

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT H

HON. ALLAN J. GOODMAN, JUDGE

BARBRA STREISAND,

)
)
PLAINTIFF,)

VS.)

) NO. SC 077257
)

KENNETH ADELMAN, ET AL.,)

)
)
DEFENDANTS.)

FRIDAY, JULY 18, 2003

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FOR PLAINTIFF: JOHN M. GATTI, ATTORNEY AT LAW
JONATHAN E. STERN, ATTORNEY AT LAW

FOR DEFENDANT ADELMAN:
RICHARD B. KENDALL, ATTORNEY AT LAW
LAURA A. SEIGLE, ATTORNEY AT LAW

FOR LAYER42.NET: DANIEL L. CASAS, ATTORNEY AT LAW

BUFORD J. JAMES
OFFICIAL REPORTER 9296
1633 PURDUE AVENUE
WEST LOS ANGELES, CALIFORNIA 90025

1 FRIDAY, JULY 18, YEAR 2003; LOS ANGELES, CALIFORNIA

2 1:45 P.M.

3
4 THE COURT: GOOD AFTERNOON.

5 MR. KENDALL: GOOD AFTERNOON.

6 THE COURT: COULD WE HAVE APPEARANCES AGAIN.
7 WE HAVE A SLIGHTLY DIFFERENT GROUP TODAY THAN WEDNESDAY.

8 MR. STERN: GOOD AFTERNOON. MY NAME IS
9 JONATHAN STERN OF ALSCHULER GROSSMAN STEIN AND KAHAN ON
10 BEHALF OF PLAINTIFF BARBRA STREISAND.

11 MR. GATTI: GOOD AFTERNOON, YOUR HONOR, JOHN
12 GATTI ON BEHALF OF ALSCHULER GROSSMAN STEIN & KAHAN ON
13 BEHALF OF BARBRA STREISAND AS WELL.

14 MR. KENDALL: GOOD AFTERNOON, YOUR HONOR,
15 RICHARD KENDALL, IRELL AND MANELLA, ON BEHALF OF
16 DEFENDANTS KENNETH ADELMAN AND PICTOPIA DOT COM.

17 MS. SEIGLE: GOOD AFTERNOON, YOUR HONOR, LAURA
18 SEIGLE, IRELL & MANELLA, FOR DEFENDANTS KENNETH ADELMAN
19 AND PICTOPIA DOT COM.

20 THE COURT: GOOD AFTERNOON.

21 MR. KENDALL: YOUR HONOR, I SHOULD JUST LET
22 YOU KNOW THAT I'VE HEARD THAT COUNSEL -- I'M NOT SURE
23 IT'S THE SAME ONE, PROBABLY FROM THE SAME FIRM, BUT NOT
24 THE SAME INDIVIDUAL LAWYER -- WAS PLANNING TO BE HERE
25 FOR LAYER 42 DOT NET, BUT I THINK THERE WAS A CLOSURE OF
26 THE RUNWAYS AT SANTA MONICA AIRPORT FOR A WHILE SO HE
27 TOOK A COMMERCIAL FLIGHT.

28 AND I DON'T KNOW ANYTHING ABOUT WHEN HE'S

1 SCHEDULED TO ARRIVE OR WHETHER HE'D WANT TO BE HERE FOR
2 ANYTHING OTHER THAN ANY FURTHER DISCUSSION ON THE CDA,
3 SECTION 230. MY GUESS IS NOT, SINCE THEY HAVEN'T
4 PARTICIPATED, BUT I SHOULD JUST BRING THAT TO THE
5 ATTENTION OF THE COURT. I HAVE HAD NO CONTACT WITH HIM
6 SO I HAVE NO MORE INFORMATION.

7 THE COURT: OKAY. THANK YOU. ASSUMEDLY, THIS
8 THIS GENTLEMAN HAS A CELL PHONE, OR LADY HAS A CELL
9 PHONE.

10 MR. KENDALL: PERHAPS, BUT I WOULDN'T HAVE THE
11 NUMBER. I DON'T KNOW IF --

12 THE COURT: ACTUALLY, MY POINT WAS THE OTHER
13 WAY. HE COULD CALL OR SHE COULD CALL.

14 MR. KENDALL: YES. VERY GOOD POINT.

15 THE COURT: AND SINCE THERE WAS NO
16 REPRESENTATION BY LAYER42 -- WELL, LET'S JUST PROCEED.

17 LET ME BEGIN BY ASKING COUNSEL WHERE DO YOU
18 WANT TO PICK UP. SHOULD WE PICK UP WITH THE THIRD CAUSE
19 OF ACTION AND WHETHER IT STATES ANYTHING THAT'S
20 INDEPENDENT OF THE CODIFIED TORTS, OR AT SOME OTHER
21 POINT?

22 MR. GATTI: I THINK WHEN WE BROKE TO HAVE OUR
23 DISCUSSION ABOUT THE CDA, I THINK I WAS IN THE
24 DISCUSSION OF THE THREE CAUSES OF ACTION. AND SO I
25 WOULD --

26 THE COURT: THAT WOULD BE A GOOD PLACE TO
27 RESUME, THEN.

28 MR. GATTI: I WOULD THINK. THAT WOULD BE MY

1 PREFERENCE.

2 MR. KENDALL: I THINK THAT'S LOGICAL. I THINK
3 IT WOULD BE BEST NOT TO RECOVER THE OLD GROUND ON THE
4 FIRST TWO THAT HE HAS ALREADY COVERED AND JUST MOVE TO
5 THE THIRD. BUT I WON'T HAVE MUCH INFLUENCE OVER HERE,
6 I'M SURE.

7 THE COURT: OKAY. MR. GATTI, GO AHEAD.

8 MR. GATTI: THANK YOU, YOUR HONOR.

9 THE COURT: OH, BY THE WAY, IT WOULD BE NICE
10 IF WE COULD CONCLUDE BY 4:00 O'CLOCK TODAY WITH RESPECT
11 TO ALL PENDING MATTERS.

12 MR. KENDALL: YOUR HONOR, JUST ONE OTHER
13 HOUSEKEEPING MATTER THAT I JUST BRING UP NOW BECAUSE I
14 DON'T WANT TO FORGET IT LATER. OF COURSE EITHER OF US
15 HAS ANY IDEA WHETHER THE COURT IS GOING TO BE PREPARED
16 TO RULE TODAY.

17 THE COURT: I'LL ANSWER THAT QUESTION RIGHT
18 AWAY. THE ANSWER TO THAT QUESTION IS NO, BUT GO AHEAD.

19 MR. KENDALL: I SUSPECTED AS MUCH. SO THAT
20 RAISES THE QUESTION OF THE DEMURRER, BECAUSE WE HAVE A
21 DEMURRER THAT WOULD BE DUE --

22 MS. SEIGLE: A WEEK FROM MONDAY.

23 MR. KENDALL: -- A WEEK FROM MONDAY, AND IT'S
24 OBVIOUSLY NOT PARTICULARLY EFFICIENT. I THINK, IF
25 MRS. STREISAND CONSENTS AND WE CONSENT, IT CAN BE BUMPED
26 FOR MORE TIME. AND WHAT I WOULD SUGGEST IS THAT WE
27 EITHER SET A NEW FIRM DATE OR SET A DATE THAT WILL FLOAT
28 WITH THE ENTRY OF THE COURT'S ORDER, GIVING US PERHAPS

1 THE NORMAL -- GIVING US A WEEK TO FILE IT AFTER THE
2 COURT'S ORDER AND THEN THE NORMAL NOTICE PERIOD AFTER
3 THAT FOR THE HEARING, BUT THAT'S JUST MY SUGGESTION.

4 MR. GATTI: I HAVE NO OBJECTION TO
5 ACCOMMODATING WHAT WOULD BE A REASONABLE SCHEDULE.

6 THE COURT: THEN THE ORDER WOULD BE THAT ANY
7 DEMURRER OR MOTION TO STRIKE WOULD BE FILED SEVEN
8 CALENDAR DAYS AFTER A RULING ON THE MATTERS THAT ARE
9 PENDING TODAY. OKAY.

10 MR. KENDALL: YOUR HONOR, I THINK IT SHOULD BE
11 ANY RESPONSIVE PLEADING.

12 THE COURT: THAT'S FINE. THAT'S MORE
13 APPROPRIATE, YES. I WOULD HOPE TO BE ABLE TO RULE ON
14 THESE MATTERS IN THE MONTH OF AUGUST. LET ME LEAVE IT
15 THAT WAY.

16 MR. KENDALL: THEN I SHOULD ADVISE THE COURT
17 OF MY VACATION PLAN, WHICH IS, I WILL BE --

18 THE COURT: WHICH IS ONE REASON WHY I CAN'T
19 RULE UNTIL AUGUST.

20 MR. KENDALL: I WILL BE OUT BEGINNING THE
21 LAST -- THE LAST MONDAY IN JULY, THE 29TH THROUGH THE
22 18TH OF AUGUST. TO THE 18TH. I THINK THE 18TH IS THE
23 MONDAY.

24 THE COURT: WELL, THEN THAT GIVES ME ENOUGH
25 TIME. I WILL NOT RULE BEFORE YOU RETURN.

26 MR. GATTI: I WOULD JUST LIKE TO STATE FOR THE
27 RECORD THAT I WOULD LIKE MR. KENDALL'S VACATION
28 SCHEDULE.

1 MR. KENDALL: HARD EARNED, I THINK.

2 MR. GATTI: I'M SURE IT WAS, BUT IT SOUNDS
3 VERY NICE.

4 THE COURT: OKAY. I'M SURE WE CAN ACCOMMODATE
5 THAT. OKAY. THANK YOU.

6 NOW, AT THIS POINT, MR. GATTI, GO AHEAD.

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

8 ONE OF THE ISSUES WE WERE TALKING ABOUT AND WE
9 HAVE TALKED ABOUT UP TO THIS POINT IS THE ISSUE OF -- IN
10 CONNECTION WITH THE SLAPP SUIT AND AS IT RELATES TO
11 THE -- ALL OF THE CAUSES OF ACTION, THIS ISSUE OF PUBLIC
12 INTEREST. AND WE WERE TALKING EARLIER ABOUT THE COASTAL
13 ZONE STATUTES AND HAVING A STATUTORY SCHEME THAT
14 APPEARED TO SUGGEST THAT THERE WAS A PUBLIC INTEREST IN
15 THE COASTAL ZONE. AND WHAT I WOULD ASK THE COURT TO
16 TAKE JUDICIAL NOTICE OF IS GOVERNMENT CODE SECTION
17 65060.1 WHICH STATES --

18 THE COURT: ONCE AGAIN, COUNSEL.

19 MR. GATTI: YES, YOUR HONOR. IT'S GOVERNMENT
20 CODE SECTION 65060.1. AND THIS IS THE STATUTORY SCHEME
21 THAT SETS FORTH THE PLANNING DISTRICTS AND PLANNING
22 ZONES WITH RESPECT TO DEVELOPMENT. AND WHAT 65060.1
23 SPECIFICLY STATES IS, I QUOTE, THE LEGISLATURE FINDS AND
24 DECLARES THAT THE PEOPLE OF CALIFORNIA HAVE A
25 FUNDAMENTAL INTEREST IN THE ORDERLY DEVELOPMENT OF THE
26 URBAN REGIONS OF THE STATE IN WHICH LARGE SEGMENTS OF
27 THE STATE'S POPULATION ARE CONCENTRATED.

28 THAT IS A DECLARATION THAT SAYS THAT THE

1 PEOPLE HAVE A FUNDAMENTAL INTEREST IN THE DEVELOPMENT OF
2 OUR COMMUNITIES OR URBAN AREAS. THAT DOESN'T MEAN THAT
3 BECAUSE WE HAVE A FUNDAMENTAL INTEREST IN THAT
4 DEVELOPMENT AND WE SET ZONING ORDINANCES AND WE SET UP
5 ZONING BOARDS, THAT THEN ANYONE'S RIGHT TO PRIVACY IS
6 IMPACTED OR LESSENERED MERELY BECAUSE OF THIS STATUTORY
7 SCHEME. AND THAT IS THE SAME ARGUMENT THAT THE
8 DEFENDANTS ARE TRYING TO MAKE WITH THIS ARGUMENT
9 REGARDING THE COASTAL ZONE.

10 THIS GOES THROUGH THE WHOLE LEGISLATIVE
11 PROCESS AND SCHEME THAT WE HAVE IN CALIFORNIA. WE
12 HAVE -- FOR INSTANCE, THE FISH AND GAME CODE HAS A
13 SECTION WHICH IS 8230 WHICH SAYS THAT "THE LEGISLATURE
14 FINDS AND DECLARES THAT COMMERCIAL SALMON FISHING IS IN
15 THE PUBLIC INTEREST AND THE PRESERVATION OF COMMERCIAL
16 SALMON FISHING DIRECTLY AFFECTS THE HEALTH AND WELFARE
17 OF THE PUBLIC."

18 WELL, OF COURSE IT DOES. WE ALL HAVE A PUBLIC
19 INTEREST IN THAT, BUT THAT DOES NOT MEAN THAT PUBLIC
20 INTEREST NOW WILL TRUMP OR WILL LESSEN ANYONE'S
21 EXPECTATION OF PRIVACY. THAT IS AN ARGUMENT -- AND I
22 COULD GO THROUGH VARIOUS OTHER CODE SECTIONS THAT GO
23 THROUGH THE SAME TYPE OF REASONING. WE HAVE CODE
24 SECTIONS THAT DEAL WITH THE PRESERVATION OF LANDS, RIVER
25 LAND AND WET LANDS.

26 THAT DOES NOT MEAN THAT IF YOU LIVE NEAR A
27 RIVER OR A WET LANDS THAT NOW YOU HAVE A LESSER
28 EXPECTATION OF PRIVACY. IT IS THE COMMUNITY NORM OF

1 WHAT THE EXPECTATION OF PRIVACY IS IN ONE'S HOME, IN
2 ONE'S SECLUDED YARD. THAT IS THE ISSUE HERE. AND THERE
3 IS NOTHING THAT THE COASTAL ZONE STATUTES THAT THE
4 DEFENDANTS HAVE CITED TO THAT WOULD BE ANY DIFFERENT
5 THAN THE FUNDAMENTAL RIGHT IN URBAN DEVELOPMENT THAT WE
6 HAVE, AND THAT IS NOT THE TRIGGER OR THE HOOK THAT WILL
7 TRUMP ONE'S RIGHT TO PRIVACY.

8 WE ALSO HAVE TALKED ABOUT WHETHER OR NOT ONE
9 HAS THE RIGHT TO EXPECTATION OF PRIVACY IN THE HOME
10 VERSUS THE BACKYARD. AND IN THIS PARTICULAR CASE I
11 THINK IT'S QUITE CLEAR, I DON'T NEED TO GO OVER IT
12 AGAIN, THE BACK YARD HERE IN -- AT ISSUE IS SECLUDED.

13 THE EVIDENCE IS THAT YOU CANNOT SEE THIS
14 BACKYARD AND THE SECLUDED AREA WITHOUT TAKING THE MEANS
15 THAT MR. ADELMAN DID IN THIS PARTICULAR CASE. AND I
16 WOULD CITE THE COURT TO SEVERAL DIFFERENT CASES THAT
17 HAVE FOUND THAT INDIVIDUALS HAVE A REASONABLE
18 EXPECTATION OF PRIVACY --

19 THE COURT: COUNSEL, HOLD ON JUST A SECOND.

20 COUNSEL, WE HAVE A MESSAGE NOW FROM MR. CASAS,
21 OR FROM HIS OFFICE. APPARENTLY MR. CASAS HAS NOW LANDED
22 IN BURBANK. FOR THOSE OF YOU WHO KNOW AND LOVE THE LOS
23 ANGELES FREEWAY SYSTEM, ON ANY FRIDAY AFTERNOON IS
24 CHALLENGING AND THE FACT THAT ONE RAIN DROP FELL DURING
25 THE LUNCH HOUR MEANS THAT WE'RE IN GOOD LUCK.

26 MR. GATTI: THIS MIGHT BE STORM WATCH, YOUR
27 HONOR.

28 THE COURT: FOR L.A.

1 I'M SORRY FOR THE INTERRUPTION. LET'S SEE IF
2 WE CAN FIND OUT IF HE MIGHT GET HERE.

3 (BRIEF PAUSE IN PROCEEDINGS)

4 THE COURT: COUNSEL, WHAT DO YOU WANT TO DO AT
5 THIS POINT?

6 MR. GATTI: MY PREFERENCE WOULD BE TO PROCEED,
7 BUT I ALSO DON'T WANT TO PREJUDICE ANYONE'S INTEREST.

8 MR. KENDALL: I THINK MY PREFERENCE WOULD BE
9 TO PROCEED TOO. WE NEED TO GET DONE. I'M SURE
10 EVERYBODY -- I HAVE NO IDEA WHETHER THE COURT HAS A
11 TRIAL NEXT WEEK, BUT YOU HAVE GIVEN US A TREMENDOUS
12 AMOUNT OF TIME THIS WEEK.

13 THE COURT: I HAVE A FEW OTHER THINGS TO DO.

14 MR. KENDALL: WE ALL PROBABLY HAVE SCHEDULES
15 NEXT WEEK. IT'S REGRETTABLE THAT HE'S LATE, BUT THAT IS
16 COUNSEL'S RESPONSIBILITY.

17 THE COURT: THAT'S GOING TO BE MY CONCLUSION
18 AS WELL. OKAY.

19 OKAY, SO MR. GATTI, NOW THAT YOU HAVE BEEN
20 INTERRUPTED SEVERAL TIMES.

21 MR. GATTI: THAT'S FINE, YOUR HONOR.

22 I WAS DISCUSSING THE REASONABLE EXPECTATION OF
23 PRIVACY IN ONE'S HOME. I HAVE CITED CASES OF THAT AND
24 ALSO THE REASONABLE EXPECTATION OF PRIVACY WHICH HAD
25 COME UP WITH RESPECT TO A SECLUDED BACKYARD WHERE
26 SOMEONE IN MRS. STREISAND'S SITUATION HAS - THE EVIDENCE
27 IS HAS CREATED A SECLUDED AREA, HAS TAKEN GREAT PAINS TO
28 KEEP THAT SECLUSION TO HERSELF AND TO PROTECT THAT RIGHT

1 THAT SHE HAS.

2 AND THE CASES THAT DEAL DIRECTLY WITH ISSUES
3 OF PRIVACY IN ONE'S BACKYARD, IN A SECLUDED BACKYARD,
4 THE CASE I WOULD CITE THE COURT TO IS PEOPLE VERSUS
5 WINTERS, WHICH IS AT 149 CAL AP 3D --

6 THE COURT: COUNSEL, LET ME JUST ASK YOU, TO
7 THE EXTENT WE'RE TALKING ABOUT CRIMINAL CASES, ARE THESE
8 CASES ARISING OUT OF THE FOURTH AMENDMENT, THE FIRST
9 AMENDMENT, OR THE CALIFORNIA RIGHT TO PRIVACY, ARTICLE
10 ONE?

11 MR. GATTI: THESE CASES -- THIS PARTICULAR
12 CASE IS A CRIMINAL CASE; HOWEVER, WHAT WE ARE TALKING
13 ABOUT IN THE CONTEXT OF THE -- THE FACTS ARE CRIMINAL,
14 HAVE TO DO WITH A CRIMINAL SITUATION; HOWEVER, THE
15 FUNDAMENTAL PRINCIPLES AND THE PRINCIPLES THAT ARE BEING
16 ANNOUNCED IN THESE PARTICULAR DECISIONS HAVE TO DO WITH
17 THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO PRIVACY THAT IS
18 IN ARTICLE ONE OF THE CALIFORNIA CONSTITUTION AND ALSO
19 THE RIGHT TO PRIVACY PROTECTED BY THE FEDERAL
20 CONSTITUTION, SO IT GOES TO THE FUNDAMENTAL RIGHT OF
21 PRIVACY.

22 THERE ARE -- SOME OF THE FACTS WILL ARISE IN
23 THE CONTEXT OF A CRIMINAL PROCEDURE, BUT IT DOES NOT
24 LESSEN IN ANY WAY THE FUNDAMENTAL HOLDING OF THE --
25 ONE'S RIGHT TO PRIVACY.

26 MR. KENDALL: JUST ONE POINT, YOUR HONOR. IF
27 WHAT IS GOING TO HAPPEN IS THAT WE'RE GOING TO HAVE
28 CASES CITED THAT HAVE NOT BEEN CITED TO THE COURT

1 PREVIOUSLY, WHICH IS ABOUT TO -- HAS JUST HAPPENED, THIS
2 I THINK IS IMPROPER, AND IT CREATES A CERTAIN AMOUNT OF
3 CHAOS, BECAUSE WE DON'T -- WE HAVE NOT BROUGHT WITH US
4 EVERY SINGLE CASE.

5 YOU KNOW, I CAN MAKE A GENERAL POINT ABOUT THE
6 CRIMINAL CASES -- I CAN CITE CASES THAT NO ONE HAS CITED
7 TO THE COURT TOO IN RESPONSE, BUT I WOULD RESPECTFULLY
8 REQUEST THAT THE COURT ASK COUNSEL TO STICK TO THE CASES
9 THAT HAVE BEEN CITED TO THE COURT; OTHERWISE, THIS WILL
10 JUST GO ON AND ON AND ON, AND I THINK THAT'S THE PURPOSE
11 OF BRIEFING.

12 THE COURT: YOU WANT TO RESPOND TO THAT
13 PARTICULAR POINT.

14 MR. GATTI: YES, YOUR HONOR. CASE LAW IS CASE
15 LAW. IF IT APPLIES TO THE CASE -- THERE WAS DISCUSSION
16 THROUGHOUT THIS HEARING THAT CAME UP. OBVIOUSLY WE HAVE
17 CITED THE CASES THAT PROTECT THE PRIVACY OF THE
18 SECLUSION OF ONE'S HOME AND ONE'S BACKYARD. THE ISSUE
19 SEEMED TO BE GOING TOWARD AN ISSUE OF WHETHER OR NOT IF
20 THERE WAS A DIFFERENCE BETWEEN A HOME VERSUS A SECLUDED
21 BACKYARD.

22 AND I BELIEVE, IF THE CASE LAW EXISTS OUT
23 THERE, IT IS PROPER TO SHED LIGHT ON IT AND BRING IT TO
24 THE COURT'S ATTENTION, AS ISSUES AND QUESTIONS HAVE BEEN
25 DEVELOPED IN THIS CASE THAT ARE OBVIOUSLY CONNECTED TO
26 WHAT WE HAVE BEEN DISCUSSING.

27 MR. KENDALL: WELL, THIS IS NOT A NEW ISSUE
28 AND THERE WAS CITATION OF CASES ON THIS PRECISE POINT BY

1 THE PLAINTIFF, AND THERE WAS RESPONSIVE CITATION BY US
2 IN OUR REPLY BRIEF, AND THAT'S THE RECORD THAT WE HAD.
3 OF COURSE, CASE LAW IS CASE LAW AND, OF COURSE, IT'S OF
4 ASSISTANCE TO THE COURT FOR US TO CITE TO THE COURT ALL
5 OF THE RELEVANT CASES, BUT IT'S ALSO VERY HELPFUL TO DO
6 THAT IN THE BRIEFING, WHICH IS WHAT THE RULES NOT ONLY
7 ENCOURAGE BUT, I THINK, REQUIRE COUNSEL ON BOTH SIDES TO
8 DO.

9 MR. GATTI: YOUR HONOR, JUST A BRIEF RESPONSE,
10 WHICH WAS, AS I SAID, IT WAS RAISED MORE IN RESPONSE TO
11 QUESTIONING FROM YOUR HONOR FROM THE BENCH ON THAT ISSUE
12 OF TRYING TO DISTINGUISH BETWEEN THE TWO. AND IN
13 RESPONSE TO THAT QUESTION, I BELIEVE THESE CASES WILL
14 SHED GREAT LIGHT. AND IF IT'S HELPFUL TO THE COURT AND
15 IT IS AN ISSUE THAT THE COURT IS INTERESTED IN, I THINK
16 IT'S OUR OBLIGATION TO PRESENT THE CASE LAW.

17 THE COURT: WELL, IN AT LEAST SOME SENSE EACH
18 OF YOU IS RIGHT, SO WHAT I AM GOING TO ASK THAT YOU DO,
19 ANYBODY WHO CITES A CASE TODAY THAT HASN'T BEEN CITED
20 BEFORE PROVIDE A CITATION TO THE OTHER SIDE, AND THEN BY
21 NEXT FRIDAY YOU CAN EACH FILE ANYTHING YOU'D LIKE WITH
22 RESPECT TO CASES CITED TODAY. OR FOR THAT MATTER,
23 EARLIER. AS LONG AS THEY WEREN'T CITED BEFORE.

24 FOR EXAMPLE, I MENTIONED A CASE WEDNESDAY AND
25 YOU MAY HAVE SOME ADDITIONAL THOUGHTS. AND THEN UNDERSCORE
26 THE WORD "ADDITIONAL," PLEASE. GENERAL ARGUMENT. PUT
27 IT IN THE BRIEF YOU FILE NEXT FRIDAY. CLEARLY SERVE IT ON
28 THE OTHER SIDE.

1 WITH THAT, I WANT TO RETURN TO THE CITATION OF
2 CRIMINAL CASES. I AM CONCERNED ABOUT WHAT IMPACT OR
3 RELEVANCE THEY HAVE IN THE CONTEXT OF THIS RIGHT TO
4 PRIVACY. SO I CERTAINLY HOPE THE CASES YOU'D LIKE TO
5 CITE TO ME SPEAK TO THAT VERY ISSUE AND THAT ISSUE
6 RATHER THAN OR IN ADDITION TO, BUT NOT ONLY THE FOURTH
7 AMENDMENT.

8 MR. GATTI: YES.

9 THE COURT: COULD I HAVE THE CITATION, PLEASE,
10 FOR THAT CASE.

11 MR. GATTI: CERTAINLY, YOUR HONOR. THE CASE
12 AGAIN IS PEOPLE VERSUS WINTERS, AND THE CITATION IS 149
13 CAL AP 3D 705. IT'S A 1983 CASE. AND THE PIN CITE PAGE
14 THAT I WAS -- I'M SORRY, YOUR HONOR. THE WINTERS CASE
15 IS CORRECT. AND THEN ALSO THE -- IF YOU WANT ME TO DO
16 ONE BY ONE.

17 THE COURT: YOU CAN DO THEM ONE BY ONE. WE
18 CAN DISCUSS THEM THEN, THAT'S FINE.

19 MR. GATTI: THE WINTERS CASE IN PARTICULAR HAD
20 TO DO WITH A FENCED BACKYARD WHERE THERE WAS A LOCKED
21 GATE, AND IN THAT THE COURT SAID "A PERSON WHO SURROUNDS
22 HIS BACKYARD WITH A FENCE AND WHEN IT'S ENTRY WITH A
23 GATE LOCKED OR UNLOCKED HAS SHOWN A REASONABLE
24 EXPECTATION OF PRIVACY."

25 THE COURT: RIGHT. THIS IS ON A MOTION TO
26 SUPPRESS THE SEARCH, WASN'T IT, OR THE CONTENTS OF A
27 SEARCH, WASN'T IT?

28 MR. GATTI: IT HAD TO DO WITH A FOURTH

1 AMENDMENT RIGHT, BUT WHAT IT IS TALKING ABOUT IS THE
2 REASONABLE EXPECTATION OF PRIVACY GENERALLY AS A
3 PRINCIPAL AND WHERE DOES ONE HAVE A REASONABLE
4 EXPECTATION OF PRIVACY; AND AS THAT THEN GETS APPLIED IN
5 VARIOUS SITUATIONS.

6 THERE IS NO SPECIAL HOLDING IN THESE CASES
7 THAT I'M CITING TO THAT WILL SAY THAT THIS IS A
8 REASONABLE EXPECTATION OF PRIVACY IN THE CONTEXT OF A
9 FOURTH AMENDMENT RIGHT, BUT IF YOU HAVE SOME OTHER SORT
10 OF TRESPASS OR PRIVACY, THEN YOU HAVE A DIFFERENT
11 EXPECTATION OF PRIVACY --

12 THE COURT: LET ME ASK YOU THIS, COUNSEL.
13 FIRST OF ALL, THIS ARISES UNDER 1538.5 OF THE PENAL
14 CODE, WHICH IS A PENAL CODE PROVISION. AND THIS RAISED
15 A REASONABLE EXPECTATION OF PRIVACY AS USED IN BOTH
16 CIVIL AND CRIMINAL CONTEXT.

17 ANOTHER CASE THAT COMES TO MIND IS HOFFA
18 VERSUS THE UNITED STATES, WHICH MR. HOFFA OR SOMEONE, HE
19 PROBABLY -- MAYBE IT WASN'T MR. HOFFA HIMSELF, BUT MAYBE
20 SOMEONE AFFILIATED WITH HIM WAS IN A PHONE BOOTH, AND
21 THE QUESTION WAS DID THE GOVERNMENT HAVE THE RIGHT TO
22 INTERCEPT THAT PHONE CONVERSATION, DID HE HAVE A
23 REASONABLE EXPECTATION OF PRIVACY THERE.

24 MR. KENDALL: I THINK THAT'S KATZ.

25 THE COURT: THAT'S KATZ?

26 MR. KENDALL: KATZ AGAINST UNITED STATES.

27 THE COURT: WELL, THERE ARE A LOT OF CASES
28 LIKE THAT. KATZ IS ANOTHER EXAMPLE. SO THE CONTEXT IN

1 WHICH THIS CASE AROSE PRESENTS A DIFFICULTY --

2 MR. GATTI: I DON'T --

3 THE COURT: -- TO SUSTAIN YOUR ARGUMENT. SO
4 TELL ME WHY IT DOES.

5 MR. GATTI: THE RIGHT TO PRIVACY, AND THESE
6 CASES ARE TALKING ABOUT GENERALLY THE EXPECTATION --

7 THE COURT: EXCUSE ME, COUNSEL, YOU ARE APTLY
8 CORRECT. IN HOFFA THE GOVERNMENT INFORMANT WAS WEARING
9 A WIRE WHO WAS ENGAGED IN THE CONVERSATION WITH
10 MR. HOFFA HIMSELF. THE QUESTION WAS WHETHER SOMEBODY
11 COULD WEAR A TRANSMITTING DEVICE. IT'S THE SAME ISSUE.
12 THESE CASE ARISE OUR OF THE FOURTH AMENDMENT.

13 MR. GATTI: BUT WHAT THEY STAND FOR, YOUR
14 HONOR, IS THE REASONABLE EXPECTATION OF PRIVACY IN ONE'S
15 SECLUDED AREA, AND THE PRINCIPLES OF THESE CASES AND
16 WHAT THEY STATE AND WHAT THEY STAND FOR HAVE VARYING
17 DIFFERENT APPLICATIONS. AND, YES, THIS -- THIS
18 PARTICULAR CASE I'M TALKING ABOUT HAS TO DO WITH AN
19 APPLICATION IN THE FOURTH AMENDMENT SEARCH AND SEIZURE,
20 BUT ARE WE NOW TO SAY THAT THE FUNDAMENTAL
21 CONSTITUTIONAL REASONABLE EXPECTATION OF PRIVACY IN
22 ONE'S SECLUDED BACKYARD CAN NOW BE VIOLATED BECAUSE YOU
23 LOSE AN EXPECTATION OF PRIVACY IF IT'S A MR. ADELMAN WHO
24 DECIDES TO TAKE THIS ACTION.

25 THERE IS NO CASES AND NO PRINCIPLE THAT WOULD
26 SAY, OH, AN INDIVIDUAL WHO WANTS TO INVADE YOUR PRIVACY
27 AND YOUR SPHERE OF EXPECTATION OF PRIVACY CAN DO SO BUT
28 THE POLICE CANNOT.

1 THE COURT: AREN'T THERE ACTUALLY A NUMBER OF
2 CASES THAT SAY THAT THE FOURTH AMENDMENT CERTAINLY
3 APPLIES, BUT ARE YOU GETTING TO THE POINT THAT THE
4 QUESTION IS WHAT'S REASONABLE AND WHAT'S NOT REASONABLE
5 UNDER ANY CIRCUMSTANCE, WHETHER IT'S A GOVERNMENT
6 INTRUSION OR A PRIVATE INTRUSION?

7 MR. GATTI: WHAT I'M SAYING IS THAT WE'RE
8 TALKING ABOUT THAT REASONABLE -- WHAT IS REASONABLE AND
9 WHERE CAN YOU EXPECT THAT REASONABLE EXPECTATION OF
10 PRIVACY AND IN WHAT ZONES. AND THESE CASES, ALTHOUGH
11 BECAUSE THE SITUATION IT'S NORMALLY GOING TO COME UP,
12 THAT ISSUE IS NORMALLY GOING TO COME UP AND BE DISCUSSED
13 IN THE CONTEXT OF, MOST LIKELY, A SEARCH.

14 BECAUSE MOST LIKELY -- I MEAN, THERE IS A CASE
15 I'M GOING TO TALK ABOUT WHICH IS AERIAL HELICOPTER.
16 OTHER THAN SOMEONE WITH MR. ADELMAN'S MEANS, MOST
17 INDIVIDUALS DON'T HAVE THE WHEREWITHAL TO FLY THEIR
18 PRIVATE HELICOPTER ALONG THE COAST AND DO WHAT HE'S
19 DOING.

20 USUALLY THIS IS A SITUATION THAT ARISES WITH
21 THE FUNDING OF A GOVERNMENT ENTITY WHO HAS A HELICOPTER
22 AND DOES THAT. OTHERS DON'T HAVE IT. SO THIS IS AN
23 INTERESTING SITUATION. WE HAVE SOMEBODY WHO IS, IN HIS
24 OWN WORDS, BASICALLY TAKING THE -- HE'S ACTING AS IF
25 HE'S PART OF A - I'M NOT SUGGESTING HE IS A STATE PARTY,
26 BUT HE'S ACTING IN THE SITUATION WHERE YOU WOULD
27 NORMALLY FIND A STATE ACTOR ACTING. AND HE'S DOING IT
28 IN THE NAME OF POLICING. HE'S -- AND IT'S SOMEWHAT OF A

1 VIGILANTE-ISM.

2 AND WHAT WE HAVE HERE IS THE STILL EXPECTATION
3 OF PRIVACY IS STILL PROTECTED, WHETHER IT'S AN
4 INDIVIDUAL, A PRIVATE CITIZEN DOING IT, VERSUS A STATE
5 ACTOR. AND THE APPLICATION OF THESE CASES AND
6 DISCUSSIONS WITH RESPECT TO THE REASONABLE EXPECTATION
7 OF PRIVACY AND THE ZONES OF PRIVACY IN ONE'S BACKYARD
8 WOULD BE SIMILAR TO THE CASES WHERE IT WOULD BE
9 PERSUASIVE ON THE COURT.

10 WE HAVE LOOKED AT CASES THAT ARE OUTSIDE THE
11 JURISDICTION, HAS PERSUASIVE WEIGHT TO IT, AND THIS IS
12 THE SAME SITUATION. IT'S DIFFICULT TO FATHOM IN
13 INDIVIDUAL CIVIL ACTIONS WHERE THESE SITUATIONS WOULD
14 COME UP. THEY TEND TO -- THE PRIVACY INTERESTS TEND TO
15 BE AFFECTED IN THE CONTEXT OF A STATE ACTOR.

16 AND THE WINTERS CASE, WHAT I WAS ABOUT TO CITE
17 TO, WHICH IS NO LESS APPLICABLE IN THIS SITUATION THAN
18 ANY OTHER, TALKING ABOUT IF YOU WERE TO LET SOMEBODY
19 INVADE THAT SECLUDED BACKYARD WHEN IT'S BEEN SECLUDED
20 AND YOU HAVE A GATE AND YOU'VE FENCED IT, THE COURT
21 STATED, "TO CONTEMPLATE A CONTRARY CONCLUSION, MEANING
22 CONTRARY TO ALLOWING AN EXPECTATION OF PRIVACY, WOULD
23 ITSELF LEND CREDENCE TO A SPECTER OF CITADEL-LIKE
24 FORTIFICATIONS IN ORDER TO SAFEGUARD AN OTHERWISE
25 OBJECTIVELY REASONABLE EXPECTATION OF PRIVACY OF THE
26 CONTEMPORARY RURAL DWELLER, A REFUGE NEITHER REQUIRED BY
27 NOR COMPATIBLE WITH ESTABLISHED CONSTITUTIONAL
28 PRINCIPLES."

1 THE COURT: WELL, COUNSEL, I APPRECIATE YOUR
2 CITATION OF THE WINTERS, BUT ARE YOU FAMILIAR WITH
3 CALIFORNIA VERSUS CIRAOLO, 478 U.S. 1014, IN WHICH THE
4 UNITED STATES SUPREME COURT HELD THAT A WARRANTLESS
5 AERIAL OBSERVATION OF A FENCED-IN BACK YARD WITHIN THE
6 CURTILAGE OF A HOME WAS NOT UNREASONABLE UNDER THE
7 FOURTH AMENDMENT?

8 MR. GATTI: THERE ARE CERTAIN SITUATIONS, YOUR
9 HONOR. AND USUALLY THOSE CASES -- I CAN'T SPEAK
10 SPECIFICLY TO THAT CASE, BUT USUALLY THERE ARE -- IN THE
11 POLICE SITUATION YOU HAVE EXIGENT CIRCUMSTANCES, AND YOU
12 HAVE SITUATIONS THAT -- EMERGENCY SITUATIONS, PURSUIT
13 SITUATIONS, THAT, YES, THEY WILL ALLOW SOMEBODY WHO IS
14 DOING CRIMINAL ACTIVITY OR SOMEBODY WHO IS EVADING THE
15 POLICE, AND IN THE CONTEXT --

16 THE COURT: WELL, COUNSEL, THIS WAS MARIJUANA
17 GROWING IN SOMEBODY'S BACKYARD, JUST AS IN WINTERS, SO
18 HOW -- I DON'T THINK THIS CASE -- CIRAOLO TURNS ON
19 EXIGENT CIRCUMSTANCES.

20 MR. GATTI: THE --

21 THE COURT: NOT ONLY THAT, BUT OUR STATE
22 SUPREME COURT FOUND IT DID VIOLATE THE FOURTH AMENDMENT.
23 IT WAS REVERSED BY THE U.S. SUPREME COURT. AT THE SAME
24 TIME CALIFORNIA SINCE -- I THINK IT WAS PROPOSITION 8
25 ABOUT 21 YEARS AGO -- RULED THAT CALIFORNIA WAS CALLED
26 THE FEDERAL TEST IN FOURTH AMENDMENT CASES. THAT'S
27 CLEARLY NOT THE LAW IN THE ARTICLE IN SECTION 8.

28 EXCUSE ME, IS IT SECTION 8 IN THE PRIVACY

1 STATUTE.

2 MR. GATTI: I THINK IT'S SECTION 1.

3 THE COURT: ALL RIGHT. ARTICLE ONE, SECTION
4 ONE, OF THE CALIFORNIA CONSTITUTION. OKAY, GO AHEAD.

5 MR. GATTI: THE OTHER CASE I WISH TO CITE TO
6 THE COURT IS PEOPLE VERSUS LOVELACE, WHICH IS AT 116 CAL
7 AP 3D 541; AND THE PIN CITE, THIS IS AT PAGE 549.

8 AND IN THIS OPINION THE COURT CITING TO ALSO
9 CASES, THE JACOBS CASE AND THE DEAN CASE, SAID THAT WE
10 ARE OF THE OPINION THAT APPELLANT AND HIS FAMILY HAD A
11 SUFFICIENT EXPECTATION, SUBJECTIVE EXPECTATION, OF
12 PRIVACY IN THE BACKYARD.

13 THE REPAIR -- THIS HAPPENED TO BE WITH WHETHER
14 OR NOT -- THERE WAS A SIX FOOT FENCE AND THERE WAS SOME
15 ISSUES WITH REPAIR OF THAT FENCE AND WHETHER OR NOT
16 SOMEONE COULD -- WHETHER THAT AFFECTED OR IMPACTED THE
17 REASONABLE EXPECTATION OF PRIVACY.

18 THE COURT STATED THAT THE REPAIR OF THE
19 SIX-FOOT HIGH FENCE DEMONSTRATED IT WAS OBJECTIVELY
20 REASONABLE APPELLANT AND HIS FAMILY TO ENTERTAIN SUCH A
21 SUBJECTIVE EXPECTATION OF PRIVACY.

22 AT THAT SAME PAGE THE COURT REFERS TO PEOPLE
23 VERSUS SNEED, IT'S AT 32 CAL AP. (3) (D) 535, AND THE
24 COURT IN THIS CASE HELD THAT THE GOVERNMENT OFFICIALS
25 FLEW THE HELICOPTER AT A UNREASONABLE LOW HEIGHT IN
26 ORDER TO LOOK FOR MARIJUANA PLANTS. THE HOLDING WAS
27 THAT THAT INTRUDED INTO THE, QUOTE, SERENITY AND PRIVACY
28 OF AN INDIVIDUAL'S BACKYARD. MOREOVER, THE PRIVACY

1 INTEREST IN ONE'S BACKYARD WAS APTLY DESCRIBED BY THE
2 COURT IN DEAN, WHICH IT GOES ON TO SAY "JUDICIAL
3 STATEMENTS LIKE THE FOREGOING DISCLOSE THAT MANKIND'S
4 COMMON HABITS IN THE USE OF DOMESTIC AND BUSINESS
5 PROPERTY SUPPLY A PRIME MEASURE OF THE REASONABLENESS OF
6 EXPECTATION OF PRIVACY."

7 GOES ON TO SAY, "ONE WHO BUILDS A SWIMMING
8 POOL AND SUN BATHING AREA IN HIS BACKYARD EXPECTS
9 PRIVACY, OPEN PAREN, HENCE IMMUNITY, CLOSE PAREN, FROM
10 AERIAL INSPECTION. AREAS REASONABLY USED IN ORDINARY
11 BUSINESS OPERATIONS ARE ASSUMEDLY ENTITLED TO SIMILAR
12 IMMUNITY. SUCH AREAS ARE EXPECTEDLY PRIVATE ACCORDING
13 TO THE COMMON HABITS OF MANKIND, SO WAS THE AREA EXPOSED
14 TO HELICOPTER SURVEILLANCE IN PEOPLE VERSUS SNEED," AND
15 IT GUESS ON.

16 THE EXPECTATION OF PRIVACY OR THE PRIVACY
17 INTERESTS AT STAKE OR THE SPHERE OF SECLUSION THAT'S
18 BEING IMPACTED IN THIS CASE, IS NOT AFFECTED BY, OH, YOU
19 HAVE THAT SPHERE OF EXPECTATION OF PRIVACY. IF IT'S A
20 CRIMINAL MATTER VERSUS IF AN INDIVIDUAL HAS THE MEANS TO
21 DO THIS AND DO THAT ON TO A FELLOW CITIZEN. IT'S NO --
22 THE EXPECTATION OF PRIVACY IS NO LESS AND --

23 THE COURT: WOULD IT MAKE ANY DIFFERENCE TO
24 YOUR ARGUMENT THAT -- REMEMBER, HOLMES RELIED ON SNEED,
25 AND SNEED WAS OVERRULED IN PEOPLE VERSUS COOK, OR
26 APPARENTLY SO, AND PROBABLY ON THIS POINT. SHOULD WE
27 JUST GO TO CIRAOLO FOR GUIDANCE SINCE IT'S A MUCH LATER
28 U.S. SUPREME COURT DETERMINATION ON APPARENTLY THE SAME

1 ISSUE.

2 MR. GATTI: THESE CASES ARE APPLICABLE LAW IN
3 CALIFORNIA. THEY ARE GOOD LAW. AND THEY STAND FOR THE
4 GENERAL PROPOSITIONS, AND NONE OF THOSE GENERAL
5 PROPOSITIONS PERTAINING TO THE PRIVACY ISSUE HAVE BEEN
6 OVERTURNED. IN FACT, WE KNOW FROM THE CALIFORNIA
7 CONSTITUTION ARTICLE 1, SECTION 1, AND THE MOST RECENT
8 OF CASES THAT WE'VE CITED IN OUR PAPERS, LAWRENCE V
9 TEXAS FOR THE PROPOSITION THAT THE HOME --

10 THE COURT: WELL, LAWRENCE IS SOMETHING THAT
11 HAPPENED IN A BEDROOM, NOT IN THE BACKYARD AND NOT BY
12 AERIAL SURVEILLANCE. I THINK THAT EVERYBODY IN THE
13 COURTROOM WOULD CONCEDE THAT IF THE GOVERNMENT WERE IN
14 THE CLOSET WATCHING THE PARTIES IN THE TEXAS CASE THAT
15 WOULD BE AN UNPERMITTED, IMPERMISSIBLE, AND
16 CONSTITUTIONALLY VIOLATIVE ACT OF CONDUCT ON THE
17 GOVERNMENT'S PART.

18 MR. GATTI: BUT WHAT LAWRENCE DOES SAY, AND I
19 DON'T THINK THERE CAN BE ANY DISPUTE AS TO THE FINDING.
20 IT IS AN ANNUNCIATION FROM THE SUPREME COURT OF THE
21 UNITED STATES, IS THAT'S HOME IS THE MOST PRIVATE OF
22 PLACES.

23 THE COURT: RIGHT. THE INTERIOR OF THE HOME
24 FOR SURE, AND THAT'S BEEN THE CASE SINCE PRIOR TO
25 GRISWALD. BUT WE'RE DEALING WITH THE BACKYARD EXTERIOR.
26 AND GRANTED WE HAVE SOME VERY HIGH PERIMETER FENCING
27 HERE. THAT'S WHY CIRAULO, WHICH IS AN AERIAL
28 SURVEILLANCE CASE, IF YOU WILL, SEEMS TO BE MORE

1 APPOSITE THAN CASES THAT DEAL WITH WHAT MIGHT OCCUR
2 INSIDE THE HOUSE. AND AT THIS STAGE, WHILE WE'RE
3 TALKING IN THE CONTEXT OF THE SLAPP MOTION, CCP 425.16,
4 IT'S IMPORTANT TO NOTE THAT 425.16 IS JUST A PROCEDURAL
5 MECHANISM. IT DOES NOT CHANGE THE SUBSTANTIVE RIGHTS.

6 THE COURT: UNDERSTOOD. BUT IT'S AN EXPEDITED
7 SUMMARY JUDGMENT PROCEDURE, IF YOU WILL.

8 MR. GATTI: AND IN THAT VEIN, THE COURTS HAVE
9 FOUND -- AND THE CASE I AM REFERRING TO FOR THAT
10 PROPOSITION IS ROBERTSON VERSUS RODRIGUEZ, WHICH IS
11 36 CAL AP. 4 347.

12 MR. KENDALL: JUST A MOMENT.

13 MR. GATTI: SURE.

14 MR. KENDALL: IS THIS ANOTHER NOT CITED CASE?

15 THE COURT: EACH SIDE IS GOING TO GIVE A LIST
16 OF CITATIONS TO THE OTHER SIDE, SAY, BY MONDAY NOON.

17 MR. KENDALL: WHAT'S THE CITATION?

18 MR. GATTI: CERTAINLY. IT'S ROBERTSON VERSUS
19 RODRIGUEZ. IT IS 36 CAL AP. 4 347, A 1995 CASE.

20 DEFENSE: 347?

21 MR. GATTI: 347, YES.

22 MR. KENDALL: YOUR HONOR, CAN I JUST MAKE ONE
23 REQUEST, THAT THERE BE A TIME LIMIT.

24 THE COURT: YES, WE'RE GOING TO HAVE TO.

25 MR. KENDALL: BECAUSE I'M GOING TO NEED TO GET
26 A CHANCE TO --

27 THE COURT: LET ME ASK MR. GATTI, HOW MUCH
28 TIME?

1 MR. GATTI: IF WE'RE TALKING ABOUT, YOUR
2 HONOR, JUST -- I CAN WRAP UP VERY QUICKLY ON THE --

3 THE COURT: FIVE MINUTES ON THIS POINT?

4 MR. GATTI: SHOULD BE, YES, ON THE THIRD CAUSE
5 OF ACTION.

6 THE COURT: THEN GIVE THE DEFENSE A FEW
7 MINUTES TO RESPOND, AND THEN WE'RE GOING TO PROCEED TO
8 THE REMAINING TWO CAUSES OF ACTION, THEN TO THE
9 PRELIMINARY INJUNCTION, WHICH SEEMS TO BE -- AND YOU CAN
10 CERTAINLY HAVE A DIFFERENT VIEW WHEN WE GET THERE,
11 DERIVATIVE OF THIS. BECAUSE IF THERE IS NO -- IF THE
12 SLAPP MOTION WERE TO BE GRANTED, THEN THERE WOULD BE NO
13 BASIS FOR THE SUMMARY JUDGMENT -- EXCUSE ME, THE
14 PRELIMINARY INJUNCTION.

15 MR. GATTI: NOT EXACTLY SO, YOUR HONOR.

16 THE COURT: FINE. WE'LL TALK ABOUT IT THEN.
17 OKAY. LET'S NOT -- SO YOU ARE GOING TO -- YOU HAVE TILL
18 2:35 WITH RESPECT TO CAUSE OF ACTION ONE THROUGH THREE.

19 MR. GATTI: THANK YOU. SPEAKING DIRECTLY TO
20 THE CONSTITUTIONAL RIGHT TO PRIVACY AND THAT INALIENABLE
21 RIGHT THAT IS IN THE CONSTITUTION, CALIFORNIA
22 CONSTITUTION. IT IS SIMILAR, THAT CAUSE OF ACTION IS
23 SIMILAR TO THE PUBLICATION, DISCLOSURE OF PRIVATE FACT
24 CAUSE OF ACTION, BUT THAT ONE MUST, RATHER THAN AN
25 OFFENSIVENESS STANDARD, SHOW A SERIOUS INVASION OF
26 PRIVACY.

27 AND THE HILL CASE THAT WE'VE REFERRED TO
28 EARLIER INSTRUCTS THAT, QUOTE, IF A -- IF DEFENDANTS

1 LEGITIMATE OBJECTIVES -- EXCUSE ME.

2 WHEN -- IF YOU HAVE A SITUATION WHERE THE --
3 I'M TAKING THE QUOTES OFF, BUT WHEN YOU HAVE A SITUATION
4 WHERE DEFENDANT'S LEGITIMATE OBJECTIVES, IF THERE ARE
5 ONE, SUCH AS IN THIS CASE MR. ADELMAN PUTS FORTH THAT
6 HE'S TRYING TO GET A RECORD OF THE CALIFORNIA COAST
7 LINE. THAT SEEMS TO BE HIS STATED PURPOSE.

8 WHAT HILL INSTRUCTS US IS THAT IF YOU CAN DO
9 THAT IN A LESS -- IN ALTERNATIVE MEANS OR A LESS
10 INTRUSIVE WAY OF IMPACTING ON SOMEONE'S PRIVACY RIGHTS
11 AND INTERESTS, THE PROSPECT OF AN ACTIONABLE INVASION OF
12 PRIVACY CLAIM IS ENHANCED. AND IF WE'RE TALKING HERE
13 ABOUT THE ABILITY TO TAKE A PICTURE OF THE COAST, THE
14 ISSUE IS -- BEFORE THE COURT IS A VERY MARROW ONE TODAY,
15 AND AS WE'VE BEEN DISCUSSING, IS THAT TO ACCOMPLISH THAT
16 THERE IS A VERY SIMPLE ALTERNATIVE APPROACH THAT WOULD
17 NOT IMPACT ANYTHING UPON MR. ADELMAN, WHICH IS KEEP --
18 THIS GOES TO ALL OF THE CAUSES OF ACTION BUT RAISES IN
19 THE CONSTITUTIONAL RIGHT TO PRIVACY, IT'S ALSO THE
20 PUBLICATION OF PRIVATE FACT, IS KEEP MRS. STREISAND'S
21 NAME OFF AS A LOCATOR; STOP THE IDENTIFICATION AND THE
22 USE OF HER NAME TO IDENTIFY THE LOCATION; AND IF YOU DO
23 THAT, YOU HAVE NOT IMPACTED MR. ADELMAN ONE BIT.

24 BUT IN THE ALTERNATIVE WHAT YOU HAVE DONE IS
25 PROTECTED THE MOST HIGHLY REGARDED PRIVACY OF A CITIZEN,
26 WHICH IS THEIR HOME, THEIR LOCATION, THE IDENTIFICATION.
27 THERE IS NOTHING THAT SERVES ANY LEGITIMATE PURPOSE BY
28 DOING WHAT THE DEFENDANT HAS DONE IN THIS CASE. AND

1 THAT IS THE NARROW ISSUE THAT WE'RE TALKING ABOUT HERE.

2 AS I SAID EARLIER ON ALL THREE CAUSES OF
3 ACTION WE'VE BEEN DISCUSSING, THE PUBLICATION OF PRIVATE
4 FACT, INTRUSION, AND THE CONSTITUTIONAL RIGHT TO
5 PRIVACY, LOOKING BACK OVER WHAT THE DEFENDANTS HAVE
6 SUBMITTED TO THE COURT, THEY HAVE NOT SUBMITTED ANY
7 CASES THAT APPLIED THE SLAPP STATUTE TO -- THAT WAS
8 GRANTED TO DENY A CLAIM FOR INTRUSION OR A
9 CONSTITUTIONAL RIGHT TO PRIVACY.

10 THE ISSUE HAS COME UP VERY LIMITED IN THE
11 CONTEXT OF A PUBLICATION OF PRIVATE FACT CASE, AND IN
12 THOSE SPECIFIC CASES THE SLAPP STATUTE HAS NOT BEEN
13 APPLIED TO GRANT IT. IT HAS BEEN LOOKED AT, BUT NOT A
14 SINGLE PUBLICATION OF PRIVATE FACT CAUSE OF ACTION HAS
15 BEEN LOST EXCEPT IN THE NARROW SITUATION WHERE YOU HAVE
16 HOLDINGS, I BELIEVE SEELIG IS ONE CASE WHERE THE COURT
17 FOUND THAT THE CLAIM THERE CENTERED AROUND DEFAMATION, A
18 DEFAMATION CLAIM.

19 WE DO NOT HAVE ANY DEFAMATION CLAIMS THAT
20 EXIST IN THIS CASE. IF YOU TAKE THE DEFAMATION ASPECT
21 OUT, WHICH DEALS DIRECTLY WITH WHETHER OR NOT A
22 STATEMENT IS TRUE AND FALSE AND GOES MORE CLOSELY TO A
23 RIGHT OF ONE'S SPEECH, THE COURT HAS LOOKED AT THOSE
24 SITUATIONS IN A VERY LIMITED NUMBER OF CASES.

25 OTHER THAN THAT SITUATION, WHICH DOES NOT
26 EXIST HERE, THE COURT -- THE COURTS IN CALIFORNIA HAVE
27 NOT APPLIED THE SLAPP MOTION STATUTE HOW IT IS BEING
28 ASKED TO BE APPLIED BY DEFENDANTS. THIS WOULD BE A VERY

1 NOVEL AND NEW ROAD TO TAKE AND A VERY DANGEROUS ONE TO
2 TAKE. AND IT'S NOT WHAT THE SLAPP STATUTE SCHEME WAS
3 SET UP TO DO.

4 THE LAST THING I WOULD SAY, YOUR HONOR, VERY
5 BRIEFLY WITH RESPECT TO JUMPING BACK TO THE PUBLICATION
6 OF PRIVATE FACT ISSUE, WE HAD A DISCUSSION LAST SESSION
7 WITH RESPECT TO THE CASES THAT HAD TO DO WITH THE
8 PROTECTION OF ONE'S LOCATION OF A HOME, IDENTITY, NAME,
9 PHONE NUMBER AND ADDRESS. AND WE HAVE CITED THE COURT
10 IN OUR PAPERS TO VARIOUS CASES THAT HAVE TO DO WITH THE
11 PROTECTION OF THAT INFORMATION AS PRIVATE EVEN IF IT IS
12 PUBLIC IN OTHER AREAS. WE'RE TALKING ABOUT SITUATIONS
13 WHERE ADDRESSES ARE IN A PUBLIC PHONE BOOK.

14 COURTS HAVE HELD IN CITY OF SAN JOSE, IN OTHER
15 CASES THAT DON'T HAVE ANY -- AND WE TALKED ABOUT THE
16 PLANNED PARENTHOOD CASE. AND THE ISSUE THERE WAS
17 PROTECT THOSE INDIVIDUALS IDENTITIES BECAUSE THERE ARE
18 SAFETY CONCERNS AND THREATS.

19 WE PUT IT TO THE COURT HERE THAT
20 MRS. STREISAND HAS THOSE SAME TYPES OF THREATS. IN
21 FACT, SHE HAS PEOPLE WHO ARE STALKING HER AND PURSUING
22 HER; DANGEROUS PEOPLE WHO ARE CURRENTLY DOING THIS. AND
23 THAT IS THE MOST -- WE'RE TALKING ABOUT SAFETY TO ONE'S
24 HEALTH AND WELFARE AND FAMILY IN THEIR HOME. AND THIS
25 IS INFORMATION THAT IS NOT SPECULATIVE, NOT TRIVIAL,
26 THIS IS REAL AND SERIOUS. THE SAME TYPE OF REAL AND
27 SERIOUS SAFETY CONCERNS THAT PLANNED PARENTHOOD
28 EXPRESSED.

1 IN CITY OF SAN JOSE AND THE DOJ VERSUS
2 REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS CASES
3 STATE THAT THE FACT THAT AN EVENT IS NOT WHOLLY PRIVATE
4 DOES NOT MEAN THAT AN INDIVIDUAL HAS NO INTEREST IN
5 LIMITING DISCLOSURE OR DISSEMINATION OF THAT
6 INFORMATION.

7 U.S. VERSUS FLRA AT PAGE 500 STATES THAT "AN
8 INDIVIDUAL'S INTEREST IN CONTROLLING THE DISSEMINATION
9 OF INFORMATION REGARDING PERSONAL MATTERS DOES DISSOLVED
10 SIMPLY BECAUSE THAT INFORMATION IS MADE AVAILABLE TO THE
11 PUBLIC IN SOME FORM.

12 HERE WE HAVE A SITUATION --

13 MR. KENDALL: I FEAR IF I DON'T RISE, IT WILL
14 JUST GO ON.

15 MR. GATTI: THIS IS MY LAST WRAP-UP, YOUR
16 HONOR. WITH RESPECT TO THE SITUATION MRS. STREISAND --
17 DIFFERENT FROM THE PEOPLE IN THIS CASE WHERE THEY DID
18 NOT PROTECT THEIR LOCATION AND THEIR ADDRESS AND THEIR
19 IDENTITY. MRS. STREISAND HAS TAKEN GREAT PAINS, AND IT
20 IS THE EVIDENCE IS UNDISPUTED THAT SHE KEEPS THAT
21 INFORMATION PRIVATE.

22 AND THE FACT THAT SOMEWHERE ALONG THE LINE IN
23 SOME ASPECT OF THIS INFORMATION HIGHWAY WE'RE ALL ON
24 RIGHT NOW, SOMEONE HAS GOTTEN A HOLD OF AN ADDRESS, DOES
25 NOT CHANGE THE FACT THAT MRS. STREISAND HAS DONE
26 EVERYTHING IN HER POWER TO KEEP IT PRIVATE. WHEN IT
27 DOES COME UP, MR. KENDALL REFERRED TO IN HIS PAPERS,
28 BARBRATIMELESS DOT COM --

1 MR. KENDALL: I'M GOING TO OBJECT TO ANYTHING
2 THAT'S NOT IN THE RECORD IF HE'S ABOUT TO TALK ABOUT
3 WHAT SHE'S DOING WITH BARBRATIMELESS DOT COME.

4 THE COURT: AND ALL WE HAVE FROM
5 BARBRATIMELESS IS THAT EXHIBIT.

6 MR. GATTI: OKAY.

7 MR. KENDALL: OKAY. WE HAVE TO FOLLOW --

8 THE COURT: WELL, MR. GATTI, CAN FINISH HIS
9 SENTENCE.

10 MR. GATTI: THANK YOU, YOUR HONOR. THE FINISH
11 OF THE SENTENCE IS THAT MRS. STREISAND HAS PROTECTED
12 THAT TO THE MOST CAPABLE APT DEGREE THAT ONE CAN, AND
13 THE FACT THAT IT MAY OR MAY NOT BE OUT IN ONE PLACE, THE
14 CASES WE'VE CITED TO STATE SPECIFICLY THERE IS NO LOSS
15 OF THAT INTEREST IN KEEPING IT PRIVATE. AND THE FACT
16 THAT MR. ADELMAN WANTS TO MAKE IT PRIVATE -- EXCUSE ME,
17 WANTS TO MAKE THAT INFORMATION PUBLIC TO THE WORLD ON
18 THE WEB, DOES NOT CHANGE THE FACT THAT MRS. STREISAND
19 HAS THE RIGHT TO KEEP IT PRIVATE, LIKE ALL INDIVIDUALS
20 DO. THANK YOU, YOUR HONOR.

21 THE COURT: THANK YOU.

22 MR. KENDALL: YOUR HONOR, WHAT I WOULD LIKE TO
23 DO IS START BY DISCUSSING THE POINTS THAT HAVE BEEN MADE
24 THIS AFTERNOON, THEN I'LL GO BACK AND -- TO MY NOTES AND
25 COVER MY RESPONSE TO WHAT WAS SAID TWO DAYS AGO.

26 FIRST OF ALL, THE CRIMINAL CASES THAT WERE
27 CITED TO YOU ARE INAPPLICABLE FOR SEVERAL REASONS. ONE,
28 COUNSEL IS MISTAKEN AS TO THE LAW OF THE FOURTH

1 AMENDMENT JURISPRUDENCE, AS YOUR HONOR HAS POINTED OUT.

2 BUT THERE IS ANOTHER REASON, WHICH IS EVEN
3 MORE A TOP LEVEL REASON, WHICH IS THIS IS -- BECAUSE
4 THIS IS NOT A FOURTH AMENDMENT CASE, IT DOESN'T PRESENT
5 THE QUESTION THAT THOSE CASES ADDRESS, WHICH IS THE
6 QUESTION OF WHAT IS A, QUOTE, REASONABLE EXPECTATION OF
7 PRIVACY, UNQUOTE, FROM GOVERNMENT INTRUSION UNDER THE
8 FOURTH AMENDMENT.

9 IN FACT, IT DOESN'T PRESENT THE QUESTION AT
10 ALL OF WHAT IS A REASONABLE EXPECTATION OF PRIVACY IN
11 THE BALANCE BETWEEN THE INDIVIDUAL AND THE STATE. AND
12 THAT'S WHAT THOSE CASES ARE ABOUT. THIS CASE PRESENTS
13 THE QUESTION OF WHETHER, UNDER THE JURISPRUDENCE FOR THE
14 FIRST THREE CAUSES OF ACTION, PLAINTIFF HAS CARRIED HER
15 BURDEN TO SHOW AN UNLAWFUL INTRUSION OR AN UNLAWFUL
16 DISCLOSURE OF PRIVATE FACTS, OR THE VIOLATION OF THE
17 RIGHT UNDER THE CONSTITUTION, WHICH IS CIRCUMSCRIBED BY
18 THE ELEMENTS SET FORTH IN HILL.

19 AND WHAT THEY ARE DOING IS THEY ARE CONFUSING
20 THE POINT BY CITING GENERAL COMPOSITIONS THAT ARE
21 ENUNCIATED BY COURTS ON ROUTE TO TRYING TO FIGURE OUT
22 WHETHER THE GOVERNMENT CAN SPY ON YOU AND USE THE FRUITS
23 OF THAT SPYING TO PROSECUTE YOU CRIMINALLY AND APPLYING
24 THAT IN THE WRONG CONTEXT.

25 THE CONTEXT THAT'S APPROPRIATE IS THE CONTEXT
26 OF THE CIVIL CASES THAT HAVE ALLEGED THESE WRONGS
27 BEFORE. AND NONE OF THOSE CASES SUPPORTS THEM. AND
28 THERE IS A VAST DIFFERENCE BETWEEN NEWS HELICOPTERS,

1 PRIVATE HELICOPTERS, PRIVATE PLANES FLYING AROUND, AND
2 INCIDENTLY SEEING PEOPLE'S HOMES AND THE GOVERNMENT
3 TARGETING SOMEONE FOR A SEARCH.

4 THE COURT: WHAT'S THE DIFFERENCE, THOUGH,
5 WITH RESPECT TO THE PERSON WHOSE HOME IS INCIDENTLY SEEN
6 AND WHO ADDRESS AND PHOTOGRAPH AND CERTAINLY AREA MAP, I
7 WOULD NOT DESCRIBE IT AS A THOMAS GUIDE, WHEN I GET TO
8 THE RESIDENCE HERE, BUT AN AREA MAP.

9 MR. KENDALL: RIGHT. THE DIFFERENCE IS THAT,
10 ALTHOUGH THE U.S. SUPREME COURT HAS SAID THAT, IN FACT,
11 YOU DON'T HAVE A REASONABLE EXPECTATION OF PRIVACY FROM
12 THE AIR. THAT'S THE CALIFORNIA AGAINST CIRAOLLO CASE.
13 BUT THE ARGUMENT THAT WAS ADVANCED IN THAT CASE AND THE
14 ARGUMENT THAT'S BEEN ADVANCED IN SOME OF THE CALIFORNIA
15 CASES IS THE INDIVIDUAL DOES HAVE A RIGHT TO KEEP
16 GOVERNMENT OUT OF HIS BACKYARD, BUT THAT'S BECAUSE OF
17 THE BALANCE IN OUR SOCIETY BETWEEN INDIVIDUAL RIGHTS
18 VERSUS GOVERNMENT RIGHTS.

19 THE QUESTION THAT ARISES IS IN CALIFORNIA WHAT
20 DOES ONE INDIVIDUAL HAVE TO SAY ABOUT WHAT OTHER
21 INDIVIDUALS CAN DO. AND IT'S CLEAR NO INDIVIDUAL CAN
22 SAY YOU CAN'T FLY OVER MY HOUSE. THAT HAPPENS EVERY
23 DAY; CAN'T POSSIBLY BE UNLAWFUL. AND NO INDIVIDUAL CAN
24 SAY THAT YOU CAN'T WITH A NORMAL -- YOU ARE NOT EVEN
25 OVER MY HOUSE, BUT FROM HALF A MILE AWAY WITH A NORMAL
26 CAMERA CAPTURE AN IMAGE OF THE COASTLINE, JUST BECAUSE I
27 HAPPEN TO PLUNK MY HOUSE IN THE MIDDLE OF THAT
28 COASTLINE.

1 IF THAT WERE THE LAW, THAT WOULD MEAN THAT
2 MR. ADELMAN OR THE SIERRA CLUB OR ANYONE ELSE WHO WANTS
3 TO STUDY THE COAST -- YOU KNOW, THIS IS A WEBSITE THAT
4 THE COASTAL COMMISSION IS USING IN BATTLES WITH MALIBU.
5 WHAT THEY ARE CONTENDING FOR IS THAT NO PRIVATE PARTY,
6 AND BY THEIR ARGUMENT, NO GOVERNMENT, CAN TAKE A PICTURE
7 TO SHOW THE POSITIONING OF BARBRA STREISAND'S HOUSE ON
8 THAT BLUFF. THERE IS NO LAW THAT'S EVER SAID ANYTHING
9 SO ABSURD. THERE IS NO LAW THAT'S EVER SAID THAT NEWS
10 HELICOPTERS CANNOT PHOTOGRAPH AN AREA.

11 IT ISN'T SUFFICIENT FOR THEM TO SAY THAT IN
12 THE BALANCE BETWEEN THE INDIVIDUAL AND THE STATE IN A
13 CRIMINAL CONTEXT OF THE WELL DEVELOPED JURISPRUDENCE OF
14 THE FOURTH AMENDMENT, IT IS NOT ENOUGH FOR THEM TO SAY
15 THAT UNTIL THE UNITED STATES SUPREME COURT SAID
16 OTHERWISE, THE JURISPRUDENCE IN CALIFORNIA WAS AS THEY
17 DESCRIBED.

18 NOW, THERE IS ANOTHER POINT I SHOULD MAKE
19 SINCE THEY BROUGHT UP ALL THIS LAW -- AND I DON'T WANT
20 TO CITE ANY NEW CASES, YOUR HONOR, BECAUSE I DON'T WANT
21 TO GIVE THEM THE CHANCE TO BRIEF A WHOLE NEW ROUND OF
22 CASES. I'M AFRAID WE'LL GO INTO NEW BRIEFS AND REPLY
23 BRIEFS, AND THIS HAS GONE ON FOR QUITE SOMETIME.

24 I WILL SAY THAT THEY ARE WRONG IN THINKING
25 THAT INCIDENTLY CAPTURING A BACKYARD IS AN UNLAWFUL
26 SEARCH AND SEIZURE UNDER THE LAW IN THE STATE OF
27 CALIFORNIA. AND THERE IS CASE LAW RIGHT ON POINT FROM
28 THE CALIFORNIA SUPREME COURT WHICH -- IN THE -- IF THE

1 COURT WANTS ME TO DISCUSS IT, I WILL, BUT I REALLY DON'T
2 WANT TO PRECIPITATE MORE BRIEFING.

3 THE COURT: WHAT ABOUT MR. GATTI'S POINT THAT
4 ALL MAY BE WELL AND GOOD, BUT DON'T POST IT ON THE
5 INTERNET?

6 MR. KENDALL: LET'S TALK ABOUT THAT. THAT'S
7 CALLED CENSORSHIP, AND THAT IS WHAT THE FIRST AMENDMENT
8 IS ALL ABOUT, AND I THINK THAT GOES TO THE VERY HEART OF
9 THIS.

10 THE RIGHT OF MR. ADELMAN IS TO DECIDE WHAT HE
11 WANTS TO SAY ON A NEWSWORTHY TOPIC OR, FOR THAT MATTER,
12 ON ANY TOPIC IF IT DOESN'T IMPACT SOMEONE'S RIGHT TO
13 PRIVACY. AND EVEN IF IT DOES IMPACT SOMEONE'S RIGHT TO
14 PRIVACY, IF IT'S ON A NEWSWORTHY TOPIC, THAT'S A
15 COMPLETE AND SUFFICIENT DEFENSE.

16 AND THEY SIMPLY DO NOT HAVE THE RIGHT IN THIS
17 FORUM TO ASK THE GOVERNMENT TO RESTRAIN HIM FROM DOING
18 THAT. THAT'S WHAT THEY ARE DOING.

19 THE ARGUMENT THAT THEY MAKE, THAT UNDER THE
20 CONSTITUTIONAL RIGHT OF PRIVACY MR. ADELMAN HAS TO
21 TAILOR HIS SPEECH, IS WRONG. IT IS A FAULTY EXTENDED
22 ANALYSIS FROM HILL, AS I'LL DESCRIBE IN A SECOND. AND
23 IT IS ALSO, CONTRARY TO THE CASE LAW THAT WE CITED IN
24 OUR BRIEF THAT SAYS THAT THE COURTS -- AND I BELIEVE, IF
25 MEMORY SERVES, I THINK THE COURT MADE THIS POINT IN
26 SHULMAN.

27 YES, IT DID, IN REJECTING THAT DISCLOSURE OF
28 PRIVATE FACTS CLAIM, WHICH WAS REJECTED THERE. THE

1 COURT CANNOT SIT AS A CENSOR AND DECIDE WHICH ASPECTS
2 ARE REVEALED AND WHICH ASPECTS ARE NOT. IF IT'S
3 NEWSWORTHY, IT IS THE PRIVILEGE OF MR. ADELMAN TO DECIDE
4 WHAT TO SAY AND HOW TO SAY IT, AND NOTHING IN HILL IS TO
5 THE CONTRARY.

6 NOW, WHAT IS AT ISSUE IN HILL IS THE MANNER IN
7 WHICH A COMPULSORY DRUG TESTING PROGRAM WAS CARRIED OUT.
8 THAT WASN'T SPEECH. THAT'S WHY HILL IS INAPPLICABLE TO
9 THIS POINT. THERE WAS NO ISSUE OF CENSORSHIP FOR THE
10 COURT TO ADDRESS IN THE HILL CASE.

11 AND RATHER THAN REPEAT MYSELF, YOUR HONOR, I
12 WOULD JUST ASK THE COURT ON THIS POINT TO LOOK AT PAGE 7
13 OF OUR OPPOSITION TO THE MOTION FOR PRELIMINARY
14 INJUNCTION WHERE WE CITED SHULMAN, AND AT PAGE 229 THE
15 COURT DEALT WITH THE FOLLOWING ARGUMENT:

16 WHAT WAS ARGUED WAS THAT EVEN IF THE
17 BROADCASTED OF THE ACCIDENT WAS NEWSWORTHY AND THEREFORE
18 CONSTITUTIONALLY PROTECTED, SHOWING -- AND I'M QUOTING
19 FROM THE COURT'S LANGUAGE -- "INTIMATE, PRIVATE MEDICAL
20 FACTS AND THE VICTIM'S SUFFERING WAS NOT NECESSARY" --
21 THAT'S WHAT WAS ARGUED -- "TO ENABLE THE PUBLIC TO
22 UNDERSTAND THE SIGNIFICANCE OF THE ACTION OR THE RESCUE
23 AS A PUBLIC EVENT."

24 THE CALIFORNIA SUPREME COURT RESPONDED BY
25 REJECTING THAT ARGUMENT, SAYING THE STANDARD IS NOT
26 NECESSITY. THAT THE BROADCAST COULD HAVE BEEN EDITED TO
27 EXCLUDE CERTAIN WORDS AND IMAGES DID NOT ASSIST." AND
28 THE REASON WAS BECAUSE THE COURTS DO NOT AND

1 CONSTITUTIONALLY COULD NOT SIT AS SUPERIOR EDITORS OF
2 THE PRESS. AND I BELIEVE SHULMAN, IF MY MEMORY IS
3 RIGHT, POST DATED THE HILL CASE, AND THAT'S -- SHULMAN
4 IS A CALIFORNIA SUPREME COURT CASE AS WELL.

5 ONE OF THE VERY FIRST POINTS MR. GATTI MADE
6 WHEN HE STOOD UP THIS AFTERNOON WAS TO CITE THE
7 GOVERNMENT CODE SECTION. I GUESS HIS ARGUMENT IS THAT
8 SINCE THERE ARE A NUMBER OF AREAS IN SOCIETY WHERE
9 GOVERNMENT AND THE PUBLIC HAVE AN INTEREST, THAT ONE IS
10 NEVER ABLE TO CONTEND THAT THERE IS A PUBLIC ISSUE AS A
11 RESULT OF, FOR EXAMPLE, IN THIS CASE PUBLIC CONCERNS, AS
12 STATED BY THE LEGISLATURE, ABOUT THE COASTLINE.

13 I WANT TO MAKE SOMETHING CLEAR. THE PUBLIC
14 INTEREST ISSUE GOES TO TWO POINTS. FIRST, THE FIRST
15 PRONG OF THE ANALYSIS OF WHETHER IT'S WITHIN THE
16 COVERAGE OF THE SLAPP STATUTE. AND THAT'S ONE REASON
17 WHY THE PUBLIC ISSUE PRONG COMES UP. AND THE OTHER IS
18 IT GOES TO NEWSWORTHINESS, WHICH IS A CONSTITUTIONAL
19 FIRST AMENDMENT PRIVILEGE WHEN BALANCED AGAINST THE
20 RIGHT TO PRIVACY.

21 WE ARE NOT SAYING THAT THERE IS LESS PRIVACY
22 ON THE COAST; WE'RE ARE NOT SAYING THAT THERE IS -- THAT
23 A PRIVATE FACT IS NOT PRIVATE JUST BECAUSE IT'S ON THE
24 COAST. WHAT WE ARE SAYING ON THAT POINT IS THAT EVEN --
25 AND HERE THERE IS NO PRIVATE FACT; THERE IS NO PERSON
26 INVOLVEMENT AND SO FORTH, AS I'VE SAID. BUT EVEN IF
27 THERE WERE A PRIVATE FACT, THERE IS AN AFFIRMATIVE
28 PRIVILEGE UNDER THE FIFTH AMENDMENT. THESE ARE PUBLIC

1 ISSUES. THAT'S THE SECOND WAY THE PUBLIC ISSUE POINT
2 COMES UP. AND THE THIRD, NOT TO JUMP AHEAD, WILL BE ON
3 MISAPPROPRIATION OF IDENTITY, THAT CLAIM, BECAUSE THERE
4 IS A PUBLIC AFFAIRS EXCEPTION.

5 WE'VE NEVER ARGUED THAT THE BEDROOM ON THE
6 COAST IS NO LONGER PRIVATE. THE ARGUMENT THAT WAS MADE,
7 THAT THERE IS NO CASE GRANTED UNDER THE SLAPP STATUTE
8 FOR INTRUSION, IS REALLY A RED HERRING. THE SLAPP
9 STATUTE HAS BEEN APPLIED TO INTRUSION CASES, AS I
10 POINTED OUT THE OTHER DAY.

11 THE NEXT QUESTION WE HAVE TO ASK IS NOT
12 WHETHER INTRUSION CASES HAVE BEEN DISMISSED AT THE
13 INSTANCE OF A MOVANT ON AN ANTI-SLAPP MOTION. THE
14 QUESTION IS THIS QUESTION OF INTRUSION IS AN ISSUE OF
15 LAW; ARE THESE RIGHTS OF PRIVACY CLAIM ISSUES OF LAW.
16 AND CLEARLY ON THESE FACTS, THERE ARE NO DISPUTED FACTS;
17 WE'RE IN SUMMARY JUDGMENT TERRITORY.

18 AND AS THE COURT HAS POINTED OUT, THE SIMPLE
19 QUESTION HERE IS ON THESE FACTS, WHICH ARE UNDISPUTED,
20 HAVE THEY CARRIED THEIR BURDEN. IT DOESN'T MATTER
21 WHETHER IT COMES UP IN A SLAPP STATUTE OR ON THIS MOTION
22 FOR SUMMARY JUDGMENT OR IF YOU CAN TELL ALL THE FACTS
23 FROM A PLEADING IN THE CASE ON DEMURRERS, AND THAT'S ALL
24 THAT NEEDS TO BE SAID ON THAT POINT.

25 THEY CLOSED TODAY, MR. GATTI CLOSED BY TALKING
26 ABOUT THIS GREAT DANGER POSED BY THIS PICTURE. THERE IS
27 NO EVIDENCE IN THE RECORD AT ALL OF DANGER POSED BY THIS
28 PICTURE. THERE IS NO EVIDENCE THAT THIS PICTURE HAS

1 CAUSED ANY DAMAGE, AND THERE IS NO EVIDENCE THAT IT
2 COULD CAUSE ANY DANGER. THE MERE FACT THAT BARBRA
3 STREISAND MAY HAVE BEEN STALKED IN THE PAST -- REMEMBER,
4 THERE IS NO EVIDENCE IN THIS CASE SHE'S BEEN STALKED AT
5 THIS RESIDENCE.

6 AND THE MERE EVIDENCE THAT SHE MAY HAVE BEEN
7 STALKED IN THE PAST, LIKE ANY OTHER CELEBRITY, DOES NOT
8 CONVERT INTO A CLEAR AND PRESENT DANGER WITH RESPECT TO
9 THIS RESIDENCE BASED UPON THIS PICTURE. THERE IS NO
10 REASON TO THINK IT WOULD. SHE'S STILL PROTECTED BY THE
11 SAME CLIFF, AND PEOPLE HAVE ALWAYS HAD THE RIGHT TO BE
12 ON THAT BEACH. AND PEOPLE HAVE ALWAYS BEEN ABLE TO FIND
13 BARBRA STREISAND'S HOUSE ON A THOMAS GUIDE, AS WE HAVE
14 SUBMITTED IN EVIDENCE. AND THEY HAVE ALWAYS BEEN ABLE
15 TO FIND BARBRA STREISAND'S ADDRESS ON STAR MAPS SITES.
16 IF THEY HAVE GOT FIVE BUCKS TO PLUNK DOWN, THEY CAN EVEN
17 HAVE A STAR MAP TO CARRY AROUND WITH THEM.

18 MR. GATTI: OBJECTION.

19 MR. KENDALL: OR THEY COULD DOWNLOAD IT FROM
20 THE INTERNET.

21 THE COURT: TO THE EXTENT THAT WE HAVE
22 INFORMATION AS AN EXHIBIT OF A STAR SITE, THAT'S OKAY.
23 EVERYTHING ELSE IS OUTSIDE THE RECORD ON THAT POINT.

24 MR. KENDALL: SO THERE IS NO EVIDENCE HERE
25 THAT THERE IS ANY DANGER POSED BY THIS PHOTOGRAPH, AND
26 SUPPOSITION TO THE CONTRARY IS JUST ARGUMENTATION. IT'S
27 NOT EVIDENCE.

28 WE HAVE NOT REVEALED THE PHONE NUMBER. WE

1 HAVE NOT REVEALED AN ADDRESS. AND THE PUBLIC RECORDS
2 CASES IN WHICH PHONE NUMBERS OR ADDRESSES HAVE BEEN
3 REVEALED ARE INAPPLICABLE BECAUSE THEY ARE
4 DISTINGUISHABLE ON THEIR FACTS, BUT THEY ARE ALSO
5 INAPPLICABLE BECAUSE THE LAW IS CLEAR THAT THOSE CASES
6 ARE NOT INFORMATIVE ON THE CALIFORNIA LAW, RIGHT OF
7 PRIVACY.

8 AND THE VERY CASE THAT WE BEGAN TO CITE, WHICH
9 WAS I BELIEVE INCLUDED IN THE PAPERS, UNITED STATES
10 DEPARTMENT OF JUSTICE AGAINST THE REPORTER'S COMMITTEE
11 FOR FREEDOM OF THE PRESS 489 U.S. 749, SAYS AT FOOTNOTE
12 13 ON PAGE 762 THAT "THE STATUTORY MEANING OF PRIVACY
13 UNDER FOIA, THE FREEDOM OF INFORMATION ACT, IS OF COURSE
14 NOT THE SAME AS THE QUESTION OF WHETHER A TORT ACTION
15 MIGHT LIE FROM INVASION OF PRIVACY." THESE CITES ARE,
16 AGAIN, TAKING AN APPLE AND CALLING IT AN ORANGE.

17 NOW, GOING BACK TO THE ARGUMENTS THAT WERE
18 MADE TWO DAYS AGO IN THE AFTERNOON. THE FIRST POINT IS
19 THAT THERE WAS LUMPING TOGETHER OVER -- SHALL WE TAKE A
20 MOMENT, YOUR HONOR.

21 THE COURT: WHY DON'T WE TAKE TILL 3:00
22 O'CLOCK, AND YOU CAN BRING MR. CASAS UP TO SPEED. WHY
23 DON'T THE FIVE OF YOU MEET TOGETHER. WE'LL RESUME AT
24 3:00.

25 (RECESS)

26
27 THE COURT: MR. CASAS, WELCOME. SOUNDS LIKE
28 YOU HAD QUITE A TRIP GETTING HERE.

1 MR. CASAS: THANK YOU, YOUR HONOR. SOUTHWEST
2 AIRLINES SENDS IT'S APOLOGIES.

3 MR. KENDALL: OKAY, YOUR HONOR, THE POINT THAT
4 WAS MADE, THAT BARBRA STREISAND HAS DONE EVERYTHING
5 POSSIBLE TO MAINTAIN THE PRIVACY OF HER HOME, ONE ONLY
6 NEEDS TO LOOK AT THE ARTICLE IN PEOPLE MAGAZINE TO KNOW
7 THAT'S NOT QUITE RIGHT.

8 AND ONE CAN COMPARE THE SITUATION WE FACE
9 HERE, WHERE SHE HAS NOT DONE EVERYTHING POSSIBLE TO
10 MAINTAIN THE PRIVACY OF HER HOME, WITH AT THAT, FOR
11 EXAMPLE, IN THE HURVITZ CASE THAT WE CITED TO THE COURT,
12 84 CAL AP. 4 1232. THAT WAS A CASE WHERE, IF YOU
13 RECALL, THERE WAS A PLASTIC SURGEON WHO HAD APPARENTLY
14 MOLESTED HIS PATIENTS WHILE THEY WERE UNDER SEDATION,
15 AND IN DISCOVERY IN THE CASE THAT THIS PLASTIC SURGEON
16 HAD WITH HIS FORMER PARTNER, THE IDENTITIES OF THESE
17 PATIENTS WERE REVEALED, NOT BY THE PATIENTS, BUT BY THE
18 PARTIES WHO WERE BATTLING OVER THE PRACTICE, THE PLASTIC
19 SURGERY PRACTICE.

20 AND YOU WOULD THINK, IF THERE IS EVER A
21 SITUATION IN WHICH SOMETHING WOULD BE A EXPOSURE OF A
22 PRIVATE FACT AND BE BARRED, IT WOULD BE A SITUATION
23 IN WHICH THE FACT THAT ONE HAD BEEN MOLESTED WHILE UNDER
24 SEDATION AND THE DETAILS OF WHAT HAD HAPPENED YOU WOULD
25 THINK WOULD BE PROTECTED. CERTAINLY SEEMS A LITTLE MORE
26 INTIMATE THAN THE WAY THAT THE DECK CHAIRS AND PARASOLS
27 LOOK IN THE BACKYARD.

28 BUT WHAT THE COURT HELD WAS, ONCE THAT

1 INFORMATION HAD BEEN PUBLIC, THE HORSE WAS OUT OF THE
2 BARN, AND THE BARN DOOR COULDN'T BE SHUT. AND BARBRA
3 STREISAND CANNOT SHUT THE BARN DOOR AFTER THE HORSE HAS
4 LEFT THE BARN. SHE GAVE THAT INTERVIEW TO PEOPLE
5 MAGAZINE. SHE HAS TO LIVE BY IT.

6 THIS IS AN ISSUE THAT THEY REALLY HAVE NO
7 ANSWER TO. THE VIRGIL AGAINST TIME CASE THAT MR. GATTI
8 KEEPS TALKING ABOUT IS A CASE IN WHICH THE CELEBRITY
9 DECIDED BEFORE PUBLICATION TO WITHDRAW THE CONSENT. HAD
10 BARBRA STREISAND DONE THAT BEFORE PERMITTING PEOPLE
11 MAGAZINE TO GO AHEAD, SHE'D HAVE AN ARGUMENT TO MAKE.
12 SHE DIDN'T DO THAT.

13 THE MELISSA GILBERT CASE IS ANOTHER ONE WE
14 CITED TO THE COURT, THE 43 CAL AP. 4 1135, 1996 CASE.
15 HERE IS THE EX-HUSBAND OF A CELEBRITY AND -- YOU KNOW,
16 AND THE CELEBRITY WHO IS "THE LITTLE HOUSE ON THE
17 PRAIRIE" GIRL; I MEAN, THAT'S HER REPUTATION SHE IS
18 TRYING TO PROTECT. AND THE HUSBAND DECIDES, EX-HUSBAND,
19 I'M GOING TO REVEAL PERSONAL THINGS, SEXUAL THINGS,
20 ABOUT OUR MARRIAGE. AND MELISSA GILBERT CAN'T PROTECT
21 THAT.

22 AND AGAIN I ASK, WHICH IS MORE INTIMATE; I
23 THINK THAT QUESTION ANSWERS ITSELF. IF MELISSA GILBERT
24 CANNOT PROTECT, IF THE PATIENTS IN THE HURVITZ AGAINST
25 TEFRON, (PHONETIC) I THINK IS THE OTHER PARTY'S NAME,
26 CANNOT PROTECT AGAINST THE REVELATION OF THOSE HIGHLY
27 PERSONAL FACTS, HOW COULD IT BE THAT BARBRA STREISAND
28 CAN KEEP MR. ADELMAN FROM TAKING A LONG DISTANCE PICTURE

1 AND PUBLISHING THE RESULT THAT SHOWS, AT MOST, HER
2 BACKYARD, HER SWIMMING POOL, HER DECK CHAIRS, AND HER
3 PARASOLS.

4 THE COURT: IS THERE SOME DIFFERENCE --
5 PERHAPS AN ARGUMENT -- SEMI PERMANENCE, TO THE EXTENT
6 THAT ANYTHING ON THE INTERNET IS PERMANENT, OR THE
7 SCOPE? BECAUSE I THINK IT'S A FAIR STATEMENT THAT WHAT
8 IS ON THE INTERNET IS AVAILABLE TO ANYBODY WITH A
9 COMPUTER AND WEB BROWSER.

10 MR. KENDALL: IN OTHER WORDS, IS THERE A
11 QUESTION ABOUT WHETHER THE BREADTH OF THE PUBLICATION --

12 THE COURT: THE GEOGRAPHIC DISTRIBUTION AND
13 THE ASSUMED LONGEVITY.

14 MR. KENDALL: WELL, EXCELLENT POINT. I'M GLAD
15 YOU USED THE WORD "ASSUMED."

16 THE COURT: DEFINITELY.

17 MR. KENDALL: BECAUSE WE ALL KNOW THAT THESE
18 BITES CAN BE WIPED AWAY IN A MOMENT; WHEREAS PEOPLE
19 MAGAZINE IN SOME LIBRARIES WILL LIVE FOREVER. AND THE
20 SECOND -- WE ALSO HAVE THE MALIBU PUBLIC RECORDS THAT
21 ARE IN EVIDENCE, EXHIBITS U AND V.

22 THE COURT: WELL, IS THERE SOMETHING
23 DIFFERENT -- AND IT GETS BACK TO THE ONE OF BASES OF THE
24 QUESTION. IS THERE SOMETHING DIFFERENT FROM HAVING TO
25 GO TO THE CITY OF MALIBU, WHICH IS A WONDERFUL PLACE,
26 AND AS WE ALL KNOW FRIDAY AFTERNOON IS A BAD TIME TO GET
27 THERE; IT'S ALMOST AS HARD TO GET THERE AS IT IS TO GET
28 FROM BURBANK HERE, AS MR. CASAS FOUND OUT TODAY.

1 BUT TO HAVE TO GO PHYSICALLY TO THE LOCATION
2 AND LOOK SOMETHING UP AS OPPOSED TO GOING INTO THE
3 PRIVACY OF YOUR BEDROOM AND DOING A FEW CLICKS ON YOUR
4 COMPUTER.

5 MR. KENDALL: IT'S A VERY INTERESTING
6 QUESTION. LET ANSWER IT WITH TWO POINTS.

7 FIRST, I DON'T THINK IT CAN BE THE BUSINESS OF
8 COURTS TO TELL PEOPLE WHERE TO PUBLISH INFORMATION.
9 BECAUSE IF YOU EXTEND THE PROPOSITION THAT I JUST THREW
10 OUT FOR DISCUSSION, OF COURSE, WHAT THAT WOULD MEAN IS
11 THAT ONE HAS A DIFFERENT FIRST AMENDMENT RIGHT IN THE
12 MAGAZINE THAN ONE HAS ON THE INTERNET.

13 I ALSO THINK, THOUGH, YOUR HONOR, THAT IT'S
14 IMPORTANT TO FOCUS ON THE FACTS THAT WE HAVE ON THIS
15 CASE, BECAUSE WHAT DO WE KNOW ABOUT PUBLIC ACCESS AND
16 INTEREST. WELL, WE ONLY HAVE SOME EVIDENCE, AND ONE
17 SHOULDN'T JUMP TO THE CONCLUSION THAT JUST BECAUSE
18 SOMETHING IS ON A WEBSITE THAT EVERYBODY IS LOOKING AT
19 IT.

20 IN FACT, WHAT WE KNOW HERE IS THAT, AT LEAST
21 MEASURING THE INTERESTS IN THE PICTURE OF BARBRA
22 STREISAND BY DOWNLOADING ACTIVITY AND PRINTING ACTIVITY,
23 MOST OF THE PEOPLE INTERESTED IN THAT PICTURE ARE BARBRA
24 STREISAND'S LAWYERS. THAT'S WHAT WE HAVE IN THE WAY OF
25 A FACTUAL RECORD.

26 THE COURT: WELL, WE HAVE A SHORT PERIOD OF
27 TIME AS WELL.

28 MR. KENDALL: WELL, THAT'S RIGHT, BUT ALL WE

1 CAN GO ON IS WHAT WE HAVE IN THE RECORD. AND THE SECOND
2 THING THAT WE KNOW IS THAT THIS WEBSITE WAS DESIGNED SO
3 THAT THE NAME -- WELL, SO THAT THE CAPTIONS WOULD NOT BE
4 VISIBLE TO SEARCH ENGINES.

5 AND LET ME FURTHER POINT OUT, THERE IS NO
6 INDEX OR TABLE OF CONTENTS ON THIS WEBSITE THAT SAYS
7 DAVID GEFEN, BARBRA STREISAND. THERE IS NO WAY FOR
8 SOMEONE TO SCROLL DOWN AND SEE -- I THINK, I'LL GO LOOK
9 AT THIS GUY, I THINK I'LL LOOK AT THIS WOMAN'S HOUSE.
10 YOU CAN'T DO THAT.

11 THE ONLY WAY SOMEBODY WOULD EVER FIND THEIR
12 WAY TO BARBRA STREISAND'S HOUSE IS TO GO ON THIS WEBSITE
13 AND PROBABLY HAVE SOME PRIOR KNOWLEDGE, BECAUSE WHY ELSE
14 WOULD YOU DO IT, THAT BARBRA STREISAND LIVES ON COAST,
15 AND YOU TYPE IN STREISAND'S NAME; OTHERWISE, WOULD YOU
16 HAVE NO WAY TO KNOW. THE ONLY OTHER WAY -- THERE IS ONE
17 OTHER WAY, YOUR HONOR, IF YOU CLICK PICTURE BY PICTURE
18 GOING ALL THE WAY UP AND DOWN THE COAST, YOU WILL SEE
19 THE CAPTIONS.

20 SO, WHILE I THINK YOUR HONOR RAISES AN
21 INTERESTING INTELLECTUAL THOUGHT EXPERIMENT, WHICH IS,
22 DOES THE FIRST AMENDMENT HAVE DIFFERENT EFFICACY
23 DEPENDING ON THE MEANS OF PUBLICATION AND GREATER
24 BREADTH MEANS LESS RIGHTS TO SPEAK, AND I WOULD DISPUTE
25 THAT PROPOSITION FOR THE REASON I SAID, BUT THERE IS
26 ALSO THAT THERE ISN'T THE FACTUAL RECORD IN WHICH TO
27 CONDUCT THAT THOUGHT EXPERIMENT.

28 THERE IS NOTHING, YOUR HONOR, THAT ACTUALLY

1 DISTINGUISHES THIS PHOTOGRAPH FROM THE THOUSANDS OF
2 OTHER PHOTOGRAPHS THAT WE SEE EVERY DAY, AND AT LEAST --
3 AND I MUST SAY, IT'S NOT IN THE RECORD, BUT ONE CAN JUST
4 TAKE JUDICIAL NOTICE, HAVING SOME EXPERIENCE AS WE ALL
5 IN THIS ROOM DO, WITH THE COAST, AT LEAST HUNDREDS,
6 SINCE THE WHOLE COAST LINE IS THERE --

7 MR. GATTI: OBJECTION TO HIS --

8 THE COURT: WELL, I DON'T HAVE THE LAST PART
9 OF THE THOUGHT SO IT COULD BE REALLY WELL TAKEN, BUT
10 LET'S HEAR WHAT --

11 MR. KENDALL: THERE ARE HOMES UP AND DOWN THE
12 CALIFORNIA COAST. THERE ARE HOMES --

13 THE COURT: THAT I THINK IS A FAIR STATEMENT.

14 MR. KENDALL: RIGHT. SO YOUR HONOR HAS BEEN
15 CONFRONTING -- NOW THAT I'VE FINALLY GOT A LITTLE
16 RESEARCH DONE AND FIGURED IT OUT, THERE IS A HUGE BATTLE
17 GOING ON ABOUT WHETHER THE PEOPLE OF MALIBU GET TO
18 DECIDE WHAT THEY ARE DOING WITH THE LOCAL COASTAL PLANS
19 OR WHETHER IT'S THE COASTAL COMMISSION. WHAT IS ALL
20 THAT ABOUT, HOMES.

21 THE COURT: WELL, I THINK YOU NEED TO MAKE
22 WHATEVER POINT YOU ARE MAKING IN A SLIGHTLY DIFFERENT
23 WAY.

24 MR. KENDALL: OKAY. WELL, I SHOULDN'T MAKE
25 ANY POINT ABOUT IT. YOU KNOW A LOT MORE ABOUT THAT CASE
26 THAN I DO, AND I'LL ONLY GET MYSELF INTO TROUBLE.

27 BUT MY POINT IS, THE PROPOSITION THAT YOU
28 CAN'T TAKE PICTURES OF THE CALIFORNIA COASTLINE IF --

1 THE COURT: BUT MR. GATTI'S ARGUMENT IS NOT
2 WITH THAT, BUT WHAT ONE DOES WITH THEM, HOW THEY ARE
3 LABELED, AND THINGS OF THE LATTER SORT.

4 MR. KENDALL: WELL, REMEMBER THAT WHEN THIS
5 PICTURE WAS TAKEN AND PUT UP ON THE WEBSITE, IT WASN'T
6 LABELED. THERE IS NO EVIDENCE THAT BARBRA STREISAND WAS
7 EVER TARGETED. THERE IS NO EVIDENCE THAT ANYONE HAS
8 EVER GONE ONTO THIS WEBSITE LOOKING FOR BARBRA
9 STREISAND. THERE IS NO EVIDENCE THERE HAS EVER BEEN ANY
10 ATTEMPT TO USE BARBRA STREISAND FOR ANY PURPOSE
11 WHATSOEVER, EXCEPT THAT SHE IS PART OF THE RECORD OF THE
12 COAST.

13 NOW, BARBRA STREISAND DOES HAPPEN TO BE A
14 NEWSWORTHY PERSON AND HER ACTIVITIES ON HER PROPERTY DO
15 HAPPEN TO BE NEWSWORTHY ACTIVITIES, PARTICULARLY
16 PERTAINING TO THE MANNER IN WHICH SHE HAS DEVELOPED THAT
17 PROPERTY --

18 MR. GATTI: OBJECTION --

19 MR. KENDALL: -- AND THAT'S ALL YOU CAN SEE.
20 ALL YOU CAN SEE IS THE EXTERIOR OF THAT PROPERTY AND
21 WHAT'S BEEN DEVELOPED ON IT AND WHAT'S NOT, EXCEPT FOR
22 THE FACT YOU CAN ALSO SEE A COUPLE OF PARASOLS AND DECK
23 CHAIRS.

24 THE COURT: HOW LONG DO YOU ANTICIPATE TAKING
25 ON THIS SEGMENT OF YOUR ARGUMENT?

26 MR. KENDALL: I'M GETTING THERE. NOT MUCH
27 LONGER. I KNOW WE HAVE TIME PRESSURE, BUT HE MADE THE
28 POINTS. I HAVE TO RESPOND TO THEM.

1 ALL OF THESE POINTS THAT I'VE BEEN MAKING,
2 THEY ARE ALL ISSUES OF LAW. NEWSWORTHINESS IS AN ISSUE
3 OF LAW. SHULMAN DECIDED IT AS A SUMMARY JUDGMENT
4 MOTION. THE SIPPLE AGAINST CHRONICLE CASE, THE WASSER
5 AGAINST SAN DIEGO UNION, ALL THAT WE'VE CITED, THESE ARE
6 ALL ISSUES OF LAW ON NEWSWORTHINESS, YOUR HONOR.

7 LET ME LOOK TO THE CONSTITUTIONAL RIGHT OF
8 PRIVACY, JUST PAUSING TO SAY I'M NOT GOING TO TALK ANY
9 MORE ABOUT THE COMMUNICATION DECENCY ACT, BUT IT'S
10 IMPORTANT TO REMEMBER THAT THAT DOES PROTECT THE
11 CAPTION, SO ALL THIS ARGUMENTATION ABOUT THE CAPTION HAS
12 TO GIVE WAY.

13 THE CONSTITUTIONAL RIGHT OF PRIVACY, COUPLE
14 POINTS IN RESPONSE TO WHAT'S BEEN SAID, BESIDES THE
15 INAPPOSITENESS OF THE CRIMINAL CASES. ONE OF THE THINGS
16 THAT IS CLEAR FROM HILL IS THAT UNLIKE -- IT IS NOT
17 NECESSARY TO SHOW A COMPELLING INTEREST TO USE THE
18 INFORMATION THAT SOMEONE WANTS TO USE THAT MIGHT COLLIDE
19 WITH A PRIVACY INTEREST IF THE INVASION -- OBVIOUSLY, WE
20 ARGUE THERE IS NO INVASION HERE, BUT IF THERE WERE AN
21 INVASION, IF IT'S JUSTIFIED BY COMPETING INTEREST,
22 THAT'S SUFFICIENT.

23 AND ALL THAT HAS TO BE ESTABLISHED IS A
24 LEGITIMATE COMPETING INTEREST, SO THE ONLY QUESTION ON
25 THIS FIRST AMENDMENT ASPECT OF THE ANALYSIS UNDER THE
26 CONSTITUTIONAL RIGHT OF PRIVACY IS WHETHER IT'S
27 LEGITIMATE TO INFORM THE PUBLIC ABOUT THE STATE OF THE
28 COASTLINE AND ABOUT BARBRA STREISAND BEING ON THE

1 COASTLINE; DOESN'T HAVE TO BE COMPELLING; DOESN'T HAVE
2 TO BE THE ONLY WAY TO DO IT. IT JUST HAS TO BE
3 LEGITIMATE.

4 AND, CLEARLY, IT IS LEGITIMATE TO IDENTIFY
5 SOMEONE WHO IS, INDEED, IN PROCEEDINGS CONCERNING THE
6 DEVELOPMENT; NOT TO MENTION THAT SHE IS A CELEBRITY,
7 UNDER ALL THOSE CASES FROM SURFING TO FOOTBALL TO
8 BASEBALL TO OTHER ENTERTAINMENT FIGURES, TO BOOKS, THAT
9 WE'VE CITED, SHOWING THAT CELEBRITIES ARE A PROPER AREA
10 OF HUMAN INTEREST. THAT'S WHY PEOPLE MAGAZINE EXISTS.
11 THAT'S WHY BARBRA GOT HER HOUSE PUBLISHED IN
12 PEOPLE MAGAZINE.

13 IF THIS DEVELOPMENT WAS -- WAS A COASTAL
14 FACTORY OR A COMMERCIAL DEVELOPMENT, NOBODY WOULD
15 SERIOUSLY CONTEND YOU COULDN'T TAKE A PICTURE OF IT.
16 SHE'S SAYING BECAUSE IT'S A HOME YOU CAN'T. BUT, YOU
17 KNOW, HOMES HAVE IMPACTS ON THE ENVIRONMENT, AND HOMES
18 HAVE IMPACTS ON THE COASTLINE, AND THIS HOME IS
19 CURRENTLY IN ISSUE IN THAT WAY.

20 SO YOU NOT ONLY HAVE AN INDIVIDUAL --

21 MR. GATTI: YOUR HONOR, OBJECTION TO THAT LAST
22 STATEMENT. IT'S NOT IN EVIDENCE.

23 THE COURT: WHICH PART?

24 MR. GATTI: THE OBJECTION THAT THIS HOUSE IS
25 IN THE NEWS OR THERE IS A DISPUTE AS TO THIS HOUSE, THAT
26 THIS HOUSE IS NOT IN A DISPUTE AND THERE IS NO EVIDENCE
27 TO THE EFFECT THAT THIS HOUSE --

28 THE COURT: I HAVE TO GO BACK AND LOOK AT THE

1 RULING, BUT CERTAINLY THE DEFENSE OFFERED INFORMATION
2 FROM THE CITY OF MALIBU RECORDS, SOME OF WHICH DID COME
3 IN.

4 MR. KENDALL: RIGHT.

5 MR. GATTI: YOUR HONOR, THOSE RECORDS DO NOT
6 REFLECT A DISPUTE WITH THIS HOME. THERE ARE DIFFERENT
7 RESIDENCES THERE THAT MRS. STREISAND OWNS THAT IS NOT --

8 THE COURT: WELL, YOU KNOW, ONE THING THAT IS
9 NOT CLEAR FROM THE RECORD IS IN WHICH OF THESE HOUSES
10 SHE RESIDES, WHICH ONE IS HERS.

11 MR. KENDALL: THEY NEVER OFFERED THAT. WE
12 DON'T EVEN KNOW WHERE SHE LIVES AMONG --

13 THE COURT: I ASSUME FROM THE ARGUMENT --
14 EXCUSE THE INTERRUPTION, MR. KENDALL -- THAT THE ONE
15 WITH THE POOL IS THE ONE IN WHICH SHE LIVES, BUT THERE
16 ARE TWO OTHER HOUSES IN THE -- WELL, THERE ARE MANY IN
17 THE PHOTO, BUT THERE IS ONE ON EACH SIDE. AND THERE IS
18 NOTHING IN THE RECORD THAT SAYS SHE OWNS EITHER OF THOSE
19 TWO HOUSES.

20 MR. GATTI: I WOULD JUST --

21 THE COURT: EXCUSE ME AGAIN, BUT I INFERRED
22 FROM THE FACT THAT THERE WAS A PARTIAL RECORD OF THE
23 CITY OF MALIBU RECORD THAT RELATED TO THIS HOUSE, AND I
24 TAKE IT FROM YOUR COMMENT, MR. GATTI, THAT THEY DON'T.

25 MR. GATTI: THERE IS NO DISPUTE AT ISSUE WITH
26 THE HOME WHICH IS THE RESIDENCE, AND THE RESIDENCE IS
27 IDENTIFIED IN THE RECORD THROUGH THE COMPLAINT, THE
28 ALLEGATIONS, AND THE OTHER EVIDENCE THAT WE'VE SUBMITTED

1 WITH MRS. STREISAND'S DECLARATION THAT THAT IS THE
2 RESIDENCE.

3 MR. KENDALL: WELL, YOUR HONOR, I THINK
4 HE'S -- HE'S OUTSIDE THE RECORD, BUT IN ANY EVENT I
5 THINK IT'S BESIDE THE POINT. BECAUSE THE ISSUE IN THAT
6 DEVELOPMENT DISPUTE HAS TO DO, AMONG OTHER THINGS, WITH
7 STABILITY OF THE BLUFF. AND THAT'S WHAT WE GOT A
8 PICTURE OF THERE, IS THE BLUFF AND THE DEVELOPMENT
9 THAT'S ON TOP OF IT.

10 MR. GATTI: YOUR HONOR, I WOULD -- THERE IS
11 NOTHING IN EVIDENCE BEFORE THE COURT THAT THERE IS ANY
12 DISPUTE WITH OR ANY CONTROVERSY WITH THE BLUFF THAT IS
13 IN FRONT OF MRS. STREISAND'S RESIDENCE, AND THAT IS --
14 IT'S SIMPLY THAT. THERE IS NO EVIDENCE OF IT, AND IT
15 DOESN'T EXIST. THAT'S JUST MERELY AN ATTEMPT TO TRY TO
16 DIVERT -- CREATE ATTENTION WHERE NONE SHOULD BE.

17 MR. KENDALL: WELL --

18 THE COURT: IT APPEARS FROM THE RECORD THAT
19 SHE OWNS ANOTHER HOUSE IN THE AREA.

20 MR. KENDALL: YOUR HONOR --

21 THE COURT: IF NO ONE WANTS TO TELL ME WHICH
22 IT IS, I GUESS I'LL NEVER KNOW WHICH IT IS FOR PURPOSES
23 OF THIS HEARING, BUT I DON'T KNOW WHICH SIDE THAT HURTS
24 OR HELPS, IF EITHER.

25 MR. GATTI: WELL, OUR POINT IS THERE IS
26 NOTHING IN THE EVIDENCE THAT SETS FORTH ANY -- ANY
27 ALLEGED NEWSWORTHINESS TO THIS RESIDENCE OF
28 MRS. STREISAND.

1 THE COURT: LET'S ASSUME, FOR SAKE OF
2 DISCUSSION, THAT SHE OWNS ANOTHER HOUSE -- CLEARLY IT'S
3 CASE THERE IS SOME OTHER HOUSE IN THE AREA WHICH SHE
4 OWNS AND WHICH SHE IS IN DISCUSSIONS WITH THE CITY OF
5 MALIBU --

6 MR. KENDALL: YOUR HONOR.

7 THE COURT: JUST A SECOND, MR. KENDALL. BUT
8 THE FACT THAT SHE OWNS THIS HOUSE IN THE CENTER OF THE
9 PICTURE WITH THE POOL IN THE BACKYARD, MIGHT BE FAIR
10 COMMENT WITH RESPECT TO WHATEVER MR. ADELMAN WANTS TO
11 SAY ABOUT PEOPLE WHO OWN COASTAL PROPERTY. DOES THIS
12 REALLY HELP YOUR POINT, MR. GATTI?

13 MR. GATTI: YES, IT DOES.

14 THE COURT: AND HOW, PLEASE?

15 MR. GATTI: BECAUSE, A, IT'S -- THERE IS
16 NOTHING NEWSWORTHY, AND MR. ADELMAN --

17 THE COURT: ISN'T THAT WHAT MAKES IT
18 NEWSWORTHY, SHE ALREADY OWNS ONE HOUSE IN THE COASTAL
19 AREA? WHY WOULD -- WHY DO WE GET TO DECIDE EXCEPT IN
20 THE GENERAL, MOST GENERAL MANNER, WHAT THE PUBLIC FINDS
21 NEWSWORTHY?

22 MR. GATTI: WELL, THE ASSUMPTION BEING MADE IS
23 THAT MR. ADELMAN HAS THE SUPERIOR RIGHT TO IDENTIFY THE
24 LOCATION OF INDIVIDUAL'S HOMES, AND THERE HAS NEVER BEEN
25 A HOLDING THAT WOULD SAY A PRIVATE CITIZEN HAS A
26 FUNDAMENTAL RIGHT THAT TRUMPS THE FUNDAMENTAL RIGHT OF
27 PRIVACY TO DO WHAT IS BEING DONE HERE TO A PRIVATE
28 CITIZEN. AND THAT'S WHAT MR. ADELMAN IS ASKING TO DO.

1 THE COURT: MR. KENDALL.

2 MR. KENDALL: I THINK HE'S GONE WELL BEYOND
3 THE OBJECTION TO EVIDENCE --

4 THE COURT: YOU ARE NOT GOING TO LOSE ANY TIME
5 AS A CONSEQUENCE.

6 MR. KENDALL: THE PROBLEM IS WE'RE ALL UNDER
7 COLLECTIVE TIME PRESSURE. YOUR HONOR, THE FACT THAT'S
8 CLEAR IS THAT THERE IS CONTROVERSY ABOUT THE PROPERTY
9 THAT IS BEING DEVELOPED HERE. YOU CAN SEE THERE ARE
10 THREE STRUCTURES ON THIS PROPERTY THAT ARE VISIBLE IN
11 THE PICTURE.

12 THE COURT: BUT THAT'S EXACTLY THE ISSUE THAT
13 HASN'T BEEN RESOLVED FOR ME, AND MAYBE COUNSEL WANT TO
14 STIPULATE TO IT; MAYBE THEY DON'T. ALL I KNOW FROM THE
15 RECORD IS THAT APPARENTLY SHE LIVES IN THE CENTER HOUSE.
16 I DON'T KNOW WHETHER SHE OWNS EITHER OF THE TWO
17 STRUCTURES ON THE SIDES, FOR THE RECORD.

18 MR. KENDALL: THEY HAVEN'T INTRODUCED EVIDENCE
19 OF THAT.

20 THE COURT: I DON'T REMEMBER. I CAN LOOK
21 AGAIN AT THE EXHIBIT FROM THE CITY'S FILES, OR EXHIBITS,
22 WHICHEVER IT MAY BE, THAT IS OR ARE IN THE RECORD WITH
23 RESPECT TO THE PURPOSE FOR WHICH THEY ARE OFFERED AND
24 WHETHER THAT'S GOING TO APPEAR FROM THE CONTEXT OF THOSE
25 FILES OR NOT. MR. KENDALL.

26 MR. KENDALL: YOUR HONOR, I WANT TO MAKE A
27 POINT ABOUT THE NEWSWORTHINESS. YOUR HONOR DECLINED TO
28 ADMIT NEWS ARTICLES ABOUT THE CONTROVERSY. AND WITH

1 RESPECT -- I THINK THAT, UNLESS THE ONLY BASIS IS
2 AUTHENTICATION, BECAUSE THEY HAPPEN TO BE DOWNLOADED
3 FROM THE INTERNET, WHICH I RESPECTFULLY SUBMIT IS WRONG
4 FOR THE SAME REASON THAT A WESTLAW PRINTOUT IS
5 PERMITTED.

6 BUT IT'S CLEAR THAT THERE IS DISCUSSION IN THE
7 NEWS, AND IT SEEMS TO ME THAT THOSE ARE ADMISSIBLE FOR
8 THE FACT, AND IF -- AND I DON'T THINK THERE WOULD BE ANY
9 PREJUDICE TO THE OTHER SIDE IF WE ACTUALLY SUBMITTED THE
10 ACTUAL NEWSPAPER, IF THAT'S WHAT THE COURT REQUIRES, OF
11 THE SAME DOCUMENT THAT WE SUBMITTED EARLIER.

12 AND FOR THEM TO BE ARGUING THERE IS NOTHING
13 NEWSWORTHY ABOUT THIS BECAUSE OF THE FACT THAT THIS WAS
14 A DOWNLOAD FROM WESTLAW SEEMS TO ME TO BE TWISTING THIS
15 CASE FAR AWAY FROM THE FACTS.

16 THE OTHER THING, YOUR HONOR, IS THE FACT THAT
17 IT'S THE PUBLIC WHO DETERMINES IF SOMETHING IS
18 NEWSWORTHY. IN OTHER WORDS, IF THERE IS PUBLIC INTEREST
19 IN SOMETHING, IT'S NEWSWORTHY AS A MATTER OF LAW. THERE
20 IS A GOOD DISCUSSION OF THIS IN THE CARAFANO CASE THAT
21 WE CITED. REMEMBER, THAT WAS THE ACTRESS WHO DIDN'T
22 THINK IT WAS GREAT THAT HER HIGHLY SPECIFIC SEXUAL
23 PRACTICES WERE BEING DISSEMINATED ON A WEBSITE.

24 AND THE CENTRAL DISTRICT OF CALIFORNIA SAYS
25 "THIS COURT CONCLUDES THAT THE PUBLICATION OF
26 PLAINTIFF'S ADDRESS," WHICH WAS NOT DONE HERE, "WAS
27 NEWSWORTHY," TOGETHER WITH AN ACCOUNT OF HER SEXUAL
28 PRACTICES, WHICH OBVIOUSLY DIDN'T MAKE HER FEEL TOO GOOD

1 AS WAS ARGUED IN THE CASE, BECAUSE SHE WAS CLAIMING SHE
2 WAS THEN GETTING CONTACTED BY VARIOUS PEOPLE WHO WANTED
3 TO EXPLORE THOSE SEXUAL PRACTICES WITH HER.

4 "PLAINTIFF'S ADDRESS CAN BE INFERRED FROM THE
5 MYRIAD TOURS AND MAPS OFFERED OF STARS' HOMES THROUGHOUT
6 LOS ANGELES COUNTY. SECOND, THE INTRUSION HERE IS
7 MINIMAL, GIVEN THE FACT THAT THE PLAINTIFF'S ADDRESS IS
8 NOT A PRIVATE MATTER BUT, RATHER, IS A MATTER OF PUBLIC
9 RECORD." AND THE COURT GOES ON WITH LOTS OF LANGUAGE
10 SHOWING THERE HAPPENS TO BE PUBLIC CURIOSITY ABOUT THIS
11 PARTICULAR ACTRESS.

12 WELL, THERE IS PUBLIC CURIOSITY ABOUT BARBRA
13 STREISAND, WHO FOR MUCH OF HER LIFE HAS DECIDED TO QUIET
14 AGGRESSIVELY TO MAKE HERSELF A MATTER OF PUBLIC
15 CURIOSITY, AND WE'VE CITED TO THE COURT THE CASES THAT
16 SAY THAT JUST BECAUSE YOU DECIDE TO STOP DOING IT
17 DOESN'T MEAN THAT THE CELEBRITY STATUS NO LONGER COUNTS
18 FOR PURPOSES OF PEOPLE MAKING COMMUNICATION ABOUT YOU.

19 WITH THAT, YOUR HONOR, UNLESS YOU HAVE
20 QUESTIONS FOR ME, I'M PREPARED TO MOVE ON TO THE
21 ANTI-PAPARAZZI ACT MISAPPROPRIATION.

22 MR. GATTI: MAY I --

23 THE COURT: COUNSEL, THAT WAS YOUR TIME TO
24 RESPOND. THEY ARE, OF COURSE, THE MOVING PARTY. YOU
25 ARE THE RESPONDING PARTY. THAT WAS THE REPLY.

26 SO WE ARE GOING TO MOVE ON. ARE YOU GOING TO
27 TAKE UP THE FOURTH OR FIFTH CAUSE OF ACTION, OR YOU WANT
28 TO DEAL WITH THEM AT THE SAME TIME?

1 MR. KENDALL: YOUR HONOR, I COULD DO IT
2 WHICHEVER WAY YOU THINK IS MOST EFFICIENT.

3 THE COURT: LET'S DO IN NUMERICAL ORDER THEN.
4 YOU CAN DO THEM AT THE SAME TIME BUT IN ORDER, 1708.8
5 AND THEN AT 3344.

6 MR. KENDALL: I THINK I CAN VERY QUICK ON
7 1708.8, YOUR HONOR. IT REQUIRES A PICTURE OF A PERSON
8 OR AT LEAST AN ATTEMPT TO TAKE A PICTURE OF A PERSON
9 ENGAGING IN A FAMILIAL ACTIVITY. THERE IS NO PERSON
10 HERE. THERE IS NO EVIDENCE THAT THERE WAS EVER ANY
11 INTENTION TO TAKE A PICTURE OF A PERSON. END OF THAT
12 ELEMENT.

13 IT WOULD ALSO HAVE TO BE OFFENSIVE TO A
14 REASONABLE PERSON. THERE IS NO EVIDENCE OF THAT. AND,
15 FINALLY, THERE MUST BE A VISUAL ENHANCING DEVICE BEING
16 USED TO TAKE THAT PICTURE, AND THERE IS NOTHING OF THE
17 SORT HERE.

18 THEY ARE TRYING TO ARGUE THAT THERE IS A
19 VISUAL ENHANCING DEVICE BECAUSE YOU CAN ENLARGE THE
20 PICTURE LATER ON ON THE INTERNET. FIRST, AS I FURTHER
21 DESCRIBED YESTERDAY -- I MEAN, TWO DAYS AGO -- IN FACT,
22 THE PICTURE HAS BEING SHRUNKEN, NOT ENLARGED. THERE IS
23 NO ENLARGEMENT HAPPENING AT ALL.

24 BUT, SECONDLY, THEY CAN'T --

25 THE COURT: WE DON'T HAVE THAT EVIDENCE,
26 ACTUALLY, IN THE RECORD.

27 MR. GATTI: YES.

28 MR. KENDALL: WELL, I THINK IT IS IN EXHIBIT C

1 ON PAGE 13 WHERE IT SAYS THAT THE PICTURES ARE REDUCED
2 TO THE THUMBNAIL AND PREVIEW.

3 THE COURT: WE HAD A DISCUSSION ABOUT WHAT
4 THUMBNAIL AND PREVIEW WAS. GO AHEAD.

5 MR. KENDALL: I'LL SAY THERE IS NO EVIDENCE
6 THAT THERE IS ANY KIND OF VISUAL ENHANCING DEVICE BEING
7 USED AT ALL, AND -- IN THE CAMERA, AND THERE IS NO
8 EVIDENCE THAT THERE IS A VISUAL ENHANCING DEVICE BEING
9 USED ON THE WEBSITE.

10 BUT, ANYWAY, WHATEVER IS HAPPENING ON THE
11 WEBSITE IS PUBLICATION, AND THE ANTI-PAPARAZZI ACT,
12 1708.8, HAS NOTHING TO DO WITH PUBLICATION. IT HAS TO
13 DO WITH STALKERS AND PAPARAZZI USING, YOU KNOW,
14 HIGH-POWER TELEPHOTO LENSES OR OTHER KINDS OF VISUAL
15 ENHANCING DEVICES TO INTRUDE, IF THEY DON'T ACTUALLY
16 TRESPASS. WE DON'T HAVE THAT HERE.

17 SO WE'VE GOT NO PICTURE OF A PERSON, NO
18 ATTEMPT TO TAKE A PICTURE OF A PERSON, NO OFFENSIVENESS,
19 AND NO ENHANCING DEVICE BEING USED. END OF ELEMENT --
20 END OF ANTI-PAPARAZZI ACT CLAIM. LET'S REMEMBER THIS IS
21 BARBRA STREISAND'S BURDEN TO ESTABLISH ALL THOSE FACTS.
22 SHE'S FALLEN FAR, FAR SHORT OF THAT.

23 NOW, MISAPPROPRIATION -- LET ME GO BACK TO
24 SOMETHING, BECAUSE THIS DID COME UP IN MR. GATTI'S
25 ARGUMENT TWO DAYS AGO. THE COURT ASKED WHAT ABOUT A
26 COFFEE MUG. IT'S IMPORTANT TO DISTINGUISH BETWEEN THE
27 FIRST CLAUSE OF 3344, THE STATUTORY PROVISION THAT'S IN
28 ISSUE HERE, AND THE SECOND CLAUSE. BECAUSE IT MAKES A

1 GREAT DEAL OF DIFFERENCE. I WANT TO GO OVER THAT WITH
2 THE COURT.

3 3344 (A) READS AS FOLLOWS: "ANY PERSON WHO
4 KNOWINGLY USES ANOTHER PERSON'S NAME, VOICE, SIGNATURE,
5 PHOTOGRAPH AND LIKENESS IN ANY MANNER ON OR IN PRODUCTS,
6 MERCHANDISE, OR GOODS" -- THAT'S CLAUSE ONE.

7 "OR" -- NOW READING CLAUSE TWO -- "FOR
8 PURPOSES OF ADVERTISING OR SELLING OR SOLICITING
9 PURCHASES OF PRODUCTS, MERCHANDISE, GOODS OR SERVICES."

10 SO CLAUSE TWO HAS A PURPOSE REQUIREMENT.
11 CLAUSE ONE DOESN'T, BUT WE'RE NOT IN A CLAUSE ONE CASE.
12 A COFFEE MUG IS A CLAUSE ONE CASE. A COFFEE MUG WITH A
13 PICTURE OF BARBRA STREISAND, IF THAT WAS DONE, WOULD NOT
14 REQUIRE A COMMERCIAL PURPOSE. BUT A CLAUSE TWO CASE,
15 WHICH IS WHAT WE HAVE HERE, THEY ALLEGE, AND OF COURSE
16 WE DISAGREE, DOES.

17 THE PROBLEM THEY HAVE IS THAT THERE IS A
18 PUBLIC AFFAIRS EXCEPTION THAT PROTECTS AGAINST THIS
19 ARGUMENT. AND THE SECOND PROBLEM THEY HAVE IS THAT
20 THERE IS NO COMMERCIAL PURPOSE INVOLVED IN THE STATUTE
21 IN THIS ACTIVITY BECAUSE EVERYTHING IS GIVEN TO CHARITY
22 BY MR. ADELMAN.

23 AND THERE IS NO EVIDENCE THAT THEY'VE
24 SUBMITTED THAT THERE IS ANY COMMERCIAL PURPOSE. AND, OF
25 COURSE, THE VERY FACT THAT THESE IMAGES ARE GIVEN AWAY
26 FOR FREE BY WAY OF DOWNLOAD AND THE FACTS YOU HAVE IN
27 THE RECORD, THAT THERE HAVE BEEN THREE ORDERS FOR
28 REPRINTS, ONE BY THE JACOBSON'S, WHOSE HOUSE IS IN THE

1 PICTURE AND THE NEIGHBORS, AND THE OTHER TWO BY
2 MR. GATTI'S FIRM'S WEBSITE -- THAT'S AS FAR AS WE CAN
3 SAY, AND MR. GATTI IS NOT DENY THEY ARE THE
4 PURCHASERS -- THERE DOESN'T SEEM TO BE A REAL COMMERCIAL
5 PURPOSE HERE. YOU GIVE IT AWAY FOR FREE AND PEOPLE WHO
6 ARE EITHER IN THE PICTURE, WHICH WOULD BE BARBRA
7 STREISAND AND THE NEIGHBORS ORDER IT. THAT'S IT.

8 BUT THERE IS ALSO THIS EXEMPTION FOR PUBLIC
9 AFFAIRS, AND WE HAVE THE MONTANA AGAINST SAN JOSE
10 MERCURY NEWS CASE WHERE THE SALE OF A POSTER OF A
11 PHOTOGRAPH OF JOE MONTANA IS PUBLIC AFFAIRS. IF THAT'S
12 PUBLIC AFFAIRS, THEN CERTAINLY THIS CALIFORNIA COASTLINE
13 DOT ORG EFFORT TO PROVIDE A -- A WEBSITE ACCESS FOR
14 GOVERNMENT AGENCIES, PEOPLE WHO ARE INTERESTED IN
15 ENVIRONMENTAL ISSUES, IS A LITTLE MORE PUBLIC AFFAIRS
16 THAN A PHOTOGRAPH OF JOE MONTANA.

17 A SURFING DOCUMENTARY WITH RESPECT TO THE
18 INCLUSION OF THE PLAINTIFF IN THE DOOR AGAINST FRONTLINE
19 VIDEO CASE THAT THE COURT HAS CITED, THE SAME.
20 GIANFREDO AGAINST MAJOR LEAGUE BASEBALL, (PHONETIC) A
21 WEBSITE, THE SALE OF PROGRAMS FEATURING BASEBALL PLAYERS
22 NAMES AND LIKENESSES, NEWSWORTHY AGAIN, PROTECTED BY THE
23 FIRST AMENDMENT. WE HAVE AT LEAST AS MUCH OF A PUBLIC
24 AFFAIRS CLAIM AS THOSE MUCH MORE COMMERCIAL AND MUCH
25 LESS PUBLIC NEWS ORIENTED USES.

26 FURTHERMORE, STEPS WERE TAKEN -- AND THIS IS
27 UNCONTROVERTED IN THE EVIDENCE -- TO MAKE THIS WEBSITE
28 AS UNCOMMERCIAL AS POSSIBLE. THE WEBSITE CAPTIONS ARE

1 INVISIBLE TO INTERNET SEARCH ENGINES. NO ONE IS GOING
2 TO FIND THIS WEBSITE IF THEY ARE PUTTING "BARBRA
3 STREISAND" INTO GOOGLE. THEY WOULD FIND ALL THOSE STAR
4 MAP SITES, THEY WOULD FIND LATITUDE AND LONG -- I'M
5 SORRY, THEY WOULDN'T FIND THAT UNLESS THEY PUT IN THE
6 ADDRESS.

7 BUT THEY WOULD FIND WHERE BARBRA STREISAND
8 LIVES; THEY WOULD FIND THE BARBRA STREISAND'S FAN SITE
9 AND NEWSPAPER ARTICLES ABOUT BARBRA STREISAND. BUT
10 UNTIL THIS LAWSUIT GOT FILED, THEY WOULDN'T HAVE FOUND
11 THIS WEBSITE.

12 NO LISTING OF CAPTIONS ON THE SITE. AS I SAID
13 BEFORE, IF MR. ADELMAN HAD WANTED TO ATTRACT PEOPLE THE
14 NAME OF BARBRA STREISAND OR ATTRACT PEOPLE TO SEE THE
15 PICTURE OF BARBRA STREISAND OR ATTRACT PEOPLE TO BUY IT,
16 HE WOULD HAVE LISTED THE CAPTIONS; HE WOULD HAVE DONE
17 SOMETHING. THAT'S NOT IN EVIDENCE. IT DIDN'T HAPPEN.

18 SO THE EVIDENCE IS ENTIRELY TO THE CONTRARY.
19 THE EVIDENCE IS THERE WAS NO EFFORT HERE TO DO SOMETHING
20 THAT WAS COMMERCIAL, AND THERE WAS NO EFFORT TO DO
21 SOMETHING THAT WOULD USE BARBRA STREISAND'S NAME IN
22 ORDER TO SELL PHOTOGRAPHS.

23 IF THE COURT EXAMINES THE EXHIBITS ON THE
24 WEBSITE ABOUT PURCHASING, THE COURT WILL SEE THAT THERE
25 IS -- WHEN YOU GO THROUGH THE PURCHASING PROCESS, THERE
26 IS NOTHING THAT REPEATS THE CAPTION. SO SOMEONE COMES
27 TO ORDER THE PICTURE, AND WHEN THEY ARE AT THE PICTURE
28 IT SAYS STREISAND ESTATE --

1 THE COURT: COUNSEL, EXCUSE ME, I DON'T
2 UNDERSTAND WHAT YOU ARE ARGUING. YOU ARE SAYING IT IS
3 IN THE DOCUMENT, OR I SHOULD GO SURF THE NET?

4 MR. KENDALL: NO, NO, IN THE DOCUMENTS. IT
5 IS -- I WANT TO SAY EXHIBIT G. LET ME JUST CHECK.

6 THE COURT: I REMEMBER LOOKING AT THE VARIOUS
7 PAGES OF THE EXHIBITS. CAN YOU FINISH BY 3:40, COUNSEL,
8 THIS SEGMENT?

9 MR. KENDALL: YES, I WILL.

10 THE COURT: THANK YOU.

11 MR. KENDALL: I'M WRONG. IT'S NOT -- IT'S NOT
12 G. WHAT THE COURT WILL SEE IS THAT WHEN YOU GO THROUGH
13 THE PROCESS OF ORDERING, AND IT'S ALSO CLEAR FROM THE
14 PICTOPIA CEO MR. LIEBMAN'S DECLARATION, THERE IS NO USE
15 OF THE CAPTION IN THE ORDERING PROCESS. IT'S CLEAR THAT
16 THIS IS NOT A SITUATION IN WHICH SOMEONE IS SAYING,
17 "BARBRA STREISAND, COME AND GET IT, ONLY FIFTEEN
18 NINETY-FIVE."

19 SO THERE REALLY IS NO USE OF BARBRA
20 STREISAND'S NAME TO SOLICIT A PURCHASE. THERE IS NO USE
21 OF BARBRA STREISAND'S NAME TO ADVERTISE. QUITE THE
22 CONTRARY, IF YOU WANTED TO ADVERTISE, YOU MAKE IT
23 VISIBLE TO SEARCH ENGINES. AND THERE IS NO USE OF
24 BARBRA STREISAND'S NAME TO SELL. SO 3344 FAILS UNDER
25 THE REQUIRED ELEMENTS OF SECTION A. AND EVEN IF THEY
26 COULD SATISFY THEIR BURDEN UNDER SECTION A, THEY LOSE
27 WHEN YOU GET TO THE PUBLIC AFFAIRS EXCEPTION.

28 FINALLY, THE LAST POINT, YOUR HONOR.

1 MR. GATTI ARGUED THAT MR. ADELMAN SAID SOME DAY -- SAID
2 THESE ARE AVAILABLE FOR LICENSE. BUT THERE IS NO
3 EVIDENCE THAT THERE HAS EVER BEEN A LICENSE. THERE IS
4 NO EVIDENCE THAT THE LICENSE WOULD BE FOR MONEY. , THERE
5 IS NO EVIDENCE THAT THE LICENSE WOULD BE FOR ANYTHING
6 OTHER THAN A NON COMMERCIAL PUBLIC AFFAIRS USE. THERE
7 IS NO EVIDENCE OF ANY LICENSING WHATSOEVER. IF THAT
8 EVER HAPPENS, WE CAN ARGUE ABOUT IT THEN, BUT THAT'S NOT
9 BEFORE THE COURT.

10 NOTHING FURTHER ON THESE POINTS, YOUR HONOR.

11 THE COURT: THANK YOU.

12 MR. CASAS, IS THERE SOMETHING YOU WANTED TO
13 RAISE ON THESE POINTS?

14 MR. CASAS: TWO QUICK POINTS, YOUR HONOR. THE
15 FIRST IS IN CONNECTION WITH THIS PUBLIC ISSUE ABOUT
16 PROBLEMS ASSOCIATED WITH THE PROPERTY, AND I DON'T
17 RECALL WHAT EXHIBIT IT'S FROM, BUT IT SEEMS TO ME THAT
18 THERE MAY NOT BE A WHOLE LOT OF RELEVANCE TO SPECIFIC
19 PROBLEMS THAT THE CITY OF MALIBU OR NEIGHBORS ARE HAVING
20 WITH MRS. STREISAND'S PROPERTY.

21 THE RELEVANCE IS THE FACT THAT IT'S -- THE
22 PROPERTY EXISTS WITHIN THE COASTAL ZONE ITSELF. AND AS
23 THE COURT POINTED OUT A FEW DAYS AGO, THE COASTAL ZONE
24 IS -- I DON'T THINK YOU PUT IT QUITE THIS WAY, BUT IT IS
25 A FIERCE MATTER OF PUBLIC DEBATE. THERE ARE STATUTES
26 GALORE ON THE POINT. THERE IS LITIGATION GALORE ON
27 ISSUES DEALING WITHIN THE COASTAL ZONE, AND THERE IS
28 EVEN AN ADMINISTRATIVE BODY THAT'S BEEN APPOINTED TO

1 OVERSEE IT.

2 THE FACT THAT THERE IS A CONTROVERSY OR MAY BE
3 A CONTROVERSY WITH RESPECT TO THIS PROPERTY, I THINK, IS
4 FORTUITOUS. IN CONNECTION WITH MR. ADELMAN'S TAKING OF
5 THE PHOTOGRAPHS, THE EVIDENCE SUGGESTS HE DIDN'T EVEN
6 KNOW THIS WAS BARBRA STREISAND'S PROPERTY SO AS HE'S
7 TAKING PHOTOGRAPHS, THE 12,200 PHOTOGRAPHS OF THE
8 CALIFORNIA COAST, HE'S DOING IT FOR THE PURPOSE OF THE
9 PUBLIC ISSUE OF DEVELOPMENT AND PRESERVATION OF THE
10 COASTLINE, NOT IN PARTICULAR WHETHER THERE IS A PROBLEM
11 WITH THIS PROPERTY.

12 THE SECOND POINT, YOUR HONOR, IS I AGREE WITH
13 MR. KENDALL IN HIS RESPONSE TO YOUR QUESTION ABOUT THE
14 PUBLICATION, SHOULD WE LOOK AT THE FACT THAT THIS IS
15 BROADER PUBLICATION BECAUSE IT'S MADE OVER THE WEB. AND
16 I REALLY THINK NOT. IF YOU TAKE THE NEW YORK TIMES
17 VERSUS SULLIVAN CASE, 376 U.S. AT PAGE 270, THE COURT,
18 SUPREME COURT IN GENERAL, ADDRESSED THIS ISSUE WHEN IT
19 SAID, QUOTE, THE FIRST AMENDMENT REFLECTS A PROFOUND
20 NATIONAL COMMITMENT TO THE PRINCIPLE THAT DEBATE ON
21 PUBLIC ISSUES SHOULD BE UNINHIBITED, ROBUST, AND WIDE
22 OPEN. WHETHER IT'S A POSTER THAT IS HUNG IN A
23 STOREFRONT, WHETHER IT'S AN ARTICLE OR A PICTURE IN THE
24 NEWSPAPER OR A MAGAZINE, WHETHER IT IS A PUBLICATION ON
25 THE WEB; I THINK, IF ANYTHING, WHAT THE CONSTITUTION, AS
26 INTERPRETED BY THE U.S. SUPREME COURT, STANDS FOR WITH
27 RESPECT TO THE FIRST AMENDMENT IS THAT WE WANT TO INVITE
28 PUBLICATION IN THE BROADEST POSSIBLE FORUM THAT WE CAN

1 HAVE, AND IT JUST SO HAPPENS THAT THIS IS A POPULAR
2 MEDIA RIGHT NOW FOR DISCLOSURE OF PUBLIC ISSUES.

3 THANK YOU, YOUR HONOR.

4 THE COURT: THANK YOU. MR. GATTI.

5 MR. GATTI: THANK YOU, YOUR HONOR. I GUESS
6 STARTING LAST, STARTING QUICKLY THOUGH, WHAT OPPOSING
7 COUNSEL IS JUST REFERRING TO, AGAIN, TIES BACK TO OUR
8 EARLIER POINT THAT THERE ARE CODE SECTIONS AND AREAS
9 THAT HAVE FUNDAMENTAL RIGHTS AND THE PUBLIC HAS
10 FUNDAMENTAL INTEREST IN AND IN THOSE ZONES ONE DOES NOT
11 JEOPARDIZE THEIR RIGHT TO PRIVACY, AND NO CASES CITE TO
12 THAT.

13 AND ALSO IN DISCUSSING THESE TWO LAST CAUSES
14 OF ACTION, WE ARE TALKING HERE IN TERMS OF -- LOOKING AT
15 THESE CAUSES OF ACTION IN THE LIGHT OF A SLAPP MOTION.
16 AND AGAIN AS I'VE STATED ON THE OTHER PRIVACY ISSUES.
17 THERE ARE NO CASES CITED THAT HAVE APPLIED THE SLAPP
18 MOTION TO MISAPPROPRIATION, AND THERE IS NO CASES CITED
19 THAT APPLY IT TO THE ANTI-PAPARAZZI STATUTE.

20 COUNSEL REFERS TO, AND WE'VE TALKED ABOUT THEM
21 EARLIER, THE MONTANA CASE AND THE OTHER CASES. THOSE
22 WERE SUMMARY JUDGMENT MOTIONS. THOSE DID NOT HAVE TO DO
23 WITH THE SLAPP SUIT AT ALL. AND TO THIS DAY THERE HAS
24 NOT BEEN A MISAPPROPRIATION CLAIM THAT HAS BEEN TOSSED
25 OUT AT THE SLAPP SUIT STAGE.

26 MR. KENDALL REFERS TO NO EVIDENCE, AND WE'LL
27 GO THROUGH THE EVIDENCE. THE EVIDENCE DOES EXIST FOR
28 THESE CLAIMS; HOWEVER, WE ALSO HAVE TO UNDERSTAND THAT

1 AT THIS PROCEDURAL LEVEL, LOOKING AT WHAT IS GOING TO BE
2 SCREENED OUT AND NOT SCREENED OUT, THE ISSUE -- WE
3 HAVEN'T HAD THE OPPORTUNITY FOR DISCOVERY.

4 IN FACT, DISCOVERY -- ONCE THE SLAPP MOTION IS
5 FILED -- AND IN THIS PARTICULAR CASE HAPPENED LITERALLY
6 AT THE BEGINNING OF THIS CASE -- DISCOVERY HAS -- NO
7 DISCOVERY HAS TAKEN PLACE, SO WE HAVE WHAT WE HAVE. BUT
8 CLEARLY SOME OF THESE ISSUES WILL BE DEVELOPED FURTHER.

9 SPECIFICLY WITH THE -- I'LL START WITH THE
10 ANTI-PAPARAZZI STATUTE FIRST, AND ADDRESS SOME OF THE
11 POINTS THAT HAVE BEEN MADE BY OPPOSING COUNSEL. SECTION
12 1708.8 SPEAKS IN TERMS OF "ATTEMPTS TO CAPTURE VARIOUS
13 VISUAL IMAGES OF THE PLAINTIFF ENGAGING IN PERSONAL OR
14 FAMILIAL ACTIVITY, UNDER CIRCUMSTANCES IN WHICH THE
15 PLAINTIFF HAS A REASONABLE EXPECTATION OF PRIVACY,
16 THROUGH THE USE OF VISUAL ENHANCING DEVICES AND IN A
17 MANNER THAT IS OFFENSIVE TO A REASONABLE PERSON."

18 WE HAVE THE SITUATION HERE, THE EVIDENCE IS
19 THAT WE OBVIOUSLY HAVE THE PICTURES AND THE CAPTIONING
20 AND THE LOCATION OF THE HOME. WE ALSO HAVE THE EVIDENCE
21 THAT STATES THAT MR. ADELMAN WILL DO THIS AGAIN. AND
22 HIS PROCESS IS HE WILL CONTINUE TO DO THIS, AND IT'S A
23 NEVER ENDING PROJECT. AND HE WILL DO IT, AS HE STATES
24 ON HIS WEBSITE, WITH FURTHER TECHNOLOGY AS THAT BECOMES
25 AVAILABLE UP TO 20 MEGAPIXEL PICTURES.

26 IT IS INTERESTING TO NOTE MR. KENDALL REFERRED
27 TO A PICTURE TAKEN AT 2700 FEET, AND IT'S OBVIOUS AND WE
28 ALL KNOW FROM THE EVIDENCE AND THE PICTURES THAT THE

1 PICTURE AT 2700 FEET IS NOT THE VIEW THAT WE'RE SEEING.
2 IT HAS CLEARLY BEEN -- IT IS THROUGH THE DIGITAL PROCESS
3 THAT YOU ARE ABLE TO ZOOM INTO THE PICTURE. AND HOW IT
4 IS DONE, I KNOW YOUR HONOR DOESN'T NECESSARILY NEED TO
5 GET INTO IT, BUT IT IS CLEAR WHEN YOU ARE LOOKING AT THE
6 PICTURES SUCH AS EXHIBITS, I BELIEVE, IT'S AT EXHIBIT 10
7 OF MY DECLARATION, YOUR HONOR, AND THE OTHER -- AND
8 EXHIBIT -- THE PICTURES OF THE -- THE THUMBNAIL PICTURE
9 IS THE PICTURE AT 2700 FEET, CLEARLY THEN WE HAVE
10 TECHNOLOGICAL ENHANCEMENTS THAT GIVE YOU A DIFFERENT
11 PERSPECTIVE ON THIS VIEW, AND THE PICTURE THAT IS FOR
12 PURCHASE IS ONE THAT IS THE ENHANCED VIEW; NOT THE VIEW
13 FROM 2700 FEET.

14 IT'S CLEARLY NOT A PICTURE, AS YOUR HONOR
15 SAID, A PICTURE TAKEN WITH A BROWNIE CAMERA. THAT'S NOT
16 WHAT WE'RE TALKING ABOUT HERE.

17 MR. ADELMAN'S COUNSEL -- AND I WOULD POINT --
18 THE COURT: BUT, COUNSEL, 1708.8 (B) REQUIRES
19 THAT THE DEFENDANT ATTEMPT TO CAPTURE IN A MANNER THAT
20 IS OFFENSIVE TO A REASONABLE PERSON ANY TYPE OF VISUAL
21 IMAGE, ET CETERA, OF THE PLAINTIFF ENGAGED IN CERTAIN
22 ACTIVITY. WHAT EVIDENCE DO WE HAVE, IF ANY, THAT THE
23 REQUIREMENTS OF 1708.8 HAVE BEEN MET?

24 MR. GATTI: WE HAVE THE FACT OF THE PICTURE,
25 WE HAVE THE FACT OF THE --

26 THE COURT: WELL, IT'S NOT A PICTURE OF THE
27 PLAINTIFF. NO ONE HAS EVER SUGGESTED THAT.

28 MR. GATTI: NO. BUT WE HAVE THE PICTURE; WE

1 ALSO HAVE THE STATED REASONING WHERE HE WILL CONTINUE TO
2 DO THIS AND DO CONTINUAL AERIAL VIEWINGS OF THAT. AND
3 STATUTE ITSELF BY ITS LANGUAGE TALKS IN TERMS OF
4 ATTEMPTS. IT'S NOT AN ACTUAL -- YOU DO NOT NEED TO
5 CAPTURE A PICTURE OF THE INDIVIDUAL. IT'S AN ATTEMPT.

6 THE COURT: WHAT AUTHORITY IS THERE FOR
7 ISSUING AN INJUNCTION AGAINST SOMEONE WHO PUTS ON HIS
8 WEBSITE THAT IN THE FUTURE AS TECHNOLOGY INCREASES HE
9 MAY TAKE MORE PICTURES USING THE NEWER TECHNOLOGY, AS
10 OPPOSED TO I CAUGHT THE GUY RED HANDED OUTSIDE MY
11 RESIDENCE TAKING PICTURES OVER THE FENCE FOR THE 50TH
12 TIME. WE'RE SOMEWHERE IN BETWEEN THOSE TWO, BUT I WOULD
13 SUGGEST TO YOU WE'RE NOT VERY FAR ALONG THE CONTINUUM TO
14 THE PEEPING TOM WHO HAS TRIED IT REPEATEDLY.

15 SO HOW CAN YOU RESPOND TO THOSE INQUIRIES?

16 MR. GATTI: WHAT WE HAVE IS WE HAVE THE
17 PEEPING TOM HERE. HE'S TRYING TO JUSTIFY IT AFTER THE
18 FACT, AND THERE IS NO EVIDENCE THAT HE WASN'T ATTEMPTING
19 TO CAPTURE.

20 MR. KENDALL: WE DON'T HAVE THE BURDEN, YOUR
21 HONOR.

22 THE COURT: EXCUSE ME, MR. KENDALL? YOUR
23 CLIENT DOESN'T HAVE THE BURDEN?

24 MR. KENDALL: RIGHT.

25 THE COURT: YES. YOU AGREE WITH THAT, THAT IT
26 IS YOUR BURDEN?

27 MR. GATTI: YES, I UNDERSTAND. AND WHAT WE
28 HAVE IS --

1 THE COURT: WELL, HOW DO WE CHARACTERIZE THIS,
2 OR HOW DOES THIS COURT CONCLUDE THAT THE DEFENDANT IS A
3 PEEPING TOM, AS THE PHRASE IS COMMONLY USED. THERE ARE
4 CASES, AS A MATTER OF FACT, BEING A PEEPING TOM IS A
5 VIOLATION OF 647 SUBDIVISION SOMETHING IN THE PENAL
6 CODE.

7 MR. GATTI: WHAT WE HAVE IS A COUPLE OF
8 DIFFERENT AREAS OF INFORMATION. OBVIOUSLY, WE HAVE THE
9 PICTURE. WE HAVE THE SECTION OF THE RANTS FROM -- IT'S
10 ENTITLED "RANTS" FROM OTHERS IN THE COMMUNITY THAT SHOW
11 THE RESPONSE --

12 THE COURT: I THINK YOU OBJECTED TO THAT, AND
13 THE OBJECTION WAS SUSTAINED --

14 MR. KENDALL: YES.

15 THE COURT: -- TO THE EVIDENCE.

16 MR. GATTI: I BELIEVE -- NO, YOUR HONOR, I
17 THINK, IF I'M NOT MISTAKEN, THE RANTS AND THE -- THE
18 PHONE CALLS AND THE -- ALSO THE OTHER RANTS WERE NOT
19 OBJECTED TO -- AT LEAST ONE OF THOSE --

20 THE COURT: OKAY. WHATEVER THE STATE OF THE
21 RECORD IS, IT IS, BUT I'M STILL A LITTLE CONCERNED ABOUT
22 WHY THE CONDUCT ON THE BEST EVIDENCE IN FAVOR OF THE
23 PLAINTIFF IN THE CASE RESULTS IN A CHARACTERIZATION OF
24 WHAT THIS DEFENDANT DID AS BEING A PEEPING TOM.

25 MR. GATTI: WELL, THE STATUTE ITSELF -- WE
26 SPOKE OF THIS IN THE PREVIOUS SESSION, BUT THE STATUTE
27 ITSELF OBVIOUSLY ADDRESSES PHOTOGRAPHY AND, OBVIOUSLY,
28 ADDRESSES THE ISSUE OF VIEWING INTO AN AREA OF

1 PRIVACY --

2 THE COURT: OKAY.

3 MR. GATTI: -- THROUGH PHOTOGRAPHS.

4 THE COURT: FINE, BUT IF A PLAINTIFF IS NOT IN
5 ANY OF THOSE PHOTOGRAPHS, HOW DOES 1708.8 APPLY? IF A
6 PERSON REPEATEDLY TAKES PICTURES OF A SCENE THAT IS
7 ADMITTEDLY A MORE PRIVATE AREA OF A RESIDENCE, 50 OR A
8 HUNDRED TIMES, BUT THERE IS NOT A PERSON EVER IN THOSE
9 PICTURES, HOW DOES IT APPLY?

10 MR. GATTI: I WOULD CITE TO SUBPART (K) OF
11 1708.8.

12 THE COURT: FIRST YOU HAVE TO COME UNDER (B),
13 DON'T YOU? IF YOU DON'T HAVE A VIOLATION --

14 MR. GATTI: WELL, WHAT (K) DOES IS --

15 THE COURT: IT DEFINES IT, OKAY. BUT,
16 COUNSEL, JUST A SECOND. BEFORE YOU GET THERE, THERE ARE
17 TWO PARTS TO (B). IT'S THE PLAINTIFF, THE PERSON HAS TO
18 BE ENGAGED IN THE CONDUCT DEFINED IN (K). YOU HAVE TO
19 HAVE A PLAINTIFF IN THE PHOTOGRAPH. A PLAINTIFF HAS TO
20 BE A SUBJECT. IS THAT A CORRECT READING OF (B)? YOU
21 SEE, (K) DOESN'T DEFINE THE PHRASE "PLAINTIFF ENGAGING
22 IN A PERSONAL OR FAMILIAL ACTIVITY." (K) DEFINES
23 "PERSONAL AND FAMILIAL ACTIVITY." SO WHAT WOULD YOU SAY
24 ABOUT THAT?

25 MR. GATTI: THIS WHOLE CAUSE OF ACTION, AND IT
26 SPECIFICLY IS DONE -- AND WE CAN LOOK TO THE LANGUAGE OF
27 THE STATUTE WHEN IT SAYS "ATTEMPTS." IT DOESN'T SAY
28 THAT ONE NEEDS TO CAPTURE.

1 THE COURT: OKAY. LET'S GO BACK TO THE
2 PEEPING TOM THAT'S BEEN TO THE HOUSE 50 TIMES TAKING
3 THOSE PHOTOGRAPHS OVER THE FENCE WITH WHATEVER KIND OF
4 CAMERA. IF HE OR SHE HAS NEVER TAKEN A PICTURE OF THE
5 PLAINTIFF, IT MAY BE TRESPASS, IT MAY BE HARASSMENT, IT
6 MAY BE A LOT OF THINGS, BUT IS IT A VIOLATION OF 1708.8?

7 MR. GATTI: YES.

8 THE COURT: OKAY. WHY DON'T YOU MOVE ON TO
9 YOUR NEXT POINT. I UNDERSTAND THIS ONE.

10 MR. GATTI: THANK YOU. WITH RESPECT TO THE
11 MISAPPROPRIATION CLAIM.

12 THE COURT: YOU ARE TALKING ABOUT THE FIFTH
13 CAUSE OF ACTION IN 3344.

14 MR. GATTI: YES, I AM.

15 THE COURT: YES.

16 MR. GATTI: MR. ADELMAN'S COUNSEL WANTS TO
17 TALK ABOUT -- TRIES TO DISTINGUISH THE ISSUE WITH A
18 PROFIT OR MONEY MAKING SITUATION. FIRST OFF, THE
19 STATUTE ITSELF DOES NOT REQUIRE ANY PROFIT TO BE
20 GARNERED IN ANY WAY.

21 THE COURT: JUST A SECOND. 3344 (A) REQUIRES
22 THAT ONE USE SOMEBODY ELSE'S NAME, ET CETERA, ON
23 MERCHANDISE. NONE OF THESE -- IS THERE ANY DISPUTE THAT
24 NONE OF THE PHOTOGRAPHS, THOUGH, HAVE THE PLAINTIFF'S
25 NAME ON THEM. WHEN YOU DOWN LOAD THAT THROUGH PICTOPIA
26 YOU GET THE PICTURE.

27 MR. GATTI: WHAT YOU DO GET, YOUR HONOR, IS AT
28 ONE OF THE -- THE ISSUE IS SOLICITATION, AND THE EXHIBIT

1 10 TO MY DECLARATION, YOUR HONOR, WHICH IS THE SECOND
2 PAGE OF THAT, PAGE 2; WHEN YOU PUT UP AN IMAGE -- FIRST
3 OFF, WHEN YOU GO TO THE -- IN THIS PARTICULAR CASE, WHEN
4 YOU USE THE STREISAND CAPTION, YOU ARE THEN GIVEN THE
5 FIRST ICON YOU SEE HERE, IT'S PURCHASE PHOTOGRAPH.

6 AND IN CONNECTION WITH THAT, IT IS IDENTIFIED
7 WITH THE STREISAND ESTATE AT MALIBU. THAT DOES SHOW UP
8 LITERALLY A HALF INCH AWAY FROM THE SOLICITATION BUTTON
9 TO PURCHASE THE PHOTOGRAPH, SO IT DOES APPLY. AND IT
10 DOES USE THE NAME IN CONNECTION WITH THE PURCHASE
11 ASPECT.

12 THE STATUTE ITSELF DOES NOT LOOK AT AN ISSUE
13 OF WHETHER SOMEBODY -- LOOK AT THE OFFENDING NATURE OF
14 THE CLAIM AND THEN BACK UP AND SAY THE PERSON HAPPENED
15 TO BE A BAD BUSINESSMAN; THEREFORE, HE LOST MONEY;
16 THEREFORE, THERE IS NO MISAPPROPRIATION. THAT IS NOT
17 THE STANDARD, AND THAT'S NOT THE APPLICATION. I BELIEVE
18 THAT'S WHERE MR. KENDALL'S ARGUMENT FALLS DOWN, IN THAT
19 ANALYSIS.

20 ALSO EXHIBIT D TO MS. SEIGLE'S DECLARATION HAS
21 THE -- IT'S THE PAGE THAT STARTS ON THE FIRST PAGE WITH
22 THE COPYRIGHT LICENSE AS THE HEADING AND THEN IT
23 CONTINUES TO GO DOWN, AND IN THE -- ON THE SECOND PAGE
24 OF THAT IT SPECIFICLY STATES ON THE WEBSITE "COMMERCIAL
25 USE."

26 AND IT SAYS, "ANY OTHER DUPLICATION OF THESE
27 PHOTOGRAPHS OR ANY DUPLICATION THAT IS NOT ATTRIBUTED AS
28 ABOVE IS PROHIBITED UNDER THE TERMS OF THIS LICENSE. WE

1 ARE HAPPY TO LICENSE THESE IMAGES FOR UNATTRIBUTED
2 COMMERCIAL USE FOR A NOMINAL FEE, THE PROCEEDS OF WHICH
3 WE USE TO SUPPORT COASTAL CONSERVATION."

4 MR. ADELMAN -- AND THE UNDISPUTED EVIDENCE IS
5 THAT THESE PICTURES WITH -- IN CONNECTION WITH
6 MRS. STREISAND'S NAME, IN CONNECTION WITH THE PURCHASE
7 ASPECT OF THIS PICTURE, AND THE ALSO ADMITTED EVIDENCE
8 THAT MR. ADELMAN IS SAYING I WILL -- I'M ALSO OPEN TO
9 COMMERCIAL LICENSING OF THIS PICTURE, AND THAT IS THE
10 STATE OF THE EVIDENCE THAT IS UNDISPUTED. AND THAT IS
11 BY NATURE A MISAPPROPRIATION CLAIM.

12 AND WE'RE TALKING ABOUT WITH MISAPPROPRIATION
13 CLEARLY A NAME OR LIKENESS. IT DOESN'T HAVE TO BE THE
14 LIKENESS OF THE IMAGE. AND IN THIS CASE, AS I'VE STATED
15 BEFORE, THE CASES BEFORE YOUR HONOR -- AND THERE IS NOT
16 A SINGLE CALIFORNIA CASE THAT HAS, ON THE SLAPP STATUTE,
17 BEEN APPLIED TO THROW OUT A MISAPPROPRIATION CLAIM.

18 I KNOW WE'RE AT 3:59, YOUR HONOR.

19 THE COURT: I WILL GIVE YOU FIVE MORE MINUTES
20 ON THIS POINT, IF YOU NEED IT.

21 MR. GATTI: OKAY.

22 THE COURT: HOW DO YOU RESPOND TO THE ARGUMENT
23 THAT (D) MAKES THE SECTION INAPPLICABLE, ASSUMING IT'S
24 OTHERWISE APPLICABLE, THE PUBLIC AFFAIRS SECTION?

25 MR. GATTI: THE USE OF THE STATUTE -- THE
26 STATUTE GOES DIRECTLY TO COMMERCIAL USE, AS THE EVIDENCE
27 I'VE JUST CITED STATES EXACTLY THAT THIS PICTURE USING
28 MRS. STREISAND'S NAME IS AVAILABLE FOR COMMERCIAL

1 LICENSING. THE PICTURE ITSELF HAS TO DO WITH -- IT'S A
2 PICTURE AND IT'S USING MRS. STREISAND'S NAME. IT HAS
3 NOTHING TO DO WITH THE TYPES OF EXCEPTIONS THAT ARE SET
4 FORTH IN THIS PARTICULAR SECTION --

5 THE COURT: DOESN'T THE JOE MONTANA CASE
6 SUGGEST TO THE CONTRARY?

7 MR. GATTI: THE JOE MONTANA CASE HAD TO DO
8 WITH A NEWSPAPER THAT TOOK PICTURES IN CONNECTION WITH A
9 SUPERBOWL, AND SUPERBOWL IS NOT ONLY --

10 THE COURT: WELL, WHO IS GOING TO MAKE A
11 DECISION WHETHER THE SUPERBOWL OR THE COAST IS A MATTER
12 OF PUBLIC INTEREST? ARE YOU SAYING ONE IS AND THE OTHER
13 ISN'T, OR THEY STAND AT DIFFERENT PLACES ON THIS
14 CONTINUUM? IF SO, WHERE, AND WHICH STANDS IN WHICH
15 PLACE?

16 MR. GATTI: WELL, THERE ARE -- THE CASES WE
17 CITE TO TALK IN CONTEXT OF ALL OF THE CAUSES OF ACTION
18 TALK ABOUT THE ISSUE OF WHAT IS GOING TO BE PUBLIC
19 AFFAIRS OR NEWSWORTHINESS OR ANYTHING IN THAT AREA. THE
20 BRISCOE CASE, THE SHULMAN CASE, ALL OF THESE CASES.

21 MR. KENDALL REFERRED TO "CURIOSITY." WELL,
22 SPECIFICLY THE CASES WE HAVE CITED IN OUR PAPERS AND
23 HAVE RELIED UPON SHULMAN, BRISCOE, SAY THE CONTRARY.
24 CURIOSITY BY ITS OWN IS NOT GOING TO MAKE SOMETHING
25 NEWSWORTHY OR NOT GOING TO BE PUT INTO SOME PUBLIC
26 AFFAIR HERE.

27 IT IS NOT MR. ADELMAN'S RIGHT TO PUBLISH, USE
28 SOMEONE' S NAME, IDENTIFY WITH A CAPTION THE LOCATION OF

1 THE HOME, TAKE A PICTURE, TURN AROUND AND SELL THAT
2 PICTURE, AND SAY I'M DOING THAT IN THE CONTEXT OF I'VE
3 DETERMINED THAT IT'S A PUBLIC AFFAIR.

4 WHAT WE'RE DOING HERE IS WE'RE TALKING ABOUT
5 AT THIS -- AT THE PRELIMINARY STAGE OF THIS PARTICULAR
6 CASE, BUT WHEN YOU ARE TALKING IN TERMS OF
7 MISAPPROPRIATION CLAIMS, AGAIN, NOTHING HAS EVER BEEN
8 APPLIED AS FAR AS A SLAPP MOTION GOES TO A
9 MISAPPROPRIATION CLAIM.

10 THE JOE MONTANA CASE AND CASES LIKE THAT DEAL
11 IN THE CONTEXT OF THE -- THE NORM OF THE COMMUNITY, AND
12 THE FACT OF THE MATTER IS THAT IT IS NOT THE NORM TO
13 ALLOW THE CONDUCT THAT MR. ADELMAN IS SUGGESTING AND HAS
14 DONE. WHAT WE'RE TALKING ABOUT HERE IS A CLASSIC
15 MISAPPROPRIATION UNDER 3344.

16 YOU HAVE SOMETHING FOR PURCHASE, YOU HAVE
17 SOMETHING FOR COMMERCIAL LICENSING, IT'S AVAILABLE FOR
18 COMMERCIAL LICENSING. THE WORD "COMMERCIAL" STANDS FOR
19 ITSELF AND IS EXACTLY THE LANGUAGE THAT IS IN THE
20 MISAPPROPRIATION CLAIM.

21 AND THE ISSUE HERE IN THE MISAPPROPRIATION
22 CLAIM IS THE -- IN CONJUNCTION WITH THE CAPTIONING WITH
23 THE NAME, WITH THE ABILITY TO PURCHASE THE PHOTOGRAPH,
24 AND ALL OF THAT TIED TOGETHER, THE ISSUE OF PROFIT
25 DOESN'T COME INTO THE PLAY IN THE STATUTE. THE
26 SOLICITATION CLEARLY IS THERE. THERE IS A LISTING OF
27 WHAT TYPE OF PHOTOGRAPHS YOU CAN PURCHASE, THE PRICING
28 OF IT, AND NOW WE ALSO HAVE THE EVIDENCE OF THE

1 COMMERCIAL USE. THAT'S WHERE I AM, YOUR HONOR.

2 THE COURT: OKAY. YOU GET TILL 10 AFTER TO
3 RESPOND ON THIS POINT. THEN WE'LL TAKE UP THE
4 PRELIMINARY INJUNCTION ISSUE.

5 MR. KENDALL: THERE IS NO EVIDENCE THAT
6 THERE'S BEEN, THERE IS NO EVIDENCE THERE WILL BE, ANY
7 COMMERCIAL LICENSING OF THIS PICTURE. THE FACT THAT THE
8 WEBSITE CONTEMPLATES COMMERCIAL LICENSING AS A
9 POSSIBILITY IN THE FUTURE AS TO, PERHAPS, SOME PICTURES
10 DOESN'T MEAN IT WILL EVER HAPPEN AS TO THIS PICTURE. NO
11 EVIDENCE OF THAT. IT'S THEIR BURDEN TO ESTABLISH IT.

12 THEY -- I WANT TO READ TWO QUOTES ON THE
13 PUBLIC AFFAIRS POINT BECAUSE THEY SEEM TO BE UNDER THE
14 MISIMPRESSION THAT MAKING A -- IF YOU FIT WITHIN 3344
15 (E) YOU CAN'T RAISE THE PUBLIC AFFAIRS POINT IF YOU HAVE
16 ANY OF COMMERCIAL INTENT AT ALL. WE'VE ARGUED ABOUT
17 COMMERCIAL INTENT, BUT AS A FALL BACK POSITION, LET ME
18 READ FROM THE GIANFREDO (PHONETIC) CASE AT 94 CAL AP 4
19 AT 411. THAT'S THE BASEBALL --

20 THE COURT: WHAT'S THE CITATION, COUNSEL?

21 MR. KENDALL: 94 CAL AP 4 AT 411.

22 THE COURT: 94.

23 MR. KENDALL: WHERE THE COURT SAID "PROFIT
24 ALONE DOES NOT RENDER THE EXPRESSION COMMERCIAL.
25 HOWEVER, THE FIRST AMENDMENT IS NOT LIMITED TO THOSE WHO
26 PUBLISH WITHOUT CHARGE. AN EXPRESSIVE ACTIVITY DOESN'T
27 LOSE IT'S CONSTITUTIONAL PROTECTION BECAUSE IT'S
28 UNDERTAKEN FOR PROFIT."

1 THIS IS UNQUESTIONABLY AN EXPRESSIVE ACTIVITY.
2 NOBODY HAS CONTENDED OTHERWISE. AND THE REASON WHY
3 THERE IS A PUBLIC AFFAIRS EXCEPTION IN THE STATUTE IS
4 BECAUSE IT'S CONSTITUTIONALLY COMPELLED. IT HAPPENS
5 ALSO TO BE THE DECISION OF THE LEGISLATURE, BUT IT IS
6 CONSTITUTIONALLY COMPELLED. AND IF THAT WASN'T THERE,
7 WE WOULD BE ARGUING ABOUT WHY THE FIRST AMENDMENT
8 REQUIRES IT TO BE THERE.

9 AND THE MONTANA CASE, THAT THE COURT HAS
10 REFERRED TO, AT 34 CAL AP. 4 AT 643 IN FOOTNOTE TWO:
11 "THE FACT THAT THE POSTERS WERE SOLD," SAYS THE COURT,
12 "IS WITHOUT SIGNIFICANCE. THE FIRST AMENDMENT IS NOT
13 LIMITED TO THOSE WHO PUBLISH WITHOUT CHARGE" -- SAME
14 POINT BEING MADE IN GIANFREDO (PHONETIC) -- "WHETHER THE
15 ACTIVITY INVOLVES NEWSPAPER PUBLICATION OR MOTION
16 PICTURE PRODUCTION, IT DOES NOT LOSE ITS CONSTITUTIONAL
17 PROTECTION BECAUSE IT IS UNDERTAKEN FOR PROFIT."

18 AND THIS GOES TO THE POINT THAT WE STARTED
19 WITH, THERE IS A FUNDAMENTAL RIGHT OF PRIVACY, AND IT'S
20 NOT TRUMPED BY ANYTHING ELSE. WELL, THERE ISN'T A
21 FUNDAMENTAL RIGHT OF PRIVACY WITH RESPECT TO YOUR DECK
22 CHAIRS AND PARASOLS, BUT IN ANY EVENT IT IS TRUMPED BY
23 SOMETHING.

24 IT IS TRUMPED BY COMPETING INTERESTS THAT ARE
25 VARIOUSLY DESCRIBED IN THE DIFFERENT CLAIMS ELEMENTS AS
26 NEWSWORTHINESS AND LEGITIMATE COMPETING INTEREST, THE
27 PUBLIC AFFAIRS EXCEPTION, THEY ARE ALL ASPECTS OF THE
28 RIGHT TO SPEECH, WHICH IS THE FIRST OF THE AMENDMENTS TO

1 THE BILL OF RIGHTS, IN THE BILL OF RIGHTS.

2 SPEECH IS WHAT THIS CASE IS ABOUT.

3 MR. ADELMAN'S RIGHT TO HAVE A WEBSITE THAT DESCRIBES THE
4 CALIFORNIA COASTLINE AS HE HAS CHOSEN TO DO; HIS RIGHT
5 TO HAVE A CAPTIONING PROCEDURE; HIS RIGHT TO PUBLISH
6 WHAT HE HAS PUBLISHED.

7 THE ARGUMENT THAT'S BEEN MADE THAT NO CASE IS
8 THROWN OUT IN THIS APPLICATION, HE'S SHIFTED HIS
9 LANGUAGE. HE USED TO SAY -- THERE'S NEVER BEEN A SLAPP
10 MOTION THAT INVOLVED INTRUSION OR MISAPPLICATION. THEN
11 I POINTED OUT THE M.G. AGAINST TIME/WARNER CASE. AND
12 IT'S CORRECT THAT M.G. AGAINST TIME/WARNER WHERE LITTLE
13 BOYS WERE MOLESTED AND THERE WAS NO REASON, BECAUSE IT
14 HAD NEVER BEEN PUBLICIZED AND NO NEWSWORTHINESS IN THE
15 NAMES OF THE LITTLE BOYS, THAT THAT WOULD BE PUBLISHED
16 OR SHOULD BE.

17 BUT THE FACT IS THAT IT WAS CONSIDERED UNDER A
18 SLAPP MOTION. IT FELL UNDER THE FIRST PRONG. AND THE
19 ISSUE ON THE SECOND PRONG IS WHETHER THEY HAVE MET THEIR
20 BURDEN, AND IT IS RIGHT THERE IN THE LEGISLATIVE
21 COMMAND, THAT'S WHAT THEY HAVE TO DO. IF THEY HAVEN'T
22 DONE IT, THEY LOSE, AND IT IS THE EFFECTIVELY THE SAME
23 THING AS A SUMMARY JUDGMENT BURDEN. THE LEGISLATURE HAS
24 COMMANDED THAT THEY DON'T GET TO SAY THAT JUST BECAUSE A
25 CASE HASN'T COME ALONG IN WHICH THE MISAPPROPRIATION
26 CLAIM WAS AS WEAK AS OURS THAT WE'RE NOT UNDER THE SLAPP
27 STATUTE. OF COURSE THEY ARE.

28 THE COURT: THANK YOU. ON THE MOTION FOR

1 PRELIMINARY INJUNCTION, I THINK WE'VE TALKED ABOUT THE
2 MERITS. THE QUESTIONS ARE PROCEDURAL, BUT IF YOU HAVE A
3 DIFFERENT VIEW ON THAT, MR. GATTI, YOU SHOULD EXPRESS
4 IT, THEN WE'LL DEAL WITH ANY OTHER ISSUE.

5 MR. GATTI: WITH RESPECT TO THE -- ON THE
6 PRELIMINARY INJUNCTION, I BELIEVE THAT WE'VE -- AS FAR
7 AS THE -- TO THE EXTENT WE'VE TALKED IN TERMS OF THE
8 CAUSES OF ACTION AND THE THE ELEMENTS AND THE
9 REQUIREMENTS AND THE CASES THAT CITE TO THAT, WE
10 OBVIOUSLY HAVE PUT THOSE IN OUR PAPERS. I DON'T KNOW IF
11 YOUR HONOR WANTS TO HAVE FURTHER DISCUSSION ON THOSE OR
12 NOT.

13 PROCEDURALLY IT, OBVIOUSLY -- I THINK I CAN
14 TALK ABOUT THAT AS WELL, BUT WITH RESPECT TO THE CAUSE
15 OF ACTION, I DON'T KNOW IF WE WANT TO GO CAUSE OF ACTION
16 WITH RESPECT TO BALANCING ISSUES AND EQUITIES AND
17 IRREPARABLE HARM IN CONNECTION WITH EACH OF THE CAUSES
18 OF ACTIONS. I DON'T KNOW HOW YOUR HONOR WOULD LIKE TO
19 PROCEED.

20 THE COURT: I THINK BOTH SIDES HAVE EXPRESSED
21 THEIR VIEWS ON THOSE POINTS OVER THE LAST THREE SESSIONS
22 SO I DON'T THINK YOU NEED TO GO INTO THAT PART OF IT.
23 BUT IF THERE ARE OTHER ASPECTS YOU WANT TO ADDRESS IN
24 THE TIME WE HAVE LEFT, GO AHEAD.

25 MR. GATTI: THE ASPECTS I WOULD LIKE TO
26 ADDRESS ON THE PRELIMINARY INJUNCTION, WHICH WE HAVE
27 REFERRED TO EARLIER, BUT EMPHASIZING HERE, IS THAT THE
28 PRELIMINARY INJUNCTION IS NOT ABOUT TAKING THE WEBSITE

1 DOWN; IT'S NOT ABOUT TAKING THE PHOTOGRAPH DOWN.

2 IT IS ABOUT THE NARROW VIEW OF TAKING
3 MRS. STREISAND'S NAME, THE CAPTION DOWN, THAT ALLOWS ONE
4 TO LOCATE HER PRIVATE HOME AND THEN LOOK INTO THAT HOME.
5 BUT WE'RE TALKING HERE THE PRELIMINARY INJUNCTION
6 REQUEST IS THAT TAKE OFF THE NAME, TAKE OFF THE NAME IN
7 CONNECTION WITH SELLING THE PICTURES, AND TAKING OFF
8 IDENTIFICATION OF HER NAME WITH THE -- WITH THE HOME.

9 THE REASON FOR THAT IS THAT, AS WE'VE
10 DISCUSSED IN THIS CASES, THERE ARE TWELVE THOUSAND SOME
11 ODD PICTURES ON THIS WEBSITE. THERE ARE, WITHIN THOSE
12 12,000 PICTURES, I COULDN'T EVEN VENTURE A GUESS, BUT A
13 MULTIPLE OF THAT IN TERMS OF HOW MANY HOMES ARE VIEWED.
14 AND ALL OF THOSE HOMES ARE ALONG THE SAME COASTLINE, AND
15 SOME ARE MUCH MORE INLAND HAVE NOTHING TO DO WITH WHAT
16 HAS BEEN DESCRIBED AS THE COAST.

17 BUT THERE IS NO WHERE -- THE AMOUNT OF TIMES
18 THAT THE NAME OF SOMEONE'S HOME IS LOCATED IS ON ONE
19 HAND. MRS. STREISAND HAPPENS TO BE ONE OF THOSE PEOPLE.
20 THERE IS NO RIGHT AND NO LEGITIMATE REASON TO LIST
21 MRS. STREISAND'S HOME AND TO IDENTIFY HER IN THE WAY
22 THAT IT'S BEEN DONE IN THIS PARTICULAR CASE.

23 IF WE'RE LOOKING AT THE INTERESTS INVOLVED
24 HERE AND THE BALANCING OF EQUITIES IN THIS PARTICULAR
25 CASE, WE HAVE -- AND THE EVIDENCE IS WE HAVE AN
26 INDIVIDUAL WHO IS SUBJECT TO EXTREME SAFETY CONCERNS.
27 SHE IS THE SUBJECT OF STALKERS; SHE IS THE SUBJECT
28 CURRENTLY OF STALKERS.

1 WE HAVE, YOUR HONOR, MADE IN OUR PAPERS AN
2 OFFER OF PROOF. AND I STAND BEFORE THE COURT AGAIN; WE
3 HAVE THE STREISAND DECLARATION AND THE DECLARATION OF
4 CHIEF SODERBERG, WHICH BOTH ARE UNREFUTED AND THEY ARE
5 UNDISPUTED AS TO THE EXISTENCE.

6 I HAVE IN FRONT OF ME, YOUR HONOR, AND I'VE
7 SAID IN THE PAST TO COUNSEL, I HAVE STATED WHEN WE FIRST
8 STARTED THIS PROCEEDING AND STATED IT IN OUR PAPERS,
9 THAT WE HAVE, AS AN OFFER OF PROOF TO THE COURT, THE
10 CURRENT CONTEMPORANEOUS SAFETY ISSUES THAT ARE AT STAKE
11 HERE WITH MRS. STREISAND WITH PARTICULAR INDIVIDUALS WHO
12 ARE KNOWN DANGEROUS, WHO HAVE TARGETED HER, AND WHO ARE
13 AT THIS MOMENT ON THEIR WAY TO HER.

14 MR. KENDALL: OBJECTION, YOUR HONOR. NONE OF
15 THIS --

16 THE COURT: NO. THIS IS A LITTLE BIT --

17 MR. GATTI: YOUR HONOR, THAT IS THE -- I HAVE
18 A DECLARATION --

19 MR. KENDALL: I'M SORRY, YOUR HONOR. IT'S
20 JUST NOT JUST NOT PROPER IN THE RECORD. THERE IS A
21 CALIFORNIA RULE OF COURT ON POINT ON THIS. EVERYONE
22 KNOWS YOU HAVE TO SUBMIT YOUR EVIDENCE IN ADVANCE.
23 WE'VE HAD THAT RULE IN THIS CASE FROM THE BEGINNING
24 APPLIED TO EVERYTHING.

25 MR. GATTI: YOUR HONOR, WE --

26 THE COURT: THE COURT IS NOT GOING TO TAKE
27 ADDITIONAL EVIDENCE ON THE MOTION. IT SHOULD HAVE BEEN
28 DONE BEFOREHAND.

1 MR. GATTI: YOUR HONOR, WE ASKED PRIOR TO THE
2 PROCEEDINGS AND IN OUR PAPERS TO MAKE AN IN CAMERA
3 REVIEW BECAUSE OF THE FACT THAT THIS INFORMATION WAS SO
4 SENSITIVE, OF SUCH A SENSITIVE NATURE. THAT IS THE
5 REQUEST THAT WE MADE. THAT IS A REQUEST THAT IS MADE ON
6 A -- WHEN THESE TYPE OF SITUATIONS OCCUR WHEN THE SAFETY
7 ISSUES ARE SO SENSITIVE, THAT IN CAMERA REVIEW IS
8 WARRANTED. WE REQUESTED THAT INFORMATION --

9 THE COURT: IN WHAT DOCUMENT DID YOU REQUEST
10 THAT?

11 MR. GATTI: WE DID THAT IN OUR REPLY BRIEF,
12 YOUR HONOR.

13 THE COURT: THAT'S NOT THE WAY YOU DO IT,
14 COUNSEL. YOU DO IT IN A MOTION. I'M LOOKING AT THE
15 FACE OF YOUR MOTION FILED JUNE 23. THERE IS NOTHING ON
16 THE FACE OF YOUR IT, AND I DON'T FIND A FOOTNOTE IN YOUR
17 MOTION THAT REFERS TO IT EITHER.

18 MR. GATTI: IN THE MOTION, YOUR HONOR?

19 THE COURT: CORRECT.

20 MR. GATTI: YOUR HONOR, IN THE MOTION WE REFER
21 TO THE -- OBVIOUSLY, THE SAFETY ASPECTS TO IT, AND WHAT
22 WE -- WHAT HAS HAPPENED IS THAT WE LEARN OF ADDITIONAL
23 INFORMATION THAT IS UP TO THE -- UP TO TODAY'S DATE, SO
24 I DON'T THINK IT'S -- I DON'T MEAN TO BELABOR THAT
25 POINT. IT'S ALREADY UNDISPUTED IN THE EVIDENCE OF THE
26 HARASSMENT AND THE STALKERS.

27 I AM REQUESTING, IF THE COURT DESIRES, AND WE
28 HAVE -- WE HAVE REQUESTED IT PRIOR TO THE PROCEEDINGS,

1 TO TAKE IN CAMERA REVIEW OF INFORMATION THAT SHOWS UP TO
2 THE CURRENT TIME WHAT THAT SITUATION IS AND THE SERIOUS
3 NATURE OF IT. AND THAT IS THE -- WE COULD NOT HAVE --
4 THE INFORMATION WE HAVE IN THERE POST DATES THE FILINGS
5 OF WHAT WE ARE TALKING ABOUT, SO THIS IS UP TO THE
6 MINUTE. I COULD NOT HAVE SUBMITTED THAT TESTIMONY OR
7 EVIDENCE PRIOR TO THAT TIME.

8 SO THAT IS -- THAT IS THE OFFER WE'VE MADE TO
9 THE EXTENT NEEDED. BUT I'M SAYING, IN THE BALANCING,
10 THAT HAS TO BE WEIGHED INTO THE BALANCING, THE THREATS
11 AND THE SAFETY ISSUES RELATING TO MRS. STREISAND,
12 AGAINST WHAT IS THE HARM TO MR. ADELMAN IN THIS PROCESS
13 IF AN INJUNCTION ON THE LIMITED NARROW FOCUS OF TAKING
14 MRS. STREISAND'S NAME OFF, WHAT IS THE HARM. THE
15 DEFENDANTS HAVE ESTABLISHED NO HARM TO THAT LIMITED
16 RELIEF.

17 IN CONTRAST, IT SAVES THE SAFETY, THE THREAT,
18 THE HARASSMENT, THE UNEASINESS, THE CONCERN, THAT IS
19 STATED IN MRS. STREISAND'S DECLARATION AND THE
20 DECLARATION OF CHIEF SODERBERG. BALANCE THAT,
21 MR. ADELMAN HAS TAKEN A 12,000 PICTURE OF THE COAST ON
22 A -- THE VAST MAJORITY OF THOSE PICTURES, AND THERE ARE,
23 AGAIN AS I SAY, NUMBERS AND NUMBERS OF HOMES, THOUSANDS
24 AND TENS OF THOUSANDS OF HOMES THAT FALL INTO THAT
25 CATEGORY WHO HE SAYS HE NEEDS TO USE TO LOOK AT THE
26 COAST AND MAKE A COASTAL RECORD. HE DOESN'T IDENTIFY
27 THOSE PICTURES.

28 ALL MRS. STREISAND IS ASKING FOR IS TO HAVE

1 THE COURT ACKNOWLEDGE THE THREAT TO HER SAFETY CONCERNS
2 TO HER, BALANCING THAT AGAINST THE LACK OF A RESTRICTION
3 ON WHAT MR. ADELMAN STATES HE IS TRYING TO DO IN TAKING
4 THAT NAME OFF SO THAT SHE CAN HAVE HER SAFETY, WHICH IS
5 SHE HAS, AS WE'VE STATED, HER FUNDAMENTAL RIGHT TO BE
6 SAFE IN HER HOME AGAINST WHAT MR. ADELMAN IS TRYING TO
7 DO.

8 HE CLEARLY, IN THE VAST MAJORITY OF THE TIME,
9 DOES NOT LOOK AT THE --

10 MR. KENDALL: YOUR HONOR, THERE IS NO EVIDENCE
11 WHATSOEVER --

12 THE COURT: LET'S DEAL WITH THE EVIDENCE ISSUE
13 RIGHT NOW. AND MR. GATTI STILL WOULD LIKE TO HAVE THE
14 INFORMATION THAT'S REFERRED TO IN FOOTNOTE 9 OF HIS
15 REPLY BRIEF, THE REPLY BRIEF THAT WAS FILED ON JULY 9TH,
16 INTRODUCED IN SOME FORM.

17 MR. KENDALL: YOUR HONOR, THERE IS A --
18 CALIFORNIA CODE OF CIVIL PROCEDURE 1005 (B) WOULD
19 REQUIRE HIM TO HAVE PUT THIS IN HIS NOTICED MOTION.
20 THERE IS NOTHING IN THE MOTION FOR PRELIMINARY
21 INJUNCTION ABOUT THIS AT ALL, FIRST OF ALL.

22 SECONDLY, THE PROPER PROCEDURE IF YOU HAVE
23 EVIDENCE THAT YOU WANT TO PROVIDE TO THE COURT UNDER
24 SEAL IS TO MAKE A MOTION WITH THE EVIDENCE AND YOU LODGE
25 IT. AND THEN THE OTHER SIDE GETS TO RESPOND. AND THAT
26 IS SET OUT IN THE CALIFORNIA RULES OF COURT. AND NOT
27 ONLY THAT, THEY KNOW ABOUT THAT RULE, BECAUSE THEY
28 SCREWED IT UP WHEN HE TRIED THEY FILE THEIR COMPLAINT

1 UNDER SEAL, AND THE COURT ADVISED THEM OF THAT RULE.

2 AND TO SUBMIT THIS AT THIS LATE DATE TO
3 DEPRIVE US OF THE OPPORTUNITY TO DEAL WITH IT, WE
4 SHOULDN'T HAVE TO DO THAT. MY CLIENT SHOULD NOT HAVE TO
5 GO THROUGH THE EXPENSE OF ENDLESS EFFORT TO INTRODUCE
6 NEW EVIDENCE. AND FINALLY THE COURT HAS BEEN VERY FIRM
7 ON THE ATTEMPTS TO INTRODUCE NEW EVIDENCE TO THE POINT
8 WHERE, I THINK ON THE FIRST DAY, WE SETTLED THAT ISSUE.
9 IT WOULD BE GROSSLY IMPROPER -- I MEAN, THEY DIDN'T EVEN
10 PUT IT IN THEIR REPLY ON THE PI PAPERS.

11 THE COURT: YOU ARE ARGUING THE PRELIMINARY
12 INJUNCTION?

13 MR. KENDALL: RIGHT, THEY DIDN'T EVEN PUT IT
14 THERE.

15 THE COURT: YES.

16 MR. KENDALL: AND I CITE TO THE COURT CCP 1005
17 (B), CALIFORNIA RULES OF COURT 317 AND CALIFORNIA RULES
18 OF COURT 322. AND THE OTHER THING THAT I JUST ROSE TO
19 OBJECT TO, THERE IS NO EVIDENCE IN THIS CASE ABOUT HOW
20 MANY -- WHAT OTHER HOMES HAVE BEEN CAPTIONED. THERE IS
21 NO EVIDENCE. HE IS SAYING THERE ARE ONLY A HANDFUL OF
22 CAPTIONS.

23 WELL, WHAT WE HAVE IS -- WHAT WE HAVE IN THE
24 EVIDENCE IS EVIDENCE ABOUT TWO HOMES THAT HAVE BEEN
25 CAPTIONED. AND NO EVIDENCE ABOUT ALL THE OTHER HOMES
26 THAT MAY OR MAY NOT HAVE BEEN CAPTIONED, ONE WAY OR THE
27 OTHER.

28 THE COURT: THERE'S ONE OTHER THING THAT

1 CONCERNS ME, AND THAT IS THE REPRESENTATION -- THE
2 INFERENCE FROM THE REPRESENTATION THAT THE EVIDENCE WAS
3 NOT EARLIER AVAILABLE, THAT IT SOMEHOW RELATED TO THE
4 PUBLICATION ON THIS WEBSITE, AND THERE IS NO EVIDENCE OF
5 THAT.

6 AND IF THAT EXISTED, THEN I WOULD EXPECT,
7 MR. GATTI, THAT YOU WOULD HAVE DONE ALL THE THINGS THAT
8 MR. KENDALL JUST REFERRED TO IN GETTING IT PROPERLY
9 BEFORE THE COURT.

10 MR. GATTI: WHAT WE DID, YOUR HONOR -- AND I
11 WOULD JUST ADDRESS THAT NOT ONLY WHAT MR. KENDALL SAID
12 IS UNTRUE, THE REFERENCE TO THIS INFORMATION WAS
13 SPECIFICLY RAISED. HE SAID IT WAS NOT RAISED IN THE
14 PRELIMINARY INJUNCTION PAPERS. IT WAS -- THE QUOTE I
15 WAS REFERRING TO WAS IN OUR REPLY TO THE PRELIMINARY
16 INJUNCTION.

17 THE COURT: WOULD YOU BE KIND ENOUGH TO DIRECT
18 ME TO THE PAGE AND LINE OF YOUR MOTION FILED ON JUNE 23.

19 MR. KENDALL: YOUR HONOR, I'M JUST BEING
20 ADVISED THAT I WAS MISINFORMED. IT IS IN THE REPLY
21 MEMORANDUM --

22 THE COURT: RIGHT. IT'S FOOTNOTE 9 ON PAGE 9
23 OR WHATEVER PAGE FOOTNOTE 9 IS ON. BUT IN THE MOTION,
24 MR. GATTI.

25 MR. GATTI: YOUR HONOR, IN THE MOTION WHAT WE
26 SPECIFICLY REFERRED TO ARE THE SAFETY ISSUES AND THE
27 SAFETY CONCERNS.

28 THE COURT: RIGHT.

1 MR. GATTI: AND WHAT WE --

2 THE COURT: AND YOU FILED YOUR CLIENT'S
3 DECLARATION AND THAT OF TWO DETECTIVES OF THE L.A.
4 SHERIFFS DEPARTMENT.

5 MR. GATTI: CORRECT. WHAT WE HAVE ON TRACK, I
6 THINK, YOUR HONOR, IS -- WHAT WE HAVE IS THE OFFER OF
7 PROOF THAT WE REQUESTED. WE HAD PUT THE OPPOSING
8 COUNSEL ON --

9 THE COURT: JUST A SECOND. SO ON THAT OFFER
10 OF PROOF QUESTION, MY COMMENT WAS DIRECTED TO THE
11 INFERENCE YOU WOULD LIKE THE COURT TO DERIVE FROM THE
12 STATEMENT YOU MADE THAT THE INFORMATION WAS NOT EARLIER
13 AVAILABLE. I ASSUME THAT THAT INFERENCE -- IS THAT A
14 CORRECT INFERENCE THE COURT IS SUPPOSE TO DERIVE FROM
15 THE OFFER, THAT THE REASON WHY IT WASN'T AVAILABLE IS
16 BECAUSE ALL THESE PROBLEMS AROSE FROM THE PUBLICATION OF
17 THE TAG LINE ON IMAGE 3850?

18 MR. GATTI: PART OF THE DISCUSSION IN THE
19 INFORMATION IS THE USE OF --

20 MR. KENDALL: I REALLY DON'T THINK YOU HAVE
21 ASKED HIM TO NOW DESCRIBE THE EVIDENCE, AND --

22 THE COURT: THAT'S TRUE.

23 MR. KENDALL: THIS IS REALLY GROSSLY IMPROPER.

24 THE COURT: WE'RE AT 4:20 P.M. ON THE THIRD
25 DAY OF WHAT WE ALL THOUGHT WAS GOING TO BE A ONE-DAY
26 HEARING, BUT SO BE IT.

27 MR. KENDALL: AND WE WILL NEED AT LEAST A
28 COUPLE MINUTES TO POINT OUT THE PRIOR RESTRAINT ISSUE

1 AND CERTAIN OF THE OTHER PROCEDURAL THINGS THAT HAVE NOT
2 BEEN MENTIONED.

3 THE COURT: I'M GOING TO SUGGEST THERE IS TO
4 WAY WE'RE GOING TO FINISH TODAY, AND I CAN SEE THE PAIN
5 ON EVERYBODY'S FACES, BUT -- YOUR POSITION THE WAY YOU
6 CANNOT SEE HOW MANY TRUCK LOADS OF DOCUMENTS ARE IN THE
7 PROCESS OF BEING FILED IN ONE OR MORE OF THE OTHER 450
8 CASES THAT I HAVE. SO IT'S NOT WITHOUT SOME TREPHINATIO
9 I SUGGEST THAT. DO YOU THINK WE CAN FINISH IN TEN
10 MINUTES?

11 MR. KENDALL: YES.

12 MR. GATTI: I DON'T BELIEVE SO, YOUR HONOR, TO
13 BE HONEST.

14 MR. KENDALL: YOUR HONOR --

15 THE COURT: YOU HAVE TO 4:25 AT THIS POINT.
16 I'M NOT INCLINED TO GRANT ANY REQUEST TO ADD ADDITIONAL
17 EVIDENCE AT THIS POINT. I THINK IT'S NOT IN COMPLIANCE
18 WITH THE RULES OF PROPER NOTICE.

19 MR. KENDALL: YOUR HONOR, WE CAN RESPOND TO
20 THESE POINTS THAT ARE BEING MADE IN SEVEN MINUTES. AND
21 ALL WE'RE HEARING NOW IS REARGUING OF THE SAME
22 PRINCIPLES THAT HAVE BEEN ARGUED OVER AND OVER AGAIN.

23 THE COURT: WE DON'T GET TO THIS, ALSO, UNLESS
24 THE PLAINTIFF HAS MADE OUT A CASE THERE IS A REASONABLE
25 LIKELIHOOD OF PREVAILING AT THE TIME OF TRIAL, DO WE,
26 MR. GATTI?

27 MR. GATTI: WITH RESPECT TO ON THE --

28 THE COURT: PRELIMINARY INJUNCTION MOTION.

1 MR. GATTI: WE GET THERE AS THAT'S ONE OF THE
2 ISSUES, OBVIOUSLY, WITH RESPECT TO THE REASONABLE
3 PROBABILITY OF SUCCESS ON THE MERITS. IF I CAN JUST
4 ADDRESS QUICKLY THE ISSUE OF THE INFORMATION AND THE
5 SAFETY ISSUES THAT ARE IN THE EVIDENCE ALREADY, I'M NOT
6 SAYING IT'S NOT THERE. I BELIEVE THE COURT HAS
7 ACKNOWLEDGED THAT.

8 THE ISSUE IS HERE, ADDITIONAL INFORMATION AND
9 ADDITIONAL EVIDENCE THAT, BY IT'S MERE DISCLOSURE IN
10 SUCH A WAY THAT WAS OTHER THAN IN CAMERA ASPECT, GOES TO
11 THE BALANCING OF THE HARM AND THE FACT THAT THERE WOULD
12 BE ADDITIONAL HARM WHEN YOU ARE TALKING ABOUT SENSITIVE
13 INFORMATION, SENSITIVE INFORMATION THAT --

14 THE COURT: ALL RIGHT. THE COURT WILL TAKE
15 UNDER SUBMISSION WHETHER THERE SHOULD BE ANY ADDITIONAL
16 EVIDENCE OFFERED ON THE -- WHAT I'LL DESCRIBE AS SAFETY
17 ASPECTS OF THIS MATTER.

18 LET'S TALK ABOUT OTHER ISSUES AT THIS POINT.

19 MR. KENDALL: I WONDER IF WE COULD RESPOND.

20 THE COURT: WELL, JUST A SECOND. WHAT OTHER
21 ISSUES DO YOU WANT TO DISCUSS WITH RESPECT TO THE
22 PRELIMINARY INJUNCTION? YOU HAVE UNTIL 4:25.

23 MR. GATTI: WHAT I HAVE IN THAT TIME PERIOD I
24 WILL. WITH RESPECT TO -- WE HAVE GONE THROUGH THE
25 VARIOUS ELEMENTS, YOUR HONOR. OBVIOUSLY I WON'T DO THAT
26 HERE AGAIN. THE ISSUE HERE IS ON THE VARIOUS CAUSES OF
27 ACTION DOES MRS. STREISAND HAVE A REASONABLE EXPECTATION
28 OF PRIVACY.

1 THE COURT: THAT WE'VE TALKED ABOUT. THE
2 QUESTION IS WHETHER YOU HAVE MET YOUR BURDEN OF
3 PREVAILING AT THE TIME OF TRIAL.

4 MR. GATTI: WHAT WE HAVE STATED IS THAT WITH
5 RESPECT TO THE INTRUSION CAUSE OF ACTION WE HAVE -- AND
6 IN TACT WHAT WE'RE TALKING ABOUT HERE I'LL FOCUS FOR THE
7 PRELIMINARY INJUNCTION BECAUSE WHAT WE'RE TALKING ABOUT
8 HERE IS THE NARROW FOCUS OF THE CAPTIONING AND WHETHER
9 OR NOT WE'RE TALKING ABOUT DOES THE ISSUE OF WHETHER OR
10 NOT MRS. STREISAND HAS MADE OUT A CLAIM OF PROBABLE
11 SUCCESS THAT THERE IS -- AN INJUNCTION SHOULD ISSUE IN
12 CONNECTION WITH A PUBLICATION OF A PRIVATE FACT IN THIS
13 PARTICULAR CASE.

14 AND THE CASES WE HAVE CITED TO, WHICH I THINK
15 ARE INSTRUCTIVE ON THIS ISSUE, ARE THE MICHAELS CASES,
16 MICHAELS VERSUS INTERNET ENTERTAINMENT GROUP, I BELIEVE.
17 AND THAT TALKS SPECIFICLY IN TERMS OF ISSUING AN
18 INJUNCTION IN THE CONTEXT OF PUBLICATION OF A PRIVATE
19 FACT, AND IN AT THAT PARTICULAR CASE MR. KENDALL HAS
20 REFERRED TO AT CERTAIN TIMES DURING THIS HEARING ABOUT
21 SORT OF A CATS-OUT-OF-THE-BAG ARGUMENT.

22 IN THAT PARTICULAR CASE, WE WERE DEALING WITH
23 A SITUATION WHERE VIDEOTAPE AND PHOTOGRAPHS OF
24 PARTICULAR INDIVIDUALS IN A REASONABLE EXPECTATION OF
25 PRIVACY SITUATION HAD BEEN -- IT WAS AVAILABLE ON THE
26 INTERNET IN OTHER AREAS; IT WAS AVAILABLE OUT IN THE
27 PUBLIC IN OTHER AREAS.

28 THE COURT STILL STATED IN THAT SITUATION --

1 AND WE HAD CELEBRITIES INVOLVED IN THAT PARTICULAR CASE
2 -- AND HE COURT SAID, BASICALLY, IT WAS NOT NEWSWORTHY;
3 IT WAS NOT SOMETHING THAT NEEDED TO BE OUT IN THE
4 PUBLIC; AND IT WAS SOMETHING THAT INJUNCTION WAS
5 PROPERLY ISSUED IN, ESPECIALLY -- AND IT DID NOT -- THE
6 ANALYSIS DID NOT TURN ON WHETHER OR NOT IT WAS AVAILABLE
7 IN OTHER AREAS ON THE WEBSITE OR OTHER AREAS IN GENERAL.

8 THE COURT: THANK YOU, SIR.

9 MR. KENDALL, ON BEHALF --

10 MR. KENDALL: MS. SEIGLE IS GOING TO --

11 THE COURT: MS. SEIGLE.

12 MR. KENDALL: WHILE SHE'S GETTING THERE, I'LL
13 JUST POINT OUT THAT IN THE MICHAELS CASE THEY WERE
14 HAVING SEX.

15 MS. SEIGLE: THANK YOU, YOUR HONOR. WE HAVE
16 JUMPED WAY, WAY AHEAD OF OURSELVES ON A PRELIMINARY
17 INJUNCTION MOTION. BEFORE WE GET TO THE REASONABLE
18 PROBABILITY OF SUCCESS ON THE MERITS, BEFORE WE GET TO
19 ANY OF THIS BALANCING, BEFORE WE GET TO IRREPARABLE
20 HARM, WE HAVE TO LOOK AT THE ISSUE OF PRIOR RESTRAINT.

21 WE'RE DEALING WITH SPEECH; WE'RE DEALING WITH
22 FIRST AMENDMENT ISSUES. WHEN A PLAINTIFF IS ASKING FOR
23 AN INJUNCTION TO PROHIBIT SOMEBODY FROM SPEAKING, YOU
24 DON'T LOOK AT ANY OF THESE OTHER ISSUES UNTIL YOU LOOK
25 AT PRIOR RESTRAINT. THE RULE IN CALIFORNIA, AS WELL AS
26 FEDERAL COURTS, IS ONE THAT PRIOR RESTRAINTS ARE
27 PRESUMPTIVELY INVALID --

28 THE COURT: LET ME ASK YOU THIS, MS. SEIGLE,

1 BECAUSE WE'RE OUT OF TIME, AND NOTWITHSTANDING THE FACT
2 THAT I'M SURE YOU'VE SPENT A LOT OF TIME PREPARING FOR
3 THIS, IS THERE A CASE, PERHAPS, THAT YOU DIDN'T --
4 HADN'T COME ACROSS BEFORE OR A DIFFERENT WAY OF PHRASING
5 A NEW WAY OR ARTICULATING THE ARGUMENTS YOU WANT TO MAKE
6 ON THIS POINT?

7 MS. SEIGLE: ON THE PRIOR RESTRAINT?

8 THE COURT: YES.

9 MS. SEIGLE: THE PRIOR RESTRAINT ISSUES ARE
10 SET FORTH IN OUR BRIEFS. EVERYTHING IS THIS THERE.

11 THE COURT: OKAY. IS THERE ANOTHER POINT?

12 MS. SEIGLE: I CAN VERY BRIEFLY RESPOND TO
13 MR. GATTI'S ARGUMENT ON THE MICHAELS CASE. THE MICHAELS
14 CASE, THE VIDEOTAPE WAS NOT PUBLIC. THE COURT SAYS AT F
15 -- FIVE F SUP SECOND 823, PIN CITE, 841, THE CASE -- THE
16 COURT SPECIFICLY ADDRESSES THIS POINT, AND SAYS THAT
17 "SOME SECONDS," I THINK IT WAS A HUNDRED AND 48 SECONDS
18 OF VIDEOTAPE, "HAD BEEN MADE PUBLIC, BUT THE WHOLE TAPE
19 WAS NOT.

20 AND THE COURT SAYS THAT THE PLAINTIFF
21 SPECIFICLY HAD A PRIVACY AND INTEREST IN THE PART OF
22 TAPE THAT HAD NOT BEEN MADE PUBLIC. THAT'S OBVIOUSLY
23 VERY, VERY DISTINCT ISSUE THAN WHAT WE HAVE HERE WHERE
24 THE CAT IS OUT OF THE BAG AND THE HORSE HAS LEFT THE
25 BARN. AS MR. KENDALL MENTIONED, THIS IS A VIDEOTAPE OF
26 THE TWO PEOPLE HAVING SEX --

27 THE COURT: I THINK I CAN DISTINGUISH THAT
28 FROM THE PICTURE OF THE COAST; HOWEVER, ACTORS ARE

1 INVOLVED. IS THERE A DIFFERENT POINT YOU WANT TO MAKE?

2 MS. SEIGLE: THOSE ARE THE TWO MOST IMPORTANT
3 POINTS ON MICHAELS.

4 THE COURT: THANK YOU. MR. CASAS.

5 MS. SEIGLE: YOUR HONOR.

6 THE COURT: YES.

7 MS. SEIGLE: THERE IS ONE OTHER POINT ON
8 IRREPARABLE HARM, WHICH IS -- AND BALANCING OF HARMS:
9 BY DEFINITION, DEPRIVATION OF A FIRST AMENDMENT RIGHT
10 CONSTITUTES IRREPARABLE HARM. THIS IS FROM THE PARADISE
11 HILLS CASE AT 235 CAL AP 3D, 1528, PIN CITED 1539.

12 SO WHEN YOU ARE BALANCING THE EQUITIES YOU
13 HAVE TO LOOK AT THE DEPRIVATION TO THE DEFENDANT OF HIS
14 FIRST AMENDED RIGHT. THAT'S IRREPARABLE HARM AS A
15 MATTER OF LAW. THE PLAINTIFF, AS WE HAVE EXPLAINED,
16 HASN'T SUBMITTED EVIDENCE OF THE IRREPARABLE HARM. FROM
17 EVIDENCE THAT'S ALREADY PUBLIC, THAT WILL REMAIN PUBLIC,
18 NO MATTER WHAT HAPPENED WITH THE INJUNCTION.

19 ONE FINAL POINT, WHICH I DON'T WANT TO GET
20 INTO IN ANY DETAIL, WHICH IS THIS -- THE ORDER THAT THE
21 PLAINTIFFS HAVE SUBMITTED ON THE INJUNCTION IS MUCH,
22 MUCH BROADER THAN TAKING OFF THE CAPTION. IT PROHIBITS
23 MR. ADELMAN FROM IDENTIFYING THE LOCATION OF THE
24 PROPERTY. THAT MEANS, BY ITS OWN WORDS, HE COULDN'T
25 TALK TO THE PRESS. HE COULDN'T POST HIS OWN COURT
26 DOCUMENTS ON THE WEBSITE. IT'S NOT JUST TAKING THE
27 CAPTION OFF.

28 THE COURT: IF AND WHEN WE GET TO THAT POINT,

1 THERE WILL BE TIME TO OBJECT TO THE FORM OF THE ORDER.

2 MS. SEIGLE: OKAY. THANK YOU, YOUR HONOR.

3 THE COURT: THANK YOU. MR. CASAS, IS THERE
4 SOMETHING ABOUT THIS YOU WANT TO SPEAK TO.

5 THE WITNESS: ACTUALLY, I DON'T THINK THAT
6 YOU'RE INVOLVED IN THE PRELIMINARY INJUNCTION.

7 MR. CASAS: NO, WE ARE NOT.

8 MR. KENDALL: NOR PICTOPIA, YOUR HONOR.

9 THE COURT: OKAY. MR. GATTI, IT'S YOUR MOTION
10 SO YOU GET WHATEVER IS LEFT OF THE FINAL WORD, OR THE
11 WORD IN THE SHORT TIME THERE IS AVAILABLE.

12 MR. GATTI: OKAY. THE ISSUE HERE WE'RE
13 TALKING ABOUT IS WAS, AS WE HAVE STATED THROUGHOUT, IS
14 UNLAWFUL CONDUCT. IT'S NOT AN ISSUE OF FREE SPEECH.
15 IT'S NOT THE ISSUE OF -- ON THIS PRELIMINARY INJUNCTION
16 IS THE RIGHT TO USE SOMEONE'S NAME AND IDENTIFY THEIR
17 LOCATION OF THEIR HOME. THAT IS THE ISSUE, AND
18 MR. ADELMAN IS TRYING TO ARGUE THAT THAT IS A
19 FUNDAMENTAL RIGHT OF HIS, TO USE SOMEONE'S NAME TO
20 LOCATE THEM AT THEIR HOME, AND DO THAT.

21 AND MR. ADELMAN'S OWN WORDS ARE THE MOST
22 IMPORTANT THING TO FOCUS ON, YOUR HONOR. HE HAS SAID
23 THROUGHOUT, AND MR. KENDALL HAS SAID THIS SEVERAL TIMES,
24 THAT MR. ADELMAN DIDN'T EVEN KNOW IT WAS
25 MRS. STREISAND'S HOME. IF THAT'S THE CASE, THEN WHAT IS
26 THE IMPORTANCE THAT HE PUTS THERE. THERE IS NO -- HE'S
27 TRYING -- AT ONE TURN HE'S SAYING THAT HE DIDN'T EVEN
28 KNOW IT WAS HER HOME. SO THE NAME IS SO UNIMPORTANT HE

1 DIDN'T EVEN KNOW THAT THIS WAS THE LOCATION.

2 SO THIS TALK NOW AFTER THE FACT THAT THE NAME
3 MUST BE THERE AND IT'S HIS EXPRESSION, HE DIDN'T EVEN
4 KNOW, BY HIS OWN WORDS HE HAS STATED HERE, THAT IT WAS
5 THE -- THAT IT WAS THE HOME.

6 BALANCED AGAINST THAT AND THE ISSUES WE'VE
7 TALKED ABOUT IS THE RIGHT TO PRIVACY, AND WHAT THE COURT
8 WOULD HAVE TO FIND HERE AND WHAT THE DEFENDANTS ARE
9 ASKING THE COURT TO SAY IS THAT MR. ADELMAN HAS THAT
10 RIGHT TO GO AHEAD AND LOCATE, IDENTIFY SOMEONE'S HOME,
11 AND LOCATE IT AND USE THE NAME AS WE HAVE STATED TO DO
12 THAT.

13 IN THIS CONTEXT, THERE IS NO STATUTORY
14 AUTHORITY AND NO CASE LAW AUTHORITY FOR THAT
15 PROPOSITION. WE HAVE STATED PREVIOUSLY THE ISSUES ABOUT
16 KEEPING INFORMATION PRIVATE. EVEN IF IT IS PUBLIC IN
17 OTHER AREAS IT CAN BE KEPT PRIVATE AND SHOULD BE KEPT
18 PRIVATE. WE DO NOT WANT TO BE IN A SITUATION WHERE
19 INDIVIDUAL CITIZENS ARE NOW -- PRIVATE CITIZENS ARE NOW
20 POSTING -- USING PEOPLE'S NAMES TO POST WHERE THEY LIVE
21 AND IDENTIFYING THAT. THAT IS NOT A FUNDAMENTAL RIGHT
22 OF MR. ADELMAN.

23 THE COURT: OKAY. THANK YOU, COUNSEL. WE
24 HAVE ONE LOOSE END. AND THAT IS THE BLOW-UP OF EXHIBIT
25 A THAT HASN'T BEEN MARKED. WE REALLY DON'T NEED THE
26 BLOW-UP, AND I WOULD PROPOSE THAT SINCE WE HAVE A IN
27 EVIDENCE THAT I THINK IT WAS --

28 MR. KENDALL: I WILL JUST CLUTTER UP THE COURT

1 FILE, YOUR HONOR.

2 THE COURT: WELL, IT'S LARGER THAN A LOT OF
3 FILES AND IT'S THINNER THAN A LOT, BUT IT TAKES UP MORE
4 SURFACE AREA. CLEARLY, IF NO ONE HAS OBJECTION,
5 MR. KENDALL, I THINK IT WAS YOU WHO BROUGHT IT. YOU CAN
6 RETREAT WITH IT. BAD CHOICE WORDS, PERHAPS. BUT IT'S
7 MEANT AGAIN IN THE BEST SENSE OF THE TERM, SINCE WE'RE
8 AT THE END OF THE DAY AND THE END OF THE ARGUMENT AND WE
9 HAVE IT IN EXHIBIT A.

10 I WANTED TO THANK YOU FOR YOUR ARGUMENT THIS
11 WEEK. THIS IS CLEARLY SOMETHING THAT IS VERY IMPORTANT
12 TO THE PARTIES AND PRESENTS A LOT OF VERY INTERESTING
13 LEGAL ISSUES.

14 MR. GATTI: WE'D LIKE TO THANK YOU, YOUR
15 HONOR, FOR TAKING TIME. I'M SURE MR. KENDALL WOULD SAY
16 THE SAME.

17 THE COURT: OKAY. BY NOON MONDAY EACH SIDE,
18 TO THE EXTENT THAT YOU HAVE CITED NEW CASES TODAY, IS TO
19 FAX THE OTHER SIDE THE CASE NAMES AND CITATIONS. AND
20 THEN BY FRIDAY THE PARTIES MAY, IF THEY WANT TO, FILE
21 ANY ADDITIONAL POINTS OR AUTHORITIES WITH RESPECT TO THE
22 NEWLY CITED CASES, AND AT THAT TIME THE MATTER WILL BE
23 SUBMITTED. YES.

24 MR. GATTI: THE ONLY OTHER HOUSEKEEPING ISSUE
25 WITH RESPECT TO THE EVIDENCE WE WERE JUST REFERRING TO,
26 I BELIEVE, YOUR HONOR --

27 THE COURT: IF THE COURT GETS TO THE POINT
28 THAT IT BECOMES AN ISSUE, THE CLERK WILL BE IN CONTACT

1 AND WE'LL RESOLVE IT.

2 MR. GATTI: WOULD IT BE POSSIBLE, YOUR HONOR,
3 TO SUBMIT A SHORT LIMITED BRIEF ON THE ISSUE OF TAKING
4 UP THE EVIDENCE OR --

5 THE COURT: WHY DON'T YOU WAIT UNTIL
6 APPROXIMATELY THE 18TH OF AUGUST AND SEE IF BY THAT TIME
7 OR THEREAFTER I'VE DETERMINED THAT IT'S IMPORTANT ENOUGH
8 TO BE REVIEWED, AND JUST BY COINCIDENCE DEFENSE COUNSEL
9 WILL BE BACK FROM VACATION SO HE'LL HAVE THE OPPORTUNITY
10 TO RESPOND. CANDIDLY, I'M ON VACATION BEGINNING THE
11 28TH FOR A WEEK, THEN I HAVE A 15-DAY TRIAL THAT STARTS,
12 SO WE'RE NOT GOING TO HAVE A LOT OF TIME DURING THE DAY.
13 SO IT'S GOING TO TAKE A WHILE TO PREPARE THE APPROPRIATE
14 DECISION.

15 MR. GATTI: WITH RESPECT TO THE 18TH --

16 THE COURT: IT'S AN APPEARANCE DATE. WE DO
17 HAVE A DATE ON THE 28TH. I'LL LET YOU KNOW BEFORE THE
18 END OF THE MONTH WHETHER WE'LL KEEP THE DATE OR IT WILL
19 BE MOVED FOR ONE REASON OR THE OTHER. IT WAS A CASE
20 MANAGEMENT CONFERENCE. THANK YOU ALL.

21 MR. KENDALL: THANK YOU, YOUR HONOR, VERY MUCH
22 FOR THE TIME.

23 MR. GATTI: THANK YOU, YOUR HONOR.

24 THE COURT: YOU ARE WELCOME.

25 (PROCEEDINGS ADJOURNED AT 4:35 P.M.)

26

27

28

