REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. D-1-GN-18-006623

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| SCARLETT LEWIS<br>Plaintiff | ) | IN THE DISTRICT COURT |
| VS. | ) | TRAVIS COUNTY, TEXAS |
| ALEX E. JONES, INFOWARS, LLC, AND FREE SPEECH SYSTEMS, LLC<br>Defendants | ) | 53RD JUDICIAL DISTRICT |

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HEARING ON MOTION FOR EXPEDITED DISCOVERY
AND MOTION FOR PROTECTIVE ORDER

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On the 24th day of January, 2019, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Scott H. Jenkins, Judge presiding, held in Austin, Travis County, Texas;

Proceedings reported by machine shorthand.

1 **A P P E A R A N C E S**

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# I N D E X

## VOLUME 1

## HEARING ON MOTION FOR EXPEDITED DISCOVERY AND MOTION FOR PROTECTIVE ORDER

## JANUARY 24, 2019


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1 **PROCEEDINGS**
2 THE COURT: All right. We're on the
3 record in Cause No. GN-18-6623 styled Scarlett Lewis vs.
4 Alex E. Jones, InfoWars, LLC, and Free Speech Systems,
5 LLC. Would you announce your presence for the record
6 beginning with counsel for plaintiff.
7 MR. BANKSTON: Yes, Your Honor, Mark
8 Bankston and William Ogden for the plaintiff, Scarlett
9 Lewis.
10 MR. ENOCH: May it please the Court. Mark
11 Enoch for the defendants.
12 THE COURT: All right. Thank you,
13 Counsel. You are set today on a hearing on a motion
14 filed by the plaintiffs. The title of the motion is
15 Plaintiff's Motion for Expedited Discovery in Aid of
16 Plaintiff's Response to Defendants' TCPA Motion filed on
17 January 8th of this year.
18 As we just discussed before we went on the
19 record, I've read that motion. I have read the
20 defendants' response, which I believe was filed on the
21 22nd of January -- that's what the hand mark indicates
22 here; I believe that's accurate -- which also includes a
23 request for -- or a motion for a protective order as an
24 alternative backstop in case I do grant discovery.
25 I read plaintiff's response to defendants'

1 motion for protective order filed apparently today, not
2 yet in the clerk's file, but hand-delivered to the Court
3 right before I walked in here. And I read plaintiff's
4 reply in support of plaintiff's motion for expedited
5 discovery filed yesterday, the 23rd.
6 I also read the live pleadings in this
7 case and read the live pleadings in the *Heslin* case
8 because of the references to it and the, to some extent,
9 overlapping facts, though it's different causes of
10 action and different facts forming the basis of that
11 cause of action, at least in part.
12 Knowing all of that, you have agreed to
13 argue this in no more than 45 minutes per side. You've
14 agreed that the plaintiff, of course, goes first, having
15 the burden of persuasion on the principal motion. And
16 even though defendant has the burden of persuasion on
17 the protective order, you've agreed that the plaintiff
18 will use 35 minutes or more to fully open and argue
19 everything, including the defendant's request for
20 protective order. The defendant will then have
21 45 minutes to argue on everything in opposition to
22 plaintiff's motion in support of defendants' request for
23 a protective order. Plaintiff will have no more than
24 ten minutes to close, and there cannot be new arguments,
25 new things raised that haven't been fully flushed out

1 before. It's purely a response to the arguments made by
2 defendant.
3 Is that our agreed schedule, and when you
4 hit those times you will be out of time and that will be
5 the end of your presentation to the Court?
6 MR. BANKSTON: Yes, Your Honor, it is.
7 MR. ENOCH: Yes, Your Honor.
8 THE COURT: All right. Thank you,
9 Counsel. With that, you may proceed and go first.
10 MR. BANKSTON: Thank you, Your Honor.
11 Your Honor, I'm going to start with what I think is
12 going to take the least time, which is the protective
13 order. And that's because you just read the pleadings
14 on that, so I think I don't have to tell you a lot about
15 it.
16 You'll see that what our argument is is
17 that in order to get a protective order under 192, the
18 movant has to show facts, has to show facts of a
19 particular specific demonstrable injury, and it has to
20 do this through evidence. It cannot make conclusory
21 allegations. The Texas Supreme Court has said over and
22 over and over again you must produce some evidence
23 supporting your request for a protective order. There
24 is no evidence supporting this protective order
25 whatsoever. The pleadings are not evidence.

1 The case is identical to the *Walmart* case
2 I cited you. It's done. It's that easy. It would be
3 the shortest appellate brief I've ever written in my
4 life. This Court would commit error if it ordered
5 protection on the discovery it orders today because the
6 defendant has to meet its evidentiary burden. There's
7 literally nothing in the record that you can point to to
8 support the protective order. And if that happens, then
9 we're going to be wasted with a lot of collateral
10 litigation.
11 You'll notice on that order -- I attached
12 a proposed order denying the motion. I also, though --
13 if for some reason -- and I can't see it, but if
14 somewhere the Court has something in the record that
15 says, okay, this does support the entry of a protective
16 order, I've offered an alternative protective order.
17 And the reason I did that is for form, is their
18 protective order doesn't meet the requirements of law.
19 I've inserted Rule 76 language consistent with what the
20 Court has used before.
21 THE COURT: And I gather you've taken the
22 order off the Travis County court's website for
23 protective order, which actually is a variation on the
24 order used in federal court, that variation being
25 drafted by my dear friend retired Judge Yelenosky, and

1 you've used that very same order?
2 MR. BANKSTON: Actually, luckily in this
3 case Elissa was kind enough, your staff attorney, to
4 send us that link directly. So yes, that's been taken
5 from the website, that Rule 76 language.
6 THE COURT: Okay.
7 MR. BANKSTON: There's some language that
8 the parties had talked about before that's in there
9 that's totally consistent with all of that, but the
10 actual Rule 76 found in that is taken directly from the
11 County's language.
12 THE COURT: Okay.
13 MR. BANKSTON: And so that's been used
14 there. Again, we're agreed to that as to form but not
15 that there's been any showing that the Court can act on
16 it and put that into effect. So again, that proposed
17 order, the exhibit, is just for a form to show the Court
18 what a protective order of confidentiality should look
19 like.
20 The other two things that are in that
21 order is that I believe that I should be allowed to show
22 any document I want to a mediator. And I've also
23 inserted provisions for a sharing provision in that
24 order because I believe that there's no reason --
25 compelling reason to keep these documents out of the

1 hands of any similarly situated litigant. But I think
2 all those arguments are academic and will probably be
3 taken up with some protective order over some future
4 discovery in this case maybe, because if there's
5 discovery ordered here today, it cannot have a
6 protective order. That's just the law.
7 THE COURT: Well, you're citing me to
8 192.6 for that argument, right?
9 MR. BANKSTON: That's the rule, yes,
10 Your Honor.
11 THE COURT: Yes. And so -- this doesn't
12 come up that often, believe it or not. You're saying
13 196 -- 192.6 requires evidence in support of this
14 motion; if you don't have it, you can't get an order
15 whatsoever.
16 MR. BANKSTON: Correct.
17 THE COURT: Okay. I'm looking at it now.
18 I know there's case law about this, but where is it in
19 the motion -- I mean, in the rule, Counsel?
20 MR. BANKSTON: I mean, from what I'm
21 saying from memory here on the rule, the rule requires
22 to make -- a finding be made of some sort that there is
23 a -- what is it -- a demonstrable injury, particular
24 specific demonstrable injury. The case law interpreting
25 this rule, I can give you three Texas Supreme Court

1 cases that 100 percent say this in black and white,
2 quote, a party must produce some evidence supporting its
3 request for a protective order.
4 THE COURT: Okay.
5 MR. BANKSTON: A party cannot prevail by
6 making conclusory allegations.
7 THE COURT: But you don't have -- you
8 don't get a lot of heartburn about the Court doing it as
9 long as it's confined to the order you submitted today,
10 this afternoon, to the Court?
11 MR. BANKSTON: No, I don't think that's my
12 position, Your Honor.
13 THE COURT: Okay.
14 MR. BANKSTON: I would say that if the
15 defendant was able to come in here and show us evidence
16 of a particular substantial demonstrable injury, if that
17 occurred, the order should look like what I've proposed.
18 But there should not be any protective order at this
19 point because there's nothing in the record to support a
20 protective order. The only thing that you have to
21 support a protective order is counsel telling you he
22 thinks he needs a protective order. That cannot support
23 a protective order.
24 THE COURT: Well, he doesn't know what
25 discovery's going to be allowed by the Court. That's

1 one problem we have that's different in this case than
2 others, don't know exactly what discovery is going to be
3 allowed. So it could be that among the documents you
4 obtain in discovery, one of them somehow reveals some
5 secret sauce of how this company works.
6 I remember in *Heslin* you wanted documents
7 pertaining to his contracts to sell vitamin supplements.
8 I recall specifically striking that from your discovery
9 because I didn't think it fell within the Civil Practice
10 and Remedies Code specific limited discovery for the
11 causes of action in *Heslin*, so I edited that out. Do
12 you remember that?
13 MR. BANKSTON: Correct.
14 THE COURT: Yes. So those could be
15 confidential contracts. I don't know. And I don't know
16 if it's in your proposed order. But wouldn't your
17 proposed order at least allow him, if I allow the
18 discovery, to mark something confidential and then have
19 the burden of continuing to maintain its confidentiality
20 by showing it reveals some sort of trade secret of the
21 company?
22 MR. BANKSTON: I agree that --
23 THE COURT: Do you see what I mean?
24 MR. BANKSTON: I agree that actually the
25 way that would work is -- well, first he would need to

1 give us an affidavit in support of a protective order
2 with some testimony. And it would have to say what
3 kinds of documents he's expecting to produce. And he
4 has discovery requests, so he knows what they are. That
5 is in every protective order I've ever done. You know,
6 and I do products liability every day of my life.
7 Defendants will come in here with Cooper Tire or Walmart
8 and put up an affidavit saying what they expect to
9 produce. Once the protective order is in place, you're
10 correct, that keeps going, because once those are
11 designated I can challenge them.
12 THE COURT: Okay.
13 MR. BANKSTON: But you can't have an order
14 at all without evidence.
15 THE COURT: So what you're really arguing
16 is it's just kind of premature. This is without
17 prejudice to their right to do the very same thing. If
18 he gets up to the point where I'm about to turn some
19 documents over and I think this reveals something that's
20 truly confidential about the way this business is run
21 and would give a competitive advantage to someone else
22 and it's truly confidential, it's a trade secret sort of
23 thing, then he could file a new motion for protective
24 order, file specific affidavit evidence to support it,
25 and the Court should entertain it.

1 MR. BANKSTON: I would think that --
2 THE COURT: Do you agree with that or not?
3 MR. BANKSTON: I would agree that that is
4 true if there was some discovery order coming up. In
5 other words, if from this date forward --
6 THE COURT: Let me be clear.
7 MR. BANKSTON: Okay.
8 THE COURT: If you get this motion granted
9 and I allow expedited discovery and he goes back and
10 looks at what I'm allowing, even though he doesn't agree
11 with it, and he says, "Golly, all right, to fall within
12 the scope of this request, I'm going to have to turn
13 over these documents, but five of them are really
14 confidential things, they reveal some trade secrets
15 about how he organizes this business; I want to mark
16 those confidential and I want to ask for a protective
17 order," he can still do that, can't he?
18 MR. BANKSTON: No, I disagree with that.
19 THE COURT: Oh. Well, then that's a real
20 problem.
21 MR. BANKSTON: I do believe it's a problem
22 for him, yes.
23 THE COURT: Then how would he know what
24 documents he's -- because you're asking for a lot of
25 things. How is it I can do it today with prejudice to

1 him not being able to file a new protective order that's
2 more specific later? Where in the law prevents him from
3 doing that?
4 MR. BANKSTON: Because he's -- right now
5 he has the discovery and there is a discovery order ripe
6 today. If you enter the discovery order today --
7 THE COURT: No, there's not.
8 MR. BANKSTON: Well, I --
9 THE COURT: There's not a discovery order.
10 MR. BANKSTON: Well, I assume that today
11 you would be signing an order saying to respond to this
12 discovery by X number of days just like you did in
13 *Heslin*.
14 THE COURT: Well, it'll probably have to
15 be tomorrow actually because there's so many other
16 things to get done.
17 MR. BANKSTON: Sure.
18 THE COURT: And I've got another big case
19 I've got to get out tomorrow too. But yeah, I'm going
20 to work feverishly on it to try to get it done tomorrow
21 because I know you've got time deadlines running --
22 MR. BANKSTON: My argument here is --
23 THE COURT: -- but after I finish my
24 family law case.
25 MR. BANKSTON: Sure. My argument here is

1 that once you have signed an order compelling certain
2 discovery, and he has set a protective order for that
3 hearing about that discovery, once that order is signed
4 and his objections are overruled, he can't lodge new
5 objections. It would be the same thing as if he had
6 done it on a relevance basis. If he comes here today
7 and say I object to this discovery because it's
8 irrelevant and you say that objection is overruled,
9 produce that discovery, here's the order saying produce
10 it, he cannot then just say, no, I object, it's
11 irrelevant and have another hearing on that.
12 THE COURT: Well, that's a different
13 question. I understand relevance and objecting to
14 specific discovery. But what we're here about is the
15 specific and limited discovery under the Civil Practice
16 and Remedies Code. Once he files a motion to dismiss,
17 discovery is stayed. There is no discovery. This is
18 not like other cases that you're referencing. Discovery
19 is stayed and we're on these schedules that maybe none
20 of us like very much because it's kind of draconian, but
21 we are. So we've got to move quickly. And I'm not
22 understanding why the law precludes him -- once he knows
23 what I am or am not willing to allow you to have in
24 discovery under the TCPA, specific and limited
25 discovery, why he then can't present a more precise

1 protective order motion about specific documents.
2 MR. BANKSTON: Let me just say I feel like
3 this is not an issue I want to spend a bunch of time on
4 today.
5 THE COURT: Okay. Good.
6 MR. BANKSTON: So I'm going to let you
7 look at that. My feeling on this, though, is that once
8 he is known that he is on -- I have a hearing set for
9 discovery, knows what the substance of that discovery
10 is, files a motion for the protective order, sets that
11 for a hearing for resolution, he can't just keep having
12 infinite bites at the apple.
13 THE COURT: Well, actually, Tuesday was
14 too late to set it for a hearing. He made it part of
15 his response. So arguably it's just sort of if you're
16 going to do this, I want this to be considered at some
17 point. I'll see what he has to say.
18 MR. BANKSTON: Right.
19 THE COURT: Actually, the only thing set
20 today is your motion.
21 MR. BANKSTON: Correct.
22 THE COURT: Technically.
23 MR. BANKSTON: I was asked if I objected
24 to it, and I didn't, Your Honor. I felt I could be
25 ready to argue this today. And partially that's why, is

1 because there's no evidence.
2 THE COURT: Okay.
3 MR. BANKSTON: So yeah, I'll let you look
4 at that and decide how you want to handle that.
5 THE COURT: All right.
6 MR. BANKSTON: As far as the other parts
7 of the protective order, the only things we're asking
8 that are changes to that Rule 76 language, let me show
9 anything to a mediator, and a sharing provision.
10 THE COURT: So if I do one, do yours.
11 MR. BANKSTON: That's what I would like,
12 yes, Your Honor.
13 THE COURT: I got it.
14 MR. BANKSTON: Again, just for the
15 appellate record purpose, not waiving our argument that
16 no protective order is justified or proven at this point
17 in time.
18 Let me move on -- and luckily, I'm glad we
19 were able to shorten it today. I wasn't sure on the
20 schedule if you were going to have a chance to look at
21 the pleadings. So luckily we're going to be able to
22 shorten it a bit today because I understand that you've
23 read them.
24 I want to start first by just talking
25 about generally what this cause of action is and a

1 little bit how it's different and what's going on here
2 that's new for the first time in your courtroom today.
3 I want to start with something that
4 I've -- you know, I've been with these clients for a
5 while, and it has very quickly occurred to me that there
6 are very few people on the planet who can understand and
7 comprehend what they've gone through. One of those
8 people who can is Beth Holloway. And you may remember
9 Beth Holloway because her daughter Natalee Holloway
10 disappeared and it became a national story. It was a
11 really big story. We still don't know what happened to
12 Natalee. We have some thoughts about what may have
13 happened, but for many, many years nobody had any idea
14 of really what happened to Natalee.
15 In 2010 the *National Enquirer* printed a
16 couple of articles, a series of three articles, about
17 Natalee Holloway, and they were what you might expect
18 from the *Enquirer*. They were our secret source tells
19 you the real details of Natalee Holloway's death,
20 details about her burial, about who said they saw her
21 body moved, a lot of stuff that were assertions of facts
22 about the circumstances of Natalee's death.
23 Her mom Beth brought suit against the
24 *National Enquirer* in 2013 about that case. And that
25 case is really instructive because it's a post-*Snyder*

1 case, post-*Westboro* case. And it's one of the cases
2 that really addresses media, IIED, false statements.
3 All of the arguments that we're talking about here were
4 addressed exhaustively by the federal court in *Holloway*.
5 In that case she alleged the articles are false, were
6 made with actual malice --
7 THE COURT: From Alabama. That's an
8 Alabama case.
9 MR. BANKSTON: Yes, that's the Northern
10 District of Alabama case, correct. That case was about
11 how the allegations were false, they were made with
12 actual malice. It had actually been ongoing since 2005,
13 the *National Enquirer* had been making articles.
14 That case upheld the denial of the motion
15 to dismiss noting that the First Amendment doesn't
16 protect reckless falsity, and it goes into a whole lot
17 of the issues that we're going to be talking here today.
18 Of all the cases that I cited you, in fact, I think
19 *Holloway* is the most useful just in terms of learning
20 the whole scope of things we're talking about here
21 today.
22 Strangely enough, right about the time we
23 brought this suit -- you know, Ms. Holloway did that
24 back in 2013. Right about the time we filed this suit,
25 Ms. Holloway filed another suit just a couple months

1 before we did, and she filed a suit against *Oxygen*
2 *Media.* And in that case she sued Oxygen Media for like
3 a true crime documentary on cable TV, same kind of
4 situation, what she called an outrageous fiction
5 published at the expense of her emotional distress. She
6 also survived a motion to dismiss on that case as well.
7 And just like with the *Enquirer* case, she ended up
8 settling that one as well.
9 She prevailed there arguing, you know, the
10 basic same things we're arguing here, they used sources
11 with zero credibility, inherently dubious arguments,
12 basically hid themselves from the truth to make a
13 sensationalized circus around her child's death using
14 the circumstances of her child's death, and she
15 prevailed on those cases.
16 This case is very similar to that kind of
17 case. And so I want to address quickly for you the sort
18 of three arguments that are raised primarily against our
19 motion which have to do with legal tenability, which is
20 to say don't even get to the discovery because there's
21 no legal way these clients can even make this claim.
22 THE COURT: Legal what?
23 MR. BANKSTON: There's no legal way they
24 can make the claim.
25 THE COURT: I just didn't hear the word

1 you said earlier. It started with a T, but I couldn't
2 hear you.
3 MR. BANKSTON: Oh, tenability.
4 THE COURT: Tenability.
5 MR. BANKSTON: Yes. So he said the legal
6 claims are not tenable; they cannot survive and it
7 wouldn't matter what discovery you got because they're
8 not legally real claims.
9 His first argument on this is this gap
10 filler argument, that the tort is really defamation. He
11 says what you're arguing here for is really defamation.
12 And you'll remember this came up in *Fontaine*.
13 THE COURT: I dismissed an intentional
14 infliction claim --
15 MR. BANKSTON: You sure did. Yes, you
16 sure did.
17 THE COURT: -- for that very reason.
18 MR. BANKSTON: And in fact, you'll notice
19 I didn't appeal that. You did that correctly. And we
20 talked about that here in the court about how that
21 was -- Marcel Fontaine was bringing the exact same cause
22 of action on IIED that he was on defamation, the idea
23 being if he didn't make defamation, it was fenced out,
24 he'd have the IIED. But there was no doubt that the
25 facts that he was alleging were his defamation facts.

1 There was nothing different about that. You were right
2 to make that ruling. I do not argue with that ruling at
3 all.
4 THE COURT: I don't hear that very often.
5 I can't remember when I have actually.
6 MR. BANKSTON: Yeah, when you've dismissed
7 a person's case on that claim and they absolutely agree.
8 I do. I think the belt and suspenders was worth the
9 cost there.
10 Here we're talking about five years of
11 horrific false statements about the circumstance of
12 Ms. Lewis' child's death. Like Holloway, they're about
13 her child's death. They're not about her. It's not a
14 claim about her reputation. It's about her outrage.
15 You'll remember in *Pozner* and *Heslin*, we
16 talked about these very specific statements about them,
17 you know, Ms. De La Rosa did a fake interview,
18 Mr. Heslin lying about holding his kid. Those are
19 specific statements about them.
20 THE COURT: I understand. There's no --
21 MR. BANKSTON: Of or concerning.
22 THE COURT: -- statement made by the
23 defendants about any statement made by this plaintiff.
24 MR. BANKSTON: Correct. And we'll get to
25 why that may be important later. But to move on from

1 that, what I want to say is you'll remember that there
2 was these sort of allegations that might include her as
3 part of a group. If you were to say the whole thing is
4 staged, synthetic, fabricated with actors, the natural
5 implication can be that the parents of the 20 murdered
6 children are fake, therefore liars. So you could say
7 that there are some statements that are made towards
8 people that as a group that includes her, right? But
9 that's not defamation. And that's been pointed out by
10 the other side plenty of times. You cannot defame a
11 group that way. You cannot take a class of people and
12 make a false statement about them. You can't say all
13 people from Texas are liars. I can't say the entire
14 staff of this courthouse are crooked thieves. That's
15 not a defamation.
16 However, even if you were to take away any
17 statements -- let's assume for the moment that in the
18 five years of history of InfoWars that they never once
19 made any statement about parents being crisis actors or
20 the parents being fake, that everything else is there
21 but that stuff is gone, there is still unquestionably a
22 cause of action for IIED here because there's five years
23 of false statements about the event itself, not about
24 the parents, and these statements themselves are enough
25 to form IIED.

1 And in fact, I mean, you look at the
2 statements we're talking about. It's not just false
3 statements about the details of the crime, but it's
4 false allegations of things that were going on with it,
5 things like satanism and cult magic and just the kinds
6 of grotesque weirdness combined with gory horrible
7 discussions that have no basis in fact. And these are
8 all things that have been in transcripts before the
9 Court. All of this coverage makes the *Enquirer's*
10 Holloway coverage look like a *People* magazine puff
11 piece. This is in my view some of the most disgusting
12 infliction of emotional distress ever conducted by the
13 media.
14 Even if all of that is -- you know, as if
15 all of that was not enough, you also have the active
16 coordination, encouragement, and participation with
17 third parties to harass and carry out a harassment
18 campaign against this family. We've talked a little bit
19 about the laws in our brief about how the First
20 Amendment doesn't protect that kind of harassment by a
21 media person. So you have really three different kinds
22 of things going on here, none of which are defamation,
23 that are being done over an extended period of five
24 years.
25 The argument that they'll try to rely on

1 is out of this case called *Draker* where you had a school
2 teacher who had facts that were like defamation. She
3 had the facts -- if she could have proved it, she would
4 have had defamation. She just didn't prove it. She got
5 to summary judgment and she was summary judgmented out.
6 And they said, well, we can't just now bring IIED on the
7 same factual allegations because that would have fit the
8 facts. That's what you have to determine, actually.
9 What you have to see is if there is, quote, a more
10 conventional tort which fits the facts that is subject
11 to some kind of structural impediment. And here her
12 impediment is factual, not structural.
13 THE COURT: So your argument is you're
14 unable -- this plaintiff is unable to bring a defamation
15 case.
16 MR. BANKSTON: I think that's probably
17 true. I think she may have one. I think it is possible
18 in the entire five years of statements there might be
19 one that you could make an argument on, and that's the
20 statement accusing Mr. Heslin of lying, right? Because
21 maybe -- it's not quite the same as *Pozner*. In *Pozner*
22 you have an event at or near the time of the incident,
23 part of his actual allegation of how the event was
24 faked, the blue screen interview. All of that could
25 pull into Mr. Pozner's a fake parent. Saying Mr. Heslin

1 lied about an event seven years later, a man she was
2 never married to, I don't think that gets her there.
3 THE COURT: Because you can -- somehow you
4 can infer that she's complicit in that.
5 MR. BANKSTON: Exactly. And maybe --
6 THE COURT: But that would be a real
7 stretch, is your argument, and that's the only one.
8 MR. BANKSTON: And that's the only one.
9 THE COURT: Ergo, no defamation case;
10 ergo, it's not a gap filler.
11 MR. BANKSTON: I think -- well, I think it
12 is a gap filler.
13 THE COURT: Well, I mean --
14 MR. BANKSTON: Oh, oh, oh.
15 THE COURT: -- it is a gap filler. It's a
16 successful gap filler because there is no cause of
17 action.
18 MR. BANKSTON: Correct. There we go. I
19 think one way to say that would be the gap filler
20 argument commonly used by defendants does not apply
21 here.
22 THE COURT: I understand.
23 MR. BANKSTON: Okay.
24 THE COURT: I understood that when I read
25 your written arguments.

1 MR. BANKSTON: Okay.
2 THE COURT: Thank you.
3 MR. BANKSTON: The other thing is we'll
4 talk about public figure, but let's save that for First
5 Amendment. We'll talk about that just briefly. But
6 just because she alleges she's not a public figure
7 doesn't mean it's a defamation case.
8 I wanted to talk about group intentional
9 infliction because this is the target. Some of this you
10 heard about in the brief. I want to let you know about
11 a case that I didn't get to put in the brief.
12 InfoWars says there must be intentional
13 targeting of the plaintiff, and this just isn't true.
14 In order to meet the cause of action, you've got two
15 mental states. You can either prove that they
16 intentionally did it or they recklessly did it. And in
17 here, every court to examine this issue says no, if you
18 had targeting and intentional and a desire to hurt
19 somebody or harm them, that's incompatible with
20 recklessness.
21 The case that I want to tell you about
22 that I didn't get chance to cite to you is the -- you
23 may know about the DuPuy hip MDL that's going on up in
24 Dallas. That case -- and let me just put that on the
25 record so I can find it later too -- is 2014 WL 3557392.

1 And in that case you had a --
2 THE COURT: And the style is *DuPuy*,
3 D-u-p --
4 MR. BANKSTON: U-y.
5 THE COURT: U-y?
6 MR. BANKSTON: Yes. And I believe the
7 style is *DuPuy Orthopaedics*.
8 THE COURT: Okay.
9 MR. BANKSTON: And that is the MDL up
10 there in Dallas.
11 THE COURT: All right.
12 MR. BANKSTON: Now, there are something
13 like 25,000 plaintiffs in that thing, several thousand
14 of them in Texas. And there they have an IIED claim
15 based on some medical reporting information. Some news
16 was presented to them that was very upsetting. There
17 they say that basically that press release to the
18 clients or whatever was not intentionally targeted at
19 any specific person but that, quote, recklessness does
20 not require the actor to aim the conduct towards a
21 specific person or a specific result because to do so
22 would relegate it to the same scope as intentional
23 conduct.
24 All right. That's the exact same thing
25 that the Houston Court found in *Johnson vs. Standard*

1 *Fruit*. That was a group of marchers. They had a
2 protest group on a bridge. And what happened there is
3 they had a series of reckless acts that caused a bunch
4 of people to get hit by a truck on that bridge.
5 Now, interesting -- you know, the actual
6 end result of that case as it kept going up was, well,
7 that's kind of a problem, though, because the primary
8 risk of that conduct isn't emotional distress. The
9 primary risk of that conduct is serious bodily injury.
10 THE COURT: I understand, physical injury.
11 MR. BANKSTON: But there's nothing that
12 keeps it from being towards a group. The other ones you
13 obviously saw was the groundwater case, *Potter* and
14 *Firestone,* the priests case and the diocese. And
15 *Baldonado*, that's some firefighters, a group of
16 firefighters. And in each of these cases, what I think
17 is important is that the defendants didn't even know the
18 specific names of the people they hurt, all right?
19 The idea that you would have to -- that
20 Jones in this case would have to, one, intentionally
21 pick Ms. Lewis out of a group of larger people of 20 or
22 40 people and then intentionally want to hurt her, if
23 that was the case, then this would really be no
24 different than an emotional assault because it would
25 that be way. That's not what we're alleging here. All

1 we have to allege is that he would have and should have
2 anticipated that emotional distress would occur.
3 The idea kind of ties us back into
4 Judge Posner's idea of the reasonable scope of danger.
5 And so if there is an identifiable group that the
6 defendant knows that he's causing stress to, that gets
7 you into the zone of danger because the defendant has
8 actual knowledge of that group. It might be a bit of a
9 stretch if you were to say, can a second and twice
10 removed sue for something like this? Well, here you're
11 going to have two problems. One, she's way outside the
12 scope of danger. She's going to face a really steep
13 hill trying to prove she had any sort of emotional
14 distress.
15 But here there's actual knowledge because
16 here you've got a couple things going on. First, I'm
17 not sure if you saw the exhibit, but you have an email
18 from Mr. Pozner who at that time was being honored. And
19 he was letting the defendants know with actual knowledge
20 what is happening is very upsetting and is not a good
21 thing. Later on Mr. Jones himself says this in
22 broadcast because Mr. Jones would tell the parents
23 things -- you know, there was this big uproar about the
24 outrage, and he addressed them directly and said I'm
25 sorry the First Amendment is so upsetting, knowing that

1 he's upsetting them, saying but we're going to keep this
2 up and we're not putting up with your bullying, we're
3 not going to cow down to you people, we're going to be
4 looking into this and we're going to be countering,
5 right? And he tells them "Me thinks you protest too
6 much."
7 And then, you know, there's the one that
8 I'm sure you've read in there about the final statement
9 on Sandy Hook calling them the soap opera type
10 statements. He knew exactly who he was hurting.
11 There's no question that he did. So there's not a
12 question of targeting here. These legally can sustain
13 on that basis.
14 The only last legal basis that you can
15 possibly get rid of these claims is the First Amendment,
16 a constitutional challenge to these claims. And one of
17 the important ones that are there was actually discussed
18 in the part where we talked about gravamen and
19 defamation, but I think it's really important to this
20 issue as well, is that *Hustler* case. And I don't know
21 if you're familiar with the facts of the old *Hustler*
22 case from the '70s. That was where *Hustler* magazine
23 published a cartoon of Jerry Falwell having sex with his
24 mother and published an ad parody where they were in an
25 outhouse having sex. This was something that was

1 definitely upsetting to Mr. Falwell. It was something
2 that was definitely outrageous. If you see the ad
3 parody, it is an outrageous cartoon, but it's not IIED
4 because it doesn't contain any statements of fact.
5 What the Supreme Court said in that case
6 is that the First Amendment prohibits public figures
7 from recovering damages for the tort of emotional
8 distress by reason of the publication of a caricature
9 such as the ad parody at issue without showing in
10 addition that publication contains a false statement of
11 fact made with actual malice.
12 THE COURT: I should let you know you're
13 down to ten minutes in your planned 35-minute opening.
14 MR. BANKSTON: Fantastic. Thank you,
15 Your Honor.
16 In this case we're different. *Holloway*
17 was different. *Snyder's* not like that either. There's
18 no statements of fact in *Snyder*. *Snyder* is not in
19 any way about Mr. Snyder; it was just conducted near his
20 son's funeral and his honestly-held religious belief.
21 There's really no sort of First Amendment possibility
22 there.
23 With regard to the scope of discovery,
24 that's what I really want to talk to you about. I agree
25 it needs to be limited. And it may be even a good idea

1 for you and I to limit that some more. I think what we
2 have presented to you is substantially similar to what
3 has been presented to Mr. Heslin, but I think if you
4 look at that *IntelliCentrics* case that we cited, it
5 gives you the reasons why we're requesting the things
6 relating to our cause of action and why we're requesting
7 them relating to alter ego. I'm pretty okay with
8 everything that's on our request. If there are things
9 that you would like limited, I would like to talk about
10 those.
11 THE COURT: Well, you need to go --
12 MR. BANKSTON: And there are a couple that
13 I could limit --
14 THE COURT: Well, let me interrupt you to
15 say since you are on that topic, you need to go first
16 limiting it, as limited as you can make it to comport
17 with the CPRC that says it needs to be specified in
18 limited discovery.
19 We just discussed earlier the fact that I
20 limited you more than you were willing to limit yourself
21 in *Heslin*. I'm not saying that to pick on you, but I
22 did some more trimming on that and then issued the
23 order. That's up on appeal now. I've got that order
24 right over here next to me. I've got the order here. I
25 know that there's some more discovery in this case

1 because in *Heslin* it was a more specific event, the
2 statements made about what Heslin said about holding his
3 son in his arms.
4 MR. BANKSTON: Correct.
5 THE COURT: This is broader, but still
6 it's sort of discovery on what did the defendants know
7 and when did they know it when they made these
8 statements that you say were made recklessly knowing
9 that it was likely -- substantially likely to inflict
10 severe emotional distress on a group of people, right?
11 MR. BANKSTON: I think that's true. And
12 another part of our discovery is not just what did they
13 say -- I mean, when did they know it, but what did they
14 actually say. We don't have a full record of what they
15 actually said.
16 THE COURT: Well, you've got a lot. And
17 that's their argument, is you've got so much; if you
18 can't win a motion to dismiss with all the stuff you've
19 got, you're not going to win it.
20 What I understand your argument to be is
21 we need to know -- because we have to show some
22 subjectivity here, we have to show reckless disregard
23 that he knew enough to know he was being reckless or
24 anyone acting under his supervision and control being
25 reckless and it's likely to inflict severe emotional

1 harm, right?
2 MR. BANKSTON: I agree, that's 85 percent
3 of what our discovery is aimed at.
4 THE COURT: Okay.
5 MR. BANKSTON: And then a little bit about
6 corporate forms as well, but yeah.
7 THE COURT: So I need to -- I've got the
8 orders here.
9 MR. BANKSTON: I have two suggestions.
10 THE COURT: I need to know the extent to
11 which you're asking for more than *Heslin* and why I
12 should allow it.
13 MR. BANKSTON: Okay.
14 THE COURT: And you're not asking for the
15 supplements discovery, are you, about health supplements
16 that you were in --
17 MR. BANKSTON: No, Your Honor.
18 THE COURT: Okay. All right. Good.
19 MR. BANKSTON: No. In fact, I think what
20 you'll see is this proposal has been copied off of what
21 you've done in *Heslin* with some additions.
22 THE COURT: Okay. Thank you.
23 MR. BANKSTON: I want to take one off just
24 because I think it's an easy one to get rid of.
25 THE COURT: All right.

1 MR. BANKSTON: Request for Production
2 No. 9 under InfoWars, LLC. So InfoWars, LLC has the
3 most requests for production -- I'm sorry, Your Honor,
4 Free Speech Systems. I'm sorry about that.
5 THE COURT: Hang on. Let me get there.
6 MR. BANKSTON: That would be Page 17.
7 THE COURT: That's helpful to have page
8 numbers. That's good. I'm there. I see it.
9 MR. BANKSTON: I don't need Request for
10 Production No. 9. That's pretty specific. I'll get to
11 that later. And, you know, there may be deposition
12 stuff about this. I don't need that request. So I've
13 gone through and looked at them. The other one I want
14 to point your attention to is No. 2.
15 THE COURT: No. 2. RFP No. 2?
16 MR. BANKSTON: Yeah, the same one, and
17 that is on Page 16.
18 THE COURT: Page 16.
19 MR. BANKSTON: And this request is
20 repeated for Alex Jones as well, so we'll have to deal
21 with it there. But the one that I want to draw your
22 attention to is A, because you did limit that in *Heslin*
23 and said, look, we can't just have everything they've
24 ever said about Sandy Hook right now.
25 THE COURT: Well, that's all you put. As

1 I recall in the *Heslin* order, you just put Sandy Hook.
2 MR. BANKSTON: Exactly.
3 THE COURT: And it was just too
4 all-encompassing.
5 MR. BANKSTON: Everything, exactly. Here
6 I am asking some kind of broad Sandy Hook shooting and
7 subsequent media investigation and media coverage. I
8 think I'm deserving of that because now I'm talking
9 about a five-year cause of action over the entirety of
10 their coverage and the coverage has to be looked at as a
11 whole, so I think I'm deserving of that, but that is
12 something I want to draw to your attention. I can see
13 if you maybe want to discuss limiting that. Other than
14 that, looking at --
15 THE COURT: How else would you limit it,
16 A, B, and C?
17 MR. BANKSTON: I think B and C limits it,
18 limits A. So that's kind of why they're there, because
19 I have a possible expectation you might strike A, is
20 that I think B and C are more specific about those
21 topics. A, I do think that it's -- I'm not asking for
22 everything in their business. I'm just asking for this
23 one topic of any communication. The other thing is I'm
24 not asking for every document.
25 THE COURT: Well, and that actually is the

1 heart of the communications, the school shooting; did it
2 occur or not?
3 MR. BANKSTON: Correct.
4 THE COURT: So everything they have about
5 that school shooting, your argument, at least on this
6 case, which is broader than *Heslin* because *Heslin* was
7 about his statement about his son -- okay. I
8 understand.
9 MR. BANKSTON: That's what I believe. The
10 last thing I wanted to bring up to you, Your Honor, is I
11 think we can do without the deposition of Rob Dew. It's
12 important, but we'll get to it later. It's important
13 because it relates to the spoliation stuff, and he's
14 also their news director. I think he has relevant
15 information. But let's keep this confined to just the
16 movants for now.
17 THE COURT: Well, I need to know what
18 you're asking for.
19 MR. BANKSTON: That's what I'm asking for.
20 I'm asking not for Rob Dew's deposition anymore.
21 THE COURT: All right.
22 MR. BANKSTON: I'm going to go ahead and
23 limit that voluntarily to try to help limit the scope of
24 this. But I do still want the deposition of Rob
25 Jacobson, Rob Jacobson being a former InfoWars employee

1 who has contacted me and let me know that he believes he
2 has critical information to this lawsuit, critical
3 information relating to plaintiff's complaint, but he
4 cannot talk to me because he is scared about being under
5 a nondisclosure agreement.
6 THE COURT: So you're going to subpoena
7 him and take his deposition. He's not affiliated with
8 them anymore, but you can't get this discovery without
9 this order.
10 MR. BANKSTON: Exactly.
11 THE COURT: I get it. All right. What
12 else?
13 MR. BANKSTON: That's it. That's the only
14 things I think I need to limit. I really do believe --
15 I stand strong behind the rest of this discovery.
16 THE COURT: Time period. I gave you two
17 and a half hours on the -- I'm looking at *Heslin* right
18 over here. I said you could take three depositions --
19 actually four, two corporate reps, which presumably
20 would be Mr. Jones, but Mr. Jones and Owen Shroyer, who
21 was one of the defendants.
22 MR. BANKSTON: Correct.
23 THE COURT: But I limited those to two and
24 a half hours each. You've expanded them here.
25 MR. BANKSTON: I have.

1 THE COURT: Why do I need to expand them
2 in this order?
3 MR. BANKSTON: Because in Mr. Jones'
4 deposition that you gave me two and a half hours for, I
5 was going to ask him about one April 22nd, 2017
6 broadcast. In this deposition I'm going to ask him
7 about five years of his conduct towards these families,
8 so I think I need more time.
9 THE COURT: And why do you need up to
10 three hours each for -- or is it three hours combined?
11 If they designate the same representative for both
12 InfoWars and Free Speech Systems, will you confine your
13 deposition to one deposition for that same person?
14 MR. BANKSTON: That was my purpose, yes,
15 Your Honor.
16 THE COURT: Okay.
17 MR. BANKSTON: I may have worded that a
18 little inartfully. Three hours combined for those two
19 entities I think should be sufficient.
20 THE COURT: So what if they designate two
21 different corporate reps, one for each one? An hour and
22 a half each or no more than three hours in the
23 aggregate?
24 MR. BANKSTON: I think it would be fair if
25 there are two different deponents to get an hour and a

1 half each just because I'm going to have to have some
2 foundational setting up of who they are in the
3 questioning.
4 THE COURT: Well, and so the point is --
5 this is good -- no more than three hours in the
6 aggregate whether they designate the same person or not,
7 right?
8 MR. BANKSTON: Yes. Yes, I think that's
9 fine.
10 THE COURT: I get it. All right. And you
11 want to examine Robert Jackson for -- or is it Jacobson?
12 MR. BANKSTON: Jacobson, yes.
13 THE COURT: For no more than two and a
14 half hours?
15 MR. BANKSTON: Correct, Your Honor.
16 THE COURT: Okay. I see what you're
17 asking. What else?
18 MR. BANKSTON: That's it. I want those
19 discovery requests and those depositions.
20 THE COURT: Your -- if you do extend the
21 time for the dismissal -- you've got May 6th here.
22 That's a jury week. There is no docket to have that
23 hearing then. It would need to be, for example,
24 May 2nd.
25 What day is it? What day of the week is

1 May 2nd? It's a Thursday, yeah. So you could have a
2 three-hour hearing on May 2nd.
3 MR. BANKSTON: Okay.
4 THE COURT: But we've done this before.
5 We've got to have a setting that works with our docket
6 system, okay?
7 MR. BANKSTON: All right, Your Honor. The
8 only thing I would ask for that is if we're moving it up
9 a couple days, maybe move the date of the responses and
10 the due dates of the discovery up a couple days too.
11 We've got a tight time frame to work under.
12 THE COURT: I don't know. What are you
13 saying? What do I need to look at in this --
14 MR. BANKSTON: Paragraph No. 3 -- I mean,
15 2 and 3, can we have written discovery within 15 days of
16 service and depositions by February 25?
17 THE COURT: I'm not understanding why
18 you're changing this proposed order now.
19 MR. BANKSTON: Oh, because we just changed
20 the date which the final hearing is going to be. So I
21 want to try to give myself as much time between getting
22 the discovery and the final hearing to prepare an
23 argument.
24 THE COURT: Well, so what date did you
25 want it on? Instead of March 20th, you want it on when?

1 MR. BANKSTON: Oh, no. I'm sorry,
2 Your Honor. I think you're looking down at the date
3 there. I had -- I hope we're looking at the same order.
4 My proposed order that I had submitted said
5 depositions --
6 THE COURT: I'm sorry. I got it. It's
7 Paragraph 2. I thought you said Paragraph 3, but it's
8 actually Paragraph 2.
9 MR. BANKSTON: 2 for within 15 days of
10 service. And then in Paragraph 3, instead of
11 February 28, February 25.
12 THE COURT: No, this is not the -- the
13 proposed order I got on your motion for expedited
14 discovery says depositions completed by March 20th.
15 MR. BANKSTON: Right. You know what I
16 think may have happened there, Your Honor? I believe
17 that's the first order that we submitted before a
18 hearing was set here, and then after the hearing was set
19 we provided a second order.
20 THE COURT: Ah. I don't have that.
21 MR. BANKSTON: The only --
22 THE COURT: I don't have it. What was
23 given to me unfortunately was --
24 MR. BANKSTON: The only difference is that
25 date you're looking at is 30 days of service in February

1 or March, whatever the date is.
2 THE COURT: So March 20th should have said
3 what?
4 MR. BANKSTON: I have that in my proposed
5 order as February 28th.
6 THE COURT: And now you want it earlier
7 than that?
8 MR. BANKSTON: I want it February 25.
9 That would be my hope.
10 THE COURT: And on Paragraph 2 you want --
11 instead of February 20th, you wanted what?
12 MR. BANKSTON: Within 20 days of service.
13 THE COURT: So instead of 30 days it's 20
14 days.
15 MR. BANKSTON: That's about what it works
16 out to.
17 THE COURT: Well, service of what?
18 Service of this order?
19 MR. BANKSTON: Correct. The moment you
20 sign the order, I will immediately serve the discovery
21 on them.
22 THE COURT: All right.
23 MR. BANKSTON: And I believe that's all I
24 need to talk to you about, Your Honor, unless you have
25 something else.

1 THE COURT: Any other things you want to
2 argue about limiting this discovery? You're actually
3 down to your last ten minutes, so you don't have to.
4 MR. BANKSTON: I'm fine.
5 THE COURT: All right. Great. It's your
6 turn.
7 MR. ENOCH: May it please the Court.
8 Let's do these in reverse order. I have a vacation
9 letter with the Court that's been on file for some time
10 from February 3 to February 17th. So if you order
11 discovery, I would not be able to comfortably do what he
12 just asked, which is within 15 days to have the
13 depositions by February 25. I don't know why the
14 difference between May 6th and May 2 should cause such
15 an urgency in accommodating the discovery.
16 THE COURT: Well, it shouldn't cause more
17 than a four-day swing. You're right. That's why I was
18 sort of picking on him about that. But within 20 days
19 of service, if I sign this order tomorrow, I don't know
20 when the 20 days is. When is that? Do you know?
21 MR. ENOCH: I don't know. I didn't
22 calculate that. We can do that real quick.
23 THE COURT: Okay.
24 MR. ENOCH: It's going to be sometime
25 within that period of time.

1 THE COURT: Well, I guess we'd better look
2 at it.
3 MR. ENOCH: Yeah, it is within that
4 vacation period, Your Honor. I don't know the exact
5 date.
6 THE COURT: I don't have my calendar here.
7 You'll have to pull it up. This computer is way too
8 slow, unfortunately. So February 14th from tomorrow,
9 roughly.
10 MR. ENOCH: So I can arrange obviously for
11 the client to be doing things to accommodate to the
12 extent you order that.
13 THE COURT: Right.
14 MR. ENOCH: But for me to look at it and
15 make the objections and, as you pointed out before, also
16 determine whether there's a document that I need a
17 confidentiality order on, I would prefer not to have to
18 do that while I'm away on vacation. I'd prefer to do
19 that when I get back.
20 THE COURT: And I understand that. The
21 problem is you've set this thing, which you're entitled
22 to do -- you set this whole thing in motion by filing
23 the motion to dismiss and we've got time deadlines
24 running. And the reason there was no discovery in
25 *Heslin* is you argued that the time deadline ran, it was

1 overruled by operation of law, and we're up on appeal.
2 MR. ENOCH: Right, but for a different
3 reason.
4 THE COURT: I'm sorry?
5 MR. ENOCH: For a different reason.
6 THE COURT: No, I know. I know. So we've
7 got to figure out -- if I grant discovery, I'm going to
8 grant it in a way that allows the discovery far enough
9 in advance of the motion to dismiss hearing that they
10 can make meaningful use of the discovery. Otherwise,
11 it's a meaningless right.
12 MR. ENOCH: So my suggestion is
13 February 20 with respect to the written discovery and
14 the depositions by March 20, and that then gives him six
15 weeks to prepare for the hearing.
16 THE COURT: Because the hearing would be
17 on --
18 MR. ENOCH: May 2nd.
19 THE COURT: -- May 2nd.
20 MR. ENOCH: That would be my position.
21 With respect to the confidentiality order, very briefly,
22 Judge, you've already made -- you've already articulated
23 why I did what I did. There is no discovery outstanding
24 now. My client should not have to go through the
25 expense of drafting specific objections to discovery

1 that might not be ordered. This was a prophylactic
2 measure hopefully to save some time with the Court so we
3 don't have to come down here again in another 20 or so
4 days on a confidentiality order.
5 So the problem that I had with the Western
6 District model, Judge, and the 76(a) is because I don't
7 know how 76 -- and maybe you've done it before. You can
8 help. Let's just assume confidential information is
9 filed and the appeal is filed within the seven days for
10 the language of the 76 modification. The language of
11 the order says automatic it becomes public. Well, your
12 hands are stayed. I can't come back here and seek the
13 confidentiality order. I can't file a 76(a). We can't
14 even have a hearing on 76(a). So the default is totally
15 within their control to create public information with
16 no ability to object to it. I could object at the
17 appellate court perhaps.
18 THE COURT: I'm not understanding. If
19 we're not going to have the dismissal hearing until May,
20 I'm not understanding why that's a problem.
21 MR. ENOCH: If we have -- with this timing
22 that's not going to be a problem, with this timing. I
23 agree with that.
24 THE COURT: So if I live with your
25 timing -- if they live with your timing in the order,

1 it's not a problem.
2 MR. ENOCH: Yes, sir, that's correct.
3 THE COURT: You can file an emergency
4 motion for 76(a), an emergency temporary --
5 MR. ENOCH: Yes, sir.
6 THE COURT: -- temporary 76(a). You've
7 got to post it for the public. We've got to have a
8 hearing 14 days later roughly on the permanent 76(a)
9 sealing, right?
10 MR. ENOCH: Yes, sir.
11 THE COURT: No court order can be sealed,
12 but documents/evidence can be sealed that way.
13 MR. ENOCH: And, of course, what we just
14 described is out of my hands, can't do anything about
15 that, totally in his hands. If he files it on May 3rd
16 and it's stayed or whatever -- I guess that's not right
17 because if he files on May 3rd and you take your full
18 30 days after the May 2nd hearing, I guess that would
19 work, Judge, as we do the math of the timing.
20 THE COURT: But, Counsel, what I'm not
21 understanding -- and I picked on him about why should
22 this be with prejudice because I just don't like anybody
23 losing their day in court on something I should
24 understand. I don't understand your motion for
25 protective order now because I'm not understanding what

1 among this stuff would be, you know, the secret sauce,
2 the Coke formula, you know, the stuff -- the trade
3 secret sort of things that I've dealt with in other
4 cases.
5 It's information about Sandy Hook. What
6 about that could possibly be a trade secret that you get
7 to hang onto and nobody gets to see that you had? I'm
8 just not understanding that. I do understand that
9 communication with you or work product might be
10 something, but once you get the discovery, then I
11 think -- once you get the order on the discovery, then I
12 would think under the rules here -- I've never dealt
13 with this before because we're all kind of figuring out
14 these anti-SLAPP motions as we go -- that you'd be able
15 to file something, put them on notice that you're now
16 touching on attorney-client communication; there are
17 documents falling within this request for production
18 that Jenkins is allowing you to have over my objection
19 and it's attorney-client privilege or it's work product
20 after we thought litigation was on its way.
21 Aren't you then able to file that and put
22 them on notice so they can ask for a privilege log and
23 then we could have a hearing about that? But that's the
24 only thing I could think of.
25 MR. ENOCH: Judge, there is no case on

1 this because the TC -- I just haven't found one.
2 THE COURT: Right.
3 MR. ENOCH: But my anticipation is it goes
4 like this. With respect to the issue of how I object --
5 THE COURT: Right.
6 MR. ENOCH: -- I have no duty whatsoever
7 to object to that which I am not served with, period.
8 The rules don't contemplate that.
9 THE COURT: I think we're saying the same
10 thing.
11 MR. ENOCH: Yes, sir. So the rules
12 contemplate that once you order and once it's issued --
13 and you can shorten the time frame, but you cannot
14 prejudge my objections. So whatever privilege
15 objections, whatever other objections, I understand.
16 I'm not an unintelligent man I hope. If you say "Mark,
17 it's relevant, I'm going to order it," I'm not going to
18 waste your time on another relevance order. But if you
19 order journalistic --
20 THE COURT: I will always say "Mr. Enoch,"
21 actually.
22 MR. ENOCH: Okay.
23 THE COURT: Go ahead.
24 MR. ENOCH: All right.
25 THE COURT: Or "Counsel."

1 MR. ENOCH: Depending on what you do
2 today, I reserve my client's right within 20 days of
3 whatever you order to file the appropriate objections at
4 the time. Now, I'm going to try to do it in such a way
5 as we don't cause another hearing, but those are my
6 rights, including moving for a confidentiality order.
7 So that's my position.
8 THE COURT: Okay.
9 MR. ENOCH: Now, with respect to the
10 discovery itself, Judge, you might recall that in the
11 *Heslin* matter, one of the things that prompted you, as I
12 recall from your statements on the bench, to allow
13 discovery was because there was a denial of liability by
14 one of the parties. In his brief, he points out the *MCR*
15 case in which the judge allowed broad discovery with
16 respect to the interrelationship of the parties. That's
17 because in that case there were special appearances
18 filed, Judge. That's because there was a dispute among
19 all the specs, those in the U.S. -- the MCR -- I can't
20 remember, the explosive companies. There were some
21 outside of the country and some inside the country and
22 they were objecting, and they were saying, hey, wait a
23 second, we're not the same ones. That's why the Court
24 allowed that.
25 In this case, unlike *Heslin* where we

1 denied liability on behalf of InfoWars with a sworn
2 denial, that hasn't happened here. So we're not taking
3 the position that if this occurred the other -- I mean,
4 the trial counsel might. We might at trial, but here
5 we're not.
6 So what happened in *Heslin*, which prompted
7 you in my judgment to allow some of that discovery,
8 hasn't occurred here. This is far more broad than
9 *Heslin*. This includes the fact that you must go through
10 and research all of your videos to determine those which
11 affect or relate to Sandy Hook. That is --
12 THE COURT: But don't they get -- you
13 heard me ask him that earlier. Don't they get discovery
14 about what you knew and when you knew it?
15 MR. ENOCH: No, sir. I don't agree with
16 that.
17 THE COURT: Because they have --
18 assuming -- and I know you've argued they cannot pursue
19 an intentional infliction of emotional distress case.
20 But if I grant this discovery, it's with the idea that
21 they might be able to. And if they can, they have to
22 show recklessness. How do they show recklessness? They
23 have to know what you knew and when you knew it and that
24 you published things -- that you said things that you
25 knew or should have known were just false and you did it

1 recklessly, not you personally, but your client
2 obviously, and that you knew it was substantially likely
3 to cause someone to experience emotional distress,
4 right?
5 MR. ENOCH: You are jumping quite a few
6 hurdles to get to that last statement, which is you
7 intended or thought it might cause someone mental
8 anguish, emotional distress.
9 THE COURT: I'm saying don't they get
10 discovery because they have to make a *prima facie*
11 showing that they can make that case? You're putting
12 them to that burden by filing the motion to dismiss, and
13 they're asking for some discovery to meet the burden
14 you're putting them to.
15 MR. ENOCH: No, sir, I don't believe so.
16 I believe what they're asking for is merit-based
17 discovery. They have 29 separate videos, over 100 hours
18 of videos of that which she says caused her emotional
19 distress, severe emotional distress. The 31st or the
20 32nd of which he is unaware is not something on which
21 she can sue for emotional distress.
22 THE COURT: I'm not being clear enough on
23 my question. They know what you said.
24 MR. ENOCH: Yes, sir.
25 THE COURT: They want to make a case that

1 you knew better than to say it.
2 MR. ENOCH: I'll respond to that. It
3 depends on what we knew better than. If they're
4 suing -- if they want the proposition of ought to be --
5 if we make a false statement about an event, whatever it
6 is, everybody associated with that event can come back
7 and sue for intentional infliction of emotional
8 distress. I don't think that's -- No. 1, the reason
9 they cited the Alaska and the Alabama and the Washington
10 case is because there's not a case in Texas that says
11 that. As a matter of fact, the *Standard Fruit and*
12 *Vegetable* case, as long as we're getting back to Texas
13 law, does say it has to be intended on the plaintiff or
14 the primary consequence that I recklessly ignored was on
15 the plaintiff, not on a group, not on the town of
16 Newtown, not on the federal government, but on this
17 plaintiff, Scarlett Lewis. Now, if the --
18 THE COURT: They don't have to know the
19 individual plaintiff to know that when they're doing
20 something that is intentional or reckless and it's going
21 to affect a group of people -- you don't have to know
22 the exact identity of the human being you're doing it
23 to. You just have to know there is someone there, I
24 don't even want to know their name, but I'm going to do
25 it recklessly because I just want to. I mean, that's

1 the cause of action, right? And I'm not understanding
2 that that is not a cause of action.
3 MR. ENOCH: It is not a cause of action
4 because, A, IIED is not available because the gravamen
5 of their complaint is defamation.
6 THE COURT: That's a different argument.
7 But I'm assuming for the sake of our back and forth,
8 which I'm enjoying somewhat -- I hope you are -- that
9 there is a cause of action for intentional infliction.
10 That's their argument. If there is, it's a successful
11 gap filler because there is no defamation case -- or
12 cause of action that applies to this particular
13 circumstance with this plaintiff, don't they get -- and
14 you're filing a motion to dismiss and now they have to
15 show a *prima facie* case that in fact they have a case,
16 don't they have to get some discovery about what you
17 knew when you made all these statements recklessly, they
18 say?
19 MR. ENOCH: Judge, the issue isn't whether
20 what we said was false and recklessly false. The
21 question is whether the primary consequence or the
22 intended consequence was to cause this plaintiff harm.
23 That's the discovery. The elements are not as they
24 describe. The elements are we acted intentionally or
25 recklessly with respect to the plaintiff, the conduct

1 was extreme and outrageous, the actions of the defendant
2 caused emotional distress, and the emotional distress
3 was severe.
4 THE COURT: But isn't that part of the
5 discovery? What if they get documents that show you
6 kind of knew what you were doing to these parents and
7 you just kept doing it anyway?
8 MR. ENOCH: And again, Judge, I am not
9 accepting the presumption -- or your position -- you're
10 the judge; you make the call. There is no case in Texas
11 that says if I intend to -- if I'm making a broadcast
12 and I'm recklessly or falsely saying what I say, a group
13 of people has an emotional distress claim against me,
14 because they have to show that the primary consequence
15 of my broadcast is either intended or the likely
16 consequence -- the primary consequence was to cause
17 Ms. Lewis mental anguish. And that's the *Standard*
18 *Vegetable* case. That's the *Robertson DDS* case. That's
19 the *Draker* case. I've cited the cases, Judge. They are
20 not -- it's not a minimal number of cases in Texas that
21 say notwithstanding 46.1 or Section 1 of the restatement
22 doesn't say targeting the plaintiff and notwithstanding
23 the fact that they cited cases from other jurisdictions.
24 Alaska was a false light case, Judge.
25 THE COURT: So if it's just collateral

1 damage, in other words, I know -- maybe my primary
2 purpose is to just get people inflamed -- that's one of
3 their arguments; you're just trying to get people
4 inflamed who are susceptible to believing conspiracy
5 theories and are quick to believe them, and one of them
6 started stalking these families and now there's a --
7 there was a criminal case against her; I think her name
8 is Richards; and they cite that in the brief -- that
9 your principal purpose was to do that, just inflame a
10 bunch of impressionable people who are likely to believe
11 things that just aren't true and make money in the
12 process; that was my primary purpose --
13 MR. ENOCH: Right.
14 THE COURT: -- I sure didn't mean to hurt
15 anybody, even though I knew -- I knew when I said these
16 things that these families were going to be hurt to the
17 core of their being, it doesn't matter because that's
18 just collateral damage. That's -- I'm sorry to frame it
19 that way, but that's your argument, isn't it?
20 MR. ENOCH: No, sir, that's not my
21 argument.
22 THE COURT: Tell me why it's not.
23 MR. ENOCH: I mean, we're trying -- you're
24 asking me to compartmentalize and it's difficult to do.
25 Even the Alaska case which they cite in their motion

1 talks about the fact that it doesn't apply to media
2 talking about public or political discussions. Whether
3 or not -- I know they want to say this is just a
4 horrible and vile conspiracy theory.
5 The other side of the argument from my
6 clients is they're talking about political views that
7 they have and they care about very deeply. Whether you
8 and I agree with them or not with respect to government
9 and media condemnation, that's not the issue. Under
10 *Snyder*, the content matters not. The issue is, are you
11 talking about a matter of public concern? And even the
12 Alaska case says you can't sue in that case.
13 So I can't compartmentalize the issues
14 here. You cannot have an IIED claim when the gravamen
15 is defamation. Their position is that because I don't
16 have defamation, because I can't fulfill all the
17 elements is a failing argument. That's what the *Draker*
18 argument was; hey, I just lost on my MSJ; I don't have
19 defamation; therefore, this must be a gap filler.
20 That's what the *Preevy* (phonetic) court case says.
21 That's what the *Robertson* court case says. It doesn't
22 matter whether you can succeed, fail, or even bring the
23 other cause of action. The issue isn't a cause of
24 action. The issue is, is the conduct that you're
25 complaining about the subject of another tort whether or

1 not you could win on that tort?
2 THE COURT: So your argument is they
3 should have done exactly what they did in *Heslin,* but
4 they should have set the discovery hearing first.
5 MR. ENOCH: Judge, I --
6 THE COURT: Right?
7 MR. ENOCH: As we discussed at the end of
8 that hearing, you and I can't control -- we just can't
9 control it. It's 30 days whether you and I like it or
10 not. What I'm suggesting here is that the IIED claim is
11 not recognized for three reasons. It violates the First
12 Amendment under *Snyder*. It's a gap -- it's not filling
13 in any gap because it is a defamation claim. There is
14 only speech.
15 Now, other thing, Judge, remember the
16 cases in Texas say you can't use IIED to circumvent and
17 avoid limitations of other causes of action. If a
18 plaintiff sues for tortious interference, for example,
19 in IIED, it's a one-year statute of limitations because
20 it's an IIED -- excuse me, it's defamation. When you
21 sue for IIED and something else, you get -- or
22 defamation and something else, you get the shorter
23 period of limitation.
24 THE COURT: Which in defamation is a
25 one-year SOL.

1 MR. ENOCH: That's right. And so what is
2 happening here is these are defamatory statements, she
3 alleges them to be, but she's trying to beat both the
4 statute of limitations, which is one year. There's only
5 one of these statements that occur within one year. And
6 the Austin Court of Appeals has very specifically said
7 that each defamatory statement must stand on its own.
8 It is not a continuing tort. IIED is a continuing tort.
9 So they are both getting by limitations and they're
10 getting by the non-continuing tort doctrine under
11 defamation by bringing IIED. Lastly --
12 THE COURT: But isn't that because also
13 the very last thing said wasn't maybe by itself standing
14 alone an IIED? It is the collective drumbeat and
15 collective concerted activities over time which
16 constitutes the IIED, I think is what they're saying.
17 MR. ENOCH: Judge, none of the cases that
18 they cite are anything close to this, whether it's *GTE*
19 *vs. Bruce*, whether it's *Clayton* for sexual abuse,
20 whether it's the radio disk jockey who talks about --
21 and I won't repeat the words on the air, they were
22 specifically directing at the plaintiff in the presence
23 of the plaintiff doing horrible things to the plaintiff
24 in their presence. Those cases don't say anything that
25 someone sitting in an Austin, Texas studio talking about

1 politics, no matter how heinous it sounds to the
2 recipient of that, can all of a sudden be hailed into
3 court under IIED for false speech.
4 False speech is the essence of defamation.
5 There is not one thing they've alleged -- there's not
6 one piece of conduct -- the way they've tried to get out
7 of this is by saying, oh, but, Judge, what they did was
8 they encouraged other people to do things. Well, that's
9 vicarious liability.
10 Another thing they're trying to use IIED
11 for is to get vicarious liability without having to
12 prove aiding and abetting, conspiracy, agency. Now, if
13 there was a connection between Alex Jones and someone
14 else, a Lucy Richards or anybody else, can this Court
15 legally find him responsible for Lucy Richards' actions
16 without a finding of vicarious liability under the laws
17 of the state of Texas?
18 THE COURT: I don't think they're asking
19 for that. I think that was just part of the factual
20 scenario of just what these actions have set loose in
21 the world, I think.
22 MR. ENOCH: They're suing because Lucy
23 Richards or someone else has caused them pain, has
24 knocked on their door. They're afraid of them.
25 Remember the affidavits in *Pozner* and *Heslin?* I'm

1 buying this because of people like that. That's not
2 Mr. Jones. Mr. Jones' speech might do it. He's no more
3 responsible for that than someone who publishes a book
4 and someone goes out and mimics what's in the book or
5 someone publishes a movie and someone goes out and gets
6 a *Texas Chain Saw Massacre* and does it. They're not
7 liable for that unless, as the Supreme Court requires in
8 this state, there be some element of control between the
9 person who speaks and the person who acts, and they have
10 not alleged it. And they're trying to get over that
11 hurdle, the third hurdle, limitations, continuing tort,
12 and vicarious liability, by saying, oh, it's just all
13 under IIED, and they can't do that.
14 Judge, the biggest fallacy of their
15 argument is they say if I don't have a defamation claim,
16 if I have elements one, two, three, it's a gap filler
17 and I need to fill in IIED. And the cases don't say
18 that. We've cited them. Let me just read some quotes
19 out of some cases. These are Texas cases. These aren't
20 Washington cases.
21 *Olivia* -- *Oliva vs. Davila,* it's a Court
22 of Appeals 14th San Antonio 2011 case. This is what the
23 judgment -- there was a judgment by a judge who said I
24 give you defamation, but in the alternative, if
25 defamation is overturned on appeal, I give you IIED.

1 And the appellate court said intentional infliction of
2 emotional distress claims will not lie regardless of
3 whether he succeeds on the slander claim or not. They
4 overturned that. In the *Preevey (phonetic) vs. Ahern*
5 case, this is a --
6 THE COURT: But their argument in this
7 case is that it's not defamation because you're not
8 saying anything in particular about her; you're saying
9 something about an event in which her son was killed.
10 You're not saying she's lying about it. None of these
11 statements are about her, unlike the statements about
12 Heslin, the boy's father. They're just these statements
13 that just continue to exacerbate -- knowingly exacerbate
14 the pain of parents who have lost their children, in
15 particular her. You keep saying this didn't happen, and
16 just continuing over this whole period of time saying it
17 didn't happen is recklessly inflicting pain on me.
18 You know, I need to get to the next stage of grief,
19 you know, which is beyond what happened. It's learning
20 to live with it. And that's her argument essentially.
21 It's not a defamation case. She's saying I can't bring
22 a defamation case.
23 MR. ENOCH: Just like the *Draker* case,
24 just like *Price vs. Buschmeyer*, just like *Preevey* said,
25 just like *Oliphint* said, just like *Oliva* said. This is

1 not a new area of law, Judge. People go into the
2 courthouse and they say, hey, I lost my claim or I don't
3 have a claim because I can't fulfill elements 2 through
4 5, and the Court says never mind, you look at the
5 conduct. And if the conduct is designed to be fixed by
6 another tort, even if you can't meet it, even if you
7 don't bring that claim, even if you lose on that claim
8 you cannot bring the IIED. All their argument is,
9 Judge, I can't meet the of and concerning element in
10 defamation.
11 THE COURT: No, I think they have to make
12 the argument -- I take your point. It doesn't fit.
13 Defamation doesn't even fit this --
14 MR. ENOCH: Yes, it does.
15 THE COURT: -- this factual scenario.
16 Well, that's their argument.
17 MR. ENOCH: Okay. Let me --
18 THE COURT: And I take your point because
19 if it does fit this but they can't meet one of the
20 elements, well, they can't use a gap filler, right?
21 MR. ENOCH: Yes, sir.
22 THE COURT: But if it doesn't fit this at
23 all -- if this isn't a defamation case but in fact is
24 just -- it's not a defamation case, then they can bring
25 this intentional infliction case if they can meet the

1 elements. That seems to be their argument.
2 MR. ENOCH: Let me cite another case to
3 the Court, the *Cain vs. Hearst* Supreme Court case. As
4 you're probably aware, *Cain vs. Hearst* was a case that
5 cited there is no false light in Texas anymore. False
6 light is exactly what they're alleging. False light is
7 precisely what they're alleging. They're saying that we
8 said something false, that's outrageously false that
9 caused them to be thought of in a way and we should have
10 known that the false light would hurt them.
11 THE COURT: You argued that in one of the
12 other cases or maybe Taube did in the *Fontaine* case. I
13 can't remember.
14 MR. BANKSTON: I haven't argued this case.
15 THE COURT: All right. Well, never mind.
16 Sorry.
17 MR. ENOCH: And false light doesn't exist.
18 And the Supreme Court said the reason it doesn't exist
19 in Texas is because it's defamation. But it doesn't
20 have the restrictions on First Amendment rights and the
21 other things of defamation. So that's why I'm saying,
22 no matter how they want to call it, it is defamation
23 because it's the essence of false light which our
24 Supreme Court has said is defamation. Defamation is
25 reputational injury. I hurt your reputation so that you

1 are harmed. You don't get a job, someone throws eggs at
2 your car, whatever it might be.
3 THE COURT: But I think she's not saying
4 it's about her reputation. She doesn't care whether
5 people think -- you know, what they think about her.
6 She's hurting because he keeps saying your son wasn't
7 killed. And saying it that publicly and that
8 persistently is emotionally painful, extremely painful,
9 and rising to the level of emotional distress and
10 intentional infliction cases. That's what she's saying,
11 I think.
12 MR. ENOCH: That's what I think she's
13 saying too.
14 THE COURT: But it's not defamation
15 because it's not saying anything about her. It's saying
16 things about her dead son.
17 MR. ENOCH: It's --
18 THE COURT: And that's what she says is
19 intentional infliction.
20 MR. ENOCH: Judge, the --
21 THE COURT: Does that make sense?
22 MR. ENOCH: No, sir.
23 THE COURT: Okay. Tell me why not.
24 MR. ENOCH: The pleading is full of crisis
25 actors. She's being accused of a crisis actor. The

1 reason she's going through this issue is not just
2 because she lost her son, because if she was suffering
3 mental anguish from the loss of her son --
4 THE COURT: I take your point. I think if
5 he was saying she's one of these crisis actors, you're
6 right, that's a defamation case, but if he's not
7 saying -- let's assume she's just been holed up in her
8 bedroom for however many years it's been since her son
9 died because she just doesn't want to go outside
10 anymore. She never went to any event, never went
11 anywhere, didn't go on Megyn Kelly, didn't do anything
12 else; she's just staying home and --
13 MR. ENOCH: And watching these videos.
14 THE COURT: I guess. Yeah, and this
15 stuff -- exactly. That's the argument, is that this
16 stuff just keeps putting the waves of grief over her and
17 piling on, and it says nothing about her personally;
18 therefore, it's not defamation. I think that's the case
19 they're bringing.
20 MR. ENOCH: They didn't plead it.
21 THE COURT: Okay.
22 MR. ENOCH: They didn't plead that.
23 THE COURT: That's the way I read it.
24 MR. ENOCH: I'm here with their claim,
25 which is that over five years we've called them crisis

1 actors, accused all the parents that they didn't lose
2 their sons and daughters, accused them of being part of
3 a plot and a cover-up --
4 THE COURT: Right.
5 MR. ENOCH: -- and that that has caused
6 her mental anguish. That's the way I read the pleading.
7 THE COURT: No, that's Heslin. I take
8 your point. When you say that these people are lying,
9 that they're frauds, that's defamation. But when you
10 don't say that, you say this about someone who's become
11 a hermit -- I'm just making, you know -- they didn't say
12 that in their pleadings, but they did not say anything
13 about her personally being defamed. When I read it, I
14 didn't read that. I read this just I didn't participate
15 in any of the things Heslin did or these other people
16 necessarily; this just hurts to have this continuing to
17 be said that this is false, that my son wasn't killed.
18 MR. ENOCH: And I think where you and I
19 will disagree -- you're going to make the choice -- is I
20 think you believe that speaking of parents of
21 Sandy Hook, first responders of Sandy Hook, the DAs, the
22 FBI who investigated it, all of our statements claimed
23 to be false about Sandy Hook can be used by each of
24 those people to bring an IIED claim.
25 THE COURT: I'm not --

1 MR. ENOCH: And I think that lacks the
2 intentionality requirement the Supreme Court puts under
3 IIED.
4 THE COURT: No, that's not what I'm saying
5 at all. I'm saying that you may be right with certain
6 plaintiffs about whom he's making certain specific
7 statements such as you are a liar, okay, you and these
8 other people you're in this cabal with are a liar.
9 That's defamation. But I'm not reading that Scarlett
10 Lewis is making that claim at all.
11 MR. ENOCH: You're right. She's not.
12 THE COURT: Because she's never said in
13 her pleading that I read -- I'll go back and read it
14 again -- that you're saying I'm lying about anything.
15 You're just saying my son wasn't killed, and you're
16 doing it recklessly, and it's caused me intense pain to
17 have you do that publicly in the way you're doing it
18 like a drumbeat over years, and most recently less than
19 a year ago. That seems to be her claim. And you're
20 arguing she can't bring an intentional infliction case
21 for that because it has to be defamation. I'm not
22 understanding how it is defamation. You see my
23 question?
24 MR. ENOCH: No, sir, I'm saying she can't
25 bring the claim because it wasn't directed at her, it's

1 First Amendment speech, and because of the gap filler,
2 and because of that. And Judge, you just said --
3 THE COURT: Well, but that's my question.
4 What cause of action could she bring for this conduct?
5 MR. ENOCH: And the answer is, under the
6 Supreme Court law, defamation. And she would lose
7 defamation. And the Supreme Court says it doesn't
8 matter if you can't prove the tort -- the recognized
9 tort fitting the pattern. If you can't fill one of the
10 elements, you still don't have IIED. That's not the gap
11 that's intended to be filled.
12 And you are also, Judge -- and forgive me.
13 I keep hearing it. It's my view that what you're saying
14 is even though it's not directed at her, even though
15 there's no evidence of intentional conduct toward her or
16 intentionally or recklessly doing something that we know
17 the primary consequence is going to be her injury, I
18 think -- I don't think there's any case that says out
19 there I don't have to have the primary consequence her
20 injury. My primary consequence can be the injury to
21 30,000 people, 10,000, 2,000 people. There is not one
22 Texas case that says that, and the Texas cases say
23 otherwise. The doctor -- the dentist case -- the DDS
24 case says Robert has to have thought about him, desire
25 to cause him damage or recklessly disregarded Kim's

1 rights. That's what *Standard Fruit and Vegetable* says.
2 You have to anticipate that the plaintiff, not some
3 group of people -- you're right, Judge --
4 THE COURT: Well, what if you had a
5 certain religious group you didn't like and you say,
6 well, that particular chapel or sanctuary is run by --
7 the religious leader of that group is a terrorist and
8 it's just a terrorist cell.
9 MR. ENOCH: Of course, that would --
10 THE COURT: I don't know the names of
11 these people --
12 MR. ENOCH: You don't have to know them.
13 THE COURT: -- but it's just a terrorist
14 cell. Isn't that intentional infliction?
15 MR. ENOCH: Yes, because it's targeted.
16 THE COURT: Okay. Even though you don't
17 know the people?
18 MR. ENOCH: Sure.
19 THE COURT: Okay. All right.
20 MR. ENOCH: Sure. I don't think you have
21 to know the name of the person. You have to intend that
22 that is the person.
23 THE COURT: Okay.
24 MR. ENOCH: Okay. So the issue isn't that
25 we have to know Scarlett Lewis' name or not. The issue

1 is we have to intend it to cause Scarlett Lewis severe
2 mental anguish, or if we were doing it recklessly, we'd
3 have to recklessly disregard and anticipate that our
4 actions -- the primary consequence of our actions are to
5 cause Scarlett Lewis severe mental anguish. And there
6 is no Texas case that says that's wrong. There is no --
7 even though they like to use *Standard Fruit and*
8 *Vegetable* for the position that the Court didn't adopt
9 46.2 of the restatement or Section 2 of the restatement,
10 which is the bystander -- that was the case where the
11 guy drove into the crowd -- the fact of the matter is
12 you still have to show, and that's one of the elements,
13 that it was intended or the primary consequence was to
14 cause the plaintiff injuries, not a group of folks.
15 There's not a case. That's why they had to go out for
16 it.
17 So I will move on to -- how much time,
18 Judge, do I have?
19 THE COURT: I was going to give you a
20 ten-minute warning. You're not there yet. You've got
21 like 13 left, I think.
22 MR. ENOCH: All right. Thank you, Judge.
23 If I might argue another case that I cited in the brief,
24 Judge, which is *Hairston vs. Southern Methodist*
25 *University*. That's the situation where the young lady

1 was recruited as a soccer player and promised a lot of
2 things and she did not get those things. And among the
3 things that she sued for was IIED. And one of the
4 things she wanted in discovery and to introduce at trial
5 was lots of evidence of the fact that this person who
6 had made these promises had also done it to a lot of
7 other folks, arguing that that shows obviously
8 intentional conduct if he's doing the same thing --
9 promising the same kind of things to these other folks.
10 The Court of Appeals in Dallas said no,
11 that has absolutely no legal significance to her IIED
12 claim, bringing it to this case. Whether -- let's just
13 assume that we say Bob Jones is a liar, he's a crisis
14 actor, whatever -- I hope I'm not really saying -- I
15 hope there's not really a Bob Jones. I'm just picking
16 that name out.
17 THE COURT: There's a former judge who's
18 Bob Jones. There are a bunch of Bob Joneses out there.
19 I wouldn't worry too much.
20 MR. ENOCH: Okay. All right. My point is
21 if there is a --
22 THE COURT: You can say Scott Jenkins if
23 you want.
24 MR. ENOCH: If there's a specific directed
25 remark at a person about that, it is not relevant to her

1 claim. The issue is did we intend -- did my clients
2 intend to cause her severe emotional distress or do
3 something that they should have known would cause her
4 and not a group of people. And that's the *Hairston*
5 case.
6 And that would take me then to the
7 objections, Judge, and I don't -- I haven't prepared
8 objections to each one. My position is that the TCPA
9 motion -- the issues are four, and that is -- because we
10 didn't plead any affirmative defenses other than the
11 statute of limitations. That is, did we act
12 intentionally or recklessly toward her? Was the conduct
13 extreme and outrageous? I think if you don't -- if you
14 can't tell from 29 videos whether it's extreme and
15 outrageous, I don't know how the 32nd or the 35th or
16 whatever would be. The actions of the defendant caused
17 the plaintiff emotional distress; this discovery is
18 obviously not intended to do that. The resulting
19 emotional distress was severe; this discovery is not
20 intended to do that. That's -- those are two of the
21 issues.
22 THE COURT: I think it all gets to -- and
23 I picked on both of you I hope -- recklessness, showing
24 recklessness. It's discovery in order to be able to
25 prove -- make a *prima facie* case that they can prove

1 recklessness, right?
2 MR. ENOCH: Yes, sir, but let me use that
3 if I can like a laser light. The recklessness with
4 respect to the false statement, that's the issue.
5 THE COURT: Right.
6 MR. ENOCH: And that's not IIED. That's
7 defamation.
8 THE COURT: No, I know. I know, but --
9 MR. ENOCH: Recklessness with respect to
10 her rights.
11 THE COURT: I thought you were getting to
12 scope of discovery, so I was going with you.
13 MR. ENOCH: Okay. Sorry. I didn't mean
14 to throw you a curve.
15 THE COURT: And if they get discovery, it
16 would be about recklessness, it seems to me, primarily.
17 That seems obvious to me. And so if I give them
18 discovery, they're going to have to persuade me when I
19 look through this that, yeah, this could lead to
20 discovery that would be important on the issue of
21 recklessness, even assuming -- that does assume they can
22 bring such a claim, because your argument is they can't,
23 and I get that.
24 MR. ENOCH: But again, my point was trying
25 to focus on recklessness of what. Their point -- what

1 they want you to do is give them stuff to show that the
2 statements about Sandy Hook were recklessly false, which
3 are relevant to the other cases that they have, and
4 that's why they bring Heslin into it. The test for
5 intentional infliction is recklessness with respect to
6 her rights with respect to what we said about her or the
7 effect of her, not what we said about Bobby Jones or
8 Dr. Carver or anybody else.
9 And that's why this discovery is way too
10 broad, because I agree with you, if you look at the --
11 if you look at the elements, recklessly, what is the
12 recklessly? It has nothing to do with the falsity of
13 the facts in the IIED. I can tell a truthful statement
14 to someone. I can give opinions to someone like *GTE* and
15 *Bruce*. I can tell someone all about my sexual
16 preferences. No defamation at all and it's still IIED.
17 Recklessly false means did we anticipate
18 that what we were doing would cause her harm? What
19 knowledge did we have about causing her harm by what we
20 were doing and primarily what evidence is that the
21 primary consequence we intended or allowed to happen was
22 that as opposed to something else as if the primary
23 consequence in Pozner -- remember they argued
24 Mr. Pozner, not mentioned in the video, it was of and
25 concerning him. All these videos are of and concerning

1 Pozner and De La Rosa.
2 THE COURT: But if you're making
3 statements that it didn't really happen, if you're
4 making statements that this child wasn't really shot,
5 isn't really killed, you're not saying anything about
6 the mother; you're saying something about her child. I
7 don't know how that is defamation. I mean, we keep
8 coming back to the same argument. It's interesting.
9 But I'm not sure that is defamation, that saying
10 something about someone's deceased child who is the
11 child of her life perhaps -- I don't know if she has
12 other children. Certainly this was the -- I mean --
13 MR. ENOCH: There is no --
14 THE COURT: -- this son was the son of her
15 life and so you're saying he's not dead, and that's not
16 defamation because you're not saying anything about her.
17 MR. ENOCH: Judge --
18 THE COURT: Does that mean -- I mean, it's
19 just different than those other cases.
20 MR. ENOCH: Well, it's also different
21 because there's no case that they've cited or could cite
22 with respect to a Texas case where someone in Texas was
23 talking about a group and an individual came forward and
24 said IIED. And now what we're really getting to here is
25 not the issue with respect to whether or not it's a gap

1 filler. You mentioned the gap fill -- I understand you
2 don't agree with me on that. You don't agree that
3 defamation is a cause of action that would be applicable
4 to false statements causing her damage.
5 THE COURT: No, this is how I think. I do
6 devil's advocacy --
7 MR. ENOCH: No, I understand.
8 THE COURT: -- to kind of keep my thinking
9 sharp to make sure, you know, if it is defamation then
10 I'm wrong.
11 MR. ENOCH: I don't mean to state what you
12 think, Judge. It's just in the discussion back and
13 forth --
14 THE COURT: Right.
15 MR. ENOCH: -- that's your point you're
16 making.
17 THE COURT: Exactly.
18 MR. ENOCH: And my point is out of the
19 cases that we've cited, whether you can win on that or
20 not, you look at the statements underneath, and if the
21 statements cause others to say false things about her
22 and her son or her family as Pozner alleged, it's gap
23 filler -- I mean, it's not available.
24 The second point -- and I don't want to
25 mix the two -- is extreme and outrageous. Every other

1 case, Judge, is I'm with that person, you know, the man
2 who stops with the woman on the highway at dark and
3 won't leave and puts his hand on the door and keeps the
4 door from -- the *Morgan* case, all those cases are
5 extreme and outrageous, not news media reporting lies
6 about someone. Once -- there is not a case -- everybody
7 is in front of someone else when they're doing it or
8 causing someone else to do that for them. This is not
9 an IIED. This does not pass the extreme and outrageous.
10 Now to the discovery, Judge. I'm sorry.
11 The 15 hours I think, maybe 12 and a half hours in
12 depositions, again, I think it's all overbroad, and
13 you're going to either agree with me or not because the
14 only --
15 THE COURT: I add up nine and a half, four
16 hours for Jones, three hours in the aggregate for the
17 two corporate defendants --
18 MR. ENOCH: Yes, sir.
19 THE COURT: -- and two and a half hours
20 for Jacobson who apparently, according to counsel -- and
21 I know you take him at his word too -- is not an
22 unwilling witness but a concerned and fearful witness.
23 MR. ENOCH: Well, I'm concerned -- my
24 client's concerned too because he's got a
25 confidentiality nondisclosure agreement. So obviously

1 that's something -- I don't know what questions are
2 going to be asked. I don't know what's going to be the
3 subject here.
4 THE COURT: Okay.
5 MR. ENOCH: But the --
6 THE COURT: But anyway, that's nine and a
7 half hours; you're right.
8 MR. ENOCH: So this is my point if I can
9 make it, and that is --
10 THE COURT: Sure.
11 MR. ENOCH: -- good cause is his burden.
12 Absence of good cause is not mine. So if you look at
13 the elements of IIED, since we haven't disputed --
14 there's not an affirmative defense that he needs to find
15 out about, if the defendant acted intentionally or
16 recklessly with regard to her rights, which means, okay,
17 tell me about what you thought about, tell me what you
18 talked about with respect to her, maybe even Jesse
19 Lewis. I don't know. I'm not suggesting otherwise.
20 But the fact that they want everything, the vetting of
21 Sandy Hook, the truth of it, the truth of the statements
22 is not an issue in IIED.
23 THE COURT: Right.
24 MR. ENOCH: It's just not.
25 THE COURT: I think where we're spinning

1 around each other is the statements are not about her
2 personally; they're about her dead son. I think that's
3 the key difference in where we are on this.
4 MR. ENOCH: Okay.
5 THE COURT: And, you know --
6 MR. ENOCH: And let's -- I'll grant -- I
7 will agree with you.
8 THE COURT: You're right; there's nothing
9 in her life probably that can affect her more than her
10 dead son, but the statements are about her dead son,
11 right?
12 MR. ENOCH: Well, sure. Sure.
13 THE COURT: So that's the essence of the
14 discovery, is what did you know about whether my son was
15 really dead and killed by a gunshot or not and did you
16 say things otherwise recklessly.
17 MR. ENOCH: And that's where we're going
18 to disagree, Judge.
19 THE COURT: Okay.
20 MR. ENOCH: You're going to win, but we
21 disagree. And that is because the falsity of the
22 statement doesn't matter under IIED because truth can be
23 IIED. Speaking the truth can be that way. The
24 recklessness has to be I know of a condition, I know
25 that she might be harmed by this, and yet I say it

1 anyway, recklessly disregarding her rights, not the city
2 of Newtown's rights.
3 Okay. So with that said, Judge, I object
4 to all of the discovery; for example, the admissions,
5 admit that you've searched for all documents responsive
6 to the request, Judge. It depends on what your orders
7 would be on the documents.
8 THE COURT: And that's exactly right, so I
9 need your backup position. If I do sign an order
10 allowing discovery, in what way -- and you saw me trim
11 back *Heslin*.
12 MR. ENOCH: Yes, sir.
13 THE COURT: I removed some things in
14 *Heslin* about his advertising, his marketing contracts,
15 all that stuff. I didn't see why they needed that, so I
16 cut that out.
17 MR. ENOCH: So --
18 THE COURT: What should I cut out on this
19 if I sign it?
20 MR. ENOCH: Okay. If we can -- let's
21 start from -- if you go to Page 5.
22 THE COURT: Let me get there.
23 MR. ENOCH: Admissions to Jones.
24 THE COURT: I'm there.
25 MR. ENOCH: Okay. Now, the only -- the

1 issue with respect to 1 is search all your documents in
2 your possession. And it depends on, again, what you
3 order here. But the way it is now, I object to that
4 because he's not going to -- we can move on to the
5 request. I don't want him to be requested to admit
6 something that he's done a search for all of the
7 documents until you've ordered it. So let's go to the
8 request for production, interrogatories -- oh,
9 Interrogatory 3.
10 THE COURT: What page?
11 MR. ENOCH: This is Page 6. I'm sorry.
12 THE COURT: I've got it.
13 MR. ENOCH: Interrogatory 3, Page 6.
14 THE COURT: I'm there.
15 MR. ENOCH: I'll go with page numbers now.
16 That is not relevant to the TCPA motion.
17 THE COURT: Okay. Why not? Because
18 accuracy doesn't matter?
19 MR. ENOCH: Because accuracy with respect
20 to an IIED is not a relevant issue of inquiry.
21 THE COURT: Okay.
22 MR. ENOCH: With respect to
23 Interrogatory 4 --
24 THE COURT: I'm sure they're making notes
25 to respond to this. Next.

1 MR. ENOCH: Interrogatory 4.
2 THE COURT: Yes.
3 MR. ENOCH: Same thing. Judge, just
4 responding, they're going to anticipate that all these
5 other things show recklessness and show he's a mean
6 person and malice, et cetera. Those are not issues.
7 Again, when you look at the elements of IIED, whether
8 you say it with malice, whether you intend it --
9 remember there are cases out there saying you can intend
10 a malicious -- you can have malice sufficient to get
11 punitive damages under another tort, but that's not
12 IIED.
13 THE COURT: Okay.
14 MR. ENOCH: Okay. Then electronically
15 destroyed documents, that's a *Heslin* follow-up.
16 Remember that --
17 THE COURT: You're on what page?
18 MR. ENOCH: I'm sorry. Same page, Page 6.
19 I'll tell you when I change pages.
20 THE COURT: Okay.
21 MR. ENOCH: No. 4.
22 THE COURT: Got it.
23 MR. ENOCH: Okay?
24 THE COURT: Yeah.
25 MR. ENOCH: Going to the request on 7.

1 THE COURT: Yes.
2 MR. ENOCH: The Sandy Hook shooting and
3 subsequent investigation and media coverage. That's
4 very, very broad, overbroad and it's not relevant. It
5 would be awful expensive to try to meet too. And I'll
6 bring that at the appropriate time.
7 And Judge, you need to know this just as
8 you order this. There are four hours of video each day,
9 over 1200 each year. They've asked for 7,000 videos to
10 be searched. There is not a way that we can do a word
11 search on these videos. So each video will have to be
12 viewed and for burden -- I will make the objection that
13 the burden outweighs the probative value of this under
14 the rules. All we can do is we can search --
15 THE COURT: I'm sorry. Why does every
16 video have to be viewed by you before --
17 MR. ENOCH: No, by my client.
18 THE COURT: By your client.
19 MR. ENOCH: Yes, sir.
20 THE COURT: Because they have to remove
21 what from the video?
22 MR. ENOCH: No, no. No, there's not
23 removing.
24 THE COURT: Oh, to see whether this is in
25 there?

1 MR. ENOCH: Yes, sir. If the videos --
2 they can search a title. One of these -- the one they
3 can --
4 THE COURT: I see. They've got all this
5 video and they don't know what's on any video?
6 MR. ENOCH: They can search --
7 THE COURT: They have no idea what's on
8 any video?
9 MR. ENOCH: They can search a title. They
10 have a word search on a title. But as you see in these
11 other videos, they go beyond that. They can't do a word
12 search of that.
13 THE COURT: Okay. Well, all we can do is
14 our best, right?
15 MR. ENOCH: Staged, synthetic -- again,
16 No. 2 is not relevant because that's not a relevant
17 inquiry. That's not relevant to the TCPA motion. Same
18 thing for C. Same thing for E through G.
19 THE COURT: I'm sorry. You said C.
20 MR. ENOCH: Yes, sir, C. InfoWars'
21 coverage of Sandy Hook is overly broad because it's not
22 relevant to the issue of whether or not --
23 THE COURT: Oh, yeah, I see. Right.
24 You're still on RFP 1.
25 MR. ENOCH: Page 7.

1 THE COURT: Yeah, and RFP 1.
2 MR. ENOCH: Yes, sir. I'm sorry.
3 THE COURT: Yeah, I'm with you.
4 MR. ENOCH: Now, with respect to D, with
5 respect to Neil Heslin or their son, I don't think
6 that's relevant, but clearly it is with respect to
7 Scarlett Lewis.
8 THE COURT: But not to their son?
9 MR. ENOCH: I'm not going to fight that
10 issue, Judge.
11 THE COURT: Okay.
12 MR. ENOCH: I understand your position.
13 THE COURT: All right.
14 MR. ENOCH: But D is the one I would
15 object to least.
16 THE COURT: Okay.
17 MR. ENOCH: No. 2, all communications
18 related to the videos and articles cited in the
19 declaration of Binkowski, I don't think that's relevant,
20 and also it's going to be burdensome to do. It's not
21 probative in the case.
22 THE COURT: Okay.
23 MR. ENOCH: Okay. All contracts
24 between --
25 THE COURT: You actually hit your 45

1 minutes, but I'll let you go through this, and I'll just
2 give them more than ten. Is that okay?
3 MR. ENOCH: Yes, sir, of course.
4 THE COURT: Okay. I'll just add to your
5 ten because I'm going to let him go through this,
6 because if I sign the order, I want to think carefully
7 about how I need to limit it.
8 MR. ENOCH: No. 3, Judge, the same page,
9 Page 7, contracts between Alex, InfoWars, and Free
10 Speech, I don't see the relevance, and it's not related
11 to the TCPA. There's no showing of good cause.
12 THE COURT: Did I allow that in *Heslin*?
13 MR. ENOCH: No, you did not, as I recall.
14 I've got your *Heslin* order here if you'd like to look at
15 it.
16 THE COURT: I've got my *Heslin* order right
17 here because I was prepared to do a side by side if
18 y'all wanted to do that with me. You know, this goes to
19 control, you know, *respondeat superior*, which actually
20 they have to show a *prima facie* case on that too.
21 MR. ENOCH: No, sir.
22 THE COURT: In fact, I think --
23 MR. ENOCH: They haven't pled it.
24 THE COURT: I'm sorry?
25 MR. ENOCH: They haven't pled it.

1 THE COURT: I think they have, but in any
2 event, okay.
3 MR. ENOCH: No, sir. That's *Heslin*. All
4 they've pled is IIED.
5 THE COURT: Okay.
6 MR. ENOCH: Okay. And that's --
7 THE COURT: Well, I know in one of the
8 cases I let Alex Jones out personally because they
9 didn't have anything on the motion to dismiss about what
10 he personally did, but that was a different case.
11 MR. ENOCH: That was not my case.
12 THE COURT: All right. I think that was
13 Eric Taube's case; you're right.
14 MR. ENOCH: Okay.
15 THE COURT: Go ahead.
16 MR. ENOCH: And then No. 5, all
17 communications with any third parties regarding their
18 investigations for media projects about Sandy Hook.
19 THE COURT: RFP No. 5.
20 MR. ENOCH: Yes, sir.
21 THE COURT: On the next page, yes.
22 MR. ENOCH: I also -- I'll point out,
23 Judge, that the journalist privilege applies and I think
24 would apply to 5 too, as well as probably 4 and 2.
25 THE COURT: Well, we're just talking about

1 specified limited discovery now, not privileges, right?
2 You can assert privileges when you file your responses.
3 MR. ENOCH: Yes, sir, but --
4 THE COURT: I know. I know.
5 MR. ENOCH: I just don't want anybody to
6 be surprised, Judge. That's all.
7 THE COURT: I appreciate that. You're
8 giving us a preview.
9 MR. ENOCH: Thank you.
10 THE COURT: And I'm sure they appreciate
11 it too.
12 MR. ENOCH: 6, Judge, relevance is the
13 objection. Then go to Free Speech Systems, which is
14 Page 15, please.
15 THE COURT: Okay. Okay.
16 MR. ENOCH: No. 2 is not limited to the
17 TCPA motion. There's no issue in the TCPA motion that
18 that would be relevant too and there's no good cause for
19 that.
20 THE COURT: Okay.
21 MR. ENOCH: Same thing for No. 3, but I
22 think he might have withdrawn that. I can't remember
23 exactly.
24 THE COURT: I didn't hear him withdraw
25 that. I didn't note that, but he's making a note of

1 your objections now. He's going to respond to each one.
2 MR. ENOCH: All right. No. 4, there's not
3 any part of that that is relevant to the issue of the
4 four elements of IIED.
5 THE COURT: I know this came up. Assuming
6 they pled *respondeat superior*, that if one of you did
7 it, the other one had the right to control --
8 MR. ENOCH: That was *Heslin* and that was
9 *Pozner* and not this one.
10 THE COURT: Right, but I remember working
11 on something like this.
12 MR. ENOCH: And you did make -- you did
13 strike --
14 THE COURT: And I trimmed it, as I recall,
15 a little bit.
16 MR. ENOCH: Yes, sir, you did.
17 THE COURT: Okay. Is this exactly the way
18 I trimmed it in *Heslin*? Have you compared it?
19 MR. ENOCH: No, sir, it is not.
20 THE COURT: They didn't bother to take out
21 the things I took out in *Heslin?*
22 MR. ENOCH: It's not my recollection they
23 did, Judge.
24 THE COURT: Uh-oh.
25 MR. ENOCH: I could be wrong.

1 THE COURT: Okay. I hope you're wrong
2 because that's not a good move. All right. But none of
3 4 should go? None of I-rog 4 should go?
4 MR. ENOCH: I don't believe so.
5 THE COURT: Okay.
6 MR. ENOCH: Let's see. No. 5, identify
7 date and title every article or video discussing the
8 Sandy Hook shooting created or published by those.
9 THE COURT: Okay.
10 MR. ENOCH: And that's one of those things
11 that, A, it's not relevant, and B, it's going to cost
12 too much to do, and we've got to watch all the videos to
13 do that. And I guess that's only 25 in her statement.
14 Request for Production No. 1, please,
15 Page 16.
16 THE COURT: I'm there.
17 MR. ENOCH: No. 1, every article and the
18 digital copy of the transcript of every video you
19 identified in response to No. 5. That's the same issue
20 as identify all the videos that talk about Sandy Hook.
21 It's overbroad, expensive, not warranted, and there's no
22 good cause for it. Request No. 2 is the same request
23 I've already argued about in the other one.
24 THE COURT: I understand.
25 MR. ENOCH: Request 3, I've already made

1 that argument. It's a similar request. 4, this is all
2 communications. This is relating to those -- I think
3 that's similar to actually what we talked about. And
4 No. 5, still on Page 16, regarding policies and
5 procedures for vetting, not relevant, not limited to the
6 TCPA. Turning to Page 17 now, all communications from
7 third parties regarding investigation of media projects,
8 not relevant to an IIED claim, not relevant to the
9 motion. Contracts, same issue, No. 7.
10 All documents related to InfoWars'
11 reporter Dan Bidondi's trip to Connecticut, don't know
12 what that has to do with whether or not we intentionally
13 tried to hurt her or knew of her hurt and acted
14 recklessly with respect to that. No. 10, same thing
15 with Brian from Alabama. Don't know how that's -- they
16 haven't established relevance and they haven't
17 established good cause, Judge. That's their burden.
18 And let me just say about all this
19 discovery, I think they have a good cause burden under
20 each request, not just general in discovery. No. 11 --
21 THE COURT: Yeah, but let's assume we're
22 really just talking specific and limited, what specific
23 limited discovery is allowed -- should be allowed.
24 MR. ENOCH: Yes, sir.
25 THE COURT: I understand you're objecting

1 there's no good cause on any of them.
2 MR. ENOCH: Yes, sir.
3 THE COURT: Right?
4 MR. ENOCH: Yes, sir.
5 THE COURT: That's a global objection.
6 MR. ENOCH: Yes, sir.
7 THE COURT: I'm trying to drill down to
8 the specific and limited like I did in *Heslin*.
9 MR. ENOCH: I'm doing that. But what I'm
10 saying is, Judge, I think -- for example, when I go
11 through here, it's not my burden to show why Brian's, or
12 whatever it is, telephone number is not relevant. It's
13 their burden to show why it's good cause for them to get
14 that.
15 THE COURT: I understand.
16 MR. ENOCH: Okay. Thank you. With
17 respect to No. 11, I made the objection with respect to
18 factual vetting. I incorporate that. And all documents
19 setting forth editorial guidelines.
20 THE COURT: That's RFP 12?
21 MR. ENOCH: Yes, sir. And it's not
22 relevant. There's no good cause. It's not related to
23 the TCPA motion. All documents setting forth -- and
24 Judge, what I'm doing now is telling you what my
25 objections are, although I'm not formally lodging

1 objections obviously because these are not issued.
2 THE COURT: You know, I think you can just
3 tell me, is there any you're not objecting to? It's
4 none of it is specific and limited enough. In other
5 words, every one of these is too broad. I think you
6 said the last three -- you kind of yielded a little bit
7 on RFP No. 2, D through G, or at least you didn't argue
8 that. You argued A, B, and C. But otherwise, is there
9 an objection to every one?
10 MR. ENOCH: D through G, Judge, I did
11 object to. That was Fetzer, Halbig, and James Tracy.
12 It was C to which I did not object. I think it was C,
13 which is --
14 THE COURT: No, it's D, Scarlett Lewis,
15 Neil Heslin, or their son. And at first you did object,
16 but then you said I would understand, Judge.
17 MR. ENOCH: You're correct.
18 THE COURT: Okay.
19 MR. ENOCH: You're correct. But I did
20 object to the balance of those, Halbig --
21 THE COURT: Okay.
22 MR. ENOCH: Halbig, Tracy, and Fetzer.
23 THE COURT: All right.
24 MR. ENOCH: And to answer your question,
25 Judge --

1 THE COURT: Is the answer yes so we can
2 give the court reporter a break?
3 MR. ENOCH: No, the answer is yes to your
4 question.
5 THE COURT: Okay.
6 MR. ENOCH: There is not a request here
7 that I think can be tailored unless you would take my
8 position and agree with me that you can focus your
9 discovery on what we said, thought, intercompany
10 communications, said publicly about her or information
11 that we had that would cause us to believe that she
12 would be the object -- a primary consequence would be
13 her mental anguish.
14 THE COURT: I get it.
15 MR. ENOCH: Thank you.
16 THE COURT: Because it's not targeted to
17 her individually, it's all objectionable.
18 MR. ENOCH: I would say it differently.
19 You don't have to target someone to do it because that
20 would take the recklessly away from it, but you have to
21 intend either to cause her or you have to know that it's
22 likely -- the primary consequence is to cause her and no
23 one else.
24 THE COURT: Okay.
25 MR. ENOCH: Thank you, Judge. I

1 appreciate it.
2 THE COURT: All right. We're going to
3 give the court reporter a break and all of us a break.
4 Let me log his time so you'll know exactly how much time
5 you have, and I'm going to tell you what you must do on
6 the break.
7 MR. ENOCH: Oh.
8 THE COURT: Is there something I didn't
9 let you say?
10 MR. ENOCH: No, sir.
11 THE COURT: You've spoken for 55 minutes
12 now.
13 MR. ENOCH: No, sir, you didn't.
14 THE COURT: Okay. Now you know the answer
15 to that. It's 55 minutes. So you have 20 minutes to go
16 through this because you had 10 that you had left over.
17 Now you have 20. But you can't make new arguments. You
18 can argue this -- you know, the gap filler argument that
19 yes, we get to use this tort, why we can't do
20 defamation.
21 More importantly, this is what you must
22 do. This is the homework on the break.
23 MR. BANKSTON: Okay.
24 THE COURT: You must get out the *Heslin*
25 order. The precision in this order had better comport

1 with the precision I required in the *Heslin* order.
2 MR. BANKSTON: Correct, Your Honor.
3 THE COURT: Because if it's broader -- he
4 suggested he thinks maybe it is. He didn't say for
5 sure, but he was worried that it was, that you didn't
6 pull back as much as I pulled you back in *Heslin* and
7 you've got some broad language in here that I wouldn't
8 let you have in *Heslin*. That would be bad.
9 MR. BANKSTON: It would be.
10 THE COURT: And, you know, it won't inure
11 to your benefit.
12 MR. BANKSTON: We'll take care of it.
13 THE COURT: In fact, it will inure to your
14 detriment. That's probably not a way to say it, but
15 anyway, I'll see you back in about 15 minutes. I need
16 you to do that quickly.
17 MR. BANKSTON: No problem.
18 THE COURT: And then we'll finish this
19 argument.
20 MR. BANKSTON: I don't anticipate needing
21 20 minutes unless we --
22 THE COURT: Perfect.
23 MR. BANKSTON: -- get into an interesting
24 conversation about constitutional law or something.
25 THE COURT: Perfect. But if there's any

1 more you're willing to react and simply remove, that
2 simply --
3 MR. BANKSTON: I'll take a look at that
4 too, Your Honor.
5 THE COURT: I appreciate that. You did
6 that on one, and if you can do it on more, that will
7 simplify things. Thank you.
8 *(Recess taken)*
9 THE COURT: All right. We're back on the
10 record. I'll let you know when your 20 minutes is
11 expired. You told me you didn't think you'd need that
12 much, but you may proceed.
13 MR. BANKSTON: All right. Thank you,
14 Your Honor. Before I jump into my homework that you've
15 given me, I just want to clear up the record on a couple
16 of things. So I'm not wanting to go into any more
17 argument. We all kind of know what we're arguing about,
18 but let me give some quick facts.
19 The first is the statement that there is
20 not a case in Texas approving of group IIED, that IIED
21 can be inflicted towards a group. It was repeatedly
22 said that there is no Texas case holding that. There's
23 been a lot of talk about this *Johnson* and *Standard Fruit*
24 *and Vegetable* case. And in that case the Houston court
25 stated we see nothing in restatement 46.1 that excludes

1 the situation where a defendant exercises extreme or
2 outrageous conduct towards a group.
3 Now, as I was talking to you earlier, that
4 case went up again on appeal. It went up on appeal on
5 the issue of whether the conduct -- the primary risk of
6 the conduct is IIED. But in that opinion when it went
7 up to the Texas Supreme Court, the Texas Supreme Court,
8 talking about the Houston Court's decision here, said we
9 do not decide whether and to what extent conduct must be
10 directed at a particular individual to give rise to
11 liability under an intentional infliction of emotional
12 distress theory. Instead, we hold only that Johnson is
13 not entitled to recover because the tort of IIED is
14 available only in those situations which the emotional
15 distress is a primary risk of the actor's conduct.
16 There we discussed the actual risk with serious bodily
17 injury.
18 There's no other risk here to this
19 conduct. When you make emotionally grotesque statements
20 and direct them specifically at the parents by
21 addressing them as Sandy Hook parents --
22 THE COURT: Well, basically they're saying
23 we're not going to answer that question in this case.
24 MR. BANKSTON: Correct. Correct.
25 THE COURT: They didn't say it could be a

1 group. They didn't say it couldn't be a group.
2 MR. BANKSTON: Exactly. They did not
3 address whether the Houston Court of Appeals was correct
4 or not.
5 THE COURT: So I guess --
6 MR. BANKSTON: The Texas Supreme Court I
7 guess you could say has not yet spoken specifically to
8 that particular issue.
9 THE COURT: So this case may decide it.
10 MR. BANKSTON: It may end up. It may end
11 up that we actually have to go up here and the Texas
12 Supreme Court will finally have to answer that question.
13 The Houston courts answered it. The Northern District
14 of Texas has answered it in *Dupuy.* And pretty much
15 every court around the country who's ever looked at it
16 answered it the same way, so I'm confident how the Texas
17 Supreme Court will rule.
18 THE COURT: Well, opposing counsel has
19 made it clear that's his objection and I think the issue
20 is framed. No way to avoid it in this case.
21 MR. BANKSTON: Exactly. The second is the
22 statement that an IIED case cannot be about false
23 statement or that the reckless falsity of a statement is
24 not relevant to IIED. Not only is this not true, it's
25 not just relevant; it is an essential and necessary part

1 of the cause of action. The United States Supreme Court
2 commanded use. And in fact, I'm going to quote them
3 again from them talking about a public official.
4 And just from an interesting aside, it
5 might be that a private person doesn't have to prove
6 actual malice. I don't know. Actually, that's kind of
7 up in the air, and that's a thought for another day.
8 Maybe an IIED plaintiff who's private might have to
9 prove actual malice, and we're seeing that in some
10 recent cases. But aside from that, let's just pretend
11 we're talking about a public official.
12 The First Amendment prohibits public
13 officials from recovering damage from IIED without in
14 addition showing that the publication contains a false
15 statement of fact which was made with actual malice. I
16 absolutely have to in this case prove that at least it
17 was negligently made, these false statements, or that
18 they were made with actual malice. And I'm actually
19 kind of leaning towards --
20 THE COURT: You have to show they were
21 recklessly made, don't you?
22 MR. BANKSTON: Right. And one of the ways
23 you can prove that a statement was actual malice is it
24 was made with reckless disregard for the truth.
25 THE COURT: Right, right.

1 MR. BANKSTON: Right. So it's kind of --
2 it's interesting how the reckless requirement, the state
3 of mind, is similar to the actual malice statement or
4 state of mind for that because they both have the same
5 First Amendment protections when they're about speech.
6 And that's what these courts talk about, is that when
7 you have them, they have the same constitutional
8 protections.
9 So I absolutely have to prove that
10 statements were made false and with reckless disregard.
11 For instance -- and there are some other cases where
12 statements were made on a matter of public concern.
13 They were incredibly outrageous, incredibly upsetting,
14 but they were not false statements. They were not --
15 they were just statements of opinion on a matter of
16 concern. Those are absolutely constitutionally
17 protected. There's no doubt about that. If I can't
18 prove false statements, I don't have this case.
19 The other argument is this idea that
20 anybody who could make a failed defamation claim can't
21 make an IIED claim. But every IIED plaintiff could make
22 a failed defamation claim. There's no doubt about that.
23 So what I think the argument appears to be being is that
24 any time a plaintiff brings a cause of action based upon
25 the truth or falsity of a speech, it must be a

1 defamation action. And all of the cases cited for our
2 brief show you that's not true. The only real question
3 comes whether that reckless conduct, and in this case
4 speech, so it has to meet First Amendment, could have
5 made that person -- they should have known it would
6 cause emotional distress.
7 The other thing I want to clear up for the
8 record is about the discovery relating to a single
9 business enterprise and alter ego allegations. The
10 argument here is that they didn't make a specific
11 allegation that InfoWars isn't responsible. You'll
12 remember actually in the *Fontaine* case there was no
13 specific allegation, but that was raised at the hearing,
14 and the argument there is I have to make my *prima facie*
15 case and I have to make it against every defendant.
16 They say, though, well, he never alleged anything like
17 this in his petition that would make this in any way
18 relevant. But if you look at Paragraph 6 of our
19 petition, part of the way we --
20 THE COURT: I just conveniently pulled
21 that out. I thought you were headed there.
22 MR. BANKSTON: That's where I'm headed.
23 THE COURT: Hang on. Hang on. I'm at
24 Paragraph 6. Go ahead.
25 MR. BANKSTON: Paragraph 6 says -- it's

1 one of our ways we're going to try to establish
2 liability among these parties -- at all times relevant
3 to this petition, the defendants -- and I list them
4 there -- operated as a joint venture, joint enterprise,
5 single business enterprise, or alter ego. The *MCR* case
6 that I cited for you in my brief is exactly about that.
7 When a plaintiff alleges alter ego, they get this
8 discovery. That's why we've asked it there.
9 Those requests, as counsel told you, they
10 are the same as they are in *Heslin*. There is one
11 notable exception to that, but I think you'll see why it
12 was edited. Let me pull that up for you really quick,
13 Your Honor. And that would be Interrogatory No. 3 on
14 Page 15. Yeah, these are interrogatories towards Free
15 Speech. And No. 3 on --
16 THE COURT: Hang on. I'm not quite there
17 yet.
18 MR. BANKSTON: Page 15.
19 THE COURT: I'm at Page 15, Interrogatory
20 No. 3. And what are you saying about that?
21 MR. BANKSTON: Correct. Now, in the
22 original *Heslin* case, this interrog was worded
23 identically except for it said -- it wants to know about
24 all these things for the April -- or I'm sorry,
25 June 26th broadcast entitled, you know, Zero Hedge

1 discovers anomaly about Sandy Hook, the one specifically
2 defamatory broadcast.
3 Here we're asking for the same information
4 on the videos that were cited by Ms. Binkowski that
5 we're using to form our IIED claim. So it is broader.
6 It's asking for more episodes. But I think you can
7 understand why I would do that in this case.
8 And that's the only one that I've checked
9 here that is not -- that is a duplicate of a *Heslin*
10 request. Now, that being said, not all requests are
11 duplicates of *Heslin* requests, and I think we've talked
12 about those enough.
13 There are some that I have done some
14 homework for you to limit, and I believe we can limit
15 just a little bit further, so I want to go through those
16 with you real quick.
17 THE COURT: All right.
18 MR. BANKSTON: Okay. The first is if we
19 go to Jones' interrogatories. I'll give you a page
20 number. That is Page No. 6.
21 THE COURT: I'm there.
22 MR. BANKSTON: Okay. On No. 3 it's about
23 the process for vetting factual allegations in their
24 programming. I think it would make sense there after
25 the word "programming" to add the words "about

1 Sandy Hook." I think that would -- or "related to
2 Sandy Hook" I think is a good way to say that, because
3 that would confine it to things in my cause of action.
4 I don't need to know the process for vetting other
5 stories, at least not at this point.
6 THE COURT: Well, and the Sandy Hook
7 school shooting, which I think Sandy Hook is a shorthand
8 for the Sandy Hook school shooting, but that's what you
9 mean.
10 MR. BANKSTON: It is, yes. And I think we
11 should put that because that makes it clear I'm not
12 asking for everything about the town ever.
13 THE COURT: So programming -- what are the
14 words you would plug in?
15 MR. BANKSTON: Relating to the Sandy Hook
16 school shooting.
17 THE COURT: Pertaining?
18 MR. BANKSTON: Yes, pertaining to the
19 Sandy Hook school shooting.
20 THE COURT: All right. What else? What
21 other changes are you suggesting?
22 MR. BANKSTON: On the next page on Page 7
23 is Jones' RFP No. 1.
24 THE COURT: Yes.
25 MR. BANKSTON: The change here is -- let's

1 go ahead and strike James Tracy off the bottom of there.
2 That's a person who's kind of important, but unlike the
3 other two, unlike Fetzer and Halbig, are not key to the
4 specific allegations that are talked about in the
5 complaint. So I think James Tracy is somebody who can
6 wait till later.
7 THE COURT: Okay.
8 MR. BANKSTON: Regarding RFP 4 on that
9 same page, it's again a question about the policies and
10 procedures for factual vetting. So when it says here
11 for the factual -- the last line, for the factual
12 vetting for reporting on InfoWars programming, add to
13 the end "pertaining to Sandy Hook Elementary School
14 shooting."
15 THE COURT: Okay.
16 MR. BANKSTON: The next is on Page 15.
17 THE COURT: All right.
18 MR. BANKSTON: I'm sorry. If we can go to
19 Free Speech's RFPs, which is 16.
20 THE COURT: Page 16. So nothing on 15.
21 MR. BANKSTON: Nothing on 15.
22 THE COURT: I'm on 16.
23 MR. BANKSTON: On 16 in RFP 2, we'll
24 withdraw the name James Tracy. And on RFP 5, we'll make
25 the same addition of pertaining to Sandy Hook at the

1 conclusion of their request.
2 THE COURT: After the word "programming"?
3 MR. BANKSTON: Correct. All right. And
4 then if you can flip back to Page 27 after that.
5 THE COURT: All right.
6 MR. BANKSTON: On Page 27, let's
7 withdraw -- plaintiffs are going to be withdrawing for
8 the sake of limitation RFP No. 3.
9 THE COURT: No. 3. RFP No. 3, all
10 documents regarding ownership, management,
11 administration.
12 MR. BANKSTON: Correct, Your Honor. I
13 think there are less intrusive ways to do that.
14 THE COURT: Okay.
15 MR. BANKSTON: All right. A couple of --
16 just a couple statements on -- on most of these, I think
17 you'll understand exactly why I'm asking them. There's
18 two that I wanted to make a little more clear. One was
19 the reference to Dan Bidondi's trip to Connecticut.
20 This is about a --
21 THE COURT: What page is that on just so
22 I'm oriented?
23 MR. BANKSTON: Oh, I'm sorry, Your Honor.
24 THE COURT: Do you have that in more than
25 one place?

1 MR. BANKSTON: I believe I do. Well,
2 actually, no. No, it's in Free Speech. Let me find
3 that for you.
4 MR. ENOCH: 17.
5 MR. BANKSTON: On Page 17, Your Honor.
6 THE COURT: Okay.
7 MR. BANKSTON: And this would be RFP
8 No. 8.
9 THE COURT: All right.
10 MR. BANKSTON: The reason that I'm
11 requesting that is Dan Bidondi is an InfoWars reporter.
12 And you'll see described in our motion and in our
13 pleadings we talk about these broadcasts where they sent
14 people along with Wolfgang Halbig, this man Dan Bidondi,
15 the reporter, to harass and basically do horrendous
16 things.
17 THE COURT: The problem in all documents
18 relating to his trip to Connecticut includes his hotel
19 reservation, his travel vouchers, his plane ticket. I
20 mean, it's just -- it's not precise about what about the
21 trip do you want.
22 MR. BANKSTON: I hear what you're saying
23 there. I mean, it's tough because --
24 THE COURT: You know, you do product
25 liability cases. You can't get that in a product

1 liability case, tell us everything about this engineer's
2 trip to this, you know -- tell us about what this
3 engineer did on this trip about investigating this
4 particular widget, you know. You can do that.
5 MR. BANKSTON: Yeah, yeah. I'm trying to
6 think of ways we could limit that. I'm in agreement
7 with you here, Your Honor. I mean, I might be
8 interested to know who paid for his trip if it's not
9 InfoWars, but I'm not fishing for that yet. It may
10 become relevant later. I'm definitely interested in
11 documents about what he was there to do, what he found,
12 what he said, what his instructions were, those sorts of
13 things.
14 THE COURT: Well, you could say "all
15 documents relating to the purpose for," but is that what
16 you're after?
17 MR. BANKSTON: I am after the purpose in
18 all that, but I'm also after -- I mean, let me just give
19 you an example. If Dan Bidondi sends emails back to
20 InfoWars saying, hey, here's what we're doing up here,
21 here's what we did, we really put the scare into this
22 one person, oh, you should have seen it," these are
23 documents I'd love to see.
24 THE COURT: Okay.
25 MR. BANKSTON: And I think they'd prove

1 the recklessness and intent of what they're doing.
2 THE COURT: All right.
3 MR. BANKSTON: So what I'm really wanting
4 is reports on his activities there to understand what he
5 was doing, what he said, what he did, what they knew
6 about what he did. So I guess what I'm asking for is
7 status reports, progress notes, communications about the
8 purpose and conduct of the journalistic activities on
9 that trip.
10 THE COURT: Well, you might add that to
11 Bidondi's trip, you know, on the -- the purpose,
12 activities and, you know, whatever qualifier you want to
13 put in there.
14 MR. BANKSTON: Yeah, and details of
15 journalist -- his journalism practices on his trip to
16 Connecticut.
17 THE COURT: You come up with the language.
18 We've got to have it first thing in the morning --
19 MR. BANKSTON: I sure will.
20 THE COURT: -- if you want me to sign this
21 tomorrow.
22 MR. BANKSTON: Okay. The other -- then I
23 will give you a similar something like this for Request
24 for Production No. 10, which is about the gentleman
25 Brian from Alabama. And you may remember this is the

1 gentleman who was the caller when Mr. Pozner's address
2 was posted and when there was, you know, the sort of
3 talk about how the Sandy Hook parents are shutting down
4 free speech and censorship and the harassment that
5 occurred there. And we believe that these parties
6 operate in tandem, in unison. We believe there's
7 coordination there between Brian's group of Sandy Hook
8 hoaxing documentary makers or whatever with the context
9 within --
10 THE COURT: Okay. Are you on another one
11 now?
12 MR. BANKSTON: Yes. That would be No. 10,
13 is that Brian from Alabama.
14 THE COURT: Okay.
15 MR. BANKSTON: So I would give you another
16 proposal. I take your meaning on all documents relating
17 to him. I'm going to try to limit that to all documents
18 relating to that specific transaction of events that
19 we're talking about in our petition.
20 All right. Your Honor, I think with that,
21 we've got an understanding of what's going on, so I
22 don't need the rest of my time. I appreciate you having
23 us today.
24 THE COURT: All right. This is under
25 advisement. I need you to simultaneously send to this

1 Court and to Mr. Enoch your revised Exhibit 1.
2 I will tell you that I take his point
3 about the timing on this, so I need to ask you that
4 question too. Why should I not -- I'm looking at the --
5 if I sign this order on the very first part of the
6 order, the timing -- not allow -- and this was your
7 first draft. I came out here with an edited version of
8 your first draft, didn't know there was another one. I
9 know you sent another one in, but it wasn't seen by me.
10 So on Paragraph 2, defendant shall respond
11 to written discovery. By February 20th is what your
12 first draft said. You can live with that, can't you.
13 MR. BANKSTON: By February 20th?
14 THE COURT: Yes.
15 MR. BANKSTON: I can live with it. I'm
16 not going to ask for it, but I can --
17 THE COURT: Well, I understand. You'd
18 like to ask for the 20 days, which is a little earlier
19 than February 20th, but you can live with that and get
20 ready for this hearing in May, right? Right? Because
21 that was your first ask.
22 MR. BANKSTON: Yeah, I think I can.
23 THE COURT: Okay. Because that's what
24 opposing counsel's asking to do.
25 MR. BANKSTON: Okay.

1 THE COURT: Because this is a ton of work,
2 and he may want to file something about some of these
3 precise requests. I don't know. I'm hoping we're not
4 going to have a gargantuan fight about this. I'm hoping
5 this is the last time I see you until May, but hope
6 springs eternal, right? Not that I don't like seeing
7 you. It's just we don't want to keep working on
8 discovery, not my favorite thing to do as a judge.
9 Depositions shall be completed no later
10 than March 20th is what your first draft said.
11 MR. BANKSTON: Correct.
12 THE COURT: You can live with that and get
13 ready for a May 2nd hearing, can't you?
14 MR. BANKSTON: The more I think about
15 that, no, I don't like that. I really don't.
16 THE COURT: Well, how about --
17 MR. BANKSTON: And commonly --
18 THE COURT: March 16th would be four more
19 days. Your first draft had March 20th with a May 6th
20 date. Those were your dates.
21 MR. BANKSTON: Correct, and I was wrong
22 about those dates, Your Honor.
23 THE COURT: Well --
24 MR. BANKSTON: I've done a little more
25 looking into the law of when these things are typically

1 produced under the timelines of the TCPA, and deponents
2 have been asked to appear ten days after the hearing.
3 THE COURT: Okay.
4 MR. BANKSTON: And here 50 days is --
5 you know, I mean, that's not going to be --
6 THE COURT: Well, I know you know opposing
7 counsel's not making up this trip.
8 MR. BANKSTON: Sure.
9 THE COURT: And he wants to be able to,
10 you know, do this work when he can do it, as quickly as
11 he can do it. What is the --
12 MR. BANKSTON: If you had to give me one
13 last pitch, I'd ask for March 10th, but it's in your
14 discretion. I'm not going to push hard on this.
15 THE COURT: But you could live with the
16 documents February 20th --
17 MR. BANKSTON: Correct.
18 THE COURT: -- but give me depos by
19 March 10th.
20 MR. BANKSTON: Correct.
21 THE COURT: Okay. That doesn't really
22 distress you too much on the depos, does it, Mr. Enoch,
23 just in terms of the possibility of doing them if I
24 ordered them? You were really concerned about the
25 February dates because of your letter on file, right?

1 MR. ENOCH: Yes, sir.
2 THE COURT: Okay.
3 MR. ENOCH: I don't think I'm going to
4 have a problem with that.
5 THE COURT: Thank you for saying that.
6 And I know you appreciate it too.
7 Yeah, I just got information March 10th is
8 a Sunday if that matters to you. It just means you've
9 got to do it by then. Let's see. Completed no later
10 than March 10th. Do you want me to say March 10th even
11 though it's a Sunday?
12 MR. BANKSTON: That's fine with us,
13 Your Honor.
14 THE COURT: Is that okay with you?
15 MR. ENOCH: Sure. Yes, sir.
16 THE COURT: All right. March 10th.
17 February 20th, March 10th. Okay. And May 2nd. I think
18 the deadline for ruling on this is May 7th, something
19 like that.
20 MR. ENOCH: That's right.
21 THE COURT: All right. Anything else you
22 need for the record? I don't think so.
23 MR. BANKSTON: No, Your Honor.
24 MR. ENOCH: Just one clarification.
25 Perhaps you can do this.

1 THE COURT: Do you need this on the
2 record?
3 MR. ENOCH: No, sir.
4 THE COURT: Okay. Then our hearing --
5 MR. ENOCH: Let's leave it on the record.
6 THE COURT: Okay.
7 MR. ENOCH: What is your present intention
8 with respect to a confidentiality order?
9 THE COURT: The protective order?
10 MR. ENOCH: Yes, sir, protective order.
11 THE COURT: I don't know. I think you do
12 have to put something on the record evidence-wise --
13 MR. ENOCH: I agree.
14 THE COURT: -- to do that.
15 MR. ENOCH: I agree.
16 THE COURT: And I think at this point you
17 haven't. Do you see what I mean?
18 MR. ENOCH: I do, sir.
19 THE COURT: Just lawyer to lawyer, I think
20 that's the defect here. So my present inclination is
21 simply to deny this motion. Don't know what you can do
22 going forward. We had an interesting discussion about
23 what procedure applies in these expedited discovery
24 matters. And you heard me kind of picking on the other
25 side about that, and I think there are arguments either

1 way about that. You'll just have to decide.
2 What I'm hoping is that if I allow some
3 discovery, it's limited enough. It's not going to touch
4 on attorney-client privilege. It's not going to touch
5 on work product. And there's not going to be any trade
6 secrets. I know you object to all the discovery for all
7 the reasons you've articulated, but that it's not going
8 to really require protection other than -- I mean, his
9 argument is you just don't want other people to see it,
10 and that's not a trade secret kind of protection.
11 That's my reaction to your motion. But if
12 there is that kind of stuff, if there is confidential
13 stuff, if there is privileged information such as a -- I
14 don't know. You mentioned earlier reporter's privilege.
15 That's not something that comes up very often. But if
16 there's a specific discrete, targeted, surgical
17 privilege, my inclination without researching this at
18 all -- this is just Jenkins from the hip; after 18 years
19 on the bench, I'm more inclined to do that -- is that
20 you haven't waived that, but that's what I think. He
21 seems to argue that you have. I don't know how you can
22 until you know what you're required to produce, but
23 that's my inclination. Having said that, I go back to
24 what I started with, which is I don't think you've
25 gotten it yet. Does that make sense?

1 MR. ENOCH: It does. And the reason I ask
2 is because we just compressed the time between
3 production of documents and depositions, which might
4 cause an issue with respect to a hearing to protect,
5 because we would want the confidentiality order
6 obviously before the depositions, and we just -- because
7 of that compression, I want to bring it to your
8 attention that if there is an objection that I want to
9 stand on that I don't think he's met, I need to have it
10 heard. He'll need to have it heard, perhaps with the
11 confidentiality order, in that timeframe between
12 February 20th and March 8th or whatever.
13 THE COURT: Well, all you can do is your
14 best, but you'd better be meeting the standards like in
15 76(a) or something that indicates the public can't see
16 this, other people can't see this.
17 MR. ENOCH: Sure.
18 THE COURT: And you're going to have to
19 meet a burden about why they can't see this. And I'm
20 just not -- anyway, but I'll let you figure that out
21 and --
22 MR. ENOCH: I'm not trying to bridge
23 whether I do it or not. I'm just pointing out the
24 timeframe and accessibility to Your Honor. That's the
25 issue.

1 THE COURT: Well, accessibility to me is a
2 real problem. But, you know, I'm going to get your
3 order out tomorrow.
4 MR. ENOCH: Okay. All right.
5 THE COURT: I've got *Students for Fair*
6 *Admission*. I've got to get an order out before I lose
7 jurisdiction.
8 MR. ENOCH: Very well.
9 THE COURT: And I've got a family case
10 I'll be hearing in the morning, and I start a five-day
11 trial on Monday. So, you know --
12 MR. ENOCH: Other than that.
13 THE COURT: -- accessibility is a problem.
14 I didn't mean to whine. That's just the life. Okay.
15 MR. BANKSTON: I just had one final --
16 THE COURT: Anything else we need on the
17 record?
18 MR. BANKSTON: Maybe.
19 THE COURT: Okay. Well, then we'll keep
20 going on the record.
21 MR. BANKSTON: And cut me off if this is
22 not an important thing to talk about now, but it just
23 occurred to me during some of that, this idea that there
24 needs to be a confidentiality order in place before the
25 depositions, which makes me think that there might be an

1 argument that some of the deponents aren't entitled to
2 see the documents maybe or something like that. And, I
3 mean, my position obviously is that all employers and
4 people -- movants are former employees.
5 THE COURT: I don't know what you're
6 saying on the record now or what you need.
7 MR. BANKSTON: What I'm asking is --
8 THE COURT: There's nothing for me to
9 decide.
10 MR. BANKSTON: Right. So what I'm asking
11 to maybe you give an order on with your discovery order
12 is I have a feeling based on this that the deposition
13 particularly of Jacobson can be particularly contentious
14 and have a lot of objections whether we can show him
15 documents. My request is, is it possible to conduct
16 that deposition here in the court with the Court?
17 THE COURT: Oh, I don't know. First time
18 I've ever heard that. Probably not, just given my
19 schedule.
20 MR. BANKSTON: Sure.
21 THE COURT: Probably not.
22 MR. BANKSTON: Okay.
23 THE COURT: And we don't do depositions in
24 court unless you've already taken a stab at lawyers
25 following the rules and doing it on your own.

1 MR. BANKSTON: Okay.
2 THE COURT: I don't know. We'll just have
3 to see what's filed between now and then, put one foot
4 in front of the other and keep moving forward.
5 MR. BANKSTON: Then I think --
6 THE COURT: I hope nobody's going to be
7 obstreperous in this. So far I'm not seeing that. But
8 I'm hoping everybody -- that's why I said what I said.
9 I want you to -- let's not make more work in this than
10 we have to make. It's hard enough as it is for all of
11 us.
12 MR. ENOCH: And -- excuse me. I didn't
13 mean to interrupt you.
14 THE COURT: That's all right. What?
15 MR. ENOCH: And so we have two
16 corporations that are going to be deposed.
17 THE COURT: Yes.
18 MR. ENOCH: Are you then going to fashion
19 or assist him with topics? The reason I say that is
20 because I want to defend my client. I do not want to
21 run afoul with any orders of the Court. I need to know
22 what those orders are.
23 THE COURT: I know. If you have a
24 corporate rep depo, you have to identify the topics, and
25 so he'd better be within the scope of the topics that

1 are allowed in written discovery. Otherwise, he'd be
2 exceeding that, right? So you're right. If he goes
3 beyond that, then you can probably Rule 11 that we
4 object to this because we don't think Jenkins could
5 order this discovery. But until you mandamus me, that's
6 the order.
7 MR. ENOCH: I understand.
8 THE COURT: That's the legal order that
9 you have to comply with. So you have to decide what
10 you're going to do. You either mandamus this order that
11 I sign tomorrow if I do sign one that allows limited
12 discovery or you're going to have to -- it seems to
13 me -- we're doing a lot of hypothetical questions
14 here -- live with that if the depo from the corporate
15 rep tracks identically the language in my order. I
16 don't know how you'd come back for another hearing on
17 the same arguments. Do you see my point? And I don't
18 think that's what you mean.
19 MR. ENOCH: No. What I mean is if you
20 say -- if you put the -- so long as when I'm defending
21 Mr. Johnson, whoever that might be, the corporate rep,
22 on an issue that he has designated and you approved,
23 then I as a lawyer can say, okay, that's relevant to the
24 topic versus outside the scope. For me to not have the
25 topics is not fair. It's not pursuant to the rule.

1 THE COURT: No, he has to have the topics.
2 You agree you're going to have to designate the topics
3 upon which the corporate rep for each of these entities
4 will testify?
5 MR. BANKSTON: Absolutely.
6 THE COURT: Yeah.
7 MR. BANKSTON: And in fact, to make it
8 easier on all the parties, I'll submit that with my
9 proposed order tonight.
10 THE COURT: Okay. Yeah, I never imagined
11 he wouldn't do that. Like you, I just assumed that was
12 something he was going to have to do quickly. So now
13 you're going to incorporate that in my order?
14 MR. BANKSTON: Yes, Your Honor. I'll put
15 that proposal in there. I think if that -- unless the
16 parties and the Court think there's a better opportunity
17 for the order to issue, then serve the topics and add
18 that objection at deposition.
19 THE COURT: Well, that's --
20 MR. BANKSTON: But that seems maybe
21 cumbersome.
22 THE COURT: I'm sure he appreciates it
23 because you're confirming what he just said, which is
24 you've got to put in writing what the topics are for the
25 corporate rep.

1 Can we let the court reporter get a break
2 now?
3 MR. BANKSTON: Yes, we can.
4 THE COURT: That concludes our record?
5 MR. BANKSTON: Yes, it does, Your Honor.
6 MR. ENOCH: Yes, it does.
7 THE COURT: All right. That concludes our
8 record. Thank you.
9 *(Court adjourned)*
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1 **REPORTER'S CERTIFICATE**

2

3 THE STATE OF TEXAS )

4 COUNTY OF TRAVIS )

5 I, Chavela V. Crain, Official Court

6 Reporter in and for the 53rd District Court of Travis

7 County, State of Texas, do hereby certify that the above

8 and foregoing contains a true and correct transcription

9 of all portions of evidence and other proceedings

10 requested in writing by counsel for the parties to be

11 included in this volume of the Reporter's Record, in the

12 above-styled and numbered cause, all of which occurred

13 in open court or in chambers and were reported by me.

14 I further certify that this Reporter's Record of

15 the proceedings truly and correctly reflects the

16 exhibits, if any, offered in evidence by the respective

17 parties.

18 WITNESS MY OFFICIAL HAND this the 10th day of

19 February, 2019.

20

*/s/ Chavela V. Crain*

21 Chavela V. Crain, CSR, RDR, RMR, CRR
Texas CSR 3064

22 Expiration Date: 12/31/2019
Official Court Reporter

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