UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 06-1051(DMC)

NXIVM CORPORATION, formerly known as EXECUTIVE SUCCESS PROGRAMS, INC., and FIRST PRINCIPLES, Plaintiffs, -vs- MORRIS SUTTON, ROCHELLE SUTTON, THE ROSS INSTITUTE, RICK ROSS a/k/a "RICKY" ROSS, STEPHANIE FRANCO, PAUL MARTIN, PhD, and WELLSPRING RETREAT, INC., Defendants.	TRANSCRIPT OF PROCEEDINGS January 9, 2007 Newark, New Jersey

B E F O R E:

THE HONORABLE MARK FALK,
UNITED STATES DISTRICT MAGISTRATE JUDGE

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

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THE CLERK: All rise.

THE COURT: Please be seated.

Good morning.

This is the case of NXIVM Corporation against the Ross Institute, et al. It is Docket No. 06-cv-1051.

Would counsel place their appearances on the record, please.

MR. ANDRETTA: Good morning, your Honor.

Gage Andretta and Andrew Dixon from the firm of Wolff & Samson.

With your Honor's permission, I would like to introduce Scott Eggers to my far right, and Douglas Rennie from Proskauer Rose. Mr. Eggers will be arguing on behalf of plaintiff.

MR. EGGERS: Good morning, your Honor.

THE COURT: Good morning.

MS. WINDT: Good morning, your Honor.

Heather Windt, and my colleague Bob Lack who also will be arguing on behalf of the Interfor, non-parties.

THE COURT: Okay.

MR. KOFMAN: Good morning, your Honor.

Harold Kofman and Anthony Sylvester from Riker, Danzig, Scherer, Hyland and Peretti on behalf of Stephanie Franco and Morris and Rochelle Sutton, and I will be arguing.

MR. SKOLNIK: Good morning, your Honor, and happy new year.

Peter Skolnik from Lowenstein Sandler, and my colleagues, Michael Norwick and Tom Dolan.

Mr. Norwick will argue on the umbrella protective order, and I will argue the balance of the motions.

THE COURT: Okay. Well, we have a full schedule, a full plate this morning of motions. I believe there are five or six motions that have been filed. There was extensive briefing. There were many affidavits. When I piled it all up, it was several feet in length, and it was all very well done I thought.

I have read the papers, and I have reread the papers, and I want everyone to know that. On the other hand, I would be happy to hear argument, but I just would note that it is probably not necessary to repeat everything in your papers. We could be here for a very long time.

I think I would like to begin with the motion to seal. Actually there are two motions to seal various things in the proceedings. There is a NXIVM motion and an Interfor motion to seal -- sorry, not to seal -- there is an Interfor motion to quash. I'm sorry. There's only a motion to seal by NXIVM.

Thank you, Justin, for reminding me.

So with respect to that motion, I guess it is

NXIVM's motion. Would you like to be heard on it?

MR. EGGERS: Thank you, your Honor.

THE COURT: Mr. Eggers.

MR. EGGERS: We're dealing just with the motion to seal, not the motion for a protective order?

THE COURT: Yes.

MR. EGGERS: Okay.

On the motion to seal, your Honor, we seek an order sealing the proposed pleadings and the briefing that was filed by the Ross defendants in connection with their motion to amend their complaint.

The motion seeks to seal information that is and should remain protected by NXIVM's work product privileges for reasons we will go into detail, I am sure, throughout the day. That material remains subject to a claim of work product protection.

Briefly, Mr. O'Hara was NXIVM's attorney. Mr. O'Hara hired Interfor. Mr. O'Hara subsequently had a falling out with NXIVM.

Mr. O'Hara decided that the appropriate course for dealing with his falling out with NXIVM was to reveal materials that had come into his possession during the course of an attorney/client relationship, so that he might injure his former clients with whom he was now having a dispute.

In addition, Mr. O'Hara, prior to revealing that information, threatened to do so unless NXIVM paid him $50,000. It is probably the most reprehensible conduct an attorney could engage in.

Mr. O'Hara later decided to forward the Interfor report to Mr. Ross, so that he might injure NXIVM by sharing work product material that he learned in the course of an attorney/client relationship with the adversary in the very litigation to which it relates.

We have various arguments principally in the other motions for why when the Ross defendants received those materials, they were not free to seek to exploit them. They were not free to serve subpoenas to seek more. They were not free to attempt to file an amended complaint. Based on that information and, in fact, they had a duty to notify NXIVM and its counsel that they had received the information, and that they would not make use of it until their obligations with respect to that information had been sorted out.

Rather than do that, what counsel for the Ross defendants did is attempt to summarize as much of it as possible and put it into the public record. That violates NXIVM's rights to Mr. O'Hara's confidentiality. It violates NXIVM's rights with respect to the work product protection that the Interfor report enjoys.

By eviscerating those rights, Ross has given grounds -- good cause under Local Rule 5.3 to seal the motion papers and the proposed pleading which go into that information.

The Third Circuit has noted, which we cited in our brief, that the attorneys do give confidentiality as an interest worthy of the maximum protection. I won't repeat every argument that's in our brief.

THE COURT: Thank you.

MR. EGGERS: I will, however, point out for the Court something that was not in our brief, and that is the amendment to Rule 26(b), which went into effect on December 1, 2006. That amendment we do not contend controls the outcome here. However, I think that amendment is perfectly in accordance with the law in this district as it stood prior to that date.

Under the amended Rule 26(b), if information is produced in discovery that is subject to a claim of privilege or work product protection, the party making the claim may notify any party to receive the information of the claim and the basis for it.

After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has and may not use or disclose information until the claim is resolved.

A receiving party may promptly present the information to the Court under seal for a determination of the claim. If the receiving party discloses the information before being notified, it must take reasonable steps to retrieve it.

We believe, your Honor, that that summarizes through the mechanism of the Maldonado decision, for example, and the various decisions of the Third Circuit which suggest or flat out state that this material or that the interest in maintaining the confidentiality of materials given to your attorney is a paramount one in our judicial system.

This just restates the law, the common law, that was in effect prior to that date.

It specifically authorizes a motion to seal in order to determine whether or not the information is subject to a claim of privilege. So I think that through the amendment to the Rule 26(b)(5), the Advisory Committee and Congress have recognized essentially the basis on which we are making a motion to seal, and I think they have endorsed the approach that we ask your Honor to take with respect to these materials, and we would ask that the Court enter the order.

THE COURT: Thank you.

Mr. Skolnik?

MR. SKOLNIK: Thank you, your Honor.

May it please the Court, I think some overview of Ross' position is in the order as an introduction to this motion and to the others that you will hear today.

In the simple sense, while this action was actively being litigated in the Northern district of New York, NXIVM and its private investigator as Interfor concocted and carried out an elaborate scheme to solicit Mr. Ross, to subject him to extensive ex-parte and plainly improper and unethical extrajudicial discovery in effect to depose him and to illegally obtain his telephone and bank records.

Ironically, NXIVM's answer to all of these allegations is to deny and to deny defiantly that it has done anything improper, that it has done anything unusual, and to deflect attention away from its own remarkable malfeasance by claiming that somehow we are the ones to blame, as if it is our fault that NXIVM's former consultant, Joseph O'Hara, who NXIVM insists is its attorney, decided to inform the press and Mr. Ross about the unlawful conduct NXIVM had engaged in, that that's our fault.

It is the height of hypocrisy for NXIVM to seek sanctuary in the attorney/client privilege in order to conceal litigation misconduct that was designed to circumvent Mr. Ross' relationship with his own counsel and to obtain unauthorized and improper discovery outside of Mr.

Ross' counsel presence.

So putting aside the question of whether or not Mr. O'Hara was or was not NXIVM's attorney, and that is an issue that we submit your Honor need not resolve in order to adjudicate any of the pending motions, and that as you know is at the red hot center of litigation pending up in the Northern District of New York.

Putting that aside, communication that Mr. O'Hara was involved in for the purpose of assisting NXIVM with ongoing crimes and frauds wouldn't be privileged regardless of Mr. O'Hara's status as an attorney. And whatever ethical obligations NXIVM claims that Mr. O'Hara was subject to as its attorney, those obligations in the words of one Appellate Court take a back seat to the quest for truth in this matter.

All of the documents and information here should be discoverable in this litigation, if they aren't privileged. And the -- I submit striking evidence of crimes and torts and unethical misconduct in this litigation that is already before the Court show that what Ross seeks here can't possibly be subject to any privilege.

It is astounding, but NXIVM claims not only that the documents and the testimony sought by Ross' subpoena is privileged, but that the very allegations of wrongdoing that are incorporated in Mr. Ross' proposed counterclaim and Mr.

Ross' briefs are themselves privileged and/or protected materials.

I mean, for example, NXIVM claims privilege for Mr. O'Hara's assertion that he was never NXIVM's lawyer. They claim privilege for the fact that Interfor improperly deposed Mr. Ross while this litigation was pending and obtained copies of his bank and telephone statements through bribery or pretexting or some other improper means. They claim privilege for the fact that the concerned mother introduced to Mr. Ross by Interfor as Susan L. Zuckerman was an actress that Interfor had hired.

They claim privilege for the fact that Vanguard Raniere and Pretext Salzman and the legal liaison, Kristin Keeffe, began to plot with Interfor to lure Ross on to a cruise ship and had discussed Ms. Keeffe portraying the fictional daughter of fictional Susan Zuckerman, and they claim privilege for the fact that about the same time that this cruise ship plot was being concocted, Mr. O'Hara came to conclude that he couldn't any longer be a willing participant in NXIVM's conduct, and that he received a death threat spray painted on his property when he began speaking out publicly against NXIVM. They claim that all of those facts are somehow privileged and protected.

It boggles the mind that any of these facts could be subject to a privilege or other protection by this Court,

and NXIVM makes no effort to articulate the basis for any such protection, other than to insist that Ross' knowledge of these facts, most of which had already been published in public newspapers, that that knowledge comes directly or indirectly from O'Hara.

We'll, I'm sure, cover the sequence of events and other aspects of NXIVM's privileged claims on some of the other motions before you today, but -- and I know that the Court is intimately familiar with Pansy and the Local Rule 5.3(c)(2), so I certainly need not recite their sealing requirements.

NXIVM's entire basis for sealing lies in the assertion of privilege. And if the Court comes to recognize that neither Ross' counterclaim nor any of the briefs filed with the Court contain any privileged information whatsoever, then no further inquiry is going to be necessary. There won't be any basis to claim that any of the information contained in those papers should be sealed. If it is not privileged, there is no basis to seal it.

And NXIVM hasn't even stated its basis for claiming that any of the communications outlined in Ross' supplemental declaration, which were submitted in-camera to your Honor, that any of those are applicable.

In Securimetrics v. Iridian, this court, this district made clear that mere conclusory allegations of harm

are insufficient to obtain a sealing order absent an independent showing.

So the serious injury that NXIVM claims it will suffer is relegated to a single paragraph in its 24-page brief. Here is what they say about the serious injury, quote:

The serious injury that would result if the filings are not sealed and are publicly disclosed is clear and immediate. Such a disclosure would have the potential of vitiating both the attorney/client privilege and work product immunity as to those materials before the plaintiffs are able to exercise their absolute right to be heard by testimony and argument.

Well, Your Honor, I would submit it would be hard to write a more conclusory allegation of harm, and indeed, no sealing order could reverse the disclosure of facts that were published months ago in the Metroland newspaper, and no sealing order can protect NXIVM from the information that Ross learned months ago from the reporter at Metroland, Jeff Hardin, and from the interesting Mr. O'Hara, and no sealing order can sweep under the rug the facts that Ross knew because he was himself improperly interrogated by NXIVM and its investigators two years ago.

NXIVM's papers also ignore the fact that it was NXIVM who placed into the public domain a privilege log that

identified the Interfor report. Cleansing the docket in this case is not going to stuff some metaphorical genie back into a bottle.

NXIVM relies on the Third Circuit comments in Haines v. Liggett, where the Court believed that secrecy should be maintained pending final dissemination of the privilege claim, but in Haines the party opposing the privilege didn't already have access to all of the documents and information in question as the defendants do here.

So in closing on the sealing issue, your Honor, I would remind your Honor of the New Jersey Appellate Division's observation recently when it vacated a sealing order in Letterman v. Prudential. The Appellant Division said, quote, Even though plaintiff violated his confidentiality agreement with defendants when he did not file the complaint under seal, at that point the information became public and no current justification for privacy remains.

THE COURT: Thank you.

MR. EGGERS: Your Honor, may I respond?

THE COURT: Absolutely.

MR. EGGERS: Thank you, your Honor.

With respect to whether Mr. O'Hara was NXIVM's attorney, I am not sure why Mr. Ross is running away from that issue, but I suspect it has to do with the fact that he

wrote in a letter to NXIVM that he signed that I am your attorney. That letter was written on letterhead, which stated O'Hara Group & Associates, Attorneys and Counselors At Law. The retention of Interfor was on a letterhead of O'Hara Group & Associates, Attorneys and Counselors At Law. It stated that your work for us will be covered by the work product rules.

You have an attorney hiring an investigator. There is no more clear example of work product protection. It is right there in the Advisory Committee notes. The work of an investigator is subject to work product protection.

You just heard a nice dissertation on all of the things that we claim are, quote, privileged that are in the record now. With respect to each of those things, we are not claiming a privilege per se. We are claiming that they were placed in the record in violation of our work product protections, and that they were placed in the record in violation of a duty of confidentially.

I am just dealing with the motion to seal now.

THE COURT: I understand.

MR. EGGERS: The work product claim and the confidentiality obligation both are plain in this case.

Now, Mr. Ross would like to say, so what, the genie is out of the bottle. Mr. O'Hara prior to disclosing to Mr. Ross sent the same report to a reporter, and the reporter

also said some of these things to Mr. Ross.

I don't think it makes a difference, the route through which Mr. O'Hara's impropriety ultimately reaches Mr. Ross' ears. But in conclusion, let me just say that the Court in the Northern District of New York entered a text order in March 2006, in which it specifically directed Mr. O'Hara not to reveal the Interfor report to anyone. Mr. O'Hara violated that order as well.

There is a court order from another District Court, which says: You shall not reveal that information.

Mr. Ross gets the information in violation of that court order, as well as all of those other obligations, and now he says, the genie is out of the bottle, never mind that there is a court order, never mind that the rules say that you shouldn't expose confidential information that improperly finds its way into your hands, never mind that, we can just go out and summarize it for the public's consumption.

It doesn't work that way. It should not work that way. The Local Rule 5.3 standards are more than met simply by the risk and the injury to the work product protection and the confidentiality obligations that we are entitled to, your Honor.

THE COURT: Okay.

(Court and clerk confer)

Sir, was that order that you just referred to in the records submitted to the Court?

MR. EGGERS: I know for a fact it is referred to in the brief from the Northern District of New York that we last submitted to the Court, I believe, with my letter of December 4. I cannot locate it in the pile of papers before me right now, your Honor. It is a docket order, a text order, entered right on the docket in the O'Hara action.

If we neglected to submit it, I am not sure frankly if we did, but if we neglected to submit it, we ask the Court to take judicial notice of it. It was referred to in the papers that we submitted to your Honor.

THE COURT: Can you find where it was referred to? I just want to see it. I may have read about it, but I don't think I saw that order.

MR. SKOLNIK: If I may, your Honor, I think that there is something else important for you to know about all of that, which is that the status and operation of the order that Mr. Eggers is referring to is, as I recall, because this was not frankly precisely what Mr. Ross was addressing in the Northern District matter where he intervened, but I am under the clear impression that whether or not that order was still operative is currently before Magistrate Fries in the Northern District. There had been orders. There had then been --

THE COURT: Okay. You mean it was an order in the case between NXIVM and Mr. O'Hara?

MR. SKOLNIK: Exactly.

THE COURT: It was not an order in this case.

MR. SKOLNIK: Certainly not. It was an order entered at some point in the O'Hara litigation in the Northern District. There is, you know, a stack of briefing now before Magistrate Fries about whether or not that order even remains in place, so --

THE COURT: Understood. Now I understand.

MR. EGGERS: Your Honor, if I may, you just heard him say that the stack of briefing as to whether that order remains in place, there is no such briefing in the Northern District. The order is clear. It is not in dispute, nor frankly does Mr. O'Hara deny that he violated it. He sent the Interfor report out to reporters. He admits that in the Northern District case. He sent it to Mr. Ross. Mr. Ross admits that.

So we have a text order in the Northern District of New York, which flatly obligates Mr. O'Hara not to do what he has done, and that ought to also inform this Court's exercise of its discretion with respect to the sealing of the information that was contained or that was supposed to remain confidential pursuant to that court's order.

THE COURT: Thank you.

All right. I am going to go through some basic facts, not all of the facts in this case because it is an extremely fact intensive case, only certain facts that I think are relevant to our current motions today as my preface to deciding the sealing issue.

I will state that the facts that I am going to go through, the general description, which may not be entirely complete, applies to each motion. Okay, so bear with me. I am doing this for the record, and as I say, it applies to each of the motions.

The plaintiffs NXIVM and First Principles are producers of business training seminars. At least that is one description of the business. NXIVM provides a course manual for paid subscribers to its exclusive and expensive seminar training program known as "Executive Success." NXIVM claims to have developed a proprietary "technology" called "Rational Inquiry," a methodology to improve communications and decision-making.

Defendant Rick Ross runs nonprofit websites, www.rickross.com and www.cultnews.com, in connection with his work as a for-profit cult "deprogrammer." The websites provide information to the public about controversial groups about which complaints of mind control have been lodged.

Plaintiffs NXIVM Corporation and First Principles instituted this action in the United States District Court

for the Northern District of New York on August 22nd, 2003 to protect their intellectual property rights. The complaint alleges that Ross and other defendants stole the trade secret copyrighted materials and posted excerpts on the internet.

On September 9th, 2003, District Judge McAvoy denied plaintiffs' application for a preliminary injunction preventing the defendants from disseminating information about its business.

Plaintiffs filed an appeal to the United States Court of Appeals for the Second Circuit, which was denied by published opinion, dated April 20th, 2004, and it's available at 364 F.3d 471. In its opinion, the Court of Appeals for the Second Circuit stated that it agreed that NXIVM could not show a likelihood of success on the merits. The Second Circuit's decision was based on the fact that it agreed with the district court that any alleged harm that arises from the "biting criticism of this fair use, not from a usurpation of the market by defendants."

The Circuit further stated that, "If criticisms on defendants' websites killed the demand for plaintiffs' service, that is the price that under the first amendment must be paid in the open marketplace of ideas."

In a concurrent circuit, Judge Jacobs stated, "Mr. Ross and his co-defendants quote NXIVM's manual to show that

it is a pretentious nonsense of a cult." Page 486.

Following the Second Circuit's denial of a petition for a Writ of Certiorari filed with the United States Supreme Court, which was also denied, on February 21st, 2006 this matter was transferred from the Northern District to this Court pursuant to both 28 U.S.C. 1404(a) and 1406(a). Since the case was transferred, there is a new set of facts that have come to the fore, and they are the primary focus, although not the total focus of the motions that we are here to decide today.

In November 2004, Mr. Ross supposedly received a phone call from Interfor, the private investigation firm. Interfor's president, Mr. Aviv, allegedly said that Interfor represented a woman whose 27-year-old daughter was involved with NXIVM, and when Interfor learned of Mr. Ross' background with such issues, Mr. Aviv had recommended Ross to help the woman with her daughter. Mr. Ross states that he disclosed to Mr. Aviv that he was then involved in this litigation with NXIVM, which had already been pending for over a year.

Mr. Ross apparently arranged a meeting through Interfor in New York City in November 2004 with Anna Moody, Mr. Aviv, and the supposed concerned mother introduced to him as Susan Zuckerman. Mr. Aviv identified Ms. Zuckerman as a friend, and Mr. Ross was told that Ms. Zuckerman's

daughter was involved with NXIVM.

Several months later, Ms. Moody contacted Mr. Ross again, and on April 20th, 2005, he met with her and Ms. Zuckerman at Interfor's offices. During the meetings at Interfor's offices with Mr. Aviv, Ms. Moody and the apparent Ms. Zuckerman, Mr. Ross says that he was interviewed extensively concerning everything he knew about NXIVM, and how he might go about helping Ms. Zuckerman with her daughter. According to Ross, it was suggested by someone at that meeting that an "intervention" be conducted on a cruise ship. Ross was paid $2500 and signed a retainer agreement on behalf of Ms. 'Zuckerman. Ultimately, Mr. Ross was advised by Ms. Moody that Ms. Zuckerman did not wish to go forward with the intervention.

Now, we go forward to July 4th, 2006. Mr. Ross said he had received a telephone message from Chet Hardin, a newspaper reporter, at an Albany based newspaper who said he wanted to confirm a story about a NXIVM plot to lure Mr. Ross onto a cruise ship. Ross claims that the message, which was received more than a year and a half after Ross first met with Interfor, made him realize that NXIVM had hired Interfor, and that the stated purpose for the meeting with him was all part of an elaborate deception or charade to question him out of the presence of his attorneys, and he also makes the statement or allegation to cause harm to him.

Plaintiffs assert that in the fall of 2004, their then counsel Nolan & Heller - and I know they are not here, not participating in this proceeding, they have different counsel - recommended that NXIVM hire Interfor to conduct an investigation of defendant Rick Ross in connection with this lawsuit and I believe also other issues or other lawsuits. NXIVM claims that Interfor worked under the direction of Joseph O'Hara, who was alleged to be an attorney for NXIVM, although not counsel of record in this case.

After July 4th, Ross spoke with Chet Hardin, the reporter who had contacted him. Hardin allegedly explained that he was working on a story that involved NXIVM hiring Interfor to investigate Ross and lure him into a cruise ship. According to Mr. Hardin, the source for this story was a former NXIVM consultant named Joseph O'Hara, the same Joseph O'Hara that NXIVM says was a lawyer for NXIVM.

Mr. Hardin's article in the Albany paper was published on August 10th and has been attached to various documents or to a declaration in this case. According to Mr. Ross, during his conference with Mr. Hardin, Mr. Hardin read to Mr. Ross from a report that had been written for NXIVM by Interfor, which Ross claims established that Interfor had illegally obtained Ross' and perhaps his roommate's bank and telephone records, and the allegation in the papers that have been submitted is this was done

illegally.

On July 12th, Ross says he received an unsolicited phone call from O'Hara and then spoke to Mr. O'Hara again after that. During the phone call and in other phone calls Ross says that Mr. O'Hara advised him of the following:

That Mr. O'Hara was never NXIVM's lawyer;

That Mr. O'Hara, Nancy Salzman and NXIVM employee Kristin Keeffe met with Interfor in connection with the investigation of Ross, and that Raniere, who was referred to in the papers repeatedly as Vanguard Raniere, was well aware of Interfor and was involved with Interfor's conduct.

Ross claims he was also told Interfor bribed employees of Fleet Bank and one of Ross' phone providers to illegally obtain copies of his bank and telephone records.

He was also told allegedly that Interfor bribed someone who worked at or resided in Ross' building to sort through his garbage, and that Mr. O'Hara is in fact still in possession of a box sent to him by Interfor that contains Ross' garbage.

Finally, that he was also told that the supposed mother, concerned mother, introduced to Ross by Interfor as Susan L. Zuckerman was actually and as yet an unidentified actress hired by Interfor.

On July 11th, 2006, Ross served subpoenas on Interfor, Juval Aviv and Ms. Moody demanding that they

produce documents and testimony in this matter.

The motion that is under consideration is a motion to seal certain motion papers and proposed pleadings, and I have some questions about exactly what is being sought to be sealed, which I will address in a minute, but I want to state at the outset that all such papers have been public and on the public docket of this court for months, some dating back to August. Much of the information that is sought to be sealed has already been in the press. In fact, Ross claims that he learned of much of it from the press.

Several weeks back the Court denied an order to show cause to seal these documents on an emergent basis. One of the bases of the denial was that the documents were already out there and had been out there for some time, and there had been some delay in seeking to seal them, although this motion to seal had already been filed.

The law on this subject is very well known. Courts in this circuit consistently held there is a presumption in favor of public access to court proceedings. Leucadia v. Applied Technologies. I am going to leave out the cites. Glenmede Trust v. Thompson, Pansy v. Borough of Strousdbourg.

The presumption of access must be balanced against the factors militating against access. The burden is on the party who seeks to overcome the presumption of access to

show that the interest and secrecy outweighs the presumption. For the presumption to be overcome, there must be a showing of good cause. These all have cites to Pansy, Leucadia and other cases. Good cause requires a showing of a clearly defined and serious injury. Mere assertions of broad harm unsubstantiated by specific examples or articulated reasoning are insufficient to show good cause.

As the parties are well aware, the District of New Jersey has promulgated a very specific and to this Court's view a somewhat stringent standard for sealing documents and court proceedings. It has been codified in Local Rule 5.3, which sets forth in specificity the showing needed to place a document under seal. It requires the party seeking protection to show the nature of the materials at issue for legitimate, private or public interest which warrant the relief sought, the injury which would result, if the relief is not granted, and while a less restrictive alternative to relief sought is not available.

A party is required to make a good cause showing *with respect to each and every document sought to be sealed.*

The Court is going to deny the motion to seal. The plaintiffs have failed to satisfy their burden of demonstrating good cause, which is based solely on an extremely broad, I would say an overbroad and non specific claim of privilege that plaintiff contends extends to

everything related to the Interfor sting operation, and I use that word because that is the way that Interfor in its papers described the operation, as a sting operation.

The basis of the argument why this should be sealed, the alleged interest is basically the attorney/client/work product privilege.

I want to turn to the case of Securimetrics v. Iridian Technologies, 2006 WL 827889, a decision by Judge Kugler. In that case the District of New Jersey considered 5.3 and the attorney/client privilege and rejected the plaintiff's reliance on the attorney/client privilege as a standalone basis for alleged harm. The Court stated:

> "There are significant disputes regarding whether the documents are subject to attorney/client privilege, but even putting aside these privilege issues, the defendant still fails to allege the particularized harm that would result from public disclosure of these documents."

It's very analogous here. There are many disputes as to whether there is an attorney/client privilege in this case, and we are going to get to that. But even assuming that there is or was, there is no basis that has been presented to this Court to seal these briefs in their entirety that have already been on the docket for some time. Securimetrics required an independent showing of harm or

else a sealing order couldn't be entered.

In this case we have a very conclusory assertion that virtually every allegation in defendants' filing is privileged. The plaintiffs have made no attempt to articulate the harm except for a very general statement that the harm is obvious. The broad allegation of harm lacking in any specificity fails to satisfy the standards by Pansy, Securimetrics and Local Rule 5.3. 5.3 also requires movants to state why a less restrictive alternative to relief would be inadequate, and there is no attempt to make such a showing.

Plaintiffs failed to articulate which statements would be privileged, and they really failed to identify the basis for the asserted privilege except for the general facts that we have heard that NXIVM claims that Mr. O'Hara was their attorney, and that somehow this investigation was conducted or supervised by him, and therefore, everything should be privileged. Broadside implications of privilege are insufficient, just as broadside invocations of harm are insufficient.

There has been no designation with particularity. The specific statements, which were privileged, as Mr. Skolnik said in his argument, some of the things in the briefs are things within various parties' personal knowledge. There is legal argument. There are all kinds of

things in the brief which couldn't be privileged and certainly not privileged, even assuming there was an attorney/client privilege, there has been no showing of the requirements under 5.3.

Under 5.3 and Pansy, one of the factors to be considered is the interest of the public, the public interest. Under Pansy public interest if there is an issue strongly favors that proceedings remain open. Quoting from Pansy, "Circumstances weighing against confidentiality exist when confidentiality is being sought over information important to public health and safety."

In this case, the press has been involved. Indeed, Ross claims he learned about this investigation from the press. Other articles may have been written, the interest to the press, the fact that the press has been involved demonstrates some level of public interest. But this Court is going to go further having read the papers very carefully, having read the underlying articles, including the Arthur Miller article that's referenced in Pansy and studying the issue of secrecy in our courts.

Based on a review of the pleadings and briefs in this case, the Court finds that there is a strong public interest in disclosure of the true facts in this case. If some of the facts and the allegations by the parties in this case are true, there is information that could be important

to the public health and safety. This then becomes more than a private dispute between the parties. Of course, there is no indication whatsoever of what is true or not.

In addition to that, the Court has some very serious concerns and reservations about things that have been said in the pleadings in this case -- no, not only the pleadings, the pleadings, but also the briefing, and the Court has reservations and concerns about the true motivations of the parties in saying some of these things in the pleadings, and the Court also has concerns as to whether it is proper to put some of these things in the briefing and pleadings.

Nevertheless, they are there, and both parties have included them to some degree, and they raise very serious issues that the public has an interest in, and I want to make clear I am not referring now to the information that only dealt with what the plaintiff claims is its intellectual property. I am dealing with this subsequent issue of the Interfor investigation. There is a compelling case for openness here. There is a compelling case for public access. There is a public interest in it.

These facts at this point require the light of day. I don't state this lightly. I am going to be more specific about some of the things that are in the pleadings and briefs in this case. Once again, I am not sanctioning or

condoning the placement of some of these things in the briefs, but I will quote from them.

From the proposed verified counterclaim, there is the statement:

"Counterclaim defendant Keith Raniere is the founder of NXIVM and is its de facto leader and chief financial beneficiary. Raniere known to his followers as 'Vanguard' is, upon information and belief, a megalomaniacal sociopath who is nevertheless revered by his followers as a messianic figure."

I have very serious questions which I am going to address shortly about what that is doing in a pleading, but there it is.

Not to be outdone, NXIVM in its brief in opposition to Ross' Motion to Amend at 9, citing Mr. Rennie's declaration states:

"Doctors who have examined Ross have described him as an 'opportunist' with sociopathic inclinations."

We have papers filed in this Court where each side is making statements to the effect that the other side or someone associated with the other side is a sociopath.

Let me go further.

"Under the guise of offering executive training courses, NXIVM is on information and belief a front

for a dangerous and destructive cult."

(Verified Counterclaim, paragraph 5.)

"Indeed, NXIVM demonstrates the attributes of a classic personality-driven cult, and is led by a failed multi-level marketing guru, Counterclaim Defendant Keith Raniere, who insists that his followers address him as 'Vanguard.' Much as in other infamous cult groups, such as David Koresh's 'Branch Davidians,' the Charles Manson 'Family' and the 'Peoples Temple' led by Jim Jones."

That's the Verified Counterclaim Paragraph 5.

"NXIVM training has been linked to catastrophic results, including one suicide and at least three people who required psychiatric treatment, one of whom has been hospitalized. NXIVM has also been the cause of numerous family estrangements and divorces."

(Verified Counterclaim Paragraph 5.)

Ross' brief in support of the motion to amend states that:

"Ross seeks leave to amend arising out of the outrageous conduct that occurred while this matter was pending, including an attempt to lure Ross onto a cruise ship under false pretenses with the apparent intent to harass and intimidate him,

and/or at least on the part of NXIVM's inner circle - to inflict bodily harm upon him."

"Interfor bribed employees of Fleet Bank and one of Ross's phone providers to illegally obtain copies of Ross's bank and telephone statements."

That is Ross' brief in support of the motion to amend.

"Ross has been faulted as being partially responsible for instigating incidents in Waco, Texas that resulted in the government's siege of the Branch Dividian compound."

That is NXIVM's brief in opposition to Ross' motion to amend.

"Ross is a convicted felon."

That is NXIVM's brief in opposition to Ross' motion to amend.

"O'Hara confirmed that he had received a death threat spray-painted on his property after he began speaking out publicly against NXIVM, and a former NXIVM insider who was Raniere's live-in girlfriend has referred to Raniere and Salzman as 'very, very dangerous, scary people,' and has maintained that in Raniere's view, 'If you had to kill somebody, and it is for the betterment of the family, it would be OK.'"

That is from Ross' brief in support of motion to amend at

Page 5.

Once again, the Court has no idea whether there is anything to any of these statements and has very serious concerns about putting these kinds of things in pleadings and briefs.

In any event, there is a stringent standard for sealing things in this district, for closing courtrooms, and with these kinds of allegations which impact the public and repeating the fact that this information has been out there for months available on the docket of this court, I am going to deny the motion to seal in its entirety.

Okay. Let's now go on. I think we should deal with the motion for a protective order now.

MR. EGGERS: Your Honor, that is the motion for an umbrella protective order as we styled it?

THE COURT: Yes.

MR. EGGERS: Okay.

I think it is important to recognize that what this motion is and what it is intended to accomplish. We are seeking an umbrella protective order, not an order sealing a whole bunch of documents. We are simply seeking an order that would allow the parties the right to designate materials confidential or highly confidential. That designation would have three principal effects.

First, it would prevent the parties from

publicizing materials learned in discovery.

Secondly, if something was designated highly confidential, it would restrict party access to the documents.

Thirdly, it would provide a mechanism for teeing up these sealing issues under Local Civil Rule 5.3.

That is what we seek. That order is contested, and so we made a showing -- excuse me -- under Local Rule 5.3(b) intended to establish the nature of the materials that we were seeking confidential treatment for, the sorts of harms that would result from the public disclosure of such materials. Again, it is not a sealing motion. It is a different standard.

It is my experience that parties typically agree to such things as a matter of course. In fact, I never ever had to make a motion like this in my entire career, which is strange because if you look at the record that we submitted to your Honor, with respect to what the defendants have stated in their own interrogatories and document demands, they state repeatedly you can't have that information, that is private.

Now, we have been asked repeatedly for information that we consider private. Our response is: We are happy to give it to you. It's relevant. We are obligated to give it to you. All we ask is that you agree not to immediately

post it on the internet or take other steps to publicize it. That is how one typically approaches this. Defendants flat out refused to provide it.

But for that position, I suspect that they also would be seeking a similar relief to the relief that we are seeking here today.

In addition, the interests of third-parties, such as Mr. Brottman, who has received a subpoena from the defendants, are implicated here. He has also indicated that he has some concerns about the nature of what is going to happen with the information he is required to reveal pursuant to that subpoena, so we got parties who are refusing to provide discovery absent some confidentiality -- third-parties rather. We got parties who are simply refusing to provide discovery, period.

The remedy for that is an umbrella protective order. The Third Circuit has plainly endorsed them in Cippolone v. Liggett and again in Pansy, they endorsed such an order.

What the court said is: Let's not fight over every document. Allow the parties to designate it. If there is a dispute about the confidentiality of a particular argument or a particular document, let the parties fight it out with respect to those particular documents that are contested.

The Court reiterated that approach in Pansy. I

think the Court did not address the interplay between the umbrella protective order and Local Rule 5.3. I have not seen any case that addresses the interplay between those two.

In your typical umbrella protective order, there is a provision for two levels of confidentiality. One is simply materials that you are not going to share with the public by putting them on your website, for example.

The other is materials that the party claiming confidentiality thinks are more important. Those are the highly confidential materials. Under some circumstances they seek to prevent the revelation of those documents to the other side's principals as distinct from their counsel.

In other circumstances, the confidentiality with respect to those documents is such that the parties would be expected to file a motion to seal.

The paradyme of such a document and the type of documents we have here is a trade secret. The revelation of that trade secret in the public records is going to destroy the confidentiality and destroy a property right of a party.

Now, because the rule, Local Rule 5.3, does not specify how those motions get teed up in the case of an umbrella protective order, I think realistically there are three ways one could do it.

One would be to require advance notice of an

intention to file publicly a document as to which one party has claimed highly confidential status, thereby obligating the party claiming that it is highly confidential to go move under Local Rule 5.3.

Another possibility might be that you file your motion with respect to highly confidential materials. You would have a given period within which to move, otherwise it becomes unsealed on a certain day.

The third, and I think the least appropriate possibility, is that a party is free to simply dump into the public record materials that may be trade secrets and leave it to somebody in our position to say -- to come in after the fact and unseal them after, as your Honor put it, they are already on the public record for months. As we just saw, that is not a terribly good option with respect to highly confidential information.

We would propose - and this is a slight modification from the order that we submitted - we would propose that the Court enter the confidential, highly confidential order with respect to highly confidential material, we would propose that the Court allow ten business days' notice of an intention to place those documents in the public record, thereby giving the party claiming confidentiality the right or the opportunity to seek an order under Local Rule 5.3 or simply to determine whether

they think they can meet the standard. Perhaps the party would waive the highly confidential or the right to seek a motion.

We think that a ten-day period triggered either by a notice in advance of filing the motion or by the filing of the motion would make sense. That would allow the opportunity to make these decisions with sufficient care that we are not burdening your Honor with motions that you are likely to deny.

Why generally is the confidentiality order necessary here?

Mr. Ross is in the habit of publicizing on his website and elsewhere information that he seeks through or that he obtained through litigation. He has put depositions on his website. He put the pleadings in this case on his website. He publicly identified NXIVM clients on his website and suggested that they should consider having an intervention, presumably using his services.

His business is what he called "cult de-programming." In order to foster that business, he tries to create an impression that a given group is a cult, whose members need his services.

He would like the information to publicize any information about NXIVM that he can spin to achieve that result in a negative way, and if he gets enough information

and spins it wildly enough, he could increase his chances of getting business from NXIVM's clients.

I think there is something else afoot here, which is interesting. There is a motion to unseal 57 course modules that were attached to a declaration of Stephanie Franco when this case was pending in the Northern District of New York. With respect to those 57 course modules, there was an order by the Northern District of New York sealing those records. Those records are the core of plaintiffs' trade secret claims.

Mr. Ross filed a motion. It was a cross motion to our motion for an umbrella protective order in which he seeks to unseal those trade secrets or those documents in which NXIVM claims a trade secret.

There is no motion pending to which those relate. There is no need to file them in the public record now. There is absolutely no reason why this issue came up now or in opposition to our umbrella protective order motion.

What is plain is that Mr. Ross would like to get some leverage. He would like to tell NXIVM or have this Court tell NXIVM, you can only pursue your trade secret claim at the risk of your trade secrets. That is an inappropriate reason for parties to seek discovery. It is abuse of the discovery process. I think it establishes good cause for an umbrella protective order.

With respect to attorneys' eyes only, because Ross in particular makes it a part of his business to disclose materials in which NXIVM claims a trade secret, or to summarize his conclusions about those materials, or to mischaracterize those materials, even in the situation where he does not have access or where he does not post the materials themselves on his website, his spin is, I've seen the material, and let me tell you, I can't tell you what they say, but let me tell you, they confirm my conclusion that NXIVM is a cult.

He would like to undoubtedly walk up to the line of disclosing the contents of those materials and do so in such a way as to publicize his business.

I think given that that is what he is about, we have a situation where attorneys' eyes only treatment is appropriate with respect to certain documents.

Similarly, with respect to Ms. Franco, she signed a contract to keep those 57 course modules confidential, not to disclose them. They found their way into Mr. Ross' hands because Ms. Franco gave them to him.

She is, in fact, a competitor of NXIVM. We take that position in this court based on information, for example, that was not before the Second Circuit when the Second Circuit ruled on a similar issue. The Second Circuit was unaware that Ms. Franco has advertised her counseling

business as late as 2003, that she's listed as a certified trainer for an organization called Taibi Kahler. That's T-a-i-b-i. Kahlar is K-a-h-l-e-r.

She is on the website as a trainer for that organization. That organization is seminars and personal improvement, and NXIVM considers them to be a competitor.

So with respect to those materials, we would like to see, given Ms. Franco's demonstrated propensity to disclose them in violation of her contractual obligations, and given the fact that she's a competitor, that she not be allowed access to those materials as well.

With respect to the particular materials that are attached to that Franco affidavit, there are 57 course modules attached there. I'm sure that when Mr. Skolnik stands up, you will hear him utter words like charade, which is in his brief, because he says, well, 20 of those are on file in the copyright office, and indeed, 20 of them are.

There is no automatic destruction of your trade secret by filing in the copyright office. One can file trade secret material pursuant to certain regulations of the copyright office that limit or actually prohibit public access to those materials. I was unaware that those procedures had not been followed in this case and somewhat surprised to learn that they hadn't been.

When we stepped in, that is the state of play with

respect to 20 of those modules. That does not change the fact that there are 37 other modules, which are not on file in the copyright office, which are not publicly available, and in which NXIVM maintains a claim of trade secret protection.

We had like 15 categories of stuff in our papers. I don't know how much you want to hear on each one. I could go for hours on this stuff.

THE COURT: I don't think it is necessary at this time. We may get to it at some point, but I understand your claim.

MR. EGGERS: Well, then that was the only one -- I guess the patent, I should probably discuss the patent because that is the other charade that they point to.

There are some European patents, which are available on the internet, which contain certain information. We are not looking to seal those, or we're not looking for confidential treatment for them.

There is, however, a U.S. patent application, which discloses information that is not in the European applications. I don't know how much familiarity your Honor has had with patent cases. I know I have had as little as I care to.

However, I do know this: In the European system, one does not need to disclose the best mode in order to

obtain a patent, unlike the U.S. system, so you got these general ideas that are out there, which are disclosed in the European patent. When you get down to the U.S. patents and there is a best mode requirement, you have to give enough information so that somebody practiced in the art can practice the invention -- I just misused my terminology there, but it is roughly that.

With respect to the material that's in the U.S. patent file, there is material that goes beyond what is in those European patents. There is material -- this is material, which is not publicly available. Unlike the copyright office, the files in the U.S. Patent Office under the regime in place when we filed these patent applications are not publicly available.

I understand that there has been a change in the regulations, but with respect to this patent, we were grandfathered in, so there is material in the patent office which is not publicly available as to which I think the trade secret protection ought still to have some play. The revelation of that material in the patent office does not destroy our secrecy.

Lastly, with respect to the material that is in the copyright office, the copyright office does not simply copy those materials for the asking, as I think Mr. Skolnik's investigator learned. They have severe limitations on what

you can do with those materials. Even once you're provided access to the deposit copies, you cannot copy them. You cannot write verbatim notes about them. You could write a few things down about them and then they will scan your notes when you leave to see whether or not you have violated the copyright office regulations.

So the fact that they are filed in the copyright office, even with respect to those 20 modules as to which the trade secret protection arguably was blown, then there is still a difference between having public access to those documents under the copyright office procedures and stuffing those documents into the public record and giving Mr. Ross the chance to publish them for all of NXIVM's competitors.

So there are a huge number of companies in what we define as the personal development business with respect to any number of those competitors. They would be more than happy to receive these materials. We ought not to be required to give up the protections of our trade secrets or to enforce them. Mr. Ross would like us -- would like to see us be forced into that choice. That is not the purpose of discovery. As I think under the cases we have more than sufficiently met the burden, not again for the 5.3(c) motion, but simply for the umbrella protective order.

Other than with the modifications that I mentioned earlier in my argument, that form of order is attached to

our motion.

Thank you, your Honor.

THE COURT: Thank you.

MR. NORWICK: Your Honor, I think the reason that we oppose this motion is because NXIVM has at every turn tried to push confidentiality in this case to as far as they can. I think the Court has already recognized that there is an incredible public interest in open access to documents in this case, and we don't even have a protective order in place yet.

The parties have agreed to a temporary confidentiality agreement pending the outcome of this motion, and already we have gotten Answers to Interrogatories to the most innocuous questions, like what are the items that you claim are disparaging, and what is Keith Raniere's relationship to NXIVM.

They marked every single page of their interrogatories answers as confidential, even their objections, even answers to questions where they said they don't know the answer. We have seen in just in them filing their motion, they filed in-camera an affidavit of Kristin Keeffe, which says that they keep documents under lock and key, and there is plenty of material in there that isn't even arguably some sort of a security procedure, and we have to ask ourselves how do we even respond to this motion in

court without revealing the secrets in the Keeffe declaration.

We had -- and in addition to that, in the interrogatory answers, we had an argument in our papers about Keith Raniere having a volunteer status with NXIVM. And, again, we didn't even know how to present that to the Court. And under the order that they have asked your Honor to sign, we would essentially have to ask them permission to file anything under seal. We would have to ask them permission to show a document to a witness at a deposition that is highly confidential.

The order, and if I got a copy of the order here -- I thought -- oh, here it is. I got it.

Here is their definition: Confidential constitutes confidential business or other sensitive information.

That is pretty vague, and then they got the highly confidential, particularly sensitive business or financial information including, but not limited to, trade secrets and marketing plans and information of a sensitive personal nature.

What they can do with an order like that is basically designate everything confidential. And, in fact, that is what they have done. We have gotten about 5,000 documents from them. I think probably -- I would -- actually I think it is 6,000, and I think 5,000 of them they

have claimed to be confidential or highly confidential. It is hard to keep track because they keep changing their designations.

I think that the order that they are asking for is way overbroad. Some of the documents that they have asked that be maintained confidential, we're talking about copies of checks that are sent as filing fees to the patent office. We are talking about transmittal letters to the copyright office, or we are talking about cover pages of their manuals. We're talking about documents that show how many students have to be recruited by a NXIVM enrollee in order to earn a yellow sash or a gold stripe.

And, you know, as your Honor has already pointed out, they have to show -- they have to make a particularized showing of harm, and particularly in this case where they come to the Court with an argument that basically the world is going to come to an end if any of these documents come out.

Then as it turns out, a lot of these documents are already in the public domain, and then they don't really explain, well, what's the difference between the documents that you already released and the documents that you have not. They don't make any effort to distinguish between the two in their papers.

In fact, what they do distinguish is that the

papers that they have made a matter of public record are actually their most important papers.

If you look at the Raniere declaration, which is attached to the Andretta declaration as Exhibit C, and at Paragraph 4, they say:

Three of the copyrighted materials currently posted on the internet, the 12-point mission statement, working value and face of the universe reveal the content and methodologies that are critical to the heart of the entire course work.

Those are all documents -- they didn't only submit them to the copyright office. They -- those documents are available on Pacer because they filed them with their copyright complaint.

And they don't give any reason for saying why the little extra bits of information that they put in their U.S. patent versus their international patent are worthy of any additional protection.

I would love to read some of them, but I guess they are highly confidential, so I shouldn't be reading them in open court, but some of them are astounding, and I suspect that is why they didn't put in the papers what the difference is between the two materials.

I think Mr. Eggers also mischaracterizes the purpose of the copyright regulation. The copyright

regulations are intended to protect copyrights. That is why they don't allow verbatim copying or photocopying because it is intended to protect the expression of copyrighted works, and we don't claim that they don't have a copyright in their work.

Trade secret law is very different because trade secret law protects ideas, and those ideas have been released into the public domain. As we demonstrate by our declaration of Catherine Sealey, she had no problem going into the copyright office and writing the gist of those ideas, taking a quote, a direct quote from those materials. In fact, that is exactly what they allege was done in this case, which is that the articles that were posted on Ross' website contained, quote -- and as you know, we went up to the Second Circuit, and they said that was fair use.

Mr. Eggers has alleged that we want these documents to be undesignated, so that Ross can post them on his website.

That is ridiculous. He wouldn't do that, because he's bound -- not bound by copyright laws. Those documents are protected by copyright law, and I mean Mr. Eggers himself said that the reason they want this order is so that he can't criticize them, and that is what every court that they already gone to has said they are not entitled to do.

So, in other words, they want by this umbrella

protective order to put greater restrictions on Mr. Ross than they were already not able to get from the Northern District, from the Second Circuit or the Supreme Court.

I just want to see if there is anything else that I want to cover here.

I think your Honor already articulated the standard.

THE COURT: Yes. Thank you.

MR. KOFMAN: I guess I'm to make a cameo appearance.

THE COURT: We are happy to hear you.

MR. KOFMAN: I am here on behalf of Stephanie Franco and Morris and Rochelle Sutton and to argue against the protective order on a limited basis here, and that is the provision that would designate certain highly -- quote, "highly confidential," end quote, documents as being attorneys' eyes only, in essence preventing Ms. Franco and the Suttons from even reviewing the documents here.

My clients are three individuals who live in New Jersey, who through their misfortune came into contact with NXIVM. They are now being sued for $40 million in compensatory damages, plus punitive damages.

The order that plaintiffs seek to obtain would prevent them from meaningfully participating in the defense of these potentially ruinous claims, from attending

depositions that go to this, from finding out basically how their case is going. This isn't some insignificant matter to them. This is a grave -- this is a $40 million lawsuit that has been filed against them, would prevent Ms. Franco from even seeing a copy of a videotape of her at the NXIVM workshops.

Now, plaintiffs' counsel says that plaintiffs take the position that Ms. Franco is a competitor of plaintiffs.

With all due respect, they may be entitled to their position, but they are not entitled to the facts. The facts in this case are set forth that Ms. Franco does not in any way, shape or form compete with NXIVM, never has. She had -- she has a defunct counseling business that has not seen patients for years, well before she went to NXIVM. She has never trained for Taibi Kahler. There were affidavits submitted by people from Taibi Kahler. She simply is not a competitor of plaintiffs. I just wanted to clarify that on the record.

What we have here is a situation where plaintiffs are seeking to deprive her and her parents of the ability to meaningfully participate in this suit. This is not the situation that was present in Culligan or Fireman's Fund in which the court didn't even deal with an argument as to whether or not some party should have access. In those cases it seems evident that the injured plaintiffs were not

in the position to help participate in a product liability suit having to do with design of a product.

Here Ms. Franco took the course. She is in a position to know and to see documents.

Now, once before this Court or a court in this matter was faced with claims that if parties were allowed to access to documents, the sky would fall.

Plaintiffs sought to have an order that treated Exhibits A, B and C to the amended complaint as in essence highly confidential to prevent the parties from seeing lists of former students, former vendors. The same arguments were advanced before the Northern District of New York that were advanced here, which is it is such a risk. You know, these things will hit the -- the minute they are released, they're going to hit the airwaves.

The Magistrate Judge there considered that and said if I enter a protective order, Ms. Franco and the Suttons and the other parties to this litigation will be bound by that protective order, so he entered a protective order that allowed the parties to have access. And surprise, surprise, a year and a half later, the sky hasn't fallen. The documents have remained in possession. The documents -- none of this information has been leaked to the public or publicized on any websites. The same could be done in this litigation without any harm to plaintiffs.

They have not shown any particularized harm as to letting the parties participate in the defense of a $40 million lawsuit.

Thank you.

THE COURT: Thank you.

MR. EGGERS: Your Honor, I will be very brief.

With respect to the argument made by counsel for Mr. Ross, that they want the right to go out and express their opinions about NXIVM, and NXIVM wants to stop that, and that is what this is all about, I would like to draw the Court's attention to the Third Circuit decision in Cippolone v. Liggett describing or discussing the Seattle Times v. Reinhardt decision at page 1119. The Third Circuit said, and I quote: The Seattle -- we believe that Seattle Times prohibits a court considering a protective order from concerning itself with first amendment considerations.

What the Supreme Court said in Seattle v. Reinhardt, there is no first amendment right of access to documents provided in discovery in a civil litigation.

In that case, it was a newspaper who was a party. The party sought an order that said the newspaper wouldn't publish the materials that were produced to it in discovery in the newspaper, but would only use them for purposes of the litigation.

The Supreme Court affirmed and said there was no

first amendment violation there.

That is a simple order. It is routinely granted even in the District of New Jersey, as I understand it, and even under -- since the passage of Local Rule 5.3. There is nothing controversial about that.

With respect to Ms. Franco and her need for access to documents, we have a demonstrated history of somebody under contract taking these documents and giving them to people who are not entitled to them. We have a demonstrated history of her attempting to destroy the trade secrets of NXIVM by giving them to Mr. Ross, so that they can find their way into the public domain accompanied by criticism.

With respect to Ms. Franco herself, she has previously had access to some of these materials, and if we were perhaps more imaginative, we would conjure up an order that said since Ms. Franco was sitting there during the course that she is on videotape at, she can have access to that document, but there is no reason why Mr. Ross should.

Mr. Ross in that particular example would be able to discern from the course as presented the nature of the plaintiffs' trade secrets. And given Mr. Ross' stated desires to destroy NXIVM, his obvious intention to reveal as much of our trade secret material as possible, we think that is a bad result. He personally does not need access. If she had access, I am willing to carve that out under any

order that the parties could agree to or that the Court would care to try to construct.

That is my only response.

THE COURT: Thank you.

MR. NORWICK: I think I would like to briefly respond to that.

I mean Rick Ross and also our client Dr. Paul Martin are two of the leading experts on cults in this country.

What does Mr. Eggers think the trial in this matter will be an about?

They filed a disparagement claim, saying that we accuse them of being a cult that engages in brain washing and so they have made it an issue in the trial of this matter as to whether or not they are a cult. Now, they are upset that the issues in this case are going to relate to whether their materials demonstrate that they're a cult.

My clients need to be able to access this material, so that they can explain to the jury why they made those comments. I think it's just completely inappropriate under any order for my clients to be barred from accessing these materials.

MR. EGGERS: If and when the time comes for expert discovery, and if and when, your Honor, they are in fact designated plaintiffs' experts, which I think would lead to

certain problems with respect to their objectivity, for example, then we would be happy to provide them with the materials subject to whatever protections we would then need to devise. Otherwise, there is no reason why they need to be -- to be the experts.

THE COURT: All right.

Well, this is a different kind of a motion, and I will be very brief on it.

A motion for a protective order, umbrella protective order, Local Rule 5.3(b) states that the parties can agree upon such an order, which is what usually happens and it's submitted to the Court with a certification that establishes the four elements under 5.3, which are coextensive with Pansy, which we discussed, and everyone in the courtroom is familiar with Pansy. In this case that has not occurred. The parties were unable to agree on a stipulated discovery confidentiality order, which is the way it is termed.

Now, the plaintiff has asked for some kind of an umbrella protective order, and the case law, the manual for complex litigation, Cippolone certainly and even Pansy have sanctioned the use of an umbrella protective order in the initial stage as an initial procedure in complex litigation understanding that there could be many numerous documents. Now, Pansy makes clear that upon a dispute regarding the

confidentiality of any document, the Court is required, it's reversible error not to make findings on a document-by-document basis for confidentiality.

Having said that, I mean in this case there has been some discussion on this motion of some documents. However, the documents have not been submitted to the Court for in-camera review, although NXIVM has offered to do so with respect to certain documents.

I don't think that the Court can simply enter a protective order because it thinks it would be fruitful. In this case, the Court finds that there has been a threshold showing of good cause by the plaintiff for the entry of an umbrella protective order. I think they have done so by indicating the nature of the materials sought to be addressed by the protective order, which may include alleged trade secrets, names of third-party clients, DVDs of training seminars, patent applications and copyright documents, as well as pricing and fees. These are the types of information that traditionally under New Jersey law are considered and subject to protection under a discovery confidentiality order, and I think that it is absolutely appropriate to have some order in place.

I am not going to enter the order that has been submitted by the plaintiff. Rather, I am going to direct the parties to confer, and perhaps this will lead to the

entry of that kind of an order with a simple structure for a procedure allowing either party to designate documents as confidential and a procedure to challenge that confidentially.

I think, Mr. Eggers, Local Rule 5.3 does address what happens when there is a dispute. I don't know if you were saying otherwise, but any disputes regarding the entry of or the confidentiality of discovery materials as in (b)(5), 5.3 under any order, this section shall be brought before a Magistrate Judge pursuant to Local Rule 37.1. 37.1 requires the parties to confer in good faith.

If the parties can't confer in good faith, usually the matter could be raised with the Magistrate Judge informally by a letter or a telephone call. You know I accept faxes. If that is unsuccessful, a motion can be filed.

So to summarize, I am going to grant the motion in part. I think an umbrella protective order is appropriate. It makes sense in complex litigation to make the case move forward, and I am going to direct the parties to confer on that, but I have some further comments.

There are ethical constraints certainly as to what lawyers can do and should do with respect to information received in litigation and publication of that. Those constraints do not directly concern the clients. However,

there is case law on the subject which gives power to the Court to control what clients do with information, especially confidential information, and I do want to note, of course, in relating to the Franco situation, that being under a contract is different than being under a consent order or an order of the Court. It is a different thing.

The purpose of litigation is not to glean information for other uses - these are just comments - just guidance, and so I would certainly, if something is ultimately deemed confidential, then I would expect that it would be kept confidential.

the next thing I want to state is that based on what I have seen, I see no basis for the "attorneys' eyes only" designation with most of the information that was attached or was referred to in the motion. I am not deciding that now because, once again, it has not been presented to me for in-camera review, and I have not had the kind of real specific argument on it that I would require, but I think that is an extremely aggressive designation. I have no intention to keep that information from Ms. Franco under the current set of facts, and I am going to direct the parties to confer in good faith and take reasonable positions. And if we become bogged down, as I could see it happen, then the Court has ways of dealing with that.

I will note that the discovery rules make it

mandatory to award fees against the losing party on discovery motions. That is not something that is done in the normal course, notwithstanding the mandatory nature of the Federal Rules of Civil Procedure. But that is something that would be strongly considered in this case, not to mention a special master to consider it, because we are simply not going to have the docket taken up with an endless discussion of these issues.

Some of this information clearly would fall under a confidentiality order, meaning that it be kept for use in this litigation and not used elsewhere. This is all for guidance.

I will grant that motion in part and deny it only in part, and I am not going to enter the order that has been submitted, but ask that another order be submitted.

If you cannot come up with an order, then I will enter my own order. The Court will enter an order to establish a structure allowing the parties to designate a document as confidential, and what happens after that.

Now, I want to just amend my lengthy decision on the sealing because there is something I left out, and I just want to put it on the record. That is, I mentioned the fact that this information is out in the public domain. I didn't give the citation about that, and I think that there is substantial case law to the effect that the confidential

nature of documents, at least as it relates to a motion to seal has been lost when something is a matter of public record.

The courts both in and out of this Circuit have held that once documents were publicly filed, they essentially lost any protective nature they may have. I cite Bank of America, National Trust v. Hotel Rittenhouse Associates, 800 F.2d 339, a Third Circuit case, and Gambale v. Deutsch Bank, 377 F.3d 133, a Second Circuit case. The language in Gambale is instructive, and I will quote from it.

> "However confidential the material may have been beforehand subsequent to publication, it was confidential no longer. It now resides on highly accessible data bases of West Law and Lexis and apparently has been disseminated prominently elsewhere. We simply do not have the power even where we have the mind to use it, if we had to make what was public private again."

That is at 144.

The court continued:

> "Once the genie is out of the bottle, albeit because of what we consider to be a District Court's error, we have not the power to put the genie back."

The Court went on further with some hyperbole, I suppose, that said:

"This would apply to various types of communication, whether it be settlement terms of a discrimination lawsuit or the secrets to make a hydrogen bomb."

Now, I think what we might do is take a five-minute break and proceed with the remainder of our motions.

Thank you.

(Recess taken.)

THE CLERK: Remain seated.

THE COURT: All right. I think we should take up the two motions to quash at this time.

We have NXIVM and First Principle's motion to quash and enter a protective order including discovery related to Interfor and disclosure and return of the documents the defendants received from Joseph O'Hara, and we also have Interfor's motion to quash.

I have read the papers, but I am happy to hear from you.

MR. EGGERS: Thank you, your Honor.

THE COURT: Sure.

MR. EGGERS: With respect to this motion, we have the situation I described earlier, where Mr. O'Hara has taken it upon himself to reveal information that he is under

a court order not to reveal pursuant to the Northern District of New York, to reveal information that he has an ethical obligation not to reveal, to reveal information that is subject to claims of work product protection and attorney/client privilege.

He calls up Mr. Ross, and he says, according to Mr. Ross, the first thing he lists, I was not NXIVM's lawyer, which is kind of a strange thing to say if you are really not their lawyer. Why would anybody ever have thought that you were?

THE COURT: Right.

MR. EGGERS: In point of fact, he has acknowledged, as I mentioned earlier, that he is or was functioning as NXIVM's lawyer during this period.

With respect to the Interfor retainer letter, he signed it as NXIVM's lawyer, and he provided in the retainer agreement that the information or the work product of NXIVM would be maintained confidential only subject to the work product protection.

When Mr. Ross and his counsel get that information, they have a choice. They can do it the right way, or they can do it the wrong way. They did it the wrong way.

They said, look, we got this juicy information. We can put all of this salacious stuff about the megalomaniacal sociopath and murder on a cruise ship, which they invented,

and we can put it in the public record and look what we really can do to NXIVM now.

Based on the information that was in the Interfor report, based on the letter that we sent to them, they had almost the exact opposite obligation. They were supposed to cease, notify and return, as we put it, and that is the same obligation that is now codified in Rule 26(b) that I referenced earlier. It is also a subject of numerous court decisions in this district and elsewhere. When you receive inappropriately revealed confidential information from your adversary, you are not supposed to then put it in an amended complaint. You are not supposed to then issue a subpoena to go get some more.

You are supposed to find out why you got it and whether it is indeed subject to a claim of protection. You are not supposed to take the steps that Ross has taken once you receive this information, unless and until the Court has determined that they have the right to do that. This Court never determined that. Therefore, we seek to quash the protec -- the motion -- excuse me -- we seek to quash the subpoena to Interfor, as well as to oppose the amendment.

Indeed, courts have taken this obligation so seriously, that there are cases in which counsel who receive such information and act on it have been disqualified. Obviously, we didn't seek that in this motion, but it is a

measure I think of just how inappropriate the subpoena was here, that courts in similar circumstances have granted disqualification orders.

The issues with respect to the motion to quash, I think the crime fraud exception is probably the one that is going to occupy my adversary's argument the longest, so let me just jump to that.

Quite simply, there is no evidence as opposed to speculation of any crime or fraud having been committed here. There is no evidence at all.

There is a probable cause showing that is necessary. It has to be supported by the evidence, and the cases suggest that the evidence that you rely on cannot be the inappropriately revealed materials that are in your possession. And we got Mr. O'Hara speculating that there was some bribery going on, although even Mr. Ross denigrates that theory.

We have Mr. Ross speculating there was some murder that was going to go on, which is just pure bunk, just nonsense. He made it up.

He copied together a few quotes from newspaper articles and put some together, so that they come to the conclusion that NXIVM likes to murder even its adversaries. It is utter nonsense. I've never seen anything like it.

If the Court felt there was enough to look at it,

and believe me, I do not suggest in any way that we think there is, quite the opposite, the remedy is I think spelled out pretty clearly in Haines. The first instance would have to be an in-camera inspection, not open the flood gates and let Ross have a field day asking questions about things that were subject to a confidentiality obligation and things like that.

With respect to the sting operation, what we call the sting operation, the operation where Mr. Ross was interviewed by Interfor in the guise of a NXIVM client seeking his help, we think the cases are directly on point, Gidatex and Apple Corps, dealing with similar circumstances.

Again, there is no impropriety there, because the Apple Corps and Gidatex cases, even if the Court were to feel they were inapplicable, we believe the question is close enough that under the cases that say work product privilege is not vitiated unless there is a clear violation, the Court could not or should not find that work product protection has been vitiated here by virtue of its different reading of the Apple Corps or Gidatex case.

Lastly, on this motion Mr. Ross concedes at pages 12 and 27 of his opposition on the motion to quash, that the information he is seeking is irrelevant, that his only basis for seeking this information is with respect to the proposed amended pleading, and therefore, a subpoena ought to be

quashed on that basis and admittedly seeks irrelevant information. There is no basis for such a subpoena.

Thank you, your Honor.

THE COURT: Thank you.

Does Interfor want to be heard?

MR. WINDT: Whichever you prefer, your Honor.

THE COURT: Well, yes, I think we should hear from you.

MS. WINDT: By way of background, Interfor is an international investigation firm, whose clients are Fortune 500 companies, major law firms, and a number of western governments.

According to Mr. Ross, Interfor's investigation triggers the application of the crime fraud exception. This morning Mr. Norwick referred to Interfor and NXIVM's elaborate scheme. I believe the elaborate scheme he is referring to is a sting operation, an undercover investigation. This is routinely used by both private investigators and law enforcement agencies. It's not criminal or fraudulent.

Mr. Eggers just went through Gidatex and Apple Corps, which is well detailed in our papers, and we explained why Mr. Norwick's attempt to distinguish these cases fails. I will not take the Court's time because it is in the papers.

I would also add that if this Court were to hold that Ross' broad assertion that Interfor's undercover investigation was subject to the crime fraud exception, it would have far reaching implications. All undercover investigative work, whether done by private investigators or a member of the law enforcement community could become discoverable, because all undercover investigations are inherently deceitful.

In addition, Ross urges the Court to apply the crime fraud exception because the Interfor report gives limited information about Ross' bank and phone records.

Today and in the papers, Mr. Norwick referred generally to ongoing crimes or frauds today. He listed maybe it was bribery, maybe it was pretexting, and then he went on to say, well, you know, maybe it was some other improper means. In short, Mr. Ross and his counsel don't know how Interfor obtained this information, and all they can do is purely speculate, and it is form of law that pure speculation is not enough to trigger the crime fraud exception, and because he has no actual evidence of crime or fraud, Mr. Ross urges the Court to apply the crime fraud exception simply because Interfor possessed limited information about the phone and bank records, and this is not sufficient under the standard set forth in Haines Mr. Eggers just explained.

So here where Ross can present no evidence, other than the Interfor report itself, the crime fraud exception is not triggered.

THE COURT: Thank you.

MR. SKOLNIK: Thank you, your Honor.

The Court has already noted that that light should shine on what has happened here.

Let me note at the outset that these subpoenas are relevant to Ross' proposed counterclaims and to a likely motion seeking sanctions for NXIVM's litigation.

Simply stated, Ross and the Court are entitled to know what it is that Interfor and NXIVM learned through the improper extrajudicial discovery they obtained from my client, and how they obtained his bank and telephone records.

NXIVM doesn't even address our argument that the information sought by the subpoenas is relevant to prosecution of our counterclaims, or our pursuit of sanctions, and of course, none of the cases that NXIVM cites holds that the relevancy of a subpoena is determined only by the allegations in a complaint and not by the allegations in a counterclaim, and NXIVM can't with a straight face make that argument.

I'll also plan to address NXIVM's wholesale implication of privilege for all documents related to

Interfor's conduct rather than approaching privilege on a document-by-document basis, as the law would require.

But, let me start by addressing the crime fraud exception and its sure applicability here.

As we explained through the case citations in our briefs, the circumstances under which the crime fraud exception applies are extremely broad. The exception requires the disclosure of otherwise privileged communications or material obtained in the course of the attorneys' duties on the client's behalf that are made or performed in furtherance of a crime fraud or other misconduct that is fundamentally inconsistent with the premises of the adversarial system. That is a close paraphrase of a case called Gutter v. E.I. Dupont. I will skip the case citations. If at any point you want one, I will give you the specifics, but that is a Southern District of Florida case, but several federal cases are in accord.

Now, with the exception -- the exception has a similarly broad sweep with respect to the work product doctrine. In a 1994 case from this district, Ward v. Maritz, the Court explained that protection of the work product document may be vitiated by the unprofessional or unethical behavior of an attorney or a party.

New Jersey state law reflects those very same principles. In Fellerman versus Bradley, the New Jersey

Supreme Court held that where a client seeks the assistance of an attorney for the purpose of committing a fraud, a communication in furtherance of that design isn't privileged.

And the Ocean Spray Cranberries case explained that the crime fraud exception under New Jersey state law encompasses, and this is a quote, "virtually all kinds of deception and deceit, even though they might not otherwise warrant criminal or civil sanctions."

Now, one of the cases that NXIVM relies on extensively throughout their papers, Maldonado, lists the traditional elements of the attorney/client privilege under federal common law as articulated by the Third Circuit, and the Third Circuit's list includes that the communications must not be for the purpose of committing a crime or tort.

NXIVM quotes this very list, and this very requirement on page eleven of its moving brief. But now painfully aware that the communications at issue here involving their alleged attorney, Mr. O'Hara, were demonstratively made in furtherance of the tortious investigation that it undertook with Interfor, NXIVM is making a transparent attempt to extricate itself from the grip of that Third Circuit list.

NXIVM tries to do that by suggesting, well, it's not just any old tort that would qualify as a fraud for the

purposes of the crime fraud doctrine, and they try to imply that the torts that we have alleged are not sufficiently serious to merit application of the exception. But neither NXIVM nor Interfor has come up with a single case even suggesting that the types of crimes and torts and unethical conduct that we have alleged are somehow outside the ambit of the crime fraud exception, and I submit that they should instead be viewed as sitting at the red hot center, the sort of abusive conduct that the exception is meant to deter.

In furtherance of NXIVM's theory, that the exception as construed by federal law doesn't apply here, NXIVM cites to one case from this district, the Prudential v. Mozzaro case, and they cite that for the proposition that the federal common law crime fraud exception is narrower than the New Jersey State rule. But, your Honor, NXIVM entirely misconstrues the Prudential case. It relies or NXIVM relies on a single sentence which reads: "The crime fraud exception does not extend to tortious conduct generally, but is limited to communications to and from an attorney in furtherance of a crime or a fraud."

And NXIVM places great stock on the fact that the court referred to fraud rather than tort.

Well, a reading of the Prudential case demonstrates that any narrowing in the federal crime fraud doctrine as compared to New Jersey state law simply requires under

federal law that the tortious conduct at issue be in furtherance of a crime or fraud.

The Prudential case doesn't narrow or diminish the sweep offending activity encompassed by the New Jersey state cases. Those cases hold that notions of fraud apply to a wide range of dishonest activity.

So what the Prudential case reflects is simply that a specific nexus between the supposed fraud and the attorney's consultation has to be shown before the exception can apply. In other words, that the communication must be in furtherance of the crime or fraud.

Prudential itself doesn't consider communications involving ongoing misconduct, but instead addressed only communications regarding alleged past wrongdoing.

Here, where the communications with the punitive attorney O'Hara are directly in furtherance of ongoing crimes and torts, Ross has more than established a prima facie showing that the exception should apply.

There are three major reasons, your Honor, why documents and testimony concerning the NXIVM Interfor investigation are subject to the crime fraud exception:

First, that the investigation violated the anti-contact rule;

Second, that it involved the unlawful acquisition of Ross' bank and telephone records;

Third, that it pursued this bizarre cruise ship plot through a second meeting with Mr. Ross even after Mr. O'Hara, the attorney whose involvement provides NXIVM's only basis to assert privilege to begin with, if he was an attorney, they pursued a second meeting with Mr. Ross even after Mr. O'Hara had resigned and had resigned in disgust.

Let me address each one of those three reasons for you.

The conduct engaged in by NXIVM and Interfor and O'Hara inarguably violated the anti-contact rule. That is prohibited under New York's Disciplinary Rule No. 7104, and that has a New Jersey parallel in RPC 4.2.

That unethical conduct alone would invoke the crime fraud exception. At the time of the contacts, Mr. Ross was a main party to ongoing Northern District litigation. He held important information regarding that litigation and Interfor's extensive interviews were unquestionably a violation of the prohibition against communicating with parties represented by counsel and outside the presence of counsel.

Now, since those interviews were patently a sham, their sole and obvious intent was to trick Mr. Ross into revealing information and making statements regarding that pending litigation outside of the presence of his counsel and without their advice.

The misrepresentations that Interfor used to solicit Ross into these quasi-depositions are strictly written, and neither Interfor or NXIVM cite any case law from any jurisdiction that come close to endorsing that kind of conduct.

Now, NXIVM and Interfor like to emphasize that the 8th Circuit's very persuasive, and I suggest to your Honor completely germane opinion in 2003 in a case called Midwest Motor Sports versus Arctic Cat Sales, Inc., they like to point out that it hasn't been much cited by other courts in the few years since it came down. Parenthetically it has been cited repeatedly in Law Review articles and other discussions of attorney ethics.

I would suggest that the relative paucity of citations in case law likely demonstrates nothing so much as that very few litigants have had the chutzpah to do what it is NXIVM and Interfor did here.

The Midwest Motor Sports' court found that an investigator's attempt to solicit admissions from even a low level employee of a party violated the anti-contact rule, and here where Ross was himself the named party, the conduct was not to put too fine of a point on it, your Honor, was egregious at about a twelve on a ten-point scale, and to try to climb down off of that scale, NXIVM and Interfor relied principally on the Apples Corps and Gidatex cases, where

unlike here, undercover investigations were undertaken only to seek out ongoing misconduct by an adversary.

In the Gidatex case, a case from the Southern District of New York, the plaintiff used private investigators who posed as consumers and who spoke, quote, only to nominal parties not involved in any aspect of the litigation, and even then made no attempt to trick those sales clerks, because that is what they were, into making statements that they otherwise wouldn't have made.

Apple Corps, which is a case from this district, didn't involve ongoing litigation at all. Instead, a licensor had retained investigators to test a former adversary's compliance with a previously entered consent order, and the investigators posed as normal customers in contact with the licensees's low level sales representatives.

NXIVM essentially argues that the anti-contact rule doesn't apply to undercover investigators at all. But if the rule doesn't apply in this situation, your Honor, I don't know when it would apply.

Interfor's brief doesn't even address the anti-contact rule. It focuses on the entirely separate issue of whether or not Interfor's investigation was deceptive. And on that issue, which I think pretty astonishingly, it claims with a straight face that its

investigation was, and this is a quote, the equivalent of an ordinary business transaction for Ross, one in which Mr. Aviv and Ms. Moody and the distraught mother, Susan L. Zuckerman, and I always think that the middle initial is a nice touch, were merely posing as potential consumers of Mr. Ross services.

But Ross' argument that the Interfor interviews are subject to the crime fraud exception, which is a violation completely separate and distinct from the acquisition of his bank and phone records, Ross' argument is that that is a violation of the anti-contact rule. It has nothing to do with whether or not the investigation was deceptive, so NXIVM and Interfor have no reasonable argument that they have not violated the anti-contact rule and neither Apple Corps or Gidatex give them a reasonable argument that they have.

And -- nor, of course, does the case law establish that any privilege can properly shield NXIVM and Interfor from discovery into their unlawful acquisition of Ross' bank and telephone records.

Now, why do I say unlawfully?

I say unlawfully, your Honor, because we still know of no level way by which they could have obtained those records. We have repeatedly extended an implicit and even an explicit invitation to them to provide such an

explanation to us and to the Court, and they have just repeatedly failed to do so, all of the time trying to hide beyond the claim that we are merely speculating.

Well, to characterize the prima facie evidence of criminal and tortious misconduct that I think jumps out from the pages of the Interfor report as mere speculation, I analogize it, your Honor, to -- it is like them cradling a lifeless body in one hand and clutching a smoking revolver in the other and saying that we're merely speculating that they were the ones who pulled the trigger.

Here, your Honor, it is New Jersey state law that determines how to characterize NXIVM's and Interfor's conduct, and New Jersey state law follows the restatement second of torts section 652(b).

Section 652(b) makes it clear that the invasion of Ross' private records constitutes this tortious intrusion. New Jersey's Appellate Division held in Bisby v. Connolly that the tort of intrusion can be committed -- this is a quote -- by some form of investigation or examination into his private concerns as by opening his private and personal mail, searching his safe or his wallet or examining his private bank account.

And Illustration No. 4 from restatement 652(b) makes it clear explicitly that using a subterfuge to obtain bank records for use in a civil lawsuit constitutes an

unlawful invasion of privacy under New Jersey law.

Indeed, Bisby and other cases we cite in our opposition to Interfor's motion support the argument that even the search through Ross' garbage, which they also admit they did, even that could constitute unlawful activity under New Jersey law.

And Interfor does not deny that if it obtained Ross' bank information from his bank, it would violate the non disclosure provisions of the Gramm-Leach Bliley Act, which has provisions in section -- well, the Gramm-Leach Bliley Act has a provision in Section 15 U.S.C. 6208(c) dealing with receiving information from a bank.

And Interfor points out that 6208(c) applies only to parties who have received private information from a bank, and it repeats the arguments that Ross can't get proof that that is how Interfor obtained the bank records. That is precisely what the subpoenas are intended to find out.

Now, helpfully, Interfor points out that, in fact, that it is in Section 6802(c), but rather it is Section 6821 that carries criminal penalties, so I thank Interfor for reminding us all that if it obtained Ross' bank records from pretexting, it committed a federal offense by violating Section 6821, which criminalizes the obtaining information from a financial institution under false pretenses.

Interfor has steadfastly declined to deny that it

engaged in pretexting, which we have all come to learn recently is a well traveled path for those on Interfor's trade. So instead of entering a not guilty plea to pretexting, its defense seems to be, oh, we're making a mountain out of a molehill here with just four credits and ten debits, what's the big deal.

Well, your Honor, four credits or 400, the Interfor report constitutes prima facie evidence that the acquisition of Ross' personal records is actionable as a tort in New Jersey, and it may well subject someone to federal criminal penalties.

So if NXIVM used its attorneys illicitly to obtain Mr. Ross' private information through Interfor, then the crime fraud exception to the attorney/client work product privilege is unmistakenly applicable since NXIVM plainly, quote, used the lawyer's services to further a continuing crime or tort.

That is the very simple standard that the Third Circuit set out almost three decades ago in a case called In Re: Grand Jury Proceedings. It explained that the Third Circuit, that while the ultimate aim of the attorney/client privilege is to promote the proper administration of justice, and I am quoting the Third Circuit, that end, however, would be frustrated if the client used the lawyer's services to further a continuing crime or tort. Thus, when

the lawyer is consulted not with respect to past wrongdoing, but to future illegal activities, the privilege is no longer defensible, and the crime fraud exception comes into play.

Well, and so it must come into play here. Ross didn't consent to releasing his personal information. We know of no way that NXIVM and Interfor could have obtained it lawfully, no way that their conduct to be other than tortious and fraudulent, and they have conspicuously declined to identify a lawful way.

So, now we come to the third reason why the crime fraud exception applies to NXIVM -- it's because neither NXIVM nor Interfor deny that they plotted to lure Mr. Ross onto a cruise ship, which was at least an effort to trick him and to harass him, to convert him in the quaintly vague allocution of Ms. Keeffe, although I am not quite sure what "convert" would mean here, but NXIVM never claimed to be a religious organization.

The record is clear that by the time that Interfor summoned Mr. Ross to subject himself unwittingly to a second interrogation and to perpetuate the cruise ship gambit, NXIVM no longer had any lawyer acting as an intermediary on its behalf for purposes of asserting the privilege, not even the dissertation from Mr. O'Hara who already resigned in disgust.

So NXIVM doesn't even begin to explain, your Honor,

how any privilege could apply to its communications with Interfor after O'Hara withdrew from whatever the nature of his relationship with NXIVM was. And Mr. O'Hara explained in his resignation letter to Pretext Salzman, that he had become aware of, quote, a variety of activities that he believed to be illegal, including some that he judged to be, quote, clear violations of a variety of civil and criminal statutes and regulations.

Bribery or pretexting anyone?

I don't know.

So if the Court is satisfied that the crime fraud exception may well eviscerate NXIVM, the question arises, well, where do we go from here.

NXIVM's argument that in these circumstances there is no justification for even an in-camera review of the subpoenaed documents is specious, your Honor.

Ross has more than satisfied his obligation to establish a prima facie case to invoke the crime fraud exception. NXIVM and Interfor have both repeatedly cited Haines v. Liggett, insisting that if Ross meets his prima facie burden, which I submit he has already done, they then have the absolute right to offer testimony and argument to show that the crime fraud exception should not apply.

Well, NXIVM has had some seven weeks to respond to our papers invoking the exception, so I would ask them now,

and I would respectfully suggest that the Court should ask them now, is there anything more?

I mean, is there some other argument?

Is there some other testimony beyond what is in their papers and their affidavits and beyond what they have said today in court, that they want the Court to know when it reviews any documents as to which NXIVM may continue to assert privilege, and as to which the Court must determine the applicability of the crime fraud exception.

I would hope that your Honor would urge upon NXIVM, that rather than them pulling a truck up to your back door with the documents that they think you ought to be examining, that they do some very careful screening to make sure that they really want to be claiming privilege for those documents.

I guess another alternative, your Honor, would be in the tradition of the Liggett case would be to appoint a special master to review a big pile of documents, if that is what they want to dump on you. I would certainly suggest if that is the case, that the expense of that special master has to be on NXIVM.

But at any rate, even Interfor has had repeated opportunities to deny that it engaged in illegal conduct, but it has chosen instead simply to hide beyond the Gossimer claim of privilege that NXIVM continues to assert and to

claim, I would suggest, that it engaged only in sort of a garden variety investigative techniques and again to insist over and over again that Ross hasn't yet proven the improper and potentially criminal conduct that the subpoenas are seeking to unearth.

Of course, the Interfor report makes it crystal clear that this is not your proverbial fishing expedition.

Let me also address just briefly, your Honor, NXIVM's total failure to establish the necessary document-by-document basis for privilege as it relates to these motions to quash.

In a case called United States versus O'Neill, the Third Circuit rejected, quote, broadside invocations of privilege, those that failed to designate with particularity the specific documents or files to which a claim of privilege applies. But here NXIVM's entire motion to quash amounts to one elephantized assertion of privilege, and Interfor clings to the elephant's back. NXIVM offers no particularized basis to justify privilege for any given document.

It cites to a District of Massachusetts case for the proposition that a document-by-document showing of privilege isn't required where, quote, nearly every item sought is privileged, but that can't be the case here, your Honor. NXIVM hasn't shown and cannot show how, for example,

if there are any secret tape recordings that Interfor may have made of Mr. Ross while interviewing him, if they can't show that the bank statements that they obtained of Mr. Ross' or its retainer agreement between NXIVM, how could any of those things conceivably be privileged?

Nor can NXIVM demonstrate privilege for any communications that don't involve Mr. O'Hara because Mr. O'Hara was already gone.

And even NXIVM's Massachusetts case --

THE COURT: Mr. Skolnik, can I interrupt you just for a second?

MR. SKOLNIK: Please.

THE COURT: I would like to ask NXIVM and Interfor, how could those things be privileged, what he just said, how Interfor got the telephone or bank records be privileged, how is that attorney/client privileged communication?

MR. EGGERS: Your Honor, I have been listening to him summarize his motion for fifteen minutes and waiting for him to get to my principal argument, which is that he should never have heard about it in the first place because Mr. O'Hara had no business telling him about it.

Therefore, the work product protection, which adheres in the Interfor report and in all of the activities which Interfor undertook, a protection which is widely recognized. It's in the Advisory Committee Notes to Rule

26, investigators have to do their job and lawyers have to rely on investigators, and investigators' work is subject to a work product privilege -- a work product protection.

He keeps throwing around this word "privilege" like we are claiming attorney/client privilege if we were to pick up the phone and call Interfor. That is not what it is about. It is a purest form of work product protection. He keeps misusing the word "privilege." I suppose that is what he has done in his outline, and he's just going to read it again and again. The word "privilege" comes out again, again, again, and again. It is work product.

THE COURT: So that question at a deposition of Interfor is how did you get the bank records of Mr. Ross, you wouldn't be claiming that is attorney/client privilege?

I understand your argument that you are saying it is improper, and they shouldn't have had any of it in the first place, but is anyone claiming that is a privileged communication?

MR. EGGERS: Yes, we would, your Honor -- not privileged per se. It's not privileged per se. It's not attorney/client privilege, but what we have is an intrusion into a work product relationship, a confidential relationship, the zone that the courts protect around an attorney's efforts to find out the facts to prosecute his case free from the intrusion of his adversary.

Now, am I going to say that his adversary could just intrude and ask the question, what did you do to investigate?

And then say, well, it's not attorney/client privilege, so don't worry about it.

Of course not. It is the heart of the work product protection claim. It's the heart of the work product protection that the federal rules afford us. It is not a privilege. He keeps throwing around the word "privilege" as if this was our attorney that we were discussing this with. It is our investigator. The work product protection couldn't be clearer. It is the core of the work product doctrine, your Honor.

THE COURT: Well, okay. Just to engage in a little discussion, let's assume that is the case, which I think you said is quite an assumption, but assuming that was the case, how else could Mr. Ross get to that information? That information, which, if depending on the answer, would clearly establish a crime fraud.

For example, if the answer was as alleged, we don't know what the truth is, if the answer was that it was a bribery of a bank employee to get records, bank records, private bank records, that would establish an exception, or that would establish certainly the crime fraud exception, which would vitiate both attorney/client and work product

privileges would apply.

So if you say it's work product, and I am just having this discussion because I have questions as to that alone, but if it is, how else could they get this information?

MR. EGGERS: Your Honor, there are any numbers of ways. He could have asked his bank, "Did you give my records to anybody?"

It doesn't have to intrude on my relationship.

First of all, I start with the premise that he should never have had this information. He had how many months to go ask his bank, "Where did you send my records, did you send my records anywhere?"

Remember, there are any number of possible ways that have been suggested for how these records came to be in Interfor's possession. One of them is that they went through the garbage and found records relating to his financial information. Nothing wrong with that --

THE COURT: No, and there's nothing wrong --

MR. EGGERS: -- so he's going to say, either A or B. I have to be able to determine if it's A or B in order to meet the crime fraud exception. He's putting the cart before the horse. He has to have evidence to tell us it is A or it's B, not invoke the presumed answer to A or B, and say now I met my burden.

THE COURT: If it is privileged in the first place, I might agree.

But go ahead, Mr. Skolnik. I interrupted you.

MR. SKOLNIK: Thank you, your Honor.

And just to pick up on the final point that was being discussed here, I mean quite candidly, I think that you put your finger on it.

Mr. Ross hears from a news reporter that there has been this thing to get him on a cruise ship, and the reporter starts quoting to him the exact amounts of deposits and checks drawn on his bank account, and he gives it to his attorneys. And I would suggest that faced with that kind of thing, it is inconceivable that he is not entitled to act upon that kind of knowledge. And the notion that what should have happened instead is that he should have called, number one, a bank that was no longer in existence because it was Fleet Bank, and Fleet Bank became Summit Bank, and Summit Bank became Bank of America, and there may have been two or three in between, that he should have been able to find somebody representing Fleet Bank to be able to make reliable representations about whether or not one of its employees may have been bribed.

You know, it goes nowhere, your Honor. So, you know, again, NXIVM is arguing that every document and communication is -- Mr. Eggers doesn't like the word

"privilege," although I must say that privilege is what they argue repeatedly in their brief, but that all of this material somehow is protected regardless of its purpose, regardless of its subject matter, regardless of its date or regardless of the participants, including whether or not Mr. O'Hara or anybody else was still involved in the loop.

The example Ms. Eggers gave of some communication between NXIVM and Interfor, well, if there was no lawyer involved here at all, I'm not quite sure where any claim of privilege comes from.

At any rate, you know, I mentioned the possibility that NXIVM or that Interfor tape recorded its sessions with Mr. Ross. Frankly, given the sophisticated intelligence operation, I would be surprised if they didn't. But at any rate, in the Ward v. Maritz case, this Court noted the express holding in New Jersey law that secret tape recordings are not subject to the work product privilege.

Indeed, the case notes that if such recordings are directed by an attorney, then they violate the anti-contact rule as well under New York law. So it is beyond reason that communications with an adverse party, like Mr. Ross, could be subject to any sort of a protection or privilege, and none of the investigative cases that Interfor tells us about suggest otherwise.

As a final matter on the motions to quash, since

the crime fraud exception establishes that none of the documents or information at issue was actually privileged, there is no basis for NXIVM's several complaints that Mr. Ross has improperly used the information.

NXIVM seems to rely on the notion that the subpoenas were the result of Mr. O'Hara's allegedly unethical revelation to the news reporter, Mr. Hardin, but the privilege log that NXIVM filed publicly in the Northern District, which we also reviewed prior to even serving the subpoenas, would have provided both sufficient justification for us to subpoena Interfor, in any event, and all of their misconduct would have eventually come to light under any circumstances, even without the communication of the Interfor from Mr. O'Hara.

Your Honor, the motions to quash have to be denied.

THE COURT: Thank you.

MR. EGGERS: Your Honor, I actually had a few other comments besides what the Court asked me about.

THE COURT: Go ahead.

MR. EGGERS: Mr. Skolnik started his argument by quoting the standard that the crime fraud exception is extremely broad. In the Prudential case he accuses us of reading -- misreading that case, excuse me.

Prudential was actually in accord with other courts. We cite the 10th Circuit here for the proposition

that the crime fraud exception does not extend to tortious conduct generally.

We know for sure Prudential Insurance itself also said that the federal rule with respect to the crime fraud exception is broader in New Jersey than it is in the federal courts, so there is not some extremely broad crime fraud exception. It is mere deceit is not sufficient. It's got to be a fraud. It is not any old white lie told by an investigator to somebody they want to investigate to try to get them to talk.

With respect to his showing that there is a crime or fraud here, he cites the anti-contact rule. There is no anti-contact rule exception. In fact, in New York, you cannot state even a civil cause of action based on a violation of the rules of evidence. A client can't, a third-party can't. It is not even the basis of a claim of civil liability in New York, much less a crime under fraud.

The bank records, I heard him say -- I think I addressed it for the most part, but I just heard him say we can't ask the bank because if it was bribery, they won't tell us. They keep shifting back and forth. This is the nature of what we are dealing with here.

It started as bribery. Then they said, no, O'Hara was assuming that, we think that's wrong. We think it's pretexting, which by the way, if there was pretexting, the

pretexting would be a very simple question to ask the bank, "To whom did you mail my records? Did you mail them to me, or did you mail them to someone else?"

And the bank is not in on it, so nobody at the bank would be in on it, and the bank would have every reason to answer that inquiry.

So he shifts back from that, which would have been a perfectly rational question, ask your bank, if you wanted to know the truth, and now he goes back to his original theory. There was bribery. He is still speculating as to the various ways in which this information might have been obtained illegally, but he has no idea how it was done. It is purely speculating, that it doesn't meet his burden under any case.

As for the plot to lure Mr. Ross on a cruise ship and this crime fraud exception, and this heinous act of plotting to get Mr. Ross on a cruise ship, I am not sure where the crime or the fraud comes in or when. He is being paid to do it --

THE COURT: Well --

MR. EGGERS: -- by the retainer agreement.

THE COURT: -- maybe not a crime. I don't know, but certainly what you could call a fraud. In other words, the whole thing was false.

MR. EGGERS: It never happened, Judge. He never

went on the cruise.

THE COURT: I understand.

MR. EGGERS: He never went there. It never happened.

How is it a crime or fraud?

Even if he did, is it crime or a fraud for them to pay him his usual rate, have him come work for somebody, and it turns out that it is not a real client of NXIVM, but somebody who has posed as one. I don't know that that is a fraud within the meaning -- I don't believe it is a fraud within the meaning of the law.

THE COURT: I don't know about that, but he was certainly a represented party, a party himself in this lawsuit, and certainly you couldn't have an employee of your law firm call him up and say he was someone else and interview him under those circumstances, could you --

MR. EGGERS: No.

THE COURT: -- either under New Jersey or New York ethical rules?

MR. EGGERS: There are numerous situations in which parties have been held, and this is in Apple Corps and Gidatex, to be able to send investigators to the premises of their adversary, so that they might uncover whether the adversary is engaged in wrongdoing. It happens every day.

THE COURT: Is there any limit on that?

Where do you draw the line on that?

In other words, those cases are dramatically distinguishable factually, which I will get to in a minute. But is there any limit?

I read what Interfor in the brief said. Is there any limit on that? In other words, are parties free to do anything they want to try to investigate what the other side is doing?

MR. EGGERS: Nobody is suggesting they are, Judge, but we don't believe that the kind of investigation that was done here falls outside of the kind of investigation that was done in Apple Corps or Gidatex.

In any event, with respect to the contact with Mr. Ross, we are not dealing here once again with the anti-contact rule exception, and it just doesn't qualify under the standard enunciated in Maldonado, Prudential or cases cases like Motley v. Marathon Oil. A crime of a fraud is necessary, not any simple deceit.

I think that's what I wished to respond to.

THE COURT: Thank you.

MR. WINDT: Just briefly, your Honor.

Mr. Norwick seems to fault Interfor for not committing or denying the allegations that he makes. It is not Interfor's responsibility to provide Mr. Ross with free discovery at this point. It is Mr. Ross' burden to prove the

application to the crime fraud exception. And if he can't do it, we don't need to assist him.

Secondly --

THE COURT: But that only applies if something is privileged. See, you folks are not really taking that into account. In other words, the crime fraud exception is only if something is privileged. If it is not privileged, then he could ask the question assuming that it is relevant. That is a separate issue. I can address the relevance, but I understand your point.

MS. WINDT: The second point also on the crime fraud exception, your Honor, Mr. Norwick asked you to change the standard set forth in Haines. He said he doesn't know how the records were obtained, and unfortunately for Mr. Ross -- excuse me -- unfortunately for Mr. Ross, we understand he wants to get his nose under the tent, but there is a high bar. He must satisfy the standard.

If the crime fraud exception applies, it needs to be satisfied, and it is set forth, and we highly value the attorney/client privilege, and that is why the bar is set so high.

If everyone said, well, I know something funny went down, so I should be entitled to some sort of a discovery to figure out how they got it, that's not where the law is right now, so we ask that the Court not be a trailblazer and

extend the law beyond where it is is now under the crime fraud.

Thank you, your Honor.

THE COURT: Thank you.

MR. SKOLNIK: Your Honor, I am very pleased to be confused with Mr. Norwick because it makes me 30 years younger than I am.

I have to point out the irony, Interfor claiming that Ross is trying to get free discovery from Interfor. Yeah, sure, they pay him 2500 bucks to depose him twice without his lawyers, but we are not finding it free discovery, but --

THE COURT: Okay.

These are the motions that I described before. Rule 45 provides that a Court may quash a subpoena that requires disclosure of privileged matters.

Certainly in the briefs that were submitted, which I read very carefully, the basis of these motions to quash are the attorney/client and work product privileges, and most of it is really dealing with attorney/client, but also work product. And I am going to refrain right now, I have it as part of my notes, as to all of the requirements and elements of the attorney/client work product doctrine. It is certainly Hornbook law, but the well experienced counsel in this courtroom know the elements and requirements I

assume of these doctrines.

The motion is based on the claim by Interfor and NXIVM that the entire Interfor investigation, which Interfor refers to as a "sting operation" is protected from disclosure by these privileges.

There is also an argument that there was nothing unethical about Interfor's activities. Ross made various arguments, including that if the attorney/client privilege or work product applied, which is denied, it would be vitiated by the crime fraud exception. I must say that this motion and the briefing was quite complex, and there are numerous arguments which were touched upon in court and need not have been addressed in court because they were well presented in the briefs.

After considering the issue, the Court will deny both NXIVM's and Interfor's motion to quash the subpoenas for the following reasons:

First, plaintiffs and I also say NXIVM have failed to meet their burden to establish the elements of the attorney/client work product privilege. I think at the outset I have to say that the first issue is that there is a very substantial dispute about whether Mr. O'Hara was a lawyer for NXIVM, in other words, whether an attorney/client relationship existed at all.

Both sides agree it is a disputed fact issue in an

action between NXIVM and O'Hara pending in the Northern District of New York. Suffice it to say that from the Court's review of what has been submitted, there is strong evidence on both sides of the issue, and it is diametrically opposed. O'Hara disputes he was ever NXIVM's lawyer, was not counsel in the case, was not admitted to the bar in New York. He says he was a business consultant, never provided legal services. He says he didn't speak to certain people who say they spoke to him. All of this is squarely disputed by affidavits submitted by NXIVM, not only affidavits, but documents which refer to legal services.

The Court believes that this will ultimately be a credibility issue. I can't tell, of course, because I have very little before me, but suffice it to say that this is a major disputed issue, and it is very difficult to establish that there is an attorney/client privilege when we are not sure whether there really was an attorney/client relationship. And given the directed contrary claims, it seems to me there will be a credibility issue, but perhaps not. I don't know what the proofs will be. But in any event, I will not decide it now. I'm not being asked to decide it now, and I won't decide it now, and I don't have before me what is necessary to decide it now. But the statements that were made by Mr. O'Hara are sworn statements. The statements that were made by NXIVM's people

are sworn statements, so there is a question as to who will be believed, but I will proceed with the analysis assuming that Mr. O'Hara was NXIVM's lawyer, even though that has not been established.

I do want to reiterate that the burden of showing and proving each and every element of the privilege is the party asserting it. In re Grand Jury Investigations and Torres v. Kuzniasz, these are cases that are often cited in this Circuit.

Plaintiffs have failed to establish other elements of the privilege, in part because they have made a rather unexplained, extremely overbroad blanket assertion of privilege claiming, and I will quote, that "this subject necessarily and completely implicates the attorney/client privilege, the work-product doctrine and an attorney's ethical obligations to maintain client confidences." (Plaintiff's Reply Brief at 19.) Therefore, NXIVM concludes there is no need for a document-by-document review of materials.

There is no privilege log in this case. There is no discussion of specific documents or communications.

Indeed, much of what is sought are not communications at all. Much of the information sought by the subpoenas is not and could not be privileged at all. Some things could or may be privileged, others not at all.

This extremely overbroad blanket assertion of an all encompassing privilege is entirely unsupported by law and improper. The Court can think of many, perhaps hundreds of questions that could be asked that would not encroach on privileges of any kind.

In any event, in this Circuit claims of privilege "must be asserted document by document rather than as a single, blanket assertion." Rockwell International is the case. The Circuit has rejected "'broadside implications of privilege' which fail to designate the specific documents to which the claim of privilege applies." Torres v. Kuzniasz, United States v. O'Neill and Wheaton v. United States.

Plaintiffs have failed to undertake the showing and they have attempted to argue just what Third Circuit has said that you can't do. A broad invocation of privilege is a failure to "designate with particularity" the nature of the document for which they are asserting privilege, and this is fatal to their motion to quash.

As to the depositions, the same thing. If there are depositions, there are many questions that could be asked that would not be privileged, and those that were privileged could, assuming the crime fraud exception doesn't apply, that would have to be objected to and addressed at that time.

I want to make clear that what I just said is the

basis of the Court's denial of the motions to quash. As a result of the arguments and the circumstances here, the Court is going to go further, not really making final and formal decisions, but strongly stating the Court's inclinations. This is being provided for a variety of reasons. I feel it is necessary given the arguments that were made, the time spent on it, and to help proceed as the case goes forward.

If what is alleged is true, and if the attorneys supervised the Interfor investigation, the Court has little doubt that there was a violation of the rules of professional conduct.

NXIVM states that while this matter was pending in the Federal District Court in the Northern District of New York, its trial counsel, Nolan & Heller, recommended that NXIVM retain Interfor, and that Joseph O'Hara, who may or may not have been its attorney, oversaw the Interfor investigation.

If this is so, and if there is not another explanation or not more to it, this conduct violated the Disciplinary Rules of New York's Lawyers Code of Professional Responsibility, which provides at 7-104:

"During the course of the representation of a client, the lawyer shall not:

"1. Communicate or cause another to communicate on

the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so."

It is alleged here that NXIVM's lawyers have caused Interfor "to communicate on the subject of the representation with Ross, knew that Mr. Ross was represented by a lawyer in the matter, and did so without the consent of Ross' lawyers or authorization by law."

Mr. Skolnik referred to Ward v. Maritz, a decision from this District in which the District has recognized that work product may be vitiated by the unprofessional or unethical behavior of an attorney or a party.

Here, it is true that it has been described by the plaintiffs as an elaborate subterfuge, but I think that is an apt description. Plaintiffs' investigator essentially deposed defendant Ross, a represented party in this case, twice outside of the presence of his counsel. If this was supervised by lawyers, it is unethical, and it is misconduct in this litigation, and Ross is entitled to and should be and is permitted to learn about this "investigation" and what it revealed. The Court believes that what occurred here was unfair to the plaintiffs. No case involving investigators is analogous, none had facts that were similar

to this.

This is beyond any situation in which an investigator fails to correct the misapprehension that would involve an affirmative misstatement made in an effort to solicit verbal responses especially in an interview of an individual represented party outside the presence of his counsel, and this was done under false pretenses and in an effort to have them meet with him. That kind of activity is inappropriate in civil litigation, and the Court is aware of no case that comes close to this situation.

The Midwest Motor Sports v. Arctic Cat Sales, 347 F.3d 693 (8th Cir. 2003) in this Court's view is on point, although nowhere as egregious as what the Court believes occurred here. In Midwest Motor Sports the investigators posed as consumers in an effort "to elicit evidence in a pending civil case on behalf of lawyers that hired him." The Court said, "The purpose of the undercover ruse was to elicit damaging admissions from the parties to secure an advantage at trial." In that case the Court found that such tactics fell squarely within a different ethical rule as well, involving fraud, dishonesty and deceit.

In that case the District Court imposed evidentiary sanctions against the party that was responsible. The Court rejected the manufacturer's arguments that the investigator was sent to speak to only low level employees to become

familiar with the relevant product line.

The Court stated: "Even if these factual assertions were true, lawyers cannot escape responsibility for the wrongdoing they supervise by asserting that it was their agents, not themselves, who committed the wrong...since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject matter of the representation, she may not circumvent the rule by sending an investigator to do on her behalf that which she herself is forbidden to do."

The Court goes on, and this is in very strong terms. The Court stated that evidentiary sanctions were further justified since the investigator's "interviews took place under false and misleading pretenses, which [the investigator] made no effort to correct."

The cases cited by the plaintiffs are clearly distinguishable. They involve investigators dealing with low level employees of corporations basically going into the places to see if certain counterfeit items and that sort of thing were being sold. It is not akin to a detailed scheme with actors and in-depth interviews with a represented individual as opposed to low level salespersons on the floor of a furniture store, which relates to one of the cases. I want to address the cases in more detail.

Apple Corps is a case coming out of this district,

and as it relates to Rule 4.2, that once again is more analogous to the the factual scenario that I just described.

> "4.2 cannot apply where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as members of the general public to engage in ordinary business transactions with low-level employees of a represented corporation."

The Court further stated that 4.2 is intended "to prevent situations in which a represented party may be taken advantage of by adverse counsel."

Now, none of these cases, and that includes Gidatex v. Campaniello Imports, and in that case it involves speaking to "nominal parties who are not involved in any aspect of the litigation." 82 F.Supp. 2d at 126. Also unrelated is Cartier v. Symbolix, another one. None of those cases involve someone who is a member of the litigation control group, but even more importantly, to an individual represented party in the litigation, none of those cases involve the level of detail that went into this plan.

The Court believes this conduct is improper, well beyond the rules of litigation, the rules of the game. If this kind of sting interviews of represented parties is permitted, there would be no stop to what could occur in

civil litigation. I pose the rhetorical question, where does this end, where does this lead?

It was said in court today that there is no problem with something being deceitful. It has to be deceitful. Well, if that's the case, and there's no limit on it, I suppose I could imagine situations where one could impersonate an employee of the represented parties' law firm. You might get to the point where investigators or actors and actresses could represent themselves to be members of part of the court or an employee of the court. This kind of conduct is not sanctionable. There is absolutely nothing. We have done an extensive search, and it is a very serious matter in this Court's opinion.

That gets to the next question, which is: Has there been a prima facie showing sufficient to vitiate the attorney/client privilege and work-product doctrine in this case, if it applies. I am not making that finding now. I want to make it clear, but the Court's inclination is that a prima facie showing - inclination, mind you, not a decision - is that a prima facie showing has been made. The crime fraud exception allows for disclosure of otherwise privileged communications when they are made with the intent to further a continuing or further a crime of fraud. It applies to both attorney/client privilege and work product.

I am not going to repeat the entire standard in

terms of how it works with Haines v. Liggett and In re Grand Jury Subpoena and the in-camera review, but the Court takes note of it. And if we get to the point where I have to make that decision, I will conduct whatever in-camera review is necessary, if I am not satisfied at that point that there has been a complete vitiation, if that is the way to put it, of the privilege.

Now, the Court believes that a flagrant violation of the rules of professional conduct could be a sufficient basis to pierce the attorney/client work product doctrine. NXIVM and Interfor argue there is a strict requirement that the activity complained of must be an actual crime or fraud, but this ignores the basic purpose of the privilege and the reasons for piercing it. The Third Circuit has stated expressly that the "ultimate aim" of the privilege would be frustrated if the client used the lawyer's service to further a continuing crime or tort. In re Grand Jury Proceedings, 604 F.2d 798, 802 (3d Cir. 1979)

In a well-known treatise, the attorney/client privilege and the work product doctrine in Epstein, Fourth Edition 2001, it is stated that:

> "Even if few courts have held that communications made in the commission of a garden variety tort vitiate the availability of the attorney/client privilege, there is no doubt that courts are

recognizing a wider range of improper behavior that will do so. For example, some courts have held that a lawyer's unprofessional or even unethical behavior may vitiate the availability of the privilege."

A number of courts that have considered the topic have vitiated the privilege on a showing less than that of a crime or fraud and some even on the basis that "the conduct is fundamentally inconsistent with the basic premises of the adversary system." In re Sealed Case, 676 F.2d, 793, 812. In re Sealed Case, 754 F.2d, 395, Irving Trust Co. v. Gomez, 100 F.R.d. 273, 277. In 2006 in this district, Watchel v. Guardian Life Ins., 2006 WL 1286189, the courts have held that "under federal law, the exception can encompass communications and attorney work product in furtherance of an intentional tort that undermines the adversary system itself." And, of course, we have the Ward v. Maritz case, where it states that "Protection of the work product doctrine may be vitiated by the unprofessional or unethical behavior of an attorney or party."

Now, we had the whole discussion of the bank records and phone records. We don't know the answer to that. That is one of the reasons that there will be discovery here. That discovery is not privileged in any event. As to how that occurred, depending on the answer to

that, there may be more information on crime and fraud.

Without deciding the issue, the Court is inclined to say that Ross presented the Court with a sufficient basis to conclude that a common law fraud itself has occurred. Fraud consists of "a material misrepresentation of fact made with the knowledge of its falsity, with the intent the other party will rely on that misrepresentation, and the other party does so to his detriment." That citation is J. Fitzpatrick v. Solna, 1991 WL 186661 out of this district. Even if there is a lack of damages on that common law type of fraud, the law in this state is that party "should be able to vitiate his rights through an award of nominal damages."

Now, I want to deal with the issue of relevancy. The information sought, at least some it, it's hard to say because, once again, we are dealing more with generalities at this point is relevant to the litigation misconduct in this case. It is hard to imagine that a party who has interviewed, if this occurred, if this occurred, by a lawyer's agent on two occasions, when it clearly was represented -- it shouldn't be able to find out what information there is, if there are tapes of that, and that sort of thing, and that is only fair.

It is even possible that if depending on the extent of the misconduct that that could rise to the level of a

fraud on the Court, in which case that could lead to various results including sanctions, and that provides a basis for the relevance of this discovery.

There is further information needed on this very motion or on this very issue which permeates all of the motions that we are hearing today, and the discovery is certainly called for.

There would also be relevancy to Ross' proposed counterclaims. However, I have not yet addressed whether they would be permitted or not.

The argument that the subpoenas are based on privileged information, there is some question because the subpoenas were served before Ross ever spoke with Mr. O'Hara.

There is an argument of waiver made. I don't know that I need to get into waiver. I am not making any decision on waiver at this point, but there are serious waiver issues in this case, and one of them is the extent that Keith Raniere participated in any of these meetings. He has been described as "a full-time volunteer providing services to the organization" in NXIVM's reply brief.

Certainly, any "voluntary disclosure to a third-party waives the privilege." There is a lot of law on this subject or various lines of reasoning as to whether the parties have a common interest. Some courts require that

there be a common legal interest, and others a common financial interest. None of this has really been established, and it is very easy to say that because Mr. Raniere founded the organization, that he is protected by the privilege, but the law is quite strict in this area, so that is an issue. I am not deciding it. I am just throwing it out there.

Although this hasn't been addressed by the parties, it occurs to me that there is another individual who may have been involved here, and that is again if any of this occurred, if the actress who is referred to as Susan Zuckerman, I don't know who this party is. I don't know if she is an employee of a party or an agent of a party, but even assuming there was a privilege, all the Court knows at this point is she is a third-party. If she participated and things were disclosed to her, that could constitute a waiver.

Once again, to reiterate, I am not making a ruling on crime fraud or waiver, but I am denying the motions to quash the subpoenas. I think much of the information that is sought is not in any way privileged, and I think that the plaintiffs are entitled to this information. I think the Court is entitled to some further information on the subject.

Okay. The final motion is a motion to amend to

assert a verified counterclaim in this case.

MR. EGGERS: Before we address that motion, not by way of reargument --

THE COURT: That's okay.

MR. EGGERS: -- just a question --

THE COURT: Sure.

MR. EGGERS: -- the Court has said that the discovery will go forward, but is not vitiating any claims of privilege based on crime fraud right now.

May I suggest to the Court, that given the history here of disputes between ourselves and Mr. Ross' counsel, that we will be shortly back here with an awful lot more to discuss. I say that by way of background for a suggestion that in this instance a special master might be appropriate with respect to that issue because I'd just as soon not waste our time disputing whether this or that is privileged.

THE COURT: I appreciate the suggestion, Mr. Eggers. It is not a bad one. I will address case management issues after today, but I also want to point out that I went through that rather lengthy probably boring exposition for a reason, too, to give you my strong inclinations. Of course, you have to preserve your rights and get rulings, so you could have a record to do whatever you think you want, but I want to just make clear I was trying to give certain guidance there. But, yes, we may

indeed have to do that notwithstanding it, but let's deal with that later.

MR. EGGERS: Thank you, your Honor.

THE COURT: Mr. Skolnik, you have a motion to amend. I have read it very carefully, and I have some questions. But if you want to be heard, I will be happy to hear you.

MR. SKOLNIK: Well, your Honor, I would be happy to simply answer questions. I don't want to bore your Honor. I don't want to waste time going over sort of well traveled ground.

I think to summarize, that there is no legitimate basis to deny amendment here. I take to heart the comments that your Honor had made earlier, that you think that the proposed pleading has some inappropriate assertions, and I can assure your Honor that they would be moved before we actually filed it.

I am also going to take into consideration quite candidly the suggestion that we may have a cause of action that we had not yet previously pled, which is common law fraud, but any under circumstances, your Honor, rather than belabor the well-known presumption in favor of permitting amendment, I will be happy to answer questions.

THE COURT: Okay. I do have a few.

Although you know something? Maybe I will ask

these questions after I hear from the opposition.

MR. SKOLNIK: Okay.

Needless to say, your Honor, I would like to reserve my right to respond to the opposition having just waived giving you very much argument on it.

THE COURT: That's fine. It is getting late in the day, and I want to move it forward.

MR. SKOLNIK: I have heard some surprising things here today, and I held my tongue.

THE COURT: Okay.

MR. EGGERS: I won't rehash my papers, your Honor.

I just would like to point out that for, I guess, almost four months now, probably close to five, we have been dealing with these issues, and it suggests a basis for a denial of the motion to amend, which was actually not raised in our papers because when we briefed the issue, we hadn't been litigating these things for five months, and that is the dilatory nature of this motion and these charges and this proceeding.

What we have here is a situation where we have been seeking discovery for Mr. Ross. We sent a letter, I don't know three months ago, a deficiency letter. It's still unanswered.

We then spent an inordinate amount of time briefing these things, one brief a week for a while there it seemed,

and frankly, the lack of a response on discovery goes unnoted or something that becomes difficult to deal with, because you are writing a brief a week.

We asked for -- last month I think we asked for some deposition dates for people, and the response was, well, why don't we wait until the motions are decided.

We are now, I guess, a little under two months from the discovery cutoff. And as a result of the motions that we have been dealing with here, we have been completely diverted into this back order. That suggests to me that the motion was filed for its dilatory effect.

Now, I know we will address case management issues later. No matter which way I think the Court comes out on the motion, there will have to be an extension of the discovery cutoff as a result of this, as a result of a need to spend some time running through the thickets of Interfor. But I do wish to point out that but for this motion, these issues that were raised, we probably would not be in this position, and had we been able to litigate this case, they managed to successfully create a three-ring circus. Based, I may add, on information that Mr. O'Hara was under a court order not to reveal, so they got what they wanted by virtue of the motion, but it ought not to continue out of the perpetuity by virtue of a counterclaim.

THE COURT: Thank you.

MR. SKOLNIK: Your Honor, I just want to say briefly, I'm not really sure what it is that this -- that Mr. Eggers means by the motion having been filed for a dilatory purpose.

I assume he is not suggesting that we filed it late because, in fact, it was very shortly after all of these pieces of information came to light that we first approached your Honor about seeking leave to amend.

If time has been eaten up over the past several months, I think you can count the number of motions on your desk from that side of the courtroom as compared to our single motion here to amend, not to mention that, of course, they had to run into court up in the Northern District of New York to seek to quash the subpoena that we served on Mr. O'Hara, so everybody was spending time on that.

You know, if it is dilatory to try to protect your client's rights, then I am guilty. But beyond that, your Honor, I am not quite sure what is being referred to here.

THE COURT: Okay. Then I do have some questions, the first one is not something that was raised by either party. But what is the basis for jurisdiction here on this proposed counterclaim?

MR. SKOLNIK: Jurisdiction over --

THE COURT: Federal jurisdiction.

MR. SKOLNIK: Well, it all comes under a

supplemental jurisdiction because of the -- I mean, we are here on a combination of diversity and --

THE COURT: Is there $75,000 in dispute based on what's been pled there?

I don't know that there is. I am not saying there is or there isn't, but --

MR. SKOLNIK: Well, they are seeking -- I mean the case to the extent that it also includes the Suttons, I mean, if you heard from Mr. Kofman, they are seeking $40 million from the Suttons, so I mean the case as a whole is both a diversity case and because of their copyright claims, I believe at one point they had trademark claim, and there were also federal questions, so all of these causes of action that would come by way of counterclaim are certainly supplemental claims.

You know, we briefed fairly extensively and candidly, your Honor, I don't remember the intricacies of the various rules that we cited you to, but I think that Rule 20 talks about joint --

THE COURT: Well, it does, and I know you are not prepared for this, but I did want to raise it in the bigger context of the discussion, which is -- yes. You know, if there is diversity, that is an independent basis for jurisdiction. A lot of the circuits require an independent basis for jurisdiction on a permissive counterclaim, but the

Third Circuit is more accepting of such, but it has to arise out of the same cause of action, sort of a common nucleus of facts as I recall the law, and I don't know whether this one does. I am not saying that it does or doesn't. I am not saying there isn't $75,000 for diversity. I am not saying you can't bootstrap it, somehow it would be the other side, but I guess what I am wondering about is: Is it necessary to have this counterclaim in this case? Perhaps I'm putting apart any other problems with the statute of limitations and things like that.

What about having this on a separate case? It is kind of a separate issue on a certain level.

MR. SKOLNIK: Well, your Honor, I acknowledge on a certain level, but in fact it is not a separate issue on many other levels, not the least of which, you know, if we were in -- if we were in a situation, for example, where all that the NXIVM/Interfor investigation had done was get some bank and telephone records from Mr. Ross, I might be more willing to accept the general premise that that really is a separate thing. But given that this investigation really involved bare taking discovery of my client, fairly extensively asking him everything that he knew about NXIVM, about Salzman and Raniere, it seems to me that that in and of itself made the entire Interfor investigation almost part of the discovery in this case in a very odd way, and to the

degree that we are now challenging the basis for that conduct and challenging the kind of propriety or impropriety involved with that discovery, it seems to me that it is so inexplicably tied up with the other issues that are going on in this case, that it would do a disservice to not only all of the parties, but for that matter to another court to require it to go sort through all of this stuff, and, you know, we'll all be here in front of another judge on the same range of issues, so --

THE COURT: Just checking.

(Laughter.)

MR. SKOLNIK: -- but we've already taken four hours of your time today, your Honor, I --

THE COURT: That is a fair answer. Let me get to my second question.

I am prepared to address all of the arguments, but there is one and, of course, this is a rather complex situation because you are dealing with a case where you have a choice of law, a threshold choice of law issue, which I am not really going to finally and fully decide, but it seems that nobody can argue -- well, step one, futility is a basis for denying leave to amend, and I will go into what that really means. But under New York law neither of these causes of action exist. That seems to have been presented by the parties in a way that is hard to argue.

Now, under New Jersey laws both parties agree that the privacy intrusion/seclusion causes of action exist.

The harassment cause of action frankly does not seem to exist under New Jersey law, and I guess I would like to hear from you. I know you cite the Paternoster case. I am somewhat familiar with this area and these cases because, of course, the Strousdbourg case was one I was heavily involved with as a Magistrate Judge for Judge Lifland, and he decided very clearly in that case, first, that the New Jersey courts hadn't expressly decided it, but that as far as he could see, there was no cause of action. It is not necessarily binding, but then the Third Circuit adopted his reasoning on that very point, and I just have scoured the books and the computer and just have found no other support for a cause of action for harassment. Since I am going to allow the privacy claim to be asserted, and I will explain my reasons, I guess, regardless of whether I allowed the other one, and then have a motion to dismiss, but I don't really see enough. I have to do what I think is correct, of course. If there is something that I am missing, if there is a cause of action out there, I don't see it.

MR. SKOLNIK: Well, your Honor, you anticipated certainly my response, which is that I think that the proper way to deal with that issue would be for us to file the motion and for us to file the counterclaim, and if they

choose to bring a motion to dismiss, and I am sure they will be heartened by your view that the harassment claim is not sound.

You know, I can only say that the analysis that we had offered thus far, which to the extent that we have plumbed the depths of the question suggest that in the Dluhos case, it is certainly conceivable on the basis of the opinion that the plaintiff in that case, who was pro se, had not called the Court's attention to Paternoster. Certainly our reading of Paternoster is different. We think Paternoster does stand for the proposition that there is -- at least there are circumstances when a private cause of action under the harassment statute can proceed. We would suggest that that exists here.

I guess what I am really saying, your Honor, is that I would respectfully request that relatively little is lost by your permitting us to file the counterclaim including the harassment, as well as the inclusion claim, and, you know, let us at least have the luxury of responding more completely on a properly teed up motion if, in fact, NXIVM chooses to move to dismiss that.

Were you also implicitly inviting me to address the question of New York versus New Jersey law here?

THE COURT: If you wish. I don't need you to.

MR. SKOLNIK: Well, I mean at the simplest level,

your Honor, I think that under the conflict principles of both states would send us to New Jersey law. I think that that is clear. I mean, they both to one degree or another use a sort of an interest analysis and the facts certainly are that NXIVM and Interfor contacted Ross under the false pretenses in New Jersey. They entered into a retainer agreement with him in New Jersey, a retainer agreement, which parenthetically has a kind of a strange jurisdiction clause that says that jurisdiction will sit in New Jersey. They unlawfully obtained records from the bank in New Jersey. They obtained his New Jersey telephone records. They searched his New Jersey garbage. I don't think there is much question that the conduct took place in New Jersey, and it is New Jersey that has a pretty overriding interest, or redress, you know -- so I mean I won't belabor that, but I think that that's pretty much it.

THE COURT: Okay. We have the motion of Rick Ross to amend the pleadings and assert a counterclaim. The verified counterclaim consists of two counts; invasion of privacy described as intrusion upon seclusion and harassment.

Defendants's oppose the amendment on various grounds. One I guess is an allegation that they failed to establish good cause to amend the scheduling order, which had been entered up in the Northern District. This is

easily dispatched. I think there is good cause here. I think there is a serious question as to whether that scheduling order applies. All of those dates have fallen by the wayside, and I don't think that that would apply in that context.

But, in any event, there has certainly been a showing of good cause, and that to establish good cause the movant has to show that "despite its diligence, it could not reasonably have met the scheduling order deadline." Here there is no doubt that the information that forms the basis of the claim was brought to the attention of the plaintiff well after the deadline in the scheduling order.

Now, you know, it seems that July 2006 at the earliest is really when the counterclaimant Ross became aware of the facts that form the basis of the counterclaim.

Now, bear with me one second.

We then come to Rule 15(a), which requires that leave to amend shall be freely given when the interests of justice so requires. It is a very liberal standard. It can be limited where justice is not served by granting leave to amend, and the reasons given for denial of such a motion are undue delay. There has been none here whatsoever in my view. This came up this past summer in July of 2006, and again, in a few weeks letters were being written to the Court to amend.

Bad faith has been alleged. I see no evidence of it at all. This came as a surprise to Rick Ross, and I don't believe this has been interposed for that or a dilatory motive as just was argued by NXIVM, but I don't see that.

Undue prejudice is referred to as the touchstone of a motion to amend, and there has been no showing whatsoever of prejudice in this case. Absent those reasons, leave should be freely given. But, of course, another reason to deny a motion is on the ground of futility. And whether a proposed amendment is denied on grounds of futility depends on whether the claims asserted in the complaint could withstand a motion to dismiss for failure to state a claim. Pharmaceutical Sales and Consulting, 106 F.2d. 761. Courts emphasize that because of the liberal standards applied for amending pleadings, those who oppose motions to amend on futility grounds are met with a "heavy burden." That is the Pharmaceutical Sales case at 106 F.2d at 764.

Bear with me one second, please.

In addition, as set forth in 6 Wright & Miller, Federal Practice & Procedure, Section 1487, it is not just futility, but a claim has to be "clearly futile" to not survive a motion to amend. Now, so it is against that standard that we analyze the futility issue.

There is a major choice of law issue in this case.

As I stated, the defendant Ross, the counterclaim of Ross claims that New Jersey law applies, and the briefs do go into the choice of law analysis, and it is the Court's, once again, inclination, but not decision, that New Jersey law would apply to these facts, given the fact that this case was transferred here on the grounds of both 1404(a) and 1406, and there was a jurisdictional component, which I think affects the choice of law analysis. In addition, there are various factors that both states use an interest test, and if New York law were to apply, then these two claims would be futile. If New Jersey law applied, we would have the issue that I will get to.

But, once again, remember I stated that the amendment has to be "clearly futile." I don't think the Court is required to go through the kind of extremely complex in-depth and fact intensive choice of law analysis on a motion to amend to address futility. I don't think it's appropriate. I think if it is, and the parties feel strongly that it is fully briefed and considered, and the very fact that the Court would have to go through that kind of analysis, which is a fact intensive analysis, suggests to the Court that that alone argues against it being clearly futile, so the Court without deciding the issue will assume that New Jersey law would apply. Both parties agree that an invasion of privacy claim is cognizable under New Jersey

law, and I will grant the motion with respect to that claim.

As to the claim of harassment, although the Court is strained given the fact there may be a motion to dismiss in any event to allow that claim, the Court can simply find no basis to do so. It seems that that claim is futile under New Jersey law, and I will explain my reasons.

Ross relies on the Paternoster v. Schuster case, 296 N.J. Super 544 to support his claim that harassment is a viable cause of action in Jersey. However, in Dluhos v. Strasberg, which is at 2000 WL 1720272, and ultimately in the Third Circuit at 321 F.3d 365, Judge Lifland dismissed plaintiff's harassment claim pursuant to 12(b)(6) because "he declined to create a civil cause of action for harassment while New Jersey had declined to do so." While reversing on unrelated grounds, the Third Circuit affirmed and specifically adopted Judge Lifland's rationale in this area.

Ross asserts it is possible that the pro se plaintiff failed to call Paternoster to the District Judge's attention. However, much, if not all of Judge Lifland's analysis was based on a New Jersey Appellate Division Case, Aly v. Garcia, which was decided three years after Paternoster. The Aly court discusses Paternoster in great detail. Thus, even supposing the pro se plaintiff failed to raise Paternoster, Judge Lifland was clearly aware of it,

and given its extensive discussion of it in Aly, there simply is no support that the Court could find under New Jersey law for a civil claim of harassment. Therefore, the Court will deny as futile the proposed counterclaim on harassment.

I think those are our motions, and I know that you have to get over across the street.

I want to thank you for your help today, Phyllis.

THE REPORTER: You're very welcome, Judge.

THE COURT: So is there anything that anybody wants to raise briefly before we adjourn?

MR. EGGERS: Just to thank the Court for all of the time you devoted to us today.

THE COURT: Thank you for the fine papers.

I will be in touch with you. I think we will set up a telephone call.

What I suggest you do is I would like you to let what happened today sink in for a day or so and decide what you want to do about it. I will set up a call, which I would like to do in the next couple of days to address case management issues, and I would like you to also consider what your proposals are on that, because I think right now we are all a little bit fatigued, so is that acceptable?

MR. SKOLNIK: Yes.

MR. EGGERS: Fine.

Thank you, your Honor.

MR. SKOLNIK: Thank you, your Honor.

(The matter concluded.)