

1 IN THE UNITED STATES COURT OF FEDERAL CLAIMS

2

3 STARR INTERNATIONAL COMPANY,)

4 INC., Individually and on)

5 Behalf of All Others)

6 Similarly Situated,)

7 Plaintiff,) Case No. 11-779C

8 vs.)

9 UNITED STATES OF AMERICA,)

10 Defendant.)

11 -----)

12

13

14 Courtroom 4

15 Howard T. Markey National Courts Building

16 717 Madison Place, N.W.

17 Washington, D.C.

18 Monday, September 15, 2014

19 10:00 a.m.

20 Pretrial Conference

21

22 BEFORE: THE HONORABLE THOMAS C. WHEELER

23

24

25 Susanne Bergling, RMR-CRR-CLR, Reporter

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2
9/15/2014

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1 P R O C E E D I N G S

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3 (Proceeding called to order, 10:00 a.m.)

4 THE COURT: Good morning.

5 ALL COUNSEL: Good morning, Your Honor.

6 THE COURT: We're on the record this morning for

7 the pretrial conference in the case of Starr

8 International Company vs. the United States, Docket

9 Number 11-779C. It's good to see you all again.

10 Let's begin with the introductions of counsel.

11 For the Plaintiff?

12 MR. BOIES: Good morning, Your Honor. David
13 Boies of Boies, Schiller & Flexner. With me I have my
14 partners, Amy Mauser, Alanna Rutherford, and Bob Dwyer,
15 and my colleague John Gardiner from the Skadden firm.

16 THE COURT: So, we have one new face this
17 morning, I think.

18 MS. RUTHERFORD: Good morning.

19 THE COURT: Nice to have you.

20 For the United States?

21 MR. MIZOGUCHI: Good morning, Your Honor. Brian
22 Mizoguchi for the Department of Justice, and with me are
23 my colleagues, Matthew Scarlato, Scott Austin, John
24 Todor, Kenneth Dintzer, Claudia Burke, and Joshua
25 Gardner.

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1 THE COURT: Good morning. Good to see you all
2 again.

3 I thought what we would do today is go through a
4 series of standard subjects that I typically raise in
5 every pretrial conference. They're sort of the routine
6 things that you all can anticipate, and then we will get
7 to the specific items that you all included in your
8 recent joint status report. So, we'll proceed in that
9 fashion. Stop me at any time if you have questions or
10 comments about any of this, make sure that we're all on
11 the same wavelength here.

12 First of all, with regard to our daily trial
13 schedule when we start in a couple of weeks, the normal
14 trial schedule will be from 9:30 in the morning until
15 5:00 in the afternoon, with a 15-minute break in the
16 morning and afternoon, and typically one hour for lunch.
17 So, that will give you a solid six hours of trial each
18 day.

19 The first day, as you know, is Monday, September
20 29, two weeks from today, and I -- when I went back over
21 the pretrial order, I discovered that I had actually
22 miscalculated the number of trial days. I think I gave
23 you a time period that included more than 30 trial days,
24 and I guess we still have that time, actually, so that
25 if it goes over 30 trial days, it should not be a

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1 problem, but -- I think 30 days is still a reasonable
2 target, but if we need a little more time, it should not
3 be a problem.

4 A couple of specific points here is that we will
5 not meet on the two federal holidays that are in this
6 time period, which are, namely, Columbus Day on Monday,
7 October 13, and Veterans Day on Monday, November the
8 10th. In addition, we will not meet on Friday, November
9 the 7th. I have an obligation out of town that weekend,
10 and so we will give you the day off there. I figure you
11 will have gone at it for a number of weeks by that time
12 and perhaps would enjoy a long weekend. So, that's what
13 will happen.

14 And then you may find this somewhat amusing. We
15 have a fire drill scheduled at the Court for Wednesday,
16 October the 1st, at 9:30 in the morning. So, I suggest
17 on that day that we simply begin at 10:00 instead of
18 9:30, and we can go an extra half-hour in the afternoon
19 so that you get your full time that day.

20 Are there any questions about that schedule?

21 (No response.)

22 THE COURT: All right. We will be using this
23 courtroom, Courtroom 4, for the duration of the trial,
24 and both sides may have access to the courtroom on
25 Friday, September 26th, for the purpose of setting up

1 exhibits and perhaps testing your electronic connections
2 and so forth. And also, we have two conference rooms
3 available, one for each party. One is on this floor,
4 actually close to the windows outside of Courtroom 4,
5 and I thought we would give that room to the United
6 States. And then there's another courtroom -- excuse
7 me, another conference room on the third floor, just two
8 floors below, which is right near the elevators. I
9 think it's actually a nicer conference room than the one
10 on this floor, but it is an elevator ride away. So, one
11 for each side.

12 Regarding opening statements for the trial, I
13 typically allow 30 minutes per side for an opening
14 statement, but I'm willing to hear any discussion about
15 whether additional time should be allowed for this
16 trial. I would say that I have a lot of excellent
17 summary information that I have received from you in the
18 recent days leading up to this, but can both of you live
19 with 30 minutes, do you think, or would you like more
20 time?

21 MR. BOIES: Your Honor, I think we could live
22 with 30 minutes, but my inclination would be a little
23 more time might be helpful to the Court. We are going
24 to have a long trial, we have got a lot of witnesses, a
25 lot of exhibits, and I think 45 minutes or an hour I

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1 think at the beginning might save us some time later on
2 and give us a chance to explain sort of where we're
3 going now that we've got a little more detail from all
4 the work that we've done over the last few weeks.

5 THE COURT: All right.

6 Mr. Dintzer?

7 MR. DINTZER: Your Honor, whatever pleases the
8 Court, but we can see some assistance being provided by
9 45 minutes, perhaps, or even an hour. That would be
10 fine.

11 THE COURT: All right. Well, let's say 45
12 minutes, then, for opening statements.

13 All right, my next subject regards Federal Rule
14 of Evidence 615 and the exclusion of fact witnesses
15 during the trial. I always follow that rule, and I
16 intend to do so here. I assume that would be the
17 parties' desire anyway.

18 MR. BOIES: Your Honor, could I just raise one
19 question?

20 THE COURT: Yes.

21 MR. BOIES: Does that apply for opening
22 statements?

23 THE COURT: That's a good question. It's fine
24 with me for any witness to be here who wants to listen
25 to opening statements. I have no objection to that.

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1 MR. BOIES: Thank you, Your Honor.

2 THE COURT: But for fact witnesses, they should
3 not be in the courtroom except for when they testify.
4 After they testify, unless you see a need to possibly
5 call them as a rebuttal witness, I would have no problem
6 with them staying afterwards and observing the
7 proceedings. Rule 615 does not apply to expert
8 witnesses, so we will expect any expert witness to
9 remain in the courtroom and listen to the proceedings if
10 they desire.

11 And then, as you know, each party is entitled to
12 one in-court representative to observe the proceedings,
13 and if you know that information today, I'd be glad to
14 make note of it.

15 MR. BOIES: Your Honor, our representative is
16 going to be Mr. Bertil Lundqvist, who --

17 THE COURT: I'm sorry, what is the first name?

18 MR. BOIES: Bertil, B-E-R-T-I-L, who is here in
19 court.

20 MR. LUNQVIST: Good morning.

21 THE COURT: All right. Nice to see you.

22 And for the United States?

23 MR. DINTZER: We haven't yet identified one, Your
24 Honor, but we will let the Court know as soon as we do.

25 THE COURT: Okay. Now, my expectation is that

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1 the in-court representative should remain the same
2 person throughout the trial. I don't look favorably on
3 juggling the in-court representative depending on what
4 the subject matter of the day is. So, it should be the
5 same person throughout.

6 All right. Then, as to the format for examining
7 witnesses, I typically permit two rounds of examination
8 for each witness. So, you would have direct, cross, and
9 then potentially redirect and recross, and then that's
10 it. After two rounds, we would excuse the witness
11 unless there's really some compelling reason to press
12 further.

13 Now, we -- there's a number of witnesses on the
14 witness list that overlap. I saw a good many. I think
15 I counted 18, but I'm not sure if that's the right
16 number or not. There's a lot of overlap in the witness
17 lists, and we have the question of how to deal with
18 those situations. I know there was some discussion of
19 that in the joint status report.

20 One suggestion is that when it comes time for the
21 Government to cross examine a witness who is on the
22 Government's list, they could just go ahead and ask that
23 witness those subjects that would be covered in their
24 direct part of the case anyway.

25 Do you have any views about that proposal,

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1 Mr. Boies?

2 MR. BOIES: Your Honor, we don't have any
3 objection to that approach as a general matter where
4 it's necessary or appropriate for the convenience of the
5 witness and presumably also for the convenience of the
6 Court; however, there are a number of witnesses on our
7 witness list that are there only because we need to
8 authenticate a document or get a document admitted,
9 overcome objections of one kind or another, or to
10 establish a single fact that may be in dispute.

11 Now, it may be that we don't need to call those
12 witnesses at all, because my experience is, as we get
13 into a trial, a lot of objections fall away and the
14 parties are more willing, particularly in a bench trial,
15 to stipulate to the facts as they become obvious.

16 But if we do need to call these witnesses in
17 order to establish either facts that we think should be
18 stipulated or the admissibility of documents that we
19 think should not have AN objection, we wouldn't want
20 that to open the door to a broad-range examination in
21 the middle of our case, because that really prevents us
22 from ordering our case in what we think is a sensible
23 way to present our points to the Court.

24 So, if we had, for example, a witness that we
25 needed to call for a specific fact or a specific

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1 document, put the witness on for 15 or 20 minutes, we
2 wouldn't want a broad-ranging examination of a couple of
3 hours that would then lead to cross. And what we've
4 done then is we've sort of destroyed the structure of
5 our case.

6 So, I think to some extent what we would like to
7 do is take it case by case, where if they want to do
8 that once they see one of our witnesses that's on their
9 witness list, if they want to put the witness on only
10 once, we will talk with them, we will work it out. I
11 think we will work it out in the majority of cases where
12 we have a substantial examination time. I think the
13 issue for us is going to be when we have only really --
14 we're really using them as we might a deponent in a case
15 where you're going to do depositions, which is to
16 authenticate a document or prove a particular fact.

17 THE COURT: All right. I think that's a
18 well-taken point.

19 Mr. Dintzer?

20 MR. DINTZER: Yes, Your Honor. Just to add to
21 what Mr. Boies said, I think we should, you know, for
22 the most part work on it case by case, of course, taking
23 into account the witness' convenience as well. So,
24 sometimes perhaps they only want to identify one point,
25 but we would be reluctant to ask that witness to return

1 to court for then our examination. So, we will then
2 work with the Plaintiffs to try to make sure that both
3 for our convenience and for the witness' convenience,
4 that they -- that we can avoid that.

5 The second thing is, is that if we exceed scope,
6 we want the understanding that we would be doing so but
7 preserve our right to bring a 52(c) if we choose to
8 after the close of the Plaintiff's evidence and that we
9 wouldn't be prejudicing ourselves by theoretically
10 opening our case in doing so.

11 THE COURT: All right. Well, it does tend to
12 complicate things a little bit if you get to a Rule
13 52(c) motion if there's evidence in the record that is
14 part of the Government's direct case. We will try to
15 keep it straight.

16 MR. DINTZER: Yes. Thank you, Your Honor. If we
17 cite it -- if we chose to do a 52(c), we would be
18 assiduous in not citing what was elicited beyond the
19 scope of Plaintiff's direct.

20 THE COURT: All right, very well.

21 I think the Government also raised in the joint
22 status report the right to waive cross examination of
23 somebody who's on your witness list and then cover all
24 of it as part of your direct case. Is that right?

25 MR. DINTZER: Yes, Your Honor, just to preserve

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1 that opportunity; that is, if they call a witness -- as
2 Mr. Boies has described, the ability to put on their
3 case and structure it as they see fit, it may turn out
4 that rather than be put in a position where we would
5 want to do -- elicit certain facts during their case, we
6 might choose, if the Court permits -- and I don't know
7 if we're going to do this, but just to get it into
8 the -- as a possibility, that we would reserve our
9 entire examination and then do a direct, and obviously
10 subject to cross, in our case in chief, if we chose to.

11 THE COURT: Okay. I think the best approach is
12 to take each witness as it comes, understanding the
13 views of each side. I can tell you that I will always
14 be sensitive to the convenience of the witness as well.
15 If somebody has traveled here from a long distance, I'm
16 going to be sensitive to trying to take care of that
17 witness while he or she is here.

18 MR. DINTZER: We appreciate that, Your Honor.

19 MR. BOIES: And we agree with that as well, Your
20 Honor.

21 THE COURT: All right.

22 MR. BOIES: And with respect to the reservation
23 of the right for cross examination, it's obviously
24 whatever works best from the Court's understanding, but
25 from our perspective, we do not have an objection if

1 they want to waive cross examination and do it as a part
2 of their case.

3 THE COURT: All right, very well.

4 My next question concerning witnesses deals with
5 the fact that a number of the witnesses on your filings
6 seem to have their own counsel. They have retained
7 their own counsel for whatever reason during the
8 deposition phase of this case and perhaps for other
9 reasons as well. It is not my intention to allow such
10 separate counsel to participate in the examination of
11 witnesses.

12 I suppose they can always talk to counsel of
13 record and, you know, tell them whatever's on their
14 mind, but I think that you all will control the
15 examination of witnesses, and I do not intend to let
16 other counsel, who are not counsel of record for the
17 parties, to participate.

18 Now, it strikes me that a possible exception to
19 that might arise if we have questions about
20 confidentiality of an exhibit. If there's a point to be
21 made by, I don't know, the Federal Reserve Bank of New
22 York or somebody who's written a book or something like
23 that and they're concerned about confidentiality, I
24 suppose a situation might arise where I'd be willing to
25 hear a viewpoint about whether an exhibit should remain

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1 confidential, but save for that exception, I don't see
2 them participating.

3 Is there any -- do you all agree with that?

4 MR. BOIES: We agree with that, Your Honor.

5 MR. DINTZER: We do as well, Your Honor. We
6 anticipate that all work will be done by the Department
7 of Justice team.

8 THE COURT: All right, very well.

9 Now, the next subject, something that I included
10 in the pretrial order, it has to do with your
11 discussions with or among witnesses who are yet to come
12 to testify. The rule, as you all know, is that counsel
13 or other witnesses should not confer with witnesses who
14 have not yet testified about what they have observed in
15 the proceedings and so forth.

16 I understand -- well, let me just ask you, are
17 you expecting to use realtime reporting services in this
18 case?

19 MR. BOIES: We are, Your Honor.

20 THE COURT: Okay. Well, then, all the more
21 reason to be diligent in observing this restriction. We
22 don't want witnesses to come to have access to any of
23 the transcripts or to have discussions with you all that
24 might color or change their testimony in some way.
25 That's all clear, right?

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1 MR. BOIES: Yes, Your Honor.

2 MR. DINTZER: Yes, Your Honor.

3 THE COURT: Okay, very good.

4 And then after a witness has been tendered for
5 cross examination, if we have a break or something,
6 there should not be any discussions with that witness by
7 the party who offered the witness.

8 Now, the Government did raise a point which I
9 think has some validity about what if the Plaintiff
10 calls somebody who's really a person from the
11 Government's side of the case, should that restriction
12 apply during direct rather than cross? It seems
13 reasonable to me, but what ---do you have any thoughts
14 about that?

15 MR. BOIES: As I understand it, what they would
16 want -- let's say we call Secretary Paulson. They would
17 want the ability to talk to Secretary Paulson while I'm
18 examining -- while they're examining, not while I'm
19 examining.

20 THE COURT: During cross, let's say.

21 MR. BOIES: During what is in form cross but what
22 is, in effect, their examination of the witness.

23 THE COURT: Yes.

24 MR. BOIES: So, they would have the same right to
25 examine him -- to talk to him that they would have had

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1 if they had called him in their case.

2 THE COURT: Yes.

3 MR. BOIES: I think that's fair, Your Honor.

4 THE COURT: Yes.

5 MR. BOIES: I think that each side ought to be
6 able to talk to their witnesses when they are examining
7 their own witnesses but not when the other side is
8 examining their witnesses.

9 THE COURT: Correct, yes.

10 MR. BOIES: I think that's fair.

11 THE COURT: All right. I thought it was
12 reasonable, and so that's the practice that we'll
13 follow.

14 MR. DINTZER: Thank you, Your Honor.

15 THE COURT: All right. Let's --

16 MR. BOIES: Your Honor, could I just ask one
17 question?

18 THE COURT: Yes.

19 MR. BOIES: I assume, though, that any
20 conversations that are had with a witness after the
21 witness takes the oath are subject to examination; that
22 is, once a witness is on the stand, they can't have a
23 conversation with the witness about their testimony that
24 we cannot examine about, regardless of when it takes
25 place.

1 THE COURT: Mr. Dintzer, do you have any problem
2 with that?

3 MR. DINTZER: Your Honor, my -- I understood
4 that -- just getting back sort of to the Court's
5 original rule, which is during the -- during the
6 direct -- let's say the Plaintiffs call Mr. Greenberg or
7 Mr. Lundqvist, and during his direct, they could --
8 maybe there's a break, they could talk to him. My
9 understanding of the Court's thinking was that that
10 would be privileged, that if they -- if there's
11 something that they wish to converse with him about
12 about his direct, that that would be privileged, and
13 that's the whole idea of allowing that conversation to
14 take place in the first place.

15 Then, when they tender Mr. Lundqvist to us, then
16 we would begin our cross examination, of course, then
17 they would be closed off from any conversation with him,
18 and then -- so -- privileged or otherwise, and that that
19 was sort of the nature of the -- of allowing the
20 conversation to take place in the first place.

21 If it's not going to be privileged, it almost is
22 beside the point if we can't have a -- I mean, we're
23 talking to our client, if we can't have a privileged
24 conversation with him. So, we would ask the Court to
25 line up the privilege protection with the ability to

1 speak to the witness so that it blossoms into what I
2 think the Court had intended.

3 THE COURT: Well, perhaps we should take that on
4 a case-by-case basis. I would think that if you have a
5 conversation with a witness along the lines of you're
6 talking too much, you need to make your answers more
7 precise, I don't know, is that privileged or --

8 MR. DINTZER: We would like -- or even just slow
9 down or have a sip of water or relax, we would like to
10 think that that would be privileged, as they could have
11 with their witnesses, but that -- I mean, that that
12 would be the whole idea of the Court allowing these
13 conversations to take place during the "direct,"
14 whenever they happen, that that's the very nature of the
15 conversations.

16 THE COURT: Well, I'm not going to alter the
17 rules of privilege for these discussions. I think
18 privilege rules would still apply, but you could have a
19 question, for example, of a witness, "Did you really
20 mean 2009 or didn't that event really happen in 2008?"
21 I don't know, maybe that's privileged; maybe it isn't.

22 MR. BOIES: Our strong view, Your Honor, is that
23 that is not privileged. If a witness has a question,
24 whether they want to seek legal advice, where the
25 witness says, "Can I talk about this? Is what I am

1 going to say privileged?" If the witness is asking for
2 legal advice, that can be -- that may be a privileged
3 conversation under those circumstances, but coaching the
4 witness, whether to slow down, take a drink of water,
5 did you really mean 2009, those are not a confidential
6 exchange of legal advice, and we do not think that is
7 privileged.

8 THE COURT: I tend to agree with you. So, I
9 think we'll take it as it comes, and, again, I'm not
10 going to alter the rules of privilege, but I think
11 questions and points like that are fair game.

12 MR. DINTZER: Thank you, Your Honor.

13 THE COURT: Okay. All right, let's talk about
14 simply the managing of exhibits a little bit. First of
15 all, I think the joint exhibits that you all have
16 identified can be admitted into evidence at the
17 beginning of trial. I take it there's no controversy
18 about those documents and we can just admit them. All
19 other exhibits, I think, would be taken up as they arise
20 during trial.

21 In addition, in large document cases such as this
22 one, it has proved effective to me to have a witness
23 binder to work from. It's true that you end up making
24 perhaps multiple copies of the same exhibit, but it's
25 far more efficient to deal with exhibits in that fashion

1 than to try to find them and pull them off the bookshelf
2 each time. So, if you all would do that, that would be
3 great.

4 MR. DINTZER: Just to clarify on that, Your
5 Honor, having worked with the witness binders as well,
6 would the understanding of the Court be that when a
7 witness is seated, the party on -- would hand a copy of
8 the binder to the witness and a copy to the other side
9 so that they are not racing and finding documents as
10 well?

11 THE COURT: Yes, that would be highly preferable.

12 MR. DINTZER: We appreciate that, Your Honor.

13 THE COURT: And just a small point, please
14 include on the spine of the binder what the contents
15 are, because when we get these binders back up to
16 chambers, they are going to be on a shelf, and if you
17 don't have something on the spine, I don't know what
18 they are.

19 MR. DINTZER: Speaking of shelves, Your Honor,
20 when we're setting up shelves for ourselves, would the
21 Court like a shelf back there to absorb these binders?

22 THE COURT: Not these so much, but there may come
23 a time when I'll want to look at the sequential binders
24 for some reason. So, if you -- yes, the answer is yes.

25 MR. DINTZER: And, Your Honor, would you -- would

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1 the Court and the Clerk -- we can produce two, and I'm
2 sure the Plaintiffs would agree -- want hard-copy paper
3 copies, along with the witness binders, of a full set of
4 the exhibits?

5 THE COURT: Yes.

6 MR. DINTZER: Okay. Would that be one set or
7 two, Your Honor?

8 THE COURT: Two.

9 MR. DINTZER: So, we will provide bookshelves --
10 we will work with the Plaintiffs, of course, and provide
11 bookshelves and complete sets of the exhibits, Your
12 Honor.

13 THE COURT: Right. And the reason for that is
14 one copy of the exhibits will end up in chambers that we
15 will work with in reaching a disposition of this case,
16 and the other set will end up in the Clerk's Office as
17 being the official set of exhibits for the case.

18 MR. DINTZER: And those would be the stickered
19 copies, Your Honor, the ones that --

20 THE COURT: Yes.

21 MR. DINTZER: So, we will identify and separate
22 those copies.

23 THE COURT: Yes.

24 MR. DINTZER: Thank you, Your Honor.

25 THE COURT: Now, you might wonder, well, all of

1 these exhibits are not yet in evidence, so what -- how
2 do we deal with that? Well, I think at the close of
3 trial, we'll just probably take some time off the record
4 and go through them and take out the ones that have not
5 been admitted into evidence. It will take a few
6 minutes, but it's not going to be an overwhelming task.

7 MR. DINTZER: Along that score, Your Honor, if we
8 might suggest, at the close of trial on Friday each
9 week, that we make an effort to match up with the
10 Plaintiffs, and if your Clerk is keeping score, the
11 documents that have been admitted into evidence?

12 THE COURT: That's probably a good thing to do.

13 MR. BOIES: We agree, Your Honor.

14 THE COURT: All right.

15 MR. DINTZER: Thank you, Your Honor.

16 THE COURT: Very well.

17 Now, regarding the use of technology, I imagine
18 we're going to have significant use of electronic
19 display of exhibits perhaps and some demonstratives no
20 doubt, and so that's fine. I encourage you just to
21 install it and test it out on Friday, the 26th, to make
22 sure everything's working as you like.

23 As to the realtime transcript, it would be great
24 if I could get a screen up here that displays that and
25 also for my law clerk so we can follow along.

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1 MR. DINTZER: We and the Plaintiffs will provide
2 that, Your Honor.

3 THE COURT: Okay. Are there any witnesses that
4 we expect to testify by videoconference?

5 MR. DINTZER: Not videoconference, Your Honor.
6 Videotape.

7 THE COURT: Videotape?

8 MR. DINTZER: There is one, I believe, we've
9 identified it, uncontested, Mr. Studzinski is, I
10 believe, abroad, and both of the parties have agreed
11 that if it please the Court, that we would show -- I
12 believe show a video of -- at some point in the trial.
13 We would each select portions of the video and show that
14 to the Court.

15 THE COURT: All right. How long is that? How
16 much time do you think that would require?

17 MR. DINTZER: We haven't done our -- I mean,
18 obviously, he was deposed, Your Honor, for a full day.
19 We haven't done our designations, so I couldn't hazard a
20 guess on that. I -- I -- well, I best not speak if I
21 don't know.

22 THE COURT: Okay.

23 MR. DINTZER: Somebody is going to get angry with
24 me if I do, so --

25 MR. BOIES: I'll rashly make a guess, Your Honor,

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1 and it is only a guess, but I would suspect it would be
2 in the nature of probably a couple of hours. It could
3 be -- it could be a little longer, but I don't -- I
4 think when we actually get -- I have gone through that
5 tape, and taking both what I might like and what they
6 might like, I suspect it's going to be in the range of a
7 couple of hours.

8 THE COURT: All right. I had a case a couple of
9 years ago, a trial, where I had a lot of video
10 recordings of deposition testimony, and it just proved
11 to be too much. And I ended up asking the parties just
12 to submit them to me for viewing at my leisure
13 afterwards, and that was fine. But I think if it's just
14 two hours, that's -- we can look at it.

15 MR. BOIES: And thus far, we have only identified
16 one such witness. There might be a couple others that
17 will come up, but this is the only witness that is
18 outside the subpoena power and won't come voluntarily.

19 THE COURT: Okay.

20 MR. BOIES: So, I think the -- the video here
21 will be quite limited.

22 THE COURT: All right, that's fine. So, if I
23 understand, then, we're not going to have any live video
24 testimony from a remote location?

25 MR. DINTZER: Not -- it is not planned, Your

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1 Honor.

2 THE COURT: Okay.

3 MR. BOIES: That is our understanding as well.

4 THE COURT: All right, very well.

5 All right, just a couple of points about
6 courtroom decorum. No beverages or snacks are allowed
7 during the trial except for water. All electronic
8 devices that are used for voice communication shall be
9 turned off at all times.

10 And also, anyone who's late for a proceeding, if
11 you come back after a break and you're a few minutes
12 late, please just sit in the gallery if you're not a
13 participant in what's going on, sit in the gallery until
14 the next opportunity arises. It's just disconcerting to
15 have people coming back and forth to counsel table all
16 the time. So, if you will do that.

17 Now, I received some questions about the
18 possibility live streaming of the transcript? I need to
19 hear more about that. What -- my initial reaction is
20 no, but I'll -- I'll listen to what you have to say.

21 MS. BURKE: Your Honor, when we use Livenote
22 these days, I'm told, it's called Livestream, and our IT
23 people, in conjunction with Starr's, would like to
24 provide that Livestream to the Court as well as members
25 of our constituencies in our own offices. So, what we

1 need is a wireless capability, which I believe we can do
2 with the Court, and possibly even wireless in the
3 courtroom, which is one of the things we wanted to raise
4 with the Court.

5 THE COURT: Is this a closed-circuit setup, so
6 it's not going to the public at large?

7 MS. BURKE: No, it is not going to the public.
8 It is a closed-circuit setup, yet.

9 THE COURT: And it would go to where? It would
10 go to Starr's offices and to --

11 MS. BURKE: It would go to wherever it's
12 designated to go. So, it -- there would have to be an
13 application process that we would allow the Court to
14 have access to and our offices and Starr's offices.

15 THE COURT: Mr. Boies?

16 MR. BOIES: We have no objection to that, Your
17 Honor. We have done that in other cases, and what I
18 think we would contemplate, if the Court approved this,
19 is we would advise the Court of each location where the
20 Livestream was going to go and see whether that location
21 posed any issue.

22 The idea would be that this would be something
23 that would enable Department of Justice counsel over at
24 their building or Starr counsel back at Starr
25 headquarters to see the Livestream. It would not be to

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1 distribute it to members of the public or members of the
2 press or anything like that.

3 And for control purposes, we would present to the
4 Court each location to which the stream was going to go
5 for the Court to review it on a case-by-case basis.

6 THE COURT: And the idea is that they would just
7 see the written transcript as it's being prepared?

8 MR. BOIES: Yes, Your Honor. There is no --
9 there is no video that goes with it. This is really the
10 output of what the court reporters do now in terms of --
11 they have this ability, using computers and other
12 things, to create essentially an almost instantaneous
13 transcript, and it is that transcript that goes out.

14 Now, that's an uncorrected transcript, and so
15 nobody wants that to go out broadly, but it is very
16 useful both for counsel and I think for the Court here
17 to see the words that are being used, and it is a
18 convenience to people who have curiosity on both sides
19 as to what's happening in court, to see it as opposed to
20 waiting until the end of the day.

21 THE COURT: You know, this strikes me as a
22 product that may have some initial attraction, but I'm
23 wondering how high the ratings are going to be after a
24 while. I don't know.

25 MR. BOIES: I think the real concern that I think

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1 the Court would have and I think both of us would have
2 as well is that it's very important that because of the
3 Rule 615 issue --

4 THE COURT: Yes.

5 MR. BOIES: -- that the recipients of this be
6 tightly controlled, and so I think both of us are alert
7 to that -- to that problem, and that's another reason
8 why I think it's important that the Court look at the
9 locations on a case-by-case basis.

10 THE COURT: That was my immediate concern, in
11 fact, was how are we going to control our Rule 615
12 restrictions if this transcript is being live streamed
13 around, but it -- if you both want to do it, I'm okay
14 with that. Let's just be diligent about making sure
15 that Rule 615 is not breached.

16 MR. DINTZER: Thank you, Your Honor.

17 THE COURT: All right, okay.

18 All right. At the conclusion of trial -- and I
19 think I covered this point also in the pretrial order --
20 my usual practice, and I think it will work well here,
21 is to afford each side the opportunity to submit
22 post-trial proposed findings of fact and conclusions of
23 law, which would be keyed extensively to the record, the
24 trial record that we have, the transcript and exhibits.
25 This will save enormous time when it's my turn to

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1 prepare a decision in this case.

2 This is really your opportunity to provide as
3 much assistance as you can to the Court in reaching an
4 accurate and timely decision. So, you will have that
5 opportunity. We'll talk about the time periods for
6 those requirements at the end of trial, and each side
7 would then have a chance to submit a response brief,
8 too, to the other side.

9 Often, we wait for the transcript to come in
10 before that time starts to run, but we won't have that
11 issue in this case because you'll all have the
12 transcript immediately. So, that will save time there,
13 but I just wanted to raise that point for your
14 consideration today.

15 Mr. Dintzer?

16 MR. DINTZER: If we could be heard on that, Your
17 Honor. As I understand what the Court is suggesting,
18 that it would be -- we would each be filing and then we
19 would each be filing replies to each other's briefs?

20 THE COURT: Yes.

21 MR. DINTZER: And we would ask, Your Honor, for
22 seriatim briefing as we did with the pretrials. We
23 generally find that we can be more precise as to the
24 items that we need to respond to if we have had a chance
25 to see the Plaintiff's, and then that would give us a

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1 chance to target our response better than simply filing
2 a brief at the same time as them. So, we would ask for
3 seriatim filing on the post-trials.

4 THE COURT: We can probably accommodate that. I
5 think that will work fine.

6 MR. DINTZER: We appreciate that, Your Honor.

7 THE COURT: Yes. We will talk -- again, we will
8 talk about the time periods for all of that at the close
9 of trial.

10 MR. DINTZER: Thank you, Your Honor.

11 THE COURT: And then, after I have your
12 post-trial briefs, you'll have an opportunity for
13 closing arguments, but I think all of this will work
14 efficiently and ultimately produce a more timely
15 resolution of the case for both sides.

16 And then one final thing on my list that I think
17 helps our court reporter is if the parties would prepare
18 a joint glossary of terms for the court reporter. I'm
19 sure all of you and perhaps the Court itself, we're
20 familiar with many of the unusual terms that will come
21 to light in this case, but for the court reporter, this
22 is probably the first time that they have heard or come
23 across these terms. So, if you can provide a fairly
24 comprehensive list of the unusual terms that you know
25 are going to come up in this case, I think that will

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1 help quite a bit.

2 All right. Any questions about any of that at
3 this point? I'm ready to move to the joint status
4 report.

5 MR. DINTZER: We're good, Your Honor.

6 THE COURT: Okay.

7 All right, the Studzinski deposition we have
8 already talked about.

9 The second thing is there was a paragraph about
10 the fact that no testimony or exhibits discussed during
11 trial will be deemed to cause any waiver of attorney-
12 client privilege or deliberative process privilege with
13 respect to subjects addressed following discovery order
14 number 6, which is the one that dealt with a lot of
15 privilege issues. I'm fine with that, and apparently
16 you all have stipulated to that. Is that correct?

17 MR. DINTZER: Yes, Your Honor. It will avoid
18 unnecessary interruptions in court and repeating it, and
19 this will just preserve our objections and preserve our
20 rights.

21 THE COURT: All right, that will be fine.

22 MR. BOIES: Yes, Your Honor. We have agreed to
23 that.

24 THE COURT: All right. The next thing is that
25 you all have stipulated to the authenticity of all

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1 documents on each other's exhibit lists, except for
2 handwritten documents, and I understand that that
3 stipulation doesn't extend to whether a document was a
4 draft or the final version, but I think authenticity
5 issues would be resolved except for handwritten
6 documents, and that's fine.

7 MR. DINTZER: And marginalia, so handwritten
8 notes on printed documents, Your Honor. Yes, that is
9 our stipulation.

10 THE COURT: All right.

11 MR. BOIES: Yes, Your Honor.

12 THE COURT: Okay, good.

13 All right. Then you raised a subject concerning
14 assertions of confidentiality of exhibits. Tell me what
15 you have in mind there.

16 MR. BOIES: I think we've largely resolved that
17 issue. My understanding is that at least for all of the
18 party exhibits, that is, the exhibits generated by
19 either of the two parties, we've agreed that there will
20 not be a confidentiality issue in terms of their use at
21 trial.

22 MS. BURKE: That's correct, Your Honor. So, this
23 doesn't extend to the third-party documents that are a
24 part of both our and Starr's exhibit lists, but extends
25 to all of the parties' assertions of confidentiality.

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1 THE COURT: Okay. I think that's a useful
2 agreement. My intention, by the way, is to have the
3 entire trial to be open to the public, including the
4 transcript and I suppose any exhibits, unless there's
5 some issue about a third-party document, but the
6 objective is to be as transparent as possible with
7 everything that's going on during the trial.

8 And that actually is the next item on here about
9 the open courtroom. That, again, is my intention. Are
10 there any concerns about that?

11 MS. BURKE: No, Your Honor.

12 THE COURT: Okay. All right, opening statements
13 we've covered. I think we've also covered the first
14 item raised by the Government about witnesses that are
15 first called by Starr even though they're aligned with
16 the Defendant. Item two we have also discussed about
17 discussions with the witness.

18 All right, let me get to the third item you
19 raised in this joint status report about the parties
20 shall be permitted to make minor modifications to their
21 exhibit lists, up to 25 additions, up to one week before
22 the start of trial, September 22nd. What is this about?

23 MS. BURKE: Your Honor, in our preparations for
24 trial, we've identified a handful, really, of documents
25 that we would like to ask the Court's permission to

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1 supplement our exhibit list. So, we came up with the
2 number 25 a little bit arbitrarily, just to give both
3 parties a little bit of cover, but it's my understanding
4 that the number that we will be attempting to add is far
5 smaller.

6 So, the Court's order states that either party
7 may add exhibits for good cause shown, and what we're
8 asking here is for a little more flexibility up until
9 this upcoming Monday.

10 THE COURT: Mr. Boies?

11 MR. BOIES: We have no objection, Your Honor.

12 THE COURT: All right. I'm not going to place a
13 limit on this, the 25. I think it is arbitrary, and I
14 don't -- I don't see a need to do that, but I think,
15 again, assuming the cooperation of the parties, if you
16 have some last-minute exhibits that you want to add to
17 your list, I'm sure they will cooperate with you and I'm
18 happy to have you add them.

19 MS. BURKE: Thank you, Your Honor.

20 THE COURT: All right. The next one is the
21 suggestion that the parties must notify each other at
22 least four business days in advance of calling a
23 may-call witness. Ms. Burke?

24 MS. BURKE: So, Your Honor, Starr's witness list
25 has a great number of may-call witnesses, and the

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1 pretrial order right now contemplates that each side
2 would, the Friday before each week, give the lineup of
3 all of the witnesses. What we were hoping for is a
4 little bit more advance notice for the may-calls so that
5 we're not in the position of learning on Friday that a
6 whole slew of may-calls are going to be called on Monday
7 and Tuesday, because, of course, these are people who we
8 haven't been devoting the significant portions of our
9 resources to. We're devoting our resources to the
10 will-calls. So, I think, actually, Starr is willing to
11 do this, but --

12 MR. BOIES: Yes, Your Honor. We have no
13 objection to that.

14 THE COURT: All right. Since the parties agree,
15 I'll be happy to observe that. I still want you to give
16 the lineup each Friday of what's coming the following
17 week.

18 MR. BOIES: Yes. This would be in addition to
19 that, Your Honor.

20 THE COURT: Okay.

21 MR. BOIES: In other words, we are still going to
22 give a lineup on Friday. This was just an assurance
23 that they would have at least four days -- and this
24 applies obviously to both sides, so that --

25 THE COURT: Right.

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1 MR. BOIES: -- neither side, on a Friday, finds
2 out that they have got a whole bunch of may-call
3 witnesses on Monday.

4 THE COURT: Okay.

5 MR. BOIES: And we have no objection to that
6 proposal; in fact, we think it's a sensible one.

7 THE COURT: All right, very well.

8 What about the next one? Plaintiffs must notify
9 Defendant by tomorrow whether it intends to call any of
10 its expert witnesses currently on its may-call list in
11 its case in chief.

12 MS. BURKE: Your Honor, in our view, there are a
13 large number of expert witnesses on Starr's may-call
14 list. In fact, we're not really used to seeing any
15 expert witnesses on a party's may-call witness list.
16 And so taking into account the amount of resources
17 involved in preparing for our expert examinations, we
18 would really like to know, sooner rather than later,
19 what Starr plans with these, I think, four may-call
20 expert witnesses.

21 THE COURT: Mr. Boies?

22 MR. BOIES: Your Honor, could Ms. Rutherford
23 respond to that?

24 THE COURT: Sure.

25 MS. RUTHERFORD: Your Honor, briefly, just two

1 points: One is I have already sent an email to the
2 Department of Justice approximately two weeks ago
3 stating that if they look at our may-call list, many of
4 those experts only submitted rebuttal reports. So,
5 their identification as may-calls should be obvious,
6 that they're there based on their dependency on what
7 arguments the Government raises at trial.

8 THE COURT: So, they're rebuttal witnesses more
9 than direct --

10 MS. RUTHERFORD: Correct.

11 THE COURT: -- case-in-chief witnesses?

12 MS. RUTHERFORD: Correct. To the extent we plan
13 on calling them, it will be dependent on what issues get
14 raised in trial. While we're not restricting ourselves
15 from potentially calling them in our case at any time,
16 at this moment, meaning today or tomorrow, we can't say
17 definitively whether these experts will be called.

18 THE COURT: Okay.

19 MS. BURKE: Your Honor, this is not the same
20 situation as a fact witness where opposing counsel
21 doesn't know exactly what we're attempting to elicit
22 from the fact witness or what the witness will testify
23 to. Starr knows exactly the contents of the expert --
24 our expert reports and what the experts plan on
25 testifying to. So, there's really no reason to hold

1 people in abeyance until the end.

2 THE COURT: How many expert witnesses are on the
3 Plaintiff's may-call list?

4 MS. BURKE: I believe four.

5 THE COURT: Four. Well, this idea strikes me as
6 a little too onerous for what we're trying to achieve
7 here. I think that the restrictions we have in place to
8 tell you who's coming each Friday will aid this process,
9 and so I'm not going to do this one. The fact that
10 they're on the list at all, I mean, you can prepare for
11 them at least to some extent, and I think that's fair.

12 MS. BURKE: Thank you, Your Honor.

13 THE COURT: Okay. All right, then we get to the
14 question of entitlement to and proper method of
15 calculating prejudgment interest that you want to
16 bifurcate for some reason? Isn't this more of a legal
17 question than a fact question?

18 MR. BOIES: We think it is, Your Honor, and we
19 think in the interest of having the whole case resolved
20 as expeditiously as possible, the Court is going to be
21 able to make this judgment. We may want to make some
22 arguments about it in our post-trial briefs and in our
23 closing arguments, but I don't see any reason why we
24 ought to bifurcate that and just extend it.

25 I mean, in addition, I think there's one witness

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1 on each side that may speak to some of these -- some of
2 the issues that are relevant to interest, and we
3 certainly wouldn't want to have a second mini-trial with
4 just bringing those two witnesses back.

5 THE COURT: Yes, I mean, that's my reaction.
6 It's mainly a legal issue, and if there's any factual
7 evidence we need on this point, it's a relatively minor
8 thing, it seems to me. So, I would be inclined to just
9 hear it all at one time as part of the main trial.

10 MR. DINTZER: Thank you, Your Honor.

11 THE COURT: Okay. All right, then, the question
12 of how much advance notice for demonstratives, you have
13 72 hours in advance of their use at trial. Is Plaintiff
14 okay with that?

15 MR. BOIES: Your Honor, some time ago -- I can't
16 remember the exact hearing, but we did address this some
17 time ago, and I think at that point we agreed that it
18 would be 48 hours, and I think actually 48 hours is
19 enough time, and I think 72 hours is going to be
20 difficult to meet sometimes and that things are going to
21 happen during a trial. Indeed, in most trials, you
22 don't even have 48 hours.

23 THE COURT: Right.

24 MR. BOIES: The Court's original order did not
25 provide for any time. The Government asked for some

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1 advance notice, and we agreed to 48, but I think -- I
2 think even that is more time than people usually get and
3 will be difficult to meet under the rigors of a
4 fast-moving trial.

5 THE COURT: Um-hum. So, you're okay with 48
6 hours?

7 MR. BOIES: We will stick with 48, because we
8 agreed to it, Your Honor.

9 THE COURT: Okay, all right.

10 MR. DINTZER: And we had floated, Your Honor,
11 with the Plaintiff's recently the 48 hours. Part of
12 what we're requesting here is a clarification so we both
13 understand what "demonstrative" means. In cases that
14 we've had with this Court, typically the Court will
15 exclude purely textural slides, typically presentation
16 slides used in opening or perhaps with an expert that
17 don't involve any data and that, frankly, don't need to
18 be exchanged in advance, because the other side doesn't
19 need a chance to inspect the data, inspect the flow
20 charts, et cetera. So, part of what we're asking for is
21 a clarification on demonstratives that do not include
22 purely textural slides.

23 THE COURT: Well, sometimes it's mixed.

24 MR. DINTZER: And then we would expect that they
25 be produced 48 hours in advance.

1 THE COURT: For example, if a party puts on an
2 expert witness and they use 25 slides with that witness
3 and some of them are textural and others aren't, I would
4 still expect you to exchange the entire group 48 hours
5 in advance. I mean, I really don't want to make that
6 precise distinction, but any -- any slides that are, you
7 know, used for examining a witness or for opening
8 statements, why don't you just exchange them 48 hours
9 ahead of time?

10 MR. DINTZER: We will, Your Honor.

11 THE COURT: Okay. All right, that brings us to
12 the question of certification of additional class
13 members, and you have given us a lot of material on
14 that, but it seems like there's not really an objection
15 to this procedure. Is that correct?

16 MS. BURKE: That's correct, Your Honor. We've
17 preserved our original objection, but we have no
18 objection at this time to these additions.

19 THE COURT: All right. So, what's the total
20 number of the class members, then? It's in the hundreds
21 of thousands, right?

22 MR. DWYER: If we add these 6000 people, the
23 total number is approximately 275,000 persons or
24 organizations.

25 THE COURT: All right. Well, for this issue,

1 we're going to issue an order that we will get out in a
2 few days, adding these people or entities to the list of
3 certified class members. I think that's the only thing
4 that you'll receive an order about, perhaps. I think
5 the rest of it will be a matter of record on today's
6 transcript. We will get that out for you.

7 And then the -- I guess the last item is
8 Plaintiff's contention that Defendant has asserted
9 frivolous objections to Plaintiff's trial exhibits. Do
10 you want to go into that, Mr. Boies, or --

11 MR. BOIES: Well, Your Honor, the Court earlier
12 said that we would take this up during the trial, and we
13 can do that on an individual basis. As we indicated in
14 our -- in the pretrial order, there are a large number
15 of exhibits that we think the assertion of the hearsay
16 objection to simply isn't very plausible, and it would
17 be more efficient, obviously, if we resolved these
18 issues in advance.

19 We're prepared to do it on a case-by-case basis
20 during the trial, but we do think that to object to some
21 of the exhibits that we've indicated in the joint status
22 report that have been objected to on hearsay grounds
23 doesn't meet the rule and is -- it's an undesirable use
24 of trial time to deal with these kinds of evidentiary
25 objections if we can get them resolved.

1 We wanted to raise it with the Court, because
2 sometimes when a party has to look at the Court and say,
3 "We're keeping these objections," some of the objections
4 fall away. So, we thought it was at least worth raising
5 with the Court, but we're prepared to do whatever the
6 Court thinks is appropriate as we move forward.

7 MR. GARDNER: Thank you, Your Honor. I'd like to
8 address the Court. As Mr. Boies rightly noted, pursuant
9 to the Court's pretrial order, we understand the Court
10 is going to take up objections as exhibits are offered
11 into evidence, and particularly with hearsay, that makes
12 perfect sense, because we do not know at this juncture
13 whether Plaintiffs are even offering a particular
14 exhibit for the truth of the matter asserted or the
15 multiple levels of hearsay.

16 Many of these documents contain multiple levels
17 of hearsay that they may be able to overcome, and as
18 Mr. Boies alluded to, we may decide not to actually
19 lodge the objection as the fog of trial continues
20 forward. So, the Government's perspective is that until
21 we know how the document is being used, which portions
22 of the document, it is simply premature to address these
23 types of hearsay objections.

24 I will also note that many of the exhibits over
25 which Plaintiffs have identified have multiple

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1 objections beyond just hearsay, so even if we resolve
2 the hearsay objection now, which we believe would be
3 premature, it still wouldn't deal with the overall issue
4 of admissibility.

5 THE COURT: I think as much as I would like to
6 resolve matters in advance of trial, I think for this
7 one, I think we will wait until trial and we'll address
8 them as they come up. I think that many of them will
9 just drop out or fall aside as we progress through the
10 case.

11 Speaking of things that we might resolve in
12 advance of trial, I know that both sides have spent a
13 lot of time on filing motions in limine on various
14 subjects, and there's lots of paper accumulating in
15 chambers on these subjects, and I'm still expecting some
16 responses and replies that you may want to file. I know
17 that some were just filed on Friday, I believe.

18 I'll just tell you for what it's worth at this
19 point, this is a very unusual case, and it's not a jury
20 trial. So, I think my present inclination is to hear as
21 much of the story as we can during the trial, and I'm
22 really not inclined to limit things in advance when
23 really I'll know more about it and be more up to speed
24 on it at the time of trial.

25 I think that the filings have been useful in

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1 alerting me to important issues that are going to be
2 presented in this case, but don't be surprised if
3 they're not granted, I guess is what I'm saying.

4 MR. DINTZER: Thank you, Your Honor.

5 THE COURT: All right. I think that comes out
6 about equal, because I think we had four from each side,
7 so it's kind of a wash.

8 MR. BOIES: I think we were equally affected,
9 Your Honor.

10 THE COURT: All right.

11 MR. DINTZER: So, Your Honor, are you asking us
12 to forgo reply briefs on these?

13 THE COURT: You can file them if you want. I'm
14 just --

15 MR. DINTZER: If the Court tells us the Court
16 will not read them, then we will not file them.

17 MR. BOIES: I think we can jointly agree to save
18 a tree or something.

19 MR. DINTZER: Yes. I think we can jointly agree
20 to that, Your Honor.

21 THE COURT: Okay, that's fine. If you want to
22 cease the briefing on those, that's fine.

23 MR. DINTZER: Thank you, Your Honor.

24 THE COURT: It will save some space for other
25 things on the shelves.

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1 All right, I think that's all that I have. Are
2 there any other items or issues that either of you want
3 to address?

4 MR. BOIES: Not at this time, Your Honor, from
5 our standpoint.

6 MR. DINTZER: Just one moment, Your Honor.

7 THE COURT: Sure.

8 (Pause in the proceedings.)

9 MR. DINTZER: We're set, Your Honor.

10 THE COURT: All right, very well. I guess we'll
11 get under way two weeks from this morning, and I'll see
12 you all on September 29th.

13 ALL COUNSEL: Thank you, Your Honor.

14 (Whereupon, at 11:00 a.m., the proceedings were
15 adjourned.)

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1 CERTIFICATE OF TRANSCRIBER

2

3

4 I, Susanne Bergling, court-approved transcriber,
5 certify that the foregoing is a correct transcription
6 from the official digital sound recording of the
7 proceedings in the above-titled matter.

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12 DATED: 9/15/2014

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SUSANNE BERGLING, RMR-CRR-CLR

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