,

1 YOU'RE MOST LIKELY NOT GOING TO MAKE IT ON AN INDIVIDUAL  
2 CAMPGROUND, IF IT'S A NICE ONE.

3 Q NOW, GIVEN THE NOVELLI RESORTS WERE IN THAT  
4 SAME ENVIRONMENT WHERE IN ESSENCE THE RESORT SYSTEM IS  
5 BEING SPREAD TOO THIN, GIVEN THE PUBLIC APPEAL AND  
6 OPPORTUNITY TO MARKET THESE PEOPLE; IS THAT RIGHT?

7 A YES.

8 Q DURING THOSE YEARS THERE HAVE BEEN MANY  
9 NOVELLI COURT CASES AND BANKRUPTCIES -- BANKRUPTCY COURT  
10 CASES; CORRECT?

11 A YES.

12 Q AND YOU WERE PART OF UPPER MANAGEMENT DURING  
13 ALL THOSE; IS THAT CORRECT?

14 A YES.

15 Q IN SPITE OF THE COURT CASES AND BANKRUPTCY  
16 DIFFICULTIES, DID THE NOVELLI RESORTS CONTINUE TO GROW WITH  
17 RESPECT TO MEMBERS?

18 MR. RIVIN: OBJECTION, YOUR HONOR. THIS IS  
19 CUMULATIVE AND LACK OF FOUNDATION.

20 THE COURT: OBJECTION IS SUSTAINED.

21 WE'LL TAKE OUR MORNING BREAK AT THIS TIME.

22 TAKE 20. SEE BACK YOU ON THE HOUR.

23 (RECESS TAKEN.)

24 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN  
25 COURT IN THE PRESENCE OF THE JURY:)

26 THE COURT: PROCEED, COUNSEL.

1 BY MR. MOSHENKO: Q MR. THOMPSON, DURING THE  
2 DECADE OF THE '90'S WHEN THE PLAINTIFFS' RESORTS WERE IN  
3 BANKRUPTCIES, DID THE PLAINTIFFS' MEMBERS ABANDON THE  
4 RESORTS?

5 MR. RIVIN: OBJECTION. LACK OF FOUNDATION.

6 THE COURT: SUSTAINED.

7 BY MR. MOSHENKO: Q DO YOU HAVE PERSONAL KNOWLEDGE  
8 BY BEING THERE TO OBSERVE THE EBB AND FLOW OF THE NUMBER OF  
9 PLAINTIFFS' MEMBERS THAT WERE MEMBERS OF PLAINTIFFS' PARKS  
10 DURING THE 1990'S DURING BANKRUPTCIES?

11 A WAS I THERE?

12 Q YES.

13 A YES.

14 Q YOU WERE THERE?

15 A YES, I WAS THERE.

16 Q AND WERE YOU -- WAS KEEPING ABREAST AND  
17 KEEPING TRACK OF MEMBERS AND MEMBER RESPONSE TO  
18 BANKRUPTCIES AND MEMBER NUMBERS PART OF YOUR JOB DUTIES?  
19 IS THAT SOMETHING --

20 A YES.

21 Q -- YOU WERE INVOLVED IN?

22 A I KEPT RECORDS OF MEMBERS THAT WERE THERE  
23 AND THINGS OF THAT NATURE.

24 Q ALL RIGHT. AND WAS PLANNING STRATEGY AND  
25 RESPONSE TO THE PUBLIC RELATING TO WHAT EFFECT IF ANY  
26 BANKRUPTCIES MIGHT HAVE ON MEMBER ATTITUDES PART OF

1 SOMETHING THAT YOU WERE INVOLVED IN DOING BACK IN 1992?

2 A SOMETHING THAT YOU ALWAYS CONSIDERED, YES.

3 Q AND SO WITH THAT BACKGROUND OF YOUR PERSONAL  
4 KNOWLEDGE, DID THE MEMBERS OF THE NOVELLI RESORTS QUIT IN  
5 LARGE NUMBERS THE NOVELLI RESORTS BECAUSE BANKRUPTCIES WERE  
6 PENDING?

7 MR. RIVIN: OBJECTION. THERE'S STILL A LACK OF  
8 FOUNDATION FOR THAT QUESTION.

9 THE COURT: SUSTAINED.

10 MR. RIVIN: ALSO SECONDARY EVIDENCE.

11 THE COURT: SUSTAINED.

12 BY MR. MOSHENKO: Q MR. THOMPSON, YOU PARTICIPATED  
13 IN THE DECISION TO DISAFFILIATE THE PLAINTIFFS' RESORTS  
14 FROM CAMP COAST TO COAST; CORRECT?

15 A TO A DEGREE, YES.

16 Q AND, IN FACT, YOU MADE A RECOMMENDATION THAT  
17 THAT WAS THE COURSE TO FOLLOW; IS THAT CORRECT?

18 A I SUPPORTED IT, YES.

19 Q OKAY. AND YOU WROTE THE DISAFFILIATION  
20 LETTER WHICH WAS SIGNED BY RAYMOND NOVELLI AND HANS SCHULZ;  
21 IS THAT CORRECT?

22 A I THINK I TYPED THE LAST DRAFT, YES. AND I  
23 WAS INVOLVED IN THE CREATION. IT'S PART OF WHAT I DO IS  
24 PREPARE DOCUMENTS.

25 Q OKAY. AND WHAT WERE THE REASONS FOR YOUR  
26 SUPPORTING DISAFFILIATION?

1 MR. RIVIN: OBJECTION. CUMULATIVE. IRRELEVANT.

2 THE COURT: I'LL ALLOW IT. HIS REASONS. HIS  
3 REASONS. I'LL ALLOW IT.

4 MR. RIVIN: BUT HIS REASONS ARE IRRELEVANT, YOUR  
5 HONOR. THAT'S BASIS FOR THAT OBJECTION.

6 BY MR. MOSHENKO: Q GO AHEAD.

7 THE COURT: YOU MAY ANSWER.

8 BY MR. MOSHENKO: Q YES.

9 A TERRIBLE THING. COULD YOU ASK THE QUESTION  
10 AGAIN?

11 Q WHAT WERE THE REASONS FOR YOU SUPPORTING THE  
12 DECISION TO DISAFFILIATE?

13 A OH, AT THAT PARTICULAR JUNCTURE AND TIME I  
14 FELT LIKE THAT DISAFFILIATION WAS APPROPRIATE BECAUSE IT  
15 WOULD LIMIT THE NUMBER OF RECIPROCAL SYSTEMS THAT YOU HAD,  
16 NUMBER ONE -- NOT NECESSARILY IN THAT ORDER. BUT, THERE  
17 WAS NO REASON TO HAVE TWO. AND IT WAS A WAY OF BETTER  
18 SERVING THE MEMBERS.

19 AND ALSO I DON'T KNOW IF I CAN GO BEYOND  
20 THIS. SOMEBODY CAN STOP ME. BUT R.P.I. RESORT PARKS  
21 INTERNATIONAL I THOUGHT WOULD SERVICE THE MEMBERS BETTER.

22 Q BUT YOU DID NOT INCLUDE THE ALL SEASONS  
23 RESORTS IN YOUR DISAFFILIATION LETTER; IS THAT CORRECT?

24 A NO.

25 Q WHAT WAS THE REASON FOR THAT?

26 A THAT'S CORRECT. IT WASN'T INCLUDED.

1 Q WHAT WAS THE REASON WHY YOU DID NOT INCLUDE  
2 THEM IN THE DISAFFILIATION LETTER?

3 A IT WAS INVOLVED IN THE BANKRUPTCY SITUATION  
4 AT THAT TIME. AND ALSO I BELIEVE AT THAT TIME -- I THINK A  
5 RECEIVER HAD BEEN APPOINTED.

6 Q YOU MEAN A TRUSTEE, MR. DAFF?

7 A A TRUSTEE. EXCUSE ME. YES.

8 Q RIGHT.

9 A I THINK.

10 Q DID YOU CONSIDER AND CONTEMPLATE ACTING  
11 DURING THE BANKRUPTCY TO CHANGE ALL SEASONS RESORTS'  
12 CONTRACTUAL RELATIONS WITH COAST TO COAST?

13 MR. RIVIN: OBJECTION. VAGUE AND AMBIGUOUS. AND  
14 ALSO IRRELEVANT.

15 THE COURT: SUSTAINED.

16 BY MR. MOSHENKO: Q WAS REMOVING THE ALL SEASONS  
17 RESORTS SOMETHING YOU CONSIDERED DOING IN SPITE OF THE  
18 BANKRUPTCY?

19 A I DON'T BELIEVE THAT I CONSIDERED IT, YOU  
20 KNOW, AS A THOUGHT PROCESS.

21 Q WHAT EFFECT DID THE BANKRUPTCY, THE  
22 EXISTENCE OF THE BANKRUPTCY, HAVE ON THE DECISION WHETHER  
23 OR NOT TO LEAVE ALL SEASONS RESORTS IN THE COAST SYSTEM?

24 MR. RIVIN: OBJECTION. THIS QUESTION CALLS FOR A  
25 LEGAL CONCLUSION.

26 MR. MOSHENKO: NO. IT CALLS FOR HIS PERSONAL --

1 THE COURT: OVERRULED.

2 THE WITNESS: YOU'RE GOING TO HAVE TO ASK IT AGAIN.  
3 SORRY.

4 BY MR. MOSHENKO: Q WHAT EFFECT DID THE EXISTENCE  
5 OF THE BANKRUPTCY HAVE ON YOUR DECISION TO LEAVE ALL  
6 SEASONS RESORTS AS REMAINING AN AFFILIATED RESORT?

7 A AGAIN, I BELIEVE THE DECISION AT THAT TIME  
8 WAS TO NOT INCLUDE THEM WAS BECAUSE THEY WERE INVOLVED IN  
9 THE BANKRUPTCY SITUATION. AND I BELIEVE THERE WAS, AS YOU  
10 POINTED OUT, A TRUSTEE AS OPPOSED TO RECEIVER, BUT A  
11 TRUSTEE I THINK AT THAT TIME.

12 Q YOU UNDERSTOOD THERE WAS A STAY ORDER IN  
13 EFFECT?

14 A WELL, IN GENERAL THE BANKRUPTCY PROCEDURES  
15 THAT ARE REQUIRED, AND I KNOW WHAT A STAY IS.

16 Q NOW, YOU ALSO WROTE A LETTER TO CAMP COAST  
17 TO COAST INDICATING THAT YOU WANTED TO HAVE THE RESORT,  
18 DEER RUN, STAY IN AS A COAST TO COAST AFFILIATE; IS THAT  
19 CORRECT?

20 A I DRAFTED THAT, I BELIEVE, THE FINAL VERSION  
21 OF THAT, YES.

22 Q WHY DID YOU DO THAT?

23 A BECAUSE IT HAD BEEN INADVERTENTLY PUT ON THE  
24 FIRST DISAFFILIATION LIST. DEER RUN WAS THE PARK THAT WAS  
25 USED TO SERVICE COAST DELUXE MEMBERS. AND IT WAS MY  
26 UNDERSTANDING THAT SINCE THAT COAST DELUXE PRODUCT HAD BEEN

1 SOLD, IT NEEDED TO BE RETAINED AS AN AFFILIATE TO SERVICE  
2 THOSE MEMBERS.

3 Q DID YOU AND THE OTHER EXECUTIVES OF TRAVEL  
4 AMERICA WANT TO KEEP DEER RUN IN -- TO TRANSFER 30,000  
5 MEMBERS TO DEER RUN AND KEEP EVERYBODY IN THE COAST SYSTEM?

6 A NO. NO.

7 Q YOU KNOW THAT COAST TO COAST SENT A LETTER  
8 IN RESPONSE TO THE LETTER REQUESTING THAT DEER RUN REMAIN  
9 AN AFFILIATE REFUSING TO ALLOW THAT TO HAPPEN; CORRECT?

10 A YES.

11 Q AND IN THAT LETTER THEY SPECIFICALLY TOLD  
12 ALL SEASONS RESORTS THAT THEY WERE GOING TO DISAFFILIATE  
13 THE ALL SEASONS RESORTS; DO YOU RECALL THAT?

14 A IT WAS IN THE SAME LETTER, YES.

15 Q NOW, YOU HAVE SEEN THE CORRESPONDENCE THAT  
16 COAST LATER NOW SENT TO THE MEMBERS OF THE PLAINTIFFS'  
17 RESORTS WHO WERE COAST TO COAST MEMBERS AS WELL; CORRECT?

18 A YES.

19 Q ONE OF THOSE LETTERS STATES THAT ALL  
20 SEASONS -- RAY NOVELLI TOOK ALL SEASONS RESORTS OUT OF THE  
21 COAST TO COAST SYSTEM.

22 DID THAT EVER HAPPEN?

23 A DID --

24 MR. RIVIN: OBJECTION, YOUR HONOR. THIS IS  
25 CUMULATIVE.

26 THE COURT: SUSTAINED.

1 BY MR. MOSHENKO: Q THAT COAST LETTER WAS FALSE;  
2 CORRECT?

3 MR. RIVIN: OBJECTION. LACK OF FOUNDATION.  
4 INAPPROPRIATE FOR THIS WITNESS TO TESTIFY TO THAT.

5 THE COURT: SUSTAINED.

6 MR. MOSHENKO: LACK OF FOUNDATION THAT THE  
7 STATEMENT THAT "RAY TOOK IT OUT" IS FALSE, YOUR HONOR?

8 MR. RIVIN: IT'S ALSO CUMULATIVE.

9 THE COURT: SUSTAINED.

10 BY MR. MOSHENKO: Q MR. THOMPSON, LET'S GO TO YOUR  
11 DATA ANALYSIS EXPERTISE.

12 HAVE YOU DONE DATA ANALYSIS OR ANALYSIS OF  
13 DATA RELEVANT TO THIS CASE?

14 A YES.

15 Q DID YOU RECEIVE WHAT WE CALL THE DECEMBER  
16 1999 COAST TO COAST DISK WHICH INCLUDED THE NAMES OF SOME  
17 34,000 PLUS PERSONS COAST TRANSFERRED FROM ONE RESORT TO  
18 ANOTHER?

19 A YES. YOU GAVE IT TO ME.

20 Q AND DID YOU DO AN ANALYSIS OF THE CONTENT OF  
21 THAT DISK TO DETERMINE THE NAMES OF THE CURRENT AND PRIOR  
22 PARKS, THAT IS, THE PRIOR PARK THAT THE MEMBERS WERE  
23 MEMBERS OF AND THE CURRENT PARK TO WHICH THE MEMBERS WERE  
24 TRANSFERRED?

25 A YES.

26 MR. RIVIN: OBJECTION, YOUR HONOR. SECONDARY

1 EVIDENCE RULE.

2 MR. MOSHENKO: IT'S FOUNDATIONAL, YOUR HONOR. IN  
3 FACT, I JUST ASKED HIM IF HE DID AN ANALYSIS.

4 THE COURT: ALL RIGHT. I'LL ALLOW IT.

5 MR. MOSHENKO: I'LL BRING IN THAT SECONDARY  
6 EVIDENCE. OKAY.

7 Q IN ORDER TO DO THAT, DID YOU PREPARE AN  
8 EXHIBIT, EXHIBIT 1808-003, WHICH I'LL NOW PRESENT TO YOU --  
9 MR. THOMPSON DID YOU PREPARE 1808-003?

10 A YES.

11 Q AND DID YOU DO IT BY USING THE DATA THAT  
12 APPEARED ON EXHIBIT 1808, WHICH WAS THE COAST DISK, THAT  
13 STATED THE NAMES AND RESORTS FROM WHICH MEMBERS WERE  
14 TRANSFERRED?

15 A IF 1808 IS THE 12/9/99 COAST DISK, YES.

16 Q YES, THE 12/99 COAST TO COAST DISK.

17 I'D OFFER THIS INTO EVIDENCE, YOUR HONOR.  
18 OTHERWISE, I COULD HAVE HIM READ --

19 THE COURT: 1808-003.

20 THE CLERK: I DON'T HAVE A 003. I HAVE A "C."

21 MR. MOSHENKO: IT'S THE THIRD PAGE OF EXHIBIT 1808.

22 THE CLERK: 1808 IS PROBABLY THREE VOLUMES. I'M  
23 SORRY. APPARENTLY IT'S NUMBERED 1808-A AND THEN 003.

24 MR. MOSHENKO: I OFFER IT INTO EVIDENCE.

25 MR. RIVIN: YOUR HONOR, WE WOULD OBJECT TO THAT AT  
26 THIS POINT OR ASK THE COURT TO TAKE IT UNDER SUBMISSION.

1 THIS ISSUE, IN LIGHT OF THE COURT'S DECISION TO BIFURCATE,  
2 WE THINK IS IRRELEVANT.

3 THE COURT: I'LL TAKE IT UNDER SUBMISSION.

4 MR. MOSHENKO: SO AS FAR AS FOUNDATION IS  
5 CONCERNED, YOUR HONOR, I WANT TO MAKE SURE I HAVE THE  
6 COMPLETE FOUNDATION.

7 SO THE OBJECTION HAS TO DO WITH THE  
8 BIFURCATION ISSUE. VERY WELL.

9 MR. RIVIN: ALSO SECONDARY EVIDENCE.

10 THE COURT: ALL RIGHT.

11 BY MR. MOSHENKO: Q NOW, DID YOU ALSO DO A  
12 CALCULATION -- AN ANALYSIS THAT ENABLED YOU TO MAKE THE  
13 CALCULATION OF THE NUMBER OF PLAINTIFFS' MEMBERS THAT WERE  
14 TRANSFERRED FROM EACH OF THE PLAINTIFFS' RESORTS?

15 A YES.

16 Q AND WERE PLAINTIFFS' MEMBERS TRANSFERRED  
17 FROM EACH OF THE PLAINTIFFS' RESORTS BASED ON THAT  
18 ANALYSIS?

19 MR. RIVIN: OBJECTION. LACK OF FOUNDATION.  
20 CUMULATIVE. AND ALSO IRRELEVANT BASED ON THE COURT'S  
21 DECISION OF BIFURCATION.

22 MR. MOSHENKO: MAY I APPROACH ON THIS, YOUR HONOR?

23 THE COURT: YOU MAY.

24 (DISCUSSION OFF THE RECORD.)

25 BY MR. MOSHENKO: Q ALL RIGHT. I'D LIKE TO GET  
26 AN ANSWER TO THE QUESTION, MR. THOMPSON.

1 DID YOUR ANALYSIS SHOW THAT EACH OF THE  
2 PLAINTIFFS HAD MEMBERS TRANSFERRED BY VIRTUE OF THE  
3 TRANSFER LETTERS REFERRED TO IN EXHIBIT 1808?

4 MR. RIVIN: AND THIS IS BASED ON THE COAST'S  
5 RECORDS.

6 MR. MOSHENKO: THE COAST RECORDS.

7 THE WITNESS: IT'S BASED ON THE 12/99 CD.

8 BY MR. MOSHENKO: Q THE DECEMBER, 1999, CD COAST  
9 PROVIDED US LISTING --

10 A YES.

11 Q -- THE NAMES OF THE MEMBERS THAT -- BEING  
12 TRANSFERRED?

13 A IT SHOWED THAT EACH PLAINTIFF HAD MEMBERS;  
14 WENT FROM A CURRENT -- WENT FROM -- THE ANSWER IS IT WENT  
15 FROM THE -- REFLECTS THAT MEMBERS WENT FROM WHAT'S KNOWN AS  
16 PRIOR PARK TO CURRENT PARK ON THE COAST CD.

17 Q AND THE PRIOR PARKS WERE PLAINTIFFS' PARKS;  
18 CORRECT?

19 A THAT IS CORRECT.

20 Q AND CURRENT PARKS -- YOU'RE FAMILIAR WITH  
21 THE NAMES AND IDENTIFICATIONS OF THE CURRENT PARKS?

22 A YES.

23 Q CURRENT PARKS WERE THE PARKS TO WHOM THEY  
24 WERE TRANSFERRED?

25 A THAT'S RIGHT.

26 Q TO WHICH THEY WERE TRANSFERRED?

1 A COAST AFFILIATES.

2 Q AND THOSE ARE NOT PLAINTIFFS' PARKS?

3 A THAT IS CORRECT.

4 Q ARE YOU, BASED ON YOUR EXPERIENCE WITH THE  
5 COAST SYSTEM AND THE RESORTS, MEMBER RESORT INDUSTRY OVER  
6 THE LAST 30 YEARS, FAMILIAR WITH COAST TO COAST RULES  
7 REGARDING TRANSFERS OF COAST TO COAST MEMBERSHIPS?

8 MR. RIVIN: YOUR HONOR, THIS IS INAPPROPRIATE FOR  
9 AN EXPERT OPINION. ALSO IT'S CUMULATIVE.

10 THE COURT: SUSTAINED.

11 BY MR. MOSHENKO: Q CAN A COAST TO COAST MEMBER  
12 TRANSFER HIS COAST TO COAST MEMBERSHIP --

13 MR. RIVIN: THE SAME OBJECTION.

14 BY MR. MOSHENKO: Q -- TO SOMEONE ELSE?

15 THE COURT: THE OBJECTION IS SUSTAINED.

16 BY MR. MOSHENKO: Q HAVE YOU DONE AN ANALYSIS --  
17 STRIKE THAT.

18 DID YOUR ANALYSIS OF THE MEMBER TRANSFERS  
19 FROM PARKS TO OTHER PARKS SHOW THAT LARGE BLOCKS OF  
20 PLAINTIFFS' MEMBERS WERE TRANSFERRED TO OTHER RESORTS IN A  
21 BLOCK MASS-TRANSFER FASHION?

22 MR. RIVIN: OBJECTION. THIS IS CUMULATIVE.

23 THE COURT: THE OBJECTION IS SUSTAINED.

24 BY MR. MOSHENKO: Q DID YOU DO AN ANALYSIS OF  
25 COAST TO COAST'S COMPUTER BATCH FILES, WHICH ARE ADMITTED  
26 INTO EVIDENCE AS EXHIBIT 2172?

1           A           I DID AN ANALYSIS OF THE COAST BATCH FILES,  
2 YES.

3           Q           LET ME SHOW YOU EXHIBIT 2172-A.  
4                        IS THIS A COPY OF THE ANALYSIS THAT YOU DID?

5           A           YES, IT IS.

6           Q           AND DID YOU PREPARE THIS FROM THE DATA WHICH  
7 IS IDENTIFIED AS EXHIBIT 2172-A, COAST TO COAST'S OWN  
8 FILES, SHOWING INFORMATION RELATING TO EACH OF THE  
9 PLAINTIFFS' RESORTS?

10          A           YES, THIS IS A COMPILATION OF THE  
11 INFORMATION THAT WAS PROVIDED BY COAST.

12          MR. MOSHENKO: OFFER EXHIBIT 2172-A INTO EVIDENCE,  
13 YOUR HONOR.

14          MR. RIVIN: I BELIEVE IT ALREADY IS.

15          THE CLERK: THE WHOLE EXHIBIT IS IN EVIDENCE.

16          MR. MOSHENKO: 2172 IS IN EVIDENCE. IS "A" IN  
17 EVIDENCE?

18          THE CLERK: I DON'T HAVE AN "A."

19          THE COURT: I'M TOLD THE WHOLE EXHIBIT IS IN. IF  
20 THERE'S A --

21          MR. MOSHENKO: 2172-A IS THE COMPILATION THAT WE  
22 DISCUSSED IN CHAMBERS A COUPLE WEEKS AGO WHEN YOUR HONOR  
23 INDICATED THAT IT WOULD GO IN WITH A FOUNDATION, AND HE IS  
24 HERE TO LAY THE FOUNDATION.

25          MR. RIVIN: THAT DISCUSSION WAS PRIOR TO THE  
26 BIFURCATION, YOUR HONOR, AND I BELIEVE THIS EXHIBIT IS NOT

1 RELEVANT AT THIS TIME IN THE CASE.

2 MR. MOSHENKO: YOUR HONOR, THIS IS NOT A DAMAGES  
3 DOCUMENT. THIS DOCUMENT DOES REFER TO THE NUMBER OF  
4 MEMBERS, THE NUMBER OF MEMBERS TRANSFERRED.

5 THE COURT: WHAT'S THE RELEVANCE?

6 MR. MOSHENKO: THIS DOCUMENT REFERS TO COAST'S OWN  
7 INTERIOR RECORDS TALKING ABOUT WHO WAS AFFILIATED, WHO  
8 DISAFFILIATED, WHY THERE WAS A DISAFFILIATION. IT GOES TO  
9 THE ISSUE OF COAST'S CONTENTION THAT ALL SEASONS RESORTS  
10 DISAFFILIATED, WHEN IT DIDN'T DISAFFILIATE. IT SHOWS A LOT  
11 OF PRE-ANY DAMAGE EVIDENCE.

12 THE COURT: IT IS IN EVIDENCE.

13 MR. MOSHENKO: THIS IS ADMITTED. ALL RIGHT.

14 THE COURT: IT HAS BEEN ADMITTED.

15 MR. RIVIN: IT WAS ADMITTED?

16 MR. MOSHENKO: VERY WELL. THANK YOU. I'LL GO ON.

17 Q MR. THOMPSON, HAVE YOU EVER HEARD THE TERM  
18 "ORPHAN MEMBERS"?

19 A YES.

20 Q WHAT DOES IT MEAN IN THE RESORT INDUSTRY?

21 A THE GENERAL CONNOTATION IS THAT IT'S A  
22 PERSON WHOSE HOME RESORT HAS CLOSED.

23 Q CLOSED?

24 A CLOSED, OUT OF BUSINESS.

25 Q WERE PLAINTIFFS' MEMBERS ORPHANED AS A  
26 RESULT OF THEIR WITHDRAWALS FROM CAMP COAST TO COAST?

1 MR. RIVIN: OBJECTION. THIS IS CUMULATIVE.  
2 IMPROPER.

3 MR. MOSHENKO: THIS MATTER HAS NEVER BEEN  
4 TESTIFIED, YOUR HONOR, AND THIS IS A CONTESTED ISSUE.

5 THE COURT: WE'VE HEARD THIS TESTIMONY.

6 MR. RIVIN: I WOULD ALSO OBJECT, YOUR HONOR, ON THE  
7 BASIS THAT WE DO NOT NEED FURTHER EXPERT OPINION ON THIS  
8 SUBJECT, ANY EXPERT --

9 THE COURT: THE OBJECTION IS SUSTAINED.

10 BY MR. MOSHENKO: Q IN YOUR 30 YEARS' EXPERIENCE  
11 IN THE INDUSTRY, HAS COAST TO COAST EVER SENT TRANSFER  
12 LETTERS TELLING ALLEGED ORPHAN MEMBERS THAT THEIR RESORTS  
13 WERE TRANSFERRED?

14 MR. RIVIN: OBJECTION. LACK OF FOUNDATION.  
15 INAPPROPRIATE FOR EXPERT OPINION TESTIMONY.

16 THE COURT: SUSTAINED.

17 BY MR. MOSHENKO: Q HAVE YOU EVER SEEN A LETTER  
18 PURPORTING TO TRANSFER A MEMBER WHERE COAST TO COAST WAS  
19 DOING THE TRANSFERRING?

20 MR. RIVIN: THE SAME OBJECTION.

21 BY MR. MOSHENKO: Q -- IN YOUR 30 YEARS OF  
22 EXPERIENCE?

23 MR. RIVIN: THE SAME OBJECTION.

24 THE COURT: THE OBJECTION IS SUSTAINED.

25 BY MR. MOSHENKO: Q WHAT HAPPENED TO THE MEMBERS  
26 OF -- I'M NOT TALKING ABOUT 1997.

1 WERE THERE INSTANCES PRIOR TO 1997 WHERE  
2 SOME OF MR. NOVELLI'S RESORTS CLOSED?

3 A PRIOR TO 1997?

4 Q YES.

5 A YES.

6 Q AND DID THE PROCEDURES IN PLACE AT THE  
7 NOVELLI ORGANIZATION INVOLVE INFORMING CAMP COAST TO COAST  
8 THAT THOSE RESORTS CLOSED?

9 A YES.

10 Q TO YOUR KNOWLEDGE HAS COAST TO COAST EVER  
11 SOUGHT TO TRANSFER THE MEMBERS OF MR. NOVELLI'S CLOSED  
12 RESORTS WHEN PREVIOUSLY NOTIFIED THAT THE NOVELLI RESORT  
13 CLOSED?

14 A SAY IT AGAIN.

15 Q I'LL ASK A DIFFERENT QUESTION.

16 WHEN MR. NOVELLI CLOSED ONE OF HIS RESORTS,  
17 DID HE THEN TRANSFER HIS MEMBERS TO A DIFFERENT RESORT?

18 A YES.

19 Q DID THE NOVELLI ORGANIZATION HAVE PROCEDURES  
20 IN PLACE TO NOTIFY CAMP COAST TO COAST THAT IT HAD CLOSED  
21 RESORTS?

22 A YES.

23 Q DID COAST TO COAST EVER DECLARE THE MEMBERS  
24 OF THE NOVELLI RESORTS THAT WERE BEING TRANSFERRED TO OTHER  
25 NOVELLI RESORTS TO BE ORPHANS AND SEND THEM TRANSFER  
26 LETTERS?

1           A           NOT TO MY KNOWLEDGE.

2           Q           HAS THE NOVELLI ORGANIZATION TO YOUR  
3 KNOWLEDGE EVER RECEIVED MEMBERS FROM A CLOSED RESORT WHICH  
4 MEMBERS WERE TRANSFERRED TO THE NOVELLI RESORTS BY COAST TO  
5 COAST?

6           A           I'M SORRY. SAY IT AGAIN.

7           Q           HAS THE NOVELLI RESORTS EVER RECEIVED  
8 MEMBERS THAT WERE TRANSFERRED TO IT BY COAST TO COAST FROM  
9 OTHER CLOSED RESORTS?

10          A           WERE TRANSFERRED?

11          Q           BY COAST TO COAST TO THE NOVELLI RESORTS.

12          A           I DON'T BELIEVE SO.

13          Q           WE'VE HAD SOME EVIDENCE PRESENTED BY, I  
14 BELIEVE, MR. EVERETT REGARDING A CLERBROOK RESORT LETTER,  
15 EXHIBIT 906. I WILL SHOW YOU 906.

16                       HAVE YOU SEEN THAT BEFORE?

17          A           YES.

18          Q           YOU WERE FAMILIAR WITH THE EVENTS OF OCTOBER  
19 OF 1993 RELATED TO CLERBROOK; IS THAT CORRECT?

20          A           YES.

21          Q           BY VIRTUE OF HAVING BEEN INVOLVED IN THE  
22 THINGS THAT HAPPENED RELATING TO IT BACK THEN; RIGHT?

23          A           YES.

24          Q           DOES THE EXHIBIT 906 -- IT'S IN EVIDENCE.  
25 COULD WE PUT IT UP ON THE SCREEN, PLEASE. AND COULD YOU  
26 PLEASE BLOW UP THE FIRST PARAGRAPH.

1 MR. THOMPSON, CAN YOU READ THAT?

2 A YES, TO A DEGREE.

3 Q ALL RIGHT. THIS INDICATES -- THIS IS  
4 REFERRING TO AN INCIDENT WHERE THE CLERBROOK RESORT WAS  
5 BEING WITHDRAWN FROM THE COAST TO COAST SYSTEM; IS THAT  
6 CORRECT?

7 A YES.

8 Q AND THIS INDICATES, "IN ORDER FOR THE  
9 MEMBERS OF CLERBROOK TO CONTINUE THEIR COAST TO COAST  
10 BENEFITS, IT WILL BE NECESSARY TO BECOME A FULL DUES-PAYING  
11 MEMBER OF ANOTHER COAST TO COAST AFFILIATED RESORT WITH  
12 FULL PRIVILEGES"?

13 A YES.

14 Q COULD WE GO TO THE NEXT PARAGRAPH.

15 THIS SAYS, "CLERBROOK HAS NOTIFIED MEMBERS  
16 THAT THEY HAVE MADE ARRANGEMENTS TO TRANSFER YOUR OLD  
17 MEMBERS TO ANOTHER RESORT, BUT MEMBERS MUST HAVE FULL  
18 MEMBERSHIP PRIVILEGES AND BE PAYING FULL MAINTENANCE FEES,  
19 COMPARABLE TO OTHER MEMBERS, AT WHATEVER HOME RESORT TO  
20 WHICH THEY TRANSFER.

21 "A TRANSFER ON PAPER ALONE IS UNFAIR TO  
22 RECIPROCATING RESORTS WHOSE MEMBERS ARE PAYING FEES."

23 DOES THIS ACCURATELY STATE THE POLICY OF THE  
24 INDUSTRY RELATING TO TRANSFERS OF MEMBERS TO NEW RESORTS IN  
25 THE EVENT OF A CLOSED RESORT --

26 A YES.

1 Q -- THAT WAS IN PLACE BACK THEN?

2 A YES.

3 MR. RIVIN: OBJECTION. LACK OF FOUNDATION.  
4 CUMULATIVE.

5 MR. MOSHENKO: HE WAS PARTICIPATING IN IT, YOUR  
6 HONOR, AND THIS MAN HAS BEEN IN THE INDUSTRY FOR 30 YEARS.  
7 AND HE KNOWS THIS INDUSTRY AS AN EXPERT. HE HAS BEEN A  
8 COAST TO COAST CONSULTANT.

9 MR. RIVIN: IT'S NOT ON MATTER ON WHICH WE NEED  
10 EXPERT TESTIMONY.

11 MR. MOSHENKO: UNLESS THE JURY UNDERSTANDS THE  
12 POLICY THAT WAS IN PLACE IN 1993, HOW CAN THE JURY MAKE THE  
13 DETERMINATION? THEY NEED EXPERT TESTIMONY ON THIS ISSUE.  
14 IT'S BEYOND THE SCOPE OF THE ORDINARY KNOWLEDGE OF THE  
15 JURY.

16 MR. RIVIN: YOUR HONOR, I OBJECT TO THE SPEAKING  
17 OBJECTION.

18 THE COURT: APPROACH.

19 MR. RIVIN: THANK YOU.

20 (DISCUSSION OFF THE RECORD.)

21 MR. RIVIN: YOUR HONOR, MAY WE HAVE THE ANSWER  
22 STRICKEN?

23 THE COURT: THE ANSWER IS STRICKEN.

24 MR. RIVIN: THANK YOU.

25 MR. MOSHENKO: ALL RIGHT. MR. DURAN, COULD WE SCAN  
26 DOWN ON THIS DOCUMENT. ACTUALLY GO TO THE FULL PAGE.

1           MR. RIVIN: YOUR HONOR, ON THE LAST OBJECTION I  
2 THINK THE RECORD DOES NOT REFLECT THAT THE OBJECTIONS WERE  
3 SUSTAINED.

4           THE COURT: I DID. I SAID I SUSTAINED THE  
5 OBJECTION.

6           MR. RIVIN: ALL RIGHT. THANK YOU.

7           BY MR. MOSHENKO: Q NOW, MR. THOMPSON, AT THE  
8 BOTTOM OF THIS PAGE THERE ARE THE NAMES OF SIX RESORTS.  
9 LET'S GO TO THE NEXT PAGE.

10                   AND IF MY COUNT IS RIGHT, THERE'S NINE MORE  
11 AT THE TOP OF THE NEXT PAGE.

12                   YOU WERE INVOLVED IN ALL SEASONS RESORTS AND  
13 SOME OF THESE ALL SEASONS -- SOME OF THE RESORTS ON THE  
14 LIST ARE ALL SEASONS RESORTS; CORRECT?

15           A        YES.

16           Q        AND WERE THOSE MEMBERS EVER PRESENTED TO ALL  
17 SEASONS RESORTS AS ORPHAN MEMBERS BY CAMP COAST TO COAST?

18           A        NOT TO MY KNOWLEDGE.

19           MR. RIVIN: OBJECTION. LACK OF FOUNDATION.

20           THE COURT: SUSTAINED.

21           MR. RIVIN: MOVE TO STRIKE THE ANSWER.

22           THE COURT: MOTION GRANTED.

23           BY MR. MOSHENKO: Q WHEN YOU WERE THERE, DID YOU  
24 RECEIVE, REVIEW LETTERS SUCH AS THIS TYPE OF LETTER?

25           A        YES.

26           Q        DID YOU HAVE COMMUNICATIONS WITH CAMP COAST

1 TO COAST PERSONNEL AS PART OF YOUR JOB DUTIES?

2 A YES.

3 Q DID CAMP COAST TO COAST EVER TELL YOU THAT  
4 THE NAMES OF THE MEMBERS OF THE CLERBROOK RESORT WERE  
5 ORPHAN MEMBERS BACK IN 1993?

6 A I DON'T RECALL SUCH A CONVERSATION, NO.

7 Q AND TO YOUR KNOWLEDGE HAVE THEY EVER BEEN --  
8 THE MEMBERS OF CLERBROOK EVER BEEN REFERRED TO AS "ORPHAN  
9 MEMBERS" PRIOR TO THIS CASE?

10 A NOT THAT I KNOW OF.

11 Q WHAT DOES THE TERM "ENHANCEMENT OF  
12 MEMBERSHIPS" MEAN IN THE INDUSTRY?

13 MR. RIVIN: OBJECTION. INAPPROPRIATE EXPERT  
14 OPINION.

15 THE COURT: SUSTAINED.

16 MR. RIVIN: AND CUMULATIVE.

17 THE COURT: CUMULATIVE.

18 BY MR. MOSHENKO: Q WHO IS DR. CALVIN BAILEY?

19 THE COURT: BIERLEY.

20 THE WITNESS: BIERLEY.

21 BY MR. MOSHENKO: Q BIERLEY I'M SORRY.

22 WHO IS DR. CALVIN BIERLEY?

23 A I DON'T KNOW HOW YOU DO THIS OTHER THAN TO  
24 POINT. IT'S THAT GENTLEMAN SITTING BACK THERE  
25 (INDICATING).

26 Q WHO IS HE?

1           A           HE IS A GENTLEMAN THAT I'VE KNOWN FOR -- I  
2 GUESS NOW ALMOST 20 YEARS. TIME GETS BY. BUT HE IS IN  
3 THIS CASE AN EXPERT WITNESS BECAUSE OF HIS YEARS IN THE  
4 INDUSTRY AND HIS EDUCATIONAL BACKGROUND.

5           Q           ALL RIGHT. DID YOU PROVIDE ANY INFORMATION  
6 OR DATA TO DR. BIERLEY FOR HIS USE IN PREPARING TO ACT AS  
7 AN EXPERT WITNESS?

8           A           YES.

9           Q           DID YOU PROVIDE HIM WITH A COPY OF THE 19 --  
10 DECEMBER, 1999, COAST TO COAST DISK?

11          A           YES. IF YOU RECALL, I OBTAINED THE ORIGINAL  
12 COPY FROM YOU, AND I SENT IT TO CAL.

13          Q           BEFORE SENDING IT, DID YOU MAKE COPIES OF IT  
14 FOR YOUR OWN USE?

15          A           YES.

16          Q           AND YOU SENT THE ORIGINAL TO DR. BIERLEY?

17          A           YES, THAT'S CORRECT.

18          Q           AND THEN TO YOUR KNOWLEDGE DID HE COPY IT  
19 AND GIVE IT BACK TO YOU OR SOMEONE IN YOUR COMPANY?

20          A           I BELIEVE THAT HE GAVE -- I BELIEVE HE  
21 ACTUALLY SENT IT BACK DIRECTLY TO YOUR FIRM.

22          Q           NOW, DID YOU THEN RECEIVE THE SAME DISK BACK  
23 FROM ME FROM A MEMBER OF MY STAFF?

24          A           YES.

25          Q           DID YOU CHECK THAT DISK TO SEE IF IT WAS  
26 RETURNED WITHOUT CHANGE OR ALTERATION?

1           A           YES. I CHECKED IT, BUT IT'S IMPOSSIBLE TO  
2 ALTER. IT'S A NON-REWRITABLE CD.

3           Q           WHAT'S THAT MEAN, IT'S NOT A REWRITABLE CD?

4           A           WE HAVE TWO KINDS OF CD'S, ONE THAT YOU CAN  
5 REWRITE AND ONE YOU CAN'T. THE COMMON TERM IS YOU BURN THE  
6 CD. SO YOU TAKE THE INFORMATION AND YOU BURN IT ON A CD  
7 DISK. AND IT'S INGRAINED IN THERE. AND IF IT'S NOT  
8 REWRITABLE, YOU CAN'T WRITE OVER IT. YOU CAN USE THE  
9 INFORMATION ON IT WHEN YOU PULL IT UP. YOU CAN TRANSFER IT  
10 INTO YOUR OWN COMPUTER.

11                       AND -- BUT ONCE YOU EJECT THE DISK, ALL  
12 INFORMATION GOES BACK TO ITS ORIGINAL PLACE ON THE DISK.  
13 IT CAN'T BE CHANGED, TO MY KNOWLEDGE.

14           Q           ALL RIGHT. SO THE DATA ON THE DISK COULD  
15 NOT BE CHANGED OR MUTILATED?

16           A           IT COULD BE MUTILATED. IT WOULDN'T BE  
17 READABLE ANYMORE. YOU DROP A DISK, YOU'RE LIKELY NOT TO  
18 READ IT AGAIN.

19           Q           DID YOU AT MY REQUEST -- THIS IS THE ACTUAL  
20 DISK THAT MAKES UP EXHIBIT -- THAT HOLDS THE DATA IN  
21 EXHIBIT 1808, WHICH IS IN EVIDENCE.

22                       DID YOU AT MY REQUEST GO TO THE DISK, OPEN  
23 IT, TO DETERMINE IF THERE HAD BEEN ANY MUTILATIONS TO ITS  
24 CONTENT?

25           A           YES, I DID.

26           Q           AND DID YOU DETERMINE WHETHER OR NOT THERE

1 WERE ANY CHANGES OR MUTILATIONS?

2 A IT OPENED JUST FINE.

3 Q YOU DID THAT WHEN?

4 A I DID THAT THIS MORNING.

5 Q WERE YOU ALSO ASKED BY DR. BIERLEY TO GO TO  
6 THE DATABASE FOR TRAVEL AMERICA TO IDENTIFY THE NAMES AND  
7 MATCH THE NAMES OF 1500 CAMP COAST TO COAST MEMBERS TO THE  
8 PLAINTIFFS' MEMBER NUMBERS?

9 MR. RIVIN: YOUR HONOR, OBJECT. THIS QUESTION IS  
10 IRRELEVANT OR CALLS FOR IRRELEVANT TESTIMONY BASED ON THE  
11 COURT'S BIFURCATION ORDER. THIS IS ALL RELATES TO DAMAGES.

12 MR. MOSHENKO: MAY I APPROACH, YOUR HONOR?  
13 OTHERWISE, WE HAVE A BIG SPEAKING --

14 THE COURT: YES.

15 (DISCUSSION OFF THE RECORD.)

16 MR. RIVIN: YOUR HONOR, MAY WE GET THE OBJECTION  
17 SUSTAINED ON THE RECORD?

18 THE COURT: THE OBJECTION IS SUSTAINED.

19 MR. RIVIN: THANK YOU.

20 BY MR. MOSHENKO: Q WHAT OTHER DOCUMENTS OR DATA  
21 DID YOU PROVIDE TO DR. BIERLEY?

22 A WELL, FIRST OF ALL, THE -- EVERYTHING THAT  
23 WAS IN THE OFFICES WAS MADE AVAILABLE. THE PLAINTIFFS'  
24 OFFICES HAS A LARGE BOARD ROOM, CONFERENCE ROOM TYPE  
25 SITUATION. AND THEN IN THE HALLWAYS IT HAS FILING  
26 CABINETS. AND THIS CASE HAS SORT OF GOTTEN LARGE, AND

1 INFORMATION IS STACKED NEATLY BUT, NONETHELESS, STACKED IN  
2 THE CONFERENCE ROOM, THE BOARD ROOM, ET CETERA, DOWN THE  
3 HALLWAYS AND ET CETERA.

4 AND THEN IT HAS TOPICS PUT ON TOP OF IT. SO  
5 ALL THAT INFORMATION WAS MADE AVAILABLE. WHATEVER YOU  
6 WANTED YOU COULD PICK UP. IT WAS ALSO GIVEN, OR SPECIFIC  
7 TERMS, INFORMATION REGARDING REVERSAL OF MEMBERS,  
8 BANKRUPTCY CASES AND INFORMATION. "NEW MEMBERS GAINED" IS  
9 THE TITLE, ONE OF THE DISKS THAT WAS -- OR THE INFORMATION  
10 THAT WAS GIVEN. AND, IN GENERAL, ALL OF THE INFORMATION  
11 THAT HE REQUESTED OF ME I TRIED TO PROVIDE.

12 Q DID YOU PROVIDE HIM COPIES OF THE COAST TO  
13 COAST LETTERS TRANSFERRING MEMBERS?

14 A YES, I BELIEVE THAT WAS IN -- A PART OF IT,  
15 YES.

16 Q DID YOU PROVIDE HIM WITH COPIES OF MEMBER  
17 LETTERS RESPONDING TO THE TRANSFERS?

18 A YES.

19 Q DID YOU PROVIDE HIM WITH COPIES OF LETTERS  
20 FROM OTHER DEVELOPERS OF OTHER RESORTS TO THE PLAINTIFFS'  
21 MEMBERS REFERRING TO AND FOLLOWING UP ON THE TRANSFER BY  
22 CAMP COAST TO COAST?

23 MR. RIVIN: YOUR HONOR, FOR THE REASONS WE  
24 DISCUSSED AT THE SIDEBAR, I BELIEVE THIS IS IRRELEVANT.

25 MR. MOSHENKO: THIS IS DEFINITELY CAUSATION. THIS  
26 IS WHAT DATA, WHAT DOCUMENTS ARE THERE TO SHOW AND PROVE

1 CAUSATION OF TRANSFERS. THEY PUT UP CAUSATION AFTER  
2 CAUSATION AFTER CAUSATION LETTER, AND THIS IS MORE  
3 CAUSATION LETTERS.

4 MR. RIVIN: HIS TESTIMONY RELATES TO WHAT THE  
5 WITNESS PROVIDED TO CALVIN BIERLEY.

6 MR. MOSHENKO: EXACTLY.

7 MR. RIVIN: AND A DETERMINATION NEEDS TO BE MADE AS  
8 TO WHETHER CALVIN BIERLEY'S TESTIMONY IS AT ALL RELEVANT TO  
9 CAUSATION.

10 THE COURT: ACCORDING TO OUR DISCUSSION AT THE  
11 BENCH, WE'LL HANDLE IT THAT WAY.

12 MR. MOSHENKO: VERY WELL.

13 MR. RIVIN: THANK YOU.

14 BY MR. MOSHENKO: Q I WANT TO ASK YOU SOME  
15 QUESTIONS, MR. THOMPSON, ABOUT PROTECTIONS OF DATA RELATING  
16 TO THE PLAINTIFFS' MEMBERS; NAMES, ADDRESSES, PHONE NUMBERS  
17 AND THE LIKE.

18 DO YOU KNOW WHAT I'M TALKING ABOUT?

19 A I DO.

20 Q IN YOUR EXPERIENCE OVER THE YEARS, HAVE  
21 THERE BEEN RULES AND POLICIES IN PLACE AT THE NOVELLI  
22 RESORTS WHICH WERE MADE FOR THE PURPOSE OF PROTECTING AND  
23 PRESERVING THE CONFIDENTIALITY OF THE PLAINTIFFS' MEMBERS  
24 DATA?

25 A YES, IT IS. THE NUMBER ONE PRIORITY WAS TO  
26 PROTECT YOUR CUSTOMER LIST. IT'S IN THE NEW EMPLOYEE

1 PACKET THAT THE LISTS ARE CONFIDENTIAL AND PROPRIETARY.  
2 IT -- THE ONLY PERSON OVER THE YEARS THAT HANDLED THAT TYPE  
3 OF INFORMATION, WHAT YOU'D CALL FROM BEGINNING TO END, WAS  
4 THE M.I.S., OR THE COMPUTER DEPARTMENT, BECAUSE THEY HAD TO  
5 HAVE IT. AND THEY HAD ACCESS TO IT. AND ANY TYPE OF  
6 INFORMATION THAT WAS RELEASED ALWAYS REQUIRED MR. NOVELLI'S  
7 APPROVAL FOR IT TO GET OUT OF THAT BUILDING.

8 Q ALL RIGHT. AND SO ACCESS WAS RESTRICTED AND  
9 LIMITED TO EVEN YOUR OWN EMPLOYEES?

10 A YES. I COULDN'T ACCESS IT.

11 Q WHAT DIRECTIVES OR DIRECTIONS WERE GIVEN TO  
12 EMPLOYEES ABOUT RELEASING THE DATA TO OUTSIDERS, IF ANY?

13 MR. RIVIN: LACK OF FOUNDATION AS TO TIME. CALLS  
14 FOR HEARSAY. ALSO SECONDARY EVIDENCE RULE.

15 BY MR. MOSHENKO: Q WELL, AT THE TIME. GIVE US A  
16 TIME.

17 A FROM THE DAY THAT -- NOT ONLY IN HIS  
18 COMPANIES, BUT ALL THE COMPANIES THAT I'VE WORKED WITH. SO  
19 FROM THE TIME I BEGAN.

20 Q OKAY. SO STAYING WITH MR. NOVELLI'S  
21 COMPANIES, WERE DIRECTIVES AND DISTRIBUTIONS GIVEN TO  
22 EMPLOYEES ABOUT RELEASING THE DATA TO OUTSIDERS?

23 A YES.

24 MR. RIVIN: OBJECTION. CALLS FOR HEARSAY.

25 THE COURT: SUSTAINED.

26 MR. RIVIN: MOVE TO STRIKE THE ANSWER, YOUR HONOR.

1 THE COURT: MOTION IS GRANTED.

2 BY MR. MOSHENKO: Q WERE YOU AWARE OF ANY OTHER  
3 EFFORTS TO PROTECT THE -- AND PRESERVE THE CONFIDENTIALITY  
4 OF THE DATA TAKEN OUTSIDE OF YOUR ORGANIZATION WITH THIRD  
5 PARTIES?

6 MR. RIVIN: OBJECTION. CALLS FOR HEARSAY.

7 MR. MOSHENKO: IT'S -- I ASKED HIM IF HE IS AWARE  
8 OF EFFORTS, YOUR HONOR. HE HASN'T GIVEN US ANY STATEMENTS  
9 AT ALL.

10 THE COURT: I'LL ALLOW IT.

11 YOU MAY ANSWER YES OR NO.

12 THE WITNESS: YES.

13 BY MR. MOSHENKO: Q OKAY. THERE'S A LETTER IN  
14 EVIDENCE CALLED "THE KENNEDY LETTER," FROM PAT KENNEDY TO  
15 CAMP COAST TO COAST.

16 THAT LETTER TALKS ABOUT PROTECTION OF THE  
17 DATA; YOU'RE AWARE OF THAT?

18 A YES.

19 MR. RIVIN: OBJECTION. THE DOCUMENT SPEAKS FOR  
20 ITSELF. THIS IS JUST ARGUMENT.

21 THE COURT: OBJECTION IS SUSTAINED.

22 BY MR. MOSHENKO: Q ARE YOU AWARE OF THE KENNEDY  
23 LETTER AND ITS CONTENTS?

24 AND IT SPEAKS FOR ITSELF, I AGREE.

25 A I HAVE SEEN THE KENNEDY LETTER.

26 Q OKAY. YOU'RE AWARE OF THE DIAMOND LETTER,

1 THE LETTER BY ATTORNEY DIAMOND, REGARDING JIM JOSEPH --

2 MR. RIVIN: YOUR HONOR, OBJECTION. THIS IS JUST  
3 ARGUMENT. THE DOCUMENTS ARE IN EVIDENCE. THEY SPEAK FOR  
4 THEMSELVES. IT INAPPROPRIATE TO BE ASKING THE WITNESS  
5 THESE QUESTIONS.

6 THE COURT: THE OBJECTION IS SUSTAINED.

7 MR. RIVIN: AND I BELIEVE THAT THERE WAS AN ANSWER  
8 GIVEN BY THE WITNESS TO THE PRIOR QUESTION.

9 THE COURT: STRICKEN.

10 MR. RIVIN: I WOULD ASK IT BE STRICKEN.

11 BY MR. MOSHENKO: Q MR. THOMPSON, THE DIAMOND  
12 LETTER REFERS TO A DEMAND BY MR. NOVELLI THAT USE OF MEMBER  
13 LISTS NOT BE MADE FOR MARKETING PURPOSES.

14 WERE YOU PRESENT AT THE TIME WHEN  
15 MR. NOVELLI WAS MAKING THOSE DEMANDS OF CAMP COAST TO  
16 COAST? I DON'T MEAN PHYSICALLY PRESENT IN THE ROOM, BUT, I  
17 MEAN, WERE THERE WORKING AT ALL SEASONS RESORTS WHEN  
18 MR. NOVELLI WAS DEMANDING COAST TO COAST PREVENT THE USE OF  
19 HIS MEMBER LISTS FOR MARKETING?

20 MR. RIVIN: OBJECTION. THE QUESTION IS  
21 ARGUMENTATIVE. LACKS FOUNDATION. AND THE DOCUMENT --

22 THE COURT: I WILL ALLOW THE ANSWER.

23 THE WITNESS: YES.

24 BY MR. MOSHENKO: Q AND YOU'RE -- DID THE  
25 DEFENDANTS, ANYONE FROM CAMP COAST TO COAST, TO YOUR  
26 PERSONAL KNOWLEDGE AGREE THAT THEY WOULD RESTRICT THE USE

1 OF THE PLAINTIFFS' MEMBER INFORMATION IN MARKETING THE  
2 PRODUCT?

3 MR. RIVIN: OBJECTION. PAROL EVIDENCE, YOUR  
4 HONOR. THE COURT HAS RULED ON THIS.

5 THE COURT: THE OBJECTION IS SUSTAINED.

6 BY MR. MOSHENKO: Q ARE YOU AWARE OF ANY OTHER --  
7 STRIKE THAT.

8 YOU ALSO INCLUDED A DEMAND THAT THE DATA NOT  
9 BE MISUSED IN THE APRIL 27TH, 1999, LETTER; CORRECT?

10 A THAT WAS INCLUDED IN THE LETTER.

11 MR. RIVIN: OBJECTION. LACK OF FOUNDATION.

12 THE COURT: OBJECTION IS SUSTAINED. MOTION TO  
13 STRIKE IS GRANTED.

14 MR. MOSHENKO: THE FOUNDATION IS THE LETTER. WE  
15 CAN PUT IT UP. LET'S PUT IT UP, THE AUGUST 27TH LETTER,  
16 DISAFFILIATION LETTER.

17 CAN YOU BLOW UP THIS PARAGRAPH HERE?

18 Q THIS SAYS FIRST NATIONWIDE CONSIDERS THESE  
19 MEMBERS ENROLLED IN THE RECIPROCAL PROGRAM TO BE  
20 PROPRIETARY. COAST IS PUT ON NOTICE THAT ANY ATTEMPT TO  
21 TRANSFER OR DISTRIBUTE THE LIST OF MEMBERS TO ANY OTHER  
22 CAMP RESORT OR BUSINESS, OR OTHERWISE VIOLATE THE  
23 CONFIDENTIALITY OF FIRST NATIONWIDE RESORTS MANAGEMENT  
24 MEMBERSHIP LIST WILL BE CONSIDERED TO BE A SERIOUS  
25 INTERFERENCE WITH FIRST NATIONWIDE RESORTS' ABILITY TO  
26 CONDUCT ITS BUSINESS.

1                   YOU WROTE THAT?

2           A           YES. I WROTE PART OF IT.

3           Q           AND DID YOU WRITE THAT FOR THE PURPOSE OF  
4 ATTEMPTING TO PRESERVE AND PROTECT THE CONFIDENTIALITY OF  
5 THE DATA RELATING TO THE PLAINTIFFS' MEMBERS?

6           MR. RIVIN: OBJECTION. IRRELEVANT.

7           MR. MOSHENKO: RELEVANCE?

8           MR. RIVIN: WHAT THIS WITNESS'S PURPOSE WAS IN  
9 WRITING THAT.

10          THE COURT: OVERRULED.

11          THE WITNESS: THE PURPOSE WAS TO INSURE --

12          THE COURT: IT'S IN EVIDENCE, ISN'T IT?

13          MR. RIVIN: YES.

14          THE COURT: IT SPEAKS FOR ITSELF.

15          THE WITNESS: YES.

16          MR. MOSHENKO: ALTHOUGH, THE DRAFTER CAN STATE HIS  
17 PURPOSE, YOUR HONOR, I BELIEVE. I KNOW IT SPEAKS FOR  
18 ITSELF, BUT THIS IS A BEHIND-THE-WORDS PURPOSE QUESTION,  
19 BECAUSE THAT'S WHAT THE LAW REQUIRES US TO PROVE, THAT WE  
20 ACTED WITH THAT PURPOSE.

21          THE COURT: WE'RE BECOMING CUMULATIVE HERE ALSO.

22          BY MR. MOSHENKO: Q SO THE PURPOSE TO PROTECT AND  
23 PRESERVE THE CONFIDENTIALITY?

24          A           THAT WAS THE PURPOSE OF THAT PARAGRAPH.

25          Q           AND, IN ADDITION, HAVE YOU BEEN PRIMARILY  
26 RESPONSIBLE FOR AT LEAST PREPARING AND PRESENTING A LOT OF

1 PROPRIETARY DATA TO THE DEFENDANTS IN THIS CASE WHEN  
2 DEMANDS FOR PRODUCTION OF DOCUMENTS WERE MADE?

3 A I HAVE RESPONDED TO ALL THE REQUESTS THAT  
4 HAS BEEN MADE, THAT I KNOW OF.

5 Q AND YOU'RE AWARE THAT PLAINTIFFS DEMANDED  
6 AND THE COURT ORDERED CONFIDENTIALITY RELATING TO THE  
7 DOCUMENTS PRODUCED; CORRECT?

8 A I THINK I HEARD THAT, YES. BUT I'M NOT  
9 SPECIFICALLY --

10 Q AND YOU HAVE PRINTED ON THE DOCUMENTS THAT  
11 WERE PREPARED FOR PRODUCTION IN THIS CASE THE TERM  
12 "CONFIDENTIAL" OVER AND OVER AND OVER AGAIN, HAVEN'T YOU?

13 MR. RIVIN: YOUR HONOR, THIS IS IRRELEVANT.

14 THE COURT: SUSTAINED.

15 MR. MOSHENKO: PURPOSE -- THE PURPOSES OF  
16 PRESERVING AND PROTECTING.

17 MR. RIVIN: WHETHER SOMETHING IS STAMPED  
18 "CONFIDENTIAL" DURING LITIGATION IS REALLY IRRELEVANT TO  
19 THE ISSUES BEFORE THE JURY.

20 THE COURT: IT IS. OBJECTION IS SUSTAINED.

21 MR. RIVIN: THANK YOU.

22 MR. MOSHENKO: I HAVE NO FURTHER QUESTIONS.

23 THE COURT: OKAY.

24 CROSS-EXAMINATION

25 BY MR. RIVIN: Q MR. THOMPSON, GOOD MORNING.

26 A GOOD MORNING.

1 Q YOU'VE BEEN AN OFFICER OF SOME OF  
2 MR. NOVELLI'S COMPANIES?

3 A YES, SIR, I HAVE.

4 Q APPROXIMATELY HOW MANY OF HIS COMPANIES HAVE  
5 YOU BEEN AN OFFICER OF?

6 A I'M NOT SURE, MR. RIVIN. BUT I THINK --  
7 LET'S SEE. THERE WAS CUTTY'S, DELTA ISLE, AND MAYBE SOME  
8 OTHERS.

9 Q ARE YOU STILL AN OFFICER OF -- OF SOME OF  
10 THESE COMPANIES?

11 A NO.

12 Q WHEN DID YOU CEASE BEING AN OFFICER OF ANY  
13 OF THE NOVELLI COMPANIES?

14 A I THINK THE LAST TIME WOULD HAVE BEEN APRIL  
15 OF '-- APRIL OR MAY OF '98. '98.

16 Q ARE YOU ON THE BOARD OF DIRECTORS OF ANY OF  
17 THE NOVELLI COMPANIES?

18 A YES. I'M ON THE BOARD OF DIRECTORS OF THE  
19 CUTTY'S DES MOINES CAMPING CLUB.

20 Q CUTTY'S DES MOINES?

21 A CAMPING CLUB.

22 Q YOU WERE EMPLOYED BY THE NOVELLI COMPANIES  
23 UP UNTIL 1996; ISN'T THAT RIGHT?

24 A THAT'S CORRECT. FROM -- I NEED TO QUALIFY  
25 THAT. FROM ABOUT 1986 THROUGH ABOUT 1996.

26 Q AND YOU WERE ACTUALLY AN EMPLOYEE FOR MOST

1 OF THOSE YEARS?

2 A MOST OF THE YEARS, YES.

3 Q AND THROUGH 1996 YOU'RE ACTUALLY AN  
4 EMPLOYEE?

5 A IN '96 I BELIEVE I WAS AN EMPLOYEE.

6 Q BUT YOU QUIT IN 1996?

7 A THAT'S CORRECT.

8 Q THIS WAS AFTER THE PRESIDENTIAL AIR FAILED,  
9 THE FAILURE OF PRESIDENTIAL AIR?

10 A I DON'T KNOW, AGAIN, WHETHER IT WAS --  
11 FRANKLY, I DON'T KNOW THE TIME FRAME. BUT IT WAS ABOUT  
12 THAT TIME.

13 Q YOU WERE INVOLVED IN PRESIDENTIAL AIR?

14 A YES.

15 MR. MOSHENKO: OBJECTION, YOUR HONOR. BEYOND THE  
16 SCOPE. IT'S IRRELEVANT.

17 THE COURT: SUSTAINED.

18 MR. RIVIN: YOUR HONOR, IT GOES TO THE ISSUE OF  
19 THE WITNESS'S RELATIONSHIP WITH THE PLAINTIFFS, WHICH IS A  
20 CREDIBILITY ISSUE, AND THAT CAN GO, AS LONG AS THE QUESTION  
21 IS RELEVANT.

22 THE COURT: I'LL ALLOW IT FOR THAT PURPOSE.

23 MR. RIVIN: THANK YOU.

24 Q YOU WERE THE CEO, THE CHIEF OPERATING  
25 OFFICER, OF PRESIDENTIAL TOURS?

26 A THAT WOULD HAVE BEEN, YES.

1 Q AND THAT WAS ANOTHER NOVELLI COMPANY?

2 A I DON'T KNOW WHO ALL -- YOU KNOW, WHO THE --  
3 WHO IT WAS MADE UP OF. I WOULD SAY YES.

4 Q AND PRESIDENTIAL TOURS WAS PROVIDING THE  
5 MARKETING SERVICES TO PRESIDENTIAL AIR?

6 A YES.

7 Q SO YOU WERE IN CHARGE OF THOSE MARKETING  
8 SERVICES AS THE CEO OF PRESIDENTIAL TOURS; IS THAT RIGHT?

9 A TO A GREATER OR LESSER DEGREE, YES.

10 Q AND YOU THOUGHT PRESIDENTIAL AIR WAS GOING  
11 TO BECOME AN INTERNATIONAL AIRLINE?

12 A NO, I DON'T THINK I THOUGHT OF IT THAT WAY,  
13 AS BEING AN INTERNATIONAL AIRLINE.

14 MR. MOSHENKO: CAN YOU KEEP YOUR VOICE UP.

15 THE WITNESS: I'M SORRY.

16 NO, I DON'T THINK I THOUGHT OF IT AS AN  
17 INTERNATIONAL AIRLINE, IN THOSE TERMS.

18 BY MR. RIVIN: Q THAT COMPANY FAILED WITHIN ABOUT  
19 A YEAR, YEAR AND A HALF, AFTER IT STARTED UP OPERATIONS?

20 A I BELIEVE IT BEGAN IN '95 AND ENDED IN '96,  
21 BUT THE EXACT TIME FRAME --

22 Q WHEN YOU LEFT THE NOVELLI ORGANIZATION IN  
23 1996, YOU WERE FED UP WITH THE ORGANIZATION; ISN'T THAT  
24 TRUE?

25 A I DON'T KNOW IF I'D USE THE WORD "FED UP,"  
26 BUT I WAS NOT HAPPY.

1 Q AND YOU WERE NOT HAPPY IN PART BECAUSE THERE  
2 WERE LARGE TAX LIABILITIES OUT THERE?

3 A I WASN'T HAPPY MORE ABOUT MY OWN PERSONAL  
4 SITUATION THAN I WAS ANYTHING ELSE.

5 Q YOU WERE UNHAPPY ABOUT YOUR OWN PERSONAL  
6 SITUATION?

7 A IN OTHER WORDS, MY RELATIONSHIP AT THAT  
8 TIME.

9 Q WITHIN THE NOVELLI ORGANIZATIONS?

10 A RIGHT.

11 Q HOW WOULD YOU DESCRIBE YOUR PERSONAL  
12 SITUATION WITH THE NOVELLI ORGANIZATIONS AT THAT TIME?

13 A PERSONALLY I JUST FELT LIKE THAT I WASN'T  
14 EITHER CONTRIBUTING TO THE ORGANIZATION OR THE ORGANIZATION  
15 WASN'T CONTRIBUTING TO ME. IT SEEMED LIKE THE TIME TO  
16 LEAVE.

17 Q AND YOU WERE CONCERNED -- YOU WERE CONCERNED  
18 ABOUT THE TAX LIABILITIES THAT WERE BEING RACKED UP BY THE  
19 ORGANIZATION?

20 A I'M CONCERNED ABOUT ANYTHING THAT ISN'T  
21 COMPLETED.

22 Q AND YOU WERE CONCERNED ABOUT THAT --

23 A YES.

24 Q -- AT THE TIME YOU LEFT; ISN'T THAT RIGHT?

25 A THAT WAS ONE CONCERN.

26 Q WHAT WERE THE OTHER CONCERNS?

1           A           AS I SAY, JUST IN GENERAL, I FELT LIKE THAT  
2 THE THINGS WEREN'T GOING THE WAY THAT I NEEDED THEM TO GO  
3 TO REMAIN EMPLOYED THERE AT THAT TIME.

4           Q           WELL, YOU WERE UNHAPPY WITH THE WAY THE  
5 ORGANIZATION WAS BEING RUN; ISN'T THAT CORRECT?

6           A           IN RELATIONSHIP TO ME.

7           Q           WHAT SPECIFIC THINGS ABOUT THE ORGANIZATION  
8 CONCERNED YOU AND CAUSED YOU TO LEAVE?

9           A           AGAIN, IT'S DIFFICULT FOR ME TO REMEMBER  
10 THOSE, TO TRY TO PUT MY NEGATIVE THOUGHTS BEHIND ME; BUT IN  
11 GENERAL, I JUST FELT LIKE THAT I WASN'T FUNCTIONING AS I  
12 WOULD LIKE TO FUNCTION IN THAT ORGANIZATION.

13          Q           WHEN YOU LEFT MR. NOVELLI'S EMPLOYMENT IN  
14 1996, OR THE COMPANY'S EMPLOYMENT IN 1996, THEY WERE IN  
15 FINANCIAL TROUBLE; ISN'T THAT CORRECT?

16          A           YES.

17          Q           THERE WAS NO FEDERAL COURT RECEIVER YET IN  
18 PLACE OVER ALL SEASONS; ISN'T THAT RIGHT?

19          A           IN 1996? NO.

20          Q           IS THAT CORRECT?

21          A           THAT'S CORRECT.

22          Q           THE NOVELLI ORGANIZATION WAS EXPERIENCING  
23 SIGNIFICANT PROBLEMS PAYING SALARIES AND OTHER BILLS?

24          A           AGAIN, YOU'D HAVE TO GET SOMEONE ELSE TO  
25 DECIDE WHETHER SIGNIFICANT OR NOT. THERE WERE PROBLEMS.  
26 YOU DEAL WITH BANKRUPT COMPANIES, YOU HAVE PROBLEMS.

1 Q WHEN YOU LEFT THE EMPLOY, THE PLAINTIFFS'  
2 EMPLOY, IN 1996, YOU LEFT AND GAVE MR. NOVELLI A LETTER  
3 STATING THE REASONS WHY YOU WERE LEAVING?

4 A YES.

5 Q AND IT LAID OUT THE UNHAPPINESS THAT YOU  
6 WERE EXPERIENCING OR FEELING WITH THE ORGANIZATION?

7 A AS WE DISCUSSED, YOU KNOW, BEFORE, IT DID.  
8 BUT I DON'T REMEMBER THE EXACT CONTENT OF WHAT I SAID. BUT  
9 I SAID GOOD-BYE.

10 Q WHEN YOU LEFT, YOU HAD NOT RECEIVED ALL OF  
11 THE COMMISSION PAYMENTS THAT YOU WERE OWED FOR PRESIDENT'S  
12 TRAVEL CLUB?

13 A THAT'S CORRECT.

14 Q WAS THAT ONE OF THE REASONS YOU LEFT?

15 A THAT WOULD BE A PARTIAL REASON, YES.

16 Q YOU WERE OWED PERHAPS \$40- OR \$50,000 THAT  
17 YOU HAD NOT BEEN PAID?

18 A YES.

19 Q THAT WAS PAST DUE?

20 A WELL, THAT I CONSIDERED TO BE PAST DUE, YES.

21 Q NOW, ABOUT ONE YEAR LATER YOU REJOINED THE  
22 NOVELLI ORGANIZATION?

23 A NOT EXACTLY. I WENT TO TEXAS, AND THEN  
24 THROUGH A PROCESS FROM APRIL OF '98 --

25 Q '97?

26 A RIGHT. I THINK I GOT MY YEARS WRONG A FEW

1 MINUTES AGO, TOO. BUT FROM APRIL WHEN WE WENT DOWN TO  
2 TEXAS AND MET WITH THE LENDERS OF THOUSAND ADVENTURES, FROM  
3 THAT POINT ON I BEGAN TO COME BACK INTO THE ORGANIZATION.  
4 I THINK I FORMALLY WENT ON THE PAYROLL EITHER AUGUST OR  
5 SEPTEMBER.

6 Q OF 1997?

7 A OF '97. RIGHT.

8 Q YOU ACTUALLY BECAME AN OFFICER OF TRAVEL  
9 AMERICA?

10 A YES, I DID.

11 Q YOU WERE VICE PRESIDENT, A VICE PRESIDENT OF  
12 THE COMPANY?

13 A YES, I WAS.

14 Q AND THEN A FEW MONTHS LATER -- WELL, LET'S  
15 GO BACK.

16 THE -- YOU BECAME A VICE PRESIDENT IN THE  
17 SUMMER OF 1997; ISN'T THAT CORRECT?

18 A WELL, EITHER AUGUST OR SEPTEMBER. I THINK  
19 IT WAS SEPTEMBER SOMETHING. BUT THE LATTER PART OF AUGUST,  
20 EARLY PART OF SEPTEMBER. I THINK. AGAIN --

21 Q YOU THEN QUIT YOUR POSITION, YOUR  
22 EMPLOYMENT, WITH THE COMPANY AGAIN IN APRIL 1998?

23 A THAT'S CORRECT.

24 Q WHILE YOU WERE EMPLOYED BY TRAVEL AMERICA,  
25 YOU WERE BEING PAID APPROXIMATELY \$6,000 PER MONTH BY THE  
26 NOVELLI COMPANIES; IS THAT RIGHT?

1 A I THINK IT WAS \$72,000, I THINK ANNUALLY.

2 Q A YEAR?

3 A I BELIEVE IT WAS ABOUT 6,000.

4 Q ABOUT 6,000.

5 NOW, WHEN YOU QUIT, YOU QUIT AS AN EMPLOYEE,

6 AND YOU BECAME AN INDEPENDENT CONTRACTOR; IS THAT RIGHT?

7 A YES.

8 Q WITH THE NOVELLI ORGANIZATION?

9 A YES.

10 Q YOU DID NOT WANT TO BE CONSIDERED AN

11 EMPLOYEE OF THE COMPANIES ANY LONGER?

12 A I WANTED MORE FREEDOM.

13 Q AND YOU DID NOT WANT TO BE CONSIDERED AN

14 EMPLOYEE -- YOU WANTED TO BE AN INDEPENDENT CONTRACTOR?

15 A I WANTED TO BE AN INDEPENDENT CONTRACTOR,

16 YES.

17 Q AS AN INDEPENDENT CONTRACTOR FOR THE NOVELLI

18 ORGANIZATIONS IN 1998 THROUGH THE PRESENT TIME, YOU'VE BEEN

19 PAID ABOUT \$1500 A WEEK?

20 A EITHER MYSELF OR THE COMPANIES I WORK WITH,

21 YES. BUT EITHER DIRECTLY OR INDIRECTLY, YES.

22 Q WHAT WOULD COME TO ABOUT 6,000 A MONTH?

23 A I THINK IT'S A LITTLE LESS NOW, ABOUT 60,000

24 A YEAR I THINK ON AN AVERAGE. BUT IN THE SAME BALLPARK.

25 Q YOU'VE BEEN SPENDING A SIGNIFICANT AMOUNT OF

26 TIME EACH WEEK ON DIFFERENT CONSULTING PROJECTS FOR THE

1 NOVELLI ORGANIZATION?

2 A YES, I HAVE.

3 Q OVER THE PAST TWO OR THREE YEARS?

4 A YES.

5 Q WEEK IN AND WEEK OUT?

6 A MOSTLY, YES.

7 Q AND, IN FACT, ISN'T IT TRUE THAT OVER THE

8 PAST THREE YEARS ALL OF YOUR INCOME HAS COME EITHER

9 DIRECTLY OR INDIRECTLY FROM THE NOVELLI COMPANIES?

10 A I'D SAY 95 PERCENT.

11 Q DO YOU REMEMBER IN YOUR DEPOSITION THAT YOU

12 STATED THAT -- WHEN I ASKED YOU WHETHER ALL OF YOUR

13 EARNINGS OVER THE PAST THREE YEARS HAVE BEEN FROM THE WORK

14 YOU HAVE DONE FOR THE NOVELLI ORGANIZATION, YOU SAID

15 BASICALLY, YES, EITHER DIRECTLY OR INDIRECTLY, PUT IT THAT

16 WAY?

17 A IF YOU SAY SO. I WOULD SAY YOU'RE RIGHT.

18 Q IS IT SOMEWHERE BETWEEN 95 AND 100 PERCENT?

19 A I WOULD SAY IT'S GOT TO BE SOMEWHERE IN

20 THAT BALLPARK.

21 THE COURT: LET'S TAKE OUR LUNCH BREAK. SEE YOU

22 ALL AT 1:30, LADIES AND GENTLEMEN.

23 (THE FOLLOWING PROCEEDINGS WERE HELD IN

24 OPEN COURT OUT OF THE PRESENCE OF THE JURY:)

25 MR. RIVIN: I'D LIKE TO DISCUSS SCHEDULING, IF WE

26 COULD.

1 THE COURT: ALL RIGHT.

2 MR. RIVIN: I ASSUME WE'LL GO WITH MR. THOMPSON. I  
3 WILL NOT BE LONG WITH HIM, HOPEFULLY HALF HOUR, 40 MINUTES.  
4 THAT'S IT.

5 AFTER WE DO REDIRECT, ANY RECROSS, I ASSUME  
6 THE JURY CAN BE EXCUSED. WE'LL DEAL WITH DR. BIERLEY,  
7 FIND OUT WHETHER OR NOT HIS TESTIMONY IS APPROPRIATE FOR  
8 THE JURY?

9 MR. MOSHENKO: IS THE COURT INTERESTED IN HEARING  
10 REFERENCES TO WHAT THE TESTIMONY IS TO DETERMINE IF A 402  
11 IS REQUIRED?

12 THE COURT: WELL, WE HEARD THAT IN CHAMBERS THIS  
13 MORNING.

14 MR. MOSHENKO: YOUR HONOR, I DIDN'T RECITE ANY OF  
15 THE TESTIMONY. YOU HEARD A ONE-SIDED VERSION THIS MORNING  
16 IN CHAMBERS.

17 THE COURT: ALL RIGHT. TELL YOU WHAT. WHY DON'T  
18 YOU COME BACK AT 1:20. WE'LL DO IT THEN.

19 MR. SHERMAN: YOUR HONOR, JUST FROM A OVERALL  
20 SCHEDULING PERSPECTIVE, I TAKE IT THAT WE'RE GOING TO HAVE  
21 MR. RYMAN FOR SOME LIMITED PURPOSES TOMORROW.

22 IS IT PLAINTIFFS' INTENTION AT THAT POINT TO  
23 REST THEIR CASE?

24 MR. MOSHENKO: WHEN WE'RE FINISHED WITH DR. BIERLEY  
25 AND MR. RYMAN. THERE'S A POSSIBILITY THAT WE'LL BRING IN A  
26 WITNESS FOR WHAT I WOULD CALL A 10-MINUTE SINGLE ISSUE

1 POINT, AND THAT WOULD BE --

2 MR. SHAW: SCHULMAN OF THE MARSHACK FIRM. YOUR  
3 HONOR, IT HAD TO DO WITH THE MEMBERSHIP LISTS BEING FILED  
4 AND THE SCHEDULE OF FIRST NATIONWIDE. AND SO FOR A VERY  
5 LIMITED -- I'D SAY MAYBE EVEN FIVE MINUTES. I'VE GOT MAYBE  
6 TWO QUESTIONS, AND THAT'S IT.

7 MR. SHERMAN: I WASN'T AWARE THAT HE WAS ON THE  
8 WITNESS LIST. IF HE IS, THEN OBVIOUSLY THAT'S THE ISSUE.  
9 IF HE IS NOT, THEN WE'VE GOT --

10 MR. MOSHENKO: I DON'T THINK HE IS ON THE LIST.

11 THE COURT: THEN HE IS NOT COMING IN.

12 MR. SHERMAN: THIS IS NOT AN IMPEACHMENT ISSUE.

13 THE COURT: OKAY. SEE YOU THEN.

14 (WHEREUPON THE COURT WAS IN RECESS UNTIL  
15 1:30 P.M. OF THE SAME DAY.)

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1 WESTMINSTER, CALIFORNIA - MONDAY, JULY 17, 2000

2 AFTERNOON SESSION

3 (THE FOLLOWING PROCEEDINGS WERE HELD IN  
4 CHAMBERS:)

5 THE COURT: OKAY.

6 MR. RIVIN: ALL RIGHT, WELL, I DON'T KNOW WHO  
7 SHOULD START. MR. MOSHENKO SAID AT SIDEBAR THAT  
8 CALVIN BIERLEY IS GOING TO TALK ABOUT CAUSE AND EFFECT;  
9 THAT HE HAS DONE THIS CAUSE AND EFFECT ANALYSIS. AND I'VE  
10 BEEN SAYING REPEATEDLY THAT DR. BIERLEY ASSUMED CAUSATION,  
11 THAT HE ASSUMED THAT THE ONLY REASON FOR THE DECLINE IN  
12 REVENUES OR DUES BY THE PLAINTIFFS FROM 1996 TO 1997 WAS  
13 THE -- WERE THE COAST LETTERS. AND I'VE GOT DEPOSITION  
14 TESTIMONY TO SHOW THAT TO THE COURT. UNFORTUNATELY IT'S  
15 OUT IN THE COURTROOM. LET ME GO GET IT. I'LL BE RIGHT  
16 BACK.

17 (PAUSE IN PROCEEDINGS.)

18 MR. RIVIN: WE KNOW THERE WERE A NUMBER OF THINGS  
19 GOING ON WITH THE PLAINTIFFS AND THE PREDECESSORS IN 1996  
20 AND 1997, THE BANKRUPTCIES, THE LAWSUITS, THE THOUSAND  
21 ADVENTURES FALLING PART. WE KNOW ALL THOSE THINGS WERE  
22 GOING ON.

23 AND SO I ASKED MR. BIERLEY IN HIS DEPOSITION  
24 WHETHER AND TO WHAT EXTENT HE TOOK THOSE OTHER FACTORS INTO  
25 CONSIDERATION, AND HE SAID THAT HE DID NOT.

26 WHAT CALVIN BIERLEY DID, HE TRIED TO

1 DETERMINE AN ATTRITION RATE FOR THE PLAINTIFFS AND THEIR  
2 PREDECESSORS BETWEEN 1995 AND 1996. THEN HE CALCULATED AN  
3 ATTRITION RATE BETWEEN 1996 AND 1997. THEN HE ASSUMED THAT  
4 THE DIFFERENCE IN THE ATTRITION RATE FROM THE FIRST PERIOD  
5 TO THE SECOND PERIOD WAS ALL CAUSED BY COAST LETTERS,  
6 DESPITE EVERYTHING ELSE THAT WAS GOING ON.

7 SO I ASKED HIM IN HIS DEPOSITION WHETHER HE  
8 TOOK THESE OTHER FACTORS INTO ACCOUNT.

9 AND I SAID, "DID YOU ACTUALLY SPECIFICALLY  
10 CONTEMPLATE THE EFFECT OF BANKRUPTCY FILINGS ON THE  
11 ATTRITION RATE?"

12 AND THE WITNESS SAID, "DID I?"

13 "YES OR NO?"

14 "I USED AVAILABLE INFORMATION I HAD WHICH  
15 WAS THE DIFFERENCE BETWEEN '95 AND '96. AND HAVING NOT  
16 KNOWN OR WHEN AND WHERE BANKRUPTCY OCCURRED TO WHICH  
17 MEMBERS, THERE IS NO WAY I COULD POSSIBLY HAVE FACTORED  
18 THAT INTO THE ATTRITION RATE. SO IT WAS  
19 BEST NOT TO TRY TO DO EITHER."

20 MR. MOSHENKO: CAN YOU GIVE ME A PAGE?

21 MR. RIVIN: YES. DEPOSITION PAGE 252, LINES 11  
22 THROUGH 23.

23 HE DID NOT CONSIDER EFFECT OF THE  
24 PLAINTIFFS' DECISION TO WITHDRAW FROM COAST TO COAST. AND  
25 EVEN THOUGH WE KNOW THAT MANY PEOPLE DECIDED NOT TO STAY  
26 WITH THE PLAINTIFFS BECAUSE THE PLAINTIFFS UNILATERALLY

1 DECIDED TO WITHDRAW FROM COAST TO COAST, NONETHELESS,  
2 MR. BIERLEY DID NOT INCLUDE THAT.

3 AT PAGE 256, LINES 10 THROUGH 16, I ASKED  
4 MR. BIERLEY:

5 "BY THE WAY, IN COMING TO YOUR CONCLUSIONS  
6 REGARDING DAMAGES, YOU ALSO ASSUMED, DID YOU NOT, THAT NO  
7 MEMBER OF THE PLAINTIFFS' RESORTS WOULD HAVE LEFT  
8 VOLUNTARILY ONCE THEY FOUND OUT THAT THE PLAINTIFFS HAD  
9 PULLED OUT OF THE COAST TO COAST NETWORK; IS THAT RIGHT?"

10 HE SAID, "YES, THAT'S CORRECT, GENERALLY."

11 AND THAT'S THE END OF THAT CITATION TO THE  
12 DEPOSITION.

13 HE GENERALLY CONSIDERED NO OTHER POSSIBLE  
14 CAUSES OF INCREASED ATTRITION AND ASSUMED THAT ALL  
15 INCREASED ATTRITION WAS CAUSED BY COAST LETTERS.

16 AT PAGE 251, LINES 15 -- LINE 15 THROUGH  
17 252, LINE 10 -- AND ACTUALLY I CAN -- WE CAN SHOW THE  
18 TRANSCRIPT, YOUR HONOR, IF YOU WANT -- IF YOU'D LIKE TO  
19 FOLLOW ALONG OR READ IT YOURSELF.

20 THE COURT: THAT'S ALL RIGHT.

21 MR. RIVIN: THE QUESTION WAS AS FOLLOWS:

22 "CAN YOU IDENTIFY FOR ME  
23 THE FACTORS THAT YOU BELIEVE  
24 CAUSED NATURAL ATTRITION, THE  
25 FACTORS THAT WOULD HAVE BEEN  
26 INCLUDED IN YOUR NATURAL

1 ATTRITION NUMBER?

2 "ANSWER: WELL, DEATH,  
3 FOR EXAMPLE.

4 "QUESTION: WELL,  
5 BANKRUPTCIES?

6 "ANSWER: I WOULD SAY SO.

7 "QUESTION: WHAT OTHER  
8 FACTORS?

9 "ANSWER: OH GENERAL  
10 ECONOMIC CONDITIONS EITHER  
11 IMPROVING OR NOT IMPROVING.

12 "QUESTION: SO YOU DIDN'T  
13 CONSIDER THAT SEPARATELY; YOU  
14 WOULD JUST INCLUDE THAT --

15 "ANSWER: RIGHT.

16 "QUESTION: -- IN NATURAL  
17 ATTRITION?

18 "ANSWER: YES.

19 "QUESTION: ANYTHING  
20 ELSE?

21 "ANSWER: REALLY TO ME IT  
22 WAS A CATCH-ALL, AND IT WOULD  
23 ENCOMPASS ANY OF THOSE  
24 CONSIDERATIONS.

25 "QUESTION: EVERY FACTOR  
26 OTHER THAN THE LETTERS FROM

1 COAST?

2 "ANSWER: YES."

3 SO ONCE AGAIN MR. BIERLEY IS JUST ASSUMING  
4 THAT NATURAL ATTRITION INCLUDES EVERYTHING ELSE THAT  
5 HAPPENED TO THE PLAINTIFFS. AND THE ONLY FACTOR, THE ONLY  
6 CAUSE WHICH CAUSED INCREASED ATTRITION, WERE THE COAST  
7 LETTERS.

8 ALSO, HE ASSUMED THAT NOTHING CHANGED  
9 BETWEEN 1996 AND 1997 EXCEPT THE COAST LETTERS. AT PAGE  
10 255 LINES 15 THROUGH 18 I ASKED MR. BIERLEY:

11 "QUESTION: BUT YOU'RE  
12 ASSUMING THAT NOTHING ELSE  
13 CHANGED BETWEEN 1996 AND 1997  
14 OTHER THAN THE MEMBERS RECEIVING  
15 THIS LETTER; ISN'T THAT RIGHT?

16 "ANSWER: YES."

17 THAT'S THE END OF THAT PASSAGE.

18 MR. MOSHENKO: WHAT PAGE WAS THAT?

19 MR. RIVIN: 255, LINE 15 THROUGH 18.

20 HE MADE NO EFFORT TO IDENTIFY ANY OTHER  
21 FACTORS THAT WOULD CAUSE INCREASED ATTRITION.

22 AT PAGE 281, LINES 12 THROUGH 15, I ASKED  
23 MR. BIERLEY:

24 "QUESTION: WHAT ATTEMPT  
25 DID YOU MAKE TO IDENTIFY ANY  
26 OTHER FACTORS THAT MIGHT HAVE

1                   LED TO AN EXCESSIVE DECLINE OVER  
2                   THE NORM?

3                                 "ANSWER: I DIDN'T."  
4                   THAT'S THE END OF THAT PASSAGE.

5                   AND, YOUR HONOR, THE BOTTOM LINE IS, AS I'VE  
6 SAID A FEW TIMES OVER THE PAST SEVERAL DAYS, MR. BIERLEY  
7 SIMPLY ASSUMED THAT ALL EXCESS ATTRITION RESULTED FROM THE  
8 COAST TO COAST LETTERS. THAT CERTAINLY DOES NOT PROVE  
9 CAUSATION. IT ASSUMES CAUSATION.

10                   THE COURT: IT APPEARS IT'S A WELL TAKEN POSITION.

11                   MR. MOSHENKO: OKAY. LET ME RESPOND, IF I MAY.

12                                 DR. BIERLEY IS A SCIENTIST, YOUR HONOR, AND  
13 HE IS GOING TO TESTIFY THAT THERE'S A PROVEN, KNOWN  
14 SCIENTIFIC TECHNIQUE FOR DETERMINING CAUSATION. AND THE  
15 TECHNIQUE INVOLVES AN ANALYSIS OF CAUSE AND EFFECT AND THE  
16 CORRELATION BETWEEN CAUSE AND EFFECT.

17                                 AND IN ORDER TO DETERMINE CAUSE AND EFFECT,  
18 YOU START BY MAKING ASSUMPTIONS. AND YOU ASSUME VARIOUS  
19 VARIABLE POSSIBLE CAUSES, AND YOU CORRELATE THEM TO THE  
20 EFFECT. YOU SEEK TO PROVE OR DISPROVE THE CAUSE BY  
21 CORRELATING IT TO THE EFFECT.

22                                 SO YOUR HONOR HEARD HIM SAY -- MR. RIVIN  
23 ARGUE THERE WERE MANY ASSUMPTIONS MADE. IT'S TRUE. HE  
24 STARTED BY ASSUMING A, B, C, D, E, F, G, AND HE WENT  
25 FORWARD, AND HE TESTED THE ASSUMPTIONS.

26                                 AND SO, FOR EXAMPLE, IF HE WAS ASKED, "DID

1 YOU ASSUME BANKRUPTCY WAS A CAUSE? DID YOU CONSIDER  
2 BANKRUPTCY" -- I HEARD MR. RIVIN SAY, "DID YOU CONSIDER  
3 BANKRUPTCY?" THE ANSWER IS -- QUESTION ON PAGE 250:

4 "DID YOU CONSIDER THE  
5 IMPACT OF BANKRUPTCY?

6 "ANSWER: THAT LIKE ANY  
7 OTHER FACTORS WOULD HAVE BEEN  
8 CAPTURED TO SOME DEGREE BY THE  
9 NATURAL ATTRITION RATE.

10 "THEN THE NATURAL  
11 ATTRITION RATE" --

12 THIS IS LINE 18:

13 "THE NATURAL ATTRITION  
14 RATE IS A CATCH-ALL?

15 "ANSWER: YES."

16 LINE 22:

17 "SO TO THE EXTENT MEMBERS  
18 MAY HAVE LEFT BECAUSE OF FILING  
19 BANKRUPTCY, THEY WOULD HAVE BEEN  
20 INCLUDED IN NATURAL ATTRITION?"

21 "YES, IN MY VIEW."

22 THEN LET ME IDENTIFY -- QUESTION, 251 LINE

23 15:

24 "IDENTIFY FOR ME THE  
25 FACTORS YOU BELIEVE CAUSED  
26 NATURAL ATTRITION."

1                   AND THESE ARE THE THINGS THAT HE ASSUMED  
2 WERE PART OF NATURAL ATTRITION, YOUR HONOR.

3                   "WELL, DEATH, FOR  
4                   EXAMPLE.

5                   "QUESTION:  
6                   BANKRUPTCIES.

7                   "I WOULD SAY SO."

8                   "WHAT OTHER FACTORS?"

9                   "GENERAL ECONOMIC  
10                  CONDITIONS EITHER IMPROVING OR  
11                  NOT IMPROVING."

12                 I GUESS MY POINT IS, MR. RIVIN READ A  
13 PASSAGE THAT SEEMED TO SUGGEST THAT HE DIDN'T CONSIDER  
14 BANKRUPTCIES. I HEARD HIM SAY HE DIDN'T CONSIDER  
15 BANKRUPTCIES. WHAT DID HE DO WITH THIS?

16                 DID YOU CONSIDER -- IDENTIFY FOR ME THE  
17 FACTORS YOU BELIEVE CAUSED THE FACTORS THAT WOULD HAVE BEEN  
18 INCLUDED IN YOUR NATURAL ATTRITION. BANKRUPTCIES? I WOULD  
19 SAY SO.

20                 SO CLEARLY BANKRUPTCIES WERE PART OF HIS  
21 CONSIDERATION.

22                 AND THERE WERE ASSUMPTIONS BEING MADE. NOW,  
23 IF YOU ASSUME BANKRUPTCIES -- THIS IS ON 253:

24                 "IF YOU ASSUME THAT THE  
25                 BANKRUPTCIES HAD SOME EFFECT ON  
26                 THE ATTRITION RATE, THEN I WOULD

1 MAKE THAT ASSUMPTION WHETHER THE  
2 EFFECT WAS POSITIVE OR  
3 NEGATIVE. THIS IS PART OF A  
4 SCIENTIFIC CORRELATION OF  
5 CAUSE/EFFECT. YOU HAVE TO  
6 CORRELATE CAUSE/EFFECT TO  
7 DETERMINE WHETHER THE EFFECT WAS  
8 POSITIVE OR NEGATIVE. YOU  
9 ASSUME THE EXISTENCE OF THE  
10 EFFECT, AND THEN YOU RULE IT  
11 OUT."

12 THIS IS WHAT HE WOULD SAY. AND WHAT YOUR  
13 HONOR IS HEARING IS REPEATED REFERENCES TO THE BASELINE --  
14 IT'S A TERM, HIS TERM -- BASELINE ASSUMPTIONS. OKAY. BUT  
15 WHAT YOUR HONOR ISN'T HEARING IS THAT HE WENT FORWARD, AND  
16 HE TESTED EACH OF THESE ASSUMPTIONS TO COME TO HIS  
17 CONCLUSION.

18 THE COURT: HOW DID HE TEST THEM?

19 MR. MOSHENKO: HE TESTED THEM BY DOING A  
20 STATISTICAL ANALYSIS -- AND THIS IS WHERE WE KIND OF BUMPED  
21 HEADS YESTERDAY BY ANALYZING DATA WHICH CREATED HIS  
22 BASELINE. BASELINE MEANS '95, '96 TIME PERIOD.

23 HE SAW THE CONDITIONS AND STUDIED THE  
24 CONDITIONS THAT EXISTED AT THAT TIME. HE THEN NOTED  
25 WHETHER OR NOT THERE WERE CHANGES IN THE CONDITIONS. HE  
26 THEN GRAPHED WHAT WAS HAPPENING IN -- DURING -- TO THE

1 MEMBERS DURING THE BASELINE PERIOD.

2 AND IF THE -- IF THE EVENTS THAT WERE  
3 HAPPENING DURING THE PROVEN BASELINE PERIOD CONTINUED  
4 WITHOUT CHANGE, THEN THAT WOULD CAUSE THE CONCLUSION THAT  
5 THERE WAS NOTHING TO CAUSE A CHANGE.

6 THE COURT: OUR WHOLE DISCUSSION HERE HAS TO DO  
7 WITH THE MATTER OF CAUSATION AND NOT DAMAGES.

8 MR. MOSHENKO: EXACTLY.

9 THE COURT: RIGHT.

10 MR. MOSHENKO: TO DETERMINE CAUSATION YOU NEED TO  
11 DETERMINE EFFECT. YOU NEED TO CONSIDER EFFECT. EFFECT IS  
12 A CHANGE IN THE BASELINE TREND OR GRAPH FROM WHAT IT WOULD  
13 BE EXPECTED TO DO HAD THERE BEEN NO NEW CAUSAL INFLUENCES.

14 THE COURT: YOU SAY HE IS A SCIENTIST. WHAT'S HIS  
15 PH.D. IN?

16 MR. MOSHENKO: HE HAS A PH.D. IN EXPERIMENTAL  
17 PSYCHOLOGY, IN INDUSTRIAL PSYCHOLOGY, STATISTICS, BEHAVIOR  
18 MODIFICATION AND INSTRUMENTATION. HE HAS AN M.B.A. IN  
19 MARKETING RESEARCH, FINANCE AND QUANTITATIVE METHODS. AND  
20 HE HAS A B.S. IN PSYCHOLOGY.

21 THE COURT: OFF THE RECORD.

22 (DISCUSSION OFF THE RECORD.)

23 MR. MOSHENKO: HE HAS BEEN AN INSTRUCTOR AT THE  
24 UNIVERSITY OF WASHINGTON, UNIVERSITY OF OHIO.

25 THE COURT: WE DON'T HAVE TO GO INTO --

26 MR. MOSHENKO: ALL THAT STUFF.

1 MR. SHERMAN: YOUR HONOR, CAN I --

2 MR. MOSHENKO: EXCUSE ME. I'D LIKE TO TOUCH ON A  
3 COUPLE OF THINGS.

4 MR. SHERMAN: GO AHEAD.

5 MR. MOSHENKO: SO LOOKING AT -- WELL, I GUESS I  
6 TOUCHED ON WHAT HE TALKED ABOUT.

7 LET'S SEE. YOU CAME TO YOUR CONCLUSIONS  
8 REGARDING DAMAGES -- OKAY. WELL, WE'RE NOT GOING TO TALK  
9 ABOUT DAMAGES. BUT WE DO NEED TO TALK ABOUT CAUSE/EFFECT  
10 TO ANALYZE A CORRELATION BETWEEN THE POTENTIAL -- ASSUMED  
11 POTENTIAL CAUSES, AND THE EFFECTS, IN DETERMINING --

12 THE COURT: YOU SEE, THERE'S THE KEY, ASSUMED  
13 POTENTIAL CAUSES.

14 MR. MOSHENKO: CORRECT. AND ONCE YOU ASSUME FIVE  
15 POTENTIAL CAUSES, HYPOTHETICALLY, YOU TEST EACH CAUSE. YOU  
16 TEST EACH ASSUMPTION AND RULE OUT THE ONES THAT DON'T TEST  
17 OUT.

18 AND WHAT HE DID IS HE ASSUMED COAST WAS A  
19 CAUSE. HE ASSUMED BANKRUPTCIES WERE A CAUSE. HE ASSUMED  
20 DAFF'S LETTER WAS A CAUSE. HE ASSUMED MEMBER DEATHS AND  
21 CHANGE OF ECONOMIC SITUATIONS WERE CAUSES. HE ASSUMED ALL  
22 THESE CAUSES FOR PURPOSES OF TESTING THEM, AND THEN  
23 DETERMINING WHETHER THEY PROVE OUT.

24 THE COURT: LET'S FIND OUT HOW HE TESTED THEM.

25 MR. SHERMAN: YOUR HONOR, CAN I TRY SOMETHING HERE?

26 MR. MOSHENKO: DEFINITELY YOU SHOULD FIND OUT HOW

1 HE TESTED.

2 MR. RIVIN: LET ME TRY SOMETHING. I'VE JUST SORT  
3 OF GRAPHED THIS OUT, CHARTED THIS OUT. HERE YOU'VE GOT A  
4 LINE. WE'LL JUST CALL THIS BASELINE. OKAY. WE'VE GOT  
5 TIME AND SOME OTHER VARIABLE. AND HERE WITH THIS DOT  
6 YOU'VE GOT BIERLEY COMING IN AND SAYING, YOU KNOW, THIS IS  
7 WHERE I FOUND, WHERE THIS DOT IS. AND THE SHADED PORTION  
8 HERE, THE SHADED PORTION -- I'LL SPEAK LIKE A SCIENTIST --  
9 THE DELTA -- OKAY -- THE DIFFERENCE IS WHERE BIERLEY SAYS,  
10 WELL, THAT'S -- THAT'S THE CONSEQUENCE OF THE COAST  
11 LETTERS.

12 AND THAT'S WHERE PLAINTIFFS ARE JUST  
13 SKIRTING AROUND THE ISSUE. BECAUSE IT'S THIS DIFFERENCE  
14 THAT -- AND CORRECT ME IF I'VE GOT IT WRONG, MR. RIVIN.  
15 IT'S THE DIFFERENCE THAT BIERLEY JUST SAYS THAT'S THE COAST  
16 LETTER. BUT THAT'S ASSUMING THE CONCLUSION BECAUSE THE  
17 CONCLUSION IS CAUSATION. AND YOU JUST CAN'T SAY THE  
18 DIFFERENCE IS THE COAST LETTER. YOU HAVE TO DIG A LITTLE  
19 DEEPER. AND HE DIDN'T BOTHER TO DIG A LITTLE DEEPER AS  
20 REVEALED BY THE PASSAGES IN THE TESTIMONY.

21 MR. MOSHENKO: HIS TESTIMONY WILL PROVE OTHERWISE.

22 THE COURT: LET'S DO THIS. THE JURY IS PROBABLY  
23 COOLING THEIR HEELS OUT THERE. YOU DON'T HAVE MUCH MORE  
24 TIME WITH --

25 MR. RIVIN: I DO NOT.

26 THE COURT: LET'S GET BACK TO THIS AFTER WE GET RID

1 OF THE LAST WITNESS AND THE JURY.

2 (THE FOLLOWING PROCEEDINGS WERE HELD IN  
3 OPEN COURT IN THE PRESENCE OF THE JURY:)

4 THE COURT: GOOD AFTERNOON, LADIES AND GENTLEMEN.

5 THE JURY: GOOD AFTERNOON.

6 THE COURT: PROCEED, COUNSEL.

7 MR. RIVIN: THANK YOU, YOUR HONOR.

8 CROSS-EXAMINATION (CONTINUED)

9 BY MR. RIVIN: Q MR. THOMPSON, THIS MORNING  
10 MR. MOSHENKO ASKED YOU A SERIES OF QUESTIONS ABOUT THE  
11 WITHDRAWAL OF THE PLAINTIFFS' PARKS FROM COAST TO COAST IN  
12 AUGUST 1997. AND I'D LIKE TO ASK A FOLLOW-UP QUESTION.

13 YOU POINTED OUT WITH MR. MOSHENKO'S  
14 ASSISTANCE THAT ALL SEASONS RESORTS DID NOT PULL ITS PARKS  
15 OUT OF THE COAST TO COAST SYSTEM IN AUGUST; DO YOU RECALL  
16 THAT TESTIMONY?

17 A I BELIEVE THAT TO BE CORRECT.

18 Q AND THAT'S YOUR RECOLLECTION OF WHAT  
19 HAPPENED?

20 A YES.

21 Q THE FIRST NATIONWIDE PARKS WERE PULLED OUT?

22 A YES.

23 Q AND ALL OF THE PARKS, ALL OF THE PLAINTIFFS'  
24 PARKS WERE PULLED OUT OF THE COAST SYSTEM WITH THE  
25 EXCEPTION OF ALL SEASONS?

26 A THAT'S CORRECT.

1 Q THAT WAS NOT THE ORIGINAL PLAN?

2 MR. MOSHENKO: OBJECTION. UNCERTAIN.

3 THE COURT: OVERRULED.

4 BY MR. RIVIN: Q ISN'T THAT CORRECT?

5 A I BELIEVE HAD ALL SEASONS NOT BEEN IN THE  
6 BANKRUPTCY, IT PROBABLY WOULD HAVE BEEN PULLED OUT. BUT  
7 I'M NOT SURE. BUT I THINK POSSIBLY SO.

8 Q WELL, NOT JUST POSSIBLY.

9 ISN'T IT TRUE BASED ON YOUR CONVERSATIONS  
10 WITH MR. NOVELLI THAT THE PLAN WAS TO PULL ALL OF THE PARKS  
11 OUT OF COAST TO COAST?

12 A I BELIEVE THAT WOULD HAVE HAPPENED, YES.

13 Q AND THAT WAS IN FACT THE UNDERSTANDING?  
14 THAT WAS THE PLAN?

15 A I THINK IT WAS, YES.

16 Q AND AT THE TIME THAT PLAN WAS FORMULATED,  
17 ALL SEASONS WAS IN CONTROL OF A RECEIVER -- EXCUSE ME. I  
18 STATED IT BACKWARDS.

19 A RECEIVER WAS IN CONTROL OF ALL SEASONS;  
20 ISN'T THAT RIGHT?

21 A AGAIN, AS YOU AND I HAVE DISCUSSED BEFORE, I  
22 WAS JUST COMING BACK IN. SO ALL THOSE DATES ARE NOT CLEAR  
23 TO ME. BUT I KNOW THERE WAS A RECEIVER, AND I KNOW THERE  
24 WAS A THIRD BANKRUPTCY. AND THEN I KNOW THERE WAS A  
25 TRUSTEE, OF A VERY SHORT ORDER.

26 Q IN THE BANKRUPTCY?

1           A       YES.

2           Q       WASN'T THE FILING OF THE THIRD ALL SEASONS  
3 BANKRUPTCY IN JULY OF 1997 A CRITICAL PART OF THE PLAN TO  
4 PULL ALL OF THE RESORTS -- ALL THE PLAINTIFFS' RESORTS OUT  
5 OF COAST TO COAST?

6           A       I DON'T REMEMBER THAT BEING DISCUSSED,  
7 BUT -- BECAUSE, AGAIN, I WASN'T THERE THAT MUCH. SO I  
8 DON'T KNOW.

9           Q       WELL, IN JUNE, 1997, A RECEIVER CONTROLLED  
10 ALL SEASONS?

11          A       OKAY.

12          Q       DO YOU RECALL THAT?

13          A       I KNOW THERE WAS A RECEIVER. KEEP IN MIND  
14 THE DATES ARE NOT CLEAR TO ME. YOU CAN TELL ME WHEN, AND  
15 I'LL GO FOR IT.

16          Q       BUT DON'T YOU RECALL DISCUSSIONS THAT ONE OF  
17 THE REASONS ALL SEASONS RESORTS HAD TO FILE THAT THIRD  
18 BANKRUPTCY WAS TO WREST CONTROL OF THE RESORTS AWAY FROM  
19 THE RECEIVER?

20          A       YES. I BELIEVE THAT, YES.

21          Q       AND ONE OF THE REASONS FOR THAT IS BECAUSE  
22 ALL SEASONS COULD NOT DO ANYTHING WITH THE PARKS SUCH AS  
23 PULL THEM OUT OF COAST TO COAST UNTIL THEY HAD CONTROL  
24 AGAIN; ISN'T THAT CORRECT?

25          A       THAT MAY BE YOUR INTERPRETATION. I DON'T  
26 RECALL THAT AT ALL.

1 Q THE PLAN, HOWEVER, WAS, AS OF JULY 1997, TO  
2 PULL ALL THE PARKS OUT?

3 A AGAIN, I BELIEVE THAT IT WAS. IT'S MY  
4 IMPRESSION. BUT I DON'T REMEMBER HAVING A SPECIFIC  
5 CONVERSATION LIKE THAT. THEREFORE, I CAN'T SAY THAT I  
6 DISTINCTLY REMEMBER THAT. I BELIEVE THAT IT WAS.

7 Q THAT'S CONSISTENT WITH THE AGREEMENT YOU  
8 SIGNED WITH R.P.I. --

9 A YES.

10 Q -- ON BEHALF OF TRAVEL AMERICA?

11 A I BELIEVE --

12 Q THAT R.P.I. WAS GOING TO BE THE EXCLUSIVE  
13 PROVIDER OF RECIPROCAL SERVICES?

14 A I BELIEVE THAT WOULD HAVE HAPPENED.

15 Q WHICH MEANT THE PLAINTIFFS HAD TO PULL ALL  
16 THEIR PARKS OUT INCLUDING ALL SEASONS?

17 A I WOULD THINK SO.

18 Q AND SO NOTWITHSTANDING THE BANKRUPTCY FILING  
19 IN JULY, THE PLAINTIFFS WERE STILL PLANNING TO PULL OUT THE  
20 ALL SEASONS PARKS, EVEN THOUGH ALL SEASONS WAS IN  
21 BANKRUPTCY; ISN'T THAT TRUE?

22 A AS A PART OF THE BANKRUPTCY, THE DEBTOR IN  
23 POSSESSION COULD HAVE DONE THAT, YES.

24 Q AND SO IT WASN'T THE AUTOMATIC STAY OF THE  
25 BANKRUPTCY THAT PREVENTED ALL SEASONS FROM PULLING ITS  
26 PARKS OUT OF THE COAST TO COAST SYSTEM; IT WAS THE FACT

1 THAT A TRUSTEE CAME IN AND A TRUSTEE WAS APPOINTED,  
2 CHARLES DAFF?

3 A THE DEBTOR IN POSSESSION BECAME MR. DAFF, I  
4 WOULD ASSUME, AT THAT TIME.

5 Q A TRUSTEE REPLACED THE DEBTOR IN POSSESSION?

6 A LEGALLY I'M NOT EXACTLY SURE, BUT I'LL TAKE  
7 YOUR WORD FOR IT.

8 Q AND SO WHAT HAPPENED IS THAT THE PLAINTIFFS'  
9 EFFORTS TO PULL THE ALL SEASONS PARKS OUT, WHICH WERE IN  
10 PLACE IN JULY, AFTER THE BANKRUPTCY WAS FILED, WERE  
11 THWARTED BECAUSE FINOVA WENT IN AND GOT A TRUSTEE APPOINTED  
12 TO TAKE OVER CONTROL OF ALL SEASONS AND THE BANKRUPTCY;  
13 ISN'T THAT RIGHT?

14 A THAT WOULD BE AN INTERPRETATION. IT COULD  
15 BE THAT WAY, YES.

16 Q ISN'T THAT YOUR BEST RECOLLECTION OF WHAT IN  
17 FACT HAPPENED?

18 A THE RECOLLECTION IS THAT THERE WAS -- A  
19 TRUSTEE CAME IN. I CALLED THEM A RECEIVER EARLIER, BUT A  
20 TRUSTEE CAME IN AND TOOK OVER CONTROL OF OUR -- OF ALL  
21 SEASONS RESORTS AND, THEREFORE, WAS IN CHARGE AND I PRESUME  
22 MADE THE DECISION -- IN OTHER WORDS, THE DECISION NOT TO  
23 PULL OUT OR SO WOULD HAVE BEEN HIS AT THAT TIME, I ASSUME.

24 Q YOU DON'T KNOW OF ANY COMMUNICATIONS BETWEEN  
25 MR. NOVELLI OR ANYONE ELSE FROM ALL SEASONS AND THE TRUSTEE  
26 ABOUT PULLING PARKS OUT OF COAST?

1           A       NO, I DON'T.

2           Q       SO, IN OTHER WORDS, THE TRUSTEE WAS IN  
3 CONTROL OF THE PARKS, NOT ALL SEASONS? NOT THE DEBTOR IN  
4 POSSESSION ANY LONGER; ISN'T THAT RIGHT?

5           A       WELL, THE DEBTOR IN POSSESSION WOULD HAVE  
6 BEEN, I BELIEVE -- IF I'M GETTING IT RIGHT LEGALLY -- WOULD  
7 HAVE BEEN MR. DAFF.

8           Q       HE WAS THE TRUSTEE?

9           A       RIGHT.

10          Q       NOW, WHEN YOU PUT TOGETHER MATERIALS TO SEND  
11 OUT TO THE NEW MEMBERS OF TRAVEL AMERICA, THOSE MATERIALS  
12 INCLUDED THE REFERENCE TO ALL SEASONS RESORTS, DIDN'T THEY?

13          A       YES. I BELIEVE THE INITIAL ONES DID, AND  
14 THEN LATER SUBSEQUENT ONES DID NOT.

15          Q       LET'S TAKE A LOOK AT EXHIBIT 2150, PAGE 334.

16          MR. MOSHENKO: OBJECTION. IT'S BEYOND THE SCOPE,  
17 YOUR HONOR.

18          MR. RIVIN: NOT AT ALL.

19          THE COURT: OVERRULED.

20          MR. MOSHENKO: I WASN'T GIVEN THAT AT ALL.

21          BY MR. RIVIN: Q THIS IS A DOCUMENT WE HAD LOOKED  
22 AT BEFORE SEVERAL TIMES. IT'S A LETTER, TRAVEL AMERICA  
23 LETTER, TRAVEL AMERICA LETTERHEAD, DATED AUGUST 27, 1997.

24                   MR. THOMPSON, THIS IS A COPY OF A LETTER  
25 WHICH YOU HELPED PREPARE; ISN'T THAT CORRECT?

26          A       YES, UH-HUH.

1           Q           THIS WAS SENT OUT TO OVER 30,000 PEOPLE WHO  
2 TRAVEL AMERICA WAS TRYING TO TAKE OVER AND TREAT AS THEIR  
3 MEMBERS; ISN'T THAT CORRECT?

4           A           YES. WELL, I SAY -- I DON'T KNOW HOW MANY  
5 GOT THIS EXACT LETTER. BUT THIS LETTER WENT OUT.

6           Q           THERE WERE THOUSANDS OF THESE LETTERS IN THE  
7 MAIL?

8           A           THERE WERE -- THOUSANDS OF THESE WENT OUT.

9           Q           YOU HELPED DRAFT THIS?

10          A           YES.

11          Q           AND THIS ONE WENT OUT ON AUGUST 27, 1997.  
12 YOU PROBABLY DON'T HAVE PERSONAL KNOWLEDGE.

13                    THIS SPECIFIC LETTER WENT OUT AUGUST 27,  
14 1997, BUT WASN'T THAT THE PERIOD OF TIME WHEN THESE LETTERS  
15 WERE BEING SENT OUT?

16          A           I BELIEVE THAT AUGUST 27 WAS THE FIRST TIME  
17 THAT THEY WERE PREPARED. THERE WAS -- IN OTHER WORDS, THEY  
18 RAN THROUGH -- I DON'T KNOW HOW MANY -- 1,000, 2,000,  
19 3,000. THAT WAS PROBABLY THE FIRST CREATE DATE.

20          Q           IN LATE AUGUST?

21          A           THE DATE WOULD BE CORRECT. IT WOULD COME  
22 OFF THE COMPUTER.

23          Q           SO WHEN MR. NOVELLI SAID THOSE LETTERS  
24 STARTED GOING OUT IN JULY, HE WOULD HAVE BEEN MISTAKEN?

25          A           THESE LETTERS I BELIEVE RIGHT HERE WERE THE  
26 FIRST ONES OUT.

1 Q AND THE FIRST LINE WHICH WE'VE LOOKED AT  
2 BEFORE -- AND I DON'T WANT TO BELABOR IT -- BUT IT MENTIONS  
3 THE RECIPROCAL AGREEMENT BETWEEN THOUSAND ADVENTURES, ALL  
4 SEASONS, FIRST NATIONWIDE AND CUTTY'S. AND THEN LATER IN  
5 THE LETTER IT TALKS ABOUT R.P.I. AND THE ARRANGEMENT  
6 BETWEEN R.P.I. AND TRAVEL AMERICA?

7 A YES.

8 Q DO YOU RECALL THAT?

9 SO THE CONTEMPLATION WAS AS OF AUGUST 27,  
10 THAT ALL SEASONS PARKS -- THE ALL SEASONS PARKS WERE  
11 SOMEHOW, SOME WAY GOING TO BE PULLED OUT OF COAST SO THEY  
12 COULD GO WITH R.P.I.?

13 A I WOULD THINK SO, YES.

14 Q AND WHEN YOU SAY, "I WOULD THINK SO," ARE  
15 YOU SAYING THAT'S YOUR BEST RECOLLECTION?

16 A NO. I BELIEVE THAT TO BE CORRECT. I  
17 BELIEVE YOU'RE CORRECT.

18 Q THANK YOU.

19 SO WHAT THE PLAINTIFFS HAD TO DO THEN IS  
20 FIGURE OUT HOW THEY COULD PULL THEIR PARKS OUT OF COAST TO  
21 COAST WITH MR. DAFF BEING IN CONTROL OF ALL SEASONS -- LET  
22 ME REPHRASE THAT QUESTION.

23 ALL SEASONS HAD TO FIGURE OUT A WAY TO PULL  
24 OUT ITS PARKS EVEN THOUGH MR. DAFF WAS THE TRUSTEE AND IN  
25 CONTROL OF ALL SEASONS?

26 A I DON'T KNOW -- I WASN'T INVOLVED IN THOSE.

1 SO YOU SAY LIKE THERE WAS SOME DISCUSSION WITH MR. DAFF TO  
2 DO THAT?

3 Q NO, NOT WITH MR. DAFF.

4 I'M ASKING YOU ABOUT INTERNAL DISCUSSIONS AT  
5 TRAVEL AMERICA OR ALL SEASONS ABOUT HOW YOU WERE GOING TO  
6 BE ABLE TO ACCOMPLISH WHAT YOU HAD PROMISED R.P.I. TO DO.  
7 AND THAT IS CREATE THIS EXCLUSIVE RELATIONSHIP WITH R.P.I.  
8 AND TRAVEL AMERICA, IF MR. DAFF WAS IN CONTROL OF THE ALL  
9 SEASONS PARKS?

10 A I DON'T REMEMBER DISCUSSIONS LIKE THAT. I'M  
11 NOT SAYING THERE WEREN'T DISCUSSIONS, BUT I DON'T RECALL  
12 DISCUSSIONS LIKE THAT.

13 I DON'T UNDERSTAND THE POINT. IF THERE WERE  
14 DISCUSSIONS LIKE THAT, IT WOULD BE FINE. IF THERE WEREN'T,  
15 THAT WOULD BE FINE.

16 Q ISN'T IT TRUE, THOUGH, THAT AT ALL TIMES IN  
17 AUGUST AND SEPTEMBER AND OCTOBER OF 1997 THAT TRAVEL  
18 AMERICA AND THE OTHER PLAINTIFFS INTENDED TO PULL THE ALL  
19 SEASONS PARKS OUT OF COAST TO COAST?

20 A ACTUALLY I BELIEVE THAT TO BE CORRECT.

21 Q AND RIGHT AFTER THE AUCTION SALE, COAST SENT  
22 A LETTER TO TRAVEL AMERICA OR ALL SEASONS -- WE'VE SEEN  
23 THAT LETTER.

24 A YES, I'M FAMILIAR WITH IT.

25 Q MR. MOSHENKO ASKED YOU ABOUT IT SAYING --  
26 TERMINATING THE RELATIONSHIP WITH ALL SEASONS?

1 A YES.

2 Q BETWEEN COAST AND ALL SEASONS?

3 A YES.

4 Q SO, WHAT COAST DID, IN TERMINATING THE  
5 RELATIONSHIP, IS REALLY EXACTLY THE SAME THING AS THE  
6 PLAINTIFFS HAD CONTEMPLATED. IT'S JUST THAT COAST  
7 TERMINATED THE RELATIONSHIP BEFORE THE PLAINTIFFS HAD A  
8 CHANCE -- BEFORE THE PLAINTIFFS DID; ISN'T THAT RIGHT?

9 A AT THAT JUNCTION IN TIME I DON'T KNOW WHAT  
10 WOULD HAVE HAPPENED, VERY CANDIDLY. BUT THE ANSWER IS THEY  
11 DID WHAT APPARENTLY WAS CONTEMPLATED OR WAS CONTEMPLATED AT  
12 THAT JUNCTURE IN TIME.

13 Q SO WHEN COAST TERMINATED THE RELATIONSHIP  
14 WITH ALL SEASONS, IT ACCOMPLISHED WHAT THE PLAINTIFFS  
15 WANTED TO DO?

16 A NOT NECESSARILY. YOU'D HAVE TO ASK  
17 PLAINTIFFS AT THIS POINT.

18 Q BUT THAT'S CONSISTENT WITH YOUR  
19 UNDERSTANDING?

20 A I BELIEVE THAT IT WOULD HAVE HAPPENED. I  
21 BELIEVE THAT ALL SEASONS WOULD HAVE BEEN PULLED OUT.

22 Q AND WHEN -- AND WHEN COAST TERMINATED THE  
23 RELATIONSHIP, THAT ACCOMPLISHED IT?

24 A I DON'T SEE IT THAT WAY. BECAUSE THERE WAS  
25 NO DISCUSSION. IT WAS -- COAST MADE THE DETERMINATION.  
26 AND EVERYTHING IN HERE SEEMS TO BE HANGING ON WHO DID WHAT

1 AT WHAT TIME.

2 BUT THEY DROPPED DEER RUN AGAINST THE  
3 REQUEST OF MR. NOVELLI, AND THEY AT THAT TIME INFORMED HIM  
4 THAT ALL SEASONS WAS GOING TO BE DROPPED WHETHER THEY  
5 WANTED THEM TO BE OR NOT. THAT'S WHAT HAPPENED.

6 Q LET ME ASK YOU SOME QUESTIONS ABOUT CUTTY'S  
7 DES MOINES.

8 I THINK YOU INDICATED YOU WERE ON THE BOARD  
9 OF DIRECTORS --

10 A YES.

11 Q -- OF CUTTY DES MOINES?

12 THAT WAS ONE OF THE COMPANIES THAT YOU HAD  
13 SOME INVOLVEMENT IN THE MANAGEMENT INFLUENCE?

14 A. AS A BOARD OF DIRECTORS MEMBER, YES.

15 MR. RIVIN: LET ME -- BEFORE I FORGET, I WOULD LIKE  
16 TO GO BACK AND OFFER EXHIBIT 2150, PAGE 334, INTO  
17 EVIDENCE. THAT HAS A BATES STAMP NUMBER OF A.G.I. 1784.

18 MR. MOSHENKO: NO OBJECTION.

19 THE COURT: IT WILL BE RECEIVED IN EVIDENCE.

20 (WHEREUPON, EXHIBIT NO. 2150, TRAVEL AMERICA  
21 LETTER, TRAVEL AMERICA LETTERHEAD, DATED AUGUST 27, 1997,  
22 WAS RECEIVED IN EVIDENCE.)

23 BY MR. RIVIN: Q ACTUALLY, THERE'S A BACK PAGE OF  
24 THIS I'M INFORMED. AND THAT IS BATES STAMP ABI 1781. AND  
25 THIS WAS A TWO-PAGE DOCUMENT, WASN'T IT? IT WAS FRONT AND  
26 BACK?

1           A           I THINK THIS ONE WAS.

2           Q           FRONT AND BACK?

3           A           YES, SHOULD HAVE BEEN.

4           MR. RIVIN:   OKAY.   SO IF WE COULD GIVE INTO  
5 EVIDENCE BOTH PAGES.

6           THE COURT:   IT WILL BE SO RECEIVED.

7           BY MR. RIVIN:  Q   NOW, I'LL MOVE ON TO CUTTY'S DES  
8 MOINES, MR. THOMPSON.

9                        YOU WERE ON THE BOARD OF DIRECTORS OF  
10 CUTTY'S DES MOINES.   FOR WHAT PERIOD OF TIME HAVE YOU BEEN  
11 ON THE BOARD OF THAT COMPANY?

12          A           I BELIEVE -- I BELIEVE 1990 -- IT MAY HAVE  
13 BEEN PRIOR TO THAT TIME.   BUT EITHER LATE '80 OR EARLY  
14 '90.   BUT FOR QUITE SOME TIME.

15          Q           THROUGH THE PRESENT TIME?

16          A           YES, THROUGH THE PRESENT TIME.

17          Q           WE'VE HEARD SOME TESTIMONY IN THE CASE  
18 ABOUT -- FROM MR. NOVELLI AND FROM -- ABOUT HIS HAVING  
19 ALLOWED CUTTY'S DES MOINES TO REMAIN IN THE COAST TO COAST  
20 SYSTEM NOTWITHSTANDING THE WITHDRAWAL OF ALL THE OTHER  
21 PARKS, AND THAT MR. NOVELLI COULD HAVE TRANSFERRED MEMBERS  
22 TO CUTTY'S DES MOINES, COAST MEMBERS TO CUTTY'S DES MOINES,  
23 HAD HE WANTED TO DO SO BECAUSE THAT PARK WAS STILL IN THE  
24 SYSTEM.

25          A           THAT'S CORRECT.

26          Q           BUT HE DIDN'T DO SO.

1 A YES.

2 Q ISN'T THAT RIGHT?

3 A THAT'S CORRECT.

4 Q AND THAT'S BECAUSE IN PART HE INTENDED TO  
5 PULL ALL OF HIS PARKS AND ALL OF HIS MEMBERS OUT OF COAST;  
6 CORRECT?

7 MR. MOSHENKO: OBJECTION. MISSTATES THE EVIDENCE.

8 THE WITNESS: I DON'T KNOW WHY.

9 MR. MOSHENKO: OBVIOUSLY HE DIDN'T INTEND THAT  
10 BECAUSE HE WANTED DEER RUN IN.

11 THE COURT: THE OBJECTION IS SUSTAINED.

12 BY MR. RIVIN: Q CUTTY'S DES MOINES IS A DIFFERENT  
13 TYPE OF CAMPGROUND, ISN'T IT?

14 A YOU HAVE TO DEFINE "DIFFERENT." TO ME IT'S  
15 A CAMPGROUND.

16 Q WHO OWNS CUTTY'S DES MOINES?

17 A OF THE -- THE MEMBERS OWN PART OF IT. IT'S  
18 AN UNDIVIDED INTEREST. SO IT GETS TO BE A CONVOLUTED  
19 QUESTION. IT'S LIKE THE PONDEROSA. IT'S LIKE THE LANDING.  
20 IT'S LIKE HIDDEN SPRINGS. IT'S LIKE A NUMBER OF THE OTHER  
21 OF THE CAMPGROUNDS. THE REASON WHAT -- WHAT YOU MEANT BY  
22 "DIFFERENT." IT'S AN UNDIVIDED INTEREST. IN THAT -- MAY I  
23 EXPLAIN?

24 Q YES.

25 A IT'S LIKE -- I APOLOGIZE FOR THOSE OF YOU  
26 WHO DO KNOW WHAT IT IS. I DIDN'T KNOW WHAT IT WAS THE

1 FIRST TIME I RAN INTO IT. IT'S LIKE TAKING THIS WATER  
2 CONTAINER, AND ALL OF YOU PAY A DOLLAR. AND IT BECOMES  
3 YOURS. AND YOU DON'T GET IT APART. IT'S UNDIVIDED. BUT  
4 YOU ALL HAVE AN INTEREST, AN OWNERSHIP INTEREST IN IT. SO  
5 THAT'S AN UNDIVIDED INTEREST. AND IT IS ONE OF THE  
6 UNDIVIDED INTEREST PROJECTS.

7 Q SO EACH OF THE -- EACH OF THE MEMBERS OF  
8 CUTTY'S DES MOINES HAVE AN UNDIVIDED INTEREST, HAVE AN  
9 OWNERSHIP INTEREST IN THE PARK?

10 A THAT'S CORRECT.

11 Q AND IT'S BECAUSE THAT'S AN UNDIVIDED  
12 INTEREST PARK THAT -- THE NOVELLI ORGANIZATION CAN'T  
13 TRANSFER MEMBERS IN AND OUT OF THAT PARK BECAUSE THE  
14 MEMBERS OF THAT PARK HAVE AN OWNERSHIP INTEREST IN IT;  
15 ISN'T THAT CORRECT?

16 A YOU COULD TRANSFER MEMBERS IN. BECAUSE ALL  
17 YOU HAVE TO DO IS ASSIGN AN UNDIVIDED INTEREST TO THEM. SO  
18 YOU COULD TRANSFER THEM IN. TO ANSWER YOUR QUESTION, YOU  
19 CAN TRANSFER THEM OUT.

20 Q BUT MEMBERS HAVE NOT BEEN TRANSFERRED IN?

21 A NO, SIR -- WELL, I DON'T THINK SO.

22 Q AND CUTTY'S DES MOINES IS NOT PART OF TRAVEL  
23 AMERICA; ISN'T THAT CORRECT?

24 A THAT'S CORRECT.

25 Q CUTTY'S DES MOINES IS PART OF THE  
26 PRESIDENT'S TRAVEL CLUB OR LARGE RECIPROCAL GROUP?

1 A YES.

2 Q BUT NOT PART OF TRAVEL AMERICA?

3 A THAT'S CORRECT.

4 Q SO CUTTY'S DES MOINES IS NOT ONE OF THE  
5 PARKS IN TRAVEL AMERICA?

6 A IT IS NOT PART OF THE TRAVEL AMERICA SYSTEM.

7 Q AND HAS NOT BEEN; IS THAT CORRECT?

8 A AND HAS NOT BEEN, THAT I KNOW OF.

9 Q SO IT'S INDEPENDENT OF TRAVEL AMERICA?

10 A RIGHT.

11 Q YOU TESTIFIED ON DIRECT EXAMINATION THAT YOU  
12 DID SOME WORK FOR COAST TO COAST IN THE PAST?

13 A YES, SIR.

14 Q THAT WAS I BELIEVE YOU SAID IN THE '80'S,  
15 SOMETIME IN THE '80'S?

16 A I LOSE TRACK OF TIME BUT IT'S EITHER LATE  
17 '80'S OR EARLY '90'S.

18 Q AND I THINK YOU INDICATED THAT YOU HAD BEEN  
19 HIRED AS A CONSULTANT FOR A SHORT PERIOD OF TIME TO DO SOME  
20 MARKETING, WORK ON MARKETING?

21 A WELL, TO WORK ON A MARKETING PROGRAM THAT  
22 THEY WERE WORKING ON.

23 Q IS IT CORRECT THAT MR. BUTLER BECAME  
24 PRESIDENT DURING THE PERIOD OF TIME THAT -- DURING THE TWO-  
25 OR THREE-MONTH PERIOD OF TIME THAT YOU WERE WORKING?

26 A NO. HE HAD BEEN PRESIDENT, I BELIEVE --

1 AND, AGAIN, I GET YEARS MIXED UP. BUT I THINK 1985, FIVE  
2 YEARS PRIOR.

3 Q DO YOU RECALL THAT TWO OR THREE MONTHS AFTER  
4 YOUR SERVICES HAD BEEN RETAINED AS A CONSULTANT FOR COAST  
5 TO COAST THAT MR. BUTLER INDICATED TO YOU THAT YOU WERE NO  
6 LONGER -- YOUR SERVICES WERE NO LONGER NEEDED?

7 A AGAIN, WE DISCUSSED THIS BEFORE. BUT I  
8 DON'T EXACTLY REMEMBER, BUT I WAS UP THERE ON A TEMPORARY  
9 BASIS IN ORDER TO HELP THEM GET THAT THING STARTED. AND  
10 THEN MY ROLE ENDED.

11 Q DO YOU HAVE -- IS IT YOUR RECOLLECTION THAT  
12 MR. BUTLER BASICALLY LET YOU GO?

13 A WHAT YOU MEAN -- LET GO IN A NEGATIVE  
14 CONNOTATION. NO BECAUSE WE HAD DINNER THE NIGHT BEFORE AT  
15 HIS HOUSE WITH HIS WIFE. SO I DON'T COUNT THAT AS A  
16 NEGATIVE. IT WAS A TIME WHEN MY SERVICES WERE NO LONGER  
17 NEEDED.

18 Q WERE YOU HIRED AGAIN BY COAST TO COAST A  
19 COUPLE YEARS LATER?

20 A I DON'T THINK SO. IF I, WAS I DON'T  
21 REMEMBER IT.

22 Q YOU HAD MANY HEATED DISCUSSIONS WITH COAST  
23 TO COAST OVER THE YEARS?

24 A YES.

25 Q AND FOCUSING ON THE YEARS PRIOR TO 1997, YOU  
26 DON'T RECALL WHETHER YOU DID OR YOU DID NOT THREATEN TO SUE

1 COAST TO COAST?

2 A I DON'T BELIEVE I EVER THREATENED TO SUE  
3 COAST.

4 Q BUT YOU DON'T REMEMBER ONE WAY OR THE  
5 OTHER? YOU MAY HAVE; YOU JUST DON'T REMEMBER?

6 A WE HAD THAT DISCUSSION. IT'S HARD TO  
7 REMEMBER SOMETHING YOU DIDN'T DO. BUT I DON'T RECALL EVER  
8 SAYING THAT I'M GOING TO SUE YOU BECAUSE I WAS NEVER IN A  
9 CAPACITY TO DO THAT.

10 Q SO THE BEST --

11 A SO IT WOULDN'T MAKE SENSE.

12 Q ARE YOU SAYING TO THE BEST OF YOUR  
13 RECOLLECTION YOU NEVER DID THREATEN TO SUE COAST?

14 A RIGHT.

15 Q IS THAT RIGHT?

16 A THAT'S THE BEST OF MY RECOLLECTION, YES.

17 Q MR. MOSHENKO ASKED YOU SOME QUESTIONS ABOUT  
18 ORPHAN PROGRAMS AND ORPHAN MEMBERS. AND I WANT TO ASK YOU  
19 JUST A COUPLE OF QUESTIONS ABOUT THE ORPHAN PROGRAM.

20 ISN'T IT TRUE, BASED ON YOUR KNOWLEDGE OF  
21 THE NOVELLI ORGANIZATION, THAT THEY DID IN FACT OBTAIN,  
22 ACQUIRE ORPHAN MEMBERS OVER THE YEARS?

23 A IT DEPENDS ON WHAT YOU CALL ORPHAN MEMBERS.  
24 THERE WERE MEMBERS WHO CAME AND APPLIED FOR MEMBERSHIP AND  
25 WERE -- WERE SOLD MEMBERSHIPS, AND THEY MAY HAVE COME FROM  
26 OTHER CAMP CLUBS.

1 Q WERE THERE INSTANCES IN WHICH THE NOVELLI  
2 ORGANIZATION ACTUALLY ACQUIRED ORPHAN MEMBERS FROM OTHER  
3 PARKS?

4 A THE ONLY ONE THAT I CAN REMEMBER THAT MIGHT  
5 GO INTO THAT CLASSIFICATION WOULD BE U.S.V.R., UNITED  
6 STATES VACATION RESORTS. AND THEY CONTACTED ALL SEASONS --  
7 I BELIEVE IT WAS ALL SEASONS -- SOME NUMBER OF YEARS AGO  
8 AND ASKED WOULD -- COULD THOSE MEMBERS BE TRANSFERRED OVER  
9 TO THEM. AND U.S.V.R. DID IT. BUT I DON'T THINK COAST WAS  
10 DIRECTLY INVOLVED IN THAT.

11 MR. RIVIN: I'D LIKE TO SHOW THE WITNESS'S  
12 TESTIMONY, DEPOSITION TESTIMONY, FROM MARCH 6TH, PAGE 11,  
13 LINE 7 THROUGH 23.

14 MR. MOSHENKO: ALL RIGHT, NO OBJECTION, YOUR HONOR.

15 BY MR. RIVIN: Q MR. THOMPSON, YOU RECALL THAT  
16 YOUR DEPOSITION WAS TAKEN IN THIS CASE?

17 A YES.

18 Q MORE THAN ONCE?

19 A YES.

20 Q YOU TOOK AN OATH WHEN YOU TESTIFIED --

21 A YES.

22 Q -- AT YOUR DEPOSITION?

23 TO TELL THE TRUTH, THE SAME OATH THAT YOU'VE  
24 TAKEN HERE; CORRECT?

25 A YES.

26 Q LINE 7 THROUGH 23.

1                   "QUESTION: MR. THOMPSON, WERE THERE  
2 INSTANCES WHEN THE NOVELLI ORGANIZATION EVER OBTAINED  
3 ORPHAN MEMBERS FROM OTHER PARKS?

4                   "ANSWER: YES.

5                   "QUESTION: AND THAT WAS SOMETHING THAT  
6 OCCURRED ON SEVERAL OCCASIONS OVER THE YEARS; RIGHT? IT  
7 WAS MORE THAN ONCE?

8                   "MR. MOSHENKO: OBJECTION. COMPOUND. TWO  
9 QUESTIONS. SEVERAL OR MORE THAN ONCE. WHICH QUESTION DO  
10 YOU WANT ANSWERED?

11                  "MR. SHERMAN: LET ME REPHRASE IT.

12                  "QUESTION: THIS FACT PATTERN IS SOMETHING  
13 THAT OCCURRED ON MORE THAN ONE OCCASION; CORRECT?

14                  "MR. MOSHENKO: OBJECTION. UNCERTAIN AS TO  
15 THIS FACT PATTERN.

16                  "THE WITNESS: IT OCCURRED ON MORE THAN ONE  
17 OCCASION, YES.

18                  A            COULD YOU READ BEFORE THAT SO WE CAN DEFINE  
19 THE WORD ORPHAN AS IT WAS DEFINED THAT DAY? BECAUSE I  
20 DON'T RECALL THAT BUT I OBVIOUSLY SAY IT AND I'D LIKE TO  
21 SEE WHAT I WAS THINKING AT THAT POINT IN TIME.

22                  Q            MR. MOSHENKO TOOK A LOOK AT THAT TESTIMONY  
23 AND HE WILL HAVE AN OPPORTUNITY TO READ THAT.

24                  A            BECAUSE --

25                  Q            I ASSUME, MR. THOMPSON, THAT WHEN YOU WERE  
26 REFERRING TO ORPHAN MEMBERS IN YOUR DEPOSITION TESTIMONY,

1 YOU REFERRED TO THEM IN THE SAME WAY THAT YOU DID ON THE  
2 WITNESS STAND THIS MORNING?

3 A WELL, I'M NOT SURE. YOU'RE GOOD AT  
4 QUESTIONING. YOU HAVE A TENDENCY TO ASK IT ABOUT 10 TIMES.  
5 SO I'M NOT SURE EXACTLY WHICH TIME.

6 BUT ORPHANS IN THE SENSE THAT WE'RE TALKING  
7 ABOUT RIGHT NOW, IF THERE HAD BEEN SOME, I WOULD JUST  
8 SIMPLY SAY THERE HAD BEEN SOME BECAUSE YOU CAN FIND THEM.  
9 IT'S EASY TO DO.

10 BUT ORPHANS IN THE SENSE THEY WERE  
11 TRANSFERRED FROM ANOTHER ORGANIZATION, I'M NOT EXACTLY SURE  
12 WHY I ANSWERED IT THAT WAY. BECAUSE AT THE MOMENT I DON'T  
13 RECALL ORPHANS BEING TRANSFERRED IN. I JUST DON'T. MAYBE  
14 AT THAT TIME I DID, BUT I'D LIKE TO SEE THE CONTEXT.

15 Q YOU TESTIFIED, MR. THOMPSON, ABOUT YOUR  
16 ROLES IN THE NOVELLI ORGANIZATION. YOU TESTIFIED TO SOME  
17 EXTENT ABOUT YOUR RELATIONSHIP WITH MR. NOVELLI?

18 A YES.

19 Q THAT YOU LIKED HIM.

20 I'D LIKE TO ASK YOU SOME QUESTIONS, ABOUT  
21 TWO OR THREE OTHER, JUST A FEW QUESTIONS, ABOUT TWO OR  
22 THREE OTHER PEOPLE --

23 A OKAY.

24 Q -- IN THE NOVELLI ORGANIZATION.

25 MR. MOSHENKO: OBJECTION. THAT'S BEYOND THE SCOPE.

26 THE COURT: I DON'T KNOW UNTIL I'VE HEARD THE

1 QUESTION.

2 BY MR. RIVIN: Q I WANT TO ASK YOU A COUPLE OF  
3 QUESTIONS ABOUT THREE OTHER PEOPLE THAT YOU WORKED WITH IN  
4 THE NOVELLI ORGANIZATION.

5 FIRST I'D LIKE TO ASK YOU ABOUT KEN HOEL.

6 A OKAY.

7 MR. MOSHENKO: OBJECTION. BEYOND THE SCOPE.

8 THE COURT: SUSTAINED.

9 MR. RIVIN: MAY WE APPROACH?

10 THE COURT: YOU MAY.

11 (DISCUSSION OFF THE RECORD.)

12 MR. RIVIN: YOUR HONOR, AS I INDICATED, I ONLY HAD  
13 TWO OR THREE MINUTES' WORTH OF QUESTIONS ON THIS SUBJECT.  
14 BUT GIVEN YOUR HONOR'S RULING, I HAVE NOTHING FURTHER.

15 WE WOULD, HOWEVER, LIKE TO MAKE SURE THAT  
16 MR. THOMPSON UNDERSTANDS THAT HE WILL NEED TO COME BACK IN  
17 OUR CASE.

18 THE COURT: THANK YOU.

19 REDIRECT.

20 MR. MOSHENKO: NOT TOO LONG, YOUR HONOR

21 REDIRECT EXAMINATION

22 BY MR. MOSHENKO: Q MR. THOMPSON, MR. RIVIN ASKED  
23 YOU SOME QUESTIONS ABOUT WHETHER YOU COULD TRANSFER MEMBERS  
24 INTO OR OUT OF A U.D.I. PARK, UNDIVIDED INTEREST PARK?

25 A YES.

26 Q IN YOUR ANALYSIS OF RECORDS YOU DETERMINED

1 THAT COAST IN FACT TRANSFERRED MEMBERS WITH U.D.I. RESORT  
2 INTEREST OUT OF A U.D.I. PARK TO ANOTHER PARK; RIGHT?

3 A MANY TIMES, YES.

4 Q BEG YOUR PARDON?

5 A MANY TIMES.

6 Q AND SO THESE MEMBERS WHO WERE TRANSFERRED  
7 AWAY FROM THE PARKS THAT THEY OWNED INTEREST IN, WERE THEY  
8 TOLD THAT, THAT THEY WERE BEING -- GIVING UP THEIR  
9 INTEREST?

10 A I DON'T KNOW, MR. MOSHENKO.

11 Q OKAY. WE'LL GO ON TO ANOTHER ISSUE.

12 MR. RIVIN SHOWED YOU -- ASKED YOU SOME  
13 QUESTIONS ABOUT WHETHER TRAVEL AMERICA INTENDED TO PULL ALL  
14 SEASONS RESORTS OUT, BUT FOR THE AUTOMATIC STAY; DO YOU  
15 RECALL THOSE QUESTIONS?

16 A YES.

17 MR. RIVIN: THAT MISSTATES -- THAT MISSTATES MY  
18 QUESTION.

19 THE WITNESS: SORRY.

20 BY MR. MOSHENKO: Q HE ASKED YOU IF THE AUTOMATIC  
21 STAY WAS REALLY NOT THE REASON WHY COAST -- WHY TRAVEL  
22 AMERICA DIDN'T REMOVE A.S.R. MEMBERS, WORDS TO THAT EFFECT;  
23 DO YOU REMEMBER THAT?

24 A YES. I UNDERSTAND THERE WAS A QUESTION LIKE  
25 THAT.

26 Q HE SUGGESTED THAT MR. DAFF WAS IN CHARGE,

1 AND THAT'S THE REASON WHY. DO YOU RECALL WHAT QUESTION?

2 A YES.

3 Q OKAY. NOW, HE THEN ASKED YOU, SO -- WORDS  
4 TO THE EFFECT OF, SO WHEN COAST TOOK ALL SEASONS RESORTS  
5 OUT, ALL COAST DID WAS ACCOMPLISH WHAT THE PLAINTIFFS  
6 INTENDED; DO YOU RECALL THAT?

7 A YES.

8 Q DID THE PLAINTIFFS INTEND TO REMOVE ALL  
9 SEASONS RESORTS BY THE GIVING OF THE MEMBERS LETTERS  
10 TELLING THEM THEY HAD BEEN TRANSFERRED AWAY FROM THE  
11 PLAINTIFFS' RESORTS TO OTHER COMPETITOR RESORTS?

12 MR. RIVIN: OBJECTION. THE DOCUMENTS SPEAKS FOR  
13 THEMSELVES.

14 MR. MOSHENKO: THIS IS LEGITIMATE RESPONSE TO THE  
15 SUGGESTION OR INFERENCE THAT --

16 THE COURT: I'LL ALLOW IT. THE OBJECTION IS  
17 OVERRULED.

18 PROCEED.

19 THE WITNESS: I'M SORRY.

20 BY MR. MOSHENKO: Q THE PLAINTIFFS NEVER INTENDED  
21 TO PULL ALL SEASONS RESORTS OUT BY THE USE OF -- AND FOLLOW  
22 IT UP WITH LETTERS TELLING THE MEMBERS THAT THEY HAD BEEN  
23 TRANSFERRED TO COMPETITOR RESORTS?

24 A NO.

25 Q DID THE PLAINTIFFS INTEND THAT THE -- THEIR  
26 DISAFFILIATION OF ALL SEASONS RESORTS WOULD BE HANDLED

1 ALONGSIDE OF, EFFECTIVELY, PROVIDING LISTS OF ITS MEMBERS  
2 TO COMPETITORS?

3 A I'M SORRY. BREAK IT DOWN A LITTLE BIT FOR  
4 ME, MR. MOSHENKO. I'LL LOSE IT.

5 Q COAST TO COAST TOOK ALL SEASONS RESORTS OUT  
6 AND SHORTLY THEREAFTER PROVIDED LISTS OF ITS -- OF THE  
7 PLAINTIFFS' MEMBERS TO COMPETITORS; DO YOU RECALL THAT?

8 MR. RIVIN: OBJECTION. LACK OF FOUNDATION.

9 THE WITNESS: YES.

10 MR. MOSHENKO: OH, NO.

11 THE COURT: OVERRULED.

12 BY MR. MOSHENKO: Q DID THE PLAINTIFFS INTEND THAT  
13 TO BE THE MANNER IN WHICH THEY TOOK ALL SEASONS RESORTS OUT  
14 OF THE SYSTEM?

15 A NO OWNER OR DEVELOPER WOULD INTEND THAT, NO.

16 Q DID THE PLAINTIFFS INTEND THAT THE MEMBERS  
17 WOULD BE NOTIFIED OF THE DISAFFILIATION WITH A LETTER THAT  
18 FALSELY STATED THAT RAY NOVELLI DID IT WHEN HE DIDN'T?

19 MR. RIVIN: OBJECTION. ARGUMENTATIVE.

20 THE COURT: SUSTAINED.

21 MR. MOSHENKO: THAT'S ALL I HAVE.

22 THE COURT: ANYTHING FURTHER?

23 MR. RIVIN: NO.

24 THE COURT: THANK YOU, SIR. YOU'RE EXCUSED SUBJECT  
25 TO RECALL.

26 LADIES AND GENTLEMEN, WE ARE AGAIN IN A

1 POSITION WHERE WE'RE GOING TO HAVE TO TAKE SOME TESTIMONY  
2 AND RULE ON SOME MOTIONS WITHOUT YOUR ASSISTANCE. I KNOW  
3 YOU'RE REALLY DISAPPOINTED TO HAVE TO LEAVE EARLY.

4 BUT, AT ANY RATE, WE'LL SEE YOU ALL AT 9:30  
5 TOMORROW MORNING -- I BEG YOUR PARDON. 9:00. WISHFUL  
6 THINKING.

7 I'M AWARE OF YOUR SITUATION, AND I HOPE  
8 EVERYTHING WILL BE ALL RIGHT. BUT WE'LL HEAR FROM YOU IN  
9 THE MORNING.

10 JUROR 12: EITHER I'LL BE HERE OR YOU'LL GET A  
11 PHONE CALL THAT I WILL NOT BE HERE.

12 THE COURT: ALL RIGHT. SEE YOU IN THE MORNING.  
13 9:00.

14 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN  
15 COURT OUT OF THE PRESENCE OF THE JURY:)

16 THE COURT: DO YOU WANT TO TAKE MR. BIERLEY,  
17 MR. SHERMAN, OR MR. RIVIN?

18 MR. SHERMAN: MR. RIVIN IS.

19 MR. MOSHENKO: ALL RIGHT, WE'LL START A HEARING.  
20 AND I'LL LAY THE FOUNDATION FOR WHAT HE INTENDS TO TESTIFY  
21 TO.

22 SO WE'RE GOING TO PUT HIM ON THE STAND?

23 THE COURT: YES.

24 MR. MOSHENKO: OKAY. DR. BIERLEY, PLEASE COME  
25 FORWARD.

26 CALVIN BIERLEY,

1 CALLED AS A WITNESS ON BEHALF OF THE PLAINTIFFS, HAVING  
2 BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS  
3 FOLLOWS:

4 THE CLERK: TAKE A SEAT IN THE WITNESS STAND,  
5 PLEASE.

6 PLEASE STATE YOUR FULL NAME FOR THE RECORD  
7 AND SPELL YOUR LAST NAME, PLEASE.

8 THE WITNESS: CALVIN MICHAEL BIERLEY. LAST NAME IS  
9 B-I-E-R-L-E-Y.

10 THE COURT: L-U --

11 THE WITNESS: B-I-E-R-L-E-Y.

12 THE COURT: PROCEED.

13 MR. MOSHENKO: I'LL DO AN ABBREVIATED, SOMEWHAT  
14 ABBREVIATED BACKGROUND, YOUR HONOR.

15 DIRECT EXAMINATION (402)

16 BY MR. MOSHENKO: Q DR. BIERLEY, WE'RE CALLING YOU  
17 "DOCTOR" BECAUSE YOU HAVE A PH.D. DEGREE FROM THE STATE  
18 OF -- WASHINGTON STATE UNIVERSITY; IS THAT CORRECT?

19 A YES.

20 Q WHAT WAS THE -- LET'S SEE.

21 YOU GRADUATED IN AUGUST, 1983 --

22 A YES.

23 Q -- WITH A DEGREE IN EXPERIMENTAL PSYCHOLOGY  
24 WITH PRELIMINARY EXAMS IN INDUSTRY PSYCHOLOGY, STATISTICS,  
25 BEHAVIORAL MODIFICATION AND INSTRUMENTATION; CORRECT?

26 A YES, THAT'S CORRECT.

1 Q AND PRIOR TO THAT, YOU RECEIVED YOUR  
2 MASTER'S DEGREE IN MARKETING RESEARCH WITH ADDITIONAL  
3 COURSE WORK IN FINANCE AND QUANTITATIVE METHODS FROM  
4 WASHINGTON STATE UNIVERSITY?

5 A YES.

6 Q THAT WAS IN JANUARY, 1982?

7 A UH-HUH, YES.

8 Q AND THEN BEFORE THAT YOU HAD YOUR BACHELOR  
9 OF SCIENCE DEGREE IN PSYCHOLOGY GRADUATING WITH HONORS,  
10 RECEIVING THE E.V. ESTENSEN AWARD FOR OUTSTANDING  
11 PSYCHOLOGY MAJOR OF 1976 FROM THE NORTH DAKOTA STATE  
12 UNIVERSITY; RIGHT?

13 A YES.

14 Q AND SO YOU FINISHED YOUR FORMAL EDUCATION IN  
15 1983; IS THAT CORRECT?

16 A YES.

17 Q AND AFTER THAT WHAT DID YOU DO?

18 A AFTER THAT I JOINED A JOB AT AMERICAN  
19 CAMPGROUNDS, INCORPORATED, IN BELLEVUE, WASHINGTON AS A  
20 MARKETING AND SALES ANALYST AND EVENTUALLY BECAME DIRECTOR  
21 OF STRATEGIC PLANNING FOR AMERICAN CAMPGROUNDS.

22 Q AND YOU HAVE ONE WAY OR ANOTHER BEEN  
23 INVOLVED SINCE 1984 IN THE CAMPGROUND INDUSTRY IN  
24 SPECIFIC -- WITH SPECIFIC REFERENCE TO MARKETING DATA AND  
25 STATISTICAL ANALYSIS; IS THAT CORRECT?

26 A YES. TYPICALLY IN SOME CAPACITY THERE MAY

1 HAVE BEEN A ONE- OR TWO-YEAR LEG WHERE I MIGHT HAVE BEEN  
2 WORKING FOR I THINK THE EAST SIDE HUMAN SERVICE CENTER.  
3 AND I WASN'T PARTICULARLY -- WASN'T WORKING IN THE CAMP  
4 RESORT INDUSTRY FOR ABOUT A YEAR, OR THE TIME SHARE  
5 INDUSTRY. BUT I'VE PRETTY MUCH BEEN INVOLVED ON A  
6 CONTINUING BASIS, YES, THAT'S TRUE.

7 Q YOU'VE BEEN AN INSTRUCTOR AT CITY  
8 UNIVERSITY, BELLEVUE, WASHINGTON IN '93, '94. YOU TAUGHT  
9 PRINCIPLES OF MANAGEMENT?

10 A IF THAT'S WHAT IT SAYS, THEN '93 OR 4.

11 Q I'LL GIVE YOU YOUR RESUME.

12 AND SO THEN WERE YOU AN INSTRUCTOR AT  
13 CHAPMAN COLLEGE, BELLEVUE, WASHINGTON, 1988 -- PRIOR TO  
14 1993 WHEN YOU WENT TO CITY UNIVERSITY?

15 A YES.

16 Q OKAY. AND PRIOR TO -- THAT WAS 1988 TO 1990?

17 A YES.

18 Q AND THEN PRIOR TO THAT YOU WERE AN  
19 INSTRUCTOR AT ANTIOCH UNIVERSITY IN SEATTLE, WASHINGTON, ON  
20 MERITS OF STATISTICS AND RESEARCH CONCEPTS?

21 A YES.

22 Q BEFORE THAT YOU WERE AN INSTRUCTOR AT  
23 WASHINGTON STATE UNIVERSITY, 1981, 1982?

24 A YES.

25 Q IN BUSINESS STATISTICS?

26 A YES.

1 Q AND BEFORE THAT YOU WERE AN INSTRUCTOR AT  
2 THE UNIVERSITY OF OHIO?

3 A IDAHO.

4 Q OH, IDAHO. YOU'RE RIGHT.

5 AND ALSO AT WASHINGTON STATE UNIVERSITY ON  
6 MATTERS RELATING TO INTRODUCTORY PSYCHOLOGY AND  
7 EXPERIMENTAL PSYCHOLOGY?

8 A YES.

9 Q YOU'VE PUBLISHED MANY ARTICLES RELATING TO  
10 STATISTICS, LOGISTICS, CONDITIONING OF PERSONS RELATING TO  
11 STIMULI, SEGMENTAL TECHNIQUES FOR FINANCIAL SERVICES,  
12 PREDICTIVE MODELING, AMONG OTHER THINGS; CORRECT?

13 A THE FIRST TWO THINGS YOU MENTIONED WERE  
14 ACTUALLY PRESENTATIONS, NOT PUBLICATIONS. BUT --

15 Q OKAY.

16 A -- THE REST ON THERE ARE.

17 Q FOR EXAMPLE, WHAT IS "USE OF PREDICTIVE  
18 MODELING AND SEGMENTATION TECHNIQUES FOR FINANCIAL  
19 SERVICES" A REFERENCE TO?

20 A THAT WAS A PRESENTATION I MADE AT THE  
21 HARLAND USER CONVENTION. AND IT WAS A COUPLE-HOUR  
22 PRESENTATION TO FINANCIAL INSTITUTIONS OR PEOPLE WHO WORKED  
23 AT FINANCIAL INSTITUTIONS, CREDIT UNIONS AND BANKS ON  
24 SEGMENTATION TECHNIQUES.

25 Q WHAT'S SEGMENTATION TECHNIQUES?

26 A SEGMENTATION TECHNIQUES ARE A WAY TO TAKE A

1 HOMOGENOUS MARKET AND BREAK IT UP INTO DIFFERENT PORTIONS  
2 OF THE MARKET THAT HAVE UNIQUE NEEDS AND FOR DIFFERENT  
3 PRODUCTS SO THEN YOU CAN MARKET TO THE NEEDS OF EACH  
4 SEGMENT AS OPPOSED TO THE WHOLE MARKET WHICH HAS VARYING  
5 NEEDS.

6 Q ALL RIGHT. AND ON TO YOUR PROFESSIONAL  
7 EXPERIENCE, FROM THE PRESENT WORKING BACKWARD.

8 TODAY YOU'RE A BOEING EMPLOYEES CREDIT  
9 MARKETING STATISTICAL ANALYST; CORRECT?

10 A YES.

11 Q AND WHAT IS IT THAT YOU DO ON A DAY-TO-DAY  
12 BASIS?

13 A WELL, MY MAIN JOB IS STATISTICAL ANALYST.  
14 SO ANY PROJECTS THAT REQUIRE MODELING, USING STATISTICAL  
15 TECHNIQUES LIKE NEURO NETWORKS, I WOULD GET THAT PROJECT.

16 I ALSO DO SURVEY RESEARCH, SELECT SAMPLES  
17 FROM A MEMBER BASE TO SEND THESE SURVEYS TO, ANALYZE THE  
18 RESULTS OF THE SURVEYS ONCE I GET IT BACK.

19 I DO INQUIRIES INTO OUR MARKETING CONSUMER  
20 INFORMATION FILE. WE MAY GET A REQUEST FOR INFORMATION.  
21 I'D GO IN THERE AND GET THAT INFORMATION OUT OF THE FILE.  
22 AND DATA MINING. DATA MINING IS USING STATISTICAL  
23 TECHNIQUES TO GO INTO THE DATABASE AND FIND RELATIONSHIPS  
24 AMONG THE MEMBERS TO PREDICT WHO IS GOING TO BUY A  
25 PARTICULAR PRODUCT. AND THEN BASED ON THAT MODEL, WE WILL  
26 DECIDE TO MAIL TO THAT GROUP OF MEMBERS.

1           Q       YOU KNOW WE'RE GOING TO BE ASKING YOU SOME  
2   QUESTIONS THAT RELATE TO THE SUBJECT OF WHETHER YOU CAN  
3   TESTIFY AS AN EXPERT ON A SUBJECT OF CAUSATION,  
4   CAUSE/EFFECT OF PERSONS ACTING IN A CERTAIN MANNER BASED ON  
5   WHAT STIMULI ARE CAUSED; DO YOU UNDERSTAND THAT?

6           A       YES.

7           Q       I NOTE IN YOUR RESUME IT SAYS YOU SERVED --  
8   YOU WERE RESPONSIBLE FOR EXECUTING, ANALYZING AND  
9   INTERPRETING THE STRATEGIC VALUE OF RESEARCH AND SURVEY  
10   RESULTS.

11                   IS THAT CAUSAL-RELATED, CAUSATION-RELATED?

12          A       I WOULDN'T SAY THE SURVEY RESULTS ARE  
13   CAUSAL-RELATED.  TYPICALLY WHERE I WOULD BE INVOLVED IN --

14          Q       SLOW DOWN.

15          A       WHERE WE WOULD DO CAUSATION-TYPE RESEARCH  
16   WOULD BE WHEN WE DO A MARKETING CAMPAIGN, OFTENTIMES WE'LL  
17   SET ASIDE A CONTROL GROUP.  AND WE WON'T MARKET TO THAT  
18   CONTROL GROUP, BUT WE'LL MARKET TO A SIMILAR GROUP, OR AN  
19   IDENTICAL GROUP, TO SEE IF THE MARKETING CAMPAIGN IS  
20   EFFECTIVE.  AND THEN IF THERE'S A DIFFERENCE BETWEEN THE  
21   GROUP IN THEIR RESPONSE, THEN YOU KNOW IT'S FROM THE  
22   CAMPAIGN, AND IT'S CAUSED BY THE CAMPAIGN.  SO THAT'S THE  
23   TYPE OF CAUSATION RESEARCH I WOULD DO.

24          Q       OKAY.  WHAT EXPERIENCE DO YOU HAVE IN THAT  
25   TYPE OF CAUSE/EFFECT ANALYSIS?

26          A       WHAT EXPERIENCE?

1 Q YES.

2 A WELL, MY ACADEMIC BACKGROUND, ONE THING THEY  
3 TEACH YOU IS EXPERIMENTAL DESIGN, WHICH LAYS THE GROUNDWORK  
4 FOR ESTABLISHING CAUSE AND EFFECT.

5 THE WHOLE IDEA BEHIND RESEARCH DESIGN IS TO  
6 DESIGN A STUDY SO THAT WHEN YOU'RE DONE, THAT YOU CAN  
7 ESTABLISH THAT SOMETHING CAUSED SOMETHING ELSE TO HAPPEN,  
8 WHATEVER IT IS OF INTEREST.

9 MR. RIVIN: YOUR HONOR, I WOULD SUGGEST THAT WE  
10 MIGHT BE ABLE TO CUT THROUGH THIS AND ASK DR. BIERLEY IF HE  
11 DID SUCH AN ANALYSIS -- SUCH AN ANALYSIS.

12 MR. MOSHENKO: I'LL GET THERE. I THINK --

13 MR. RIVIN: AND THAT JUST WASN'T DONE HERE, AND I  
14 THINK WE CAN SHORT-CIRCUIT THE PROCESS IF THOSE QUESTIONS  
15 WERE ASKED.

16 THE COURT: WHY DON'T YOU ASK THAT.

17 MR. MOSHENKO: WELL, DID YOU DO AN ANALYSIS OF DATA  
18 TO DETERMINE THE CAUSES OF MEMBERS LEAVING THE PLAINTIFFS'  
19 RESORTS?

20 A YES, I DID.

21 Q OKAY. WHAT DATA DID YOU USE TO DO THE  
22 ANALYSIS?

23 A I USED THE DATA ON -- I CONNECTED THE DATA  
24 ON DUES PAYMENTS FROM THE PLAINTIFF, MARRIED UP WITH A  
25 SAMPLE FROM THE DEFENDANTS' DATABASE PROVIDED TO THE  
26 PLAINTIFF -- THAT'S THE 34,000 MEMBERS IN THOSE TWO FILES

1 ON THE '99 CD THAT HAD BEEN MENTIONED BEFORE, EARLIER IN  
2 BOB THOMPSON'S TESTIMONY.

3 Q OKAY.

4 THE COURT: WOULD YOU GET A LITTLE CLOSER TO THE  
5 MICROPHONE.

6 MR. MOSHENKO: YEAH, THAT WOULD -- OR PULL THE MIKE  
7 CLOSER TO YOU.

8 THE WITNESS: HOW ABOUT THIS?

9 BY MR. MOSHENKO: Q OKAY. BEFORE I GET FURTHER  
10 DETAIL ON WHAT YOU DID, IS THERE A KNOWN, VALID SCIENTIFIC  
11 METHOD OF DETERMINING CAUSATION?

12 A YES, THERE'S --

13 Q WHAT'S IT CALLED?

14 A THE THREE CRITERIA FOR ESTABLISHING CAUSE  
15 AND EFFECT.

16 Q OKAY. AND HOW LONG HAVE YOU BEEN USING THIS  
17 TECHNIQUE FOR DETERMINING CAUSATION?

18 A I FIRST BECAME AWARE OF IT WAY BACK IN THE  
19 '70'S BUT BECAME CLEAR TO ME IN -- OH, ABOUT -- '76 FROM  
20 FRANCIS MC SWEENEY, MY PROFESSOR AT WASHINGTON STATE  
21 UNIVERSITY.

22 Q ALL RIGHT. WHAT ARE THE -- DESCRIBE THE  
23 CRITERIA FOR DETERMINING CAUSATION, CAUSE/EFFECT?

24 A THE THREE CRITERIA ARE THAT WHATEVER YOU'RE  
25 CONSIDERING TO BE THE CAUSE HAS TO OCCUR PRIOR TO WHAT  
26 YOU'RE CONSIDERING TO BE THE EFFECT. THAT'S THE FIRST

1     CONDITION.

2             Q            THAT MAKES SENSE.

3                            WHAT ELSE?

4             A            THEN THE SECOND CONDITION IS THAT THERE'S  
5     SOME CORRELATION OR APPARENT CONNECTIVITY BETWEEN THE CAUSE  
6     AND THE EFFECT.  IN OTHER WORDS, THEIR COVARIANCE.  SO, FOR  
7     EXAMPLE, WHEN THE CAUSE COMES ALONG, WHAT YOU'RE LOOKING AT  
8     IS THE EFFECT ALSO CHANGES.  IT GOES UP OR DOWN.

9                            IF IT DOESN'T, THEN THERE'S NO CONNECTIVITY,  
10    AND IT DOESN'T MEET THAT CRITERIA.

11            Q            LET ME INTERRUPT YOU FOR A SECOND.

12                            IN ORDER TO DO THE FIRST ONE, TO DETERMINE  
13    THE TIMING OF THE CAUSE AND THE EFFECT, YOU HAVE TO  
14    IDENTIFY THE EFFECT THAT YOU'RE TRYING TO DECIDE WHAT THE  
15    CAUSE WAS?

16            A            RIGHT.  YOU HAVE TO IDENTIFY WHAT YOU'RE  
17    GOING TO TREAT AS THE EFFECT AND THEN MEASURE IT.

18            Q            AND THEN IN THIS CASE WHAT WAS THE EFFECT  
19    THAT YOU ATTEMPTED TO DETERMINE THE CAUSE OF?

20            A            I WAS LOOKING FOR LOSS OF MEMBERS.

21            Q            THAT WAS THE EFFECT?

22            A            YES.

23            Q            OKAY.  AND SO YOU'RE -- PART OF YOUR JOB, TO  
24    DO WHAT WE ASKED YOU TO DO, WAS TO DETERMINE WHAT CAUSED  
25    THE LOSS OF MEMBERS?

26            A            YES.

1 Q ALL RIGHT. NOW, YOU SAID CAUSE AND EFFECT  
2 MUST BE CORRELATED. WHAT DOES THAT MEAN?

3 A WELL, THAT MEANS WHEN THE CAUSE OCCURS, THAT  
4 THE EFFECT IN THIS CASE HAS TO ALSO BE SEEN. IN THIS CASE  
5 IT WOULD BE A DECREASE IN MEMBERS, WHICH WOULD BE YOUR  
6 MEASURE OF LOST MEMBERS. AND I USED DUES PAYMENTS TO GAUGE  
7 THAT.

8 Q ALL RIGHT. SO TO DETERMINE THAT, IT IS  
9 NECESSARY TO FOCUS ON THE TIMING OF THE EFFECT?

10 A YES.

11 Q AND THE TIMING OF THE POTENTIAL CAUSE OR  
12 CAUSES?

13 A YES.

14 Q OKAY. NOW, TO CORRELATE CAUSE AND EFFECT,  
15 YOU NEED TO IDENTIFY POSSIBLE CAUSES?

16 A YES.

17 Q OKAY. HOW DO YOU DO THAT?

18 A WELL, YOU THINK AND ASK ABOUT, WHAT ARE THE  
19 POTENTIAL CAUSES, AND MAKE A LIST OF THEM.

20 Q OKAY. NOW, TO DO THAT, YOU DON'T HAVE THE  
21 CONCLUSION OF CAUSE WHEN YOU DO THAT?

22 A NO.

23 Q BEFORE YOU DO IT; RIGHT?

24 A NO, YOU DO NOT.

25 Q SO IS IT NECESSARY TO MAKE ASSUMPTIONS?

26 A YES. YOU HAVE TO ASSUME THAT ALL THOSE

1 THINGS THAT YOU'VE LISTED AS POTENTIAL CAUSES COULD INDEED  
2 BE A POTENTIAL CAUSE. AND THEN THAT'S -- THE THIRD STEP OF  
3 THE THREE CRITERIA IS TO CONTROL FOR AND SYSTEMATICALLY  
4 ELIMINATE POTENTIAL CAUSES UNTIL YOU'VE ARRIVED AT ONE OR  
5 SOMETIMES TWO CAUSES. I MEAN, THERE'S GOING TO BE MORE  
6 THAN ONE CAUSE IN THE END.

7 Q ALL RIGHT. DID YOU USE THE TERM "POTENTIAL  
8 CAUSES" -- I THINK YOU SAID YOU HAVE TO ASSUME THOSE  
9 CAUSES; IS THAT CORRECT? AS POTENTIAL CAUSES?

10 A WELL, YEAH. BECAUSE YOU DON'T KNOW IF IT'S  
11 A CAUSE OR NOT UNTIL YOU COLLECT THE DATA AND STARTED TO  
12 MEASURE AND RULE OUT THE POTENTIAL CAUSES.

13 Q OKAY. SO IN THIS CASE YOU DETERMINED THE  
14 EFFECT TO BE THE LOSS OF MEMBERS; IS THAT CORRECT?

15 A YES.

16 Q AND I THINK YOU TESTIFIED YOU DID THAT BY  
17 LOOKING AT DATA THAT WAS PROVIDED TO YOU FROM WHERE?

18 A FROM THE PLAINTIFF.

19 Q AND WHAT DID THE DATA SHOW YOU?

20 A IT SHOWED ME THAT IN PARTICULAR AFTER --  
21 WHAT IT SHOWED ME WAS FROM 1995 THROUGH '96 THERE WAS A  
22 SMALL -- RELATIVELY SMALL DROP-OFF OR LOSS OF MEMBERS. AND  
23 THEN AFTER '96, MOVING INTO '97, '98 AND '99, THERE WAS A  
24 CONSIDERABLY STEEPER DROP-OFF IN MEMBERS, SUCH THAT BY THE  
25 TIME YOU GOT TO 1999, APPROXIMATELY 50 PERCENT OF THE  
26 MEMBERS THAT WERE DUES-PAYING IN '95 HAD CEASED -- DID NOT

1 PAY DUES IN 1999.

2 Q CAN YOU DEPICT THAT ON A BOARD --

3 A YES, I CAN.

4 Q -- WHAT YOU JUST TESTIFIED TO?

5 GO AHEAD AND GRAPH WHAT IT IS YOU JUST

6 SAID.

7 A GOING BY MEMORY HERE, ON THE WHOLE SAMPLE

8 COMBINED. AGAIN, I'M GOING BY MEMORY.

9 BUT I THINK THE TREND -- SO FROM '95 TO '96,

10 APPROXIMATELY 50 PERCENT OF THE MEMBERS IN THE TWO FILES

11 THAT I LOOKED AT, COMBINED --

12 Q SO THE JUDGE CAN SEE.

13 A -- WERE PAYING DUES. AND THEN BY 1999

14 SOMEWHERE AROUND 25 PERCENT WERE. I THINK MAYBE 27. SO

15 THAT'S WHY I'M SAYING THERE WAS A 50-PERCENT DROP-OFF,

16 BECAUSE, YOU KNOW, TAKE 50 PERCENT OF 50, AND THAT GETS YOU

17 DOWN TO THIS 25.

18 Q OKAY. CAN YOU DO THE CAUSAL/EFFECT ANALYSIS

19 WITHOUT CONSIDERING DATA THAT IS FOUND IN THE DATABASE FOR

20 TRAVEL AMERICA, SHOWING THE NUMBER OF MEMBERS PAYING DUES

21 AT THE VARIOUS TIMES?

22 A NO, I CAN'T, BECAUSE I HAVE TO BE ABLE TO

23 SHOW AT MINIMUM THAT CAUSE CAME BEFORE THE EFFECT, AND THAT

24 THERE'S A CORRELATION BETWEEN CAUSE -- BETWEEN POTENTIAL

25 CAUSE AND CAUSE AND EFFECT.

26 AND THIS SHOWS THAT SOMETHING HAPPENED. AND

1 WITHOUT SEEING THAT, THIS SHOWS AT LEAST THERE'S A  
2 CORRELATION THERE. THEN WITHOUT BEING ABLE TO SAY THAT,  
3 YOU HAVE TO HAVE THE DATA TO SAY THAT. AND OF COURSE I  
4 COULDN'T. I COULDN'T GET PAST THE SECOND STEP IN THE THREE  
5 CRITERIA REQUIRED TO ESTABLISH CAUSE AND EFFECT.

6 Q OKAY. NOW, TO GET THAT DATA, YOU REQUESTED  
7 OF ROBERT THOMPSON THAT HE PROVIDE YOU WITH DATA RELATING  
8 TO MEMBERS AND WHAT MEMBERS PAID AND WHAT MEMBERS DIDN'T  
9 PAY; CORRECT?

10 A YES.

11 Q OKAY. AND THE JUDGE HAS HEARD SOME OF THIS  
12 SO IT WOULD BE FAMILIAR.

13 AND WHEN YOU INITIALLY REQUESTED IT, WHAT  
14 DID YOU REQUEST?

15 A WELL, AT FIRST I REQUESTED THAT HISTORY OR  
16 THE PERCENTAGE THAT WERE PAYING DUES EACH YEAR, YOU KNOW,  
17 FOR -- I DIDN'T SPECIFY A PERIOD OF YEARS WHEN I MENTIONED  
18 THAT. BUT I JUST SAID, I'D LIKE TO HAVE DUES PAYMENT  
19 PERCENTAGES OVER THE YEARS.

20 Q OKAY. LET ME GET ONE THING STRAIGHT.

21 YOU ARE TALKING ABOUT THE PERCENTAGE OF  
22 PLAINTIFFS' MEMBERS WHO ARE ON THE COAST TO COAST DISK THAT  
23 YOU TESTIFIED --

24 A RIGHT.

25 Q -- THAT YOU RECEIVED?

26 A RIGHT. WERE PAYING DUES, RIGHT.

1 Q SO CALL IT THE PERCENTAGE OF 35,000 PEOPLE?

2 A YEAH. FOR THOSE 35,000, WHAT PERCENT WERE  
3 PAYING DUES IN EACH OF THESE YEARS.

4 Q OKAY. AND WE UNDERSTAND YOU WERE TOLD THAT  
5 THE PLAINTIFFS WERE UNABLE TO PROVIDE THAT INFORMATION TO  
6 YOU?

7 A YES.

8 Q SO THEN WHAT DID YOU DO TO DETERMINE -- TO  
9 GET THE INFORMATION THAT YOU NEEDED?

10 A WELL, I BEGAN TO, YOU KNOW, QUERY, WELL,  
11 WHAT CAN I GET? WHAT CAN YOU DO? AND THEN THE THOUGHT  
12 OCCURRED TO ME THAT IF I COULD REDUCE THIS DOWN TO  
13 SOMETHING MORE MANAGEABLE TO THE PLAINTIFF -- AND I'M USED  
14 TO DOING THINGS ON A SAMPLING BASIS. I PROPOSED, WELL,  
15 WHAT IF WE DID A SAMPLE OF THIS 34,000? THEN IS THAT MORE  
16 MANAGEABLE? AND YOU CAN I GUESS PUT ENOUGH MANPOWER IN IT  
17 TO FIND INFORMATION ON DUES PAYMENTS FOR THAT PORTION, THAT  
18 SAMPLE OF THE 1500.

19 Q OKAY. AND WHAT DID YOU DETERMINE WAS A  
20 SAMPLE THAT YOU WANTED?

21 A THE SAMPLE SIZE OR --

22 Q THE SAMPLE SIZE.

23 A I DETERMINED 1500 BECAUSE THAT WOULD BY MY  
24 CALCULATIONS INSURE THAT I HAD A SAMPLING ERROR WITHIN PLUS  
25 OR MINUS 4 PERCENTAGE POINTS WHICH IS -- SAMPLING ERROR IS  
26 BASICALLY A RELIABILITY MEASURE OF A SAMPLE WHERE THE

1 ACCEPTED STANDARD IS THAT YOU'RE 95 PERCENT CONFIDENT THAT  
2 THE PERCENTAGE LIES -- THE TRUE PERCENTAGE LIES WITHIN 4 OR  
3 5 PERCENT OF YOUR SAMPLE PERCENTAGE.

4 SO THAT'S HOW I USE -- THERE'S A FORMULA TO  
5 CALCULATE THAT, AND THAT FORMULA PRODUCED A SAMPLE SIZE OF  
6 1500.

7 Q PROFESSIONALS IN YOUR INDUSTRY ARE USED --  
8 IS THIS -- ARE THEY USED TO DOING THINGS ON SAMPLES AS  
9 OPPOSED --

10 A OH, ABSOLUTELY.

11 Q -- THE WHOLE POPULATION?

12 A I CAN MENTION A WHOLE -- COUPLE OF THINGS.  
13 FIRST OF ALL, I JUST GAVE A PRESENTATION A YEAR AGO IN JUNE  
14 AT THE ADVANCED UNIVERSITY TECHNOLOGY FORUM IN MONTEREY  
15 WHICH I ATTENDED AGAIN THIS YEAR. AND THE PAPER THERE WAS  
16 ON THE DIFFERENCE BETWEEN MARKETING TECHNIQUES -- DATA  
17 MINING TECHNIQUES, "COMPARISON OF NEURAL NETWORKS, CHAID  
18 AND LOGISTIC REGRESSION FOR TARGETING MARKETING CAMPAIGNS."  
19 AND I DID THAT RESEARCH BASED ON SAMPLES, SUBMITTED A  
20 TWO-PAGE ABSTRACT ON WHAT I DID. AND A REVIEW COMMITTEE OF  
21 UNIVERSITY PROFESSORS AND RESEARCHERS THAT WERE ON THE  
22 COMMITTEE FOR THE ADVANCED RESEARCH TECHNOLOGY FORUM  
23 ACCEPTED THAT BASED ON -- WHERE IT WAS BASED ON SAMPLING  
24 TECHNIQUES.

25 MR. RIVIN: YOUR HONOR, I SUBMIT THAT THE TESTIMONY  
26 WE'RE HEARING IS IRRELEVANT FOR THE PURPOSES -- FOR OUR

1 PURPOSES HERE THIS AFTERNOON. ALL OF THIS GOES TO --  
2 STRICTLY TO DAMAGES METHODOLOGY. IT HAS NOTHING TO DO WITH  
3 CAUSATION.

4 THE COURT: IT WOULD SEEM TO.

5 MR. MOSHENKO: YOUR HONOR, TO DETERMINE CAUSATION,  
6 YOU NEED TO DETERMINE EFFECT AND CORRELATE THE EFFECT TO  
7 CAUSATION. HE IS TALKING ABOUT DATA THAT HE USED TO  
8 IDENTIFY EFFECT. HE IS ALSO TALKING ABOUT -- ALTHOUGH HE  
9 HASN'T GOTTEN TO IT YET -- THE METHOD OF CORRELATING THE  
10 PRE-CAUSE OF COMPARING THE PRECAUSE CIRCUMSTANCES TO THE  
11 POST-CAUSE CIRCUMSTANCES TO DETERMINE IF THAT PARTICULAR  
12 ASSUMED CAUSE IS A VALID CAUSE OR A RULED-OUT CAUSE.

13 THE COURT: WELL, CORRECT ME IF I'M WRONG, DOCTOR.  
14 BUT THIS IS NOT AN EXACT SCIENCE WE'RE TALKING ABOUT HERE,  
15 IS IT?

16 THE WITNESS: IT'S IS AS EXACT AS YOU CAN BE --

17 THE COURT: IT'S NOT AN EXACT SCIENCE?

18 MR. MOSHENKO: OBJECTION. WHAT DOES "EXACT" MEAN?  
19 100 PERCENT?

20 THE WITNESS: LET'S PUT IT THIS WAY: IT'S BASED ON  
21 APPLYING SCIENTIFIC PRINCIPLES TO THIS BUSINESS SITUATION  
22 AS EXACTLY AS YOU CAN.

23 SO, YOU KNOW, IN A BUSINESS -- WHEN YOU DO  
24 RESEARCH IN BUSINESS, ESPECIALLY AFTER THE FACT LIKE THIS  
25 WHERE, YOU KNOW, THE EVENT THAT YOU'RE TRYING TO ESTABLISH  
26 CAUSE HAS ALREADY HAPPENED, YOU HAVE TO COME ALONG AND

1 APPLY THE BEST EXPERIMENTAL DESIGN THAT'S APPLICABLE IN  
2 THOSE SITUATIONS.

3                   THERE'S A BOOK CALLED "EXPERIMENTAL AND  
4 QUASI-EXPERIMENTAL DESIGN." AND A TRUE EXPERIMENTAL DESIGN  
5 IS WHEN YOU START IN THE BEGINNING WITH A CONTROL GROUP.  
6 SO THE WAY TO HAVE DONE THIS PRECISELY, THE --  
7 SCIENTIFICALLY WOULD HAVE BEEN, FOR EXAMPLE, IF THE  
8 DEFENDANT WOULD HAVE HAD A HOLD-OUT SAMPLE AT THE  
9 BEGINNING.

10           THE COURT: IT'S PRETTY THEORETICAL.

11           THE WITNESS: NOT TO ME. BUT --

12           THE COURT: ALL RIGHT. WELL, LOOK, THE JURY WILL  
13 HAVE AN OPPORTUNITY TO JUDGE THE -- YOU KNOW, WE GOT THE  
14 INSTRUCTION, YOU KNOW. YOU CAN DISREGARD THE TESTIMONY OF  
15 AN EXPERT WITNESS IF YOU DON'T AGREE WITH IT, SO FORTH.

16                   BUT AS FAR AS THE CAUSATION IS CONCERNED, I  
17 WOULD SUGGEST THAT -- GIVE THEM A BRIEF SYNOPSIS OF IT, AND  
18 GO ON FROM THERE.

19           MR. RIVIN: RIGHT NOW YOU MEAN?

20           MR. MOSHENKO: NO. I CAN DO THAT, YOUR HONOR.

21           THE COURT: I'D LIKE TO HEAR IT NOW, A BRIEF  
22 SYNOPSIS OF IT AND --

23           MR. MOSHENKO: FOR YOUR HONOR'S SAKE, YES.

24           THE COURT: YEAH. YEAH.

25           MR. RIVIN: THERE'S SOME FUNDAMENTAL UNDERPINNINGS  
26 OF THE CAUSATION ANALYSIS THAT DR. BIERLEY HAS JUST

1 DESCRIBED THAT ARE MISSING, THE CONTROL GROUP, THE SURVEYS,  
2 NONE OF THAT.

3 MR. MOSHENKO: WE HAVEN'T GOTTEN THERE YET.

4 THE COURT: LET'S GET THERE.

5 MR. MOSHENKO: AND, IN FACT, YOUR HONOR HAS  
6 EXCLUDED THE -- I KNOW ONLY TEMPORARY BECAUSE YOU SAID IT  
7 WITH LEO NOVELLI, WHEN IT'S RELEVANT THEY CAN COME IN --  
8 PREVENTED PROVIDING OF THE TESTIMONY THAT PROVIDES THE  
9 CONTROL GROUP DATA, BUT I'LL ASK HIM.

10 THE COURT: LET'S GET THERE.

11 BY MR. MOSHENKO: Q OKAY. SO NOW TO DO YOUR  
12 CORRELATION, YOU HAVE YOUR EFFECT; YOU HAVE YOUR ASSUMED  
13 POTENTIAL CAUSES; AND HOW DO YOU PHYSICALLY DO THE  
14 CORRELATION?

15 A OKAY. WELL, THE SITUATION LIKE THIS, YOUR  
16 CONTROL GROUP ACTUALLY BECOMES THIS BASELINE RIGHT HERE.

17 Q CAN YOU DRAW A VERTICAL LINE SHOWING US  
18 WHERE YOU'RE REFERRING TO.

19 A THIS PERIOD RIGHT HERE FROM '95 TO '96 IS  
20 THE CONTROL GROUP, IF YOU WILL. THAT'S WHAT A BASELINE  
21 DESIGN IS ALL ABOUT. WHEN YOU DON'T HAVE RANDOM -- A  
22 RANDOM CONTROL GROUP, THEN THE BASELINE BECOMES THE  
23 CONTROL.

24 Q WHAT IS THE IMPORTANCE OF HAVING A BASELINE  
25 CONTROL GROUP?

26 A WELL, IT HELPS YOU TO INVESTIGATE AND

1 CONTROL FOR -- AND RULE OUT OTHER POTENTIAL CAUSES --

2 Q OKAY.

3 A -- TO REDUCE IT DOWN TO WHATEVER CAUSES ARE  
4 LEFT OVER AT THAT POINT.

5 THE COURT: I HAVE ONE QUICK QUESTION, IF I MAY.

6 MR. MOSHENKO: PLEASE, OF COURSE.

7 THE COURT: DID YOU CONSIDER ANY LETTERS FROM ANY  
8 OF THE COAST MEMBERS WHO ELECTED TO STAY WITH COAST AND  
9 THEREFORE LEFT ANY OF THE NOVELLI ENTERPRISES WHEN NOVELLI  
10 ENTERPRISES WITHDREW?

11 THE WITNESS: I'VE READ THOSE LETTERS.

12 THE COURT: DID YOU CONSIDER THEM IN YOUR  
13 STATISTICAL FINDINGS?

14 THE WITNESS: STATISTICALLY, NO.

15 THE COURT: DID YOU CONSIDER THE ECONOMIC  
16 SITUATIONS OF THE TIMES?

17 THE WITNESS: WELL, YES. THAT WOULD BE IN THE  
18 BASELINE HERE. BECAUSE THE IDEA --

19 MR. RIVIN: IF YOUR HONOR COULD ASK ONE MORE  
20 QUESTION. THE TIMES I ASSUME YOUR HONOR WAS REFERRING TO  
21 WERE '96 TO '97.

22 THE COURT: YEAH.

23 MR. RIVIN: AND THE TESTIMONY THAT I READ IN  
24 CHAMBERS SHOWED THAT THE WITNESS DIDN'T CONSIDER ANY OF THE  
25 ECONOMIC CIRCUMSTANCES --

26 THE COURT: THAT'S WHAT I'M SAYING.

1           MR. RIVIN:  -- THAT THE PLAINTIFFS FOUND THEMSELVES  
2 IN IN THE YEAR 1997.  THAT'S THE KEY.  AND THAT'S WHY NONE  
3 OF THIS WORKS FROM A CAUSATION STANDPOINT.

4           MR. MOSHENKO:  ON YOUR FIRST QUESTION -- MAY I  
5 FOLLOW UP WITH YOUR FIRST QUESTION?

6           THE COURT:  SURE.

7           BY MR. MOSHENKO:  Q  WHY DID -- WHAT DO YOU MEAN  
8 WHEN YOU SAY STATISTICALLY, NO, I DIDN'T CONSIDER THE  
9 LETTERS?  WHAT DOES THAT MEAN?

10                         REMEMBER HIS HONOR SAID, DID YOU CONSIDER  
11 MEMBER LETTERS SAYING I WANT TO STAY WITH COAST?  AND YOU  
12 SAID STATISTICALLY, NO.

13           A           YES.  I MEAN, I CONSIDERED THEM AS PART OF  
14 MY ANTIDOTAL EVIDENCE THAT LEADS ONE TO REALIZE SOMETHING  
15 IS HAPPENING HERE.

16           Q           SO NOW WE NEED TO HEAR -- WHAT'S THE  
17 DISTINCTION BETWEEN ANTIDOTAL EVIDENCE AND STATISTICAL  
18 EVIDENCE?

19                         WHAT'S ANTIDOTAL EVIDENCE?

20           A           WELL, ANTIDOTAL EVIDENCE MEANS SOMETHING  
21 THAT YOU FOUND AND HEARD ABOUT THAT LEADS YOU TO BELIEVE  
22 THAT THERE'S SOME CAUSE LEADING TO AN EFFECT.

23                         SO, FOR EXAMPLE, WHEN YOU SEE THE LETTERS  
24 FROM THE MEMBERS THAT THEY HAVE WRITTEN IN SAYING THAT  
25 THEY'RE LEAVING THE PLAINTIFF AND TRANSFERRING OVER AND  
26 THEY'RE MENTIONING -- AT LEAST THE TRANSFER OFFERS THAT

1 THEY COULD GO TO ANOTHER RESORT FOR NO COST, THEN THAT'S  
2 ANTIDOTAL EVIDENCE THAT THAT CAMPAIGN WAS A CAUSE LEADING  
3 TO THE EFFECT OF THEM TRANSFERRING TO ANOTHER RESORT.

4 Q WHICH CAMPAIGN? WHAT'S THE CAMPAIGN?

5 A THAT'S THE COAST TO COAST CAMPAIGN TO  
6 TRANSFER MEMBERS.

7 Q SO DID YOU JUST SAY THAT ANTIDOTALLY THOSE  
8 LETTERS TENDED TO PROVE THAT COAST LETTERS CAUSED MEMBERS  
9 TO LEAVE?

10 A YES. TO ME IT'S ATTRIBUTING -- IT ADDS TO  
11 THE BODY OF EVIDENCE THAT THEY DID.

12 MR. RIVIN: YOUR HONOR, THAT MISSTATES THE COURT'S  
13 QUESTION, MISSES THE COURT'S POINT COMPLETELY. THE COURT  
14 WAS ASKING ABOUT THE EFFECT OF THOSE PEOPLE WHO WERE COAST  
15 MEMBERS WHO DECIDED AFTER THE PLAINTIFFS PULLED OUT OF  
16 COAST TO STAY WITH COAST AND LEAVE THE PLAINTIFFS.

17 THE COURT: THAT WAS MY QUESTION.

18 MR. RIVIN: THAT'S NOT WHAT THE WITNESS WAS JUST  
19 TALKING ABOUT.

20 MR. MOSHENKO: YES. BUT THOSE PEOPLE WHO DECIDED  
21 TO STAY WITH COAST DID SO AFTER THEY RECEIVED THE LETTERS  
22 FROM THE DEFENDANTS SAYING YOUR RESORT IS OUT OF THE COAST  
23 SYSTEM.

24 AND TO ME, YOUR HONOR, IF I COULD BE A BIT  
25 ARGUMENTATIVE, THAT'S IRRELEVANT, REFUTABLE EVIDENCE THAT  
26 THE LETTERS WERE AN ATTRIBUTING FACTOR IN CAUSING PEOPLE TO

1 CHANGE RESORTS, TO MOVE.

2 NOW, IF YOUR HONOR WANTS TO TALK ABOUT  
3 WHETHER THEY HAD A RIGHT TO SEND THE LETTERS OR WHETHER THE  
4 MEMBERS HAD A RIGHT TO MAKE THE CHANGES, THE QUALITATIVE  
5 THINGS, THAT'S A DIFFERENT WEIGHING FACTOR THAN WAS -- WERE  
6 THEY AN ATTRIBUTING FACTOR OR SUBSTANTIAL FACTOR, WHICH IS  
7 A LEGAL DEFINITION OF CAUSE.

8 THE COURT: MAYBE I MISSED SOMETHING ALONG THE WAY  
9 HERE.

10 BUT DIDN'T THE NOVELLI ENTERPRISES NOTIFY  
11 THE COAST TO COAST MEMBERS THAT THEY WERE PULLING OUT OF  
12 THE COAST TO COAST?

13 MR. MOSHENKO: THE ANSWER IS SOME YES AND SOME NO.

14 THE COURT: WELL, THOSE ARE THE ONES I'M  
15 REFERRING --

16 MR. MOSHENKO: THERE WAS SOME BILLINGS THAT WENT  
17 OUT. I THINK WE SAW A DOCUMENT ON THE SCREEN TODAY. AND  
18 WE HEARD MR. RIVIN TALK ABOUT 10- OR 20,000 OF THEM.

19 BUT THE PLAINTIFFS HAD AT THAT TIME A  
20 POOL -- TOTAL POOL OF MEMBERSHIP OF 100,000. HAVE I GOT  
21 THAT RIGHT? I'M NOT SURE. MAYBE MORE. AND SO MAYBE 20  
22 PERCENT, MAYBE MORE, I DON'T KNOW. I DON'T REMEMBER  
23 EXACTLY HOW MANY.

24 BUT THAT DOESN'T KILL THE WHOLE POOL OF  
25 INFORMATION BECAUSE SOME OF THAT -- THE FACT IS THAT THERE  
26 WAS A TARGETED MAILING TO 35,000, USING A ROUNDED NUMBER,

1 OF PLAINTIFFS' MEMBERS WHO HAPPENED TO ALSO BE ON THE  
2 MAILING LIST OF COAST TO COAST. AND THEY CALLED THEM COAST  
3 TO COAST MEMBERS.

4 AND ALL OF THOSE LETTERS, IT'S OUR POSITION,  
5 SHOW OR -- MAYBE NOT 100 PERCENT, BUT THE GREAT MAJORITY OF  
6 THOSE LETTERS SHOW A CONNECTION BETWEEN THE NOTIFICATION  
7 FROM COAST TO COAST THAT THEY WERE BEING TRANSFERRED AND  
8 THE ACCEPTANCE OF THE TRANSFER.

9 THE COURT: APPROACH THE BENCH HERE, WILL YOU?

10 (DISCUSSION OFF THE RECORD.)

11 CROSS-EXAMINATION (402)

12 BY MR. RIVIN: Q DR. BIERLEY, I'M GOING TO ASK YOU  
13 SOME QUESTIONS ABOUT YOUR TESTIMONY.

14 MR. MOSHENKO: YOUR HONOR, COULD I SIT HERE?

15 THE COURT: SURE.

16 BY MR. RIVIN: Q ISN'T IT TRUE THAT YOU ASSUMED  
17 THAT THE ENTIRE EXCESS DECLINE IN MEMBERSHIP FROM 1995,  
18 '96, FROM THIS TIME PERIOD, TO '96, '97, RESULTED FROM THE  
19 COAST LETTERS?

20 MR. MOSHENKO: OBJECTION. THE QUESTION IS  
21 UNCERTAIN UNTIL THE TERM "EXCESS DECLINE" HAS A DEFINITION  
22 AND MEANING TO THE TRIER OF FACT.

23 MR. RIVIN: I WILL LAY A FOUNDATION FOR THAT.

24 THE COURT: ALL RIGHT.

25 BY MR. RIVIN: Q DR. BIERLEY, YOU LOOKED AT SOME  
26 DATA, AND YOU DETERMINED THE DECLINE IN MEMBERSHIP BETWEEN

1 1995 AND 1996; IS THAT CORRECT?

2 A YES.

3 Q AND THEN YOU DID A CALCULATION BASED ON YOUR  
4 SAMPLE OF THE DECLINE IN MEMBERSHIP BETWEEN 1996 AND 1997;  
5 IS THAT RIGHT?

6 A I THINK SO. KEEP GOING, BUT --

7 Q WELL, IS THAT RIGHT?

8 A SO FAR, SO GOOD, YES.

9 Q LET'S SAY YOU HAD A 2 PERCENT -- JUST FOR  
10 HYPOTHETICAL, JUST PICK NUMBERS -- A 2-PERCENT DECLINE  
11 BETWEEN 1995 AND 1996 AND A 20-PERCENT DECLINE FROM 1996  
12 AND 1997.

13 A YES.

14 Q THIS IS IN FACT WHAT YOU DID; RIGHT?

15 A YES.

16 Q AND YOU CAME UP WITH AN EXCESS DECLINE OF 18  
17 PERCENT?

18 MR. MOSHENKO: HYPOTHETICALLY.

19 BY MR. RIVIN: Q HYPOTHETICAL; IS THAT RIGHT?

20 A HYPOTHETICAL, YES.

21 Q THE 18 PERCENT IS HYPOTHETICAL?

22 A YES.

23 Q ALL RIGHT. YOU ASSUMED THAT THIS 18  
24 PERCENT, THIS ENTIRE 18 PERCENT, RESULTED FROM THE LETTERS  
25 SENT BY COAST TO COAST IN THE FALL OF 1997, DIDN'T YOU?

26 A BUT THAT WAS A TESTABLE AND PROVABLE

1 ASSUMPTION.

2 Q PLEASE ANSWER MY QUESTION.

3 YOU ASSUMED THAT?

4 A WELL, ALWAYS START OUT WITH AN ASSUMPTION,  
5 AND THEN TEST THEM AND PROVE THEM.

6 Q FINE.

7 I WOULD THINK -- AND, IN FACT, I THINK YOU  
8 SAID THIS WHEN YOU TALKED ABOUT THE METHODOLOGY FOR  
9 DETERMINING CAUSATION. I THINK THE THIRD PRONG --

10 A YES.

11 Q -- IS YOU TEST OTHER FACTORS?

12 A YES.

13 Q YOU TRY AND COME UP WITH A CONTROL; IS THAT  
14 RIGHT?

15 A YES. AND I HADN'T EXPLAINED THAT YET.

16 Q DID YOU CONSIDER THE FACT THAT IN 1997,  
17 BEFORE THE COAST LETTERS WERE SENT, THAT APPROXIMATELY  
18 18,000 OF THE 35,000 PEOPLE WHO RECEIVED THE COAST LETTERS  
19 GOT A LETTER FROM A BANKRUPTCY TRUSTEE TELLING THEM THAT  
20 THEIR CONTRACTS WERE BEING REJECTED AND THEIR PARKS WERE  
21 BEING CLOSED?

22 MR. MOSHENKO: OBJECTION. THAT MISSTATES THE  
23 EVIDENCE, YOUR HONOR. THERE WEREN'T 18,000 ALL SEASONS  
24 RESORTS MEMBERS WHO WERE COAST TO COAST MEMBERS. THERE  
25 WERE A MUCH SMALLER NUMBER.

26 HE IS TALKING ABOUT THE ENTIRE POPULATION OF

1 ALL SEASONS RESORTS AND NOT THE COAST TO COAST POPULATION.

2 MR. RIVIN: MR. MOSHENKO MAY BE RIGHT WITH RESPECT  
3 TO THE NUMBER. MR. DAFF --

4 MR. MOSHENKO: 4500, IN FACT.

5 MR. RIVIN: MR. DAFF SENT OUT 18,000 LETTERS. I  
6 DON'T KNOW THE PRECISE NUMBER OF PEOPLE WHO WERE COAST TO  
7 COAST MEMBERS WHO RECEIVED THOSE LETTERS. BUT BASED ON  
8 WHAT WE'VE SEEN, I THINK IT'S AT LEAST 5,000.

9 THE COURT: ALL RIGHT.

10 BY MR. RIVIN: Q DID YOU TAKE INTO CONSIDERATION  
11 THE FACT THAT THOUSANDS OF PEOPLE RECEIVED A LETTER IN 1997  
12 BEFORE THEY GOT THE COAST LETTER, ADVISING THEM THAT THEIR  
13 CONTRACTS WERE BEING REJECTED, THEIR MEMBERSHIP CONTRACTS  
14 WERE BEING REJECTED, AND THAT THE PARKS WERE BEING CLOSED?

15 A YES. I'VE SUBMITTED A PETITIONED ANALYSIS.  
16 I DID IT AFTER MY DEPOSITION. BUT THAT PETITION ANALYSIS  
17 DOES PROVIDE SOME DATA THAT ADDRESSES THAT.

18 Q DO YOU ACKNOWLEDGE THAT AT YOUR DEPOSITION  
19 YOU HAD NOT CONSIDERED THE LETTER I JUST REFERRED TO?

20 A YES.

21 MR. RIVIN: YOUR HONOR, I WOULD GET TO THIS POINT A  
22 LITTLE BIT LATER, BUT I WANT TO MENTION IT NOW.

23 TO THE EXTENT THAT DR. BIERLEY DID  
24 ADDITIONAL ANALYSIS AFTER HIS DEPOSITION WAS TAKEN AND  
25 AFTER HE TOLD US HIS ASSIGNED -- AT THE DEPOSITION THAT HIS  
26 ASSIGNMENT WAS COMPLETED AND HE HAD NO FURTHER WORK TO DO,

1 WE WOULD CERTAINLY MOVE TO KEEP OUT ANY SUCH TESTIMONY  
2 THAT'S BASED UPON THAT. AND WE WERE NEVER NOTIFIED AFTER  
3 THE DEPOSITION WAS COMPLETED THAT DR. BIERLEY HAD CONDUCTED  
4 ANY ADDITIONAL ANALYSIS.

5 Q DID YOU TAKE INTO CONSIDERATION,  
6 DR. BIERLEY, IN DETERMINING THAT THE ENTIRE EXCESS DECLINE  
7 IN MEMBERSHIP OF THE PLAINTIFFS WAS A RESULT OF THE COAST  
8 TO COAST LETTERS, THAT AT LEAST 50 PERCENT OF THE PEOPLE  
9 WHO RECEIVED THE COAST TO COAST LETTERS IN THE FALL OF 1997  
10 WERE MEMBERS OF THOUSAND ADVENTURES, AND THAT THE THOUSAND  
11 ADVENTURES ORGANIZATION WAS COLLAPSING?

12 MR. MOSHENKO: OBJECTION. DOES HE MEAN DID HE  
13 SPECIFICALLY KNOW THAT SPECIFIC AND CONSIDER THAT SPECIFIC  
14 FACT OR DID HE CONSIDER A GENERALITY THE EXISTENCE OF  
15 FINANCIAL PROBLEMS IN THE RESORTS?

16 MR. RIVIN: THIS IS NOT A DEPOSITION. I WOULD  
17 APPRECIATE IF MR. MOSHENKO JUST MADE HIS OBJECTION.

18 MR. MOSHENKO: THE QUESTION IS UNCERTAIN.

19 THE WITNESS: I'D HAVE TO SAY NO, I DIDN'T.

20 BY MR. RIVIN: Q DID YOU CONSIDER THE FACT THAT IN  
21 1997 ALL SEASONS HAD FILED ITS THIRD BANKRUPTCY?

22 A NOT IN THE DEPOSITION, NO.

23 Q SO YOU CAME TO YOUR CONCLUSION AT YOUR  
24 DEPOSITION ABOUT THE REASON FOR THE DECLINE WITHOUT  
25 CONSIDERING -- STRIKE THAT.

26 LET ME REPHRASE IT.

1                   AT YOUR DEPOSITION WHEN YOU TESTIFIED AS TO  
2 YOUR CONCLUSIONS, YOU REACHED THE CONCLUSION THAT THE  
3 ENTIRE EXCESS DECLINE WAS CAUSED BY THE COAST LETTERS  
4 WITHOUT CONSIDERING THE FACT OF THE THIRD ALL SEASONS  
5 BANKRUPTCY?

6                   MR. MOSHENKO: OBJECTION. MISSTATES THE DEPOSITION  
7 TESTIMONY. HE NEVER SAID THE ENTIRE EXCESS WAS CAUSED BY  
8 THE LETTERS. IN THE DEPOSITION HE TESTIFIED AS TO OTHER  
9 CONCURRENT CAUSES.

10                  THE COURT: WELL, DID YOU CONSIDER ANY OF IT?

11                  THE WITNESS: ANY OF --

12                  BY MR. RIVIN: Q DR. BIERLEY, LET ME ASK: IN YOUR  
13 DEPOSITION, ISN'T IT TRUE THAT YOU STATED THAT THE ENTIRE  
14 EXCESS DECLINE RESULTED FROM THE COAST LETTERS?

15                  A           YES, IT IS.

16                  Q           THAT'S WHAT YOU STATED?

17                  A           YES.

18                  Q           AND YOU DID NOT CONSIDER THE ALL SEASONS  
19 RESORT THIRD BANKRUPTCY FILING; ISN'T THAT TRUE?

20                  A           YES.

21                  Q           AND YOU DID NOT CONSIDER THE TERMINATION  
22 LETTERS FROM THE -- THAT WERE SENT OUT BY THE BANKRUPTCY  
23 TRUSTEE?

24                  A           NOT IN THE DEPOSITION. YES, THAT'S TRUE.

25                  Q           AND YOU DID NOT CONSIDER THE COLLAPSE OF THE  
26 THOUSAND ADVENTURES PARKS?

1 A SAY THAT -- YES. YES.

2 Q YOU DID NOT CONSIDER --

3 A YES.

4 Q -- THE COLLAPSE OF THE THOUSAND ADVENTURES  
5 PARKS; IS THAT RIGHT?

6 A YES.

7 Q AND YOU DID NOT CONSIDER ALL OF THE  
8 BANKRUPTCY FILINGS THAT OCCURRED IN 1997 BY THE PLAINTIFFS?

9 A WELL, I WOULD LIKE TO SAY THAT'S -- WHICH  
10 ONES IN PARTICULAR?

11 Q ANY OF THEM. WHICH OF THE BANKRUPTCY  
12 FILINGS IN 1997 BY ANY OF THE PLAINTIFFS DID YOU CONSIDER?

13 A THAT OCCURRED IN '97?

14 Q YES.

15 A NONE, THEN.

16 Q AND WHAT TYPE OF SURVEY DID YOU DO OF THE  
17 MEMBERS TO VALIDATE YOUR CONCLUSION THAT THE ENTIRE EXCESS  
18 DECLINE RESULTED FROM THE COAST LETTERS?

19 A THERE WAS NO SURVEY.

20 Q AND WHAT KIND OF CONTROL GROUP DID YOU SET  
21 UP TO TESTIFY THE -- TO CONFIRM THE VALIDITY OF YOUR  
22 CONCLUSION?

23 A WELL, TO ME THERE IS SOME -- THERE IS  
24 VALIDITY TO THAT BASELINE. AND THAT'S WHAT I HAVE TO STAND  
25 ON.

26 Q THAT WAS YOUR CONTROL GROUP?

1 A YES.

2 Q AND YOU DID NOT CONSIDER THE ECONOMIC  
3 COLLAPSE OF THE PLAINTIFFS IN 1997 IN REACHING YOUR  
4 CONCLUSION THAT THE ENTIRE EXCESS DECLINE RESULTED FROM THE  
5 COAST TO COAST LETTERS?

6 A YES.

7 Q THAT'S CORRECT?

8 A THAT'S CORRECT.

9 MR. RIVIN: YOUR HONOR, I HAVE MORE QUESTIONS. BUT  
10 I THINK WE'VE PROVED THAT THIS WITNESS'S TESTIMONY CANNOT  
11 ESTABLISH CAUSATION. THERE'S JUST AN ASSUMPTION AT  
12 CAUSATION.

13 THE COURT: WELL, YOU KNOW, I THINK THAT'S A  
14 QUESTION FOR THE JURY. I REALLY DO.

15 MR. RIVIN: YOUR HONOR, THERE ARE MULTIPLE -- THERE  
16 ARE AT LEAST TWO ISSUES HERE.

17 GIVE ME ONE MOMENT, YOUR HONOR, PLEASE.

18 LET ME ASK THE QUESTION -- A FEW MORE  
19 QUESTIONS.

20 THE COURT: SURE.

21 BY MR. RIVIN: Q DR. BIERLEY, WHAT ATTEMPT DID YOU  
22 MAKE IN YOUR ANALYSIS TO IDENTIFY ANY OTHER FACTORS THAT  
23 MIGHT HAVE LED TO AN EXCESSIVE DECLINE OVER THE NORM?

24 A OTHER THAN THE FACTORS THAT I KNEW ABOUT,  
25 THE BANKRUPTCIES AND JUST GENERAL REASONS FOR PEOPLE  
26 LEAVING RESORTS, AND THE FACT THAT A BASELINE WILL

1 AUTOMATICALLY PICK UP ON EVEN THINGS THAT YOU DON'T  
2 IDENTIFY.

3 SO IT BECOMES CRUCIAL -- WHAT BECOMES  
4 CRUCIAL IS EVEN IF YOU DON'T IDENTIFY POTENTIAL CAUSES THAT  
5 ARE OCCURRING DURING THE BASELINE, IT'S CAPTURED, EVEN IF  
6 YOU DON'T KNOW ABOUT IT. WHAT'S -- THE KEY IS, IS WHAT  
7 HAPPENS AFTER THAT BASELINE PERIOD. SO A LOT OF THE THINGS  
8 THAT I DIDN'T IDENTIFY MAY --

9 Q THE KEY IS AS YOU JUST SAID, WHAT HAPPENED  
10 AFTER THE BASELINE PERIOD.

11 A THAT'S TRUE.

12 Q AND IT'S TRUE THAT YOU TOOK INTO  
13 CONSIDERATION NOTHING, NO FACTORS, OTHER THAN THE COAST  
14 LETTERS, AFTER THE BASELINE PERIOD?

15 A THAT'S TRUE.

16 MR. RIVIN: THAT'S NOT -- YOUR HONOR, I'M NOW  
17 ARGUING. THAT CAN'T POSSIBLY ESTABLISH --

18 MR. SHERMAN: THERE'S ONE OTHER ISSUE, YOUR HONOR,  
19 THAT I THINK MAY HAVE BEEN OVERLOOKED AS OF THIS MOMENT.  
20 AND THAT IS THE LAW IN THE STATE OF CALIFORNIA WITH RESPECT  
21 TO THE TESTIMONY OF EXPERT WITNESSES IS WELL ESTABLISHED.

22 IN FACT, WE WERE TREATED TO A RECITATION OF  
23 THE LAW DURING THE IN LIMINE PHASE OF THIS CASE WHEN THERE  
24 WAS AN EFFORT MADE TO EXCLUDE TESTIMONY AS TO CAUSATION AND  
25 DAMAGES BY DEFENDANTS' EXPERT WITNESS ON THE GROUNDS THAT  
26 THE FULL OPINION HAD NOT BEEN STATED AT THE DEPOSITION.

1 THAT WAS THE ISSUE WITH RESPECT TO BLAINE NYE.

2 AND THE LAW IN THIS STATE IS CLEAR. IT'S  
3 THE KENNEMUR CASE. THE KENNEMUR CASE SAYS, IN ESSENCE,  
4 THAT IF YOU'RE AN EXPERT WITNESS AND YOU'RE GOING TO  
5 TESTIFY AT TRIAL, THEN PRIOR TO THE TIME OF TRIAL, PRIOR TO  
6 THE TIME OF YOUR TESTIMONY, THE OPPOSING PARTY HAS THE  
7 RIGHT TO KNOW ALL OF YOUR OPINIONS, NOT JUST SOME OF YOUR  
8 OPINIONS.

9 AND THE CASE OF MR. NYE, AS THE COURT WILL  
10 RECALL, MR. NYE IS A DEFENSE EXPERT. AND FOR THAT REASON  
11 IT WAS AN IMPOSSIBILITY FOR THE DEFENSE TO KNOW -- FOR  
12 MR. NYE TO KNOW WHAT ALL OF PLAINTIFFS' DAMAGES THEORIES OR  
13 CAUSATION THEORIES WERE UNTIL SUCH TIME AS HE HAD HAD THE  
14 OPPORTUNITY TO HEAR THE TESTIMONY AND HEAR WHAT THE EXPERT  
15 OPINIONS WERE OF PLAINTIFFS' EXPERTS ON THE SUBJECT OF  
16 CAUSATION AND DAMAGES.

17 WE HAVE SUBSEQUENTLY, A MONTH AGO,  
18 APPROXIMATELY, WRITTEN TO COUNSEL FOR PLAINTIFF SAYING  
19 MR. NYE IS AVAILABLE; HE HAS FORMULATED AND IS IN THE  
20 PROCESS OF FORMULATING CERTAIN ADDITIONAL POINTS AS A  
21 RESULT OF CONSIDERING THE TESTIMONY OF PLAINTIFFS' EXPERT  
22 WITNESSES AT DEPOSITION.

23 NO SUCH PROFFER HAS EVER BEEN MADE, EVER  
24 BEEN MADE BY THE PLAINTIFFS. AND INDEED WHAT WE JUST  
25 LEARNED FOR THE VERY FIRST TIME, I SUBMIT, THAT  
26 DR. BIERLEY, AFTER TESTIFYING THAT HIS CONCLUSIONS WERE --

1 MY WORDS -- FINAL --

2 MR. RIVIN: YES.

3 MR. SHERMAN: -- THAT HE HAD REACHED FINAL  
4 CONCLUSIONS AT HIS DEPOSITION CONTRARY TO MR. NYE WHO SAID  
5 HE WANTED TO HEAR WHAT PLAINTIFFS' EXPERTS HAD TO SAY; BUT  
6 THAT DR. BIERLEY SAID HE HAD REACHED FINAL CONCLUSIONS.

7 NOW, WHAT WE'RE HEARING IS HE HAD NOT  
8 REACHED FINAL CONCLUSIONS BECAUSE HE HAS SUBSEQUENTLY GONE  
9 AND DONE, APPARENTLY, MATERIAL TESTING. I'M SURE THAT  
10 MR. MOSHENKO WOULD LIKE TO BRING THIS OUT NOW, BUT THAT'S  
11 NOT THE ISSUE.

12 THE ISSUE IS, UNDER THE LAW WE'RE NOT  
13 SUPPOSED TO BE SUBJECTED TO THIS KIND OF SURPRISE. I  
14 SUBMIT, YOUR HONOR, THAT THERE IS A SOLUTION HERE TO THIS  
15 CONUNDRUM AND THE SOLUTION IS THIS: WHILE THE JURY DOES  
16 HAVE THE OPPORTUNITY TO CONSIDER -- OUGHT TO HAVE THE  
17 OPPORTUNITY AT A DAMAGES PHASE IF AS AND WHEN THERE IS EVER  
18 A DAMAGES PHASE TO CONSIDER THIS KIND OF TESTIMONY --  
19 BECAUSE IT GOES TO DAMAGES. IT DOES NOT GO TO CAUSATION.  
20 BECAUSE THE WITNESS BY HIS OWN ADMISSION HAS NOT -- DID NOT  
21 DO THE CAUSATION ANALYSIS AS THE -- AS OF THE TIME OF HIS  
22 DEPOSITION.

23 I SUBMIT IF WE GET TO A DAMAGES PHASE, THEN  
24 WE OUGHT TO HAVE THE OPPORTUNITY TO COMPLETE AN EXAMINATION  
25 OF THIS WITNESS, PRESERVING ALL OF OUR RIGHTS UNDER THE  
26 KENNEMUR CASE. AND AT THAT POINT AND ONLY AT THAT POINT

1 THIS WITNESS GETS TO TESTIFY. AND THAT IS NOT IN ANY WAY  
2 TO SUGGEST THAT MR. RIVIN'S POINTS IN THIS PRELIMINARY  
3 EXAMINATION OUGHT TO BE LOST ON THE COURT. AND I'M SURE  
4 THEY'RE NOT LOST ON THE COURT. WE DON'T WANT THE JURY TO  
5 HAVE TO START WEIGHING THE EVIDENCE AT THIS POINT, BECAUSE  
6 THERE'S NO EVIDENCE TO WEIGH.

7 MR. MOSHENKO: YOUR HONOR, YOU HEARD THE WITNESS  
8 SAY THESE MATTERS ARE CAPTURED IN THE BASELINE DATABASE --  
9 I'M USING THE WRONG TERM -- THE BASELINE SUBJECT MATTER  
10 THAT HE ANALYZED.

11 YOU ALSO HEARD HIM SAY THAT -- WORDS TO THE  
12 EFFECT THAT -- REFERRING TO THE EXCESS DECLINE AS HAVING  
13 BEEN CAUSED BY COAST LETTERS. AND THAT'S WHY I OBJECTED TO  
14 THE PHRASE "EXCESS DECLINE" NOT BEING DEFINED.

15 THE UNDERSTANDING THAT I BELIEVE IS LACKING  
16 IN THIS EXCHANGE IS THAT ONCE YOU DETERMINE THE NORM  
17 DECLINE, THE NORMAL DECLINE, MY TERM, AND ONCE YOU  
18 DETERMINE THE CAUSES THAT ARE INCLUDED IN THE NORMAL  
19 DECLINE, THEN IT IS ONLY ADDITIONAL OR NEW CAUSES THAT CAN  
20 CAUSE THE EXCESS DECLINE.

21 AND DR. BIERLEY -- I'D LIKE TO GO FORWARD  
22 WITH HIM AND EXAMINE HIM ON WHY HE DIDN'T CONSIDER IT  
23 NECESSARY TO SPECIFICALLY IDENTIFY THE ALL SEASONS RESORTS  
24 BANKRUPTCY THAT WAS FILED IN WHATEVER YEAR THAT MR. RIVIN  
25 TALKED ABOUT. AND IF I -- OR WHY HE DIDN'T SPECIFICALLY  
26 CONSIDER THIS DECLINE OR THAT DECLINE OF A BUSINESS

1 ENTERPRISE. AND IT HAS TO DO WITH THE FACT THAT HE IS  
2 GOING TO TELL YOU THAT THESE THINGS -- THESE KINDS OF  
3 THINGS WERE ALREADY PRESENT IN THE BASELINE. THERE WERE  
4 BANKRUPTCIES IN THE BASELINE. THERE WERE ECONOMIC PROBLEMS  
5 IN THE BASELINE. THERE WERE MEMBERS WHO DIED. THERE WERE  
6 MEMBERS WHO HAD ECONOMIC CONDITIONS, AS YOUR HONOR ASKED  
7 THE QUESTION ABOUT.

8 AND SO THE NEGATIVE ECONOMIC CONDITIONS HAD  
9 TO CHANGE TO RESULT IN THIS KIND OF A GRAPH. AND WHAT  
10 CHANGED WAS NOT THE BANKRUPTCIES. THERE WERE BANKRUPTCIES  
11 HERE, AND THERE WERE BANKRUPTCIES HERE. HE DIDN'T NEED TO  
12 CONSIDER IT SPECIFICALLY. HE SHOULD BE ALLOWED TO TELL  
13 YOUR HONOR OR THE JURY WHY IT'S IRRELEVANT OR IMMATERIAL  
14 FOR HIM TO FOCUS ON A SPECIFIC BANKRUPTCY OR A SPECIFIC  
15 DAFF LETTER OR A SPECIFIC EVENT LIKE THAT.

16 BECAUSE, AS HE SAID, THAT KIND OF STUFF IS  
17 ALREADY CAPTURED IN THE ANALYSIS. AND HOW IS IT CAPTURED  
18 IN THE ANALYSIS? WHY IS IT THAT YOU DON'T NEED OR DIDN'T  
19 NEED TO FOCUS ON THE ALL SEASONS RESORT BANKRUPTCY --

20 THE COURT: I DON'T SEE HOW IT IS CAPTURED IN THE  
21 ANALYSIS WHEN DAFF'S LETTER DIDN'T GO OUT UNTIL PAST THAT  
22 POINT.

23 MR. MOSHENKO: NO.

24 Q WHY ISN'T IT THAT YOU DIDN'T NEED TO  
25 CONSIDER THE ALL SEASONS RESORT LETTER OR BANKRUPTCY IN  
26 1997 TO GET A VALID CONCLUSION?

1           THE WITNESS: BECAUSE I THOUGHT IT STARTED IN '96  
2 WHERE SOME OF THE MONIES WENT TO THE RECEIVER; THEREFORE,  
3 THAT WOULD HAVE DEPRESSED THE '96 DUES PAYMENTS AND  
4 CONTRIBUTED TO THAT DECLINE RATE WHICH I USED TO CAPTURE  
5 THAT.

6           SO THERE'S AN EXAMPLE OF WHERE I WASN'T  
7 AWARE OF THE BANKRUPTCIES AT THAT TIME TO EXACTLY WHEN AND  
8 WHERE, BUT IT DID --

9           Q           YOU MERGED THE BANKRUPTCY AND THE  
10 RECEIVERSHIP TOGETHER IN YOUR MIND?

11          A           YES.

12          MR. RIVIN: YOUR HONOR, THIS IS NOT TESTIMONY THAT  
13 WE HEARD IN THE DEPOSITION. THIS IS SOMETHING THAT'S  
14 COMING OUT NOW.

15          MR. MOSHENKO: IT IS.

16          MR. RIVIN: I SUBMIT THAT MR. MOSHENKO'S ARGUMENT  
17 TURNS LOGIC COMPLETELY ON ITS HEAD. THIS IS ABSURD.

18                 AS DR. BIERLEY SAID JUST A MOMENT AGO, WHAT  
19 YOU HAVE TO CONSIDER IN ORDER TO DETERMINE CAUSATION IS  
20 WHAT HAPPENED DURING THE RELEVANT PERIOD OF TIME, '96 TO  
21 '97. AND AS HE ACKNOWLEDGED IN HIS DEPOSITION, DR. BIERLEY  
22 CONSIDERED NOTHING THAT HAPPENED IN 1996 TO 1997, OTHER  
23 THAN THE COAST LETTER. HE ASSUMED -- HE ASSUMED CAUSATION.

24          MR. MOSHENKO: HIS DEPOSITION SAYS I CONSIDERED THE  
25 BANKRUPTCIES. THEY WERE INCLUDED IN THE -- THEY WERE  
26 CAPTURED OR INCLUDED IN THE DATA THAT I HAD. HE SAID HE

1 CONSIDERED THE ECONOMIC CIRCUMSTANCES. YOU KNOW --

2 MR. RIVIN: THAT'S MUMBO-JUMBO.

3 MR. MOSHENKO: IT'S IN HIS DEPOSITION. I'LL READ  
4 IT TO YOU.

5 MR. RIVIN: DR. BIERLEY SAID, OH, BANKRUPTCIES,  
6 THEY WOULD BE IN THE NORM. AND HE SAID SOMETHING ELSE  
7 WOULD BE IN THE NORM. BUT DID HE CONSIDER EVERYTHING THAT  
8 WAS GOING ON IN 1997, WITH THE COLLAPSE OF ALL SEASONS AND  
9 THE COLLAPSE OF THOUSAND ADVENTURES, AND THE RESURRECTION  
10 OF THESE COMPANIES AS TRAVEL AMERICA, AND THE CHARLES DAFF  
11 LETTERS, AND ALL OF THE TRANSFERS AND ALL OF THE PARK  
12 CLOSURES, WHICH WERE HAPPENING IN 1997, AND NOT IN 1996?

13 ALL OF THESE THINGS THAT HAPPENED IN 1997,  
14 THESE TRAUMATIC EVENTS THAT TOOK PLACE THAT HAD AN IMPACT  
15 ON MEMBERS, THE WITNESS TOOK NONE OF THAT INTO  
16 CONSIDERATION. NONE OF IT.

17 THE COURT: THAT'S HIS TESTIMONY HERE TODAY.

18 MR. RIVIN: THAT'S RIGHT.

19 MR. MOSHENKO: YOU SEE, AND THIS IS A QUESTION OF  
20 THEY WANT TO FOCUS HIM IN ON A VERY SPECIFIC MINUTE AND  
21 SAY, DID YOU CONSIDER THAT SPECIFIC MINUTE? HE IS SAYING I  
22 DIDN'T NEED TO. AND THE REASON WHY IS BECAUSE THE  
23 SCIENTIFIC METHODS ALLOW ME TO COME TO MY CONCLUSIONS WITH  
24 THE CONCLUSIONS THAT -- UNLESS THAT WAS DIFFERENT FROM THE  
25 PAST. UNLESS IT WAS DIFFERENT IN A SUBSTANTIAL SENSE FROM  
26 THE PAST, IT CAN'T AFFECT -- CREATE THE CAUSE/EFFECT THAT

1 WE FIND HERE.

2 AND, YOUR HONOR, YOU CAN DISAGREE WITH HIM.  
3 HE CAN DISAGREE WITH HIM. BUT IT GOES TO WEIGHT, NOT  
4 ADMISSIBILITY. HE IS ENTITLED TO OFFER HIS OPINIONS.  
5 THEY'RE VALID, SCIENTIFIC OPINIONS.

6 MR. SHERMAN: THE ISSUE IS NOT SAMPLING, BECAUSE  
7 THE WITNESS HIMSELF ACKNOWLEDGES THAT THERE IS A DIFFERENCE  
8 BETWEEN SAMPLING AND SURVEY. THE WITNESS DID NOT CONDUCT A  
9 SURVEY. IF HE DID, IT WAS CONDUCTED WELL AFTER HIS  
10 DEPOSITION. BUT IT DOES NOT APPEAR LIKE HE CONDUCTED A  
11 SURVEY.

12 AND TO USE THE -- WHAT HAS NOW BECOME THE  
13 WELL-WORN PHRASE, "THE SCIENTIFIC METHOD," UNDER THIS  
14 SO-CALLED SCIENTIFIC METHOD, A SURVEY SHOULD HAVE BEEN  
15 DONE. A SURVEY WAS NOT DONE.

16 I AM AWARE OF YOUR HONOR'S -- HAVING READ  
17 YOUR JUDICIAL BIOGRAPHY -- YOUR POLITICAL LEANINGS. I USE  
18 THIS SAYING SOMEWHAT GUARDEDLY. BUT BOB DILLAN SAID IT  
19 WELL ABOUT 25 YEARS AGO. YOU DON'T NEED A WEATHER MAN TO  
20 TELL YOU WHAT THE WEATHER IS.

21 THE COURT: WHO IS BOB DILLAN?

22 MR. SHERMAN: AND, YOUR HONOR, FOR DR. BIERLEY TO  
23 COME IN HERE AND TALK ANTIDOTALLY JUST TURNS THE EVIDENCE  
24 CODE AND THE USE OF EXPERT WITNESSES ON ITS HEAD.

25 WE'VE SEEN THE LETTERS. WE DON'T NEED  
26 DR. BIERLEY TO TELL US THAT CHARLES DAFF SENT OUT

1 COMMUNICATIONS TO 18,000 PEOPLE, OR THAT THE FIRST  
2 NATIONWIDE BANKRUPTCY WAS IN A CHAPTER 7 LIQUIDATION MODE.

3 MR. RIVIN: AND, YOUR HONOR, ONE OTHER POINT: THE  
4 THIRD PRONG OF DR. BIERLEY'S CAUSE AND EFFECT SCIENTIFIC  
5 ANALYSIS WHICH HE DESCRIBED WAS YOU MUST CONTROL FOR AND  
6 SYSTEMATICALLY ELIMINATE OTHER POTENTIAL CAUSES. HE DID  
7 NONE OF THAT.

8 ALL HE DID, ACCORDING TO MR. MOSHENKO, IS HE  
9 ASSUMED THAT -- HE ASSUMED ALL OF THE OTHER POTENTIAL  
10 CAUSES WERE THE SAME IN 1996 AS THEY WERE IN 1997. AND THE  
11 ONLY THING DIFFERENT WAS THE COAST LETTERS. THAT WAS HIS  
12 ASSUMPTION. AND THAT IS NOT SCIENTIFICALLY VALID. THAT  
13 DOES NOT MEET THE THIRD PRONG OF THAT APPARENT SCIENTIFIC  
14 PROTOCOL WHICH DR. BIERLEY TESTIFIED TO.

15 MR. MOSHENKO: AND THAT IS NOT TRUE. AND YOU KNOW,  
16 YOUR HONOR, I HEARD MR. SHERMAN TELL US WHAT AN EXPERT IN  
17 THIS FIELD SHOULD DO TO COME TO A VALID CONCLUSION. I'VE  
18 HEARD MR. RIVIN TELL US THE LAW SAYS THEY CAN'T EVEN BRING  
19 IN ANOTHER EXPERT TO TALK ABOUT THE QUALIFICATIONS AND  
20 ABILITIES OF THE FORMER EXPERT.

21 AND WITH ALL DUE RESPECT, MY ABLE OPPONENTS  
22 HERE ARE NOT EXPERTS TO START TO TELL THIS COURT WHAT KIND  
23 OF PROPER RESERVE AND CAUSATION ANALYSIS METHODS ARE  
24 ACCEPTABLE AND ARE NOT. IT'S A QUESTION IF THE EXPERT SAYS  
25 HE DID IT, AND HE IS PREPARED TO BACK IT UP WITH TESTIMONY  
26 AS TO WHY IT'S VALID AND WHY IT'S PROPER, THE JURY CAN

1 THROW IT OUT IF THEY DON'T WANT TO BELIEVE IT. THEY CAN  
2 ACCEPT IT IF THEY DO WANT TO BELIEVE IT.

3 IT'S A QUESTION THAT GOES NOT TO  
4 ADMISSIBILITY, OUTRIGHT ADMISSIBILITY. HE HAS A FACTUAL,  
5 LEGAL, SCIENTIFIC BASIS FOR HIS CONCLUSIONS. AND YOU'RE  
6 ONLY GETTING HALF OF THE FACTS BECAUSE THIS SYSTEM IS NOT  
7 ALLOWING US TO GET THEM ALL OUT IN FRONT OF YOU.

8 MR. RIVIN: ONE OTHER COMMENT.

9 UNDER EVIDENCE CODE SECTION 802 AND SECTION  
10 803, IT'S THE COURT'S DUTY TO MAKE THE INITIAL  
11 DETERMINATION OF WHETHER OR NOT THE EXPERT'S TESTIMONY IS  
12 SUFFICIENTLY RELIABLE IN ORDER TO GO TO THE JURY.

13 THE COURT: THAT'S WHAT I FELT.

14 MR. SHAW: AND, YOUR HONOR, IF I MIGHT ADD, I'M  
15 READING NOW FROM THE LAW IN THIS AREA. "SCIENTIFIC EXPERTS  
16 CAN TESTIFY ABOUT SCIENTIFIC, RELIABLE DATA THAT THEY  
17 PREPARED TO PRESENT TESTIMONY." THAT'S A SUFFICIENT  
18 BASIS.

19 IF MR. SHERMAN AND MR. RIVIN WANT TO SHOW  
20 THAT THIS IS SCIENTIFICALLY IMPROPER IN SOME WAY, THE  
21 KELLY/FRYE TEST, THIS IS WHAT THIS WITNESS -- AND  
22 MR. MOSHENKO LAID THE FOUNDATION. HE TALKED ABOUT HIS  
23 STUDIES. HE TALKED ABOUT HIS ANALYSIS. HE DOES THIS FOR  
24 BOEING. THIS IS -- I'M SORRY, MR. RIVIN, IF I CAN JUST  
25 FINISH.

26 THIS IS SCIENTIFICALLY RELIABLE METHODOLOGY.

1 HE TOOK INTO CONSIDERATION THE BANKRUPTCIES, THE  
2 BANKRUPTCIES IN '95, '96. WHAT MR. RIVIN DOESN'T TELL YOU,  
3 IN '96-'97 THE DATA STILL TAKES INTO CONSIDERATION  
4 BANKRUPTCIES. IT TAKES INTO CONSIDERATION BECAUSE OF THE 2  
5 PERCENT, STILL DECLINED BECAUSE OF THE BANKRUPTCIES. SAME  
6 BANKRUPTCIES THAT HAPPENED IN THE CONTROL DATA.

7 THE FACT IS, THIS IS SCIENTIFICALLY  
8 RELIABLE. HE HAS TESTIFIED IT'S SCIENTIFICALLY RELIABLE.  
9 SO IT IS ADMISSIBLE. THAT'S THE FIRST LEVEL.

10 ALL OF THEIR WEIGHT AND SUFFICIENCY  
11 ARGUMENTS AND CROSS-EXAMINATION ON WHAT HE CONSIDERED OR  
12 WHAT HE DIDN'T CONSIDER GOES TO WEIGHT AND SUFFICIENCY. IT  
13 DOESN'T GO TO ADMISSIBILITY.

14 THE QUESTION FOR THIS COURT THIS MOMENT IS,  
15 IS THIS SCIENTIFICALLY RELIABLE DATA? AND WHAT THE COURT  
16 HAS TO LOOK AT, IS THIS WHAT AN EXPERT STATISTICAL EXPERT  
17 SUCH AS DR. BIERLEY LOOKS AT TO MAKE A DETERMINATION ON  
18 THIS CAUSATION AND EFFECT? THEY HAVE SHOWN NOTHING THAT  
19 SHOWS THAT THIS ISN'T SCIENTIFICALLY RELIABLE. IT IS  
20 SCIENTIFICALLY RELIABLE.

21 AND IF I CAN JUST MOVE TO ONE OTHER SUBJECT,  
22 AND THAT IS WHAT HE DID BEFORE OR AFTER THE DEPOSITION.

23 THE ISSUE ON KENNEMUR IS DID HE CHANGE HIS  
24 OPINION. AND HE HADN'T CHANGED HIS OPINION. DID HE DO  
25 OTHER INFORMATION AS DATA CAME IN BECAUSE OF LATE DISCOVERY  
26 WITH JUDGE JIM SMITH'S MOTION TO COMPEL; THAT THEY HAD TO

1 TURN OVER ALL THESE DISKS THAT THEY HAD NEVER TURNED OVER?  
2 HE CAN TESTIFY ABOUT HIS ANALYSIS AFTER HIS DEPOSITION, AS  
3 LONG AS IT DOESN'T CHANGE HIS OPINION. IT'S CHANGING THE  
4 OPINION. THAT IS THE ISSUE.

5 SO JUST TO SUM UP, WE HAVE KELLY/FRYE, THE  
6 TEST. THIS IS SCIENTIFICALLY RELIABLE. IT'S WHAT OTHER  
7 SCIENTISTS USE IN ANALYZING CAUSE AND EFFECT. THAT'S WHAT  
8 HE HAS TESTIFIED ABOUT. ALL THEIR ARGUMENTS GO TO WEIGHT  
9 AND SUFFICIENCY. THEY HAVE DONE NOTHING HERE TODAY TO  
10 CHALLENGE THE SCIENTIFIC RELIABILITY. THAT'S NUMBER ONE.

11 NUMBER TWO, IF HE DID DO WORK AFTER THE  
12 DEPOSITION -- AND ALL EXPERTS DO -- THE ONLY THING THAT  
13 KENNEMUR SAYS IS YOU CAN'T CHANGE YOUR OPINION. AND HE  
14 HASN'T CHANGED HIS OPINION.

15 THE COURT: RESPONSE?

16 MR. RIVIN: YOUR HONOR, I'M READY TO SUBMIT. I  
17 MADE THE ARGUMENTS.

18 I THINK THAT -- I THINK THAT MR. SHAW'S  
19 POINTS ARE JUST ABSOLUTELY COMPLETELY OFF THE MARK.

20 ON KENNEMUR, I AM CONCERNED ABOUT THE  
21 ADDITIONAL WORK THAT THE WITNESS DID. MR. SHAW SUGGESTED  
22 THAT IT WAS ADDITIONAL WORK BASED UPON WHAT DEFENDANTS'  
23 PRODUCED IN THE CASE. I SUSPECT THAT'S NOT TRUE. I DON'T  
24 KNOW THE EXTENT OF THE ADDITIONAL WORK HE DID. BUT IT'S  
25 NOT THE DEFENDANT'S WHO PRODUCED ADDITIONAL DATA. IT WAS  
26 THE PLAINTIFFS WHO WERE ORDERED BY JUDGE JIM SMITH TO

1 PRODUCE ADDITIONAL DATA.

2 MR. MOSHENKO: THAT'S NOT TRUE -- SORRY.

3 MR. RIVIN: SO -- AND MR. NOVELLI TESTIFIED TO THAT  
4 ABOUT THE BIG BOX AND SOME CORRELATION THAT WAS DONE BY  
5 DR. BIERLEY AND BOB THOMPSON, PRESUMABLY AFTER THE START OF  
6 TRIAL.

7 IN ANY EVENT, THE REAL ISSUE FOR ME IS NOT  
8 EVEN KENNEBUR; ALTHOUGH, I'M CONCERNED ABOUT THAT ISSUE.  
9 BUT THE REAL ISSUE IS THERE MAY BE -- ALTHOUGH, THERE MAY  
10 BE A SCIENTIFIC METHOD, THAT IS NOT WHAT THIS WITNESS HAS  
11 DONE. THIS WITNESS DID NOT DETERMINE CAUSATION. ALL HE  
12 DID IS ASSUME CAUSATION. AND THERE'S NO GETTING AROUND  
13 IT. HE ASSUMED CAUSATION. HE ASSUMED THAT NOTHING CHANGED  
14 BETWEEN 1996 AND 1997, EXCEPT COAST LETTERS SENT IN THE  
15 FALL OF 1997. AND AS FAR AS THIS WITNESS WAS CONCERNED,  
16 NOTHING ELSE CHANGED. AND THAT'S THE WAY HE CAME TO HIS  
17 CONCLUSIONS ON CAUSATION. AND THAT'S RIDICULOUS, AND IT IS  
18 COMPLETELY AND TOTALLY ILLOGICAL.

19 MR. MOSHENKO: YOUR HONOR, I'D LIKE TO MAKE THE  
20 POINT I TRIED TO A MINUTE AGO AND RESPOND.

21 REMEMBER WHERE WE STARTED? DEFENDANT SAID  
22 THIS MAN IS NOT A CAUSATION EXPERT AT ALL. HE DOESN'T KNOW  
23 ANYTHING ABOUT CAUSATION. HE HAS COME IN AND GIVEN US  
24 INFORMATION THAT PROVES THAT HE IS QUALIFIED AND ABLE TO  
25 RENDER CAUSATION AND TOLD US I THINK MORE SCIENTIFICALLY  
26 THAN ANYONE ELSE COULD UNDERSTAND.

1 THE COURT: EXCUSE ME. YOU'D PROBABLY BE MORE  
2 COMFORTABLE IF YOU GOT OUT OF THERE.

3 THE WITNESS: THANK YOU, YOUR HONOR.

4 MR. MOSHENKO: NUMBER TWO, WE'VE HEARD MR. RIVIN  
5 ARGUE HE DIDN'T CONSIDER ANYTHING ELSE, NOTHING ELSE EXCEPT  
6 COAST TO COAST LETTERS.

7 PAGE 250:

8 "DID YOU CONSIDER, FOR  
9 EXAMPLE, THE IMPACT OF  
10 BANKRUPTCIES ON THE MEMBERS'  
11 LIKELIHOOD OF STOPPING THEIR  
12 PAYMENT OF DUES?

13 "ANSWER: THAT, AND ANY  
14 FACTORS LIKE THAT WOULD HAVE  
15 BEEN -- WOULD HAVE BEEN CAPTURED  
16 TO SOME DEGREE IN THE NATURAL  
17 ATTRITION RATE. THAT'S A YES.  
18 AND IT'S CAPTURED IN MY NATURAL  
19 ATTRITION RATE."

20 THEN HE GOES ON. HE SAYS, THAT WOULD  
21 INCLUDE -- REFER TO NATURAL ATTRITION RATE. A WHOLE HOST  
22 OF THINGS THAT WOULD BE.

23 AND THAT WOULD BE ONE OF THEM?

24 AND THEN HE IS ASKED TO IDENTIFY WHAT'S  
25 INCLUDED IN THE NATURAL ATTRITION RATE AS A, QUOTE,  
26 CATCH-ALL?

1 YES.

2 SO TO WHAT EXTENT ARE THE MEMBERS'  
3 BANKRUPTCIES FILINGS OF THOSE PARTNERS -- THOSE DEPARTURES  
4 INCLUDED IN NATURAL ATTRITION IN YOUR VIEW?

5 YES, THEY ARE INCLUDED IN MY VIEW.

6 CAN YOU IDENTIFY ME OTHER FACTORS THAT  
7 CAUSED NATURAL ATTRITION?

8 THESE ARE OTHER THINGS THAT MR. RIVIN SAYS  
9 HE NEVER CONSIDERED.

10 ANSWER, DEATH, FOR EXAMPLE.

11 BANKRUPTCY?

12 I WOULD SAY SO. OTHER FACTORS, GENERAL  
13 ECONOMIC CONDITIONS, IMPROVING OR NOT IMPROVING -- THAT'S  
14 WHAT YOUR HONOR ASKED HIM ABOUT.

15 SO YOU DON'T HAVE THEM SEPARATELY?

16 BINGO. THERE'S THE WORD. YOU DON'T  
17 CONSIDER THEM SEPARATELY. YOU JUST INCLUDE THEM IN THE  
18 NATURAL ATTRITION RATE.

19 ANSWER, YES. THEY ARE CONSIDERED IN THE  
20 NATURAL ATTRITION RATE, AND IT'S NOT LIMITED TO ATTRITION  
21 IN '95 AND '96. THAT RATE SCIENTIFICALLY IN MY OPINION --  
22 AND I THINK THE WITNESS WOULD TESTIFY WOULD -- ABSENT SOME  
23 OTHER FACTOR -- BE CONTINUING OUT LIKE THIS.

24 AND YES, MR. SHERMAN WAS RIGHT THIS MORNING  
25 WHEN HE TALKED ABOUT THE DIFFERENCE IN THE CHANGE.

26 THIS INCLUDES BANKRUPTCIES, BANKRUPTCIES,

1 BANKRUPTCIES. ASSUMES BANKRUPTCIES, ASSUMES DEATHS,  
2 ASSUMES ECONOMIC CONDITIONS. WHAT'S DIFFERENT?

3 ANSWER, COAST'S LETTER.

4 AND THIS IS LEGITIMATE OPINION TESTIMONY BY  
5 AN EXPERT WITH QUALIFICATIONS AND THE ABILITY TO GIVE IT.  
6 HE SHOULD BE ALLOWED TO GIVE IT. AND IT'S NOT  
7 CONTRADICTING OR DIFFERENT FROM HIS PRIOR TESTIMONY IN  
8 DIFFERENT DEPOSITIONS.

9 MR. RIVIN: I FEEL LIKE I'M IN WONDERLAND. THIS  
10 IS -- WHAT I'M HEARING JUST DOESN'T MAKE SENSE. IT DEFIES  
11 LOGIC.

12 THE WAY THIS -- THE WAY DR. BIERLEY  
13 JUSTIFIED HIS CONCLUSION OR THE WAY HE JUSTIFIED HIS  
14 ASSUMPTION IS BY ASSUMING THE NONEXISTENCE OF FACTORS WHICH  
15 HAPPENED IN 1997. MR. MOSHENKO KEEPS SAYING THAT  
16 BANKRUPTCIES WERE IN THIS 2 PERCENT NORMAL DECLINE; THAT  
17 DEATHS WERE IN THIS 2 PERCENT NORMAL DECLINE. THE TEST  
18 IS -- AND THE WITNESS JUST SAID THIS ON THE WITNESS  
19 STAND -- WHAT HAPPENED IN 1997? THAT'S THE WAY YOU TEST  
20 THE VALIDITY OF A CAUSATION ANALYSIS. WHAT HAPPENS, WHAT  
21 HAPPENS IF THEY FILED BANKRUPTCY IN 1997 AND ALL OF THE  
22 PLAINTIFFS' BUSINESSES WENT OUT -- ALL OF THE PLAINTIFFS  
23 WENT OUT OF BUSINESS? THEY WOULD HAVE -- AND IT SO  
24 HAPPENED THAT COAST SENT A LETTER IN 1997 AS WELL. BUT  
25 THERE WAS A COMPLETE DESTRUCTION OF THEIR BUSINESS. AND  
26 LET'S ASSUME THAT BY THE END OF 1997 THEIR REVENUES WERE

1 DOWN TO ZERO.

2 SO COAST SENT THE LETTER IN THE FALL. THEY  
3 HAD A SEVERE DECLINE IN THE EARLY 1997. THEIR BUSINESS  
4 COLLAPSED. THEY FELL APART. AND THEY HAD ZERO REVENUE.  
5 FOR MR. MOSHENKO TO ARGUE THAT THAT ALL RESULTED FROM THE  
6 COAST LETTERS BECAUSE THE EFFECT OF THE DESTRUCTION OF THE  
7 BUSINESS THROUGH THE BANKRUPTCY WOULD ALREADY BE TAKEN INTO  
8 CONSIDERATION IN THE NORM DOESN'T MAKE ANY SENSE.

9 AND ONE OTHER REASON IT DOESN'T MAKE  
10 SENSE -- AND I HAVEN'T ARGUED THIS, BUT I WILL. HERE IS  
11 THE DECLINE THAT DR. BIERLEY DREW. 1997, IT WENT DOWN.  
12 THE LOSS OF MEMBERS INCREASED. THE COAST LETTER WENT OUT  
13 IN THE FALL OF 1997. THE FALL OF 1997.

14 HOW DO YOU JUSTIFY THE PEOPLE WHO STOPPED  
15 PAYING IN THE FIRST NINE MONTHS, THE FIRST 10 MONTHS OF THE  
16 YEAR? THAT'S A RESULT OF THE COAST LETTERS? THAT MAKES NO  
17 SENSE.

18 THE COURT: ALL RIGHT.

19 MR. RIVIN: I HAVE SAID CONSISTENTLY, YOUR HONOR,  
20 WHAT DR. BIERLEY DID IS NOTHING MORE THAN ASSUMED  
21 CAUSATION. HE ASSUMED THERE WAS NOTHING ELSE THAT HAPPENED  
22 IN 1997 EXCEPT THE COAST LETTERS. AND THAT IS NOT PROOF OF  
23 CAUSATION.

24 THE COURT: SUBMIT, GENTLEMEN?

25 MR. SHAW: JUST ONE FINAL POINT.

26 WHAT MR. RIVIN DOESN'T DEAL WITH IS THE

1 CALIFORNIA SUPREME COURT, PEOPLE VERSUS KELLY, 1976, 17  
2 C.3D 24, WHICH SAYS THAT THE GENERAL ACCEPTANCE TEST  
3 APPLIES IN CALIFORNIA. IF THIS IS GENERALLY ACCEPTED  
4 SCIENTIFIC MODELING AND SCIENTIFIC TESTIMONY WHICH HAS BEEN  
5 ESTABLISHED, THEN IT IS PROPER FOR THIS EXPERT TO TESTIFY.

6 WHAT MR. SHERMAN JUST WENT OVER IS ALL  
7 WEIGHT AND SUFFICIENCY AND ASKING HIM QUESTIONS, TESTING  
8 HIS SCIENTIFIC MODELING AND THE SCIENTIFIC THEORY.

9 THE CODE SECTION ALSO THAT APPLIES IS  
10 EVIDENCE CODE SECTION 801, WHICH ALLOWS THE GENERALLY  
11 ACCEPTED SCIENTIFIC MODELING TO APPLY. AND THAT'S WHAT  
12 THIS IS.

13 THEY HAVE DONE NOTHING IN THE LAST HOUR AND  
14 A HALF TO DEAL WITH HIS SCIENTIFIC PRINCIPLE AT ALL. ALL  
15 THEY HAVE TALKED ABOUT IS CHIPPED AWAY AT WEIGHT AND  
16 SUFFICIENCY. THIS IS RELIABLE SCIENTIFIC DATA. THEY  
17 HAVEN'T BEEN ABLE TO SHOW OTHERWISE. IT GOES TO THE JURY,  
18 I WOULD ARGUE ON WEIGHT AND SUFFICIENCY AND THEIR  
19 CROSS-EXAMINATION.

20 I THINK YOUR HONOR SAID ON MAY 4TH -- AND I  
21 JUST LOOKED AT THE TRANSCRIPT -- THAT THIS IS A SEARCH FOR  
22 TRUTH AND JUSTICE, AND THAT THE JUDGE -- AND IT WAS IN  
23 REGARDS TO MR. NYE'S TESTIMONY -- THAT YOU'RE GOING TO LET  
24 THIS GO TO THE JURY, AND THERE WILL BE CROSS-EXAMINATION OF  
25 WEIGHT AND SUFFICIENCY.

26 I WOULD ARGUE, YOUR HONOR, THAT THE SAME

1 PRINCIPLE APPLIES THAT THE COURT ENUNCIATED ON MAY 4TH  
2 SHOULD APPLY NOW. THESE ARE ACCEPTED SCIENTIFIC  
3 PRINCIPLES, GENERALLY ACCEPTED, UNDER PEOPLE VERSUS KELLY.

4 MR. SHERMAN: YOUR HONOR, UNDER KELLY, SCIENTIFIC  
5 METHOD AS ARTICULATED BY DR. BIERLEY INCLUDED A SURVEY, A  
6 SURVEY WITH A SET-ASIDE CONTROL GROUP WITH SOLICITED  
7 RESPONSE FROM THE MEMBERS.

8 ACCORDING TO DR. BIERLEY'S OWN TESTIMONY, HE  
9 DID NOT DO THAT. THAT IS NOT THE SCIENTIFIC METHOD.  
10 THEREFORE, UNDER DR. BIERLEY'S OWN ANALYSIS -- AND, YES, WE  
11 CAN AGREE WITH MR. SHAW WITH RESPECT TO HIS CITATIONS TO  
12 KELLY. DR. BIERLEY DID NOT CONDUCT A SURVEY.

13 MR. MOSHENKO: YOUR HONOR --

14 MR. SHAW: HE DID. 1500.

15 MR. SHERMAN: SURVEY. NOT SAMPLE.

16 MR. SHAW: HE TOOK 1500, AND THIS IS PROPER FOR HIS  
17 SCIENTIFIC METHOD. THE QUESTION IS WEIGHT AND SUFFICIENCY.

18 MR. SHERMAN: THE QUESTION IS SURVEY.

19 MR. RIVIN: MR. SHAW -- RESPECTFULLY, YOUR HONOR,  
20 MR. SHAW IS TALKING ABOUT SOMETHING ELSE. HE IS TALKING  
21 ABOUT -- WITH A MATHEMATICAL SAMPLE.

22 THE COURT: GENTLEMEN, I HAVE HEARD I THINK ENOUGH  
23 TO MAKE A DECISION.

24 SUBMITTED?

25 MR. RIVIN: YES.

26 THE COURT: I THINK THAT DR. BIERLEY'S TESTIMONY

1 CAN DEFINITELY BE GIVEN TO THE JURY AS FAR AS DAMAGES ARE  
2 CONCERNED. BUT I DO BELIEVE THAT THERE IS NOT ENOUGH THERE  
3 TO HAVE THE JURY DETERMINE CAUSE. AND SO FOR THAT REASON,  
4 I THINK WE'LL HEAR FROM HIM LATER IN THE TRIAL, IF  
5 NECESSARY.

6 NOW, WHO IS GOING TO BE YOUR WITNESS  
7 TOMORROW MORNING?

8 MR. SHAW: MR. RYMAN.

9 MR. MOSHENKO: IT'S A SURPRISE. MAY I HAVE A  
10 MOMENT?

11 THE COURT: SURE.

12 (PAUSE IN PROCEEDINGS.)

13 MR. MOSHENKO: I JUST DIDN'T KNOW THIS, BUT I HEARD  
14 TODAY MR. SHERMAN SAID MR. RYMAN WAS GOING TO BE HERE.

15 THE COURT: CORRECT. MR. RYMAN WILL BE HERE IN THE  
16 MORNING.

17 MR. SHERMAN: YES, HE WILL, YOUR HONOR, AS WE HAVE  
18 PREVIOUSLY INFORMED THE COURT.

19 THE COURT: ALL RIGHT.

20 MR. MOSHENKO: SO THAT WILL BE IT. AND I DON'T SEE  
21 US HAVING ANY WITNESSES AFTER THAT, YOUR HONOR.

22 MR. SHERMAN: YOUR HONOR, WHAT I'D LIKE TO SUGGEST  
23 IS THIS: AT THE CLOSE OF MR. RYMAN'S TESTIMONY TOMORROW,  
24 WE WOULD LIKE A FEW MOMENTS WITH THE COURT OUTSIDE OF THE  
25 PRESENCE OF THE JURY IN ORDER TO MAKE OUR ORAL MOTIONS FOR  
26 DIRECTED VERDICT AND MOTIONS FOR NONSUIT.

1 AS WE HAD DISCUSSED LAST WEEK, WE WILL BE  
2 DELIVERING PAPERS IN SUPPORT OF THOSE MOTIONS TO THE COURT  
3 AND TO PLAINTIFFS SOMETIME ON WEDNESDAY. THAT IS OUR  
4 EXPECTATION. AND WE WOULD ASK THAT THE COURT HEAR THESE  
5 MOTIONS, BOTH OUR ORAL MOTION AS SUPPORTED BY THE WRITTEN  
6 MOTIONS ON FRIDAY, AND IN ORDER TO JUST KEEP THIS MOVING  
7 ALONG FOR THE BENEFIT OF THE JURY.

8 THE COURT: CAN YOU GUYS ALL BE HERE FRIDAY  
9 MORNING?

10 MR. SHAW: YOUR HONOR, I DO HAVE A PROBLEM ON  
11 FRIDAY. AND I APOLOGIZE TO EVERYONE. BUT I COULD MAKE A  
12 CHANGE TO HAVE IT ON FRIDAY, IF THAT'S THE COURT'S DESIRE.

13 THE COURT: IF YOU COULD DO IT, I'D APPRECIATE IT.

14 MR. SHAW: I WILL DO THAT.

15 THE COURT: I CAN'T WORK BEYOND NOON. I HAVE TO  
16 SEE MY CARDIOLOGIST IN THE AFTERNOON.

17 MR. MOSHENKO: WE'RE GOING TO HEAR SOME ORAL LIKE  
18 ANTICIPATED -- ORAL MOTIONS WHICH ARE NOT GOING TO BE  
19 CONSIDERED OR RULED OR ARGUED.

20 MR. SHERMAN: NO. WE'RE ASSUMING THAT'S AGREEABLE  
21 WITH ALL, INCLUDING THE COURT. THAT IS, WE'RE GOING TO  
22 MAKE OUR ORAL MOTIONS. WE'RE NOT EXPECTED TO HEAR  
23 RESPONSES AT THAT TIME. WE'RE NOT ASKING THE COURT TO RULE  
24 AT THAT INSTANT. OBVIOUSLY, THAT'S WITHIN YOUR HONOR'S  
25 DISCRETION. BUT WE DO, WITHOUT WAIVING OUR RIGHT TO MOVE  
26 FOR DIRECTED VERDICT AND NONSUIT, INTEND ON WEDNESDAY TO

1 OPEN OUR CASE.

2 THE COURT: ALL RIGHT.

3 MR. SHAW: YOUR HONOR, WHEN IS OUR BRIEFING  
4 SCHEDULE? WE'RE GOING TO RECEIVE SOMETHING IN WRITING ON  
5 WEDNESDAY. I DON'T KNOW WHEN ON WEDNESDAY MR. SHERMAN HAS  
6 IN MIND. BUT WHEN ARE OUR RESPONSES THEN -- OUR WRITTEN  
7 RESPONSE DUE?

8 THE COURT: THURSDAY.

9 MR. MOSHENKO: WELL, YOU KNOW WHAT? I'M GOING TO  
10 OBJECT TO THAT. I'M SORRY FOR INTERRUPTING, MR. SHERMAN.  
11 I SUSPECT THEY HAVE BEEN WORKING ON PREPARING THESE MOTIONS  
12 FOR A WEEK OR MORE -- FOR WEEKS, FRANKLY. AND FOR US TO  
13 RESPOND IN ONE DAY --

14 THE COURT: WE'LL GIVE YOU MORE TIME IF THAT'S  
15 NECESSARY.

16 MR. SHERMAN: VERY WELL.

17 THE COURT: OKAY. SO MAYBE WE WON'T WORK FRIDAY.

18 MR. SHAW: I WAS JUST GOING TO SAY, THAT WILL DELAY  
19 FRIDAY INTO NEXT WEEK.

20 THE COURT: YEAH.

21 MR. SHERMAN: I JUST WANT TO MAKE IT CLEAR THAT WE  
22 ARE DOING THAT WITHOUT WAIVING OUR RIGHT --

23 THE COURT: YEAH.

24 MR. SHERMAN: -- AT THE CLOSE OF PLAINTIFFS' CASE  
25 TO IMMEDIATELY SEEK A MOTION FOR DIRECTED VERDICT AND  
26 NONSUIT.

1 THE COURT: YES.

2 MR. SHERMAN: AND GIVEN THAT MR. SHAW UNDERSTANDS  
3 AND THE COURT IS SHAKING HIS HEAD AFFIRMATIVELY, THEN WE'RE  
4 ALL IN AGREEMENT.

5 THE COURT: ALL RIGHT. SEE YOU AT 9:00.

6 (WHEREUPON THE COURT WAS IN RECESS UNTIL  
7 TUESDAY, JULY 18, 2000, 9:00 A.M.)

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