

1 WEDNESDAY, JULY 16, YEAR 2003; LOS ANGELES, CALIFORNIA

2 10:00 A.M.

3

4 THE COURT: GOOD MORNING, COUNSEL. LET'S

5 RESUME IN STREISAND VERSUS ADELMAN. APPEARANCES,

6 PLEASE.

7 MR. STERN: GOOD MORNING, JONATHAN STERN FOR

8 PLAINTIFF BARBRA STREISAND.

9 MR. GATTI: GOOD MORNING, YOUR HONOR, JOHN

10 GATTI ON BEHALF OF THE PLAINTIFF BARBRA STREISAND.

11 MR. KENDALL: GOOD MORNING, YOUR HONOR,

12 RICHARD KENDALL OF IRELL & MANELLA FOR DEFENDANT ADELMAN

13 AND PICTOPIA.

14 MS. SEIGLE: LAURA SEIGLE FOR THE DEFENDANT

15 KENTH ADELMAN.

16 MR. CASAS: DAN CASAS FOR DEFENDANT LAYER42

17 DOT NET.

18 THE COURT: THANK YOU. LET'S MOVE TO THE

19 SECOND PRONG OF THE ANTI-SLAPP STATUTE.

20 MR. GATTI: IF I COULD, YOUR HONOR.

21 THE COURT: YES.

22 MR. GATTI: AT THE END OF THE DAY ON MONDAY,

23 THERE WERE SOME QUESTIONS AND ISSUES BACK AND FORTH ON

24 THE FIRST PRONG THAT I DON'T THINK -- THAT I WOULD HOPE

25 TO GET A CHANCE TO RESPOND TO, IF I COULD.

26 THE COURT: GO AHEAD.

27 MR. GATTI: I APPRECIATE THE TIME, YOUR HONOR.

28 AND WHAT I'M SAYING PLAYS TO ALL THREE OF THE

1 DEFENDANTS, BUT WE -- AT THE END OF THE DAY WE HAD A
2 LITTLE BACK AND FORTH ON LAYER42 DOT NET AND PICTOPIA
3 DOT COM. AND WHAT I'M SAYING ALSO APPLIES TO -- AS
4 EQUALLY AS TO MR. ADELMAN AS WELL.

5 BUT WITH RESPECT TO THE FIRST PRONG, WHAT I
6 WANTED TO POINT OUT TO THE COURT, WHICH WE HAVE DONE IN
7 OUR PAPERS, BUT TO EMPHASIZE THAT WITH RESPECT TO THE
8 STATUTE ITSELF, WE WERE TALKING ON MONDAY ABOUT -- TO
9 DEAL WITH A CAUSE OF ACTION BY CAUSE OF ACTION AND WE
10 NEED TO LOOK AT EACH CAUSE OF ACTION, AND THAT IS THE
11 LANGUAGE OF THE SPECIFIC STATUTE AT 425.16 AS EACH CAUSE
12 OF ACTION.

13 THE DEFENDANT -- EACH DEFENDANT, BUT
14 SPECIFICLY THERE IS NOTHING FROM LAYER42 DOT NET,
15 PICTOPIA DOT COM, BUT ALSO MR. ADELMAN REGARDING THE
16 INTRUSION CAUSE OF ACTION THAT WOULD APPLY THE SLAPP
17 STATUTE TO THE CAUSE OF ACTION OF INTRUSION.

18 SPECIFICLY, THEY -- THE DEFENDANTS, NONE OF
19 THE DEFENDANTS CITE TO ANY CASE WHERE THE SLAPP STATUTE
20 HAS BEEN APPLIED TO AN INTRUSION CAUSE OF ACTION AT ALL.

21 THEY LISTED THREE CLAIMS, THEY -- CASES THEY
22 RELY UPON, ONE CASE YOUR HONOR HAD MENTIONED ON MONDAY,
23 WHICH WAS THE DORA CASE. AND FOR THE RECORD, THAT'S 15
24 CAL AP. 4 536, A 1993 CASE. JUST TO CLARIFY, THAT IS
25 NOT A SLAPP MOTION CASE. THAT WAS DECIDED -- THE CASE
26 WAS BROUGHT BEFORE THE SLAPP MOTION WAS EVEN ENACTED.

27 THAT SUIT WAS SPECIFICLY DEALING WITH AN ISSUE
28 OF WHETHER OR NOT CONSENT WAS NEEDED TO PUT A PARTICULAR

1 INDIVIDUAL, DORA, THE PLAINTIFF, IN A FILM WHICH HAD TO
2 DO WITH THE SURFING ENVIRONMENT. IT WAS A DOCUMENTARY
3 ABOUT SURFING.

4 AND WHAT THE COURT WENT ON TO SAY IS THAT
5 FILMING SOMEBODY ON A PUBLIC BEACH DOING SURFING
6 ACTIVITIES OUT IN THE PUBLIC IN THE CONTEXT OF A
7 MISAPPROPRIATION CASE -- NOT INTRUSION CASE, BUT A
8 MISAPPROPRIATION CASE -- THE ISSUE OF WHETHER OR NOT HE
9 PROVIDED CONSENT TO BE FILMED WAS IRRELEVANT BECAUSE HE
10 HAD PUT HIMSELF AND HE WAS FILMED IN PUBLIC.

11 AND THEY -- THE COURT WAS FINDING THAT THE
12 DOCUMENTARY DID HAVE SOME NEWSWORTHINESS TO IT. THAT
13 WAS -- THE ISSUE WAS SPECIFICLY -- THAT CASE WAS, IF I'M
14 NOT MISTAKEN, A SUMMARY JUDGMENT CASE. IT WAS NOT A
15 SLAPP -- CLEARLY NOT A SLAPP MOTION CASE.

16 THE OTHER TWO CASES THAT THE DEFENDANTS, AND
17 SPECIFICLY MR. ADELMAN RELY UPON, CITE IN THEIR PAPERS,
18 AGAIN, ARE NOT SLAPP MOTIONS ON THE -- AT ALL IN -- THIS
19 IS -- I'M FOCUSING ON MISAPPROPRIATION. DORA CAME UP IN
20 THE CONTEXT OF MISAPPROPRIATION.

21 WITH RESPECT TO MISAPPROPRIATION, THEY ALSO
22 SAY THE JOE MONTANA VERSUS MERCURY NEWS, WHICH WAS 34
23 CAL AP. 4 790, AND SPECIFICLY THERE WAS A PIN CITE TO
24 797, THAT'S A 1995 CASE. AGAIN, THIS WAS A SUMMARY
25 JUDGMENT MOTION, IT WAS NOT A SLAPP MOTION AT ALL. IT
26 HAD NOTHING TO DO WITH THE SLAPP STATUTE WHATSOEVER.

27 THE FACTS OF THAT CASE INVOLVE MR. JOE
28 MONTANA, A GREAT QUARTERBACK IN HIS OWN RIGHT. AND I'M

1 FROM SAN DIEGO SO I THINK I CAN SAY THAT. IN THAT
2 SITUATION THE SAN JOSE MERCURY NEWS WANTED TO REPUBLISH
3 PICTURES THAT APPEARED IN THEIR OWN NEWSPAPER AND WENT
4 AHEAD AND REPUBLISHED IN THAT COMMEMORATIVE FORM THAT
5 DEALT DIRECTLY WITH A COMMEMORATION OF THE SUPERBOWL,
6 WHICH CLEARLY HAD A LOT OF PUBLIC INTEREST AND PUBLIC
7 ASPECTS TO IT.

8 BUT REALLY THE CASE TURNED ON -- IT WAS A
9 MISAPPROPRIATION CASE, NOT A SLAPP SUIT ON SUMMARY
10 JUDGMENT, TURNED ON WHETHER OR NOT THE NEWSPAPER HAD THE
11 RIGHT TO REPRINT ITS OWN STORIES AND ITS OWN PICTURES.

12 THE LAST ONE THAT THE DEFENDANTS CITE TO,
13 AGAIN, ON -- THIS IS ON A MISAPPROPRIATION CLAIM, AGAIN,
14 NOT A SLAPP CASE AT ALL, IT IS A MOTION FOR SUMMARY
15 JUDGMENT CASE WHICH WAS THE GENFRITA VERSUS MAJOR LEAGUE
16 BASEBALL (PHONETIC) CASE AT 94 CAL AP. 4TH 400.

17 AND, AGAIN, THAT CASE ON THE MISAPPROPRIATION
18 CLAIM WENT TO THE FACT OF WHETHER OR NOT AT SUMMARY
19 JUDGMENT THE MAJOR LEAGUE PLAYERS, BASEBALL PLAYERS, HAD
20 SATISFIED THEIR CLAIMS ON SUMMARY JUDGMENT FOR
21 MISAPPROPRIATION ON WHETHER OR NOT THE ISSUE OF
22 PUBLISHING PLAYERS STATS, VIDEO OF THOSE PLAYERS PLAYING
23 IN ALL GAMES, HISTORICAL INFORMATION ABOUT THEIR PLAYING
24 CAREERS AND REPRINTING THAT ON THE WEBSITE WITH RESPECT
25 TO MAJOR LEAGUE BASEBALL, COULD MAJOR LEAGUE BASEBALL DO
26 THAT.

27 FOR A MYRIAD OF REASONS THE COURT FOUND MAJOR
28 LEAGUE BASEBALL COULD DO THAT, BUT NONE OF THOSE RULINGS

1 APPLY HERE. AND THE MORE IMPORTANT THING IS THAT, AS
2 EACH OF THE DEFENDANTS SITTING HERE TODAY, THEY HAVE NOT
3 CITED ONE CASE AT ALL THAT APPLIES THE SLAPP STATUTE TO
4 A MISAPPROPRIATION CLAIM.

5 NONE OF THOSE CASES -- THERE IS NOTHING BEFORE
6 THE COURT. AND THE REASON FOR THAT IS VERY SIMPLY THAT
7 IT'S NEVER BEEN DONE, AND IT WOULD BE SUCH A STRETCH.
8 BECAUSE IN LIGHT OF WHAT WE HAD DISCUSSED BRIEFLY ON
9 MONDAY, THE MILLER CASE -- AND ALSO, ON THE MILLER CASE
10 SPECIFICLY WAS TALKING ABOUT IN THE ASPECTS OF
11 INTRUSION, BUT IT ALSO WENT ON TO SAY THAT
12 MISAPPROPRIATION CASES WOULD NOT INVOLVE FIRST AMENDMENT
13 RIGHTS.

14 AND ON THAT BASIS -- CLEARLY, THE CASES HAVE
15 NOT BEEN THROWN OUT. WE HAVE -- ON THE OTHER HAND, WE
16 HAVE A LINE OF CASES, THE SHULMAN CASE, SANDERS CASE,
17 ALL OF THE CASES THAT DEAL WITH THINGS SUCH AS THE
18 MICHAELS VERSUS I.E.G. CASE, THOSE ARE ALL THE CASES
19 THAT HAVE GONE THROUGH THE COURTS AND HAVE NOT BEEN
20 THROWN OUT ON A SLAPP MOTION, AND THEY INVOLVE INTRUSION
21 CLAIMS, INVASION OF PRIVACY CLAIMS, MISAPPROPRIATION
22 CLAIMS.

23 AND THE REASON BEING IS THAT THE COURTS JUST
24 HAVE NOT APPLIED THOSE SLAPP MOTION STATUTES TO THOSE
25 PARTICULAR CLAIMS FOR MANY OF THE REASONS WE HAVE
26 OBVIOUSLY CITED IN OUR PAPERS.

27 ALSO --

28 THE COURT: WAS THERE A SLAPP MOTION MADE IN

1 SHULMAN?

2 MR. GATTI: IN SHULMAN, I'M NOT SURE, YOUR
3 HONOR, SPECIFICLY ABOUT THE HISTORY AT THE TRIAL COURT
4 LEVEL ON SHULMAN. I DID KNOW THAT SHULMAN INVOLVED THE
5 SAME CAUSES OF ACTION THAT WE ARE HERE ON TODAY, AND AT
6 THE -- GOING UP TO THE SUPREME COURT LEVEL, THE COURT
7 FOUND THAT, CLEARLY, THOSE CLAIMS EXIST FOR VARIOUS
8 PARTICULARS REASONS. THE OTHER CAUSE OF ACTION --

9 THE COURT: WELL, COUNSEL, THE FACTS RECITED
10 BY THE SUPREME COURT IN SHULMAN AT PAGE 212 NEAR THE
11 BOTTOM OF THAT PAGE AT THE FINAL PARAGRAPH RELATES TO
12 THE MATTER BEING RESOLVED IN THE TRIAL COURT ON SUMMARY
13 JUDGMENT. THERE IS NO MENTION, THAT I SEE IN SCANNING
14 THE FIRST PART OF THE OPINION, THAT A SLAPP MOTION WAS
15 EVER MADE. SO HOW DOES THAT AFFECT YOUR ANALYSIS?

16 MR. GATTI: WELL, IT --

17 THE COURT: IF AT ALL.

18 MR. GATTI: IT IS IN LINE WITH OUR ANALYSIS,
19 BECAUSE WHAT OUR ANALYSIS IS IS THAT THESE CLAIMS, IF
20 YOU WOULD BELIEVE THE DEFENDANT, WOULD ALL BE SUBJECT TO
21 A SLAPP MOTION. THE FACTS OF ALL OF THOSE CASES INVOLVE
22 SITUATIONS THAT INVOLVE PUBLIC INTEREST, PUBLIC CONCERN,
23 BUT THEY NEVER WENT TO -- THROUGH THE SLAPP PROCESS.

24 THE SLAPP MOTION, AS WE STATE IN OUR PAPERS,
25 IS A VERY SPECIFIC STATUTE DEALING WITH A VERY SPECIFIC
26 TYPE OF CASE, A CASE THAT IS PRIMARILY TO CHILL THE
27 FIRST AMENDMENT RIGHTS.

28 IN THOSE PARTICULAR CASES, SHULMAN, SANDERS,

1 WE EVEN HAD THE ADDED DIFFICULTY, ONE MIGHT THINK, WITH
2 THE PROTECTIONS THAT NEWS MEDIA WITH RESPECT TO FIRST
3 AMENDMENT RIGHTS AND THEIR ABILITIES TO GATHER NEWS.
4 THOSE INVOLVED NEWS GATHERING SITUATIONS, OBVIOUSLY
5 SITUATIONS THAT INVOLVE THE PUBLIC INTEREST, HAD TO DO
6 WITH PUBLIC CONCERNS, THE PUBLIC -- IT WAS AIRED ON THE
7 TELEVISION SET. IT OBVIOUSLY HAD A -- AN APPEAL TO THE
8 PUBLIC.

9 AND EVEN IF THOSE CASES AND EVEN WITH THE
10 PROTECTIONS THAT THE FIRST AMENDMENT MAY AFFORD IN
11 CERTAIN SITUATIONS, THE SHULMAN COURT, SANDERS COURT,
12 DIDN'T GO DOWN -- NO ONE WENT THE SLAPP MOTION ROUTE.
13 AND IT'S -- AND FROM THAT WE CAN IMPLY THAT IT JUST
14 DOESN'T -- THE STATUTE DOESN'T APPLY IN THOSE
15 SITUATIONS.

16 AND WE KNOW FROM MILLER THAT THE INTRUSION
17 CLAIM, SPECIFICLY, THE COURTS HAVE HELD IN MILLER AND
18 OTHERS THAT THE INTRUSION CAUSE OF ACTION DEALS ONLY
19 WITH THE MEANS. AND SPECIFICLY MILLER STATES THAT, AS A
20 MATTER OF LAW, THE SLAPP -- THE FIRST AMENDMENT RIGHT OF
21 FREEDOM OF SPEECH IS NOT TRIGGERED BY THE INTRUSION
22 CLAIM.

23 AND THAT THE DEFENDANTS -- NONE OF THE
24 DEFENDANTS, MR. ADELMAN, PICTOPIA OR LAYER42, CITE TO
25 ANY CASES THAT APPLY THE STATUTE, THE SLAPP STATUTE TO
26 THE INTRUSION CAUSE OF ACTION, OR CITES ANYTHING THAT
27 WOULD DIFFER FROM THE HOLDING IN MILLER THAT, AS A
28 MATTER OF LAW, THE INTRUSION CAUSE OF ACTION -- BECAUSE

1 OF WHAT IT IS LOOKING AT; IT'S NOT LOOKING AT AN
2 EXPRESSION, IT'S LOOKING AT AN ACTUAL INTRUSION, A
3 PHYSICAL INTRUSION. AND THAT IS NOT WHAT THE SLAPP
4 MOTION APPLIES TO.

5 THE COURT: WHAT WOULD HAPPEN IF THERE HAD
6 BEEN PICKETING AND A NUMBER OF DEMONSTRATORS HAD WALKED
7 DOWN WHATEVER IS THE NAME OF THE STREET THAT LEADS UP TO
8 YOUR CLIENT'S HOUSE.

9 MR. GATTI: IF THERE IS PICKETING, AND --

10 THE COURT: AND THEY ARE HOLDING SIGNS, "SAVE
11 THE COAST," OR WHATEVER.

12 MR. GATTI: IF THERE IS PICKETING, THAT DOES
13 NOT INVOLVE INTRUSION INTO ONE'S --

14 THE COURT: WHAT IF THEY WERE SHOUTING REALLY
15 LOUDLY TO THE POINT THAT NO ONE COULD HEAR HIMSELF OR
16 HERSELF THINK? WOULD THAT BE AN INTRUSION TO YOUR
17 CLIENT'S RIGHT TO THE PEACEFUL ENJOYMENT OF HER
18 PROPERTY?

19 MR. GATTI: ON THOSE FACTS, YOUR HONOR, I
20 DON'T BELIEVE SO, BECAUSE WHAT WE'RE TALKING ABOUT --
21 BECAUSE IN YOUR HYPOTHETICAL --

22 THE COURT: WOULD THE FIRST PRONG OF THE SLAPP
23 STATUTE BE MET?

24 MR. GATTI: IT WOULDN'T -- THAT SITUATION
25 INTRUSION, WITH RESPECT TO INTRUSION, IT'S SIMPLY THE
26 FIRST PRONG OF THE SLAPP SUIT; DOESN'T APPLY AT ALL
27 BASED ON THE MILLER DECISIONS. REASON BEING, YOUR
28 HONOR, IS THAT WE FOCUS ON THE MEANS OF INTRUSION, NOT

1 WHERE THE INTRUDER IS. WE'RE LOOKING AT THE MEANS OF
2 HOW THE INTRUSION IS MADE.

3 YOU COULD HAVE A SITUATION WHERE SOMEONE WOULD
4 INTRUDE INTO SOMEONE'S PRIVACY BUT NOT FORM ANY -- USE
5 ANY EXPRESSION. IT DOESN'T NEED A PHOTOGRAPH -- IT CAN
6 BE A VISUAL VIEWING INTO AND BE INTRUSION, THAT IT'S
7 SOMETHING THAT'S NOT SEEN BY THE NAKED EYE.

8 IN OUR HYPOTHETICAL, THE COURT'S HYPOTHETICAL,
9 ASSUMING THAT SOMEONE IS ON -- OUT IN FRONT OF SOMEONE'S
10 HOME, NOT TRESPASSING, AND DEALING JUST DIRECTLY WITH
11 WHAT THEY SEE BY THEIR NAKED EYE, THAT'S FINE.

12 WHAT WE'RE TALKING ABOUT HERE IS DIFFERENT.
13 THERE IS A DIFFERENCE IN ENHANCEMENT, OPTICAL
14 ENHANCEMENT IS ALL -- AS I CITED, WE'VE CITED PEOPLE
15 VERSUS ARNO (PHONETIC) AND OTHERS THAT TALK ABOUT IN
16 TERMS OF INTRUSION INVOLVING OPTICAL ENHANCEMENTS.

17 THE COURT: SO, COUNSEL, IF THIS PICTURE HAD
18 BEEN TAKEN WITH A BROWNIE INSTEAD OF WITH THE CAMERA
19 WITH WHICH IT WAS TAKEN, THERE WOULD BE A LAWSUIT HERE?

20 MR. GATTI: THERE WOULD BE A LAWSUIT. IT
21 WOULD BE DEPENDING ON -- WHAT WE HAVE NOW, WE HAVE A
22 SITUATION WHERE WE HAVE TECHNOLOGY ATTACHING UP WITH
23 CAUSES OF ACTIONS WE'RE TALKING ABOUT HERE.

24 THE COURT: WELL, WE DON'T HAVE A
25 SOPHISTICATED, FOR LACK OF A BETTER TERM, SPY CAMERA
26 HERE, DO WE? NO ONE HAS TAKEN A PICTURE THAT HAS
27 PENETRATED THROUGH THE WINDOW AND SEEN A MAGAZINE OR THE
28 NEWSPAPER ON THE TABLE THAT MIGHT BE WITHIN THE WINDOW

1 OF ANY PARTICULAR ROOM IN THE HOUSE?

2 MR. GATTI: WELL, I WOULD DIFFER --

3 THE COURT: WE HAVE A PICTURE OF WHAT APPEARS
4 TO BE THE REAR OF THE PREMISES.

5 MR. GATTI: WHAT I WOULD SAY TO THAT, YOUR
6 HONOR, IS THAT'S NOT EXACTLY WHAT WE HAVE HERE. WE DO
7 HAVE INTRUSION INTO A PRIVATE PROPERTY, INCLUDING THE
8 BACKYARD, WHICH IS NOT VIEWABLE FROM ANY ASPECTS,
9 ESPECIALLY IN LIGHT OF THE VISUAL THAT HAS BEEN
10 PRESENTED. WE ALSO --

11 THE COURT: BUT COUNSEL, DO WE NEED TO LOOK AT
12 THE DETAIL AND HOW DOES THAT AFFECT THE FIRST PRONG?
13 WE'RE GOING TO COME BACK TO THIS WITH RESPECT TO THE
14 SECOND PRONG AND THEN THE MOTION FOR PRELIMINARY
15 INJUNCTION. HOW DOES THAT AFFECT THE TEST? ARE WE
16 LOOKING AT THE WRONG PARTY? FOR EXAMPLE, DOES THE SLAPP
17 STATUTE FOCUS INSTEAD ON THE DEFENDANT'S RIGHTS AND WHAT
18 THE DEFENDANT WAS DOING? IS THAT WHY THE POINTS YOU
19 HAVE MADE DON'T ARISE IN THE CASES YOU HAVE CITED?

20 MR. GATTI: NO. THEY --

21 THE COURT: FOR EXAMPLE, IN SHULMAN, THAT'S
22 ONE OF THE CASES TO WHICH I AM REFERRING, THERE
23 APPARENTLY WAS THIS SLAPP STATUTE CLAIM MADE. SHOULD WE
24 BE LOOKING AT INFRINGEMENT ON THE DEFENDANT'S RIGHTS IN
25 ANALYZING THE FIRST PRONG AS OPPOSED TO IMPLICATIONS
26 WITH RESPECT TO THE PLAINTIFF?

27 MR. GATTI: WELL, THE FIRST ANALYSIS WE DO IS
28 LOOKING TO SEE IF THE DEFENDANTS HAVE SATISFIED THEIR

1 BURDEN THAT THE CAUSES OF ACTION THAT ARE BEING ATTACKED
2 APPLY TO THE SLAPP MOTION, ELEMENTS OF THE SLAPP MOTION.
3 AND WHAT WE HAVE DONE IN THIS -- IN OUR PAPERS AND THE
4 CASES WE'VE CITED TO HAVE SPECIFIC -- THE CASES, AND
5 FOCUSING ON MILLER AND OTHERS, THAT SAY AS A MATTER OF
6 LAW INTRUSION CAUSES OF ACTION DO NOT INVOLVE FREEDOM OF
7 SPEECH, FREEDOM OF EXPRESSION, INTRUSION IS NOT ABOUT A
8 PROTECTED EXPRESSION OF SPEECH. AND IF YOU DO NOT
9 SATISFY THAT CAUSE OF ACTION DOESN'T IMPLICATE THAT, YOU
10 DON'T EVEN GO -- YOU CANNOT SATISFY THE FIRST PRONG OF
11 THE CAUSE OF ACTION --

12 THE COURT: CAN YOU GIVE ME THE CITATION TO
13 MILLER AGAIN, COUNSEL.

14 MR. GATTI: YES, YOUR HONOR. IT IS 187 CAL
15 AP. 3 D 1463. AND THEN THE PIN CITE I WAS SPECIFICLY
16 REFERRING TO WAS 1491, WHICH SAYS, AND I QUOTE,
17 INTRUSION DOES NOT RAISE FIRST AMENDMENT DIFFICULTY
18 SINCE IT'S INTERPRETATION DOES NOT INVOLVE SPEECH OR
19 OTHER EXPRESSION, END QUOTE. AND THAT THE COURT WAS
20 CITING, AS I SAID, ON MONDAY TO MILLER ON PRIVACY AND
21 INCLUDING THAT IN ITS HOLING, AND AT THAT SAME --

22 THE COURT: COUNSEL, WHEN WAS THE SLAPP
23 STATUTE ADDED?

24 MR. GATTI: THE SLAPP STATUTE WAS ADDED IN
25 1992.

26 THE COURT: '92. AND MILLER IS 1986.

27 MR. GATTI: CORRECT.

28 THE COURT: SO MILLER WOULDN'T DISCUSS THE

1 SLAPP ISSUES EITHER.

2 MR. GATTI: NO, IT WOULDN'T, YOUR HONOR. I
3 WASN'T -- IF I -- I DIDN'T MEAN TO GIVE YOU THAT
4 IMPRESSIONS. BUT WHAT IT DOES IS THAT AFTER THE STATUTE
5 HAS APPLIED, THERE IS NOT A SINGLE INTRUSION CAUSE OF
6 ACTION THAT HAS BEEN THROWN OUT ON A SLAPP MOTION.

7 THE COURT: WELL, COME BACK TO 425.16 (E),
8 COUNSEL. DOES IT NOT FOCUS ON THE DEFENDANT AS OF IN
9 THIS CASE THE DEFENDANT'S RIGHTS. IT DEFINES ACTS IN
10 FURTHERANCE OF A PERSON'S RIGHT OF PETITION OR FREE
11 SPEECH UNDER THE UNITED STATES AND CALIFORNIA
12 CONSTITUTION AS ONE OF FOUR CATEGORIES OF ITEMS.
13 DOESN'T THAT REQUIRE WE FOCUS ON DEFENDANT'S CONDUCT
14 RATHER THAN THE INJURY TO PLAINTIFF FOR THE FIRST PRONG?

15 MR. GATTI: FOR THE FIRST PRONG WE FOCUS ON
16 THE DEFENDANT'S CONDUCT, AND WE ALSO FOCUS -- I DON'T
17 THINK YOU CAN DISTINGUISH THE TWO -- THEY WOULD HAVE TO
18 BE LOOKED AT AT THE SAME TIME -- LOOKING AT THE TYPE OF
19 CAUSE OF ACTION THAT IS BEING ASSERTED. BECAUSE IT
20 DEALS -- SPECIFICLY, 425.16 SAYS A CAUSE OF ACTION
21 AGAINST A PERSON ARISING FROM ANY ACTS OF THAT PERSON IN
22 FURTHERANCE OF THAT PERSON'S RIGHT OF PETITION OR FREE
23 SPEECH UNDER THE UNITED STATES OR CALIFORNIA
24 CONSTITUTION IN CONNECTION WITH A PUBLIC ISSUE.

25 THE INTRUSION CAUSE OF ACTION AND THE REASON
26 WHY YOU WILL NOT FIND A SLAPP MOTION CASE THAT DEALS
27 WITH INTRUSION IS BECAUSE, AS WE SAID, THE INTRUSION
28 DEALS WITH THE MEANS OF THE INTRUSION; IT DOESN'T DEAL

1 WITH ANY PROTECTED FREEDOM OF EXPRESSION. AND WHAT YOU
2 NEED TO -- WHAT WE NEED TO LOOK AT WHEN YOU ARE LOOKING
3 AT THAT IS THE DEFENDANT'S CONDUCT. INTRUSION, THE
4 ISSUE IS UNLAWFUL CONDUCT OF AN INTRUSION OF THE
5 DEFENDANTS.

6 ISN'T -- WE'RE NOT ADDRESSING IN THIS
7 PARTICULAR CASE ANYTHING IN THE INTRUSION ASPECTS ABOUT
8 ANYONE'S FREEDOM OF EXPRESSION. AND BY ITS NATURE, BY
9 THE TYPE OF CAUSE OF ACTION IT IS, INTRUSION DOESN'T
10 APPLY. AND THAT IS WHY, BASED ON MILLER, BUT FOLLOWING
11 AFTER THAT THE COURT WILL NOT FIND, WE HAVEN'T FOUND,
12 AND THE DEFENDANTS HAVE NOT CITED, TO ANY SLAPP CASE
13 THAT DISMISSED THE INTRUSION CAUSE OF ACTION --

14 THE COURT: JUST A SECOND, MR. KENDALL, YOU
15 WILL HAVE THE OPPORTUNITY TO RESPOND.

16 ARE THERE OTHER POINTS YOU WANTED TO MAKE WITH
17 RESPECT TO THE FIRST PRONG?

18 MR. GATTI: WITH RESPECT TO THE FIRST PRONG,
19 MY OVERALL COMMENT WAS WITH RESPECT TO LAYER42 DOT NET
20 AND ALSO WITH RESPECT TO PICTOPIA DOT COM. I DON'T
21 BELIEVE THERE'S BEEN ANY EVIDENCE SUBMITTED THAT WOULD
22 SAY -- WOULD ESTABLISH THAT THOSE PARTICULAR DEFENDANTS
23 WOULD SAY THE SAME THING FOR MR. ADELMAN, BUT I'M
24 FOCUSING NOW ON THOSE TWO DEFENDANTS. NOTHING THAT
25 WOULD HAVE EVER SHIFTED THE BURDEN OF THE DEFENDANTS TO
26 SAY THAT THE SLAPP MOTION -- THEY'VE ESTABLISHED THAT
27 THE SLAPP MOTION SHOULD BE APPLIED TO ANYTHING THEY'VE
28 DONE IN THIS CASE. I DON'T THINK THERE IS ANY EVIDENCE

1 OF THAT AT ALL.

2 ALSO, WITH THE -- JUST BRIEFLY WITH RESPECT TO
3 THE OTHER CAUSES OF ACTION, THE ANTI-PAPARAZZI CAUSE OF
4 ACTION, WHICH IS A CIVIL CODE SECTION 1708.8, AGAIN, I
5 WOULD POINT OUT THE DEFENDANTS FAIL TO CITE ANY CASE AS
6 APPLYING TO THE SLAPP MOTION STATUTE TO A CAUSE OF
7 ACTION IN THIS PARTICULAR CASE. AND I BELIEVE TO APPLY
8 THE SLAPP MOTION TO THE ANTI-PAPARAZZI CASE STATUTE, BY
9 IT'S NATURE INVOLVES THE UNLAWFUL -- IT IS GEARED TOWARD
10 THE TAKING OF PHOTOGRAPHS AND ALSO CAPTURING OF IMAGES
11 AND INTRUSIONS.

12 AND THAT, BY ITS NATURE, IF THE DEFENDANTS
13 WOULD SAY YOU WOULD HAVE TO FIND THAT THE STATUTE ITSELF
14 IS UNCONSTITUTIONAL TO EVEN APPLY IN THE SITUATION
15 BECAUSE BY ITS -- IN ITS OWN WORDS, IN ITS OWN
16 EXPRESSION, IT'S PROHIBITING PARTICULAR ACTIVITY,
17 INCLUDING PHOTOGRAPHING.

18 AND SO TO APPLY THE SLAPP STATUTE TO THAT AND
19 SAY THAT IS TRIGGERED BY THE SLAPP STATUTE, YOU WOULD
20 HAVE TO FIND IT UNCONSTITUTIONAL, BECAUSE BY ITS NATURE
21 IT'S SAYING WHAT THE DEFENDANTS ARE TRYING TO CLAIM IS
22 AN EXPRESSION DOESN'T APPLY. IT'S PROHIBITING THAT
23 EXPRESSION.

24 AND WHAT WE'VE CITED IN MANY OF OUR CASES --
25 THIS INVOLVES SHULMAN, THIS INVOLVES -- THE VIRGIL CASE
26 IS VERY CLEAR ON THIS, IS THAT THESE CAUSES OF ACTION
27 AND THE PRIVACY RIGHTS INVOLVED IN THESE CAUSES OF
28 ACTION OBVIOUSLY ARE PROTECTED. AND I'LL GET INTO THAT

1 IN MORE DETAIL WHEN WE GET TO THE SECOND PRONG OF
2 THINGS.

3 BUT WITH RESPECT TO THE ANTI-PAPARAZZI CAUSE
4 OF ACTION, AGAIN, NO SLAPP MOTION HAS BEEN APPLIED TO
5 THAT. AND AS I SAY, IT WOULD BE IMPOSSIBLE, UNLESS WE
6 WERE TO FIND THAT THE STATUTE ITSELF IS
7 UNCONSTITUTIONAL, TO EVEN APPLY THE STATUTE TO ANY OF
8 THE DEFENDANTS.

9 WITH RESPECT TO THE PUBLICATION OF PRIVATE
10 FACTS ON THE FIRST PRONG OF THIS AS IT RELATES TO ALL
11 THE DEFENDANTS, THERE ARE SITUATIONS WHERE PUBLICATION
12 OF PRIVATE FACT MAY INVOLVE A SITUATION WHERE IT
13 INVOLVES A FIRST AMENDMENT EXPRESSION. BUT THAT'S NOT
14 THE CASE HERE.

15 AND WHAT WE NEED TO FOCUS ON IN YOUR HONOR'S
16 SUGGESTION EARLIER IN A QUESTION TO ME WAS DO WE LOOK AT
17 THE DEFENDANT'S CONDUCT, AND WE NEED TO LOOK -- WE DO
18 NEED LOOK AT THE DEFENDANT'S CONDUCT, AND THE CONDUCT
19 HERE, I HAVE YET TO SEE A GOOD EXPLANATION OF WHAT THE
20 PUBLIC ISSUE IS, WHAT THE PUBLIC CONCERN IS. IN THIS
21 PARTICULAR CASE WE'RE LOOKING VERY NARROWLY AT THE CASE.
22 THIS IS A VERY NARROW CASE. THIS DOESN'T INVOLVE
23 MR. ADELMAN' S WEBSITE IN TOTAL.

24 I THINK THE DEFENDANTS WANT TO TALK IN TERMS
25 OF THE WHOLE WEBSITE. WE DIDN'T ATTACK -- WE'VE NEVER
26 ASKED FOR SOME RULING OR SOME AFFECT OR SOME RECOVERY
27 THAT WOULD TAKE THE ENTIRE WEBSITE DOWN. THAT'S NOT
28 WHAT WE'RE TALKING ABOUT.

1 WE'RE TALKING ABOUT HERE FOCUSING ON THE
2 CAUSES OF ACTION BROUGHT BY A SPECIFIC PLAINTIFF,
3 MRS. STREISAND. AND THE PUBLIC EXPRESSION, THE FREEDOM
4 OF EXPRESSION, WHATEVER THIS PUBLIC ISSUE, THERE IS NO
5 EVIDENCE OF ANY PUBLIC ISSUE. AND WE TALKED ON MONDAY,
6 THE TRIMETICA CASE SPECIFICLY ADDRESSES THIS TYPE OF
7 ISSUE WHERE IF WE WERE GOING TO TALK IN TERMS, AS THE
8 DEFANDANTS WANT TO TALK, THAT THIS INVOLVES THE COAST,
9 THEREFORE, OUR FREEDOM OF EXPRESSION, FREEDOM OF SPEECH
10 TO SAY ANYTHING ABOUT THE COAST, TO DO ANYTHING
11 INVOLVING THE COAST, THAT'S OUR RIGHT; WE TRUMP
12 EVERYTHING. THAT'S NONSENSE. THAT IS ABSOLUTE
13 NONSENSE.

14 WE KNOW FROM THE CONSTITUTION, THE CALIFORNIA
15 CONSTITUTION, THE FEDERAL CONSTITUTION, THAT THERE IS A
16 VERY SPECIFIC RIGHT TO PRIVACY. WHAT THE DEFENDANTS ARE
17 TRYING TO DO IN THIS PARTICULAR CASE IS SAY THAT PEOPLE
18 ON THE COAST -- AND WHAT WE HAVE TO LOOK AT IN THIS
19 PARTICULAR CASE, WE HAVE A PLAINTIFF WHOSE PROPERTY IS
20 SITUATED IN SUCH A WAY, AND HER -- MRS. STREISAND'S
21 DECLARATION POINTS IT OUT VERY CLEARLY, THIS PROPERTY
22 WAS SELECTED BY HER. SHE HAS TAKEN PAINS TO KEEP IT AS
23 PRIVATE AS ONE CAN DO TO ONE'S HOME.

24 SHE SEARCHED FOR THE PROPERTY, FOUND IT. IT'S
25 A UNIQUELY SITUATED PROPERTY SO THAT IT IS PRIVATE. AND
26 NOT THAT ANYONE ELSE'S HOME ISN'T PRIVATE, EVERYONE HAS
27 A PRIVATE HOME, BUT THIS ONE, YOU CAN'T PEER INTO IT.
28 WHAT WE HAVE HERE IS PEERING INTO THE MOST PRIVATE OF

1 AREAS. AND --

2 THE COURT: DOES IT -- DOES THE DEFENDANT'S
3 INTENT HAVE ANY RELEVANCE? AGAIN, WE'RE TALKING NOW
4 ABOUT THE FIRST PRONG OF THE SLAPP STATUTE, ARE WE NOT?

5 MR. GATTI: LOOKING AT THE FIRST PRONG OF THE
6 STATUTE, IT WILL -- WHAT WE'LL LOOK AT IS, AGAIN, THE
7 CAUSE OF ACTION OF THE PLAINTIFF AND WHAT EXPRESSION OR
8 WHAT DISCUSSION HAS BEEN OUT THERE. THERE IS NO
9 DISCUSSION. IN FACT, MR. ADELMAN ON HIS OWN, IN HIS
10 PAPERS, SAYS AS PART OF AN AFTER THE FACT SORT OF
11 ATTEMPT TO, I GUESS, JUSTIFY WHAT HE DID, HE SAYS THAT
12 HE DIDN'T EVEN KNOW IT WAS BARBRA STREISAND'S HOME.
13 IT'S A LITTLE DISENGENUOUS TO SAY I NEED TO TALK ABOUT A
14 PUBLIC ISSUE OR PUBLIC CONCERN, AND, BY THE WAY, I
15 DIDN'T EVEN KNOW THIS HOME, THIS INVASION, I DIDN'T EVEN
16 KNOW IT HAD AN ISSUE ABOUT IT.

17 THAT'S THE FACTS OF THIS CASE. THERE IS
18 NOTHING OF A PUBLIC ISSUE OR PUBLIC CONCERN ABOUT THIS
19 PRIVATE HOME, OTHER THAN TO SAY IF YOU WANTED TO GO SO
20 BROAD AND SAY ANYTHING WITHIN THE COAST, ANYTHING HAVING
21 TO DO WITH THE COAST, INVOLVES A PUBLIC ISSUE OR PUBLIC
22 CONCERN. NO ONE, NO COURT, NO CASE, GOES THAT FAR.

23 IN FACT, TRIMETICA WARNS AGAINST THAT TYPE OF
24 REASONING AND SAYS WE CANNOT TALK IN GENERALITIES. WE
25 NEED TO TALK SPECIFICLY ABOUT WHAT IS AT STAKE. AND
26 HERE THE EXPRESSION, WE'RE TALKING ABOUT USING
27 SOMEBODY'S NAME, USING IDENTIFIERS TO LOCATE THAT
28 PERSON'S HOME, PUTTING A PHOTOGRAPH THAT I CAN --

1 DIGITALLY ENHANCED TO BE BLOWN UP TO VIEW THAT HOME --

2 THE COURT: JUST A SECOND, COUNSEL. THAT
3 LAST -- COUNSEL, WHERE IS THAT SUPPORTED BY THE RECORD?
4 HOW DOES ONE VIEW THE INSIDE OF THE HOME BY BLOWING UP
5 PHOTOGRAPHS, BASED ON THE EVIDENCE WE HAVE?

6 MR. GATTI: BASED ON THE EVIDENCE, THESE ARE
7 DIGITALLY TAKEN PHOTOGRAPHS --

8 THE COURT: WELL, COUNSEL, YOUR FIRM SUBMITTED
9 AN EXHIBIT, WHICH IS 11, WHICH -- APPARENTLY REPRESENTS
10 WHAT WE DOWNLOADED FROM THE COMPUTER WEBSITE TO A WHICH
11 IS -- ABOUT 17 BY 24.

12 MR. GATTI: I WOULD BE GUESSING, BUT I THINK
13 ACTUALLY A LITTLE BIGGER THAN THAT, YOUR HONOR.

14 THE COURT: OKAY. SO CERTAINLY IN THIS
15 PHOTOGRAPH, EXHIBIT 11, ONE CAN LOOK INTO THE HOME. SO
16 WHAT -- WHAT EXHIBIT IS IN EVIDENCE THAT ONE CAN ENHANCE
17 THIS PHOTOGRAPH AND LOOK INSIDE THE HOME?

18 MR. GATTI: WELL, I WOULD PROPOSE THAT IN THAT
19 PHOTOGRAPH AND IN THE OTHER EXHIBITS THAT WE'VE
20 SUBMITTED TO YOUR HONOR, WHICH IS THE PHOTOGRAPH WHICH
21 IS A HIGHER RESOLUTION AND THE LITTLE BETTER VIEW --

22 THE COURT: IS THAT 16?

23 MR. GATTI: I BELIEVE IT IS. YES, YOUR HONOR.

24 THE COURT: OKAY.

25 MR. GATTI: WITH RESPECT TO THAT -- FIRST,
26 TWO POINTS, YOUR HONOR. YES, YOU CAN LOOK INTO THE
27 HOME. AND, SECONDLY --

28 THE COURT: OKAY. SHOW ME. EXPLAIN TO ME.

1 USE YOUR WORDS TO EXPLAIN TO ME HOW -- I'M LOOKING
2 AT -- GET THE BETTER ONE OUT, EXHIBIT 16 -- HOW I SEE
3 INSIDE THE HOUSE. I WILL GRANT YOU THAT APPEARS TO BE
4 CLEARLY A VIEW OF THE REAR, AND ONE CAN SEE THAT -- I'M
5 LOOKING AT THE CENTER PROPERTY. ONE CAN SEE THERE ARE
6 SOME KIND OF WINDOW TREATMENT ON THE WINDOWS THAT ARE
7 NEAR THE LEFT EDGE OF THE POOL, WHICH I TAKE IT IS
8 EITHER THE SOUTH OR WEST EDGE. I DON'T KNOW WHICH WAY
9 THE COAST RUNS AT THIS SPOT.

10 ONE CAN TELL THERE IS SOME KIND OF WINDOW
11 TREATMENT THERE. AND THE WINDOWS TO THE RIGHT OF THAT,
12 WHICH ARE BEHIND THE CENTER OF THE SWIMMING POOL, ONE
13 CAN SEE THERE ARE HORIZONTAL BARS, IF YOU WILL, WHETHER
14 WOOD OR METAL, ACROSS THE WINDOWS. IS THERE SOME BETTER
15 VIEW THAT SHOWS INSIDE THE HOUSE?

16 MR. GATTI: WELL, TWO THINGS WE HAVE, YOUR
17 HONOR, FROM THE EVIDENCE. ONE IS THAT THE -- ON THE
18 WEBSITE, DEFENDANT, MR. ADELMAN, BRAGS THAT THIS IS DONE
19 WITH A SIX PIXEL -- SIX MEGAPIXEL DIGITAL CAMERA. HE'S
20 AWAITING THE ABILITY TO HAVE AND WILL, HE INTENDS TO USE
21 20 MEGAPIXEL. WITH THAT TECHNOLOGY AND WITH DOING
22 NOTHING MORE THAN JUST HAVING THAT TECHNOLOGY, YOU CAN
23 LOOK -- YOU WILL BE ABLE TO ACTUALLY BE RIGHT IN THAT
24 HOME.

25 THE COURT: WHAT EVIDENCE IS THERE THAT WITH
26 THE 20 MEGAPIXEL CAMERA ONE CAN LOOK INSIDE THE HOUSE
27 AND SEE INSIDE THE HOUSE?

28 MR. GATTI: WHAT WOULD HAPPEN, YOUR HONOR --

1 WELL, RIGHT NOW I CAN POINT TO THE PHOTOGRAPH ITSELF
2 WHERE YOU CAN SEE INSIDE THE HOME --

3 THE COURT: WHAT DID YOU SEE INSIDE THE HOME?

4 MR. GATTI: YOU CAN SEE INSIDE TO THE ROOMS.
5 I CAN SEE -- ON THE RIGHT SIDE I CAN SEE FURNITURE IN
6 THE ROOM --

7 THE COURT: WHERE DID YOU SEE FURNITURE?

8 MR. GATTI: ON THE VERY RIGHT SIDE, YOUR
9 HONOR. LOOKING AT THE PICTURE, THE VERY FAR LOWER,
10 RIGHT-HAND CORNER.

11 MR. KENDALL: YOUR HONOR, SINCE WE WEREN'T
12 FURNISHED WITH COLOR, I WONDER IF I COULD JUST LOOK --

13 THE COURT: SURE. GO AHEAD. EVERYONE IS
14 LOOKING AT EXHIBIT 11. I SEE YOUR COLLEAGUE IS LOOKING
15 AT EXHIBIT 16. I CAN SEE THERE MAY BE FURNITURE INSIDE
16 THE HOUSE. THERE IS SOMETHING THAT IS WITHIN THE
17 INTERIOR OF THE HOUSE, BUT WHAT CAN BE MADE OUT, WHAT
18 CAN BE DISCERNED WITH THE PHOTOGRAPHS THAT ARE IN
19 EVIDENCE?

20 MR. GATTI: WELL, YOUR HONOR --

21 THE COURT: CERTAINLY ONE CANNOT SEE ANY
22 PEOPLE. AS A MATTER OF FACT, I DON'T SEE ANY PEOPLE ON
23 THE DECK NEAR THE POOL OR IN THE POOL. THERE IS
24 SOMETHING -- WHETHER SHADOWS -- OR MAYBE THERE IS
25 SOMETHING IN THE POOL. THEY LOOK TO BE SHADOWS. I
26 CAN'T TELL WHAT THEY ARE. I CAN'T MAKE OUT ANYTHING
27 FROM WITHIN THE HOUSE FROM EITHER EXHIBIT 11 OR EXHIBIT
28 16.

1 MR. GATTI: WITH RESPECT TO THE CLAIMS THAT WE
2 HAVE, THE INTRUSION CLAIM, THE DISCUSSION ON INTRUSION,
3 AND WHAT IT TALKS ABOUT IS THE SPHERE OF PRIVACY. AND
4 ALL OF THE CASES --

5 THE COURT: OKAY. WE'RE GETTING A LITTLE FAR
6 AFIELD HERE. WE WERE GOING TO TALK ABOUT THE FIRST
7 PRONG OF THE ANTI-SLAPP STATUTE. I'M HAPPY TO COME BACK
8 TO THIS WHEN WE DISCUSS THE OTHER ELEMENTS, BUT HOW DOES
9 IT BEAR ON THE FIRST PRONG OF THE SLAPP STATUTE?

10 MR. GATTI: WELL FIRST, AGAIN, EVERYTHING
11 I'VE SAID REGARDING THE INTRUSION CLAIM AND THE SLAPP
12 DOESN'T APPLY. IT EQUALLY APPLIES IN THIS SITUATION.
13 AND ALSO WHAT YOU WOULD HAVE TO BE HOLDING THEN IS, YOUR
14 HONOR, YOU WOULD HAVE TO HAVE A FINDING THAT ONE CANNOT
15 HAVE AN INTRUSION CLAIM BY VIEWING ONE'S -- INTO ONE'S
16 PRIVATE BACKYARD. AND YOU WOULD BE SAYING, THE COURT
17 WOULD BE SAYING, THAT YOU WOULD HAVE TO MAKE OUT WITH
18 SOME SORT OF VERY CLEAR PRECISE VIEWING SOMETHING THAT
19 IS IN THE HOME. I WOULD --

20 THE COURT: I WANT TO COME BACK TO THAT. HOW
21 DOES THAT RELATE, HOWEVER, TO THE FIRST PRONG ON THE
22 SLAPP STATUTE?

23 MR. GATTI: WELL -- IT DOESN'T APPLY BECAUSE
24 WHAT APPLIES --

25 THE COURT: EXCUSE ME. IT DOES OR DOES NOT?

26 MR. GATTI: I'M SORRY, YOUR HONOR, AS FAR AS
27 THE FIRST PRONG APPLIES, THE ISSUE OF THE CAUSE -- WE
28 FIRST LOOK AT THE CAUSE OF ACTION. THE CAUSE OF ACTION

1 WE'RE FOCUSING ON RIGHT NOW IS INTRUSION. INTRUSION
2 DEALS WITH THE MEANS. THE CASE LAW AS A MATTER OF LAW
3 HAVE HELD THAT INTRUSION DOES NOT INVOKE ISSUES OF
4 SPEECH OR EXPRESSION.

5 THEREFORE, IT DOESN'T -- DOES NOT APPLY. THE
6 ISSUE OF HAVING TO LOOK INTO WHAT IT IS, WE'RE LOOKING
7 AT JUST, FIRST, THE INITIAL WHETHER OR NOT THE SLAPP
8 MOTION -- WHICH, AGAIN, THE SLAPP MOTION IS A VERY, VERY
9 SPECIFIC --

10 THE COURT: WELL, LET'S BACK UP A FEW MINUTES,
11 COUNSEL. 425.16 (E) DOES APPARENTLY FOCUS ON THE
12 DEFENDANT'S CONDUCT. THE WAY YOU HAVE DESCRIBED IT NOW,
13 THERE WOULD BE NO CASE IN WHICH THE SLAPP STATUTE EVER
14 APPLIED. LOOK ON THE FACE OF (E), THE PERSON WHOSE
15 RIGHTS ARE TO BE INQUIRED OF APPEARS TO BE THE
16 DEFENDANTS RIGHTS.

17 IF WE LOOK AT THE PLAINTIFF'S RIGHTS, THERE
18 WOULD BE NO PURPOSE FOR HAVING A SLAPP STATUTE TO BEGIN
19 WITH, WOULD THERE? OR LET ME ASK THE QUESTION LESS
20 ARGUMENTATIVE. WHAT WOULD BE THE PURPOSE OF A SLAPP
21 STATUTE IF WE LOOKED AT THE PLAINTIFF'S RIGHTS AS
22 OPPOSED TO DEFENDANTS?

23 MR. GATTI: I DON'T DISAGREE, YOUR HONOR.
24 THERE IS AN ASPECT OF THE STATUTE THAT DEALS WITH THE
25 DEFENDANT'S CONDUCT. BUT THE PRELIMINARY DECISION OR
26 THE PRELIMINARY ANALYSIS IS LOOKING AT THE CAUSE OF
27 ACTION THAT THE PARTICULAR PLAINTIFF HAS PUT FORTH AND
28 WHETHER OR NOT THAT CAUSE OF ACTION TRIGGERS A VIEW INTO

1 THE CONDUCT.

2 AND ALL WE ARE SAYING IN THE CASE LAW WE HAVE
3 CITED AND THE LACK OF CASE LAW THAT HAS BEEN CITED BY
4 THE DEFENDANTS, IN FACT, IN CASE LAW CITED BY THE
5 DEFENDANTS, WHICH IS APPARENT BECAUSE IT'S SUCH A
6 WELL-ESTABLISHED FACT OF LAW, THAT THE INTRUSION CAUSE
7 OF ACTION FOCUSES ON THE MEANS. IT DOESN'T FOCUS ON AN
8 EXPRESSION. AND THAT IS WHAT THE CASES WE'VE CITED
9 ESTABLISH, AND THERE IS NOT A SINGLE CASE FROM THE
10 DEFENDANTS THAT SAYS OTHERWISE.

11 THE COURT: OKAY. NOW, WHAT -- WERE THERE
12 OTHER POINTS YOU WANT TO MAKE ON THIS? WE GOT BACK ON
13 THE SUBJECT BECAUSE YOU SAID ONE COULD SEE INTO THE
14 HOME, AND I DON'T -- I'M LOOKING FOR SOME FACT UPON
15 WHICH TO SUPPORT THAT REPRESENTATION. ASIDE FROM SOME
16 VERY GENERAL VIEW THAT REQUIRES, IN FACT, THAT ONE
17 SURMISE WHAT IS WITHIN THE HOME, I DON'T SEE WHAT YOU
18 CAN SEE FROM THOSE WINDOWS IN THESE PHOTOGRAPHS WHICH WE
19 HAVE IN EVIDENCE AND WHETHER AT SOME POINT -- AS A
20 MATTER OF FACT, TODAY I WOULD BE WILLING -- IF COUNSEL
21 WOULD STIPULATE, THERE MUST BE A CAMERA RIGHT NOW THAT
22 WOULD PROBABLY READ THE NEWSPAPER IF THERE IS ONE ON A
23 TABLE, ASSUMING THERE IS ONE THERE IN THE BREAKFAST ROOM
24 OF YOUR CLIENT'S HOUSE. THAT'S NOT A CAMERA THAT WAS
25 USED HERE, SO WHAT IS THE RELEVANCE OF THAT?

26 MR. GATTI: WELL, YOUR HONOR, WHAT HAS BEEN
27 USED HERE IS A TECHNOLOGY THAT THIS IS AN EXAMPLE OF --
28 THIS IS NOT THE END ALL OF HOW THIS PICTURE CAN BE BLOWN

1 UP. IT CAN BE BLOWN UP LARGER, AND AT SOME POINT IN
2 TIME IT WILL BLOW-UP AND IT WILL, BASED ON THE
3 TECHNOLOGY OF THIS PARTICULAR CAMERA, YOU WILL BE ABLE
4 TO SEE A LARGER AND LARGER VIEW. AT SOME POINT IN TIME
5 THE RESOLUTION WILL START TO GET FUZZIER.

6 THE COURT: WHAT EVIDENCE DO WE HAVE THAT WHAT
7 IS NOW POSTED ON THE WEBSITE CAN BE ENHANCED BY SOME
8 MEANS SO THAT ONE CAN ACTUALLY MAKE OUT THINGS WITHIN
9 THE HOUSE?

10 MR. GATTI: THE EVIDENCE IS THE -- WELL, FIRST
11 OFF, IF I CAN ADDRESS ONE THING THAT THE COURT HAS
12 FOCUSED ON. THE INTRUSION CAUSE OF ACTION DEALS WITH A
13 SPHERE OF PRIVACY, AND THE SPHERE OF PRIVACY DEALS
14 WITH -- IS NOT LIMITED TO, YOUR HONOR, WHAT CAN BE SEEN
15 INSIDE THE HOUSE BUILDING PROPER.

16 WHAT IT IS ALSO DEALING WITH IS THE GROUNDS
17 AND THE PRIVATE GROUNDS OF THE PROPERTY. NOWHERE IS THE
18 INTRUSION LIMITED TO A VIEW OF THE INSIDE OF THE HOME.
19 I WOULD PUT IT TO YOUR HONOR AND THE COURT THAT THE VIEW
20 OF THE HOME INSIDE CAN OCCUR, BUT ALSO IT IS UNDISPUTED
21 THAT YOU CAN SEE INTO THE PRIVATE AREAS OF THE GROUNDS
22 THAT ARE NOT VIEWED BY ANY OTHER -- THERE IS NO ABILITY
23 TO SEE THIS PICTURE OTHER THAN THROUGH THE ENHANCEMENTS
24 AND THROUGH WHAT HAS BEEN DONE IN THIS PARTICULAR CASE.

25 THERE ARE NO CASES CITED TO THE COURT THAT SAY
26 THAT INTRUSION MEANS INTRUSION INTO THE HOME ONLY.
27 WE'RE TALKING ABOUT DEALING WITH SPHERES OF PRIVACY,
28 WHICH CLEARLY INVOLVE THE HOME. AND IF WE HAVE THE

1 EXAMPLE AS A HYPOTHETICAL, IF WE HAD THE EXAMPLE HERE
2 WHERE MRS. STREISAND OR SOMEBODY ELSE BECAUSE THERE ARE
3 PICTURES ON THE WEBSITE THAT HAVE CAPTURED INDIVIDUALS
4 IN THEIR BACKYARD, IF THE SITUATION WAS THAT, IT'S NO
5 DIFFERENT. BECAUSE THEN YOU ARE SAYING THAT
6 MRS. STREISAND OR ANY OTHER INDIVIDUAL IN THE MOST
7 PRIVATE OF PLACES, THEIR HOME, HAS TO BE CAUTIOUS ABOUT
8 THEIR FREEDOM OF EXPRESSION IN THEIR HOME BECAUSE AT ANY
9 GIVEN TIME A MR. ADELMAN OR SOMEBODY LIKE THAT CAN BE
10 PEERING INTO YOUR PRIVATE AREA.

11 THE COURT: OKAY. DO YOU HAVE POINTS YOU WANT
12 TO MAKE ON THIS PRONG? BECAUSE WE DO NEED TO GIVE
13 MR. KENDALL TIME. BUT I WANT TO POINT OUT TO YOU MY
14 UNDERSTANDING OF THE STATE OF THE EVIDENCE IS THAT
15 EXHIBIT I TO THE DECLARATION FILED BY DEFENDANTS IS ALSO
16 IN EVIDENCE. AND IT IS AN ATTEMPT TO PEER INTO THE
17 HOUSE THROUGH THOSE WINDOWS BY ENHANCING THE WEBSITE.
18 AND IT'S CERTAINLY INEFFECTIVE.

19 SO THIS IS AN ATTEMPT TO DO WHAT YOU SUGGEST
20 ORALLY, COUNSEL. WERE YOU ABLE TO GET SOME VIEW
21 DIFFERENT THAN EXHIBIT I? IT'S NOT IN EVIDENCE.
22 THIS -- I IS IN EVIDENCE. THIS IS AN ATTEMPT TO ENHANCE
23 THAT VIEW SO WE CAN LOOK INTO THE WINDOW AND CAN READ
24 THAT NEWSPAPER BASED ON THE PRESENT PHOTOGRAPH THAT'S
25 PRESENTLY ON THE WEBSITE.

26 NOW, I'M NOT SAYING THAT YOUR CLAIM WITH
27 RESPECT TO THE BACKYARD DOESN'T HAVE ITS OWN CHARACTER,
28 BUT WITH RESPECT TO WHETHER THE PICTURES THAT ARE POSTED

1 ON THE WEBSITE OR THE PHOTOGRAPH, IMAGE 3850, ALLOWS
2 SOMEONE TO ENHANCE IT TO PEER INSIDE THE HOUSE, EXHIBIT
3 I IS APPARENTLY THE ONLY EVIDENCE WE HAVE WITH RESPECT
4 TO THAT. IS THERE OTHER EVIDENCE?

5 MR. GATTI: THERE ARE -- THE EVIDENCE IS ON
6 THE WEBSITE ITSELF THAT STATES THAT CAN BE -- THE
7 PICTURES CAN BE ENHANCED DUE TO THE DIGITAL PHOTOGRAPHY
8 AND THE MECHANICS THAT ARE INVOLVED HERE. AND I THINK
9 THE COURT COULD TAKE JUDICIAL NOTICE OF THE COMMON FACT
10 THAT WHEN ONE TAKES DIGITAL PICTURES --

11 THE COURT: YOU FLATTER ME, COUNSEL.

12 MR. GATTI: I HOPE WE DON'T HAVE TO GO TOO FAR
13 DOWN --

14 THE COURT: I WAS IMPRESSED WHEN MR. KENDALL
15 SUGGESTED THAT MR. ADELMAN CAN COMPUTE DISTANCES BETWEEN
16 TWO DIFFERENT POINTS ON THE EARTH. BUT WITH RESPECT TO
17 DIGITAL TECHNOLOGY, THE STATE OF THE EVIDENCE, AS THIS
18 COURT FINDS, IS THAT EXHIBIT I IS AS CLOSE AS ONE CAN
19 GET, AND IT IS NOT PERSUASIVE THAT ONE CAN SEE INSIDE
20 THE HOUSE IN ANY MEANINGFUL DEGREE, SO YOU HAVE TWO MORE
21 MINUTES ON THIS POINT.

22 MR. GATTI: OKAY. ON THAT EXACT POINT THAT
23 WE'RE JUST TALKING TO, JUST TO CITE -- I WAS CITING TO
24 THE EXHIBIT 12 AND THE CONTEXT OF --

25 THE COURT: EXHIBIT 12, ONE MOMENT, PLEASE --

26 MR. GATTI: I'M SORRY, YOUR HONOR. I WAS
27 TALKING ABOUT EXHIBIT 12 TO MY DECLARATION.

28 THE COURT: RIGHT. THE SECOND PAGE HEADED

1 "THE CAMERA."

2 MR. GATTI: SECOND PAGE -- ACTUALLY, THE
3 SECOND PAGE OF THE EXHIBIT WHICH IS AFTER THE HEADING OF
4 "THE IDEA," AND I'M SPECIFICLY LOOKING AT THE SECOND
5 PAGE JUST PRIOR TO THE HEADING WHICH SAYS "THE
6 AIRCRAFT."

7 THE COURT: RIGHT. MAYBE YOUR ACCO FASTENER
8 IS A LITTLE TIGHTER THAN MINE. I CAN READ "THE CAMERA"
9 HEADING ABOVE THAT PAGE 2.

10 MR. GATTI: YOU ARE RIGHT, YOUR HONOR. I'M
11 SORRY. AT THE BOTTOM UNDER "THE CAMERA," THE ONE, TWO,
12 THIRD PARAGRAPH DOWN, MR. ADELMAN DISCUSSES THE -- IT
13 TAKES APPROXIMATELY FOUR PHASES OF POST PROCESSING TO
14 GENERATE THE IMAGE AND INDEX YOU SEE FROM ONE DAY OF
15 SHOOTING. THE HIGHER RESOLUTION NEF FORMAT FILES ARE
16 NOT AVAILABLE ONLINE, BUT THEY, OR TIFF FORMAT FILES,
17 COULD BE MADE AVAILABLE FOR APPLICATIONS REQUIRING THE
18 DETAIL WHICH IS LOST IN THE J PEG DESCRIPTION.

19 THE COURT: WE HAVE NO EVIDENCE AS TO WHAT ANY
20 OF THAT MEANS. IF THERE IS, WILL YOU TELL ME WHAT IT
21 IS.

22 MR. GATTI: WELL, I THINK GENERALLY WHAT IT IS
23 IS THAT --

24 THE COURT: I'M NOT ASKING YOU TO EXPLAIN. MY
25 POINT IS I DON'T KNOW WHAT THOSE INITIALS MEAN. WE HAVE
26 NO EVIDENCE AS TO WHAT THEY MEAN.

27 MR. GATTI: I THINK FROM HIS OWN WORDS, THE
28 COMMON USAGE OF THE WORDS WHERE --

1 THE COURT: THERE IS NO COMMON USAGE FOR THOSE
2 WORDS, COUNSEL, IS THERE?

3 MR. GATTI: WELL, WHAT I'M SPECIFICLY SAYING
4 IS THAT THE -- HIS DISCUSSION THAT THE HIGHER RESOLUTION
5 COULD BE MADE AVAILABLE FOR APPLICATIONS REQUIRING
6 DETAIL WHICH IS LOST, HE'S BASICALLY SAYING JUST IN A
7 NUTSHELL THAT THERE -- THAT BASED ON WHAT HE HAS DONE
8 THERE IS AN ABILITY TO ALSO USE THE TECHNOLOGY BEING
9 USED AND PICTURE IMAGES TAKEN TO ENHANCE THE VIEW.

10 THE COURT: WELL, COUNSEL, HERE IS ONE
11 PROBLEM, AND THAT IS THAT HE COULD BE SAYING TWO THINGS,
12 AND AT THIS POINT I THINK IT'S SPECULATION, BUT TAKE A
13 BRIEF DIGRESSION. WHAT HE COULD BE SAYING IS WE WOULD
14 BE ABLE TO ENHANCE A PHOTOGRAPH SO WE CAN SEE THAT THE
15 WINDOWS ARE PERP- -- ARE PERPENDICULAR TO ONE ANOTHER IN
16 THE CORNERS. THAT DOES NOT MEAN YOU CAN SEE INSIDE THE
17 HOUSE. IT MAY BE AS A MATTER OF LIGHTING. THERE'S --
18 IT'S IMPOSSIBLE TO SEE WHAT IS INSIDE THE HOUSE, BECAUSE
19 WHEN THE CAMERA TOOK THE PHOTOGRAPH IT ONLY COULD TAKE
20 SO MUCH DATA IN, AND ALL THAT WE COULD SEE -- IF THE
21 QUESTION IS COULD ENHANCE, THIS WOULD BE ENHANCEMENT OF
22 DATA THAT WAS ORIGINALLY TAKEN IN.

23 AND THAT -- BUT I DON'T KNOW. AND AS I SAID,
24 IT'S ALL SPECULATION. WE HAVE NOTHING IN THE RECORD
25 THAT SAYS THAT YOU COULD ENHANCE THIS TO READ THAT
26 NEWSPAPER ON THE COFFEE TABLE OR BREAKFAST TABLE INSIDE
27 THE HOUSE. IT'S MORE LIKELY THAT ONE COULD GET EXHIBIT
28 11 -- IS THAT THE RIGHT NUMBER, THE ONE FROM

1 MS. SEIGLE'S DECLARATION I SHOWED YOU A FEW MOMENTS AGO?

2 MS. SEIGLE.

3 MS. SEIGLE: EXHIBIT I, YOUR HONOR.

4 THE COURT: EXHIBIT I. THANK YOU. RIGHT
5 SHAPE BUT WRONG DETAIL. AND I -- THAT ILLUSTRATES THE
6 EXAMPLE. WE GET A REALLY CRISP -- IF WE COULD ENHANCE
7 THE PHOTOGRAPH BUT COULD NOT SEE BEYOND THAT, YOU
8 COULDN'T SEE WHAT IS WITHIN THE WINDOW FRAME, BUT I
9 DON'T KNOW.

10 MR. GATTI: WHAT WE DO KNOW IS, BASED ON THE
11 PICTURE WE HAVE, A VERY CLEAR --

12 THE COURT: VIEW THE BACKYARD AND THE POOL,
13 THERE IS NO DOUBT ABOUT THAT. THAT'S CLEARLY IN
14 EVIDENCE. THE QUESTION IS WHAT IS THE LEGAL
15 SIGNIFICANCE.

16 MR. GATTI: ALSO, YOUR HONOR, I DON'T THINK
17 THERE IS ANY DOUBT THAT THE PART OF THE HOME, INCLUDING
18 THE -- THE --

19 THE COURT: THE POOL, THE GROUND.

20 MR. GATTI: BUT ALSO THE DECKING THAT IS PART
21 OF THE INTERIOR OF THE HOME WHICH IS PARKED OFF OF A
22 BEDROOM IN THE HOME IS CLEARLY VISIBLE. THERE IS NO
23 QUESTION.

24 THE COURT: COULD YOU DESCRIBE THAT IN MORE
25 DETAIL.

26 MR. GATTI: YES, YOUR HONOR, LOOKING AT
27 THE -- ON THE SECOND STORY --

28 THE COURT: YES, IT IS A BALCONY.

1 MR. GATTI: THERE IS A BALCONY OFF OF THE
2 BEDROOM AREA --

3 THE COURT: I DON'T KNOW WHAT AREA THAT IS,
4 COUNSEL, BUT IT'S DEFINITELY A BALCONY OFF OF SOMETHING.
5 AS A MATTER OF FACT, IT LOOKS LIKE A SMALLER BALCONY TO
6 THE RIGHT. I DON'T KNOW IF IT IS OR NOT, BUT PERHAPS.

7 MR. GATTI: IT'S OBVIOUSLY PART OF THE
8 STRUCTURE OF THE HOME, AND WHAT --

9 THE COURT: THERE IS NO DOUBT. WE CAN SEE THE
10 BALCONY.

11 MR. GATTI: CORRECT. AND THE POINT IS, YOUR
12 HONOR, THERE IS NO -- THERE ARE NO CASES THAT HAVE BEEN
13 PRESENTED TO THE COURT THAT SAY THAT BALCONIES -- SEEING
14 BALCONIES ON A HOME IN A PRIVATE HOME DOES NOT COUNT --
15 YOU HAVE TO SEE DETAIL IN A LIVING ROOM OR DEN OR
16 WHATEVER IT IS. THERE IS NO CASE LAW THAT SAYS THIS.
17 ONLY WHAT IS WELL ESTABLISHED IS THAT ONE HAS A VESTED
18 STRONG INTEREST IN THE SPHERE OF THE PRIVACY.

19 THE COURT: HOW DOES THAT ALL RELATE TO THE
20 FIRST PRONG OF THE SLAPP STATUTE?

21 MR. GATTI: THE FIRST PRONG, WE'RE TAKING
22 ABOUT -- EVERYTHING WE'VE BEEN TALKING ABOUT HERE,
23 SPECIFICLY I WAS TALKING ABOUT THE INTRUSION CAUSE OF
24 ACTION. THE INTRUSION CAUSE OF ACTION HAS NEVER EVER
25 BEEN SUBJECT TO A SLAPP MOTION AND HAS NEVER BEEN
26 DISMISSED AS PART OF A SLAPP MOTION.

27 THE COURT: IN THE 10 YEARS PLUS THAT THE
28 SLAPP STATUTE HAS BEEN ON THE BOOKS?

1 MR. GATTI: CORRECT.

2 THE COURT: OKAY.

3 MR. GATTI: AND I THINK AS WE'VE SEEN, THE
4 SLAPP MOTION HAS RECEIVED A LOT OF ATTENTION IN A LOT OF
5 CASES, A LOT OF DECISIONS. BECAUSE IT IS A STATUTE
6 THAT'S DEFINITELY IN FLUX, AND THERE ARE DECISIONS OF
7 VARYING DEGREES, BUT THERE IS NO EXPRESSION OF THE
8 DEFENDANTS THAT IS TRIGGERED BY THE INTRUSION CLAIM.

9 AND THE LAST THING I WOULD SAY ON THE FIRST
10 PRONG IS WE THEN HAVE TO FOCUS ON WHAT -- AS YOUR HONOR
11 WAS SAYING WITH RESPECT TO THE DEFENDANT'S CONDUCT AND
12 WHAT -- HOW THIS IMPACTS THE DEFENDANT'S CONDUCT, THERE
13 IS NO EVIDENCE, YOUR HONOR, THAT THERE IS ANY PUBLIC
14 ISSUE OR CONCERN IN THIS PHOTOGRAPH OR IN THE
15 CAPTIONING. MORE IMPORTANTLY, THE CAPTIONING AND
16 SELLING PICTURES OF MRS. STREISAND'S HOME, USING HER
17 NAME, USING LOCATORS TO IDENTIFY WHERE HER HOME IS,
18 TURNING AROUND AND SELLING THE PICTURES, THAT IS NOT A
19 PROTECTED EXPRESSION OF FREEDOM OF SPEECH.

20 AND THERE IS THE QUESTION WE HAVE TO ASK IN
21 THIS CASE WHEN THE COURT WAS ASKING ME WHAT IS THE
22 CONDUCT OF THE DEFENDANTS. WELL, MY QUESTION IS WHAT IS
23 THAT EXPRESSION FOR THE DEFENDANTS. THERE IS NO ISSUE
24 OF CONCERN HERE. YOU CAN'T JUST SAY THAT -- WE KNOW THE
25 CASES WE'VE CITED TO THE COURT SPECIFICLY SAY THIS IS --
26 THAT JUST BECAUSE THERE IS AN INTEREST DOESN'T MEAN
27 IT'S -- YOU HAVE A RIGHT TO EXPRESS IT, TO PUBLISH IT,
28 TO DO ALL OF THOSE THINGS. THE CASES ARE CLEAR, AND I

1 KNOW THE COURT HAS LOOKED AT THOSE.

2 BUT WHAT IS THAT EXPRESSION HERE. WHAT --
3 THEY HAVE USED A NAME OF AN INDIVIDUAL, THEY HAVE
4 CAPTURED -- USED THAT CAPTION TO DIRECT PEOPLE TO THE
5 HOME TO VIEW THE HOME, TO VIEW THE PRIVATE GROUNDS, AND
6 IN CONNECTION WITH WHAT, THERE IS NO PUBLIC ISSUE HERE.
7 IF YOU --

8 THE COURT: COUNSEL, THE EVIDENCE ALSO SHOWS
9 THAT THE INDIVIDUAL DEFENDANT HAS TAKEN 12,200
10 PHOTOGRAPHS OF THE COAST. WE'RE ALL FOCUSING ON WHAT IS
11 ON THE TOP BLUFF, WHAT IS PWS FRONT IN THE FOREGROUND OF
12 THE PICTURE, WHICH IS THE CALIFORNIA COAST, WHICH HAS
13 BEEN SUBJECT TO REGULATIONS. AS A MATTER OF FACT, IF
14 THE BUDGET BILL HAD PASSED YET THE COASTAL COMMISSION
15 WOULD HAVE BEEN OUT OF BUSINESS. THAT'S CLEARLY AN
16 EXPRESSION OF A PUBLIC VIEW.

17 MR. GATTI: YOUR HONOR, WHAT I WOULD SAY IS
18 THAT THAT IS EXACTLY OUR POINT.

19 THE COURT: WHAT IS THAT?

20 MR. GATTI: THERE IS NOTHING THAT THAT ISSUE
21 HAS TO DO WITH MRS. STREISAND OR HER HOME IF THE
22 DEFENDANT WANTS --

23 THE COURT: I MISSPOKE, COUNSEL, BECAUSE THE
24 COASTAL ZONE EXTENDS BEYOND THE BLUFF. THAT'S SOMETHING
25 WE ALL NEED TO REMEMBER.

26 MR. GATTI: I UNDERSTAND THAT, YOUR HONOR,
27 BUT WHAT I AM SAYING, IF THE EXPRESSION WE'RE NOW SAYING
28 IS AT ISSUE HERE, THE PICTURE OF THE COASTLINE, THE

1 PICTURE OF THE BLUFF --

2 THE COURT: WELL, I NEED TO BROADEN THAT THE
3 PICTURE OF THE COASTAL ZONE, THE PARTICULAR PICTURE OF
4 THE COASTAL ZONE IS IMAGE 3850. GO AHEAD.

5 MR. GATTI: WHAT I WOULD SAY, YOUR HONOR, IS
6 THAT THEN THERE IS NO -- NO NEED TO -- IF ONE WERE TO
7 SAY THAT IS A LEGITIMATE PUBLIC CONCERN, THEN I WOULD
8 SAY THAT YOU CAN ESTABLISH THAT AND -- AS THE VIRGIL
9 CASE SAYS AND ALL THE OTHER CASES WE HAVE CITED SAY, IF
10 THERE ARE LESS INTRUSIVE WAYS TO SATISFY THAT
11 EXPRESSION, THERE IS A REQUIREMENT THAT YOU DO SO. AND
12 TO AVOID INVADING ONE'S PRIVACY, MR. ADELMAN COULD TAKE
13 PICTURES OF THE BLUFF THAT WOULD NEVER HAVE IMPACTED
14 MRS. STREISAND.

15 AND THE FACT THAT MRS. STREISAND HAPPENS TO
16 LIVE IN WHAT MAY BE DEEMED A COASTAL ZONE, EVEN THOUGH
17 THERE IS NO ISSUE IN THE EVIDENCE HERE THAT RELATES TO
18 THIS PARTICULAR PIECE OF PROPERTY, WHAT WE HAVE HERE IS
19 THEN YOU WOULD -- THE COURT WOULD BE MAKING A RULING
20 THAT SAYS IN THE COASTAL ZONE YOU LOSE A RIGHT OF
21 PRIVACY; YOU HAVE LESS PRIVACY RIGHTS. THEN WE'RE
22 TALKING ABOUT A SITUATION WHERE --

23 THE COURT: COUNSEL, YOU ARE BEYOND THE FIRST
24 PRONG. WE'RE GOING TO TAKE A TWO-MINUTE BREAK. THEN
25 MR. KENDALL IS GOING TO HAVE THE OPPORTUNITY TO RESPOND.

26 MR. GATTI: THANK YOU, YOUR HONOR.

27 THE COURT: LITERALLY TWO MINUTES.

28 (RECESS)

1 THE COURT: ALL RIGHT. WE'RE ALL HERE.

2 LET'S RESUME. MR. KENDALL.

3 MR. KENDALL: THANK YOU, YOUR HONOR. I
4 BELIEVE THAT MR. GATTI SAID ABOUT SEVEN TIMES THAT THERE
5 IS NO CASE THAT ANYONE HAS CITED IN WHICH -- IN WHICH
6 THE ANTI-SLAPP STATUTE WAS APPLIED TO INTRUSION CAUSES
7 OF ACTION, BUT THAT'S INCORRECT. BOTH PARTIES CITED THE
8 SAME CASE, WHICH IS M.G. VERSUS TIME/WARNER, INC. AND I
9 WILL READ FROM THAT CASE AT --

10 THE COURT: COUNSEL, THE CITATION AGAIN,
11 PLEASE.

12 MR. KENDALL: M.G. VERSUS TIME/WARNER, INC.,
13 AND I'M GOING TO READ FROM 89 CAL AP. 4; CASE CITE IS
14 623. I'M GOING TO READ FROM PAGE 630.

15 THE COURT EXPLAINS THAT PLAINTIFF'S FIRST FOUR
16 CAUSES OF ACTION ARE ALL FOR INVASION OF PRIVACY BASED
17 ON VARIOUS THEORIES OF LIABILITY, MISAPPROPRIATION OF
18 IDENTITY, PUBLIC DISCLOSURE OF PRIVATE FACTS, INTRUSION,
19 AND FALSE LIGHT. ALTHOUGH PLAINTIFFS HAVE PLEADED THESE
20 VARIOUS THEORIES OF SEPARATE CAUSES OF ACTIONS, THEY ARE
21 BASED ON THE IDENTICAL FACTS, SEEK THE SAME DAMAGE, AND
22 GENERALLY CONSTITUTE INVASION OF PRIVACY CLAIMS.

23 IT GOES ON, AND THIS PRECISE PASSAGE WAS CITED
24 BY MY CLIENTS. THIS IS A CASE IN WHICH THE COURT
25 DECIDED UNDER THE FIRST PRONG THAT THE ANTI-SLAPP
26 STATUTE APPLIED; HOWEVER, BECAUSE OF THE EXTRAORDINARY
27 INVASION OF THE CHILDREN'S IDENTITIES -- THESE ARE
28 CHILDREN WHO HAD BEEN MOLESTED AND THE COURT FOUND,

1 WHILE THE FACTS OF MOLESTATION WERE NEWSWORTHY, THERE
2 WAS NO REASON WHY THE IDENTITIES OF THE CHILDREN, WHICH
3 HAD NEVER BEEN REVEALED, WERE NEWSWORTHY, SO ON THE
4 SECOND PRONG THEY FOUND THAT THE CHILDREN HAD A
5 PROBABILITY OF SUCCESS.

6 WE'RE TALKING HERE ABOUT THE FIRST PRONG. AND
7 SO THAT I DON'T GO ON FOR A WHOLE HOUR, I'LL TRY TO
8 CONFINE MYSELF TO THAT. SO FIRST OF ALL, ON THE LAW
9 COUNSEL IS WRONG, SQUARELY WRONG ON THAT POINT.

10 HE'S ALSO WRONG ON THE POINT BECAUSE OF A CASE
11 THAT CAME DOWN ON JUNE 30 AFTER WE FILED OUR BRIEF,
12 WHICH I WANT TO BRING TO THE COURT'S ATTENTION, THAT
13 CASE -- I DON'T HAVE A CAL AP. CITE FOR YOUR HONOR
14 BECAUSE I DON'T THINK IT'S BEEN PUBLISHED IN CAL AP. I
15 DO HAVE A WEST LAW CITE. IT'S BEACH AGAINST HARCO
16 NATIONAL INSURANCE CO. IT'S B-E-A-C-H, AND THE WEST LAW
17 CITE IS 2003 WEST LAW 21511796. PUBLISHED ON JUNE 30,
18 2003.

19 THE COURT: WHAT SHOULD WE DO ABOUT SOMETHING
20 THAT'S NOT FINAL, COUNSEL? IT'S NOT CITABLE, IS IT?

21 MR. KENDALL: YOUR HONOR, I THINK IT'S CITABLE
22 UNTIL -- IF THERE IS AN APPEAL OR IT'S DEPUBLISHED. I
23 THINK IT'S CITEABLE BECAUSE IT'S BEEN PUBLISHED. I
24 BELIEVE IT'S BEEN PUBLISHED IN THE DAILY JOURNAL.

25 THE COURT: READ IT. I KNOW IT EXISTS.

26 GO AHEAD, COUNSEL.

27 MR. KENDALL: THE COURT SAID IN THIS CASE
28 THERE IS SIMPLY NO AUTHORITY FOR CREATING A CATEGORICAL

1 EXCEPTION FOR ANY PARTICULAR TYPE OF CLAIM. THE NATURE
2 OR FORM OF THE ACTION IS NOT WHAT IS CRITICAL BUT RATHER
3 THAT IT IS AGAINST A PERSON WHO HAS EXERCISED CERTAIN
4 RIGHTS. AND THAT'S AT PAGE STAR 7 OF THE WEST LAW
5 PRINTOUT, YOUR HONOR.

6 I THINK, YOUR HONOR, MY UNDERSTANDING IS THAT
7 YOU DON'T NEED A SLIP OPINION OF A NEWLY PUBLISHED
8 OPINION, AND YOU DON'T HAVE TO WAIT UNTIL A PETITION FOR
9 REVIEW IS EITHER FILED OR NOT WITH THE CALIFORNIA
10 SUPREME COURT WITHIN THE STATUTORY PERIOD. BUT IN ANY
11 EVENT, THERE IS NOT NEW LAW. THAT'S NEW AUTHORITY I
12 THOUGHT I SHOULD BRING TO THE ATTENTION OF THE COURT.

13 SECONDLY, YOUR HONOR, ONE LAST, I LOOKED AT
14 WHAT THEY PLEADED IN THEIR COMPLAINT, BECAUSE THEY --
15 WHAT THEY ALLEGE THAT THE DEFENDANTS DID ON THE FIRST
16 CAUSE OF ACTION. AND WHAT THEY ALLEGE THAT DEFENDANTS
17 DID IN PARAGRAPHS 32 AND 33 OF THE COMPLAINT INCLUDES
18 THE SPEECH THAT'S AT ISSUE HERE. THEY ALLEGE THAT WE
19 ARE SHOWING -- THIS IS ON THE INTRUSION CAUSE OF
20 ACTION -- THAT WE ARE SHOWING THE LOCATION OF
21 PLAINTIFF'S PROPERTY, THAT WE'RE DOING THAT THROUGH
22 LONGITUDINAL AND LATITUDINAL COORDINATES, WHICH IS
23 FACTUALLY WRONG, IS THEIR ALLEGATION. THEY ARE CLAIMING
24 THAT THE PHOTOGRAPHS AND MAPS WOULD BE -- WAS
25 FORESEEABLE, CONTEMPLATED, AND INTEND THAT THEY WOULD BE
26 EXPLOITED, PUBLISHED, DISTRIBUTED AND OTHERWISE
27 DISSEMINATED THROUGH THE PUBLIC THROUGH THE WORLDWIDE
28 WEB. THAT IS SPEECH.

1 THEIR VERY CAUSE OF ACTION FOR INTRUSION
2 ALLEGES THAT THE PURPOSE OF TAKING THESE PHOTOGRAPHS WAS
3 COMMUNICATION TO THE PUBLIC OF THEIR CONTENTS. SO
4 THAT'S WHAT THEY ARE ACKNOWLEDGING THAT THE DEFENDANT
5 DID.

6 SIMILARLY, IN THEIR MISAPPROPRIATION CAUSE OF
7 ACTION AS -- BY THE WAY, IN THE INTRUSION WHEN THEY
8 INCORPORATE BY REFERENCE ALL THE ALLEGATIONS OF THE
9 COMPLAINT SO EVERYTHING THAT THEY SAY ANYWHERE PRIOR TO
10 THE INTRUSION CAUSE OF ACTION IS INCORPORATED IN THAT
11 CAUSE OF ACTION, AND OF COURSE THAT'S ALL THE
12 ALLEGATIONS ABOUT ALL ACTIONS OF THE DEFENDANT,
13 INCLUDING ALL THE SPEECH ACTIVITIES, AND SIMILARLY FOR
14 THE MISAPPROPRIATION CAUSE OF ACTION THEY DO THE SAME
15 THING.

16 AND BEYOND THAT THEY HAVE SPECIFIC ALLEGATIONS
17 RELATING TO THE USE OF THE PLAINTIFF'S NAME FOR PURPOSES
18 OF SELLING THE PICTURES, WHICH IS JUST LIKE A NEWSPAPER,
19 SELLING THE NEWSPAPERS CONTAINING THE PHOTOGRAPHS OF
20 PLAINTIFF'S PROPERTY. AND, AGAIN, THEY ARE -- IN DOING
21 SO THEY ARE ALLEGING CONDUCT THAT IS A SPEECH CONDUCT.

22 NOW, MR. ADELMAN HAS SAID IN HIS DECLARATION
23 AND THE WEBSITE THAT'S IN EVIDENCE, FURTHER PROOF THAT
24 THESE PHOTOGRAPHS ARE, AS THE COURT HAS POINTED OUT, ONE
25 TILE IN A MOSAIC THAT THE DEFENDANT HAS ASSEMBLED TO
26 DEPICT THE CALIFORNIA COASTLINE FOR USE OF THE ENTIRE
27 POPULATION OF INTERNET USERS, INCLUDING GOVERNMENT
28 AGENCIES AND SO FORTH WHO ARE INTERESTED IN THE COAST.

1 AND MRS. STREISAND HAS NO MORE RIGHT TO TELL
2 US WHETHER THAT PICTURE CAN BE THERE AS A MATTER OF
3 SPEECH THAN DOES A CENSOR HAVE A RIGHT TO GO UP TO A
4 MURAL AND TAKE A TILE OUT OF A MOSAIC BECAUSE HE DOES
5 NOT LIKE THE COLOR OF IT OR DOESN'T LIKE WHAT IT SAYS,
6 AND THAT'S WHAT THEY ARE DOING. THEY ARE WRONG ON THE
7 LAW IN SAYING WE HAVE TO LOOK AT JUST THIS TILE, WE
8 DON'T LOOK AT THE WHOLE MOSAIC. THEY ARE WRONG ON THIS
9 LAW, AND I WANT TO GIVE THE COURT SOME CITATIONS ON
10 THAT.

11 THE SAME CASE I CITED EARLIER, THE M.G.
12 AGAINST TIME/WARNER CASE. IN THIS ISSUE -- IN THAT
13 CASE, THE PUBLIC ISSUE AT STAKE WAS THE BROAD TOPIC OF
14 CHILD MOLESTATION IN YOUTH SPORTS; NOT THE NARROW
15 QUESTION OF THE IDEAS OF A PARTICULAR VICTIM WHOSE
16 LIKENESS APPEARED IN THE PHOTOGRAPHS AND WHO SUED FOR
17 INVASION OF PRIVACY.

18 ONE COULD HAVE SAID, AS THE COURT, YOU KNOW,
19 FINALLY HELD, THAT THE PRIVACY CLAIMS WERE WELL TAKEN,
20 BUT NEVERTHELESS IT FELL UNDER THE SLAPP STATUTE, AND
21 THE REASON IT FELL UNDER THE SLAPP STATUTE WAS BECAUSE
22 OF THE GENERAL PURPOSE FOR WHICH THIS PARTICULAR
23 COMMUNICATION, AND IN THAT CASE INTRUSION AND ALLEGED
24 MISAPPROPRIATION, OCCURRED.

25 SIMILARLY, IN THE CASE THAT WE'VE CITED TO,
26 YOUR HONOR, SIPPLE AGAINST FOUNDATION FOR -- I THINK
27 IT'S NATIONAL --

28 THE COURT: CHRONICLE PUBLISHING COMPANY.

1 MR. KENDALL: RIGHT. I HAD THE ABBREVIATION,
2 I APOLOGIZE, SO I COULDN'T TELL.

3 MR. KENDALL: 71 CAL AP. 4 226.

4 THE COURT: WELL, ACTUALLY, COUNSEL, THERE IS
5 THE OTHER SIPPLE CASE --

6 MR. KENDALL: LET ME MAKE SURE I'M SAYING THE
7 WHOLE TITLE CORRECTLY, AND I'LL GIVE THE COURT THE CITE.

8 ACTUALLY, THERE IS A DIFFERENT SIPPLE CASE,
9 SIPPLE AGAINST FOUNDATION FOR -- I'LL GIVE YOU THE
10 ABBREVIATION N-A-T, PERIOD, PROGRESS. 71 CAL AP. 4 226
11 PIN CITES AT 238 AND -39. IT'S A 1999 CASE.

12 ALLEGATIONS OF WIFE BEATING AGAINST THE PROMINENT
13 POLITICAL CONSULTANT WERE PART OF THE SPEECH ON THE
14 BROAD ISSUE OF DOMESTIC VIOLENCE.

15 SO THEY CAN'T GET AROUND THE SLAPP STATUTE BY
16 SAYING THAT WE'RE ONLY TALKING ABOUT ONE TILE OF A
17 MOSAIC BECAUSE WHAT IS AT ISSUE IS WHETHER MR. ADELMAN'S
18 ACTIVITY IN CREATING A WEBSITE WITH 12,200 PICTURES,
19 INCLUDING THIS PARTICULAR PICTURE AND INCLUDING
20 PERMITTING -- AND I'M GOING TO GET TO THE SECOND POINT,
21 A PUBLIC FORUM OF CAPTIONS TO EMERGE AND PERMITTING A
22 THIRD PARTY, PUT A CAPTION -- REMEMBER, THAT'S A THIRD
23 PARTY PUTTING THAT CAPTION THERE, AND MR. ADELMAN
24 PROVIDING THAT FORUM --

25 MR. GATTI: YOUR HONOR.

26 MR. KENDALL: -- AND PUBLISHING THAT CAPTION.

27 MR. GATTI: NOT TO INTERRUPT, I WOULD LIKE TO
28 OBJECT. THE EVIDENCE IS THAT THERE IS NO EVIDENCE IN

1 FRONT OF THE COURT THAT A THIRD PARTY HAS PRESENTED THAT
2 CAPTION.

3 MR. KENDALL: I THINK THAT'S INCORRECT, YOUR
4 HONOR, BUT WE CAN GET BACK TO THAT.

5 THE COURT: LET'S RETURN TO THAT LATER.

6 MR. KENDALL: AND I WOULD BE GRATEFUL NOT TO
7 BE INTERRUPTED.

8 THE FACT IS, YOUR HONOR, THAT A FORUM, A
9 PUBLIC FORUM HAS BEEN CREATED ON THIS WEBSITE WHERE
10 INDIVIDUALS CAN COME IN AND THEY CAN SUGGEST A CAPTION.
11 DAVID GEFFEN, WHO HAPPENS TO BE INVOLVED IN CONTROVERSY,
12 BARBRA STREISAND, WHO HAPPENS TO BE INVOLVED IN
13 CONTROVERSY SURROUNDING HER HOME OR WHATEVER ELSE THEY
14 WANT TO PUT THERE, AND THAT'S A PUBLIC FORUM ON A MATTER
15 OF PUBLIC INTEREST.

16 AND THE LEGISLATURE, AS THE COURT HAS STATED
17 AND AS IT SAYS IN THE PUBLIC RESOURCES CODE IN SECTION
18 30006, THE PUBLIC HAS A RIGHT TO FULLY PARTICIPATE IN
19 DECISIONS THAT AFFECTING COASTAL PLANNING, CONSERVATION,
20 AND DEVELOPMENT. THIS VERY PROPERTY IS INVOLVED IN
21 CONTROVERSIES, AND GOVERNMENT CONTROVERSIES.

22 THE LEGISLATURE WENT ON, TO ACHIEVE A SOUND
23 COASTAL CONSERVATION AND DEVELOPMENT IS DEPENDENT UPON
24 PUBLIC UNDERSTANDING AND SO FORTH AND CONTINUING
25 PLANNING AND IMPLEMENTATION OF THE PROGRAM FOR THE
26 COASTAL CONSERVATION AND DEVELOPMENT SHOULD INCLUDE THE
27 BRIGHTEST OPPORTUNITY FOR PUBLIC PARTICIPATION. THIS IS
28 A PUBLIC FORUM THAT SUGGESTS CAPTION FUNCTION THAT

1 ALLOWS THE PUBLIC TO PARTICIPATE IN THAT DEBATE.

2 AND THAT CAPTION IS PART OF THE ALLEGATIONS OF
3 THE COMPLAINT, AND THE PUBLISHING OF THAT CAPTION IS
4 PART OF THE CLAIMS OF WHAT THIS DEFENDANT HAS ALLEGEDLY
5 DONE THAT SUPPOSEDLY IS WRONG.

6 SO YOUR HONOR FOR ALL OF THE REASONS I'VE
7 STATED, HE'S WRONG ON THE FACTS, BECAUSE HE'S ALLEGED
8 THAT THIS DEFENDANT HAS COMMUNICATED, SPOKEN,
9 PHOTOGRAPHED, RANTED, REPUBLISHED GRANTS, REPUBLISHED
10 CAPTIONS AND GENERALLY ENGAGED IN A WIDE VARIETY OF
11 SPEECH INCLUDING BUT NOT LIMITED TO HIS CLIENT'S
12 PHOTOGRAPH. AND HE'S WRONG ON THE LAW BECAUSE INTRUSION
13 HAS BEEN SPECIFICLY UPHELD AS BEING WITHIN THE FIRST
14 PRONG OF THE SLAPP STATUTE.

15 AND HE'S WRONG BECAUSE THE CORE OF THE CONTENT
16 OF THE CONDUCT THAT HE IS ARGUING ABOUT WITH RESPECT TO
17 THE INTRUSION IS THE MERE TAKING OF PHOTOGRAPHS FOR THE
18 PURPOSE OF USING THE PHOTOGRAPH ON THIS WEBSITE. THERE
19 IS NO OTHER PURPOSE FOR TAKING THIS PHOTOGRAPH THAT'S IN
20 EVIDENCE, AND ALL THE EVIDENCE IS TO THE CONTRARY.

21 NOW, I WILL TRY TO KEEP THIS VERY BRIEF, YOUR
22 HONOR, BUT SO I DON'T LEAVE THE RECORD IN A CONFUSED
23 STATE WITH RESPECT TO THE CAMERA AND THE PHOTOGRAPH, IF
24 I COULD DIRECT THE COURT FIRST BACK TO EXHIBIT 12, WHICH
25 MR. GATTI POINTED YOU TO. MR. GATTI HAS A, I THINK,
26 FUNDAMENTAL MISUNDERSTANDING OF WHAT THIS CAMERA IS
27 DOING AND WHAT IMAGE IS CREATED AND WHAT IMAGE IS
28 CREATED AND AVAILABLE ON THE WEBSITE.

1 THE CAMERA IS NOT A 20 MEGAPIXEL CAMERA, AND
2 NOTHING ABOUT THESE PHOTOGRAPHS CAN EVER BE TURNED INTO
3 A 20 MEGAPIXEL IMAGE. AND IF ONE DAY THE COURT HAS A 20
4 MEGAPIXEL CASE IN FRONT OF IT OR A SPY CAMERA CASE IN
5 FRONT OF IT OR THE GOVERNMENT COMES AND HAS SOME KIND OF
6 SUPER-DUPER SATELLITE CAMERA, WELL, THAT WILL BE ANOTHER
7 DAY. THAT'S NOT THIS CASE.

8 WHAT THIS CASE INVOLVES IS A -- IS A CAMERA
9 FIRST STORES AN IMAGE, WHICH NO ONE HAS EVER SEEN BUT MY
10 CLIENT, NO EVIDENCE OF THAT, THAT DOES NOT HAPPEN TO BE
11 THE CASE, STORED IN SOMETHING CALLED, AS IT SAYS HERE,
12 NIKKON PROPRIETY NEF FORMAT.

13 THE COURT: WHATEVER THAT MAY BE.

14 MR. KENDALL: I COULD TELL YOU, BUT IT'S NOT
15 IN EVIDENCE. I'M NOT GOING TO GO PAST THE RECORD. AND
16 LATER CONVERTED INTO J PEG USING NIKKON CAPTURE RUNNING
17 ON A POWER MAC. NOW WITH -- J PEG IS A KIND OF --

18 THE COURT: I DIDN'T KNOW WHAT IT WAS WHEN
19 MR. GATTI TALKED ABOUT IT, AND I DON'T THINK IT WOULD BE
20 APPROPRIATE TO LEARN ABOUT IT FROM YOU, COUNSEL, WHERE
21 THERE IS NOTHING IN THE RECORD WITH RESPECT TO WHAT
22 EITHER OF THOSE TERMS MEANS.

23 MR. KENDALL: LET ME SAY THIS, YOUR HONOR, FOR
24 PURPOSES OF THIS PROVISION, THERE IS NOTHING IN THE
25 RECORD, AND IT WOULDN'T BE TRUE TO ARGUE THAT THERE IS A
26 TIF FILE OR A NEF FILE ANYWHERE AVAILABLE TO THE PUBLIC.
27 AND --

28 THE COURT: WELL, THERE IS NO EVIDENCE THAT

1 THERE IS.

2 MR. KENDALL: RIGHT.

3 THE COURT: ISN'T THAT THE END OF THAT
4 DISCUSSION?

5 MR. KENDALL: EXHIBIT I THAT WE HAVE PROVIDED
6 TO THE COURT IS THE BEST WE CAN DO. WHAT WE WERE TRYING
7 TO ILLUSTRATE TO THE COURT WITH THAT EXHIBIT IS YOU JUST
8 CAN'T SEE INTO THE HOUSE, EVEN IF YOU USED THE FANCIEST
9 METHODS THAT ONE HAS OF TRYING TO FOCUS IN AND ENLARGE A
10 PARTICULAR SECTION. AND WHAT YOU ARE DOING WHEN YOU ARE
11 ENLARGING THAT WOULD BE A WHOLE LESSON IN COMPUTER
12 MANIPULATION OF IMAGES. BUT IT INVOLVES SUBSTITUTION OF
13 INFORMATION THAT'S NOT IN THE -- EVEN IN THE IMAGE TO
14 CREATE THAT.

15 THE FACT IS THAT WE HAVE A PICTURE WHICH THE
16 COURT HAS AND I HAVE, BY THE WAY, A MOUNTED BLOW-UP OF
17 IT, WHICH WE WOULD USE IT LATER INSTEAD OF EVERYTHING
18 UNFOLDING, THAT DOESN'T SHOW ANYTHING ABOUT THE INTERIOR
19 OF THE HOME. THE ONLY INTRUSION THAT OCCURRED HERE IS
20 THE TAKING OF A PHOTOGRAPH FROM A LONG DISTANCE FOR THE
21 PURPOSE OF PUBLISHING IT ON THIS WEBSITE. AND ALL OF
22 THEIR ALLEGATIONS ARE FOCUSED ON THE PUBLICATION BECAUSE
23 BARBRA STREISAND DIDN'T EVEN KNOW THAT THIS INTRUSION
24 TOOK PLACE. IT COULDN'T BE ACTIVE INTRUSION, COULDN'T
25 POSSIBLY ITSELF --

26 THE COURT: WELL, BUT COUNSEL THAT CAN'T BE
27 THE TEST. BECAUSE TYPICALLY WHEN THERE ARE ACTIONABLE
28 INTRUSION THAT OCCUR, THEY ARE DONE IN A LARGE NUMBER OF

1 CASES SEREPTITIOUSLY.

2 MR. KENDALL: ACTUALLY, THERE ARE CASES WHERE
3 THAT'S TRUE. THAT CANNOT BE THE TEST IN ALL CASES.
4 ALTHOUGH I THINK IT'S A FACTOR BECAUSE A NUMBER OF THE
5 CASES ARE -- FOR EXAMPLE, THE MILLER CASE THAT MR. GATTI
6 LIKES TO TALK ABOUT A LOT, THAT'S A CASE IN WHICH A MAN
7 IS DYING OF A HEART ATTACK AND THE PHOTOGRAPHERS COME IN
8 WITH THE PARAMEDICS RESPONDING TO A 911 CALL.

9 THERE ARE TWO ASPECTS TO THAT INTRUSION. ONE
10 IS THAT THEY ARE IN A PLACE THEY SHOULDN'T BE WITHOUT
11 PERMISSION. AND THE OTHER ASPECT OF THAT IS, THINK OF
12 THE WIFE AND THINK OF MAN DYING OF THE HEART ATTACK
13 FACED WITH THE KNOWLEDGE OF THAT INTRUSION. THAT'S
14 SOMETHING ELSE THAT I THINK THE COURT IS TRYING TO
15 PROTECT AGAINST.

16 IN THIS CASE YOU HAVE SOMETHING THAT'S NEVER
17 BEEN HELD BY ANY COURT TO BE INTRUSION, WHICH IS THE
18 MERE SNAPPING OF A PHOTOGRAPH, AND NOT WITH A SPY
19 CAMERA. THERE IS NO EVIDENCE THAT THIS CAMERA HAS
20 ANYTHING OTHER THAN NAKED EYE CAPABILITY IN THE CAMERA
21 ITSELF; NOTHING IN THE RECORD THAT WOULD SUGGEST THAT.

22 SO FOR THE COURT TO HOLD THAT THE ACT OF
23 INTRUSION HERE IS SOMETHING OTHER THAN JUST TAKING THE
24 PICTURES TO RECORD IT ON THIS CAMERA TO REPUBLISH IT FOR
25 PUBLIC INTEREST; FOR THE COURT TO HOLD THAT THE MERE
26 TAKING OF THE PICTURES -- AND NOW I'M GETTING AHEAD OF
27 MYSELF -- IS ACTIONABLE, THAT WOULD MEAN THAT NO ONE CAN
28 TAKE A PICTURE FROM ANY OF THOSE HELICOPTERS OR PLANES

1 AND FLY OVER NEIGHBORS, AND THAT WOULD MEAN THAT THE
2 ENTIRE WEBSITE EXCEPT FOR THOSE FEW PICTURES THAT DON'T
3 HAPPEN TO HAVE THE HOME IN THEM, THE ENTIRE WEBSITE
4 WOULD HAVE TO BE TAKEN DOWN BECAUSE EVERY SINGLE PICTURE
5 THAT HAD A HOME WOULD INVOLVE THIS KIND OF INTRUSION.

6 THAT JUST ISN'T THE LAW. IT'S NOT THE LAW
7 THAT YOU CAN'T TAKE PICTURES WITH A NORMAL CAMERA FROM
8 AN AIRPLANE OR A PHOTOGRAPH BECAUSE IT'S AN INTRUSION,
9 AND YOU HAVE TO GET INTO WHETHER THERE IS REVELATION OF
10 A PRIVATE FACT.

11 THE COURT: DO YOU AGREE WITH MR. GATTI THAT
12 THE FOCUS OF THE ANALYSIS UNDER THE FIRST PRONG SHOULD
13 BE THE PLEADING THAT THE PLAINTIFF HAS FILED?

14 MR. KENDALL: NO. WHAT -- MY POSITION IS THAT
15 THE FOCUS IS WHAT ARE THEY CLAIMING THAT THE DEFENDANT
16 DID, WHAT'S AT ISSUE IN THE CASE, WHAT ARE THE ACTS OF
17 WHICH THEY ARE COMPLAINING. IN A SENSE, YES, IT'S A
18 PLEADING, YOUR HONOR. BUT IN A SENSE, IT'S NOT.

19 THE COURT: WELL, CLEARLY THE STATUTE REQUIRES
20 ONE LOOK AT THE PLEADINGS BUT (E) FOCUSES ON WHETHER THE
21 DEFENDANT'S CONDUCT IS CONSTITUTIONALLY PROTECTED.

22 MR. KENDALL: THAT'S RIGHT.

23 THE COURT: THIS OTHER SECTION AS TO WHICH I
24 WAS REFERRING, (E), THAT I'LL HAVE IN JUST A SECOND,
25 DOES MAKE CLEAR ONE NEEDS TO LOOK AT THE PLEADINGS.

26 MR. KENDALL: RIGHT. I THINK WHAT YOU DO,
27 YOUR HONOR, IS LOOK AT THE PLEADING TO DETERMINE WHAT IS
28 THE CONDUCT THAT THEY ALLEGE TO BE UNLAWFUL. AND THE

1 CONDUCT HERE IS TAKING THE PICTURES, PUTTING IT ON THE
2 WEBSITE, ALLOWING A THIRD PARTY TO PUT A CAPTION IN,
3 HAVING THAT CAPTION ON THE WEBSITE, AND ULTIMATELY
4 PERMITTING MEMBERS OF THE PUBLIC TO PURCHASE A REPRINT
5 IF THEY CHOOSE TO, OR TO DOWNLOAD FOR FREE.

6 THAT'S BASICALLY WHAT THEY ARE COMPLAINING
7 ABOUT, SO THEN YOU HAVE TO LOOK AT THAT COLLECTION OF
8 CONDUCT AND DETERMINE, AS THE COURT HAS POINTED OUT FROM
9 THE DEFENDANT'S PERSPECTIVE, WHETHER THAT AFFECTS HIS
10 SPEECH. AND THE ANSWER IS IT CLEARLY DOES.

11 YOUR HONOR, JUST A COUPLE OTHER POINTS ON THE
12 FIRST PRONG. ON THE MISAPPROPRIATION CASE, NOT ONLY
13 DOES THE M.G. AGAINST TIME/WARNER CASE INCLUDE A
14 MISAPPROPRIATION CLAIM, BUT IT IS THE LAW WITH RESPECT
15 TO MISAPPROPRIATION GENERALLY THAT THERE IS A PUBLIC
16 AFFAIR EXCEPTION. AND IT'S ALSO THE LAW THAT IN GENERAL
17 THE COURTS HAVE TO BALANCE THE FIRST AMENDMENT RIGHTS OF
18 THE DEFENDANT AGAINST THE CLAIMS OF PUBLICITY, SO FOR
19 EXAMPLE IN THE SUPREME COURT CASE THAT THEY CITED, THE
20 THREE STOOGES CASE, THE COMEDY THREE, I THINK IT'S ROMAN
21 3 AGAINST SADERUP, S-A-D-E-R-U-P, I BELIEVE, 25 CAL 4
22 387 AT 391, THE COURT SAY THEY ARE FORMULATING A
23 BALANCING TEST BETWEEN THE FIRST AMENDMENT AND THE RIGHT
24 OF PUBLICITY, AND THE LEGISLATURE HAS SPOKEN WITH
25 RESPECT TO THE MISAPPROPRIATION -- STATUTORY
26 MISAPPROPRIATION.

27 WE DON'T HAVE A COMMON LAW MISAPPROPRIATION
28 CLAIM IN THIS CASE. IT'S JUST STATUTORY. THEY HAVE

1 SPOKEN. THERE IS A PUBLIC AFFAIRS EXCEPTION, WELL, HOW
2 COULD IT POSSIBLY BE YOU COULD ATTACK SOMEONE WHO HAS A
3 PUBLIC AFFAIRS DEFENSE AND HE COULDN'T RAISE THE
4 ANTI-SLAPP STATUTE ON A MOTION TO STRIKE SAYING HE'S
5 WITHIN THE PUBLIC AFFAIRS SPEECH COVERAGE. OBVIOUSLY
6 YOU CAN'T. AND PERHAPS THAT'S WHY THE M.G. AGAINST
7 TIME/WARNER DIDN'T FIND THAT WOULD BE AT ALL AN ISSUE.

8 UNLESS THERE IS ANYTHING ELSE ON THE FIRST
9 PRONG, YOUR HONOR, I'D LIKE TO TALK AS THE MOVANT ABOUT
10 THE SECOND PRONG.

11 THE COURT: GO AHEAD.

12 MR. CASAS: EXCUSE ME, YOUR HONOR --

13 THE COURT: YES. ACTUALLY, COUNSEL, MY
14 APOLOGIES. COUNSEL FOR LAYER42.

15 MR. CASAS: THANK YOU.

16 THE COURT: WHAT DO WE DO? ARE WE WITHOUT ANY
17 EVIDENCE WITH RESPECT TO YOUR CLIENT? HOW DOES THIS
18 AFFECT THE FIRST PRONG, IF IT DOES?

19 MR. CASAS: YOUR HONOR, FROM WHAT I UNDERSTAND
20 OF PLAINTIFF'S COUNSEL'S ARGUMENT, I THINK HE'S MISSING
21 THE MARK ON THE FIRST PRONG. THE FIRST PRONG DOES NOT
22 SUGGEST THAT THE COURT LOOK AT EACH INDIVIDUAL CAUSE OF
23 ACTION. IT LOOKS AT THE -- AND CONSIDERS THE LAWSUIT AS
24 A WHOLE. AND THAT IS INDICATED BY THE INTRODUCTORY
25 PARAGRAPH OF SECTION 425.16. THAT REFERS TO THE
26 LAWSUIT.

27 IT'S ALSO REFERENCED IN YOUR HONOR'S TENTATIVE
28 RULING. THE CASE OF NAVELLIER VERSUS SLETTEN AND DIXON

1 VERSUS SUPERIOR COURT, WHICH UPHELD THE PROPOSITION THAT
2 DEFENDANT BEARS THE INITIAL BURDEN TO MAKE A PRIMA FACIE
3 SHOWING THAT THE PLAINTIFF'S COMPLAINT ARISES FROM THE
4 DEFENDANT'S EXERCISE OF HIS FIRST AMENDMENT RIGHTS SO I
5 THINK TO LOOK AT EACH SEPARATE CAUSE OF ACTION IS NOT
6 WHAT 425.16 IS ALL ABOUT.

7 ANOTHER INDICATION THAT THE COURT GAVE US IS
8 WHETHER OR NOT WE'RE FOCUSING ON DEFENDANT'S CONDUCT. I
9 THINK CLEARLY THAT'S THE CASE AS PROVIDED IN SECTION
10 (E), AND I WOULD NOTE THAT (E) (4) INCLUDES A VERY BROAD
11 CATEGORY OF CONDUCT WHEN IT SAYS "OR ANY OTHER CONDUCT
12 IN FURTHERANCE OF EXERCISE OF CONSTITUTIONAL RIGHT OF
13 PETITION OR CONSTITUTIONAL RIGHT OF FREE SPEECH." ANY
14 OTHER CONDUCT, I WOULD SUGGEST IN THIS CASE, IS THE
15 ACTUAL TAKING OF THE PHOTOGRAPHS BEFORE THEY ARE
16 PUBLISHED.

17 THE STATUTE DOESN'T SUGGEST THAT THERE IS SOME
18 KIND OF AN AUTOMATIC RIGHT OF INTRUSION THAT FALLS IN
19 THAT CATEGORICALLY, BUT PERHAPS THERE IS. BUT IT IS
20 BROAD IN AND OF ITSELF. AND THE LAST POINT, THIS IS AN
21 INTERESTING CASE BECAUSE YOU HAVE THE PLAINTIFF
22 COMPLAINING ABOUT INTRUSION, A PERSON WHO HAS BUILT A
23 LARGE ESTATE WITHIN THE COASTAL ZONE, WHICH SHE KNOWS
24 FROM PROBABLY APPLYING FOR PERMITS FOR CONSTRUCTION
25 WITHIN THE COASTAL ZONE, RECEIVES MUCH MORE SCRUTINY
26 FROM PUBLIC AGENCIES AND FROM THE PUBLIC ITSELF. SO
27 IT'S KIND OF LIKE THE PERSON WHO BUILDS A HOUSE NEXT TO
28 A SCHOOL YARD, THEY WOULD HAVE A CERTAIN EXPECTATION OF

1 NOISE THAT'S CREATED BY THE SCHOOLYARD AT CERTAIN TIMES
2 OF DAY, AND THEY SHOULD HAVE THAT EXPECTATION.

3 WITH RESPECT TO LAYER42 DOT NET, THE EVIDENCE,
4 AS I COULD SEE IT, YOUR HONOR, THAT RELATES TO MY CLIENT
5 IS FOUND IN FOUR PLACES. AND THIS IS, FIRST OF ALL,
6 CONSIDERING THE COMPLAINT WHICH IS UNDER (B) (2) OF THE
7 STATUTE, THE COURT SHALL CONSIDER, AMONG OTHER EVIDENCE,
8 INCLUDING AFFIDAVITS.

9 THERE IS A STATEMENT ON PAGE 4, LINE 1 AND 2
10 OF THE COMPLAINT, WHERE PLAINTIFF ALLEGES DEFENDANT
11 LAYER42 DOT NET PROVIDED THE WEB HOSTING SERVICE FOR WWW
12 DOT CALIFORNIA COASTAL LINE DOT ORG. THERE IS AN
13 ALLEGATION ON PAGE 6, LINE 9 THROUGH 11, THAT IS
14 ESSENTIALLY AN ALLEGATION THAT LAYER42 DOT NET IS A
15 CALIFORNIA CORPORATION WITH A PRINCIPAL PLACE OF
16 BUSINESS IN SANTA CLARA COUNTY. THE THIRD REFERENCE IS
17 FOUND ON PAGE 7 OF THE COMPLAINT, LINE 28, GOING TO PAGE
18 8, LINE 1, WHERE THE ALLEGATION IN PART IS THE WEBSITE
19 OWNED BY DEFENDANT ADELMAN AND HOSTED BY LAYER42.

20 AND LASTLY, THE ONLY OTHER PIECE OF EVIDENCE
21 THAT THERE IS OR THE OTHER PIECE OF EVIDENCE IS FOUND IN
22 EXHIBIT B TO MR. LIEBMAN'S DECLARATION WHERE AT THE TOP
23 ABOUT A THIRD OF THE WAY DOWN JUST ABOVE THE PHOTOGRAPH
24 AND THE MAP --

25 THE COURT: COUNSEL, WHAT DATE WAS THAT FILED?

26 MR. KENDALL: YOUR HONOR, THAT WAS FILED WITH
27 PICTOPIA AND ADELMAN'S OPENING PAPERS ON THE MOTION FOR
28 SLAPP, AND THAT WAS THE 23RD.

1 THE COURT: THANK YOU.

2 MR. CASAS: THANK YOU, COUNSEL. EXHIBIT B
3 STATES JUST ABOVE THE PICTURES, YOUR HONOR, SPECIAL
4 THANKS TO LAYER42 DOT NET FOR PROVIDING A HOME FOR OUR
5 NEW WEB SERVERS.

6 LAYER42 DOT NET IS THE WEB HOSTING SERVICE,
7 THE INTERNET SERVICE PROVIDER AS ALLEGED. THERE IS NO
8 DISPUTE ABOUT THAT. THERE IS NO ALLEGATION THAT LAYER42
9 DOT NET SOMEHOW PARTICIPATED IN THE CONDUCT OF TAKING
10 THE PHOTOGRAPHS OR CREATING THE WEBSITE OR POSTING THE
11 PICTURES OR DOING ANYTHING ELSE OTHER THAN PROVIDING THE
12 MEDIUM FOR THAT INFORMATION TO BE DISSEMINATED TO THE
13 PUBLIC OVER THE WEB.

14 THAT'S ALL I REALLY HAVE ABOUT THE FIRST
15 PRONG, YOUR HONOR.

16 THE COURT: ALL RIGHT. THANK YOU. WITH
17 RESPECT TO THE SECOND PRONG, MR. KENDALL, GO AHEAD.

18 MR. GATTI: YOUR HONOR, SHOULD I -- IF TO THE
19 EXTENT I HAVE NOTHING TO RESPOND TO, SHOULD I JUST SAVE
20 IT --

21 THE COURT: IT'S PROBABLY BETTER TO DO THAT
22 NOW. LET'S SEE IF YOU CAN'T DO THAT IN THE NEXT FIVE
23 MINUTES OR SO.

24 MR. GATTI: CERTAINLY. I WANT TO MAKE A FEW
25 POINTS, WHICH IS SPECIFICLY ON THE M.G. VERSUS
26 TIME/WARNER, INC. CASE, 89 CAL AP. 4 623 AT 630. WE DO
27 REFERENCE THAT IN OUR PAPERS. AND WHAT THE M.G. CASE
28 HOLDS IS SPECIFICLY WHAT WE HAVE CITED IT FOR, WHICH IS

1 THAT IF THE CASE INSTRUCTS THAT IF ONE OF STREISAND'S
2 THEORIES OF INTRUSION, WHETHER IT'S INTRUSION, PUBLIC
3 DISCLOSURE OF PUBLIC FACTS OF A CONSTITUTIONAL PRIVACY,
4 QUOTE, IS ADEQUATE, END QUOTE, THE COURT MUST DENY THE
5 MOTION TO STRIKE AS TO PLAINTIFF'S, QUOTE, CLAIM FOR
6 INVASION OF PRIVACY IN GENERAL BECAUSE THEY ALL, QUOTE,
7 ARE BASED ON IDENTICAL FACTS THAT SEEK THE SAME DAMAGE
8 AND GENERALLY CONSTITUTE AN INVASION OF PRIVACY CLAIM.

9 WITH RESPECT TO WHAT IS AT ISSUE, YOU DO IN
10 FACT, PURSUANT TO THE STATUTE IN APPLYING THE STATUTE
11 LOOK, AT EACH CAUSE OF ACTION. THIS IS NOT A BLANKET
12 DISMISSAL OF A COMPLAINT. EVERY SLAPP MOTION LOOKS AT
13 EACH OF THE CAUSES OF ACTION, AND THEY ARE -- THERE IS A
14 POSSIBILITY THAT SOME CAUSES OF ACTION EXIST AND DON'T
15 EXIST. IT'S LOOKED AT ON A CAUSE OF ACTION BY CAUSE OF
16 ACTION BASIS. THERE SHOULD BE NO DISPUTE WITH THAT
17 ANALYSIS, AS IT'S IN THE STATUTE.

18 AND THE LAST POINT I WANT TO EMPHASIZES WITH
19 RESPECT TO WHICH WE HAVE REFERENCED EARLIER BUT THE
20 CONSUMER JUSTICE CENTER VERSUS TRIMETICA INTERNATIONAL
21 CASE, WHICH IS CITED AT 107 CAL AP. 4 595 AND SPECIFICLY
22 AT 601, ADDRESSING WHAT COUNSEL HAD JUST MENTIONED ABOUT
23 THE PUBLIC ISSUE CONCERNED PUBLIC AFFAIRS, TRIMETICA --
24 BRIEFLY, THE FACTS INVOLVE A DISCUSSION OF HERBAL
25 SUPPLEMENT IN CONNECTION WITH A PRODUCT, AND THE
26 DEFENDANTS IN THAT PARTICULAR CASE USED THE SAME TYPE OF
27 REASONING TO SAY THAT HERBAL SUPPLEMENTS ARE SUBJECT TO
28 A STATUTORY SCHEME AND ACTS OF CONGRESS; THEREFORE, THE

1 PROTECTION AND THE APPLICATION OF HERBAL SUPPLEMENTS AND
2 DISCUSSIONS ABOUT HERBAL SUPPLEMENTS IS, PER SE,
3 PROTECTED BECAUSE OF THE STATUTORY SCHEME.

4 THE CASE GOES ON TO SAY THAT SPEECH IS NOT
5 ABOUT HERBAL SUPPLEMENTS IN GENERAL. IT IS COMMERCIAL
6 SPEECH ABOUT THE SPECIFIC PROPERTIES AND EFFICACIES OF A
7 PARTICULAR PRODUCT. IF WE WOULD ACCEPT TRIMETICA'S
8 ARGUMENT, WE SHOULD EXAMINE THE NATURE OF THE SPEECH IN
9 TERMS OF GENERALITIES INSTEAD OF SPECIFICS, THEN NEARLY
10 ANY CLAIM COULD BE SUFFICIENTLY ABSTRACT TO FALL WITHIN
11 THE ANTI-SLAPP STATUTE.

12 WE HAVE TO TALK IN SPECIFICS AS FAR AS THE
13 PRONG OF (E) 1, 2, 3 AND 4. (E) 1 AND 2, I DON'T THINK
14 THAT ANYONE IS EVEN ARGUING THAT APPLIES. I DON'T THINK
15 ANYONE IS ARGUING (E) (3) APPLIES. I THINK TO THE
16 EXTENT THAT THE DEFENDANTS ARE HANGING THEIR HAT ON
17 ANYTHING, IT WOULD BE (E) (4). BUT --

18 THE COURT: WELL, I THINK THE DEFENSE DOES
19 CONTEND (E) (3) APPLIES. WE HAD THE DISCUSSION ON
20 MONDAY; MAYBE EVEN (E) (2) APPLIES --

21 MR. GATTI: WELL, WITH RESPECT TO (E) (1) --

22 THE COURT: -- IN PARTICULAR BECAUSE YOUR
23 CLIENT HAS A MATTER PENDING BEFORE THE COMMISSIONER
24 RIGHT NOW, WHICH IS AN EXECUTIVE BODY. WE HAD A
25 DISCUSSION MONDAY AFTERNOON.

26 MR. GATTI: THE POINT, YOUR HONOR, IS THAT WE
27 HAVE TO LOOK AT THE SPECIFICS OF THE CASE, AND THE
28 SPECIFICS OF THIS CASE IS A NARROW SITUATION, AN

1 EXTREMELY NARROW SITUATION. WE'RE NOT TALKING ABOUT THE
2 WEBSITE IN GENERAL THAT THE DEFENDANTS WANT TO TALK
3 ABOUT. WE'RE TALKING ABOUT ISSUES OF USING ONE'S NAME,
4 THE CAPTIONING OF A PHOTOGRAPH THAT'S TAKEN, THE SELLING
5 OF THESE PHOTOGRAPHS, AND THE INTRUSION.

6 BUT THOSE ARE ALL SEPARATE ISSUES, AND THE --
7 IT'S A NARROW, NARROW AFFECT HERE AND A NARROW REQUEST
8 THAT IS BEING TALKED ABOUT HERE. IF WE WERE TO SAY IN
9 TALKING IN TERMS OF GENERALITIES, THERE'S BEEN NO
10 EVIDENCE THAT SUGGESTS THAT ANYTHING IN TERMS OF
11 CAPTIONING THE PICTURES, IN TERMS OF PROVIDING THE
12 LOCATION OF MRS. STREISAND'S HOME, HAS ANYTHING TO DO
13 WITH ANY PUBLIC ISSUE OR CONCERN.

14 THAT IS NOT -- WE NEED TO -- UNDER THE
15 TRIMETICA CASE WHICH IS THE MOST RESENT OF CASES, A 2003
16 CASE, INSTRUCTS US THAT THE DEFENDANTS HAVE -- AND THE
17 COURT DENIED THE APPLICATION OF A SLAPP MOTION IN THE
18 CASE ON THIS SPECIFIC GROUND, SAYING IT IS RIDICULOUS TO
19 SAY IF WE'RE GOING TO TALK IN THE ABSTRACT WE COULD NOW
20 SAY THAT ANYTHING THAT IS SUBJECT TO STATUTORY SCHEME,
21 IN LAW, IS A PUBLIC ISSUE, AND THE CASES WE'VE CITED
22 SPECIFICLY SAY THAT IS NOT THE CASE.

23 THE COURT: OKAY. MOVE ON TO PRONG TWO, 3,
24 AND 4.

25 MR. GATTI: I PROMISE TO KEEP IT JUST TO WHAT
26 HE SAID, YOUR HONOR, BUT THERE ARE A COUPLE OF POINTS
27 THAT NEED TO BE MADE.

28 FIRST I CITED M.G. FOR THE PROPOSITION THAT IF

1 ONE THEORY OF THEIR COMPLAINT IS ADEQUATE, WE WOULD
2 UPHOLD DENYING THE MOTION TO STRIKE AS TO PLAINTIFF'S
3 CLAIMS FOR INVASION OF PRIVACY. THEN LATER ON I THINK
4 HE MADE THE CORRECTED STATEMENT, WHICH IS THAT EACH
5 CAUSE OF ACTION HAS TO MAKE IT ON ITS OWN.

6 BUT WHAT HE DIDN'T READ WAS THE FOOTNOTE THAT
7 THE M.G. COURT, WHICH IS THE COURT OF APPEAL UP IN SAN
8 FRANCISCO, THE 4TH DISTRICT, IF MEMORY SERVES.

9 THE COURT: IT WOULD BE THE FIRST -- SAN
10 FRANCISCO. IT WILL PROBABLY NOT BE THE FIRST.

11 MR. KENDALL: IT'S THE FOURTH. I GUESS THIS
12 MAY BE SAN DIEGO. IT'S FOURTH. THEY HAVE A FOOTNOTE TO
13 ONE OF JUDGE TURNER'S CASES AS SECOND DISTRICT, ONE TO
14 WHICH THIS COURT MUST DEFER, WHICH IS SHECHTER AGAINST
15 FINANCIAL INDEMNITY CO. CASE. I'M NOW ON THE SAME PAGE
16 READ FROM EARLIER, YOUR HONOR, PAGE 638, 639 CAL AP. 4
17 OF THE M.G. CASE WHERE THEY SAY:

18 BUT SHE, SHECHTER AGAINST FINANCIAL INDEMNITY
19 89 CAL AP. 4 131, WHICH IS DECIDED CLOSE TO THAT TIME,
20 SHECHTER COMES OUT THE OTHER WAY ON THE POINT THAT MAY
21 TURN OUT TO BE RELEVANT HERE OR MAY NOT, YOUR HONOR,
22 WHICH IS WHETHER IT'S, YOU KNOW, CAUSE OF ACTION BY
23 CAUSE OF ACTION.

24 AND I JUST WANT TO BRING THAT AUTHORITY TO THE
25 COURT'S ATTENTION, AND THE SHECHTER CASE, THE CRITICAL
26 PAGE IS 150, SO THAT WOULD BE 89 CAL AP. 4 150, WHERE
27 THEY FOCUS ON THE LANGUAGE OF THE STATUTE THAT SAYS THAT
28 A CAUSE OF ACTION AGAINST THE PERSON SHOULD BE SUBJECT

1 TO A SPECIAL MOTION TO STRIKE.

2 WITH RESPECT TO TRIMETICA, YOUR HONOR, THAT
3 CASE REALLY IS COMPLETELY DISTINGUISHABLE, HAS NOTHING
4 TO DO WITH WHAT WE'RE TALKING ABOUT. BECAUSE THAT
5 INVOLVES COMMERCIAL SPEECH AND ONLY COMMERCIAL SPEECH.
6 AND WHAT THE COURT SAID WAS THAT THE ANTI-SLAPP STATUTE
7 PROVISION FOR MATTERS OF PUBLIC SIGNIFICANCE DOES NOT
8 PROTECT A SPECIFIC ADVERTISING STATEMENT ABOUT A
9 PARTICULAR COMMERCIAL PRODUCT ABSENT FACTS WHICH WOULD
10 MAKE THE PRODUCT A MATTER OF GENUINE PUBLIC INTEREST.

11 I JUST READ FROM THE TRIMETICA CASE 107 CAL
12 AP. 4TH 595, AND I READ FROM PAGE 195 OF THAT CASE. SO
13 THE ISSUE IS WHETHER THE WEBSITE IS A MATTER OF PUBLIC
14 INTEREST; NOT WHETHER THE PARTICULAR STATEMENT IN ISSUE.
15 I'LL ALSO POINT OUT TRIMETICA INVOLVED FALSE STATEMENTS,
16 FALSE ADVERTISING, SO IT'S FALSE COMMERCIAL SPEECH.
17 THERE IS NO ALLEGATION THAT THE CONSTITUTIONALLY
18 PROTECTED NON-COMMERCIAL SPEECH IN THIS CASE IS FALSE.
19 TRIMETICA HAS NOTHING TO DO WITH WHAT WE'RE TALKING
20 ABOUT HERE.

21 NOW, I WOULD LIKE TO GO TO THE SECOND PRONG.
22 IT IS THE PLAINTIFF'S BURDEN -- LET'S BEGIN WITH THAT TO
23 PRODUCE EVIDENCE, ADMISSIBLE EVIDENCE, NOT INFORMATION
24 AND BELIEF. EVIDENCE; NOT SUPPOSITION; NOT MR. GATTI'S
25 IDEA ABOUT HOW CAMERAS WORK AND HOW DIGITAL PHOTOGRAPHY
26 WORKS ARE NOT SUPPOSITION; NOT FALSE ALLEGATIONS; BUT
27 EVIDENCE THAT WOULD ESTABLISH FOR EACH OF THEIR CLAIMS A
28 REASONABLE PROBABILITY OF SUCCESS.

1 AND I WOULD LIKE TO START WITH THE INTRUSION
2 CLAIM, AND I HAVE A SUGGESTION, YOUR HONOR, BUT IT WILL
3 HELP ME ORGANIZE MYSELF IF YOU LET ME KNOW IF YOU THINK
4 IT'S A GOOD SUGGESTION, WHICH IS THAT WE ADDRESS THESE
5 ISSUES CLAIM BY CLAIM. BECAUSE ONE OF THE REASONS THIS
6 HAS TAKEN SO LONG IS THAT MY COLLEAGUE ON THE OTHER SIDE
7 TENDS TO WANDER, YOU KNOW --

8 THE COURT: WELL, THAT MAY BE A MATTER OF,
9 ONE, PERSONAL PREFERENCE AND, TWO, YOUR OWN
10 CHARACTERIZATION. HE MAY THINK HE'S GOING RIGHT DOWN
11 THE CENTER PATHS.

12 MR. GATTI: LET THE RECORD REFLECT THAT I'M
13 BITING MY TONGUE, YOUR HONOR.

14 MR. KENDALL: MY CONCERN, IF I TRY TO BE
15 DISCIPLINED, I MAY END UP NOT HAVING THE OPPORTUNITY TO
16 THE COVER ALL THE RISKS.

17 THE COURT: MR. KENDALL, BACK TO YOUR REQUEST,
18 IF YOUR REQUEST IS -- GOES THROUGH THE COMPLAINT
19 STARTING WITH THE FIRST CAUSE OF ACTION AND THEN
20 PROCEEDING IN NUMERICAL ORDER, I THINK THAT'S A FINE WAY
21 OF PROCEEDING.

22 MR. KENDALL: OKAY. LET'S START WITH THE
23 INTRUSION TORT. JUST ABOUT THE ONLY THING WITH WHICH
24 I'VE AGREED TO THAT MR. GATTI JUST SAID THIS MORNING,
25 AND IS IN FACT WHAT WE SAID IN OUR OPENING PAPERS, IS
26 THAT THE INTRUSION TORT IS SEPARATE FROM THE TORT OF
27 DISCLOSING A PRIVATE FACT.

28 SO IT'S SEPARATE. INTRUSION AS -- TO

1 ESTABLISH THE ELEMENTS DESPITE THE FACT THAT THEY PLEAD
2 ALL OF OUR CONDUCT, WHAT THEY ARE SUPPOSED TO ESTABLISH
3 IN THE WAY OF ELEMENTS IS THAT THERE IS AN INTENTIONAL
4 INTRUSION AND THAT THE ACT OF INTRUSION IS SO OFFENSIVE
5 THAT IT SHOULD NOT BE TOLERATED. THE WAY THEY -- THEY
6 ATTEMPT TO ARGUE THIS CASE, THEY SAY, WELL, THIS CAMERA
7 TAKES AN IMAGE THAT CAN BE USED. WHAT THEY MEAN WHEN
8 THEY SAY TAKES AN IMAGE THAT CAN BE USED IS IT CAN BE
9 PUBLISHED, IT CAN BE COMMUNICATED, AND SOMEBODY COULD DO
10 SOMETHING WITH THAT IMAGINE.

11 I WILL GET TO THAT, BUT THE WAY THE IMAGE IS
12 ULTIMATELY USED, THERE IS A QUESTION OF PUBLICATION OF
13 PRIVATE FACTS. NOT INTRUSION. THIS IS A PICTURE TAKEN
14 WITH A LENS, AND THERE IS NO EVIDENCE THAT THERE IS ANY
15 OPTICAL ENHANCEMENT WHATSOEVER IN THE CAMERA OR THE
16 LENS. IF THERE WERE ANY SUCH EVIDENCE, THE COURT WOULD
17 HAVE -- WOULD HAVE ADMITTED THE SUPPLEMENTAL DECLARATION
18 OF MR. ADELMAN THAT EXPLAINED IT, BUT THE FACT IS THAT
19 YOU CAN SEE, ONE LOOK AT THIS PICTURE THAT ALL THERE IS
20 IS TAKING A LONG DISTANCE PICTURE, THE EVIDENCE THAT WE
21 HAVE IN THE RECORD IS AT LEAST 2000 FEET AWAY, NOT
22 FLYING ON THE PLAINTIFF'S PROPERTY; NOT FLYING, YOU
23 KNOW, IN HER AIRSPACE; NOT FOCUSING JUST ON HER
24 PROPERTY; BUT TAKING A PICTURE OF THE ENTIRE COASTLINE
25 INCLUDING A NEIGHBORHOOD WHICH INCLUDES HER HOUSE, HER
26 THREE HOUSES, IN FACT.

27 THE TORT DOES REQUIRE INTENTIONAL INTRUSION,
28 AND THIS RAISES AN INTERESTING QUESTION, YOUR HONOR,

1 WHICH IS GOING TO THE ONE YOU ASKED ME EARLIER, WHICH IS
2 TO WHAT EXTENT DOES THAT MATTER WHAT MR. ADELMAN
3 INTENDED TO BE ACCOMPLISHED.

4 MR. -- THERE IS NO EVIDENCE THAT MR. ADELMAN
5 WAS SEEKING TO TAKE A PICTURE OF BARBRA STREISAND OR FOR
6 THAT MATTER A PICTURE OF A HOME THAT HE KNEW TO BE
7 BARBRA STREISAND'S. ALL THAT IS IN EVIDENCE IS THAT
8 MR. ADELMAN INTENDED TO TAKE A PICTURE OF ALL OF THE 800
9 PLUS MILES OF CALIFORNIA COASTLINE USING ALL THE
10 PICTURES IT WOULD TAKE TO DO THAT, WHICH HAS SO FAR
11 AMOUNTED TO 12,200 AND HE WILL TAKE A FEW MORE WHEN
12 VANDENBERG FINALLY AGREES THEY CAN BE PHOTOGRAPHED AS
13 WELL.

14 SO JUST A MOMENT, YOUR HONOR. ACTUALLY, YOUR
15 HONOR, I THINK IT IS IN THE RECORD THAT WHEN MR. ADELMAN
16 TOOK IMAGE 3850 THAT HE WAS LOCATED APPROXIMATELY 2800
17 FEET FROM BARBRA STREISAND'S HOUSE, ALTHOUGH HE DIDN'T
18 KNOW IT WAS HER HOUSE AT THE TIME.

19 THE SHULMAN CASE, 18 CAL 3 AT 231 SAYS THAT
20 THE TORT REQUIRES AN INTENTIONAL INTRUSION, SO THE ONLY
21 WAY THERE COULD BE INTENTIONAL INTRUSION HERE -- LEAVE
22 ASIDE FOR A MINUTE THE NATURE OF THE ACT OF SNAPPING
23 THIS PICTURE AND WHAT KIND OF CAMERA WAS USED AND SO
24 FORTH, THE ONLY WAY IT COULD BE INTENTIONAL INTRUSION IS
25 IF THE ENTIRE PROJECT CONSTITUTES AN INTENTIONAL
26 INTRUSION. TO THE EXTENT THAT ANY HOMES ARE CAPTURED,
27 IT WOULD HAVE TO BE UNLAWFUL FOR HIM TO TAKE PICTURES
28 KNOWING THAT HE'S CAPTURING HOMES. THERE IS NO EVIDENCE

1 HE KNEW HE WAS CAPTURING BARBRA STREISAND'S HOME IN
2 PARTICULAR, NO EVIDENCE HE WAS STALKING HER OR PAPARAZZI
3 OR TRYING TO PROFIT FROM BARBRA STREISAND AND THAT'S WHY
4 HE WAS TAKING A PICTURE OF HER SACRED PATIO.

5 NO, THIS IS JUST PICTURE AFTER PICTURE AFTER
6 PICTURE OF THE COASTLINE, AND IF THE LAW IS THAT YOU
7 CAN'T DO THAT, THAT YOU CAN'T TAKE PICTURES OF THE
8 COASTLINE BECAUSE THEY HAPPEN TO INCLUDE HOMES, THEN
9 EVERY SINGLE INDIVIDUAL WHO TAKES A PICTURE ON SANTA
10 MONICA BEACH OF THE -- WHAT THEY CALL IVORY COAST HOMES,
11 THOSE HOMES RIGHT THERE, EVERYONE WHO LOOKS DOWN ON
12 ANOTHER HOME FROM A MOUNTIAN HOME LIKE IN THE SANTA
13 MONICA MOUNTAINS GO, GO WITH LOTS OF VIEWS OF PEOPLE IN
14 BACK YARDS, TAKE PHOTOGRAPHS OF THOSE VISTAS EVERY DAY.
15 NO COURT HAS EVER HELD THAT TAKING A PHOTOGRAPH OF A
16 VISTA IS AN INTRUSION.

17 THAT'S WHAT THIS IS. THIS IS A PHOTOGRAPH
18 AFTER PHOTOGRAPH, 12,200 TIMES, OF THE VISTA OF THE
19 COASTLINE. THERE IS NO EVIDENCE MR. ADELMAN HAS EVER
20 HIMSELF TAKEN A PICTURE OF BARBRA STREISAND. NO
21 EVIDENCE THAT HE KNEW THIS WAS HER HOUSE. NO EVIDENCE
22 THAT HE EVER INTENDED TO, EVEN WHEN THE PICTURE WENT UP
23 ON THE WEBSITE, NO EVIDENCE THAT IT WAS IDENTIFIED AS
24 MRS. BARBRA STREISAND'S HOUSE.

25 THE COAST SIMPLY CANNOT BE PHOTOGRAPHED FROM
26 THE AIR WITHOUT PHOTOGRAPHING HOMES BECAUSE THE
27 COASTLINE IS DOTTED WITH HOMES. THAT'S WHY THE
28 LEGISLATURE IS SO CONCERNED ABOUT THE COASTLINE. THAT'S

1 WHY THE COASTAL COMMISSION IS ENGAGED IN BATTLES. AND
2 ALTHOUGH I DON'T KNOW THE FACTS OF THE TEN CASES THAT
3 YOUR HONOR REFERRED TO YESTERDAY, MY GUESS IS THAT THE
4 REASON WHY THOSE CASES ARE IN YOUR COURT IS BECAUSE
5 THERE ARE A LOT OF HOMES ON THE COAST LINE AND PEOPLE
6 ARE HAVING BATTLES EVERY DAY.

7 THE COURT: ACTUALLY, THE FACTS AREN'T
8 RELEVANT. AND BELIEVE IT OR NOT, THAT PARTICULAR FACT
9 CERTAINLY IS NOT A CENTRAL ISSUE IN THOSE CASES. BUT,
10 AGAIN, IT'S NOT RELEVANT.

11 MR. KENDALL: ANYWAY, I THINK THE -- ANYONE
12 WHO LIVES IN CALIFORNIA WHO IS A JUDGE CAN TAKE JUDICIAL
13 NOTICE OF THE FACT THAT THERE ARE HOMES ALIGNING THE
14 COASTLINE, BUT WE DON'T HAVE TO TAKE JUDICIAL NOTICE OF
15 IT. WE CAN LOOK AT THE PICTURE IN ISSUE HERE, WHICH HAS
16 PLENTY OF HOMES IN IT, AND THE WEBSITE, WHICH HAS PLENTY
17 OF HOMES.

18 THE PLAINTIFFS HAVE NOT CITED A CASE, AND WE
19 HAVE LOOKED, AND I DON'T THINK THERE IS A CASE, THAT HAS
20 EVER RESTRAINED OR PUNISHED THE TAKING OF AN AERIAL
21 PARAGRAPH OF A HOME AS THE TORT OF INTRUSION. IN FACT,
22 WE HAVEN'T FOUND ANY CASE THAT SAYS THAT'S UNLAWFUL FOR
23 ANY REASON WITHOUT MORE, WITHOUT PEOPLE BEING IN THE
24 PICTURE OR SOME SPECIAL OTHER ISSUE BEING PRESENT, BUT
25 CERTAINLY THERE IS NO CASE THAT THEY'VE CITED THAT IT'S
26 INTRUSION INTO PRIVACY TO TAKE A PICTURE OF THE EXTERIOR
27 OF A HOME.

28 AND IF THAT WERE THE CASE, THEN EVERY AERIAL

1 PARAGRAPH, EVERY NEWS PHOTOGRAPHER IN A HELICOPTER
2 TAKING PICTURES OF CRIME SCENES, THEY CAPTURE ALL THE
3 HOMES IN THE NEIGHBORHOOD, INEVITABLY WOULD BE IN THE
4 POSITION OF INTRUDING. THEY WOULD HAVE TO GET CONSENTS
5 FROM EVERY ONE OF THE INDIVIDUALS, AND THIS PICTURE WAS
6 NOT EVEN AS INTRUSIVE AS FLYING OVER SOMEONE'S HOUSE
7 WITH A HELICOPTER. IT WAS SHOT FROM HALF A MILE AWAY,
8 SHOT WITH A NORMAL LENS, AND THERE IS NOTHING OFFENSIVE
9 ABOUT THE MEANS OF TAKING THIS PICTURE.

10 THIS IS NOT A HELICOPTER HOVERING OVER HER
11 BARBRA STREISAND'S HOME. THIS IS A HELICOPTER ON A
12 FLY-BY. THERE IS NO EVIDENCE THAT HELICOPTER FLEW BY
13 MORE THAN ONCE. THIS IS NOT TAKING PICTURES OF
14 SOMEBODY'S WEDDING IN THEIR BACKYARD AND IT IS NOT
15 TAKING PICTURES OF A TOPLESS BATHER OR A NAKED PERSON OR
16 ANYBODY DOING ANY OF THE THINGS THAT THE SUPREME COURT
17 HAS SAID ARE CONSTITUTIONALLY PROTECTED IN THE HOME,
18 WHICH ARE BASICALLY REPRODUCTION AND PERSONAL LIBERTY
19 WITHIN THE HOME TO ENGAGE IN SEXUAL ACTIVITIES.

20 THE CASES THAT HAVE BEEN HELD TO BE INTRUSION
21 ARE ALL CASES IN WHICH PEOPLE ARE INVOLVED. THERE ARE
22 NO CASES THAT WE HAVE FOUND WHERE THERE ARE NO PEOPLE
23 INVOLVED, AND THE CASES THAT INVOLVE INTRUSION -- AND
24 THERE IS A GREAT COLLECTION OF THEM; THE SHULMAN CASE,
25 AND YOUR HONOR HAS ALREADY REFERRED TO, IT'S A GREAT
26 CASE TO READ TO UNDERSTAND THIS LANDSCAPE.

27 BUT ALL OF THE CASES OF INTRUSION INVOLVE
28 EITHER A PHYSICAL INTRUSION INTO THE HOME OR A PLACE OF

1 PRIVACY LIKE A MEDICAL OFFICE OR THEY ARE RECORDING
2 ACTIVITIES INSIDE A HOME OR INSIDE A PLACE OF PRIVACY.
3 NONE OF THAT IS HAPPENING HERE. AS THE COURT HAS
4 POINTED OUT, THIS IS NOT A CASE WHERE YOU CAN SEE
5 ANYTHING GOING ON INSIDE THE WINDOWS.

6 THEY CITED A CRIMINAL CASE, THE ARNO
7 (PHONETIC) CASE, WHICH WAS A GAMBLING INVESTIGATION
8 WHERE A DETECTIVE LOOKING FROM, I THINK IT WAS 800 FEET
9 AWAY THROUGH A WINDOW WITH BINOCULARS WAS ABLE TO SEE
10 THE DEFENDANTS EXCHANGING PIECES OF PAPER, AND HE COULD
11 ACTUALLY READ THE CONTENTS OF THE PIECE OF PAPER AND
12 THAT WAS OFFERED IN EVIDENCE. THERE IS NO PEERING
13 THROUGH A WINDOW HERE. AND THE EVIDENCE IS CLEAR THAT
14 THERE IS NONE.

15 THE TRUE ATTACK HERE, YOUR HONOR, WHEN WE CUT
16 THROUGH IT ALL, IS NOT THE SNAPPING OF A PHOTOGRAPH FROM
17 HALF A MILE AWAY WITH A NORMAL LENS. THE TRUE ATTACK IS
18 WHAT WAS DONE WITH A PHOTO, AND THAT IS WHY THEY HAVE
19 THE INTRUSION CLAIM. THAT'S WHY THEY INCLUDE THE
20 CONDUCT OF PUBLICATION IN THEIR INTRUSION CLAIM. AND
21 WHAT THEY ARE TRYING TO RESTRAIN IS THE PUBLICATION OF
22 THE PHOTO AND THE -- GET DAMAGES FOR THE PUBLICATION OF
23 THE PHOTO AND FURTHER RESTRAIN THE CAPTION AND ANY
24 SPEECH IDENTIFYING THIS PHOTO ON THE WEBSITE. AND THAT
25 TAKES US TO THE NEXT TORT --

26 THE COURT: THAT'S A GOOD TIME TO BREAK FOR
27 LUNCH, BUT BEFORE DOING THAT, COUNSEL, I WOULD LIKE TO
28 SEE YOU. THE CLERK -- ONE REPRESENTATIVE FROM EACH.

1 SIDE -- WHO IS GOING TO GIVE YOU A COPY OF THE EXCERPTS
2 FROM THE RESTATEMENT SERVED ON THE COURT AND THE COPY OF
3 BATZEL VERSUS SMITH, WHICH WAS DECIDED ON JUNE 24 BY THE
4 NINTH CIRCUIT, WHICH RELATES TO SECTION 230 OF TITLE 47
5 BECAUSE THEY MAY COME UP THIS AFTERNOON, CERTAINLY THE
6 RESTATEMENT WILL, AND I'LL SEE YOU AT 1:30.

7 MR. GATTI: THANK YOU.

8 MR. KENDALL: THANK YOU, YOUR HONOR.

9 (RECESS.)

10 THE COURT: GOOD AFTERNOON.

11 MR. KENDALL: GOOD AFTERNOON.

12 MR. GATTI: GOOD AFTERNOON.

13 THE COURT: ALL PRESENT AS WERE THIS MORNING.

14 MR. KENDALL, YOU CAN RESUME.

15 MR. KENDALL: THANK YOU.

16 JUST TO FINISH UP VERY QUICKLY ON THE
17 INTRUSION TORT, THE ISSUE OF OFFENSIVENESS IS OF COURSE
18 THE SECOND ELEMENT THAT HAS TO BE PROVEN. AND ON THE
19 SUBJECT OF OFFENSIVENESS, WE HAVE NOT ONLY THE DISTANCE
20 OF THE HELICOPTER, THE NORMAL NATURE OF THE LENS, THE
21 FACT THAT NO PEOPLE ARE SHOWN, THERE IS ALSO THE FACT
22 THAT THIS PARTICULAR PLAINTIFF HAS CONSENTED TO THE
23 SNAPPING OF AN AERIAL PICTURE OF HER HOUSE, AND THAT'S
24 IN PEOPLE MAGAZINE.

25 SO THIS PARTICULAR INDIVIDUAL, WE HAPPEN TO
26 KNOW, DOES NOT OBJECT TO SOMEONE TAKING AN AERIAL
27 PICTURE OF HER HOUSE. AND MR. ADELMAN ALSO HAD THE
28 BENEFIT OF THE BARBRATIMELESS WEBSITE. NOW, ON THAT ONE

1 WE DON'T KNOW, BECAUSE YOU CAN'T INFER FROM
2 BARBRATIMELESS. WE DON'T KNOW WHETHER THAT IS SOMETHING
3 BARBRA STREISAND AGREED TO OR NOT. THAT'S SIMPLY A FACT
4 THAT WAS ALREADY OUT THERE IN THE PUBLIC, BUT IT WOULD
5 SEEM THAT, AGAIN, THE FACT THAT THERE WERE PICTURES
6 AVAILABLE TO THE PUBLIC GOES TO WHETHER YET ANOTHER
7 PICTURE BEING TAKEN, JUST BEING TAKEN BECAUSE THAT IS
8 WHAT THE INTRUSION TORT INVOLVES, IS OFFENSIVE TO A
9 REASONABLE PERSON WITHIN THE MEANING OF THE LAW.

10 AND THE FACT THAT BARBRA STREISAND HAS
11 PREVIOUSLY CONSENTED SUGGESTS THAT AT LEAST THIS
12 REASONABLE PERSON DIDN'T FIND IT UNREASONABLE WHEN IT
13 WAS SOMETHING THAT SHE FOUND USEFUL FOR HER OWN
14 PUBLICITY PURPOSES.

15 THE COURT: WELL, THERE'S CLEARLY NO EVIDENCE
16 IN THE RECORD THAT SHE CONSENTED TO THIS PHOTOGRAPH
17 BEING TAKEN, IMAGE 3850.

18 MR. KENDALL: THAT'S RIGHT, BUT THE QUESTION
19 IS WHETHER THE ACTUAL ACT OF TAKING A PHOTOGRAPH IS
20 OFFENSIVE TO A REASONABLE PERSON. AND IN ADDITION TO
21 ALL THE REASONS I WENT THROUGH THIS MORNING --

22 THE COURT: UNDER THE FIRST CAUSE OF ACTION.
23 THAT'S THE TEST.

24 MR. KENDALL: YES. THAT'S WHAT I'M FOCUSING
25 ON, JUST THE FIRST CAUSE OF ACTION. AND THE ADDITIONAL
26 POINT THAT I WANTED TO MAKE IS THAT WITH RESPECT TO THIS
27 REASONABLE PERSON WE HAVE NO BASIS FOR BELIEVING THAT
28 SHE FINDS PICTURES OF HER HOUSE; THAT THE ACT OF TAKING

1 PICTURES OF HER HOUSE TO BE OFFENSIVE --

2 THE COURT: ARE YOU CONCEDED, THEN, THAT IT'S
3 HER REASONABLE BELIEF THAT'S IMPORTANT HERE?

4 MR. KENDALL: NO, I'M NOT CONCEDED THAT,
5 BECAUSE IT'S NOT HER REASONABLE BELIEF. IT IS AN
6 OBJECTIVE QUESTION WHETHER IN SOCIETY PEOPLE AS A
7 GENERAL RULE BELIEVE THAT AERIAL PHOTOGRAPHS INVADE
8 THEIR INTRUSION -- OR ARE INTRUSIVE AND TORTIOUS AS A
9 MATTER OF SIMPLY SNAPPING A PHOTOGRAPH.

10 NOW, THE NEXT TORT IS THE TORT OF DISCLOSURE
11 OF PRIVATE FACTS. MY SUGGESTION TO THE COURT WOULD BE
12 THAT WE TAKE THEM ONE BY ONE SO THAT THEY DON'T GET
13 CONFUSED.

14 THE COURT: WOULD YOU LIKE TO HAVE -- YOUR
15 SUGGESTION IS THAT I HEAR FROM THE OTHER SIDE WITH
16 RESPECT TO THE FIRST CAUSE OF ACTION?

17 MR. KENDALL: RIGHT. BUT MY RESPECTFUL
18 SUGGESTION IS THAT WE TRY TO BE PRETTY DISCIPLINED
19 BECAUSE BY SEEDING THE FLOOR, YOU KNOW -- I WOULD HOPE
20 THAT MY COLLEAGUE, MY LEARNED FRIEND ON THE OTHER SIDE,
21 WOULD CONFINE HIMSELF TO THE INTRUSION TORT. BECAUSE
22 OTHERWISE MY SUGGESTION WILL CAUSE US TO BE HERE A LOT
23 LONGER, BECAUSE YOU WILL HEAR EVERYTHING FOUR TIMES.

24 THE COURT: WELL, I'D LIKE TO SUGGEST THE
25 FOLLOWING, AND THAT IS YOU DEAL WITH THE FIRST THREE
26 CAUSES OF ACTION TOGETHER, THEN WE HEAR FROM PLAINTIFF'S
27 COUNSEL, THEN TAKE UP THE FOURTH AND FIFTH CAUSES OF
28 ACTION.

1 MR. KENDALL: VERY GOOD. LET ME GO ON TO
2 PRIVATE FACTS. THERE IS NO PRIVATE FACT THAT IS
3 DISCLOSED BY THE PHOTOGRAPH.

4 THE COURT: DON'T YOU AGREE THAT NO ONE CAN
5 SEE INTO THE BACKYARD UNLESS HE OR SHE IS ELEVATED ABOVE
6 THE NORMAL LINE OF SIGHT?

7 MR. KENDALL: YES, I AGREE.

8 THE COURT: SO THEN ISN'T THE BACKYARD
9 NORMALLY -- EXCUSE ME, ISN'T THE BACKYARD IN THIS CASE A
10 PLACE OF SECLUSION?

11 MR. KENDALL: THE BACKYARD MAY BE A PLACE OF
12 SECLUSION, BUT IT IS NOT A PRIVATE FACT THAT BARBRA
13 STREISAND HAS A BACKYARD. AND IT'S NOT A PRIVATE FACT
14 THAT THE BACKYARD HAS SOME DECK CHAIRS AND PARASOLS AND
15 HAS -- AND THAT THE EXTERIOR OF THE HOUSE HAS WINDOWS,
16 WITHIN THE MEANING OF THE STATUTE.

17 AND WHY IS THAT NOT A PRIVATE FACT. WELL,
18 FIRST OF ALL, I DON'T THINK THAT ANY COURT HAS EVER HELD
19 THAT MERELY THE EXISTENCE OF A BACKYARD AND A PATIO AND
20 EXTERIOR WINDOWS IS A PRIVATE FACT. ALL OF THE CASES
21 THAT HAVE BEEN CITED BY THE OTHER SIDE WITH RESPECT TO
22 THE TORT OF DISCLOSING A PRIVATE FACT HAVE TO DO WITH
23 PEOPLE WHO ARE DISCLOSED IN VARIOUS ACTIVITIES.

24 PEOPLE HAVING MEDICAL EXAMS, PEOPLE HAVING
25 MEDICAL TREATMENT OR BEING TAKEN FROM THE ACCIDENT SITE,
26 PEOPLE WHO ARE SHOWN ENGAGING IN SEX ACTS. HERE WE HAVE
27 NO PEOPLE AT ALL, LET ALONE ANY PERSON DOING ANYTHING
28 THE LEAST BIT PRIVATE. SECONDLY, THE EXISTENCE OF THAT

1 BACKYARD AND THE WAY THAT BACKYARD LOOKS WAS ALREADY A
2 PUBLIC FACT. IT WAS ALREADY WIDELY AVAILABLE FROM OTHER
3 SOURCES, INCLUDING BY MRS. STREISAND'S OWN ACTIONS;
4 NAMELY, THE PEOPLE MAGAZINE ARTICLE.

5 THE COURT: WHAT EVIDENCE DO WE HAVE THAT SHE
6 AUTHORIZED THAT PARTICULAR PHOTOGRAPH?

7 MR. KENDALL: THE EVIDENCE THAT ONE CAN INFER
8 FROM THE ARTICLE, WHICH IS VERY OBVIOUSLY AN ARTICLE
9 WITH WHICH SHE COOPERATED AND COOPERATED EXTENSIVELY AND
10 COOPERATED TO THE POINT OF DISCUSSING HER HOUSE AND
11 ASPECTS OF HER HOUSE AND, INDEED, GOING SO FAR AS TO
12 DISCUSS HER BEDROOM AND WHAT SHE DOES IN THERE.

13 THERE IS ALSO THE BARBRATIMELESS DOT COM
14 WEBSITE WHICH HAD VERY SIMILAR PHOTOGRAPHS ALREADY
15 PUBLISHED. THERE, WE DON'T KNOW WHETHER THAT WAS
16 AUTHORIZED. THERE IS NO EVIDENCE ONE WAY OR THE OTHER
17 IN THE RECORD ABOUT THAT. THERE ARE VIEWS OF THE
18 INTERIOR OF THE HOUSE AS WELL AS THE EXTERIOR OF THE
19 HOUSE ON THAT WEBSITE. SO WHEN YOU ADD TOGETHER WHAT
20 HAS ALREADY BEEN PUBLISHED, THESE FACTS ALREADY BEING
21 PUBLIC, ARE NOT PRIVATE.

22 BUT IT IS ALSO THE BURDEN OF THE PLAINTIFF TO
23 NEGATIVE THE FOLLOWING POINT: THEY HAVE TO COME FORWARD
24 WITH EVIDENCE THAT ESTABLISHES THAT THE NEWSWORTHINESS
25 EXCEPTION DOES NOT APPLY. IT IS THEIR BURDEN TO DO
26 THAT. THAT'S WHAT THE SHULMAN SAYS. IT IS NEWSWORTHY
27 HOW THE COAST LOOKS. IT IS NEWSWORTHY HOW BARBRA
28 STREISAND'S NEIGHBORHOOD ON THE COAST LOOKS. AND IT IS

1 NEWSWORTHY HOW BARBRA STREISAND'S PROPERTY LOOKS,
2 BECAUSE IT IS WITHIN THE COASTAL ZONE, AND EVEN FURTHER,
3 BECAUSE THAT PARTICULAR PROPERTY IS THE SUBJECT OF
4 PUBLIC DISPUTE.

5 IT IS ALSO NEWSWORTHY BECAUSE BARBRA STREISAND
6 HAS INJECTED HERSELF AS AN OUTSPOKEN CELEBRITY
7 COMMENTATOR INTO THE PUBLIC EYE, AND CELEBRITIES HAVE
8 LESS PRIVATE FACT PROTECTION THAN DO THOSE WHO HAVE NOT
9 THRUST THEMSELVES INTO THE PUBLIC EYE. BUT NOT ONLY
10 THAT, SHE'S BEEN AN OUTSPOKEN COMMENTATOR USING HER
11 CELEBRITY STATUS ON NUMEROUS PUBLIC ISSUES, INCLUDING
12 THE ENVIRONMENT. SHE IS REMODELING HER HOME IN AN
13 ENVIRONMENTALLY SENSITIVE AREA, AND THAT'S A MATTER OF
14 PUBLIC CONCERN.

15 THE CASE LAW SIMPLY DOES NOT SUPPORT AN
16 ARGUMENT THAT THIS IS NOT NEWSWORTHY. AND THE CASE THAT
17 MIGHT BE MOST USEFUL FOR THE COURT TO FOCUS ON IS ONE
18 THAT'S REALLY ON ALL FOURS WITH THIS CASE; ALTHOUGH MUCH
19 MORE EGREGIOUS DISCLOSURE OF PRIVATE FACTS. AND THAT'S
20 THE CARAFANO AGAINST METRO SPLASH CASE THAT WE CITED IN
21 OUR BRIEFS, 207 F SUPP. SEVEN AT 1065, THE CENTRAL
22 DISTRICT OF CALIFORNIA FEDERAL CASE, IN WHICH ON A
23 WEBSITE THERE WAS DISCLOSURE OF SEXUAL PREFERENCES OF AN
24 ACTRESS. NOW, IF THAT'S NOT MORE EGREGIOUS THAN SHOWING
25 THE EXTERIOR OF A PATIO, I DON'T KNOW WHAT IS. AND YET,
26 THIS IS A CELEBRITY, AND IT WAS FOUND TO BE NEWSWORTHY
27 IN THE METRO SPLASH CASE.

28 GENERALLY SPEAKING, CELEBRITIES HAVE A VERY

1 HARD TIME ESTABLISHING PRIVACY, AND THERE HAS TO BE A
2 SHOWING BY THE CELEBRITY THAT SOMETHING IS GOING WAY
3 BEYOND NORMAL PRIVATE FACT PRIVACY INTERESTS IN ORDER TO
4 BE ACTIONABLE. AND I'D LIKE TO JUST REVIEW SOME OF THE
5 CASES ON CELEBRITY PRIVACY WITH RESPECT TO THE PRIVATE
6 FACTS TORT, AND I WOULD ADD, YOUR HONOR, THAT I THINK
7 WHAT I'M ABOUT TO DISCUSS ALSO BEARS ON THE
8 CONSTITUTIONAL RIGHT OF PRIVACY, THE GENERAL
9 CONSTITUTIONAL RIGHT OF PRIVACY.

10 ONE OF THE FIRST CASES TO EXPLORE THIS ISSUE
11 WAS THE CASE INVOLVING JANET LEE'S HUSBAND. THE CASE IS
12 CARLYLE AGAINST FOSTER PUBLICATIONS 201 CAL AP. 2ND 733.
13 JANET LEE HAD A ONE-DAY MARRIAGE WHEN SHE WAS 14 YEARS
14 OLD TO A YOUNG MAN WHO WAS 18 YEARS OLD AT THE TIME.
15 AND IN A MOVIE PUBLICATION THERE WAS RECOUNTED THE STORY
16 OF THEIR MARRIAGE, AND THE HUSBAND SUED. HE WAS VERY
17 UPSET. HE WASN'T A CELEBRITY. HIS ONLY CONTACT WITH
18 CELEBRITY STATUS WAS THE FACT THAT FOR A NIGHT HE WAS
19 JANET LEE'S HUSBAND, AND FOR SOME PERIOD BEYOND A NIGHT
20 HE WAS ROMANTICLY INVOLVED UNTIL THEY HAD MISGIVINGS
21 DRIVING BACK FROM I BELIEVE IT WAS LAS VEGAS.

22 THE COURT CONSIDERED WHETHER HE COULD SUE,
23 GIVEN HIS CONTACT WITH JANET LEE, FOR INVASION OF HIS
24 RIGHT OF PRIVACY. AND THE COURT SAID -- AND THIS IS THE
25 KEY LANGUAGE YOU SEE COMING UP OVER AND OVER AGAIN IN
26 THE CASE LAW, "THERE IS A PUBLIC INTEREST WHICH ATTACHES
27 TO PEOPLE WHO BY THEIR ACCOMPLISHMENTS, MODE OF LIVING,
28 PROFESSIONAL STANDING OR CALLING, CREATE LEGITIMATE AND

1 WIDESPREAD ATTENTION TO THEIR ACTIVITIES."

2 NOW, THIS IS NOT SOMEBODY HIMSELF WHO'S
3 ACTUALLY DONE ANYTHING OTHER THAN FOR A NIGHT BE MARRIED
4 TO SOMEONE. "CERTAINLY THE ACCOMPLISHMENTS IN THE WAY
5 OF LIFE OF THOSE WHO ACHIEVE A MARKED REPUTATION OR
6 NOTARIETY BY APPEARING BEFORE THE PUBLIC, SUCH AS ACTORS
7 AND ACTRESSES, MAY LEGITIMATELY BE MENTIONED AND
8 DISCUSSED IN PRINT OR RADIO OR TELEVISION. SUCH PUBLIC
9 FIGURES HAVE, TO SOME EXTENT, LOST THE RIGHT OF PRIVACY,
10 AND IT IS PROPER TO GO FURTHER IN DEALING WITH THEIR
11 LIVES AND PUBLIC ACTIVITIES THAN WITH THOSE OF ENTIRELY
12 PRIVATE PERSONS."

13 AND BY THE WAY, THE COURT ALSO MENTIONS IN
14 THAT CASE -- I WAS READING FROM 746 AND 747. ON
15 747, -48 THE COURT MENTIONS THAT THE FACT THAT THE
16 INFORMATION IS IN THE PUBLIC RECORD IS SUFFICIENT TO
17 NEGATIVE THE IDEA THAT THE PUBLICATION WAS -- WAS A
18 VIOLATION OF RIGHT TO PRIVACY.

19 SO WE BEGIN WITH BARBRA STREISAND BEING IN A
20 POSITION THAT SHE HAS LESS IMMUNITY FROM REVELATION OF
21 PRIVATE FACTS THAN DOES JANE Q. CITIZEN. AND THE SECOND
22 POINT IS THAT THE PRIVATE FACTS THAT ARE ALLEGED TO HAVE
23 BEEN REVEALED HERE ARE IN THE CASE OF A PHOTOGRAPH ONE
24 THAT HAS APPEARED IN NUMEROUS PLACES AND THAT IS WIDELY
25 AVAILABLE, AND THAT'S JUST THE PHOTOGRAPH OF A BACKYARD
26 WITH NOBODY IN IT.

27 NOW, BARBRA STREISAND'S OWN COMPLAINT
28 EMPHASIZES THAT SHE'S A PUBLIC FIGURE AND A CELEBRITY.

1 THAT'S IN THE CASE. WE'RE ENTITLED TO RELY ON IT. SHE
2 MAKES VARIOUS ALLEGATIONS AT PARAGRAPHS 1 AND 2 OF HER
3 COMPLAINT THAT ESTABLISH THAT. IN THAT CARAFANO CASE
4 WHERE THE ACTRESS WAS COMPLAINING ABOUT REVELATION OF
5 HER SEXUAL PRACTICES, THE COURT SAYS "THERE CAN BE NO
6 DOUBT THAT THE PLAINTIFF VOLUNTARILY ASSUMED THAT THE
7 POSITION OF PUBLIC NOTARIETY BY BECOMING AN
8 ENTERTAINMENT CELEBRITY. PLAINTIFF DESCRIBES HERSELF AS
9 AN ACTRESS WHO A LOT OF PEOPLE WHO LIKE TO KNOW, FANS
10 WHO WANT TO KNOW DETAILS ABOUT HER LIFE."

11 BARBRA STREISAND SAYS THE SAME THING IN HER
12 DECLARATION. PEOPLE WANT TO KNOW. PEOPLE ARE
13 INTERESTED IN HER. AND IF THAT ENABLED DISCLOSURE OF
14 THIS ACTRESS'S SEXUAL PREFERENCES, LORD KNOWS DISCLOSURE
15 OF A BACKYARD PATIO IS MUCH FURTHER DOWN THE CONTINUUM
16 OF WHAT CAN BE LEGITIMATELY DISCUSSED, PARTICULARLY
17 BECAUSE THIS PARTICULAR PLAINTIFF HAS PUT HER PROPERTY
18 INTO THE PUBLIC EYE WITHIN THE COASTAL ZONE WITH A
19 DISPUTE.

20 THE COURT: WELL, WHILE SHE'S PUT HER PROPERTY
21 IN THE PUBLIC EYE, HAS SHE ACTUALLY PUT HER BACKYARD IN
22 THE PUBLIC EYE? ISN'T THE THRUST OF HER ARGUMENT, THAT
23 SHE SHOULD HAVE THE RIGHT TO DECIDE WHEN THE PUBLIC
24 SHOULD BE INVITED INTO HER HOUSE? CLEARLY YOU MADE A
25 CASE THAT SHE INVITED PEOPLE MAGAZINE INTO HER HOUSE AND
26 THAT SHE ALLOWED THEM TO TAKE A PHOTOGRAPH; AN AERIAL
27 PHOTOGRAPH, FROM APPEARANCES. BUT SHE PERMITTED THAT.
28 HERE WE HAVE A SITUATION WHICH IT'S ALLEGED SHE DID NOT

1 PERMIT.

2 MR. KENDALL: WELL, ONE OF THE ISSUES THAT'S
3 DISCUSSED IN THE PUBLIC DISPUTE IS DESTABILIZATION OF
4 THE BLUFF, AND WE HAVE A PICTURE. AND PERHAPS I CAN PUT
5 UP THE PICTURE SO I CAN POINT OUT. MAY I APPROACH, YOUR
6 HONOR?

7 THE COURT: GO AHEAD.

8 MR. GATTI: BEFORE MR. KENDALL PROCEEDS, CAN
9 WE HAVE AN IDENTIFICATION OF WHAT PICTURE WE'RE LOOKING
10 AT SO WE KNOW IT'S ALREADY BEEN ADMITTED INTO EVIDENCE.

11 MR. KENDALL: RIGHT. THIS IS JUST THE WEBSITE
12 PHOTO.

13 THE COURT: IT'S SLIGHTLY LARGER, THOUGH.

14 MR. KENDALL: IT'S JUST ENLARGED, BUT IT'S THE
15 SAME THING YOU WERE LOOKING AT --

16 THE COURT: THIS IS EXHIBIT 16, ENLARGED OR --
17 WHATEVER IMAGE 3850 IS ENLARGED.

18 MR. KENDALL: EXACTLY. AND THE COURT CAN SEE
19 OBVIOUSLY, THE WATER, THE BLUFF, THE DRAINAGE PIPES THAT
20 ARE REQUIRED BECAUSE OF BARBRA STREISAND'S ESTATE. AND
21 OBVIOUSLY THE VERY DISTANT VIEW OF THE EXTERIOR OF THE
22 HOUSE. BY THE WAY, THERE IS A MISCONCEPTION, AND I
23 THINK THIS IS AN APPROPRIATE TIME TO TALK ABOUT IT, ON
24 THE DISCLOSURE OF FACTS POINT.

25 THEY TALK ABOUT THE PHOTOGRAPH BEING ENLARGED,
26 THAT YOU CAN GO IN AND ENLARGE THE PHOTOGRAPH. THAT'S
27 ACTUALLY BACKWARDS. THE PHOTOGRAPH IN THE STATE THAT
28 THEY ATTACHED IT AS EXHIBIT -- I'VE FORGOTTEN NOW, THE

1 BIG ONE THEY SHOW -- I WANT TO SAY EXHIBIT 16.

2 THE COURT: YES, 16.

3 MR. KENDALL: THAT IS ACTUALLY THE DIGITAL
4 FILE DIRECTLY FROM THE CAMERA IN ITS NORMAL SIZE.
5 THAT'S THE DIGITAL INFORMATION IN ITS NORMAL SIZE IF YOU
6 JUST PRINT IT AND YOU DON'T REDUCE IT.

7 THE COURT: HOW DO WE KNOW THAT?

8 MR. KENDALL: BECAUSE IT'S IN -- IF YOU LOOK
9 AT EXHIBIT C, MR. ADELMAN ON THE WEBSITE HAS DESCRIBED
10 THE PROCESS. IF YOU LOOK ON THE PAGE THAT'S ACTUALLY
11 MARKED PAGE 13 AT THE BOTTOM, IN THE SECOND TO LAST
12 PARAGRAPH ABOVE THE AIRCRAFT, THE -- IT SAYS THE
13 SMALLER -- I'LL READ THE BEGINNING OF THE PARAGRAPH SO
14 WE CAN UNDERSTAND.

15 "THE IMAGES ARE STORED IN NIKON'S PROPRIETARY
16 NEF FORMAT AND LATER CONVERTED INTO J PEG," AND THEN
17 THIS GOES ON TO SAY "THE SMALLER PREVIEW AND THUMBNAIL
18 IMAGES ARE PRODUCED FROM THE LARGER IMAGES USING PHOTO
19 SHOP." SO ACTUALLY WHAT WE HAVE HERE IS NOT ENLARGING,
20 IT'S SHRINKING. THAT'S WHAT -- THAT'S WHAT IS GOING ON.
21 THIS IS THE BIG ONE. AND THEN -- THEN IT SHRINKS.

22 MR. GATTI: YOUR HONOR, I DON'T MEAN TO
23 INTERRUPT, BUT TO THE EXTENT I WOULD LIKE TO PUT AN
24 OBJECTION ON THE RECORD TO THE EXTENT THERE IS NO
25 EVIDENCE OF THIS IN THE RECORD.

26 THE COURT: I CAN'T TELL ONE WAY OR THE OTHER.
27 WE GET BACK TO "J PEG" AND SOME OTHER TERMS ABOUT WHICH
28 WE HAVE NOTHING.

1 MR. KENDALL: WELL, I THINK WHAT YOU CAN TELL,
2 YOUR HONOR, IS THAT WHAT IT SAYS IS THAT THE SMALLER
3 PREVIEW AND THUMBNAIL IMAGES ARE PRODUCED FROM THE
4 LARGER IMAGES, WHICH ARE THE ONES REFERRED TO THE IN --

5 THE COURT: I UNDERSTAND THE WORDS, BUT A
6 "PREVIEW" AND "THUMBNAIL" ARE NOT DEFINED ANYWHERE.

7 MR. KENDALL: BUT IT'S AN ORDINARY ENGLISH
8 WORD WHICH I THINK ANYONE WHO WORKS ON WEBSITES AND THE
9 WITH COMPUTERS RECOGNIZES AS BEING A MINI VERSION OF AN
10 IMAGE.

11 THE COURT: WELL, I UNDERSTAND WHAT A
12 THUMBNAIL VERSION IS, BUT ARE YOU SAYING THAT THAT
13 EXHIBIT 1 -- NO, IT ISN'T. EXHIBIT A, PERHAPS. YES,
14 EXHIBIT A TO MS. SEIGLE'S DECLARATION IS A PREVIEW?

15 MR. KENDALL: YES, THAT'S THE PREVIEW IMAGE.

16 THE COURT: ALL RIGHT.

17 MR. KENDALL: IF YOU GO ON TO THE PREVIEW
18 IMAGE AND CLICK ON IT, WHAT YOU GET IS THE ORIGINAL
19 IMAGE, THE BIGGEST VERSION OF IT. THE REASON WHY IT'S
20 NECESSARY TO MAKE IT -- THIS IS NOT IN THE RECORD, YOUR
21 HONOR, WHY IT'S NECESSARY TO MAKE A PREVIEW IS OTHERWISE
22 WHEN SOMEONE WENT TO LOOK AT THE IMAGE, THE IMAGE WOULD
23 SPILL OVER THE SCREEN, YOU KNOW, THEY WOULDN'T
24 NECESSARILY -- THEY WOULDN'T SEE THE WHOLE IMAGE. AND
25 THE REASON FOR THAT IS THAT THE IMAGE HAS MORE PIXELS
26 THAN DOES A NORMAL MONITOR.

27 THE COURT: SOMETHING ELSE THAT'S NOT IN THE
28 RECORD.

1 MR. KENDALL: THAT'S NOT IN THE RECORD.

2 THE COURT: OKAY. LET'S MOVE ON TO YOUR NEXT
3 POINT.

4 MR. KENDALL: ALL RIGHT. THE ARGUMENT THAT
5 THEY MAKE IS THAT PEOPLE MAGAZINE DOESN'T CAUSE THEM A
6 PROBLEM BECAUSE A CELEBRITY CAN WITHDRAW HER CONSENT TO
7 INFORMATION THAT SHE PREVIOUSLY MADE PUBLIC. WRONG.

8 THE CASE THEY CITE FOR THAT PROPOSITION IS
9 VIRGIL AGAINST TIME MAGAZINE. IN VIRGIL AGAINST TIME
10 MAGAZINE, AN INDIVIDUAL WAS INTERVIEWED, HE WAS
11 INTERVIEWED FOR A SURFING STORY. HE THOUGHT HE WAS
12 GOING TO BE FEATURED IN A STORY THAT WOULD TALK ABOUT
13 HIS GREAT PHYSICAL PROWESS, BUT INSTEAD IT'S A STORY
14 THAT TALKED ABOUT ALL HIS RECKLESSNESS AND CRAZY STUNTS
15 HE PULLED. AND HE DIDN'T LIKE THAT. SO HE BROUGHT A
16 CLAIM SAYING YOU SHOULDN'T HAVE USED THE INFORMATION I
17 PROVIDED TO YOU.

18 THE COURT: WELL, WE DON'T HAVE THAT HERE
19 BECAUSE SHE DIDN'T PROVIDE THIS INFORMATION. SHE DIDN'T
20 PROVIDE ANY INFORMATION TO THE DEFENDANTS. SHE DID
21 PROVIDE INFORMATION THAT IS SUBSTANTIALLY SIMILAR IN THE
22 SENSE OF THAT SMALL, IF YOU WILL, THUMBNAIL PHOTOGRAPH
23 ABOUT THE SAME SIZE IN THE PEOPLE ARTICLE.

24 MR. KENDALL: BIGGER THAN A THUMBNAIL BUT
25 SMALLER THAN A PREVIEW, I WOULD SAY.

26 THE COURT: OKAY.

27 MR. KENDALL: BUT THE POINT IS, YOUR HONOR,
28 THAT IN THE VIRGIL CASE, THE REASON WHY THE PLAINTIFF IN

1 THE VIRGIL CASE WAS ALLOWED TO PROCEED IS BECAUSE HE
2 REVOKED HIS CONSENT TO THE USE OF THE INFORMATION HE HAD
3 PROVIDED BEFORE PUBLICATION; NOT AFTER THE HORSE HAD
4 LEFT THE BARN WITH THE DOOR OPEN.

5 WHAT THEY ARE TRYING TO DO HERE IS REVOKE THE
6 CONSENT AFTER PUBLICATION. THERE IS NO AUTHORITY THAT
7 WE HAVE FOUND THAT A CELEBRITY CAN DO THAT OR ANYONE
8 ELSE. THE OTHER CASE THEY CITE FOR THE PROPOSITION THAT
9 OLD INFORMATION IS NOT -- DOESN'T COUNT AS PUBLIC FOR
10 PURPOSES OF THE DISCLOSURE OF PRIVATE FACTS TORT IS THE
11 BRISCOE AGAINST READERS DIGEST CASE, WHICH IS A CASE OF
12 AN EX-CONVICT WHO HAD BEEN HAPPILY LIVING A
13 REHABILITATED LIFE AS AN EXEMPLARY CITIZEN FOR 11 YEARS,
14 I BELIEVE IT WAS, AND THEN THE STORY CAME OUT DESCRIBING
15 HIS UNSAVORY PAST AS A TRUCK HIJACKER.

16 AND WHAT THE COURT SAID IN THAT CASE WAS --
17 AND IT WAS LATER DEALT WITH AS WE POINTED OUT IN --
18 LIMITED TO THOSE FACTS IS THAT WHERE, AS IT WAS IN THAT
19 CASE, THERE WAS THE PUBLIC POLICY OF REHABILITATION OF A
20 CONVICT TO CONSIDER AND WHETHER -- WHERE THERE WAS NO
21 CURRENT NEWSWORTHINESS OF THIS INDIVIDUAL'S NAME AT ALL
22 TO THE STORY, THAT HE COULD PROCEED WITH HIS CASE.

23 WELL, WE HAVE A VERY DIFFERENT SITUATION,
24 BECAUSE IT IS NEWSWORTHY THAT THIS HOUSE IS WHERE IT IS.
25 IT IS NEWSWORTHY THAT BARBRA STREISAND IS THE PERSON WHO
26 LIVES THERE. AND THERE ARE A NUMBER OF CASES THAT SAY
27 THAT A PERIOD OF TIME SINCE A CELEBRITY LAST INJECTED
28 HERSELF INTO THE PUBLIC SPOTLIGHT DOES NOT ELIMINATE

1 NEWSWORTHINESS. IT MAY BE THAT BARBRA STREISAND, WHO
2 ONCE WAS AVID ABOUT SEEKING PUBLICITY, HAS CHANGED
3 DIRECTION. BUT THAT HAS COME UP NUMEROUS TIMES IN THE
4 CASE LAW.

5 THE FORSHER AGAINST BUGLIOSI CASE IS AN
6 EXAMPLE OF THAT WHERE VINCENT BUGLIOSI, WHO WAS ONCE THE
7 KING OF GRANDSTANDING, LATER DIDN'T LIKE HAVING BOOKS
8 WRITTEN ABOUT HIM, THE COURT SAID -- THIS IS CALIFORNIA
9 SUPREME COURT AT 26 CAL AP 3D 792 AT 811, THE GENERAL
10 RULE IS THAT ONCE A MAN HAS BECOME A PUBLIC FIGURE OR
11 NEWS, HE REMAINS A MATTER OF LEGITIMATE RECALL TO THE
12 PUBLIC MIND TO THE END OF HIS DAYS.

13 THE CARLYLE AGAINST FOSTER PUBLICATION CASE,
14 THAT THE JANET LEE CASE, TO THE SAME EFFECT. THERE IS
15 ANOTHER CASE, WASSER AGAINST SAN DIEGO UNION, TO THE
16 SAME EFFECT. AND BARBRA STREISAND REMAINS VERY MUCH IN
17 THE PUBLIC EYE, SO THIS IS NOT SOMEONE WHO IS NO LONGER
18 IN THE PUBLIC EYE. SHE HAS, AND IT'S EVIDENCE, HER OWN
19 WEBSITE WHERE SHE PROTRAYS HERSELF AS AN ENVIRONMENTAL
20 ACTIVIST AND AS VERY INTERESTED IN ENVIRONMENTAL ISSUES
21 AND AS INTERESTED IN POLITICAL ISSUES OF ALL KINDS, AND
22 SHE'S UP THERE ON THE SOAP BOX. AND MR. ADELMAN AND THE
23 CAPTIONERS ON HIS WEBSITE ARE ENTITLED TO HAVE THEIR
24 SOAP BOX TOO.

25 SO, IN CONCLUSION ON THE DISCLOSURE OF PRIVATE
26 FACTS, WITH RESPECT TO THE HOUSE AND PROPERTY ITSELF,
27 THERE IS JUST SIMPLY NOTHING PRIVATE ON IT. ANOTHER
28 POINT, THERE IS VERY LITTLE EVIDENCE IN THE RECORD ABOUT

1 HARM THAT THIS ALLEGEDLY DOES. THERE IS AN ARGUMENT
2 MADE -- THERE IS AN ARGUMENT MADE THAT AN INTRUDER COULD
3 FIND THE WAY UP. WHEN YOU YOU LOOK AT THIS PICTURE,
4 WHAT INFORMATION DOES IT EVEN GIVE ABOUT HOW AN INTRUDER
5 COULD GET TO THIS HOUSE. BASICALLY NONE. IT DOESN'T
6 SHOW ANYTHING SHOWING THE ROUTES THAT AN INTRUDER COULD
7 USE. DOESN'T SHOW ANYTHING OF THE KIND.

8 IF AN INTRUDER WANTS TO GO TO THE BOTTOM OF
9 THIS BEACH WHERE BARBRA STREISAND LIVES, AND I'LL GET TO
10 THE LOCATION IN JUST A MINUTE, ALL HE HAS TO DO IS LOOK
11 UP THE CLIFF AND HE'LL HAVE A MUCH BETTER VIEW OF HOW TO
12 GET UP THAT CLIFF THAN HE CAN FROM THIS PICTURE.

13 BUT IN ANY EVENT, IF HE HAD WANTED TO HAVE
14 THAT VIEW, HE COULD HAVE LOOKED UP BARBRATIMELESS DOT
15 COM AND HAVE A TERRIFIC VIEW.

16 THE COURT: IS THERE NO OTHER INJURY THAT A
17 PERSON WHO HAS ATTEMPTED TO LOCATE HIMSELF OR HERSELF
18 WHAT I'LL DESCRIBE AS A SAFE HAVEN CAN TAKE OR WHAT MUST
19 THEY -- CAN THEY NOT WITHDRAW FROM THE PUBLIC EYE, AT
20 LEAST IN ONE GEOGRAPHIC LOCATION?

21 MR. KENDALL: YOUR HONOR, I THINK IF YOU HAD
22 SOMEONE, WHICH YOU DON'T HAVE HERE, WHERE THERE IS NO
23 FACTS IN THE PUBLIC EYE ABOUT WHERE THEY LIVE -- AND
24 HERE WE'VE GOT STAR MAPS, WE'VE GOT WEBSITES THAT GIVE
25 AWAY THIS ADDRESS WHERE THEY LIVE, AND IF YOU HAVE
26 SOMEONE WHO WASN'T LIVING IN THE COASTAL ZONE, AND YOU
27 HAD SOMEONE WHO HADN'T PERMITTED PICTURES OF THIS VERY
28 HOUSE AND WHERE THERE WEREN'T PICTURES OF THE HOUSE,

1 THEN, YOU KNOW, WE WOULD HAVE A DIFFERENT CASE AND THAT
2 ORWELLIAN QUESTION, AS MY OPPONENTS PUT IT, COULD BE
3 ANSWERED. BUT THAT'S NOT THE CASE WE HAVE HERE.

4 AND THE CASE WE HAVE HERE HAS TO BE DECIDED ON
5 ITS FACTS BASED UPON WHAT IS IN THE EVIDENCE BASED UPON,
6 IN THIS INSTANCE, THE BURDEN BEING CARRIED BY THE
7 PLAINTIFF.

8 AND ON THESE FACTS WHAT THE COURT WOULD BE
9 HOLDING IS THAT IT IS THE DISCLOSURE OF A PRIVATE FACT
10 TO TAKE AN AERIAL PHOTOGRAPH OF SOMEONE WHO WANTS TO BE
11 IN A SECLUDED LOCATION. THERE IS NO LAW THAT WOULD
12 SUPPORT THAT.

13 NOW, THE OTHER POINT -- I SHOULD SPEAK TO THE
14 LONGITUDE AND LATITUDE COORDINATES, THEY KEEP SAYING
15 WE'VE GIVEN THOSE AWAY, TO THE HOUSE. ACTUALLY, WE'VE
16 ONLY GIVEN THEM AS TO A HELICOPTER, BUT AS WE DISCUSSED
17 YESTERDAY AND WHAT REMAINS IN EVIDENCE IS THE FACT THAT
18 MEMBERS OF THE PUBLIC CAN GO ONTO THE GEOCODE DOT COM
19 WEBSITE AND AT LEAST BELIEVE THAT THEY ARE GETTING THE
20 LATITUDE AND LONGITUDE OF HER PRECISE ADDRESS. A GOOGLE
21 SEARCH OF BARBRA STREISAND IN MALIBU WILL PULL UP BARBRA
22 STREISAND'S HOME ADDRESS WITHIN ABOUT FOUR SECONDS.
23 ANYONE WHO WANTS TO KNOW THAT CAN FIND IT OUT.

24 STAR MAPS HAVE BEEN AVAILABLE FOR ALL KINDS OF
25 CELEBRITIES IN LOS ANGELES SINCE THE DAY I CAME HERE
26 WHEN I WAS EIGHT YEARS OLD. THAT IS NOTHING NEW. AND
27 GIVING AWAY CELEBRITY ADDRESSES IS A TIME HONORED
28 CUSTOM. THAT'S JUST PART OF BEING A RECORDING STAR AND

1 A MOVIE STAR.

2 NOW, COULD BARBRA STREISAND UNDER TOTALLY
3 DIFFERENT FACTS BE IN A PLACE WHERE THERE HADN'T BEEN
4 PUBLIC REVELATIONS AND TAKE STEPS TO PREVENT PUBLIC
5 DISCLOSURES FROM THE BEGINNING AND HAVE A CASE? THAT'S
6 AN INTERESTING QUESTION. IT'S NOT TODAY'S QUESTION.
7 IT'S NOT THIS CASE'S QUESTION. IT'S AN INTERESTING ONE.
8 THE QUESTION OF WHETHER YOU CAN SOMEHOW CREATE A PRIVACY
9 INTEREST IN THE EXTERIOR OF YOUR YARD FREE FROM ANYBODY
10 BEING ABLE TO TAKE A PHOTOGRAPH OF IT AND REVEALING THAT
11 PHOTOGRAPH TO ANOTHER HUMAN BEING, THAT REMAINS TO BE
12 DECIDED BY A COURT.

13 IT WOULD BE A VERY INTERESTING QUESTION,
14 BECAUSE THINK OF THE IMPLICATIONS OF THAT RULE. THAT
15 MEANS THAT -- THAT WOULD MEAN THAT IF THE COURT RULED --
16 ON THIS CASE, IT WOULD MEAN THAT TOMORROW EVERY SINGLE
17 PERSON WHO TAKES A PICTURE OF BARBRA STREISAND'S HOUSE,
18 IF THE MERE TAKING OF A PICTURE WAS INTRUSION, OR WHO
19 GIVES THE PICTURE TO SOMEONE ELSE HAS COMMITTED A TORT
20 BY SIMPLY DOING THAT.

21 I DON'T THINK THAT ANY COURT HAS EVER HELD
22 ANYTHING QUITE SO EXTRAORDINARY, AND I THINK THE REASON
23 IS THAT THERE ARE CERTAIN ASPECTS OF LIVING IN SOCIETY
24 THAT WE ALL HAVE TO PUT UP WITH, AND IT IS NOT OFFENSIVE
25 TO A REASONABLE PERSON, NOT AN EGG SHELL CELEBRITY;
26 THAT'S NOT THE TEST. BUT TO A REASONABLE PERSON THAT
27 SOMEONE MIGHT SNAP AN AERIAL VIEW OF YOUR YARD.

28 YOU KNOW, IF YOU LIVE IN JUST ABOUT ANY PART

1 OF LOS ANGELES, YOU HAVE HELICOPTERS AND AIRPLANES
2 FLYING OVER YOUR HOUSE ALL THE TIME. WHEN YOU LOCATE
3 YOURSELF ON THE BEACH THERE, YOU HAVE PEOPLE GOING BY
4 WITH "VOTE FOR BUSH" YOU HAVE, YOU KNOW, "DRINK BEER"
5 SIGNS. YOU HAVE GOT ALL THOSE PLANES THAT GO BY
6 DRAGGING SIGNS, YOU'VE GOT HELICOPTERS GOING UP AND DOWN
7 THE COAST, YOU'VE GOT PRIVATE PILOTS ENJOYING THE VIEW
8 OF THE BEACH; ALL UP AND DOWN. DOES SHE HAVE AN
9 INTEREST IN NOT BEING SHOWN AS A TOPLESS SUNBATHER, WE
10 WOULD CONCEDE THAT, BUT THERE IS NO PERSON IN THIS
11 PICTURE.

12 NOW, WITH RESPECT TO THE CAPTION, I'M GOING TO
13 LET MY PARTNER LAURA SEIGLE DISCUSS SECTION 230 OF THE
14 COMMUNICATIONS DECENCY ACT. BUT IN ADDITION TO THE FACT
15 THAT IT IS NOT -- ASIDE FROM THE CDA, A DISCLOSURE OF
16 PRIVATE FACTS WITHIN THE MEANING OF THE LAW THAT WOULD
17 BE ACTIONABLE. THERE IS ALSO THE ADDITIONAL PROTECTION
18 AFFORDED BY THE CDA.

19 NOW, THE COURT DID MENTION THAT YOU WANTED TO
20 TALK ABOUT THE RESTATEMENT.

21 THE COURT: WELL, COUNSEL, ARE YOU GOING TO
22 ADDRESS THE CONSTITUTIONAL PROBLEMS, OR DID YOU CONSIDER
23 YOU HAVE DONE THAT?

24 MR. KENDAL: I WAS JUST ABOUT TO GET TO THAT.

25 THE COURT: GO AHEAD.

26 MR. KENDAL: I THOUGHT I WOULD MENTION THE
27 RESTATEMENT IN THAT CONTEXT OF DOING THAT.

28 THE COURT: THAT'S FINE.

1 MR. KENDALL: THE CONSTITUTIONAL RIGHT OF
2 PRIVACY IS -- FIRST OF ALL, THE FEDERAL CONSTITUTIONAL
3 RIGHT OF PRIVACY HAS NOTHING TO DO WITH THIS CASE
4 BECAUSE IT APPLIES ONLY TO STATE ACTIONS. AND THE CASES
5 THAT ARE DECIDED UNDER FOIA AND THE FEDERAL ACT DEALING
6 WITH THE PRIVACY OF RECORDS HAD NOTHING TO DO WITH THIS
7 CASE. BUT THE CALIFORNIA SUPREME COURT'S DECISION IN
8 THE HILL CASE AT 7 CAL 4 DOES DEAL WITH THIS CASE.

9 NOW, THE ISSUE IN HILL I THINK IS, FIRST OF
10 ALL, WHEN YOU ARE LOOKING AT THIS ANALYTICALLY IS WHAT
11 DOES THE CONSTITUTIONAL RIGHT OF PRIVACY HAVE THAT THE
12 SPECIFIC COMMON LAW TORTS DON'T HAVE. IT'S AN
13 INTERESTING QUESTION. ALL OF THE CALIFORNIA CASES THAT
14 I'VE READ THAT ADDRESS THE CONSTITUTIONAL RIGHT OF
15 PRIVACY CITE TO DEAN PROSSER'S AND, 4, PRIVACY OF TORTS,
16 AND THEY CITE TO THE BEGINNINGS OF PRIVACY ANALYSIS AND
17 THEN PROFESSOR BRANDICE'S ARTICLE, AND THEY MOVE FORWARD
18 FROM THERE. AND HERE IS WHAT I BELIEVE TO BE THE SCOPE
19 OF THE CONSTITUTIONAL RIGHT OF PRIVACY.

20 THE CONSTITUTIONAL RIGHT OF PRIVACY, I
21 BELIEVE, WHEN YOU ARE TALKING ABOUT CONDUCT THAT IS
22 ALREADY COVERED BY ONE OF THE COMMON LAW TORTS, IS THAT
23 IT IS BOUNDED BY THE COMMON LAW TORT OF LAW ITSELF.

24 SO IF YOU ARE TALKING ABOUT AN INTRUSION OR
25 YOU ARE TALKING ABOUT A DISCLOSURE OF A PRIVATE FACT,
26 THEN IN THOSE CIRCUMSTANCES I THINK YOU HAVE TO SATISFY
27 THE ELEMENTS OF THOSE TORTS. AND THE CONSTITUTIONAL
28 RIGHT OF PRIVACY IS NOT A WAY OF JUST DOING AN END RUN

1 AROUND.

2 THE COURT: ARE YOU FAMILIAR WITH BORTUN
3 VERSUS UNIVERSITY OF SAN FRANCISCO 64 CAL AP 3 825,
4 WHICH AT LEAST SUGGESTS THAT THE CONSTITUTIONAL RIGHT
5 EXISTS EVEN THOUGH THE INJURY MAY NOT FIT ANY OF THE
6 FOUR SITUATIONS LISTED BY THEN CHIEF JUSTICE LUCAS IN
7 HILL.

8 MR. KENDALL: YES. I AM FAMILIAR WITH THAT
9 CASE, AND I THINK MAYBE I'LL LET MS. SEIGLE TALK ABOUT
10 IT BECAUSE SHE AND I DISCUSSED THIS CASE AT GREAT LENGTH
11 YESTERDAY, BUT WHAT I WAS ABOUT TO SAY ABOUT THAT PART
12 OF THE LAW IS THAT IT IS A GAP FILLER, IN OUR OPINION.
13 THE BEST WAY TO READ THAT CASE IS THAT WHERE THERE IS A
14 KIND OF PRIVACY INVASION THAT IS NOT COVERED, NOT
15 ADDRESSED BY ONE OF THE EXISTING TORTS, THEN BECAUSE OF
16 THE PARTICULAR KINDS OF ALLEGATIONS MADE --

17 THE COURT: COUNSEL, THEN WHY DID THE PEOPLE
18 OF THE STATE OF CALIFORNIA IN 1972 ENACT PROPOSITION 11,
19 WHICH IS WHERE THIS GETS INTO THE STATE CONSTITUTION?

20 MR. KENDALL: BECAUSE THERE WERE CERTAIN
21 THINGS THAT WERE HAPPENING, SUCH AS THE GATHERING OF
22 INFORMATION BUT NOT PUBLISHING IT, TO TAKE ONE EXAMPLE;
23 SUCH AS THE AMASSING OF DATA BASES THAT WERE NOT
24 PROTECTED UNDER THE EXISTING TORT LAW. AND I THINK
25 THAT'S THE PRIMARY REASON; ALTHOUGH, IN THAT BORTUN CASE
26 THEY GO THROUGH A DISCUSSION. ONE OF THE PROBLEMS WE
27 HAVE, AND JUSTICE LUCAS POINTS THIS OUT, IS THAT THE --
28 ALL YOU HAVE WHEN YOU LOOK AT AN INITIATIVE IS -- YOU

1 KNOW, THE WORDS ADDING PRIVACY TO IT AND THEN THE PRO
2 AND CON THAT'S IN THE PAMPHLET, WHICH ISN'T ALL THAT
3 INFORMATIVE.

4 THE COURT: WELL, THOUGH OUR SUPREME COURT HAS
5 RELIED UPON THE BALLOT STATEMENT AS A GOOD SOURCE OF
6 GUIDANCE IN RESOLVING ISSUES, BOTH UNDER THIS PARTICULAR
7 CASE AND MANY OTHER INITIATIVES OR OTHER STATUTES.

8 MR. KENDALL: YOU ARE QUITE CORRECT. MY POINT
9 IS IT'S NOT QUITE LIKE HAVING A SENATE REPORT IF YOU ARE
10 LOOKING AT A FEDERAL LAW AND HOUSE REPORT, OR -- AND
11 HAVING CALIFORNIA LEGISLATIVE HISTORY OF THE HOUSE AND
12 SENATE OF CALIFORNIA.

13 THE COURT: WELL, IS IT ANY LESS RELIABLE
14 THAN, SAY, THE FEDERALIST PAPERS ARE WHEN THE U.S.
15 SUPREME COURT SEEKS TO INTERPRET A FEDERAL
16 CONSTITUTIONAL PROVISION? ONE CAN MAKE THE ARGUMENT
17 THAT THE AUTHORS OF THE FEDERALIST PAPERS WERE WRITING
18 THEM SPECIFICLY FOR THE VOTERS OF NEW YORK WITH RESPECT
19 TO ENACTMENT OF THE CONSTITUTION THERE, SO HOW IS WHAT'S
20 IN THE BALLOT PAMPHLET IN CALIFORNIA ANY DIFFERENT?

21 MR. KENDALL: IT'S ONLY DIFFERENT IN THAT IT'S
22 LESS EDIFYING.

23 THE COURT: WELL, CERTAINLY SHORTER.

24 MR. KENDALL: SHORTER AND THERE -- THERE ISN'T
25 AS MUCH DETAIL IN THE EXPLANATION OF POSITIONS, AND IT'S
26 NOT AS REFLECTIVE AS THE FEDERALIST PAPERS, BUT THERE IS
27 ALSO A PROBLEM -- YOUR HONOR, I'M NOT SAYING THAT COURTS
28 DON'T CONSIDER THIS. WHAT I'M SAYING INSTEAD AND WANT

1 IT LOOKS AT WHAT THE CALIFORNIA COURTS HAVE SAID ABOUT
2 THEIR CONSTITUTIONAL RIGHT OF PRIVACY, INCLUDING WHAT'S
3 IN THE BALLOT, BUT ONE HAS TO BE CAREFUL IN USING THAT
4 KIND OF EVIDENCE BECAUSE ANYBODY CAN CITE IT FOR JUST
5 ABOUT ANYTHING. JUST AS IN THE CASE OF THE FEDERALIST
6 PAPERS. WHEN JUSTICE SCALIA AND JUSTICE WARREN READ
7 THOSE SAME FEDERALIST PAPERS, THEY CAME TO REALLY
8 DIFFERENT CONCLUSIONS AND, YOU KNOW, THAT'S THE PROBLEM
9 WITH THAT KIND OF INFORMATION.

10 THE COURT: THEN WE SHOULD LOOK JUST TO THE
11 TEXT OF THE ARTICLE OR SECTION?

12 MR. KENDALL: WELL, I THINK WHAT WE SHOULD DO
13 IS LOOK AT THE CALIFORNIA CASE LAW FIRST AND WHAT IT
14 SAYS ABOUT --

15 THE COURT: WELL, ISN'T IT A BASIC RULE OF
16 STATUTORY CONSTRUCTION THAT IF THERE IS NO AMBIGUITY,
17 ONE DOESN'T GO ANY FURTHER? CLEARLY CASES INTERPRET
18 STATUTES, BUT I TOOK YOUR POINT TO BE THAT THE
19 CONSTITUTIONAL RIGHT OF PRIVACY WAS LIMITED. AND TO THE
20 EXTENT THERE WERE PRE-EXISTING TORTS, THE ENACTMENT OF
21 THIS SECTION 1972 DIDN'T EXPAND THE FIELD. IS THAT A
22 CORRECT RESTATEMENT OF YOUR ARGUMENT?

23 MR. KENDALL: NOT EXACTLY. WHAT I WAS
24 ATTEMPTING TO SAY IS THAT THE -- AS I INTERPRET THE CASE
25 LAW, THE FIELD WAS EXPANDED INTO COVERING CONDUCT THAT
26 WAS NOT OTHERWISE REGULATED BY THE EXISTING TORTS. IT
27 WASN'T EXPANDED BY JUST LOOKING IT INTO UTTER CHAOS AND
28 INDISTINCTNESS. IT DIDN'T DISPLACE THE COMMON LAW. IT

1 SUPPLEMENTED THE COMMON LAW. THAT'S THE POINT I'M
2 TRYING TO MAKE.

3 THE HILL CASE AT PAGE 23 SAYS THAT YOU LOOK AT
4 THE COMMON LAW FOR GUIDANCE AS TO WHAT'S INCLUDED. AND
5 THAT'S A SUPREME COURT CASE IN THE CONSTITUTIONAL RIGHT
6 OF PRIVACY, AND THAT YOU LOOK AT THE FEDERAL
7 CONSTITUTIONAL LAW FOR GUIDANCE, AND THAT YOU LOOK AT
8 WHAT'S ON THAT BALLOT. AND WHEN YOU GET DONE WITH ALL
9 THAT, YOU TRY TO FIGURE OUT WHAT DID THE PUBLIC MEAN
10 WHEN THEY ADDED PRIVACY.

11 WE'VE BEEN FOCUSING ON THAT QUESTION WITH THE
12 AID OF THE HILL CASE, BUT THE HILL CASE COMES DOWN AT
13 THE END TALKING ABOUT IT, IS THAT THERE HAS TO BE A
14 LEGALLY PROTECTED INTEREST THAT'S INVADED, AND IT HAS TO
15 BE A SERIOUS INVASION. AND THERE IS A NICE DISCUSSION
16 ON PAGES 35 TO 37 OF THE HILL CASE BY THE CALIFORNIA
17 SUPREME COURT, WHICH I'D LIKE TO TURN TO.

18 THE COURT SAYS -- I JUST WANT TO READ ONE
19 LITTLE PIECE ON PAGE 27 BEFORE MOVING TO THE POINT I WAS
20 DISCUSSING A SECOND AGO. THE COURT SAYS THAT "BY
21 REFERRING TO THE COMMON LAW WE SEEK MERELY TO DRAW UPON
22 THE 100 YEARS OF LEGAL EXPERIENCE SURROUNDING THE TERM
23 'PRIVACY' AND IDENTIFYING LEGALLY PROTECTED PRIVACY
24 INTERESTS AND DESCRIBING THE PROCESS BY WHICH SUCH
25 INTERESTS ARE COMPARED AND WEIGHED AGAINST OTHER VALUES.
26 THAT EXPERIENCE SUGGESTS THAT THE COMMON LAW'S
27 INSISTENCE ON OBJECTIVELY REASONABLE EXPECTATIONS OF
28 PRIVACY BASED ON WIDELY SHARED SOCIAL NORMS, SERIOUS

1 VIOLATIONS OF THOSE EXPECTATIONS, AND THOROUGH
2 CONSIDERATION OF COMPETING INTERESTS, IS AN INVALUABLE
3 GUIDE IN CONSTITUTIONAL PRIVACY LITIGATION."

4 NOW, I'M NOT SAYING THAT IT IS THE END OF THE
5 MATTER. I DON'T WANT THE COURT TO DRAW THAT CONCLUSION,
6 THAT THAT WAS THE ARGUMENT I WAS MAKING. WHAT I AM
7 SAYING IS THAT IN THE CONDUCT IN A PARTICULAR CASE IS
8 RIGHT WITHIN THE TRADITIONAL COMMON LAW ANALYSIS WHERE
9 THERE IS A CENTURY OF JURISPRUDENCE EXTRACTING THE
10 ELEMENTS AND GIVING JUDGES A WAY OF SORTING THROUGH THE
11 DIFFERENT INTERESTS WHICH, YOU KNOW, INCLUDES DESCRIBING
12 THE RIGHT OF PRIVACY AND THEN MEASURING THAT AGAINST THE
13 OTHER PUBLIC INTERESTS, SUCH AS FIRST AMENDMENT
14 INTERESTS THAT MAY BE AT STAKE, WHAT THE COURT IS
15 TELLING US IS, I BELIEVE, THERE IS AN INVALUABLE GUIDE
16 IN THAT CENTURY OF JURISPRUDENCE UNLESS THERE IS A
17 REASON TO DEPART FROM IT.

18 AND THEN WHEN THE COURT GOES TO DISCUSS WHAT
19 IS AT ISSUE IN THE CONSTITUTIONAL RIGHT OF PRIVACY, AS I
20 DESCRIBED, THE FIRST THING THAT THE COURT TALKS ABOUT ON
21 PAGE 37, IT SAYS, "THE FIRST ESSENTIAL ELEMENT OF A
22 STATE CONSTITUTIONAL CAUSE OF ACTION FOR INVASION OF
23 PRIVACY IS THE IDENTIFICATION OF A SPECIFIC LEGALLY
24 PROTECTED -- LEGALLY PROTECTED PRIVACY INTEREST."

25 SO MY ARGUMENT, YOUR HONOR, WOULD BE BARBRA
26 STREISAND CANNOT COME INTO THIS COURT AND SAY I MAY NOT
27 HAVE A LEGALLY PROTECTED PRIVACY INTEREST IN MY BACKYARD
28 UNDER THE LAST HUNDRED YEARS OF JURISPRUDENCE, AND THERE

1 MAY BE VERY WELL DEVELOPED LAW ABOUT WHAT IS PRIVATE AND
2 WHAT IS NOT PRIVATE. BUT NOW I'M IN A LOOSY GOOSY
3 CONSTITUTIONAL SECTION, AND IT'S A WHOLE NEW BALL GAME.
4 I THINK THERE HAS TO BE A SPECIFIC LEGALLY PROTECTED
5 PRIVACY INTEREST AT STAKE.

6 AND THE COURT GOES ON TO THE NEXT ELEMENT,
7 WHICH IS REASONABLE EXPECTATION OF PRIVACY, AND I
8 BELIEVE THESE TWO DOVETAIL WITH EACH OTHER, TO SAY -- I
9 THINK I WAS JUST ON PAGE 36, YOUR HONOR. NOW I'M ON
10 PAGE 37. THE COURT SAYS ON PAGE 37, "A REASONABLE
11 EXPECTATION OF PRIVACY IS AN OBJECTIVE ENTITLEMENT
12 FOUNDED ON BROADLY BASED AND WIDELY ACCEPTED COMMUNITY
13 NORMS. I SUBMIT --

14 THE COURT: WASN'T THERE A COMMUNITY NORM ON
15 THE RIGHT TO BE LEFT ALONE?

16 MR. KENDALL: BUT NOT A COMMUNITY NORM THAT
17 YOU'RE BACKYARD IS IMMUNE FROM DISCLOSURE ON A WEBSITE
18 THAT IS DOCUMENTING THE ENTIRE CALIFORNIA COASTLINE.

19 THE COURT: WHAT IF THE FENCE OR SHRUBBERY
20 ALONG EACH OF THE PERIMETERS OF THE PLAINTIFF'S PROPERTY
21 WERE 50 FEET HIGH?

22 MR. KENDALL: THEN --

23 THE COURT: ISN'T THAT FUNCTIONALLY WHAT SHE
24 WAS LOOKING FOR?

25 MR. KENDALL: WELL, SHE COULD HAVE DONE THAT
26 ON THE BLUFF TOO, BUT PRESUMABLY SHE DECIDED TO PRESERVE
27 HER VIEW SO SHE DIDN'T PUT SHRUBBERY OR -

28 THE COURT: WELL, CONSIDERING HOW DIFFICULT IT

1 WOULD BE FOR SOMEONE ACTUALLY TO SEE, AS YOU POINTED OUT
2 WHEN YOU WERE STANDING NEXT TO THE PHOTOGRAPH, UP FROM
3 THE BEACH, SHE DIDN'T HAVE TO DO IT ALONG THE BLUFF.
4 THE QUESTION IS IF SHE HAD HIGHER VEGETATION OR A FENCE
5 ALONG EACH SIDE, WOULD THAT HAVE CHANGED YOUR ARGUMENT
6 AT ALL?

7 MR. KENDALL: YOUR HONOR, WHAT THAT WOULD HAVE
8 DONE, IF SHE HAD DONE IT ON THE BLUFF, THAT WOULD HAVE
9 MEANT THAT SOMEBODY WHO HAVE HAD TO FLY OVER HER
10 PROPERTY OR VERY CLOSE TO OVER HER PROPRETY TO TAKE THIS
11 PICTURE. SHE LEFT IT OPEN ON THE COASTLINE SIDE. BUT I
12 WOULD SAY, EVEN IF SHE HAD PUT SHRUBBERY 50 FEET HIGH,
13 THE QUESTION WOULD BE WHETHER, FIRST, THERE IS A
14 SPECIFIC LEGALLY PROTECTED PRIVACY INTEREST IN A
15 PHOTOGRAPH TAKEN AT THAT LEVEL OF DISTANCE AND PUBLISHED
16 ON A WEBSITE, PARTICULARLY GIVEN THE PRIOR INSTANCES OF
17 MAKING THAT INFORMATION AVAILABLE.

18 AND SECONDLY, WHETHER BROADLY BASED AND WIDELY
19 ACCEPTED COMMUNITY NORMS WOULD PROTECT THAT. I DON'T
20 THINK THERE IS A BROADLY BASED AND WIDELY ACCEPTED
21 COMMUNITY NORM OF PEOPLE PUTTING UP 50 FOOT SHRUBBERY.
22 AND, IN FACT, I'M SURE THE COURT IS AWARE THAT THE
23 ZONING AND CC&R'S THROUGHOUT THE CITY OF LOS ANGELES
24 LIMIT FENCES TO FIVE FEET HIGH.

25 THE COURT: WELL, THAT CAN'T BE THE CASE IN
26 THE CITY OF MALIBU BECAUSE JUST BY THE PHOTOGRAPHS SHOWN
27 OF THE FENCE OF THE FRONT OF THE PROPERTY SEEMS TO BE
28 MORE THAN FIVE FEET HIGH.

1 MR. KENDALL: THEN MAYBE THERE IS A VARIANCE,
2 BUT THAT'S NOT IN EVIDENCE, YOUR HONOR. I WOULDN'T JUMP
3 TO ANY CONCLUSIONS ABOUT THE HEIGHT OF THAT FENCE. BUT
4 THAT IS GENERALLY --

5 THE COURT: WELL, NOR IS THE CITY OF L.A. CITY
6 ORDINANCE, AND IF THERE IS A COUNTY ORDINANCE, IT ISN'T
7 EITHER.

8 MR. KENDALL: WELL, WE COULD TAKE JUDICIAL
9 NOTICE OF THAT IF IT BECAME REL- --

10 THE COURT: WELL, IF YOU'D PROPERLY REQUESTED
11 IT BEFORE THE HEARING.

12 MR. KENDALL: LET ME MOVE ON TO THE THIRD
13 PRONG THAT THE HILL COURT IDENTIFIED, WHICH IS SERIOUS
14 INVASION OF PRIVACY INTERESTS. AND THE COURT OPENED
15 THIS DISCUSSION BY SAYING "NO COMMUNITY COULD FUNCTION
16 IF EVERY INTRUSION INTO THE REALM OF PRIVATE ACTION, NO
17 MATTER HOW SLIGHT OR TRIVIAL, GAVE RISE TO A CAUSE OF
18 ACTION FOR INVASION OF PRIVACY, AND IT WENT ON TO QUOTE
19 FROM THE RESTATEMENT OF TORTS THAT COMPLETE PRIVACY DOES
20 NOT EXIST IN THIS WORLD EXCEPT IN THE DESERT, AND ANYONE
21 WHO IS NOT A HERMIT MUST EXPECT AND ENDURE THE ORDINARY
22 INCIDENTS OF AA COMMUNITY LIFE OF WHICH HE'S A PART.
23 ACTIONABLE INVASIONS OF PRIVACY MUST BE SUFFICIENTLY
24 SERIOUS IN THEIR NATURE, SCOPE, AND ACTUAL OR POTENTIAL
25 IMPACT TO CONSTITUTE AN EGREGIOUS BREACH OF THE SOCIAL
26 NORMS UNDERLYING THE PRIVACY RIGHT."

27 THE COURT: ARE YOU TALKING ABOUT TWO
28 DIFFERENT THINGS, OR MAYBE FOCUSING ON THE SECOND

1 ELEMENT, JUST AS I WAS DISCUSSING WITH MR. GATTI THIS
2 MORNING, ON THE TWO ELEMENTS OF THE SLAPP MOTION. DO
3 YOU CONCEDE, THEN, THAT JUSTICE LUCAS WAS TALKING ABOUT
4 SOMETHING THAT WASN'T ALREADY A TORT UNDER COMMON LAW
5 BUT THERE WAS SOMETHING IN ADDITION? AND IF SO, I TAKE
6 IT THE SECOND PRONG OF YOUR ARGUMENT THAT IF THAT IS THE
7 CASE THEN IT'S NOT FOUND IN THIS CASE BASED ON
8 APPLICATION OF THESE PRINCIPALS.

9 MR. KENDALL: I'LL LET MS. SEIGLE DISCUSS THAT
10 IN MORE DETAIL BECAUSE I DON'T WANT TO -- I'M NOT ABLE
11 TO QUOTE YOU CHAPTER AND VERSE ON THAT CASE. BUT WHAT I
12 WAS FOCUSING ON WAS FIRST THE OUTLINES THAT THE -- THAT
13 WE HAVE FROM THE CALIFORNIA SUPREME COURT OF WHAT HAS TO
14 BE SHOWN IN ORDER TO MEET THE FIRST THREE ELEMENTS OF
15 THE CONSTITUTIONAL TORT, WHICH ARE INFORMED AND GUIDED
16 BY A CENTURY OF JURISPRUDENCE UNDER THE PRIVACY TORTS
17 FROM BRANDICE TO PROSSER TO TODAY.

18 AND THERE ARE THREE PRONGS, ALL NECESSARY
19 ELEMENTS. ESTABLISHING THAT YOU HAVE MET ONE OF THEM
20 WOULD NOT BE SUFFICIENT FOR BARBRA STREISAND. ALL OF
21 THEM ARE BOTH SUFFICIENT -- I'M SORRY, ALL OF THEM ARE
22 NECESSARY CONDITIONS. NONE IS SUFFICIENT BY ITSELF. SO
23 SHE MUST ESTABLISH A LEGALLY PROTECTED PRIVACY INTEREST,
24 A REASONABLE EXPECTATION OF PRIVACY WHICH IS FOUNDED ON
25 BROADLY BASED AND WIDELY ACCEPTED COMMUNITY NORMS, AND
26 THE SERIOUS INVASION, MEANING EGREGIOUS BREACH, OF THE
27 SOCIAL NORMS UNDERLYING THE PRIVACY RIGHT.

28 BUT THEN HER BURDEN IS NOT EVEN DONE. THE

1 NEXT THING IS, AS HILL POINTED OUT, AND AS SHULMAN --
2 WHERE, BY THE WAY, THERE WAS A CONSTITUTIONAL RIGHT OF
3 PRIVACY CLAIM ADVANCED AS WELL -- IS YOU HAVE TO GET TO
4 THIS WHOLE FIRST AMENDMENT ISSUE, WHICH GOES TO THE
5 NEWSWORTHINESS POINT. AND IF -- EVEN IF THERE IS AN
6 EGREGIOUS INVASION AND ALL THESE OTHER THINGS WERE MET,
7 IF THIS IS A MATTER OF LEGITIMATE PUBLIC CONCERN, THE
8 CONSTITUTIONAL RIGHT OF PRIVACY HAS TO GIVE WAY.

9 IT'S AS THE -- NOW, THE PARTICULAR FACTS OF
10 THE HILL CASE INVOLVING DRUG TESTING DIDN'T HAVE A FIRST
11 AMENDMENT COMPONENT. BUT WHAT THE COURT SAID AT THE
12 BEGINNING OF THE DISCUSSION OF DEFENSES TO STATE
13 CONSTITUTIONAL PRIVACY CAUSE OF ACTION WAS PRIVACY
14 CONCERNS ARE NOT ABSOLUTE. THEY MUST BE BALANCED
15 AGAINST OTHER IMPORTANT INTERESTS.

16 AND A COURT SHOULD NOT PLAY THE TRUMP CARD OF
17 UNCONSTITUTIONALITY TO PROTECT ABSOLUTELY EVERY
18 ASSERTION OF INDIVIDUAL PROPRIETY. THEN THE COURT SAID,
19 "INVASION OF A PRIVACY INTEREST IS NOT A VIOLATION OF
20 THE STATE CONSTITUTIONAL RIGHT TO PRIVACY IF THE
21 INVASION IS JUSTIFIED BY A COMPETING INTEREST."

22 THAT'S WHEN WE GET TO ALL THE FIRST AMENDMENT
23 LAW THAT WE'VE BEEN DISCUSSING FROM THE VERY BEGINNING.
24 AND THERE IS A FIRST AMENDMENT RIGHT THAT IS AT STAKE.
25 AND WE HAVE THE CASES, THE JOE MONTANA CASE, THE SURFING
26 DOCUMENTARY CASE, THE GIANFREDO BASEBALL CASE, AND THE
27 SHULMAN CASE, WHICH DISCUSSES THE CONSTITUTIONAL ISSUES.

28 AND SHULMAN IS INSTRUCTIVE. IN SHULMAN THE

1 COURT HELD THAT WITH RESPECT TO THE PRIVATE FACTS TORT,
2 AND THERE IS ALSO, AS I SAID, A CONSTITUTIONAL CLAIM IN
3 SHULMAN, THE COURT FOUND THAT THE NEWSWORTHINESS OF WHAT
4 WAS REVEALED TRUMPED THE PRIVACY INTERESTS. IT DIDN'T
5 GO TO THE INTRUSION TORT, BUT IT DID GO TO THE OTHER
6 CLAIMS.

7 LET ME LET MS. SEIGLE DISCUSS WITH YOU THE
8 PORTEN CASE, AND THEN I'LL JUST QUICKLY REVIEW MY NOTES
9 AND SEE IF I LEFT ANYTHING OUT ON THE FIRST THREE TORTS,
10 AND I'LL SEE THE FLOOR.

11 THE COURT: ALL RIGHT. MS. SEIGLE.

12 MS. SEIGLE: THANK YOU, YOUR HONOR.

13 YOUR HONOR, BEFORE GETTING TO PORTEN, I WANT
14 TO SPEND A FEW MINUTES TAKING ABOUT HILL AND JUST EXPAND
15 A BIT ON WHAT MR. KENDALL SAID ABOUT THE HILL CASE. THE
16 HILL CASE IS REALLY THE PRIMARY SOURCE OF THE
17 INTERPRETATION OF THE CALIFORNIA CONSTITUTIONAL RIGHT OF
18 PRIVACY IN WHICH THE CALIFORNIA SUPREME COURT TRIES TO
19 SET SOME STANDARD AND SOME GUIDELINES FOR UNDERSTANDING
20 WHAT KIND OF PRIVACY RIGHT WE HAVE HERE IN THE
21 CALIFORNIA CONSTITUTION.

22 WHAT THE COURT SAID IS THAT THE MERE USE OF
23 THE WORD "PRIVACY" IN THE BALLOT INITIATIVE DOESN'T
24 REALLY GET YOU THAT FAR, BECAUSE THE BALLOT INITIATIVE
25 DOESN'T DEFINE WHAT KIND OF INTERESTS ARE AT STAKE, WHAT
26 KIND OF INTERESTS MAY BE OPPOSING PRIVACY INTERESTS OR
27 HOW THE COURTS SHOULD ANALYZE CASES INVOLVING THAT
28 CALIFORNIA CONSTITUTIONAL RIGHT OF PRIVACY.

1 SO INSTEAD THE COURT SAYS, AS A GENERAL MATTER
2 WHEN WE'RE FACED WITH WORDS IN A BALLOT INITIATIVE THAT
3 HAD BEEN JUDICIALLY CONSTRUED IN THE PAST -- NOW I'M
4 LOOKING AT PAGE 23 OF HILL -- WHEN YOU ARE IN THAT
5 SITUATION, YOU CAN BE PRETTY WELL ASSURED THAT BY
6 PUTTING THOSE JUDICIALLY CONSTRUED WORDS IN THE BALLOT
7 INITIATIVE, THE DRAFTER OF THE INITIATIVE INTENDED THAT
8 THOSE CONSTRUCTIONS BE USED TO UNDERSTAND WHAT THIS WORD
9 MEANS.

10 SO THE HILL COURT THEN SAYS, WHERE IS THE WORD
11 "PRIVACY" DEFINED. AND AT THE TIME OF THE BALLOT
12 INITIATIVE, WE HAD A HUNDRED YEARS OF COMMON LAW, RIGHT
13 TO PRIVACY LAW, IN THE STATE OF CALIFORNIA, AND WE HAVE
14 THE FEDERAL CONSTITUTIONAL UNDERSTANDING OF THE FEDERAL
15 RIGHT TO PRIVACY. SO THE HILL COURT LOOKED AT BOTH OF
16 THOSE SOURCES TO UNDERSTAND WHAT "PRIVACY" MEANS IN THE
17 BALLOT INITIATIVE.

18 FIRST, WHEN IT LOOKED AT THE CALIFORNIA COMMON
19 LAW RIGHT TO PRIVACY, IT GOES THROUGH THE FOUR DIFFERENT
20 KINDS OF PRIVACY RIGHTS THAT MR. KENDALL DISCUSSED THAT
21 WERE FIRST DEVELOPED BY BRANDICE AND THEN PROSSER AND
22 THEN ADOPTED BY THE CALIFORNIA SUPREME COURT LATER. AND
23 IT SAYS THAT "THE LAW SURROUNDING THE CALIFORNIA COMMON
24 RIGHT OF PRIVACY PROVIDES VERY GOOD GUIDELINES FOR WHAT
25 KIND OF PRIVACY INTERESTS ARE AT STAKE WHEN YOU LOOK TO
26 THE CALIFORNIA CONSTITUTIONAL RIGHT OF PRIVACY CLAIM.

27 BUT IT DOES SAY, YOUR HONOR HAS NOTED, THAT
28 THE CONSTITUTIONAL RIGHT WAS NOT CIRCUMSCRIBED BY THE

1 COMMON LAW RIGHT. THERE ARE INSTANCES WHERE THE
2 CONSTITUTIONAL RIGHT GOES BEYOND THE COMMON LAW RIGHT,
3 AND THAT'S WHAT MR. KENDALL MEANT BY THIS GAP-FILLING
4 FUNCTION. AND THE KIND OF INSTANCES THAT THE HILL COURT
5 WAS REFERRING TO ARE NOTED IN FOOTNOTE SEVEN OF HILL.
6 AND THEY GIVE EXAMPLES SUCH AS A DISCLOSURE TO A SMALL
7 AUDIENCE.

8 UNDER THE CALIFORNIA COMMON LAW, DISCLOSURE
9 MUST BE TO A BROAD AUDIENCE. THERE MAY BE INSTANCES
10 WHERE DISCLOSURE IS JUST TO A FEW PEOPLE, AND THAT CAN
11 BE A VIOLATION OF THE CONSTITUTIONAL RIGHT TO PRIVACY SO
12 THAT WOULD BE AN INSTANCE OF GAP FILLING; OR IT MIGHT BE
13 AN ORAL DISCLOSURE, WHICH IS NOT A PROPER DISCLOSURE
14 UNDER CALIFORNIA COMMON LAW, BUT IT COULD BE UNDER THE
15 CONSTITUTIONAL LAW.

16 THAT BRINGS US TO THE PORTEN CASE. IN THE
17 PORTEN CASE, THE ALLEGED DISCLOSURE WAS OF A TRANSCRIPT
18 TO A COMMISSION, AND THE COURT SAID ON PAGE 828 THAT
19 THIS DISCLOSURE WAS NOT A COMMUNICATION TO THE PUBLIC IN
20 GENERAL OR TO A LARGE NUMBER OF PERSONS. SO THIS IS
21 EXACTLY THE KIND OF DISCLOSURE THAT WOULD NOT FALL
22 WITHIN THE COMMON LAW BUT COULD FALL UNDER THE
23 CONSTITUTIONAL RIGHT TO THE -- THE CALIFORNIA
24 CONSTITUTIONAL RIGHT TO PRIVACY.

25 SO AS MR. KENDALL SAID, AND AS THE HILL COURT
26 SAYS ON PAGE 27, THE COMMON LAW PROVIDES, QUOTE, AN
27 INVALUABLE GUIDE IN CONSTITUTIONAL PRIVACY LITIGATION
28 WHEN YOU ARE LOOKING AT WHAT THE INTERESTS ARE, WHAT THE

1 BALANCING OF THE COMPLETING INTERESTS ARE. AND THUS
2 WHEN WE HAVE A CASE WHERE THE ALLEGED WRONG FALLS
3 SQUARELY IN THE COMMON LAW ARENA, THE RIGHT DEFINED BY
4 COMMON LAW, IT'S AN INVALUABLE GUIDE FOR ANALYZING
5 WHETHER THERE WAS ANY CONSTITUTIONAL WRONG AS WELL.

6 AND JUST VERY, VERY BRIEFLY ON THE U.S.
7 CONSTITUTIONAL RIGHT, THE HILL COURT NOTES, AS
8 MR. KENDALL SAID, THAT U.S. CONSTITUTIONAL RIGHTS TO
9 PRIVACY DON'T GET US MUCH WHEN WE'RE LOOKING AT
10 CALIFORNIA CONSTITUTIONAL RIGHT BECAUSE FEDERAL RIGHT IS
11 LIMITED TO STATE ACTION AND IT'S ALSO LIMITED TO THE
12 VERY PRIVATE SPHERES OF MARRIAGE, CONTRACEPTION, SEXUAL
13 RELATIONSHIPS, AND DOESN'T REALLY GO BEYOND THAT. THANK
14 YOU.

15 THE COURT: ALL RIGHT. THANK YOU.

16 MR. KENDALL: YOUR HONOR, THE ONLY OTHER THING
17 I HAD -- BUT IT'S ONLY IF THE COURT WISHES TO DISCUSS
18 IT -- YOU HAD ASKED US TO TAKE A LOOK AT THE RESTATEMENT
19 DURING THE BREAK AND, OF COURSE, THE RESTATEMENT DOES
20 HAVE SOMETHING TO SAY ABOUT THE TORTS THAT I HAVE JUST
21 BEEN GOING ON.

22 THE COURT: AND THE CHIEF JUSTICE CITES IT IN
23 THE DISCUSSION IN HILL.

24 MR. KENDALL: RIGHT. SO IF YOU WANT, I CAN GO
25 OVER THE RESTATEMENT.

26 THE COURT: YOU DON'T NEED TO, UNLESS YOU
27 THINK IT'S HELPFUL.

28 MR. KENDALL: WELL, IT'S HELPFUL IN THIS -- TO

1 THIS EXTENT, WHICH IS THE RESTATEMENT ITSELF, AND I
2 THINK THAT'S WHY THE CHIEF JUSTICE CITES IT, FURTHER
3 ELABORATES NOT WITH THE AUTHORITY OF CALIFORNIA CASE LAW
4 OF THE LAST HUNDRED YEARS, BUT IS -- IT ENCAPSULATES
5 SOME OF THE LEARNING FROM ALL JURISDICTIONS AND REQUIRES
6 THE VERY SAME ELEMENTS THAT I'VE BEEN DESCRIBING ARE IN
7 THE COMMON LAW AND THAT EXCEPT FOR THE GAP FILLING. ARE
8 REQUIRED UNDER THE CALIFORNIA CONSTITUTIONAL RIGHT OF
9 PRIVACY. WITH THAT, YOUR HONOR, I'LL --

10 THE COURT: YOU ARE DONE DISCUSSING THE FIRST
11 THREE CAUSES OF ACTION?

12 MR. KENDALL: I AM; UNLESS I HAVE TO GET UP
13 AND RESPOND TO SOMETHING.

14 THE COURT: ALL RIGHT. LET ME ASK COUNSEL FOR
15 LAYER42 IF YOU WANT TO MAKE COMMENTS NOW. AFTERWARD
16 WE'LL TAKE A BREAK, AND THEN THE PLAINTIFF CAN RESPOND
17 TO THE FIRST SECTION.

18 MR. CASAS: YOUR HONOR, IF I COULD SIMPLY
19 RESERVE ABOUT 10 TO 15 MINUTES AT THE END OF THE
20 DISCUSSION ON ALL THE TORTS, I DON'T THINK I WILL NEED
21 MORE THAN THAT.

22 THE COURT: DO YOU HAVE DISCUSSION ON THESE
23 FIRST THREE?

24 MR. KENDALL: NO YOUR HONOR.

25 THE COURT: ALL RIGHT. FINE. WE'LL TAKE A
26 BREAK FOR TEN MINUTES. WE'LL RESUME AT TEN MINUTES
27 BEFORE THE HOUR.

28 THE COURT: COUNSEL, I HAD THOUGHT WE MIGHT

1 FINISH TODAY. WHAT WOULD COUNSEL LIKE TO DO?

2 MR. KENDALL: FINISH TODAY.

3 MS. SEIGLE: FINISH TODAY.

4 THE COURT: I UNDERSTAND. BUT WE'LL JUST SEE
5 HOW FAR WE GET.

6 MR. GATTI: YES. WE CAN DO THAT.

7 THE COURT: YOU CAN TELL ME, BUT WE DO NEED TO
8 STOP AT 4:30. MR. GATTI.

9 MR. GATTI: OKAY. THANK YOU, YOUR HONOR.

10 MR. KENDALL: YOUR HONOR, I ASSUMED THAT YOU
11 WANT TO TAKE UP THE SECTION 430 CDA ISSUE LATER --

12 THE COURT: 230, YES.

13 MR. KENDALL: 230.

14 THE COURT: I WOULD. WE COULD DO THAT AT THE
15 END OF THE DAY IF THAT WILL ACCOMMODATE COUNSEL FOR
16 LAYER42 NOT HAVING TO COME BACK. WHY DON'Y WE PLAN ON
17 RESERVING A HALF HOUR SO AT 4:00 O'CLOCK WE'LL STOP
18 WHEREVER WE ARE AND TALK ABOUT 47 USC 230.

19 WILL THAT BE ENOUGH TIME?

20 MR. KENDALL: I WOULD THINK SO FOR THAT.

21 THE COURT: IT'S KIND OF SLEEPER ISSUE; NOT
22 MEANT IN A PEJORATIVE SENSE, BUT IT'S ONE THAT I
23 CERTAINLY AT LEAST AM FAMILIAR WITH SO 4:00 O'CLOCK
24 WE'RE GOING TO STOP WHERE WE ARE AND MOVE ON TO THE
25 SECTION 230 ISSUE.

26 WITH THAT, MR. GATTI, GO AHEAD.

27 MR. GATTI: THANK YOU, YOUR HONOR. AND I WILL
28 PROCEED AS CLOSE AS I CAN TO THE SCRIPT WE HAVE SET OUT.

1 WE'LL BE GOING THROUGH THE FIRST THREE CAUSES OF ACTION,
2 INTRUSION, PUBLICATION OF PUBLIC FACT, AND
3 CONSTITUTIONAL RIGHT TO PRIVACY.

4 LOOKING AT THE INTRUSION CAUSE OF ACTION --
5 AND WHAT WE'RE NOW FOCUSED ON IS MRS. STREISAND'S RIGHT
6 TO PRIVACY, MRS. STREISAND'S RIGHT TO EXPRESS HERSELF IN
7 THE MOST PRIVATE OF PLACES, HER HOME. AND THAT IS A
8 PRIVACY RIGHT THAT IS AFFORDED EVERY INDIVIDUAL IN THIS
9 COUNTRY, WHETHER YOU ARE A CELEBRITY OR NOT A CELEBRITY.
10 AND AS I WILL GET TO, THE CALIFORNIA CONSTITUTION HAS
11 SPECIFICLY NAMED AN INALIENABLE RIGHT OF PRIVACY FOR
12 EACH INDIVIDUAL, EACH CITIZEN OF THE EFFORT STATE.
13 THERE IS NO CELEBRITY EXCEPTION TO THE CONSTITUTION.

14 THE COURT: BUT THE CASES CERTAINLY HAVE
15 DISTINGUISHED CELEBRITIES FROM PEOPLE WHO HAVE NEVER
16 BEFORE BEEN IN THE PUBLIC EYE.

17 MR. GATTI: ON CERTAIN CAUSES OF ACTION AND
18 CERTAIN CASES, AND I WILL ADDRESS THOSE. ON THE
19 INTRUSION CAUSE OF ACTION, SPECIFICLY, THERE IS NO
20 REQUIREMENT OF A NEWSWORTHINESS ASPECT TO IT. SO WITH
21 THAT SPECIFIC CAUSE OF ACTION, WE'RE NOT LOOKING AT A --
22 WHAT'S BEEN CALLED EARLIER TODAY AS A NEWSWORTHY CLAIM.

23 THE SHULMAN CASE, OBVIOUSLY EVERYONE HAS CITED
24 TO IT IN THEIR BRIEFS, AND OPPOSING COUNSEL HAS
25 REFERENCED IT, IS VERY INSTRUCTIVE ON THE INTRUSION
26 CAUSE OF ACTION. SPECIFICLY AT PAGE 232 OF SHULMAN, THE
27 COURT HOLDS THAT "TO PROVE ACTIONABLE INTRUSION, THE
28 PLAINTIFF MUST SHOW THE DEFENDANT PENETRATED SOME ZONE

1 OF PHYSICAL OR SENSORY PRIVACY SURROUNDING OBTAINED
2 UNWANTED ACCESS TO DATA ABOUT THE PLAINTIFF. THE TORT
3 IS PROVEN ONLY IF THE PLAINTIFF HAD AN OBJECTIVELY
4 REASONABLE EXPECTATION OF SECLUSION OR SOLITUDE IN THE
5 PLACE, CONVERSATION, OR DATA SOURCE."

6 THE PLACE WE'RE TALKING ABOUT HERE IS
7 MRS. STREISAND'S HOME AND THE PRIVACY OF THOSE GROUNDS,
8 AND THE ONLY EVIDENCE BEFORE THE COURT, YOUR HONOR, WITH
9 RESPECT TO THIS PIECE OF PROPERTY AND WHAT CAN BE SEEN
10 AND WHAT CANNOT BE SEEN, CAN BE FOUND AT
11 MRS. STREISAND'S DECLARATION. AND CONTAINED THEREIN IS
12 THE EVIDENCE WHERE MRS. STREISAND STATES THAT FROM
13 THE -- FROM THE BEACH BELOW YOU CANNOT SEE THE HOME AT
14 ALL.

15 THE COURT: WELL, I THINK YOU CAN RELY ON THE
16 PHOTOGRAPHS ALSO.

17 MR. GATTI: YES, YOU CAN, YOUR HONOR. AND
18 WHAT MRS. STREISAND STATES IN HER DECLARATION IS ALSO
19 ILLUSTRATED BY THE PHOTOGRAPHS. FROM THE PUBLIC BEACH
20 THERE IS NO VIEWING INTO THE HOME OR THE BACKYARD. THE
21 FOILAGE ALONG THE SIDES OF THE PROPERTY COMPLETELY KEEP
22 THE PROPERTY AWAY FROM ANY VIEWING OF ANY OF THE
23 PROPERTY, ANY OF THE BACKYARD AND ALSO ANY OF THE HOME
24 ITSELF. AND WE ARE TALKING ABOUT IN THIS PARTICULAR
25 CASE ONE'S HOME. AND --

26 THE COURT: RIGHT, BUT WHEN WAS THE AIRCRAFT
27 INVENTED, COUNSEL; WHEN WAS THE HELICOPTER INVENTED. WE
28 KNOW THESE THINGS FLY OVERHEAD. HIRE BALLOONS. IS

1 THERE NO SCOPE OR LIMITATION, RATHER, ON WHAT SOMEBODY
2 CAN EXPECT IN HIS OR HER BACKYARD?

3 MR. GATTI: THIS CASE, YOUR HONOR, ISN'T ABOUT
4 SOMEBODY FLYING OVER ONE'S HOME.

5 THE COURT: YOU'RE RIGHT. THEY'RE OFF THE
6 COAST. ISN'T THAT HARDER FOR YOU?

7 MR. GATTI: NO. WHAT THIS CASE IS ABOUT IS WE
8 HAVE TWO PRIVATE CITIZENS HERE. WE HAVE SOMEBODY,
9 MRS. STREISAND, WHO HAS -- IS ON A PIECE OF PROPERTY
10 THAT IS SECLUDED; SHE HAS DONE EVERYTHING IN HER POWER
11 TO KEEP IT SECLUDED. WE NOW HAVE A DEFENDANT WHO HAS
12 CHOSEN TO INTRUDE THAT AREA OF SECLUSION AND --

13 THE COURT: WELL, DO YOU DISPUTE THE EVIDENCE
14 THAT ALL HE WAS DOING WAS FLYING 2700 FEET OR HOWEVER
15 MANY FEET OFF THE COAST TAKING PICTURES OF THE COAST AND
16 THINGS THAT THAT WERE ADJACENT TO THE SHORELINE. HE
17 DIDN'T TAKE -- THERE IS NO EVIDENCE HE TOOK THIS PHOTO
18 BECAUSE HE KNEW IT WAS MRS. STREISAND'S HOUSE.

19 MR. GATTI: WELL, THE ISSUE WE HAVE HERE, YOUR
20 HONOR, WE'RE TALKING ABOUT A NARROW ASPECT HERE, IS THAT
21 THE DEFENDANT HAS TAKEN IT UPON HIMSELF TO INTRUDE UPON
22 THE PRIVACY, CAPTION THAT PICTURE, DISSEMINATE IT ON THE
23 WORLDWIDE WEB, ALLOW IT TO BE DOWNLOADED, ALLOW IT TO BE
24 ENHANCED SO THAT YOU CAN SEE A PHOTOGRAPH WITH MORE
25 INTRUSIVE NATURE TO IT THAN THE REFERRED TO THUMBNAIL
26 PICTURE, AND THAT -- HE HAS DONE THAT ALL WITHOUT
27 MRS. STREISAND'S CONSENT.

28 AND WHAT HE IS SAYING IS THAT HE HAS THE RIGHT

1 TO TRUMP MRS. STREISAND'S ABILITY TO CONSENT TO THAT
2 SORT OF IDENTIFYING LOCATION, DISSEMINATION, AND
3 INTRUSION INTO THE MOST PRIVATE OF PLACES, THE HOME.

4 THE COURT: WELL, IF HE HAD TAKEN A PICTURE
5 INTO HER KITCHEN OR INTO HER LIVING ROOM OR INTO ANY
6 OTHER ROOM WITHIN THE HOUSE, YOU'D HAVE A DIFFERENT
7 CASE. BUT WHAT WE HAVE HERE IS A PICTURE OF THE REAR
8 EXTERIOR AND A PATIO AND THE BALCONIES. ANYBODY FLYING
9 UP AND DOWN THE COAST CAN SEE THAT. WHEN WE HAD
10 PROPELLER COMMERCIAL AIRCRAFT IN USE -- AND I DON'T KNOW
11 IF YOU HAVE RECENTLY FLOWN A PROPELLER PLANE -- THEY FLY
12 A LOT LOWER THAN THE JETS DO. SO THERE ARE A LOT OF
13 PLANES THAT FLY BACK AND FORTH ALONG THE COAST.

14 MR. GATTI: AND OUR BEEF, YOUR HONOR, IS NOT
15 WITH THE PLANE FLYING ACROSS AND HAVING A GLIMPSE OF A
16 VIEW. WE'RE NOT SAYING THAT AT ALL. WHAT WE'RE SAYING
17 HERE IS THAT YOU CAPTION THE LOCATION, YOU USE
18 MRS. STREISAND'S NAME, YOU GO IN AND PROVIDE LOCATORS
19 FOR IT, YOU TAKE A PERMANENT PICTURE INTO THAT AREA,
20 PLACE IT ON THE WEB, DISTRIBUTE IT, SELL IT. THAT'S
21 WHAT WE'RE TALKING ABOUT. THAT IS NOT THE SAME.

22 AND WE DON'T HAVE AN ISSUE WITH A PLANE THAT
23 FLIES BY AND HAS A TWO-SECOND GLIMPSE OF THE AREA.
24 WE'RE NOT -- WE HAVEN'T ASKED THIS COURT FOR THAT SORT
25 OF RULING AND WE'RE NOT GOING DOWN THAT ROAD AT ALL.
26 IT'S A MUCH DIFFERENT SITUATION WITH THE FACTS IN THIS
27 PARTICULAR CASE.

28 THE COURT: WELL, LOOK AT PARAGRAPH 41 IN THE

1 SECOND CAUSE OF ACTION WHICH REFERS SPECIFICLY AT LINE
2 17 TO THE FACT OR ALLEGATION IN THE CASE OF THE
3 COMPLAINT, THAT ONE CAN INSPECT OR DETERMINE OR EVEN
4 REVEAL LONGITUDINAL AND LATITUDINAL COORDINATES. WHERE
5 IN THE SECOND CAUSE OF ACTION -- EXCUSE ME, YOU WERE
6 TALKING ABOUT THE FIRST. I NEED TO GO BACK THERE.

7 MR. GATTI: THE FIRST.

8 THE COURT: ALL RIGHT. GO AHEAD, COUNSEL.
9 WE'LL GET TO THAT IN A LITTLE BIT.

10 MR. GATTI: OKAY. THANK YOU, YOUR HONOR.
11 COUNSEL WAS REFERRING AT GREAT LENGTH TO THE -- LET ME
12 BACK UP BEFORE I GET INTO THAT AREA.

13 THE INTRUSION CAUSE OF ACTION, YOUR HONOR,
14 JUST FOCUSING ON THAT CAUSE OF ACTION FOR NOW, WE'RE
15 TALKING ABOUT MERELY AN INTRUSION INTO A PRIVATE PLACE
16 AND IN A MANNER THAT IS HIGHLY OFFENSIVE TO A REASONABLE
17 PERSON. WE'RE TALKING ABOUT THE REASONABLE PERSON
18 STANDARD HERE.

19 WHAT -- CITING TO MRS. ADELMAN'S OWN QUOTE,
20 WHICH IS IN THE EVIDENCE BEFORE YOUR HONOR, WHICH I
21 BELIEVE IS EXHIBIT 23 TO MY DECLARATION -- OR, EXCUSE
22 ME, TO THE DECLARATION OF MR. REX GLENSY, WHICH WAS
23 FILED ON JULY 9, 2003.

24 THE COURT: WILL YOU DESCRIBE IT FOR ME,
25 COUNSEL. I HAVEN'T YET FOUND IT.

26 MR. GATTI: SURE. IT IS A PRINTOUT FROM
27 THE -- EXCUSE ME, IT'S AN ARTICLE OF "CALIFORNIA COAST
28 NOW ONLINE," WHICH IS ONE OF FOUR PAGES, AND I WAS

1 SPECIFICLY REFERRING TO PAGE 2 OF THAT; WHICH, IT IS
2 EXHIBIT 20 -- 27, YOUR HONOR. I APOLOGIZE.

3 THE COURT: OKAY. GO AHEAD.

4 MR. GATTI: OKAY. AND ON THE ISSUE OF WHETHER
5 OR NOT WE'RE DEALING HERE WITH PRIVATE -- PRIVACY RIGHTS
6 AND PRIVATE PROPERTY, WE'VE OBVIOUSLY STATED OUR CASE
7 WITH THE CASES THAT WE'VE CITED, BUT MRS. ADELMAN ALSO
8 STATES HERE THAT, QUOTE, A LOT OF PROPERTY THAT WE'RE
9 PHOTOGRAPHING, YOU CAN'T GET TO BECAUSE IT'S PRIVATE
10 PROPERTY OR OTHERWISE INACCESSIBLE. WE'RE GIVING
11 CONTROL OF THIS INFORMATION TO EVERYBODY.

12 MR. KENDALL: YOUR HONOR, JUST AN OBJECTION IF
13 OFFERED FOR THE PURPOSE I THINK HE'S JUST OFFERED IT
14 FOR, THAT WOULD BE HEARSAY. BECAUSE THIS IS NOT A PARTY
15 TO THE CASE. THE WIFE OF A PARTY, AND HE'S NOW OFFERING
16 THIS STATEMENT FOR THE TRUTH OF WHAT IT ASSERTS, AND
17 IT'S HEARSAY --

18 THE COURT: FOR WHAT PURPOSE ARE YOU OFFERING
19 IT, MR. GATTI?

20 MR. GATTI: YOUR HONOR, WE'RE OFFERING IT FOR
21 THE POINT, AND OUR POSITION WOULD BE IT'S AN ADOPTIVE
22 ADMISSION BY THE DEFENDANT, MR. ADELMAN. HE'S NEVER
23 SAID ANYTHING OTHERWISE TO THIS. WE'RE OFFERING IT TO
24 THE FACT THAT THEY -- ON A COUPLE OF DIFFERENT GROUNDS.
25 ONE IS MR. ADELMAN KNOWS THAT WHAT HE IS DOING IS GOING
26 INTO AREAS OF PRIVACY AND PRIVATE PROPERTY. AND HE --
27 SPECIFICLY HIS -- THE INTENT HERE IS TO INVADE THAT
28 PRIVACY AND TO DISSEMINATE IT -- WITHOUT THE CONSENT OF

1 THE PERSON HE'S INVADING, DISSEMINATE IT TO EVERYBODY.

2 AND THAT IS -- THE CASES WE HAVE CITED TO
3 CLEARLY SUGGEST THAT AND POINT OUT THAT IT IS THE
4 CONSENT OF THE INDIVIDUAL THAT HAS THAT ABILITY TO
5 DECIDE WHAT IS DISSEMINATED AND WHAT IS NOT
6 DISSEMINATED.

7 MR. KENDALL: IN OTHER WORDS, HE'S OFFERING IT
8 FOR THE TRUTH, YOUR HONOR.

9 THE COURT: WELL, THE ADOPTIVE ADMISSION
10 RESPONSE IS CERTAINLY VERY ARTFULL. I'LL TAKE THAT
11 UNDER SUBMISSION. YOU WANT TO COMMENT ON THAT, THOUGH?

12 MR. KENDALL: I DON'T THINK THERE IS EVIDENCE
13 THAT MR. ADELMAN IS ADOPTING THAT STATEMENT AS HIS OWN.
14 HE HAS REPRINTED ON THE WEBSITE, AS WE DISCUSSED
15 YESTERDAY, STATEMENTS FROM PEOPLE WITH WHICH HE
16 OBVIOUSLY DISAGREES, STATEMENTS WITH WHICH HE AGREES,
17 AND THERE IS NO EVIDENCE IN THIS CASE ABOUT WHETHER
18 MR. ADELMAN BELIEVED, WITH RESPECT TO THIS PARTICULAR
19 PROPERTY OR OTHER PARTICULAR PROPERTY, ANY PARTICULAR
20 THING.

21 THERE IS A LOT OF NEWSPAPER ARTICLE MATERIAL
22 THAT WE WANTED TO OFFER YESTERDAY, YOUR HONOR, THAT WAS
23 EXCLUDED BECAUSE IT WAS BEING OFFERED FOR ITS TRUTH. IF
24 WE COULD GET WHAT WE WANTED IN, I WOULDN'T BE MAKING
25 THIS OBJECTION, BUT I'M JUST TRYING TO GET THE SAME
26 BENEFIT OF THE RULES THAT THEY GOT.

27 THE COURT: IF IT ENDS UP BEING RELEVANT, I'LL
28 HAVE TO RULE ON THE EVIDENCE OBJECTION.

1 MR. GATTI, GO AHEAD.

2 MR. GATTI: THANK YOU, YOUR HONOR. THERE HAS
3 BEEN MUCH MADE ABOUT THE FACT THAT -- WHETHER OR NOT
4 MRS. STREISAND'S CELEBRITY IN MR. KENDALL'S COMMENTS,
5 AND THE CASES THAT ARE EXTREMELY HELPFUL ON THIS CASE
6 DEAL WITH THE ISSUES OF CONTROL. CONSENT, CONTROL, AND
7 THEY STAND FOR THE PROPOSITION THAT TO THE EXTENT THAT
8 SOME INFORMATION MAY BE OUT THERE IN SOME FORM DOES NOT
9 RELINQUISH ONE'S ABILITY TO CONTROL THAT INFORMATION IN
10 OTHER AREAS, AND THE RESTATEMENT SECOND SPECIFICLY GOES
11 TO THAT EXACT POINT.

12 THE COURT: WHICH SECTION, PLEASE?

13 MR. GATTI: I BELIEVE IT'S SECTION 652 D.

14 THE COURT: WHAT ELEMENT OF YOUR CLIENT'S
15 PRIVATE LIFE HAS BEEN DISCLOSED HERE THAT WAS NOT
16 ALREADY PUBLIC?

17 MR. GATTI: WELL, THE ISSUE HERE IS THE
18 CAPTIONING AND THE LOCATION OF THE HOME --

19 THE COURT: WELL, THAT'S EXACTLY WHY I PHRASED
20 MY QUESTION THAT WAY, BECAUSE WE KNOW FROM TWO OR THREE
21 WEBSITES, I HAVEN'T COUNTED THEM YET, BUT THEY ARE IN
22 EVIDENCE, BUT THE LOCATION OF A HOME ATTRIBUTED TO HER
23 IS AVAILABLE ON THE WEB. AS MR. KENDALL SAID EARLIER
24 THIS AFTERNOON, YOU GO TO GOOGLE AND TYPE IT IN, AND ONE
25 CAN END UP WITH THESE WEBSITES FOR SURE.

26 MR. GATTI: WELL, WHAT ONE DOESN'T SHOW UP
27 WITH IS A CAPTIONING THAT DIRECTS YOU TO A PHOTOGRAPH
28 THAT DIRECTS YOU INTO THE HOME. THERE IS A SITUATION --

1 AND THE CASES THAT DEAL DIRECTLY WITH THAT POINT, YOUR
2 HONOR, ARE THE CASES THAT DEAL WITH THINGS SUCH AS
3 ADDRESSES, AND THE CASES I'M REFERRING TO DEAL WITH THE
4 PROPOSITION THAT EVEN IF SOMETHING IS KNOWN OR IN THE
5 PUBLIC RECORD IN SOME FORM, BECAUSE THE CASES SAY THAT
6 IN TODAY'S DAY AND AGE IT IS DIFFICULT TO KEEP SOMETHING
7 COMPLETELY OUT OF THE PUBLIC. AND THE CASES ACKNOWLEDGE
8 THAT.

9 WHAT THE CASES ARE TALKING ABOUT IS THE
10 SITUATION WHERE, EVEN IF A PUBLIC ADDRESS, A PUBLIC
11 NAME, A PUBLIC PHONE NUMBER CAN BE LISTED IN A TELEPHONE
12 DIRECTORY, IT CAN STILL MAINTAIN PRIVACY, AND IT DOESN'T
13 MEAN THAT JUST BECAUSE IT'S BEEN DISCLOSED IN ONE
14 PARTICULAR SITUATION IT IS NOW OPEN TO VIEW BY
15 EVERYBODY.

16 AND THE CASES THAT WE HAVE GO DIRECTLY TO THAT
17 POINT IS THE CITY OF SAN JOSE CASE VERSUS SUPERIOR COURT
18 OF SANTA CLARA, WHICH IS 74 CAL AP. 4 1008. IT'S A 1999
19 CASE.

20 MR. KENDALL: WHAT WAS THAT CITE AGAIN?

21 MR. GATTI: 74 CAL AP. 4 1008. THE HOLDING
22 OF CITY OF SAN JOSE -- AND CITY OF SAN JOSE WAS EVEN A
23 STRONGER SITUATION WHERE WE WERE TALKING ABOUT THE
24 PUBLIC DISCLOSURE ACT, PUBLIC RECORDS DISCLOSURE ACT.
25 AND IN THAT PARTICULAR CASE A PARTY WAS ATTEMPTING TO
26 HAVE THE NAMES AND ADDRESSES OF INDIVIDUALS AND THE
27 LOCATIONS OF INDIVIDUALS WHO HAD MADE COMPLAINTS
28 REGARDING AIRPORT, AIRPORT NOISE.

1 THEY HAD THE HELP OF A STATUTE TO SIT THERE
2 AND SAY THAT THIS DEALS WITH INFORMATION TO ALLOW US TO
3 MONITOR THE GOVERNMENTAL ACTIVITIES AND TO SEE IF THE
4 GOVERNMENT IS ACTING PROPERLY WITH RESPECT TO THESE
5 CITIZENS.

6 THE COURT: IS THERE AN EXCEPTION UNDER THE
7 GOVERNMENT -- UNDER THE PUBLIC RECORDS ACT FOR
8 COMPLAINTS TO PUBLIC AGENCIES?

9 MR. GATTI: NO, YOUR HONOR. WHAT THAT CASE
10 HOLDS IS THAT, SPECIFICLY --

11 THE COURT: THEY ARE EXEMPT FROM DISCLOSURE
12 UNDER 6254 -- I'M LOOKING AT THE WEST HEADNOTE RIGHT
13 NOW. I HAVEN'T GOTTEN TO THE BODY OF THE CASE YET.
14 WHAT THE INTERNAL CITATION INDICATE THE PAGE AT WHICH
15 THIS IS DISCUSSED?

16 MR. GATTI: SPECIFICLY, THERE IS 1018, AT
17 1018, YOUR HONOR. AND 10 -- I THINK IT GOES ON TO 1019.

18 SO WHAT THE COURT WAS SAYING IS THAT, IN
19 KEEPING TELEPHONE NUMBERS AND ADDRESSES PRIVATE AND OUT
20 OF THE PUBLIC, EVEN THOUGH THAT INFORMATION WAS PUBLIC
21 IN OTHER AREAS, IT SAID THAT THE PUBLIC INTEREST IN
22 PRIVACY OUTWEIGHS PUBLIC INTEREST IN DISCLOSURE. AND IT
23 WAS TO KEEP PRIVATE INFORMATION THAT WOULD PREVENT
24 THINGS SUCH AS HARRASSMENT, THREATS MADE TO THE
25 INDIVIDUALS, IF THAT INFORMATION WAS PRESENTED.

26 IN THIS CASE WE HAVE EXACTLY THE SAME
27 SITUATION. WE HAVE -- THE EVIDENCE BEFORE YOUR HONOR IS
28 THROUGH MRS. STREISAND'S DECLARATION, THROUGH THE

1 DECLARATION OF MR. SODERBERG, CHIEF SODERBERG, THAT
2 MRS. STREISAND HAS SEVERE SAFETY ISSUES DUE TO STALKERS,
3 HARASSERS, THREATS TO HER SAFETY, THREATS TO THE SAFETY
4 OF HER INDIVIDUALS AT HER HOME.

5 AND PREVIOUSLY, WHEN WE FIRST STARTED THE
6 INQUIRY, I BELIEVE THAT THE EVIDENCE -- THE ONLY
7 EVIDENCE IN FRONT OF YOUR HONOR OUTLINES THOSE THREATS
8 UNDISPUTEDLY, AND IT IS SET FORTH CLEARLY. WE HAVE, AS
9 I SAID AT THE BEGINNING, HAVE ADDITIONAL INFORMATION
10 THAT IS AN ADDITIONAL BACKGROUND --

11 THE COURT: LET'S NOT REFER TO SOMETHING
12 THAT'S NOT IN THE RECORD. I THINK WE ALL KNOW THAT THE
13 PUBLIC FIGURES SOMETIMES ATTRACT PEOPLE THEY WOULD
14 RATHER NOT AND SOMETIMES THERE ARE SECURITY ISSUES, AND
15 MRS. STREISAND HAS GIVEN A DECLARATION. NO ONE IS
16 CHALLENGING THAT PEOPLE ARE AT LEAST CURIOUS, IF NOT A
17 LOT MORE.

18 SO I'M LOOKING AT THE CITY OF SAN JOSE CASE,
19 AND AT PAGE 1018 THERE IS A REFERENCE TO THE BLACK
20 PANTHERS PARTY CASE. AND I'M JUST TAKING IT, PERHAPS,
21 OUT OF CONTEXT. I LOOK FORWARD TO BEING CORRECTED,
22 "THIS IS BECAUSE ONCE A PUBLIC RECORD IS DISCLOSED TO
23 THE REQUESTING PARTY, IT MUST BE MADE AVAILABLE FOR
24 INSPECTION BY THE PUBLIC IN GENERAL.

25 NOW, DON'T WE HAVE A JUST ENTIRELY DIFFERENT
26 SITUATION HERE. NO ONE WANTS THIS INFORMATION TO
27 CHALLENGE WHAT MRS. STREISAND MIGHT HAVE SAID ABOUT THE
28 CITY OF SAN JOSE AIRPORT, BUT CLEARLY THOSE AREN'T THE

1 FACTS HERE. INQUIRING MINDS WANT TO DRIVE BY AND LOOK
2 AT THE BIG GATE IN THE FRONT YARD, I GUESS. PEOPLE
3 SHOULD HAVE BETTER THINGS TO DO WITH THEIR TIME, BUT
4 SOME DON'T.

5 MR. GATTI: WHAT'S AT ISSUE HERE IS NOT THE
6 DRIVE-BY OF THE BIG GATE IN FRONT. WE'RE TALKING ABOUT
7 THE INTRUSION INTO AREAS THAT CANNOT BE SEEN BY THE
8 FRONT GATE DRIVE-BY.

9 THE COURT: WHAT DO WE DO ABOUT 652 (D), THEN,
10 SUBPART A, "WOULD BE HIGHLY OFFENSIVE TO A REASONABLE
11 PERSON"? HOW DOES THIS COURT JUDGE WHETHER THIS
12 PHOTOGRAPH OR WHAT'S ON THE WEBSITE IS HIGHLY OFFENSIVE
13 TO A REASONABLE PERSON? JUSTICE LUCAS HAS SOMETHING TO
14 SAY ABOUT THAT, DOESN'T HE?

15 MR. GATTI: WHAT WE DO IS WE LOOK AT THE NORM
16 IN THE COMMUNITY. WE LOOK TO SEE -- WE LOOK IN THE
17 OBJECTIVE -- THE REASONABLE OBJECTIVE CONTEXT OF THIS,
18 AND YOU LOOK -- WHAT THE OBJECTIVE REASONABLE CONTEXT WE
19 HAVE HERE, YOUR HONOR, IS WE HAVE SOMEBODY WHO HAS TAKEN
20 GREAT PAINS TO KEEP HER HOME AND AREA SURROUNDING HER
21 PRIVATE. SHE IS ALSO SOMEBODY WHO IS SUBJECT TO GREAT
22 SAFETY ISSUES AND CONCERNS AND THREATS.

23 SO WE LOOK AT THE OBJECTIVE STANDARD AND SAY
24 IS -- IN THAT SITUATION WHEN YOU FIND THAT OBJECTIVE
25 STANDARD, WOULD SOMEBODY FIND IT HIGHLY OFFENSIVE TO
26 FIND WHAT THEY HAVE DONE TO TRY TO KEEP THEIR PEACE
27 PLASTERED WORLDWIDE FOR ANYBODY IN ANY COUNTRY IN THE
28 WORLD TO TAKE A LOOK AT AND FOCUS ON AND DESTROY

1 EVERYTHING THAT HAS BEEN DONE UP TO THAT POINT TO TRY TO
2 MAINTAIN THE PRIVACY.

3 THE COURT: WELL, WE KNOW THAT PEOPLE MAGAZINE
4 IS AVAILABLE. IT WAS PUBLISHED AND SOLD, AND I
5 CERTAINLY HAVEN'T CHECKED TO SEE HOW MANY LIBRARIES
6 CARRY IT, BUT IT'S PROBABLY SOMEWHERE. THAT GERMAN
7 MAGAZINE -- IS IT BUNT, WHICH IS IN EVIDENCE, THAT
8 CLEARLY IS NOT A UNITED STATES PUBLICATION. SO THAT
9 CERTAINLY HAS SOME EUROPEAN CIRCULATION.

10 WE KNOW FROM THE STAR MAP WEBSITE, WHICHEVER
11 EXHIBIT IT MAY BE, THAT HER ADDRESS AND FORMER ADDRESS
12 AND A COMMENT ABOUT GETTING BURNED OUT IN THE MALIBU
13 FIRE ARE ALL THERE. WE KNOW THAT SOME GEOGRAPHIC
14 COORDINATES ARE AVAILABLE ON THE -- WHATEVER THE NAME OF
15 THAT WEBSITE IS. I'M GOING TO SAY GEOQUEST, I KNOW
16 THAT'S WRONG, BUT IT'S IN THE RECORD. IS THE PROBLEM
17 HERE THEY ARE ALL TOGETHER IN ONE SPOT?

18 MR. GATTI: THE PROBLEM IS IS --

19 THE COURT: ON ONE SITE?

20 MR. GATTI: SOME OF -- IT'S ON ONE SITE. IT'S
21 ALL LOCATED THERE, BUT ALSO, SOME OF THE INFORMATION
22 YOU'VE JUST REFERRED TO DOESN'T EVEN INVOLVE THIS
23 PARTICULAR HOME, THIS PARTICULAR RESIDENCE, SO ---

24 THE COURT: WELL, THE INFORMATION THAT SHE HAS
25 MORE THAN ONE ADDRESS CLEARLY EXTENDS BEYOND WHAT MAY BE
26 THIS RESIDENCE ADDRESS, SO TO THAT EXTENT I AGREE, BUT I
27 DON'T FOLLOW YOU OTHERWISE.

28 MR. GATTI: WELL, TO THE EXTENT YOU WERE

1 REFERRING TO BEING BURNED OUT.

2 THE COURT: OH, RIGHT. THAT'S ON -- CAME OFF
3 THAT SAME WEBSITE. IT HAS THREE ADDRESSES LISTED, THIS
4 APPARENT ADDRESS BEING ONE OF THE THREE.

5 MR. GATTI: AND --

6 THE COURT: BUT I'M TRYING TO UNDERSTAND. CAN
7 YOU POINT ME TO THE EXHIBIT, COUNSEL, THAT SHOWS ON THIS
8 SITE WHERE ALL THIS INFORMATION IS RIGHT TOGETHER?
9 WHICH EXHIBIT IS THAT?

10 MR. GATTI: THE EXHIBIT -- LET ME SEE.

11 IT'S AT EXHIBIT 9 OF MY DECLARATION, YOUR
12 HONOR.

13 THE COURT: THANK YOU.

14 MR. GATTI: AND ALSO IN EXHIBIT 10, YOUR
15 HONOR, TOO.

16 THE COURT: ALL RIGHT. I'M LOOKING AT --
17 WELL, IT'S A SINGLE PAGE IN EXHIBIT 9 AND A SINGLE PAGE
18 IN EXHIBIT 10. WELL, ISN'T THE EVIDENCE IN THE RECORD
19 WITH RESPECT TO THE LONGITUDE AND LATITUDE AT EXHIBIT 10
20 THAT THIS IS THE LOCATION FROM WHICH THE PHOTOGRAPH WAS
21 TAKEN AND THAT IS THE PATH OF THE AIRPLANE?

22 IT'S PRETTY CLOSE. WE KNOW WHAT LAND WHERE
23 THIS WAS, AND THAT'S THE SAME INFORMATION ON EXHIBIT 9.
24 SO I DON'T SEE HER ADDRESS. LET ME CHANGE THE QUESTION.
25 IN EITHER 9 OR 10, I DON'T SEE THE PURPORTED ADDRESS OF
26 THE RESIDENCE IN EITHER OF THESE TWO EXHIBITS.

27 MR. GATTI: I'M SORRY. WHAT WE HAVE, YOUR
28 HONOR, IS THE FUNCTIONAL EQUIVALENT, OR EVEN BETTER THAN

1 WHAT IS AN ADDRESS.

2 THE COURT: YOU FLATTER ME AGAIN. IF I HAD
3 THE GEOGRAPHIC COORDINATES -- I COULDN'T EVEN TELL IF I
4 HAD A COMPASS.

5 MR. GATTI: WHAT WE DO HAVE, IS WE HAVE A MAP
6 WHICH IS LIKE A THOMAS GUIDE MAP, WE HAVE A PICTURE OF
7 THE LOCATION IN THE AREA. THE -- POINTS YOU DIRECTLY TO
8 THE AREA. IT IDENTIFIES IT, OBVIOUSLY, AS "STREISAND
9 ESTATE MALIBU." AND IT HAS THE POINT DUME IDENTIFIER.
10 IT HAS THE IDENTIFIER EXACTLY WHERE THE PICTURE IS BEING
11 TAKEN FROM. IT'S LIKE GIVING --

12 THE COURT: THAT LITTLE RED X OFF THE COAST
13 THERE AND THE BLUE, WHICH CLEARLY IS THE OCEAN?

14 MR. GATTI: THAT'S CORRECT, YOUR HONOR. SO
15 WHAT YOU HAVE HERE IS BETTER THAN AN ADDRESS, AND WHAT
16 YOU HAVE HERE IS FOR THE FIRST TIME SOMETHING ALONG THIS
17 LINE BEING PRESENTED. THIS HAS NEVER BEEN PUT INTO THE
18 PUBLIC BEFORE. AND THAT'S THE ISSUE. AND THAT IS WHERE
19 THIS DIFFERS FROM THE OTHER AREAS. AND WITH RESPECT TO
20 THE INTRUSION CLAIM, YOUR HONOR, AS WE STARTED OFF
21 CITING TO SHULMAN, WE'RE TALKING HERE ABOUT A -- WE'RE
22 NOT INVOLVED IN A -- EXCUSE ME. LET ME BACK UP FOR ONE
23 MOMENT.

24 THE OTHER CASES THAT WE HAVE CITED TO THAT
25 ALLOW SOMEBODY TO CHOOSE WHEN THIS INFORMATION GETS PUT
26 OUT INTO THE PUBLIC AND WHETHER OR NOT THERE IS A
27 PRIVACY ISSUE WITH RESPECT TO OR PROTECTED PRIVACY IN
28 THE SITUATION SUCH AS ADDRESSES AND PHONE NUMBERS THAT

1 ARE OUT THERE, THAT INFORMATION, IN MOST SITUATIONS, IS
2 OUT THERE IN SOME FORM OR FASHION FOR ALL OF US.

3 THE CASES THAT ARE INSTRUCTIVE ON THAT
4 SITUATION HAS TO DO WITH THE -- TO DO WITH THE -- WHAT I
5 WOULD LIKE TO GET IS DEPARTMENT OF DEFENSE VERSUS FLRA,
6 WHICH IS A SUPREME COURT CASE, 510 U.S. 487.

7 THE COURT: THIS IS THE UNION THAT WANTED THE
8 ADDRESS OF SOME DOD EMPLOYEES FOR AN ORGANIZING DRIVE?

9 MR. GATTI: YES. AND EVEN IN THAT SITUATION
10 THAT HAD HAD WHAT SOMEONE WOULD DEEM TO BE OVERALL
11 IMPORTANT INTEREST IN GETTING THAT INFORMATION OUT IN
12 THIS PARTICULAR SITUATION OF LABOR RELATIONS --

13 THE COURT: BUT THERE IS NO INFORMATION, NO
14 EVIDENCE IN THAT CASE, THAT ANY OF THOSE PEOPLE WERE IN
15 THE PUBLIC EYE. THERE IS NO INFORMATION IN THAT CASE,
16 APPARENTLY NO DISCUSSION THAT I COULD FIND, THAT ANY OF
17 THEM WERE CELEBRITIES.

18 MR. GATTI: WELL, WHAT SPEAKS --

19 THE COURT: HOW IS IT RELEVANT?

20 MR. GATTI: WHAT SPEAKS DIRECTLY TO THAT POINT
21 IS THE RESTATEMENT OF TORTS, WHICH IS 652 (D), WHICH
22 BASICALLY SAYS -- WELL, SAYS THAT -- THIS IS PART OF --
23 IN THE CASES WE'VE CITED, THE FACT THAT A PERSON IS A
24 PUBLIC FIGURE DOES NOT THEREBY RENDER EVERY ASPECT OF
25 HIS OR HER LIFE TO PUBLIC SCRUTINY.

26 THE COURT: IT REQUIRES SOME JUDGMENT, SOME
27 DETERMINATION, THAT WHAT'S DISCLOSED WOULD BE HIGHLY
28 OFFENSIVE TO A REASONABLE PERSON. IS THAT A FAIR

1 STATEMENT?

2 MR. GATTI: NOT HIGHLY OFFENSIVE, YOUR HONOR.

3 THE COURT: WELL, THAT'S WHAT 652 (D) SUB (A)
4 SAYS.

5 MR. GATTI: WITH RESPECT TO IN CALIFORNIA AND
6 THE CASES IN CALIFORNIA --

7 THE COURT: WHICH CASES ARE THOSE? YOU HAVE
8 CITED THE CITY OF SAN JOSE. WHAT OTHER CALIFORNIA CASE?

9 MR. GATTI: SHULMAN, YOUR HONOR. AND I
10 BELIEVE THE CITE --

11 THE COURT: WELL, SHULMAN I HAVE RIGHT HERE.
12 IT'S 18 CAL 4 200. WHAT PAGE OF SHULMAN IS THAT
13 STANDARD ARTICULATED?

14 MR. GATTI: I BELIEVE IT IS PAGE 214, YOUR
15 HONOR. AND WHAT -- ON PAGE 214 IT SAYS THAT -- THE
16 ELEMENTS OF A PUBLIC DISCLOSURE TORT, IT SAYS SPECIFICLY
17 THAT "THE PUBLIC DISCLOSURE OF A PRIVATE FACT WHICH
18 WOULD BE OFFENSIVE AND OBJECTIONABLE TO THE REASONABLE
19 PERSON," SO THERE IS NOT A -- COURTS IN CALIFORNIA HAVE
20 NOT PUT INTO THAT A HIGHLY OFFENSIVE CRITERIA.

21 THE COURT: WELL, ALL RIGHT. THAT'S -- FIRST
22 OF ALL, THAT'S AS TO THE PUBLICATION OF PRIVATE FACTS
23 TORT. HAVE YOU MOVED ON FROM THE INTRUSION AREA?

24 MR. GATTI: WELL, I THINK -- I HAVE, YOUR
25 HONOR. WE CAN GO INTO THIS AREA AS WELL. AND --

26 THE COURT: BUT THERE IS A DEFENSE. I
27 THINK -- I'M LOOKING AT THIS PARTICULAR EXCERPT THAT
28 YOU'VE INDICATED, OF LACK OF NEWSWORTHINESS OR AN

1 ARGUMENT WITH RESPECT TO NEWSWORTHINESS. HOW DOES THAT
2 PLAY IN THIS CONTEXT?

3 MR. GATTI: IN THE CONTEXT OF THE --

4 THE COURT: PRIVATE FACTS.

5 MR. GATTI: PRIVATE FACT?

6 THERE IS A BALANCING THAT GOES ON IN THIS
7 PARTICULAR SITUATION, AND YOU HAVE A BALANCING OF THE
8 RIGHT TO ONE'S INTEREST IN KEEPING INFORMATION PRIVATE.
9 AND THEN YOU HAVE THE -- AGAINST THAT, A SITUATION WHERE
10 THERE MAY BE A DESIRE TO HAVE SOMETHING PUBLISHED. AND
11 IN THE DEPARTMENT OF DEFENSE CASE, IN THE PLANNED
12 PARENTHOOD CASE WE'VE ALSO CITED TO, 82 CAL AP. 4 347 --

13 THE COURT: WELL, AGAIN IN PLANNED PARENTHOOD
14 NONE OF THE -- THIS WAS A DISCOVERY MOTION WITH RESPECT
15 TO PEOPLE WHO HAD SOUGHT COUNSELING AT PLANNED
16 PARENTHOOD?

17 MR. GATTI: IT WAS A DISCOVERY -- IT WAS A
18 DISCOVERY MOTION THAT DEALT WITH THE SITUATION OF
19 WHETHER OR NOT INFORMATION REGARDING PUBLIC INFORMATION
20 ABOUT ONE'S LOCATION, ADDRESS, PHONE NUMBER, IDENTITY,
21 SHOULD BE DISCLOSED.

22 THE COURT: WELL, HOW DOES THIS CASE COMPARE
23 TO THAT?

24 MR. GATTI: IN THIS CASE THERE IS -- IN THAT
25 CASE THERE IS AN EVEN GREATER NEED OR DESIRE FOR THE
26 INFORMATION IN THE SENSE THAT WE'RE TALKING ABOUT
27 DISCOVERY OF --

28 THE COURT: WE'RE TALKING ABOUT INDIVIDUAL

1 REPRODUCTIVE RIGHTS IN THAT CASE AND THEIR PRIVATE
2 MEDICAL DECISIONS. HERE WE'RE TALKING ABOUT AN AIRCRAFT
3 2700 FEET OFF THE COAST TAKING A PICTURE THAT HAPPENS TO
4 INCLUDE SOMEBODY'S BACKYARD. WHY IS THAT CASE
5 PRECEDENT?

6 MR. GATTI: THAT CASE IS A PRECEDENT BECAUSE
7 WHAT IT STANDS FOR IS THE FACT THAT THE -- THE PRINCIPLE
8 THAT DOESN'T DISTINGUISH BETWEEN A -- IT STATES
9 SPECIFICLY THAT THE NEED FOR THE INFORMATION, THE DESIRE
10 FOR THE INFORMATION, THE FACT THAT YOU MAY HAVE A
11 LEGITIMATE INTEREST IN GETTING THAT INFORMATION, IS NOT
12 OUTWEIGHED BY THE PRIVACY INTERESTS OF THE IDENTIFIED
13 PERSON.

14 THE COURT: SO AT LEAST IT SETS OUT A
15 BALANCING TEST, AND THAT'S WHY YOU ARE REFERRING TO IT,
16 COUNSEL? I'M GOING TO BACK UP A COUPLE STEPS. YOU
17 INDICATED THAT, AND CORRECTLY SO, AT PAGE 214 OF SHULMAN
18 THE TEST IN CALIFORNIA WAS SLIGHTLY DIFFERENT THAN THE
19 TEST IN 652 (D). BECAUSE 652 (D) SUB (A) SAYS "HIGH
20 OFFENSIVE."

21 AND I FINALLY FOUND THE LANGUAGE WHICH YOU
22 WERE CITING ME TO, AND I THINK, AS YOU CORRECTLY READ
23 IT, IN CALIFORNIA AS ARTICULATED AT THIS PAGE IT SAYS,
24 IN PART, "WHICH WOULD BE OFFENSIVE AND OBJECTIONABLE TO
25 THE REASONABLE PERSON," SO RESTATEMENT HAS "OFFENSIVE"
26 AND THE CALIFORNIA STANDARD HAS BOTH "OFFENSIVE" AND
27 "OBJECTIONABLE" AS THE TEST.

28 MR. GATTI: AND, AS I STATED EARLIER, THE

1 OBJECTIONABLE TEST IS WITHIN -- IS IN THE REASONABLE
2 CONTEXT. AND --

3 THE COURT: IN THAT THEY ARE THE SAME, BOTH
4 THE RESTATEMENT AND THE CALIFORNIA TEST?

5 WELL, WHICH WAY DOES THE CALIFORNIA TEST PLAY
6 THEN? IF RESTATEMENT SAYS "HIGHLY OFFENSIVE," THE
7 CALIFORNIA TEST IS, OBJECTIVELY, IF YOU WILL, "OFFENSIVE
8 AND OBJECTIONABLE"? ISN'T THAT A LOOSER TEST?

9 MR. GATTI: THE CALIFORNIA TEST --

10 THE COURT: THE RESTATEMENT TEST?

11 MR. GATTI: THE CALIFORNIA TEST IS A LOOSER
12 TEST, IF I UNDERSTAND YOUR USE OF THE TERM "LOOSER."

13 THE COURT: I UNDERSTAND YOUR QUESTION.

14 MR. GATTI: BUT WITH RESPECT TO THAT, WHAT
15 YOU -- ALL YOU NEED TO DO UNDER THE CALIFORNIA AUTHORITY
16 IS TO LOOK AT WHETHER OR NOT YOU HAVE INTRUDED INTO A
17 SECLUDE AREA OR SOMEWHERE WHERE SOMEONE WOULD EXPECT TO
18 BE SECLUDED. THAT, ON THE CASES WE'VE CITED, THE STRONG
19 PRINCIPLE, IT'S ESTABLISHED THAT THE MOST PRIVATE OF
20 PLACES IS THE HOME.

21 THE SHULMAN CASE GOES FURTHER AND SAYS THAT
22 IT'S A REASONABLE EXPECTATION OF PRIVACY IF YOU'RE IN A
23 QUASI PUBLIC AREA. IF YOU HAPPEN TO BE ON THE SIDE OF
24 THE ROAD, THERE CAN BE A SITUATIONS WHERE THAT WOULD BE
25 A REASONABLE EXPECTATION OF PRIVACY.

26 THE SANDERS CASE SAYS, EVEN FURTHER, AND SAYS
27 IN THE OFFICE AREA, EVEN IF PEOPLE FROM THE PUBLIC ARE
28 ABLE TO COME IN TO THAT AREA, IN PARTICULAR SITUATIONS,

1 IN SANDERS WHERE WE'RE TALKING ABOUT A -- THE COURT
2 FOUND THAT ONE WOULD HAVE A REASONABLE EXPECTATION OF
3 PRIVACY IN AN OFFICE.

4 THE COURT: THAT WAS UNDERCOVER VIDEO AND
5 AUDIO SO THAT WAS IN ONE SENCE SURREPTITIOUS AND IN
6 ANOTHER UNDERCOVER.

7 MR. GATTI: WELL, IT DEALS IN THIS
8 PARTICULAR --

9 THE COURT: AND THAT WAS -- WHAT WAS
10 OBJECTIONABLE THERE WAS A VIDEOTAPING AND THE AUDIO
11 TAPING OF SOMEONE'S PERSON AND SPEECH. HOW DOES THAT
12 COMPARE TO A PHOTOGRAPH?

13 MR. GATTI: WHAT WE HAVE HERE, ONE OF THE
14 ISSUES WHERE IT TURNS IS ON ONE'S ABILITY TO CONTROL
15 CONSENT. AND THAT IS --

16 THE COURT: WELL, WOULD YOU AGREE THAT IT
17 DEPENDS ON WHERE THE PERSON IS OR WHAT IS BEING SHOT,
18 RATHER THAN, SINCE WE HAVE NO PEOPLE IN THIS PICTURE,
19 AND THAT ONE MUST LOOK AT THE SUBJECT MATTER OF THE
20 PHOTOGRAPH IN MAKING THE DETERMINATION OF WHETHER IT IS
21 OFFENSIVE AND OBJECTIONABLE?

22 MR. GATTI: ONE WOULD LOOK AT THE -- IN THE
23 REASONABLE CONTEXT, WHETHER THE REASONABLE OBJECTIVE
24 PERSON WOULD FIND IT OBJECTIONABLE TO HAVE A PICTURE
25 SUCH AS THIS WITH THE LABELING, WITH THE CAPTIONING,
26 WITH THE LOCATION, IDENTIFIED AND PUT ON THE WEB.

27 THE EVIDENCE, BASED ON LOOKING AT THE WEBSITE
28 THAT WE'VE PUT IN FRONT OF THE COURT AND HAS BEEN

1 ADMITTED, THERE ARE MANY PEOPLE. STANDARD -- PEOPLE IN
2 THE COMMUNITY WHO HAVE STATED THAT THIS IS -- THEY GO
3 FURTHER AND SAY IT'S HIGHLY OBJECTIONABLE, BUT CLEARLY
4 THEY OBJECT TO THE TYPE --

5 THE COURT: I'M SORRY. YOU ARE SAYING WE HAVE
6 EVIDENCE IN THE RECORD THAT THIS PHOTOGRAPH IS HIGHLY
7 OBJECTIONABLE?

8 MR. GATTI: WE HAVE -- WE HAVE EVIDENCE IN THE
9 RECORD THAT STATES THAT OTHERS HAVE IDENTIFIED THE
10 ACTIVITY OF THE TAKING OF THESE PICTURES, PICTURES THAT
11 ARE CONTAINED ON THIS WEBSITE AS BEING OBJECTIONABLE,
12 AND --

13 THE COURT: SEE, I DON'T KNOW WHERE THAT IS.

14 MR. KENDALL: YOUR HONOR, I THINK THAT THEY
15 ARE -- REMEMBER THE RANTS SECTION OF WEBSITE.

16 MR. ADELMAN --

17 THE COURT: I THINK THAT'S BEEN EXCLUDED.

18 MR. KENDALL: IT'S UNDER SUBMISSION.

19 THE COURT: IT'S UNDER SUBMISSION. OKAY.

20 MR. KENDALL: IT'S NOT IN EVIDENCE, AND IF
21 OFFERED FOR THE TRUTH OF WHAT THOSE PEOPLE BELIEVE, IT
22 WOULD BE HEARSAY --

23 THE COURT: THAT WASN'T YOUR THEORY AND OFFER,
24 WAS IT?

25 MR. GATTI: RIGHT. THAT WASN'T.

26 THE COURT: I UNDERSTAND IT. OKAY. GO AHEAD.

27 MR. GATTI: THANK YOU, YOUR HONOR. THE VIRGIL
28 CASE THAT WE'VE ALSO CITED TO YOUR HONOR, THE

1 PUBLICATION OF PRIVATE FACT SITUATION, AND WE'VE TALKED
2 ABOUT IT EARLIER, BUT THAT INVOLVED AN INDIVIDUAL WHO
3 HAD INFORMATION GATHERED ABOUT HIS LIFE. HE CONSENTED
4 TO IT. THERE WAS NOTHING OBJECTIONABLE IN THE GATHERING
5 OF THE INFORMATION. HE PROVIDED IT VOLUNTARILY.

6 HE THEN DECIDES TO CHANGE HIS MIND AS TO
7 WHETHER OR NOT INFORMATION SHOULD BE PUBLISHED. AND IN
8 THAT PARTICULAR CASE, EVEN INCLUDING THE SITUATION WHERE
9 THERE MAY BE NEWSWORTHINESS TO THAT INFORMATION, THE
10 COURT SPECIFICLY HELD THAT THE PUBLIC'S RIGHT TO KNOW
11 UNDER THE FIRST AMENDMENT IS SUBJECT TO REASONABLE
12 LIMITATION SO FAR AS IT CONCERNS PRIVATE FACTS OF ITS
13 INDIVIDUAL MEMBERS.

14 THE FACT THAT ONE ENGAGES IN AN ACTIVITY, AND
15 THIS IS -- I BELIEVE THIS IS AT VIRGIL AT 527 F 2ND
16 1122, I BELIEVE THIS IS QUOTING FROM 1128. "THE FACT
17 THAT ONE ENGAGES IN AN ACTIVITY IN WHICH THE PUBLIC HAS
18 A GENERAL INTEREST DOES NOT MEAN OR DOES NOT RENDER
19 EVERY ASPECT OF A LIFE OF SOMEONE SUBJECT TO A PUBLIC
20 DISCLOSURE."

21 AND WHAT IT IS VERY INSTRUCTIVE OF IS THE
22 PRINCIPLE THAT THERE IS NO RIGHT TO PRY INTO THE
23 UNNEWSWORTHY PRIVATE AFFAIRS OF INDIVIDUALS. AND THAT
24 IS AT 1128 OF VIRGIL. AND --

25 THE COURT: WHO DECIDES WHAT IS NEWSWORTHY?

26 MR. GATTI: AGAIN, IT'S A BALANCING, YOUR
27 HONOR. AND IT TAKES INTO ACCOUNT THE CONCERNS OF THE
28 PRIVACY OF THE SPHERES OF PRIVACY, AND IN THIS

1 PARTICULAR CASE THERE IS NOTHING NEWSWORTHY ABOUT
2 IDENTIFYING ONE'S HOME THROUGH A CAPTION, LOCATING IT,
3 AND THEN DISSEMINATING AND SELLING THAT PICTURE, WHICH
4 WE'LL GET TO AS WE GO DOWN THE ROAD.

5 BUT WITH RESPECT TO THAT, THERE IS NO
6 NEWSWORTHINESS IN THIS ASPECT, AND THERE IS A BALANCING
7 WHEN YOU ARE TALKING ABOUT THE BASIC PRIVACY THAT'S AT
8 STAKE HERE, WHICH IS LOOKING INTO AND INTRUDING INTO
9 ONE'S PRIVATE HOME, THAT IS WHERE THE BALANCING COMES
10 INTO EFFECT.

11 AND YOU SAY THAT, LOOKING AT THE COMMUNITY
12 NORMS, DOES THE COMMUNITY HAVE AN EXPECTATION, A
13 REASONABLE EXPECTATION THAT SOMEONE IN THEIR HOME WILL
14 BE PROTECTED. THAT IS A SPHERE OF SELF EXPRESSION THAT
15 CANNOT BE -- HAS NO GREATER PROTECTION THAN ANY OTHER
16 LOCATION. THE COURTS HAVE SAID THAT EVEN IN AN OFFICE
17 YOU CAN HAVE A REASONABLE EXPECTATION, EVEN AT THE SIDE
18 OF THE ROAD --

19 THE COURT: LET ME ASK YOU THIS, COUNSEL.
20 WITH RESPECT TO THE OFFICE, IF IT HAD BEEN A PICTURE OF
21 THE OFFICE, WHAT WOULD THE ANALYSIS BE, AS OPPOSED TO A
22 PHOTOGRAPH OF SOMEBODY IN AN OFFICE AND AN AUDIO TAPE OF
23 WHAT THAT PERSON SAID?

24 MR. GATTI: YOU WOULD HAVE THE SAME ANALYSIS,
25 YOUR HONOR. I DON'T THINK --

26 THE COURT: WOULD THE RESULT BE THE SAME?
27 WOULD THE COURT HAVE PROTECTED THAT PHOTOGRAPH?

28 MR. GATTI: THE COURT WOULD HAVE -- IN A

1 SITUATION OF -- IF YOU ARE TALKING ABOUT A DISCLOSURE OF
2 THE SAME PUBLICATION, THEN I BELIEVE THAT YOU WOULD HAVE
3 THE SAME POTENTIAL PROTECTION.

4 THE COURT: WHAT IF IT'S A BUILDING LOBBY?

5 MR. GATTI: THEN WE OBVIOUSLY HAVE DIFFERENT
6 BALANCINGS THAT GO INTO, AND IT GOES TO THE REASONABLE
7 EXPECTATION OF PRIVACY IN THE PARTICULAR AREA.

8 THE COURT: SO IF THIS HAD BEEN A PHOTOGRAPH
9 OF THE UPSTAIRS -- I'M ASSUMING THERE IS A BEDROOM
10 UPSTAIRS, THE UPSTAIRS BEDROOM, THERE WOULD BE AN
11 ANALYSIS GONE THROUGH? WOULD THAT BE A DIFFERENT
12 ANALYSIS OR PRODUCE A DIFFERENT RESULT THAN WHEN IT'S A
13 PHOTOGRAPH AS WE HAVE IN EXHIBIT 1 OR A, WHATEVER IMAGE
14 3850 IS?

15 MR. GATTI: WHAT WE HAVE HERE IS A PICTURE AND
16 THE CAPTIONING OF A SECLUDED AREA AND AN AREA THAT A
17 REASONABLE -- IT WOULD BE REASONABLE OBJECTIVELY IN THIS
18 COMMUNITY TO EXPECT THAT IN THAT SECLUDED AREA IT WOULD
19 REMAIN SECLUDED, AND YOU WOULD HAVE THE RIGHT TO BE FREE
20 OF DISCLOSURE.

21 AND THAT IS THE ANALYSIS THAT WOULD APPLY TO
22 THAT PARAGRAPH. THE DIFFERENCE WE HAVE HERE, YOUR
23 HONOR, IS THAT -- YOU REFERENCE THE OFFICE LOBBY
24 SITUATION. WE HAVE A SITUATION WHERE, AND AS I SAID,
25 IT'S A DEGREE OF EXPECTATION OF PRIVACY, ASSUMING IN
26 YOUR EXAMPLE PEOPLE CAN COME AND GO FREELY IN THAT
27 OFFICE LOBBY; THAT IS A VERY DIFFERENT SITUATION THAN A
28 SECLUDED BACKYARD, A SECLUDED HOME, A SECLUDED GROUNDS

1 THAT IS THE PRIVATE GROUNDS OF SOMEBODY. AND THAT IS
2 THE -- OBVIOUSLY, THE MAJOR DIFFERENCE HERE.

3 THE COURT: SO IF SOMEONE HAD SOMEHOW MANAGED
4 TO SCALE THAT CLIFF OR GO THROUGH THE SHRUBBERY OR OVER
5 OR UNDER THE FENCE, WHATEVER, INTO THE BACKYARD, THAT
6 WOULD BE ONE ANALYSIS. BUT SOMEONE FLYING UP AND DOWN
7 THE COAST, THAT WOULD BE A DIFFERENT ANALYSIS.

8 MR. GATTI: WELL --

9 THE COURT: BUT THEN YOU GET BACK TO WHAT YOU
10 SAID JUST A MOMENT AGO, WHICH IS, I TAKE IT IS THE
11 COMBINATION OF THE PUBLICATION OF THE PHOTOGRAPH WITH
12 THE CAPTION AND THE MAP. IS THAT RIGHT?

13 MR. GATTI: CORRECT. THAT IS CORRECT. AND
14 ALSO JUMPING BACK TO INTRUSION BRIEFLY, YOU COULD HAVE A
15 SITUATION WHERE YOU HAVE AN INTRUSION, I THINK WE TALKED
16 ABOUT IT EARLIER TODAY, BUT YOU COULD HAVE AN INTRUSION
17 IN THAT PARTICULAR SITUATION. AND MANY INTRUSIONS DO
18 HAPPEN THAT WAY WHERE SURREPTITIOUSLY SOMEONE DOES
19 INTRUDE AND NO ONE MAY EVER KNOW OF IT, AND IT MANIFESTS
20 ITSELF IN SOME POINT LATER ON. BUT THAT COULD BE --
21 THAT IS AN ACTUAL INTRUSION. IT DOESN'T NEED TO BE
22 NECESSARILY DOCUMENTED IN SOME FASHION.

23 THE COURT: WOULD YOU AGREE THAT FOR THE TORT
24 OF INTRUSION IN PRIVATE AFFAIRS THERE MUST BE AN
25 INTENTION TO INTRUDE?

26 MR. GATTI: WHAT -- THE ONLY ELEMENTS OF
27 PUBLIC DISCLOSURE OF PRIVATE FACT --

28 THE COURT: I KNOW THAT. I'M GOING BACK TO

1 INTRUSION OF PRIVATE AFFAIRS. I WANT TO GET A CLEAR
2 UNDERSTANDING OF THE PLAINTIFF'S CONTENTION OF THE
3 ELEMENTS.

4 MR. GATTI: WELL, WHAT YOU WOULD HAVE IS AN --
5 YOU HAVE AN INTRUSION INTO A PRIVATE PLACE. IF YOU --
6 IN THIS PARTICULAR SITUATION WE HAVE CLEARLY THE INTENT
7 OF TAKING THE PHOTOGRAPH OF THE AREA. AND WE HAVE THE
8 INTENT OF PUTTING THE CAPTION ON THERE. AND YOU HAVE
9 THE INTENT OF PROVIDING THE LOCATION. SO THE ISSUE IS
10 THAT THAT ASPECT OF IT WOULD BE SATISFIED IN THIS
11 PARTICULAR CASE.

12 THERE COULD BE A SITUATION THAT COULD BE
13 THOUGHT OF THAT WOULD BE INTRUSION WOULD NOT HAVE TO BE
14 NECESSARILY INTENTIONAL IN THE TERM OF INTENDING TO
15 INTRUDE. IF THE ACT OF THE CONDUCT ENDED UP BEING AN
16 INTRUSION, THAT COULD -- SO IF YOUR HONOR IS ASKING ME
17 DOES ONE NEED TO SUBJECTIVELY GO INTO THE MIND AND SAY
18 THE PERSON WAS ATTEMPTING TO INTRUDE, I DON'T THINK THAT
19 IS THE STANDARD. IT LOOKS TO THE MEANS AS TO WHAT
20 HAPPENED AND LOOKS AS TO WHETHER OR NOT THERE IS AN
21 INTRUSION. IF THAT, I HOPE, ANSWERS --

22 THE COURT: IT DOES. THANK YOU FOR CLARIFYING
23 IT.

24 MR. GATTI: THANK YOU.

25 THE -- AN OVERALL REACHING STATEMENT WHICH
26 GOES -- IT'S FOUND IN SANDERS, AND IT GOES TO THE
27 INTRUSION CLAIM AS WELL, JUST JUMPING BACK TO INTRUSION.
28 BUT IT GOES TO WHAT THE COURT HAS BEEN ADDRESSING AND

1 BOTH SIDES HAVE BEEN TALKING ABOUT THIS AFTERNOON, WHICH
2 AT SANDERS AND AT 20 CAL 4 AT 916, CITING TO MCCARTHY
3 THE RIGHTS OF PUBLICITY AND PRIVACY, THERE IS A VERY
4 STANDARD STATEMENT THERE, WHICH I THINK GOES TO ALL OF
5 THE CAUSES OF ACTION, AND IT'S JUST AN OVERRIDING POLICY
6 ISSUE HERE.

7 AND IT SPECIFICLY STATES THAT JUST BECAUSE
8 SOMEONE CAN BE SEEN BY SOMEONE, DOES NOT AUTOMATICALLY
9 MEAN THAT HE OR SHE CAN LEGALLY BE FORCED TO BE SUBJECT
10 TO BEING SEEN BY EVERYONE. AND THAT SUMS UP VERY
11 SUCCINCTLY THE PROBLEM HERE. AND THAT GOES TO OUR
12 DISCUSSION IN VIRGIL. THAT GOES TO A SUGGESTION IN SOME
13 OF THE OTHER CASES WE HAVE REFERENCED, IS THAT YOU MAY
14 HAVE SITUATIONS WHERE THIS MAY BE VIEWED, WHETHER IT'S
15 AS YOUR HONOR'S EXAMPLE EARLIER OF THE FLY-BY OF AN
16 AIRCRAFT. THAT DOES NOT MEAN AND THAT DOESN'T MEAN THAT
17 JUST BECAUSE A PLANE FLIES BY THAT NOW YOU CAN BE SEEN
18 BY SOMEONE, NOW YOU HAVE GIVEN UP YOUR RIGHT TO BE SEEN
19 BY EVERYONE, AND THAT IS THE KIND OF FUNDAMENTAL ASPECT
20 OF WHAT WE'RE TALKING ABOUT HERE.

21 I BELIEVE WHAT THE DEFENDANTS WOULD REQUIRE
22 MRS. STREISAND TO DO IS BUILD SOME SORT OF DOME OVER HER
23 HOME AND THAT WOULD BE THE ONLY WAY THAT SHE COULD
24 MAINTAIN HER PRIVACY IN HER PRIVATE HOME, AND THE CASES
25 DON'T GO THERE. THAT IS THE EXTREME POSITION THAT THE
26 DEFENDANTS ARE TAKING IN THIS CASE. THAT'S CLEARLY NOT
27 THE ISSUE HERE. THAT'S NOT THE NORM IN THE COMMUNITY.
28 THAT'S NOT WHAT IS EXPECTED, AND THAT'S NOT WHAT A

1 REASONABLY OBJECTIVE STANDARD WOULD REQUIRE IN THIS
2 PARTICULAR CASE.

3 A FOLLOW-UP TO THAT PARTICULAR POINT IS THE
4 HUSKY VERSUS NBC CASE, WHICH IS AT 632 F SUPP., 1282.
5 IT'S AN ILLINOIS CASE, 1986, THAT WE'VE CITED TO THE
6 COURT IN OUR PAPERS. AND, AGAIN, IT FOLLOWS UP ON THAT
7 POINT. THAT HAD TO DO WITH A -- AN INDIVIDUAL WHO WAS
8 IN PRISON WHO WAS IN AN EXERCISE CAGE WHO HAD VARIOUS
9 TATTOO MARKINGS AND AN NBC CREW CAME IN AND PHOTOGRAPHED
10 THEM.

11 NOW, CLEARLY WE HAVE ISSUES OF NEWSWORTHINESS
12 THAT ARE SURROUNDING THAT. WE HAVE ISSUES OF POTENTIAL
13 INTERESTS. AND IN THAT HOLDING THE COURT HELD -- ON THE
14 ISSUE OF INTRUSION, THE COURT SPECIFICLY STATED THAT,
15 "BUT THE MERE FACT A PERSON CAN BE SEEN BY OTHERS DOES
16 NOT MEAN THAT PERSON CANNOT LEGALLY BE SECLUDED.
17 FURTHER, HUSKY'S VISIBILITY TO SOME PEOPLE DOES NOT
18 STRIP HIM OF THE RIGHT TO REMAIN SECLUDED FROM OTHERS.
19 PERSONS ARE EXPOSED TO FAMILY MEMBERS AND INVITED GUESTS
20 THIS THEIR OWN HOMES, BUT THAT DOES NOT MEAN THEY HAVE
21 OPENED THE DOORS TO TELEVISION CAMERAS."

22 THAT'S AT HUSKY AT 1287 AND 1288. AND WHAT
23 THESE CASES TALK ABOUT, WHAT THE PRINCIPLE HERE, THE
24 OVERRIDING PRINCIPLE ON THE PRIVACY ISSUE IS, IN YOUR
25 OWN HOME, DOES SOMEBODY HAVE THE RIGHT TO KEEP PRIVATE
26 INFORMATION PERTAINING TO THE HOME; HERE, CAPTIONING IT
27 AND SAYING HERE IS WHERE THIS PARTICULAR PERSON LIVES;
28 THIS IS EXACTLY HOW YOU GET TO THIS PARTICULAR PLACE;

1 HERE IS A PICTURE OF IT INTO THE SECLUDE AREAS; HERE IT
2 IS ON THE WEBSITE ALL OVER THE WORLD; AND HERE YOU CAN
3 DOWNLOAD IT, PURCHASE IT, AND AS -- I'LL GET TO -- I
4 DON'T WANT TO JUMP AHEAD.

5 BUT TO THE MISAPPROPRIATION CLAIM IN THE
6 EVIDENCE BEFORE THE COURT, MR. ADELMAN SAYS THAT HIS
7 PICTURES ARE AVAILABLE FOR COMMERCIAL LICENSING. SO
8 WHAT HE'S ALSO SAYING THERE IS THAT FOR A FEE I WILL
9 COMMERCIALLY -- I WILL PROVIDE POTENTIALLY A COMMERCIAL
10 LICENSE FOR MY PHOTOGRAPHS.

11 AND SO DO WE NOW THINK MR. ADELMAN IS GOING TO
12 SAY THAT HE NOW HAS A RIGHT TO PUT THIS PICTURE,
13 DISTRIBUTE IT ON COFFEE MUGS, T-SHIRTS? THAT'S WHERE HE
14 SEEMS TO BE GOING WITH THIS. AND THAT IS -- THAT IS
15 CLEARLY NOT AN ACCEPTABLE NORM IN THE REASONABLE
16 COMMUNITY BASED ON REASONABLE STANDARDS.

17 THE COURT: SHOULD THE COURT CONSIDER HOW
18 REASONABLE THAT POSSIBILITY IS; THAT HE MIGHT DERIVE
19 SOME PROFITS FROM THE SALE OF COFFEE MUGS OR T-SHIRTS
20 WITH THIS PHOTOGRAPH OR A BLOW-UP OF IT?

21 MR. GATTI: WELL, I THINK IT GOES TO THE
22 OFFENSIVE NATURE OF THE CONDUCT AND WHAT IS THE INTENT
23 AND/OR MOTIVE HERE, BECAUSE --

24 THE COURT: WHAT'S OFFENSIVE ABOUT A
25 PHOTOGRAPH OF THE CALIFORNIA COAST ON A COFFEE MUG?

26 MR. GATTI: THE CALIFORNIA COAST ON A COFFEE
27 MUG, THE PRIVATE RESIDENCE OF SOMEBODY -- INTO THE
28 PRIVATE SECLUDED AREAS OF ONE'S SECLUDED PROPERTY.

1 THERE IS A WAY --

2 THE COURT: WELL, LET'S ASSUME IT'S THE
3 SWIMMING POOL AND THE DECK AND THE REAR PHASADE OF THE
4 HOUSE.

5 MR. KENDALL: IN THIS PARTICULAR CASE IT WOULD
6 BE --

7 THE COURT: AND IT SAYS WHATEVER THE TAG SAYS
8 ON THE WEBSITE, WHICH IS WHAT, "STREISAND ESTATE"?

9 MR. GATTI: "STREISAND ESTATE MALIBU."

10 THE COURT: OKAY. WOULD THAT BE A PUBLICATION
11 OF PRIVATE FACTS?

12 MR. GATTI: THAT -- WELL, IF WE'RE TALKING IN
13 THE CONTEXT OF THE SALE ISSUE, TAKING ASIDE THE
14 MISAPPROPRIATION ASPECT OF IT, BUT WITH RESPECT TO THE
15 CONDUCT ITSELF, YES. IN FACT, IT COULD BE A DISCLOSURE
16 OF --

17 THE COURT: SO REMEMBER TO COME BACK TO THIS
18 WHEN WE TALK ABOUT 3344.

19 MR. GATTI: OKAY.

20 THE COURT: OKAY. WE ARE GOING TO BREAK AT
21 4:00 O'CLOCK. I REALLY DON'T WANT TO FORCE YOU TO PRESS
22 AHEAD AND CONCLUDE ON THIS SECTION, BUT IF YOU CAN
23 FINISH BY 4:00, ALL THE BETTER. BUT YOU TELL ME.

24 MR. GATTI: TO BE HONEST WITH YOU, I DON'T
25 THINK --

26 THE COURT: WELL, YOU HAVE GOT ANOTHER TEN
27 MINUTES ON THIS POINT, THEN WE'RE GOING TO TALK TO
28 LAYER42'S COUNSEL, OR HE CAN TALK TO ALL OF US,

1 ACTUALLY.

2 MR. GATTI: OKAY.

3 THE COURT: SO IF YOU REACH A LOGICAL STOPPING
4 POINT AT TWO MINUTES TO 4:00, THAT'S OKAY TOO.

5 MR. GATTI: OKAY. THE -- WITH RESPECT TO THE
6 PUBLIC DISCLOSURE OF PRIVATE FACT ELEMENT WHICH WE'VE
7 BEEN DISCUSSING, THE FIRST ELEMENT OBVIOUSLY IS THE
8 PUBLIC DISCLOSURE WHICH WE HAVE IN THIS SITUATION. THE
9 PRIVATE FACT HAS TO DO WITH THE CAPTIONING OF THE NAME,
10 THE LOCATION OF THE HOME, THE GIVING ALL OF THE LOCATORS
11 TO PROVIDE WHERE THIS HOME IS.

12 AND, AGAIN, WE HAVE CITED TO THE CASES THAT
13 FIND THAT AND HOLD THAT THE PRIVACY FACT, EVEN IN AN
14 ADDRESS, EVEN IN AN IDENTITY OF A PERSON, EVEN IN A
15 TELEPHONE NUMBER, EVEN IF THAT FACT IS OUT THERE IN THE
16 PUBLIC ELSEWHERE, CAN REMAIN PRIVATE AND IS NOT TO BE
17 DISSEMINATED IN ALL PURPOSES ONCE IT IS OUT THERE IN ONE
18 PARTICULAR FORUM.

19 WE'VE GONE OVER THE OFFENSIVE AND OBJECTIVE,
20 OBJECTIONABLE ASPECT OF THAT INFORMATION, AND AS WE'VE
21 TALKED EARLIER, THE NEWSWORTHINESS ASPECT OF THIS; THERE
22 IS NO -- AND THE DEFENDANTS HAVEN'T PROVIDED ANY
23 EVIDENCE THAT'S BEEN ADMITTED TO THE COURT AS TO THE
24 NEWSWORTHINESS OF KNOWING THE LOCATION OF
25 MRS. STREISAND'S HOME, CAPTIONING THE PICTURE SO IT
26 IDENTIFIES AS MRS. STREISAND'S HOME, GIVING ALL OF THE
27 FUNCTIONAL EQUIVALENTS OF THE ADDRESS SO THAT YOU CAN
28 PROVIDE A MAP, YOU CAN PROVIDE A PICTURE VIEW OF WHERE

1 IT IS, YOU CAN PROVIDE THE LONGITUDE AND LATITUDE OF
2 WHERE THE PICTURE IS BEING TAKEN FROM, AND YOU CAPTION
3 IT WITH MS. STREISAND'S NAME.

4 THE FUNCTION OF THE NEWSWORTHINESS, THE WAY
5 IT'S BEEN EXPLAINED BY THE DEFENDANTS, IS THAT SOMEHOW
6 THIS HOME IS IN THE COASTAL ZONE AND THAT SOMEHOW
7 PROVIDES NEWSWORTHINESS PER SE. WE OBVIOUSLY OBJECT TO
8 THAT. WE'VE STATED THAT EARLIER, BUT PUTTING THE
9 CAPTION OF MRS. STREISAND'S NAME, PROVIDING THE LOCATION
10 OF WHERE SHE LIVES --

11 THE COURT: JUST A SECOND. I THINK THE
12 DEFENSE WOULD ALSO CONTEND THAT SHE HAS HER OWN WEBSITE
13 IN WHICH SHE OPINES ON MATTERS OF PUBLIC INTEREST,
14 INCLUDING ENVIRONMENTAL MATTERS. DO YOU WANT TO ADDRESS
15 THAT?

16 MR. GATTI: CERTAINLY. THAT GOES TO THE CASES
17 THAT WE HAVE TALKED ABOUT EARLIER, IS THAT BECAUSE
18 SOMETHING OR SOMEONE MAY BE COMMENTING OR MAY BE IN THE
19 PUBLIC ON ONE PARTICULAR ISSUE, DOES NOT MEAN THAT THEY
20 HAVE GIVEN UP PRIVACY. THERE IS NO CONNECTION TO THE
21 LOCATION OF ONE'S HOME, THE IDENTIFYING A PARTICULAR
22 PROPERTY AS THAT PERSON'S, GIVING THAT INFORMATION AND
23 GIVING THE LOCATION IN CONNECTION WITH, JUST FOR THE
24 PURPOSE OF LOCATING, HAS NO NEWSWORTHINESS IN AND OF
25 ITSELF.

26 IF THE NEWSWORTHINESS IS TO EXAMINE THE
27 CALIFORNIA COASTLINE, WHICH IS WHAT I BELIEVE THE
28 DEFENDANTS ARE TRYING TO SAY, THE --

1 THE COURT: I THINK THEY SAY IT. WE HAVE THAT
2 IN THE EVIDENCE.

3 MR. GATTI: RIGHT.

4 THE COURT: GO AHEAD.

5 MR. GATTI: AND THAT PROCESS IS NOT SERVED IN
6 ANY PARTICULAR FORM BY PUTTING THE LOCATIONS OF
7 MRS. STREISAND'S -- USING THE NAME, THE CAPTIONING,
8 PROVIDING THE LOCATION, THAT DOES NOT FURTHER THAT
9 ARGUMENT IN ANY WAY, SHAPE, OR FORM.

10 AND WHERE THAT -- WHERE THAT TIES IN, IF I CAN
11 JUMP TO THE CONSTITUTIONAL RIGHT TO PRIVACY, THE PORTEN
12 CASE THAT THE COURT WAS REFERRING TO EARLIER, PORTEN
13 VERSUS UNIVERSITY OF SAN FRANCISCO 64 CAL AP 3D 825 AT
14 829, STATES, AND WE CITED IN OUR PAPERS, THAT "PRIVACY
15 IS PROTECTED NOT MERELY AGAINST STATE ACTION BUT IS
16 CONSIDERED AN INALIENABLE RIGHT WHICH MAY NOT BE
17 VIOLATED BY ANYONE."

18 AND THE FOOTNOTE THAT WAS REFERRED TO EARLIER
19 BY OPPOSING COUNSEL IN HILL TALKS SPECIFICLY ABOUT THE
20 FACT THAT THESE -- THAT GIVES A SPEC PROTECTION, AN
21 ADDITIONAL PROTECTION, A PROTECTION THAT IS -- WHAT THE
22 CONSTITUTION DOES IN CALIFORNIA IS SOLIDIFY THAT PRIVACY
23 RIGHT AND MAKE IT A SELF-EXECUTING PROPOSITION, THAT
24 STATUTE. THE --

25 THE COURT: WELL, IN THE SENSE THAT IT GIVES A
26 PRIVATE RIGHT OF ACTION WITHOUT AN AUTHORIZING STATUTE.

27 MR. GATTI: CORRECT. WHAT HILL STATES, WHICH
28 IS A VERY IMPORTANT PROPOSITION AT PAGE 38, IT INSTRUCTS

1 THAT, QUOTE, IF DEFENDANT'S LEGITIMATE OBJECTIVES CAN BE
2 READILY ACCOMPLISHED BY ALTERNATIVE MEANS, HAVING LITTLE
3 OR NO IMPACT ON PRIVACY INTERESTS, THE PROSPECT OF
4 ACTIONABLE INVASION OF PRIVACY IS ENHANCED. THAT'S --

5 THE COURT: HOW -- ASSUME FOR THE MOMENT THAT
6 ONE OF DEFENSE INTERESTS IS TO DISCLOSE TO THE GENERAL
7 PUBLIC THAT THE PLAINTIFF LIVES IN A HOUSE IN THE
8 COASTAL ZONE AND THE HOUSE IS OF A CERTAIN CONDITION, OR
9 ALLOW THE PUBLIC TO SEE THAT HERE IS SOMEONE WHO SPEAKS
10 ON ENVIRONMENTAL ISSUES WHO HAS A HOUSE IN THE COASTAL
11 ZONE WHICH IS IN THE CONDITION DESCRIBED IN THE
12 PHOTOGRAPH. HOW DOES THAT AFFECT YOUR ANALYSIS?

13 MR. GATTI: WELL, THE DEFENDANT HAS STATED
14 THROUGHOUT THAT THEY DIDN'T EVEN KNOW IT WAS
15 MRS. STREISAND'S HOME.

16 THE COURT: RIGHT. BUT YOUR CONTENTION NOW IS
17 THAT ONCE THEY KNEW THEY LABELED IT OR PERMITTED THE
18 LABEL TO REMAIN AND THAT THEY ARE ALLOWING PICTURES TO
19 BE PURCHASED FROM THE WEBSITE. SO DOESN'T THAT REQUIRE
20 SOME FACTORING INTO THE ANALYSIS OF THE CONSTITUTIONAL
21 AS WELL AS THE OTHER PRIVACY RIGHTS?

22 MR. GATTI: WHAT THAT WOULD -- WHAT WE WOULD
23 HAVE -- THE ANALYSIS WOULD BE DOES SOMEBODY HAVE THE
24 CONSTITUTIONAL RIGHT TO IDENTIFY SOMEONE'S NAME, TO
25 CAPTION A HOME, CAPTION SOMEONE'S PRIVATE HOME, AND
26 IN -- BALANCED AGAINST THE PRIVACY INTERESTS HERE AND
27 BALANCED AGAINST AND FACTORING INTO THE SITUATION WHERE
28 YOU HAVE SOMEBODY WHO IS SUBJECT TO SEVERE AND VERY

1 SIGNIFICANT THREATS OF HARM, DOES SOMEBODY HAVE THE
2 RIGHT, DOES AN INDIVIDUAL HAVE THE RIGHT TO --
3 CONSTITUTIONALLY PROTECTED TO FLY A HELICOPTER, SNAP A
4 PICTURE OF A PRIVATE HOME, PUT IT ON THE WEBSITE, AND
5 STARTS IDENTIFYING IT AS A PARTICULAR PERSON'S --
6 PROVIDE THE LOCATION OF THAT, AND THEN TURN AROUND AND
7 SELL IT. IS THAT ALL SOME SORT OF PROTECTED ACTIVITY?

8 THERE'S NO CASE THAT SAYS THAT THAT IS THE
9 PROTECTED ACTIVITY HERE, AND THE BALANCING OR THE VIEW
10 THERE WOULD BE THAT, NO, IT'S NOT A PROTECTED SITUATION
11 BASED ON THOSE PARTICULAR FACTS.

12 THE COURT: ISN'T THE JUXTA POSITION OF ALL OF
13 THIS INFORMATION AN EXERCISE OF MR. ADELMAN'S FIRST
14 AMENDMENT RIGHT TO MAKE A COMMENT ON THE PLAINTIFF'S
15 ENVIRONMENTAL STAND ON THE ONE HAND AND THE FACT THAT
16 SHE LIVES IN THE COASTAL ZONE ON THE OTHER IN A
17 RESIDENCE AS DEPICTED IN THE PHOTOGRAPH?

18 MR. GATTI: NO, THE CASES ARE QUITE CLEAR
19 THAT --

20 THE COURT: WHICH CASES ARE THOSE, PLEASE?

21 MR. GATTI: THE CASES THAT WE'VE CITED TO, AND
22 I WILL -- OBVIOUSLY ONE IS HILL, BUT THERE IS ALSO CASES
23 THAT DEAL WITH THE BALANCING ASPECTS AND THE FACTS THAT
24 STAND FOR THE PROPOSITION THAT THE --

25 THE COURT: WELL, HOW DOES PLAINTIFF ESTABLISH
26 A LEGALLY -- WELL, THIS IS A GOOD POINT TO STOP AND
27 RESUME. WHENEVER WE DO RESUME, THE QUESTION IS GOING TO
28 BE HOW DOES ALL THAT SQUARE WITH THE TEST ON PAGE 39 AND

1 THE SUMMARY OF ELEMENTS AND DEFENSES THAT'S HEADNOTE 13
2 IN THE WEST EDITION THAT SETS OUT THE THREE TESTS. AND
3 WE'LL RESUME WITH THAT SUBJECT AT OUR NEXT SESSION, BUT
4 WE DID RESERVE THE LAST HALF HOUR TODAY FOR COUNSEL FOR
5 LAYER42, WHO IS IN ONE SENSE AT LEAST A MOVING PARTY.

6 GO AHEAD, SIR.

7 MR. CASAS: THANK YOU, YOUR HONOR. WITH
8 RESPECT TO THE INTERNET SERVICE PROVIDER, LAYER42 DOT
9 NET, WE'RE LOOKING AT THE SECOND PRONG OF THE STATUTORY
10 TEST. I WOULD SUBMIT THAT THE PLAINTIFF CANNOT
11 ESTABLISH A PROBABILITY, ANY PROBABILITY, OF PREVAILING
12 ON THE MERITS OF ANY OF THEIR CLAIMS. AND SINCE IT'S
13 LIKELY THAT I WON'T RETURN TOMORROW, I WILL LUMP THEM
14 TOGETHER, 1 THROUGH 5, RATHER THAN ATTACKING THEM
15 INDIVIDUALLY.

16 THERE ARE TWO REASONS FOR MY SUBMISSION. ONE
17 IS THAT THERE HAS BEEN NO EVIDENCE PRESENTED THAT I HAVE
18 SEEN THAT IMPLICATES LAYER42 IN ANY OF THE ACTS THAT THE
19 PLAINTIFF COMPLAINS OF, EITHER FLYING THE HELICOPTER,
20 TAKING PICTURES, POSTING THEM ON A WEBSITE, WHICH THEY
21 DO NOT OWN, ENABLING PEOPLE TO DOWNLOAD THOSE PICTURES,
22 AND SELLING THEM. THERE IS NO EVIDENCE WHATSOEVER THAT
23 MY CLIENT PARTICIPATED IN ANY OF THOSE ACTS, EVEN IF
24 THEY WERE OBJECTIONABLE OR ILLEGAL, WHICH I HAPPEN TO
25 DISAGREE WITH, BUT I'LL LEAVE THAT TO MR. KENDALL.

26 THE SECOND REASON HAS TO DO WITH THE FEDERAL
27 STATUTE, THE COMMUNICATIONS DECENCY ACT SECTION 230.
28 THERE IS A BLANKET FEDERAL IMMUNITY FOR AN INTERNET

1 SERVICE PROVIDER. IN FACT, IT'S INTERESTING IN READING
2 THE STATUTE AND THE CASE THAT YOUR HONOR PROVIDED US
3 OVER THE BREAK --

4 THE COURT: WHICH IS BATZEL VERSUS SMITH.

5 MR. CASAS: YES, YOUR HONOR. THE ISP HAS BEEN
6 AFFORDED SPECIAL PROTECTION UNDER FEDERAL LAW THAT GOES
7 WELL BEYOND WHATEVER PROTECTION THAT A NEWSPAPER,
8 MAGAZINE, RADIO STATION, TELEVISION STATION, HAVE TO
9 PROTECT, AS A MATTER OF PUBLIC POLICY, THE DISSEMINATION
10 OF INFORMATION OVER THE WEB.

11 AND THAT WAS VERY IMPORTANT FOR CONGRESS WHEN
12 THIS SECTION WAS ADDED, TO MAKE SURE THAT INFORMATION OF
13 PUBLIC CONCERN OR EVEN INFORMATION NOT OF PUBLIC CONCERN
14 COULD BE DISSEMINATED ON THE WEB WITH IMMUNITY FOR THE
15 INTERNET SERVICE PROVIDER. THERE IS A DISTINCTION IN
16 THE BATZEL VERSUS SMITH CASE WHEN THEY REVIEW THAT
17 STATUTE BETWEEN, IN THAT CASE, A WEBSITE OPERATOR OR THE
18 OWNER OF THE WEBSITE, KREMER, AND THE CONTENT PROVIDER,
19 WHICH UNDER THE STATUTE IS ASSUMED TO BE A THIRD PARTY.

20 AND THE COURT GOES INTO GREAT LENGTHS TO
21 DISCUSS THIS DISTINCTION WHERE YOU HAVE SOMEONE WHO IS
22 PROVIDING INFORMATION THAT IS POSTED ON A WEBSITE. AND
23 YOU HAVE THE WEBSITE OPERATOR WHO IS ALSO REVIEWING,
24 APPROVING, EDITING, COMMENTING ON, MODIFYING THE CONTENT
25 OF THAT INFORMATION.

26 HERE, THERE IS NO EVIDENCE WHATSOEVER, AND THE
27 FACT OF THE MATTER IS THERE IS NO SUCH REVIEW BY THE
28 INTERNET SERVICE PROVIDER OF THE INFORMATION THAT'S

1 POSTED ON THE WEBSITE IN THIS CASE. IT'S ALSO
2 NOTEWORTHY IN BATZEL THAT THE INTERNET SERVICE PROVIDER
3 WAS MICROSOFT, THEIR OWN NETWORK. AND I NOTICE THAT
4 THEY -- AND MICROSOFT IS NOT NAMED IN THIS CASE. THE
5 WEBSITE WAS POSTED ON THE MSN NETWORK; HOWEVER, IT WAS
6 NOT NAMED.

7 BECAUSE MY CLIENT WAS NOT INVOLVED IN ANY OF
8 THE ACTS OF DEVELOPING THE WEBSITE, OF ACTUALLY
9 GATHERING THE INFORMATION FOR THE WEBSITE, AND BECAUSE
10 OF THE IMMUNITY WHICH IT HAS AS AN INTERNET SERVICE
11 PROVIDER UNDER FEDERAL LAW, I DO NOT SEE -- OR AT LEAST
12 IN MY VIEW I DO NOT SEE A CASE TO BE ESTABLISHED AGAINST
13 THEM WITH ANY LEVEL OF PROBABILITY AND, THEREFORE, UNDER
14 THE SECOND PRONG OF THE TEST, ASSUMING THAT BURDEN HAS
15 SHIFTED TO THE PLAINTIFF, WHICH I THINK IT HAS, THERE
16 CANNOT BE LIABILITY FOR LAYER42 DOT NET IN THIS CASE.

17 THE COURT: WHAT ABOUT THE MOTION FOR
18 PRELIMINARY INJUNCTION, COUNSEL? IS THAT THE SAME
19 ANALYSIS?

20 MR. CASAS: THE SAME ANALYSIS, EXCEPT I
21 NOTICED IN THE TENTATIVE RULING THERE IS A QUESTION
22 ABOUT THE BURDEN THAT THE PLAINTIFF HAS IN AN INJUNCTION
23 SETTING OR PRELIMINARY INJUNCTION SETTING. IT APPEARS
24 TO BE A HIGHER BURDEN THAT HAS TO BE MET BY THE
25 PLAINTIFF TO ESTABLISH A SUBSTANTIAL PROBABILITY OF
26 SUCCESS ON THE MERITS. IF THEY CAN'T ESTABLISH A
27 PROBABILITY, CERTAINLY THEY CAN'T ESTABLISH SUBSTANTIAL
28 PROBABILITY SO --

1 THE COURT: SOME FOLKS ARTICULATE IT AS A
2 "REASONABLE PROBABILITY," SO I TAKE IT YOUR ARGUMENT
3 WOULD BE THE SAME.

4 MR. CASAS: I'M SORRY, YOUR HONOR.

5 THE COURT: IF THERE WERE "REASONABLE" RATHER
6 THAN "SUBSTANTIAL," YOUR ARGUMENT WOULD BE THE SAME?

7 MR. CASAS: YES. THANK YOU.

8 THE COURT: YOU ARE WELCOME. WHO WANTS TO
9 COMMENT AMONG THE OTHER PARTIES? I THINK IT WOULD
10 PROBABLY BE MORE APPROPRIATE TO HEAR FROM THAT SIDE OF
11 THE TABLE FIRST, THEN FROM THE PLAINTIFF.

12 MR. KENDALL: I THINK MS. SEIGLE WILL COMMENT
13 ON PICTOPIA DOT COM'S AND MR. ADELMAN'S VIEWS OF SECTION
14 230.

15 MS. SEIGLE: THANK YOU, YOUR HONOR.

16 THE BATZEL CASE THAT THE COURT PROVIDED BEFORE
17 LUNCH PROVIDES A NICE INTRODUCTION TO SECTION 230.

18 THE COURT: WELL, CERTAINLY AN INTRODUCTION,
19 AND IT'S VERY -- JUST THAT SECTION SEEMS TO BE RATHER
20 DIFFICULT TO UNDERSTAND.

21 MS. SEIGLE: WELL, SECTION 230, WHICH IS PART
22 OF THE COMMUNICATIONS DECENCY ACT THAT WAS ENACTED IN
23 1996, PROVIDES -- STATES THAT "NO PROVIDER OR USER OF AN
24 INTERACTIVE COMPUTER SERVICE SHALL BE TREATED AS A
25 PUBLISHER OR SPEAKER OF ANY INFORMATION PROVIDED BY
26 ANOTHER INFORMATION CONTENT PROVIDER." AND LATER ON
27 SECTION 230 (E), THERE IS A STATEMENT THAT INCONSISTENT
28 STATE LAWS ARE BASICALLY PREEMPTED BY THIS SECTION.

1 BATZEL ON PAGE 7 OF THE WEST LAW PRINTOUT, AND
2 THAT'S ALL AVAILABLE RIGHT NOW. ALL THAT IS AVAILABLE
3 RIGHT NOW. BATZEL EXPLAINS THE REASONS FOR IMPLEMENTING
4 SECTION 230. AND IT STATES THAT THERE ARE TWO PRIMARY
5 REASONS. THE FIRST WAS THAT CONGRESS WANTED TO
6 ENCOURAGE THE UNFETTERED AND UNREGULATED DEVELOPMENT OF
7 FREE SPEECH ON THE INTERNET AND TO PROMOTE DEVELOPMENT
8 OF E COMMERCE.

9 LATER ON IN THAT PAGE THE BATZEL COURT
10 RECOGNIZES THAT COURT'S CONSTRUING SECTION 230 HAVE
11 RECOGNIZED AS CRITICAL IN APPLYING THE STATUTE, THE
12 CONCERN THAT LAWSUITS COULD THREATEN THE FREEDOM OF
13 SPEECH IN THE NEW AND BURGEONING INTERNET MEDIUM. SO
14 FOR THE FIRST PRIMARY REASON WE HAVE PROTECTION OF FREE
15 SPEECH AND THE DEVELOPMENT AND ENCOURAGING OF E
16 COMMERCE.

17 THE SECOND REASON IS TO PROTECT AGAINST
18 OBSCENITY AND OTHER OFFENSIVE MATERIAL BEING AVAILABLE
19 ON THE INTERNET. SO WITH ESPECIALLY THE FIRST PRIMARY
20 REASON IN MIND, I WANT TO DISCUSS HOW SECTION 230
21 APPLIES TO BOTH KENNETH ADELMAN AND PICTOPIA DOT COM.

22 WE HAVEN'T REALLY TALKED THAT MUCH ABOUT
23 PICTOPIA. PICTOPIA, AS ALLEGED IN THE COMPLAINT, IS A
24 SEPARATE COMPANY, A SEPARATE SERVICE, THROUGH WHICH
25 PEOPLE CAN PURCHASE PHOTOGRAPHS THAT ARE AVAILABLE ON
26 MR. ADELMAN'S WEBSITE.

27 THE COURT: WE HAVE A DECLARATION FROM A
28 REPRESENTATIVE OF PICTOPIA AS WELL.

1 MS. SEIGLE: RIGHT, MARK LIEBMAN. IN HIS
2 DECLARATION HE EXPLAINS THE DETAILS OF THE STEP-BY-STEP
3 PROCESS BY WHICH THE PHOTOGRAPHS -- BY WHICH A USER ON
4 MR. ADELMAN'S WEBSITE WILL INDICATE WHAT PHOTOGRAPHS HE
5 OR SHE WANTS TO PURCHASE, AND THEN PICTOPIA OBTAINS THE
6 INFORMATION FOR THAT PHOTOGRAPH FROM THE WEBSITE'S
7 SERVER. THAT INFORMATION IS THEN TRANSFERRED TO
8 PICTOPIA AND PICTOPIA PRINTS OUT THE DIGITAL INFORMATION
9 EXACTLY AS IT APPEARS ON THE WEBSITE SERVER.

10 AN IMPORTANT POINT THAT'S MENTIONED IN THE
11 LIEBMAN DECLARATION IS THAT DURING NO TIME IN THIS
12 PROCESS -- WELL, TWO IMPORTANT POINTS, DURING NO TIME IN
13 THIS PROCESS DOES PICTOPIA CHANGE ANYTHING ABOUT THE
14 PHOTOGRAPH, ABOUT THE DIGITAL INFORMATION IN THE
15 PHOTOGRAPH; AT NO TIME DOES IT HAVE ANY ACCESS TO THE
16 CAPTION. THE CAPTION STAYS ON THE WEBSITE. IT DOESN'T
17 MOVE OVER TO PICTOPIA WHEN INFORMATION IS TRANSFERRED.
18 IT DOES NOT APPEAR ON THE PHOTOGRAPH THAT'S PRINTED OUT
19 AND MAILED TO THE PURCHASER. THAT'S PICTOPIA'S
20 INVOLVEMENT IN THE SALE OF THESE PHOTOGRAPHS.

21 NOW, SECTION 230, AS INTERPRETED BY THE
22 PRIMARY CALIFORNIA COURT THAT'S LOOKED AT THIS, THIS
23 IS -- THE COURT IS GENTRY V EBAY, INC. THAT'S AT 99 CAL
24 AP 816 828 -- THE CITE IS -- THE PIN CITE IS 828, 2002.
25 IT'S CAL AP. 4.

26 THE COURT: FOURTH.

27 MS. SEIGLE: RIGHT, I WAS REALIZING I WAS
28 MISSING A FOURTH THERE. IT'S 99 CAL AP 4. AT PIN CITE

1 828 THE CALIFORNIA APPELLATE COURT STATES THAT TO OBTAIN
2 IMMUNITY OF SECTION 230, THE DEFENDANT NEEDS TO BE A
3 PROVIDER OR USER OF INTERACTIVE COMPUTER SERVICES. THE
4 CAUSES OF ACTION AT ISSUE NEED TO TREAT THAT DEFENDANT
5 AS A PUBLISHER OR SPEAKER OF INFORMATION, AND THEN THE
6 THIRD ELEMENT IS THAT THE INFORMATION MUST BE PROVIDED
7 BY A THIRD PARTY CONTENT PROVIDER, NOT BY THE DEFENDANT.

8 LOOKING AT THE FIRST ELEMENT, THE -- WHETHER
9 THE DEFENDANT IS A PROVIDER USER OF INTERACTIVE -- AN
10 INTERACTIVE COMPUTER SERVICE, DEFENDANTS HAVE STATED
11 THAT -- THAT MR. ADELMAN DOES NOT SATISFY THAT
12 DEFINITION --

13 I'M SORRY, PLAINTIFF HAS STATED MR. ADELMAN
14 DOES NOT SATISFY THAT DEFINITION BECAUSE WEBSITES ARE
15 NOT COVERED, AND THAT IS JUST NOT TRUE. BATZEL IS ALL
16 ABOUT WEBSITES. AS LAYER42'S COUNSEL HAS EXPLAINED, THE
17 DEFENDANT WAS A WEBSITE. GENTRY WAS ABOUT EBAY. EBAY
18 IS A WEBSITE. THE COURT HELD WEBSITES ARE INCLUDED. IN
19 FACT, IN THE BATZEL DECISION THE COURT SAYS, WELL, BY
20 DEFINITION, A WEBSITE HAS TO BE A USER OF THE INTERNET.
21 THAT'S HOW A WEBSITE SHOWS UP ON THE INTERNET, BY USING
22 THE INTERNET.

23 SO AS A MATTER OF LAW THE FIRST ELEMENT IS
24 SATISFIED. PICTOPIA ALSO IS A WEBSITE AND IS ACCESSED
25 THROUGH THE INTERNET. USERS GO ONTO THE INTERNET IN
26 ORDER TO ACCES MR. ADELMAN'S WEBSITE AND THEN THEY ARE
27 PUT ONTO PICTOPIA'S WEBSITE IN ORDER TO COMPLETE THEIR
28 PURCHASE.

1 AND THIS IS SET OUT IN, BOTH MY DECLARATION
2 WHERE THERE ARE EXHIBITS ATTACHED SHOWING THE
3 STEP-BY-STEP PROCESS AND IN MR. LIEBMAN'S DECLARATION, SO
4 THERE REALLY CANNOT BE ANY DISPUTE THAT THE FIRST
5 ELEMENT IS SATISFIED.

6 THE SECOND ELEMENT OF IMMUNITY UNDER SECTION
7 230 IS THE CAUSE OF ACTION, WHETHER IT TREATS THE
8 DEFENDANT AS A PUBLISHER OR SPEAKER OF INFORMATION.
9 THAT'S WHAT WE'VE BEEN TALKING ABOUT ALL DAY HERE, IS
10 WHETHER THIS INFORMATION IS SPEECH. AND I'M NOT GOING
11 TO GET INTO ANYTHING FURTHER ABOUT THAT.

12 THE THIRD ELEMENT IS WHETHER THE INFORMATION
13 AT ISSUE WAS PROVIDED BY ANOTHER CONTENT PROVIDER. NOW,
14 LET ME SPEAK VERY BRIEFLY ABOUT PICTOPIA BECAUSE I CAN
15 TAKE CARE OF THAT QUICKLY. THE PLAINTIFF DOESN'T
16 MENTION PICTOPIA AT ALL IN THEIR PAPERS AND IN THEIR
17 OPPOSITION TO THE ANTI-SLAPP MOTION. THEY DON'T MENTION
18 MARK LIEBMAN'S DECLARATION WHICH ESTABLISHES THAT ALL OF
19 THE INFORMATION ABOUT THE PHOTOGRAPHS COMES STRAIGHT
20 FROM MR. ADELMAN'S WEBSITE.

21 PICTOPIA DOES NOT CONTRIBUTE A THING.
22 PICTOPIA DOES NOT OBTAIN ANY INFORMATION ABOUT THE
23 CAPTION AT ALL, SO EVERY PIECE OF INFORMATION THAT
24 PICTOPIA RECEIVES IS FROM A THIRD PARTY. IN THIS CASE A
25 THIRD PARTY WOULD BE MR. ADELMAN. SO PICTOPIA IS
26 CLEARLY COVERED BY THE THIRD ELEMENT. IT CLEARLY IS NOT
27 CONTRIBUTING ANY OF THE INFORMATION THAT'S AT ISSUE
28 HERE.

1 NOW, AS FOR MR. ADELMAN, WHAT DEFENDANTS HAVE
2 TRIED TO DO HERE IS REALLY CONFUSE -- I'M SORRY WHAT --
3 IT'S BEEN A LONG DAY. WHAT THE PLAINTIFF'S TRIED TO DO
4 HERE, MRS. STREISAND, IS TO CONFUSE THE ISSUES. SHE
5 SAYS THAT, WELL, OF COURSE MR. ADELMAN IS A CONTENT
6 PROVIDER.

7 NOW, LOOK AT THE PHOTOGRAPHS THAT WE'VE BEEN
8 DEALING WITH. HE TOOK THE PHOTOGRAPHS. WE DON'T
9 DISPUTE THAT HE TOOK THE PHOTOGRAPHS. BUT WHAT'S
10 IMPORTANT FOR SECTION 230 IMMUNITY IS WHETHER THE
11 INFORMATION AT ISSUE IS PROVIDED BY A THIRD PARTY. AND
12 IN OUR MOTION AS FOR MR. ADELMAN, WE ARE ONLY MAKING THE
13 SECTION 230 ARGUMENT ABOUT THE CAPTION; WE'RE NOT MAKING
14 IT ABOUT THE PHOTOGRAPH BECAUSE IT'S UNDISPUTED THAT HE
15 TOOK THIS PHOTOGRAPH. HE PUT IT ON THE WEBSITE.

16 BUT FOR THE CAPTION, THERE IS A DIFFERENT
17 SITUATION. THE CAPTION, THE ONLY EVIDENCE IN THE RECORD
18 IS THAT THE CAPTIONS ON MR. ADELMAN'S WEBSITE ARE
19 PROVIDED BY THIRD PARTIES. MR. ADELMAN STATES THIS IN
20 HIS DECLARATION AT PARAGRAPH 5 WHERE HE EXPLAINS THAT
21 THERE IS A "SUGGEST CAPTION" FUNCTION ON THE WEBSITE AND
22 THAT USERS GO INTO THAT TO TYPE IN CAPTIONS.

23 IN MY DECLARATION I ATTACH SOME EXHIBITS THAT
24 SHOW -- IT'S EXHIBIT G, THAT SHOWS HOW THE "SUGGEST
25 CAPTION" FUNCTION APPEARS ON THE WEBSITE AND WHAT
26 HAPPENS WHEN USERS TYPE IN -- TYPE IN A CAPTION.

27 THE PLAINTIFFS DO NOT HAVE ANY EVIDENCE TO THE
28 CONTRARY. SO WHEREAS WITH THE PHOTOGRAPHS, THEY SAY

1 MR. ADELMAN TOOK THE PHOTOGRAPH, THERE IS EVIDENCE OF
2 THAT. THEY HAVE NOT SUBMITTED ANY EVIDENCE THAT
3 MR. ADELMAN CONTRIBUTED TO THE CAPTION. SO AS TO THE
4 CAPTION FOR MR. ADELMAN, HE SATISFIES THE THIRD ELEMENT
5 OF SECTION 230, HE IS NOT -- THERE IS NO EVIDENCE THAT
6 HE WAS THE CONTENT PROVIDER FOR THE CAPTION.

7 NOW, THERE IS ONE FINAL ARGUMENT THAT --
8 THE COURT: BUT HE IS THE ONE WHO HAD IT
9 PROGRAMMED, WASN'T HE, WHO HAD THE WEBSITE PROGRAMMED SO
10 THAT IT COULD RECEIVE CAPTIONS. HOW DOES THAT AFFECT
11 YOUR ANALYSIS?

12 MS. SEIGLE: THAT'S CORRECT. THAT DOES NOT
13 AFFECT OUR ANALYSIS. IF YOU GO TO ANY OF THESE
14 WEBSITES. FOR INSTANCE, EBAY, WHICH IS WHAT THE GENTRY
15 VERSUS EBAY CASE IS ALL ABOUT. IN THAT CASE THE
16 PLAINTIFF WAS SUING EBAY BECAUSE OF A FALSE DESCRIPTION
17 OF A PRODUCT THAT EBAY HAD SOLD ON THE WEBSITE.

18 EBAY SAID WE DIDN'T POST THIS DESCRIPTION.
19 THIRD PARTIES USERS COME IN, THEY MOST THE DESCRIPTION
20 OF A PRODUCT THAT THEY ARE SELLING, THEY SELL THE
21 PRODUCT. OBVIOUSLY EBAY HAD TO WRITE THE PROGRAM THAT
22 ENABLES THIRD PARTY USERS TO PUT POSTINGS OR SALE OF
23 PRODUCTS ON THEIR WEBSITE. SO SOMEBODY -- AND --
24 SOMEBODY FOR ANY WEBSITE THAT ENABLES THIRD PARTIES TO
25 POST INFORMATION IS WRITING THE PROGRAMS THAT ALLOW THAT
26 KIND OF FUNCTIONING.

27 NOW, DEFENDANTS MAKE ONE OTHER ARGUMENT ABOUT
28 THE APPLICABILITY OF SECTION 230 TO THE CAPTION IN

1 CONNECTION WITH MR. ADELMAN AND, IN GENERAL, TO THE
2 ARGUMENT -- THE EXEMPTION AS TO PICTOPIA. AND THEY SAY
3 THAT -- FIRST THEY SAY THAT 230 IS LIMITED TO DEFAMATION
4 AND OBSCENITY. AND THAT'S JUST NOT TRUE.

5 THE GENTRY V EBAY CASE IS AN EXAMPLE. THAT
6 WAS A FALSE PRODUCT DESCRIPTION. IT WAS NOT DEFAMATION.
7 IT WAS NOT OBSCENITY. THE BATZEL CASE EXPLAINS THAT THE
8 PURPOSE OF THE SECTION GOES WAY BEYOND JUST OBSCENITY,
9 IT'S TO ENCOURAGE FREE SPEECH IN GENERAL.

10 THEY ALSO THEN ARGUE THAT THERE IS -- THE
11 PLAINTIFF ARGUES THAT THERE IS A LIMITATION ON SECTION
12 230 THAT IT DOES NOT APPLY TO INTELLECTUAL PROPERTY
13 CLAIMS, AND THEY ARGUE THAT BOTH THEIR PRIVACY CLAIMS
14 AND THEIR MISAPPROPRIATION CLAIM, THE RIGHT OF PUBLICITY
15 CLAIM, THAT ALL OF THOSE CLAIMS ARE INTELLECTUAL
16 PROPERTY CLAIMS. WE DO NOT AGREE WITH THIS FOR SEVERAL
17 REASONS.

18 THE FIRST IS THAT THERE IS ABSOLUTELY NO
19 AUTHORITY ANYWHERE THAT INVASION OF PRIVACY IS AN
20 INTELLECTUAL PROPERTY CLAIM. PRIVACY IS NOT
21 INTELLECTUAL PROPERTY -- IS NOT INTELLECTUAL PROPERTY,
22 AND THERE IS NO CASE THAT SAYS THAT.

23 THERE ALSO IS NO -- THERE IS NO CALIFORNIA
24 CASE HOLDING THAT SECTION 230 DOES NOT APPLY TO EITHER
25 PRIVACY OR MISAPPROPRIATION CLAIMS. THAT'S NEVER BEEN
26 HELD BY ANY CALIFORNIA COURT. ALL OF THE CASES
27 DISCUSSING 230 EXPLAIN THAT ITS PURPOSE WAS TO LIMIT
28 STATE TORT LIABILITY SO THAT INTERNET USERS AND SERVICE

1 PROVIDERS WERE NOT FACED WITH BARAGE OF STATE TORT CASES
2 SO THAT FREE SPEECH COULD DEVELOP AND E COMMERCE COULD
3 DEVELOP.

4 AS WE'VE BEEN DISCUSSING THROUGHOUT ALL THE
5 DAY TODAY, PRIVACY AND MISAPPROPRIATION CLAIMS ARE TORT
6 CLAIMS. THE HILL CASE HAS A NICE EXPLANATION OF THE
7 HISTORY OF THE HUNDRED YEARS OF CALIFORNIA PRIVACY LAW
8 AND EXPLAINS THAT THOSE ARE TWO OF THE FOUR COMMON LAW
9 TORT CLAIMS. EVEN THE STATUTORY MISAPPROPRIATION CLAIM,
10 SECTION 3344, IS A TORT CLAIM.

11 CASES HAVE DESCRIBED IT -- FOR INSTANCE, FLEET
12 VERSUS CBS, INC., WHICH IS AT 50 CAL AP. 4 1911, A 1996
13 CASE, AT PIN CITE IS 1918, IT SAYS THAT A RIGHT TO -- IN
14 TALKING ABOUT RIGHT TO PUBLICITY, IT SAYS "THIS IS AN
15 ACTIONABLE TORT UNDER BOTH COMMON LAW AND CIVIL CODE
16 SECTION 3344," SO THE CALIFORNIA COURTS CALL
17 MISAPPROPRIATION A TORT, RIGHT OF PUBLICITY IS A TORT.
18 THEY DO NOT -- NO COURT HOLDS THAT IT IS NOT WITHIN THE
19 230 EXCEPTION.

20 AND ALTHOUGH WE HAVEN'T TALKED ABOUT THIS YET,
21 AND I DON'T WANT TO GET INTO A LONG DETAILED DISCUSSION,
22 IT'S VERY IMPORTANT TO LOOK AT THE ACTUAL CLAIM THAT SHE
23 HAS MADE, THAT MRS. STREISAND HAS MADE, ABOUT
24 MISAPPROPRIATION. SHE IS NOT CLAIMING THAT HER
25 INTELLECTUAL PROPERTY HAS BEEN TAKEN. SHE'S NOT
26 CLAIMING THAT SOMEBODY IS USING PART OF HER PERSONA OR
27 PART OF HER ACT OR PART OF HER IMAGE.

28 SHE'S CLAIMING THAT A FACTUAL STATEMENT

1 INCLUDING HER -- INCORPORATING HER NAME WAS IMPROPERLY
2 USED. IT'S UNDISPUTED THAT THIS IS A PICTURE OF HER
3 HOUSE. THE STATEMENT THAT "THIS IS STREISAND'S ESTATE"
4 IS A FACTUAL STATEMENT. IT'S EQUIVALENT TO WRITING A
5 BOOK ON THE HISTORY OF MUSIC. IT WOULD SAY "BARBARA
6 STREISAND WROTE AND SANG MANY FAMOUS SONGS." THAT'S A
7 FACTUAL STATEMENT. THESE KINDS OF FACTUAL STATEMENTS
8 FALL UNDER THE EXEMPTION IN 3344 (E) FOR NEWS AND PUBLIC
9 AFFAIRS. WE'VE BEEN TALKING ABOUT --

10 THE COURT: WE'RE GOING TO COME BACK TO THAT.
11 COUNSEL, I NEED TO ASK YOU TO CONCLUDE ON 230 BECAUSE
12 THE PLAINTIFF NEEDS TO HAVE TIME BEFORE COUNSEL FOR
13 LAYER NET LEAVES.

14 MS. SEIGLE: THANK YOU. I WILL CONCLUDE. YOU
15 ARE RIGHT, WE WILL GET INTO A MUCH LONGER DISCUSSION OF
16 MISAPPROPRIATION, SO THE PLAINTIFF'S ARGUMENT THAT
17 SECTION 230 DOES NOT APPLY TO THE MISAPPROPRIATION AND
18 PRIVACY CAUSES OF ACTION DON'T HOLD ANY WATER. THERE IS
19 NO CASE LAW SUPPORTING THAT ALLEGATION, AND ALL OF THE
20 CASES, INCLUDING THE GENTRY CASE AND THE BATZEL CASE,
21 SHOW THAT BOTH PICTOPIA AND ADELMAN SATISFY THE THREE
22 ELEMENTS FOR SECTION 230 EXEMPTION.

23 THE COURT: THANK YOU. WHO IS GOING TO ARGUE
24 FOR THE PLAINTIFF?

25 MR. GATTI: I WILL, YOUR HONOR.

26 THE COURT: MR. GATTI, GO AHEAD.

27 MR. GATTI: ADDRESSING, I GUESS, THE LAST
28 POINT ON THE MISAPPROPRIATION, THE BEST PLACE TO START

1 IS TO LOOK AT THE STATUTE ITSELF, 230, AND IT SPECIFICLY
2 STATES THAT AT (E) (2), "NO AFFECT ON INTELLECTUAL
3 PROPERTY LAW. NOTHING IN THIS SECTION SHALL BE
4 CONSTRUED TO LIMIT OR EXPAND ANY LAW PERTAINING TO
5 INTELLECTUAL PROPERTY."

6 THE COMEDY THREE PRODUCTION CASE, 15 CAL 4TH,
7 387 AT 399, A 2001 CASE, STATES THAT, QUOTE, THE RIGHT
8 OF PUBLICITY, LIKE COPYRIGHT, PROTECTS A FORM OF
9 INTELLECTUAL PROPERTY THAT SOCIETY DEEMS TO HAVE SOME
10 SOCIAL UTILITY."

11 SO ACROSS THE BOARD AS TO ALL THE DEFENDANTS
12 IN THIS PARTICULAR CASE, THE ISSUES PERTAINING TO
13 INTELLECTUAL PROPERTY BASED ON THE MISAPPROPRIATION
14 CLAIM IS COMEDY THREE AND ALSO THE LANGUAGE OF THE
15 STATUTE DOES NOT APPLY. THIS STATUTE DOES NOT APPLY TO
16 THAT SPECIFIC AREA FOR ANY OF THESE DEFENDANTS.

17 THE -- ALSO 230 (A) OR EXCUSE ME, 230 (C)
18 STATES THAT THIS IS A PROTECTION FOR, QUOTE, GOOD
19 SAMARITAN BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.
20 THE REASONING BEHIND THE STATUTE, THE -- WHERE IT CAME
21 ABOUT TO ACTUALLY SPECIFICALLY OVERRULE THE STRATTON
22 PRODIGY CASE, WHICH WAS HAVING TO DO WITH A SITUATION
23 WHERE PARTIES WERE BEING HELD LIABLE FOR OR CLAIMS FOR
24 DEFAMATION RELATING TO PROVIDERS THAT WERE PROVIDING
25 BLOCKING ACCESS TO FILTER INFORMATION THAT WAS COMING
26 THROUGH THE INTERNET.

27 BASICALLY THE WHOLE PURPOSE FOR THIS ACT UNDER
28 ITS SPECIFIC STATED REASONING IS TO PROTECT THOSE WHO

1 WERE FILTERING INFORMATION, AND THERE IS NO EVIDENCE
2 ANYWHERE THAT ANY OF THESE DEFENDANTS WOULD HAVE BEEN IN
3 THAT SITUATION OF A GOOD SAMARITAN BLOCKING SITUATION SO
4 THAT ON ITS FACE THE STATUTE WOULD NOT APPLY TO ANY OF
5 THESE PARTICULAR DEFENDANTS.

6 WITH RESPECT TO THE GOOD SAMARITAN PROTECTION,
7 THAT IS AT 230 (C) -- 230 (C) (2) (A), WHEN IT'S TALKING
8 ABOUT CIVIL LIABILITY STATES THAT "NO PROVIDER OR USER
9 OF AN INTERACTIVE COMPUTER SERVICE SHALL BE HELD LIABLE
10 ON ACCOUNT OF, A, ANY ACTION VOLUNTARILY TAKEN IN GOOD
11 FAITH TO RESTRICT ACCESS TO OR AVAILABILITY OF MATERIAL
12 THAT THE PROVIDER OR USER CONSIDERS TO BE OBSCENE, LEWD,
13 LASCIVIOUS, FILTHY, EXCESSIVELY VIOLENT, HARASSING, OR
14 OTHERWISE OBJECTIONABLE, WHETHER OR NOT SUCH MATERIAL IS
15 CONSTITUTIONALLY PROTECTED; OR, B, ANY ACTION TAKEN TO
16 ENABLE OR MAKE AVAILABLE TO INFORMATION CONTENT
17 PROVIDERS OR OTHER THE TECHNICAL MEANS TO RESTRICT
18 ACCESS TO MATERIAL DESCRIBED IN PARAGRAPH 1."

19 THERE IS NO EVIDENCE THAT THAT SITUATION
20 APPLICABLE HERE TO PROVIDE IMMUNITY TO ANY OF THESE
21 PARTICULAR DEFENDANTS ON THESE FACTS.

22 WITH RESPECT TO THE ISSUE OF INFORMATION
23 CONTENT PROVIDERS UNDER THE STATUTE, "AN INFORMATION
24 CONTENT PROVIDER IS DEFINED AS ANY PERSON THAT IS
25 RESPONSIBLE IN WHOLE OR IN PART FOR THE CREATION OR
26 DEVELOPMENT OF INFORMATION PROVIDED THROUGH THE
27 INTERNET."

28 AND IT SAYS THAT THE STATUTE WILL ALLOW FOR

1 THOSE PARTICULAR PERSONS TO BE LIABLE FOR INFORMATION
2 THAT THEY ARE RESPONSIBLE FOR PROVIDING THROUGH THE
3 INTERNET. THAT'S EVEN IF A DEFENDANT WOULD TO BE
4 INCLUDED AS AN INTERACTIVE COMPUTER SERVICE PROVIDER AS
5 THAT'S DEFINED IN THE STATUTE.

6 SO IF YOU ARE AN INFORMATION CONTENT PROVIDER
7 AND IF YOU ARE RESPONSIBLE IN WHOLE OR IN PART FOR THE
8 CREATION OR DEVELOPMENT OF INFORMATION PROVIDED THROUGH
9 THE INTERNET, YOU ARE NOT GOING TO HAVE THIS IMMUNITY.
10 AND IT IS CLEAR THAT, AS WE'VE DISCUSSED UP TO THIS
11 POINT, MR. ADELMAN IS -- HAS CREATED THE INFORMATION,
12 HAS PROVIDED -- THIS IS NOT -- WE ALL KNOW WHAT EBAY IS.
13 WE ALL KNOW WHAT A LIST SERVE TYPE OF SERVICE IS WHERE A
14 CHAT ROOM -- THIS IS NOT WHAT THIS SITUATION IS. WE ALL
15 KNOW WHAT THIS IS. WE KNOW THAT MR. ADELMAN'S WEBSITE
16 IS NOT THAT. IT ISN'T A PLACE TO CHAT. HE'S CREATED
17 THE CONTENT. HE'S PUT THE CONTENT UP THERE. HE HAS --
18 HE CONTROLS IT. HE DOES ALL OF THE ASPECTS THAT CREATE
19 THE CONTENT, AND IT -- BASED ON THOSE FACTS AND WHAT IS
20 BEFORE THE COURT, HE WOULD NOT BE SUBJECT TO IMMUNITY IN
21 THIS PARTICULAR CASE.

22 AS I SAID PREVIOUSLY, WITH RESPECT TO
23 PICTOPIA, PICTOPIA WE HAVE THE CLAIMS OF
24 MISAPPROPRIATION AND THEIR SHARING IN THE SALES OF THE
25 PICTURES AND OFFERING FOR SALE THOSE PICTURES, SO AS I
26 SAID EARLIER, TO THE INTELLECTUAL PROPERTY
27 MISAPPROPRIATION CLAIM WOULD NOT APPLY.

28 WITH RESPECT TO, AS I SAID, TO LAYER42 DOT

1 NET, THERE IS NO INFORMATION -- THERE IS NO EVIDENCE
2 THAT WOULD TRIGGER THEM UNDER AN IMMUNITY UNDER 230 AS
3 THE STATUTE PROVIDES IN THAT PARTICULAR CASE AND THE
4 CARAFANO CASE IS CLEARLY ONE THAT IS INSTRUCTIVE IN THIS
5 SITUATION.

6 AND THAT CASE -- AND THE CITE THERE IS 207 F
7 SUPP. (2) (D) 1055 AT -- I BELIEVE THE PIN CITE IS
8 1066-1068 2002 CASE. AND IN THAT PARTICULAR CASE THE
9 COURT WAS FINDING THAT A NETWORK THAT OPERATES BOTH AS
10 AN INTERNET SERVICE PROVIDER AND INFORMATION CONTENT
11 PROVIDER CANNOT BE MADE IMMUNE FROM LIABILITY.

12 AND SINCE MR. ADELMAN CREATED AND DEVELOPED
13 THE OFFENSIVE CONTENT AND DID NOT SIMPLY CREATE AN
14 ENVIRONMENT FOR INDIVIDUALS TO POST WHATEVER INFORMATION
15 THEY DESIRE, AND THAT WAS A QUOTE FROM CARAFANO, THAT
16 WAS THE DISSCRIPTIVE THAT THEY USED, ADELMAN QUALIFIES AS
17 AN INTERNET CONTENT PROVIDER.

18 AND REGARDLESS OF WHETHER A THIRD PARTY POSTED
19 THE "STREISAND ESTATE MALIBU" TAG CAPTION OR NOT, IT
20 WOULD BE QUITE DISENGENUOUS AT THIS TIME FOR MR. ADELMAN
21 TO TRY TO CLAIM THAT HE IS NOT THE DEVELOPER, PROVIDER,
22 AND ACTIVELY PARTICIPATING IN THE CREATION OF THE
23 INFORMATION AND THE SUBJECT OF WHAT WE FIND OURSELVES
24 HERE TODAY. I KNOW I'VE GONE TO 4:31, AND I WILL SIT
25 DOWN AT THIS POINT. I KNOW THE COURT WANTS TO --

26 THE COURT: THANK YOU. LET ME HEAR IF COUNSEL
27 FOR LAYER42 HAS ANYTHING TO SAY AND LET ME HEAR WHAT
28 THAT WOULD BE.

1 MR. CASAS: TWO QUICK COMMENTS, YOUR HONOR.
2 FIRST IS WITH RESPECT TO THE MISAPPROPRIATION CLAIM AND
3 LAYER42 DOT NET. JUST TO REITERATE, THERE IS NO
4 EVIDENCE THAT LAYER42 DOT NET EITHER PARTICIPATED IN A
5 MISAPPROPRIATION, EVEN IF THERE WERE, OR PROFITTED FROM
6 THE ALLEGED MISAPPROPRIATION.

7 WITH RESPECT TO THE ARGUMENT THAT MY CLIENT IS
8 NOT COVERED UNDER THE FEDERAL STATUTE, I THINK THE
9 PLAINTIFFS ARE FOCUSING ON THE WRONG SECTION. THEY ARE
10 FOCUSING ON SECTION 230 (C) (2); WHEREAS 230 (C) (1) IS
11 THE PROVISION THAT APPLIES TO MY CLIENT. IT IS MUCH
12 BROADER THAN (C) (2), WHICH RELATES TO FILTERING OBSCENE
13 CONTENT. (C) (1) IS THE BROADER PROVISION THAT COVERS
14 ALL ISP USER OF INTERNET SERVICE SERVICES IN GENERAL.
15 SO IT'S NOT NARROWLY LIMITED TO OBSCENE CONTENT.

16 LASTLY, WITH RESPECT TO THE ISSUE OF WHETHER
17 OR NOT LAYER42 IS A CONTENT PROVIDER OR ANYBODY ELSE IS,
18 THE BATZEL COURT STATED THAT YOU ESSENTIALLY HAVE TO BE
19 A DEVELOPER OR A CREATOR OF THE INFORMATION THAT IS
20 POSTED ON THE WEBSITE OR ON THE INTERNET. AND THEY
21 DEFINE THE DEVELOPMENT OF INFORMATION -- I'M NOT SURE OF
22 THE CITE HERE, BUT IT'S ON PAGE 9 OF THE HANDOUT THAT WE
23 WERE PROVIDED, LOOKS LIKE -- I'M SORRY PAGE 10. AND
24 THERE'S A REFERENCE TO WHAT MAY BE A HEADNOTE 5, IT
25 STATES, AND I QUOTE, THE DEVELOPMENT OF INFORMATION
26 THEREFORE MEANS SOMETHING MORE SUBSTANTIAL THAN MERELY
27 EDITING PORTIONS OF AN EMAIL AND SELECTING MATERIAL FOR
28 PUBLICATION BECAUSE KREMER DID NO MORE THAN SELECT AND

1 MAKE MINOR ALTERATIONS TO SMITH'S EMAIL, KREMER CANNOT
2 BE CONSIDERED A CONTENT PROVIDER OF SMITH'S EMAIL FOR
3 PURPOSED OF SECTION 230.

4 WELL, THERE'S NO EVIDENCE THAT'S BEEN
5 PRESENTED THAT WOULD SUGGEST THAT LAYER42 DOT NET DID
6 ANYTHING OF THE KIND THAT WOULD QUALIFY THEM AS A
7 DEVELOPER OF INFORMATION, NOT EVEN REVIEWING OR EDITING
8 PORTIONS OF THE MATERIAL PLACED ON THE WEBSITE. AND I
9 WOULD SUBMIT ON THAT, YOUR HONOR.

10 THE COURT: ALL RIGHT. WE'LL HAVE TO BREAK
11 FOR THE DAY. WHEN ARE COUNSEL AVAILABLE TO CONCLUDE?

12 MR. KENDALL: YOUR HONOR, IF WE GO TOMORROW,
13 THE PROBLEM IS I WON'T HAVE MY PARTNER WITH ME,
14 MS. SEIGLE. I COULD BE AVAILABLE IN THE MORNING BUT SHE
15 CAN'T. AND THEN ON FRIDAY I AM AVAILABLE GENERALLY.
16 THE DIFFICULTY IS I DON'T KNOW IF MY CLIENT IS AVAILABLE
17 FRIDAY. I KNOW HE IS AVAILABLE TOMORROW MORNING. AND
18 ALTHOUGH I WOULD GREATLY LIKE TO AVOID APPEARING WITHOUT
19 MY PARTNER, IF THAT'S THE ONLY WAY WE CAN GET THIS DONE,
20 I THINK THAT'S WHAT WE WILL HAVE TO DO.

21 THE COURT: WHAT'S THE PLAINTIFF'S
22 AVAILABILITY?

23 MR. KENDALL: JUST LASTLY, YOUR HONOR, I DO
24 HAVE SOME PROBLEMS IN THE AFTERNOON, WHICH I WOULD HAVE
25 TO TRY TO RESCHEDULE.

26 THE COURT: AFTERNOON TOMORROW?

27 MR. KENDALL: I HAVE PROBLEMS BEING HERE IN
28 THE AFTERNOON, BUT THAT'S DEPENDING ON WHERE WE ARE I

1 MAY BE ABLE TO.

2 THE COURT: WHAT IS YOUR AVAILABILITY, COUNSEL
3 FOR PLAINTIFF?

4 MR. GATTI: I HAVE -- ON FRIDAY MORNING I HAVE
5 A SET SUMMARY JUDGMENT HEARING IN ANOTHER COURT. I HAVE
6 CONFLICTS TOMORROW MORNING. SO EITHER -- DEPENDING ON
7 WHAT THE COURT, OBVIOUSLY, WISHES TO DO, I -- THERE ARE
8 SIMILAR CONFLICTS TO WHAT MR. KENDALL HAD THE OTHER DAY,
9 BUT I'M AVAILABLE IN THE AFTERNOON. I'M ALSO AVAILABLE
10 ON FRIDAY AFTERNOON.

11 THE COURT: IS EVERYONE AVAILABLE FRIDAY
12 AFTERNOON ASIDE FROM MR. ADELMAN HIMSELF?

13 MR. KENDALL: I'LL CHECK WITH MR. ADELMAN.

14 (BRIEF PAUSE IN PROCEEDINGS)

15 MR. KENDALL: YOUR HONOR, MR. ADELMAN IS
16 AVAILABLE FRIDAY. THE ONLY PROBLEM FROM HIS POINT OF
17 VIEW IS HE HAS TO COME DOWN FROM THE BAY AREA EACH TIME.
18 HE WAS GOING TO STAY OVERNIGHT TONIGHT IN CASE THIS
19 HAPPENED SO IT MEANS ANOTHER TRIP, WHICH IS OBVIOUSLY
20 NOT CONVENIENT. BUT ON THE OTHER HAND, IT SEEMS AS IF
21 FRIDAY AFTERNOON MAY BE THE FIRST DAY WHEN WE CAN ALL
22 GATHER TOGETHER.

23 THE COURT: WELL, THEN WE'LL START AT 1:45 ON
24 THE 18TH. AND PLAN TO CONCLUDE BY 4:00 O'CLOCK WITH
25 EVERYTHING. OKAY. THANK YOU ALL VERY MUCH.

26 WITH RESPECT TO THIS BLOW-UP, LET'S TAKE UP
27 HOW WE MARK IT AND WHAT WE MARK IT AS ON FRIDAY. I
28 THINK EVERYBODY KNOWS EXACTLY WHAT IT IS, BUT LET'S NOT

1 FORGET.

2 MR. GATTI: THANK YOU, YOUR HONOR.

3 MR. KENDALL: THANK YOU.

4 THE COURT: THANK YOU ALL, COUNSEL.

5 (PROCEEDINGS ADJOURNED AT 4:34 P.M.)

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