

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

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

B E F O R E:

THE HONORABLE MARK FALK,  
UNITED STATES DISTRICT MAGISTRATE JUDGE

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

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1 THE CLERK: All rise.

2 THE COURT: Please be seated.

3 Good morning.

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

6 Would counsel place their appearances on the  
7 record, please.

8 MR. ANDRETTA: Good morning, your Honor.

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

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

15 MR. EGGERS: Good morning, your Honor.

16 THE COURT: Good morning.

17 MS. WINDT: Good morning, your Honor.

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

20 THE COURT: Okay.

21 MR. KOFMAN: Good morning, your Honor.

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

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

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

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

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

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

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

24 Thank you, Justin, for reminding me.

25 So with respect to that motion, I guess it is

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

2 MR. EGGERS: Thank you, your Honor.

3 THE COURT: Mr. Eggers.

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

6 THE COURT: Yes.

7 MR. EGGERS: Okay.

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

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

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

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

1           In addition, Mr. O'Hara, prior to revealing that  
2 information, threatened to do so unless NXIVM paid him  
3 \$50,000. It is probably the most reprehensible conduct an  
4 attorney could engage in.

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

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

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

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

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

9           THE COURT: Thank you.

10          MR. EGGERS: I will, however, point out for the  
11 Court something that was not in our brief, and that is the  
12 amendment to Rule 26(b), which went into effect on December  
13 1, 2006. That amendment we do not contend controls the  
14 outcome here. However, I think that amendment is perfectly  
15 in accordance with the law in this district as it stood  
16 prior to that date.

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

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

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

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

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

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

24           THE COURT: Thank you.

25           Mr. Skolnik?

1 MR. SKOLNIK: Thank you, your Honor.

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

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

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

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

1 Ross' counsel presence.

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

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

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

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

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

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

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

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

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

6 We'll, I'm sure, cover the sequence of events and  
7 other aspects of NXIVM's privileged claims on some of the  
8 other motions before you today, but -- and I know that the  
9 Court is intimately familiar with Pansy and the Local Rule  
10 5.3(c)(2), so I certainly need not recite their sealing  
11 requirements.

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

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

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

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

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

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

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

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

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

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

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

19 THE COURT: Thank you.

20 MR. EGGERS: Your Honor, may I respond?

21 THE COURT: Absolutely.

22 MR. EGGERS: Thank you, your Honor.

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

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

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

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

19 I am just dealing with the motion to seal now.

20 THE COURT: I understand.

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

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

1 also said some of these things to Mr. Ross.

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

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

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

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

24 THE COURT: Okay.

25 (Court and clerk confer)

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

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

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

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

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

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

3 MR. SKOLNIK: Exactly.

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

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

10 THE COURT: Understood. Now I understand.

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

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

25 THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 daughter was involved with NXIVM.

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

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

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

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

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

1 illegally.

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

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

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

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

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

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

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

1 produce documents and testimony in this matter.

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

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

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

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

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

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

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

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

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

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

7 I want to turn to the case of Securimetrics v.  
8 Iridian Technologies, 2006 WL 827889, a decision by Judge  
9 Kugler. In that case the District of New Jersey considered  
10 5.3 and the attorney/client privilege and rejected the  
11 plaintiff's reliance on the attorney/client privilege as a  
12 standalone basis for alleged harm. The Court stated:

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

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

1 else a sealing order couldn't be entered.

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

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

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

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

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

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

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

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

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

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

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

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

3 From the proposed verified counterclaim, there is  
4 the statement:

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

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

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

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

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

23 Let me go further.

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

1 for a dangerous and destructive cult."

2 (Verified Counterclaim, paragraph 5.)

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

11 That's the Verified Counterclaim Paragraph 5.

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

18 (Verified Counterclaim Paragraph 5.)

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

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

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

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

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

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

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

13 "Ross is a convicted felon."

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

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

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

1 Page 5.

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

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

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

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

16 THE COURT: Yes.

17 MR. EGGERS: Okay.

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

25 First, it would prevent the parties from

1 publicizing materials learned in discovery.

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

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

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

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

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

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

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

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

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

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

25 The Court reiterated that approach in Pansy. I

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

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

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

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

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

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

25 One would be to require advance notice of an

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

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

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

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

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

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

10 Why generally is the confidentiality order  
11 necessary here?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 our motion.

2 Thank you, your Honor.

3 THE COURT: Thank you.

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

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

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

1 court without revealing the secrets in the Keefe  
2 declaration.

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

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

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

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

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

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

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

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

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

25 In fact, what they do distinguish is that the

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

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

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

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

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

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

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

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

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

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

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

25 So, in other words, they want by this umbrella

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

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

6 I think your Honor already articulated the  
7 standard.

8 THE COURT: Yes. Thank you.

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

11 THE COURT: We are happy to hear you.

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

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

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

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

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

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

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

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

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

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

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

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

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

4           Thank you.

5           THE COURT: Thank you.

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

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

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

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

25           The Supreme Court affirmed and said there was no

1 first amendment violation there.

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

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

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

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

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

3 That is my only response.

4 THE COURT: Thank you.

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

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

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

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

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

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

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

6 THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 I will note that the discovery rules make it

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

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

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

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

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

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

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

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

20 That is at 144.

21 The court continued:

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

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

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

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

9           Thank you.

10          (Recess taken.)

11          THE CLERK: Remain seated.

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

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

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

21          MR. EGGERS: Thank you, your Honor.

22          THE COURT: Sure.

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

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

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

11 THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 Lastly, on this motion Mr. Ross concedes at pages  
22 12 and 27 of his opposition on the motion to quash, that the  
23 information he is seeking is irrelevant, that his only basis  
24 for seeking this information is with respect to the proposed  
25 amended pleading, and therefore, a subpoena ought to be

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

3 Thank you, your Honor.

4 THE COURT: Thank you.

5 Does Interfor want to be heard?

6 MR. WINDT: Whichever you prefer, your Honor.

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

9 MS. WINDT: By way of background, Interfor is an  
10 international investigation firm, whose clients are Fortune  
11 500 companies, major law firms, and a number of western  
12 governments.

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

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

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

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

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

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

4           THE COURT: Thank you.

5           MR. SKOLNIK: Thank you, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6           Now, NXIVM and Interfor like to emphasize that the  
7 8th Circuit's very persuasive, and I suggest to your Honor  
8 completely germane opinion in 2003 in a case called Midwest  
9 Motor Sports versus Arctic Cat Sales, Inc., they like to  
10 point out that it hasn't been much cited by other courts in  
11 the few years since it came down. Parenthetically it has  
12 been cited repeatedly in Law Review articles and other  
13 discussions of attorney ethics.

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

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

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

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

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

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

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

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

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

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

21 Now, why do I say unlawfully?

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

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

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

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

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

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

1 unlawful invasion of privacy under New Jersey law.

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

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

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

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

25 Interfor has steadfastly declined to deny that it

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

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

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

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

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

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

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

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

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

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

9 Bribery or pretexting anyone?

10 I don't know.

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

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

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

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

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

3 I mean, is there some other argument?

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

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

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

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

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

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

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

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

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

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

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

9 And even NXIVM's Massachusetts case --

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

12 MR. SKOLNIK: Please.

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

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

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

1 26, investigators have to do their job and lawyers have to  
2 rely on investigators, and investigators' work is subject to  
3 a work product privilege -- a work product protection.

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

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

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

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

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

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

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

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

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

1 privileges would apply.

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

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

9 It doesn't have to intrude on my relationship.

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

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

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

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

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

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

4 MR. SKOLNIK: Thank you, your Honor.

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

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

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

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

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

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

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

25 As a final matter on the motions to quash, since

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

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

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

16 THE COURT: Thank you.

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

19 THE COURT: Go ahead.

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

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

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

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

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

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

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

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

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

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

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

20 THE COURT: Well --

21 MR. EGGERS: -- by the retainer agreement.

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

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

1 went on the cruise.

2 THE COURT: I understand.

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

5 How is it a crime or fraud?

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

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

17 MR. EGGERS: No.

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

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

25 THE COURT: Is there any limit on that?

1           Where do you draw the line on that?

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

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

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

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

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

20           THE COURT: Thank you.

21           MR. WINDT: Just briefly, your Honor.

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

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

3 Secondly --

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

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

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

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

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

3 Thank you, your Honor.

4 THE COURT: Thank you.

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

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

13 THE COURT: Okay.

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

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

1 assume of these doctrines.

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

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

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

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

25 Both sides agree it is a disputed fact issue in an

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 "1. Communicate or cause another to communicate on

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

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

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

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

1 to this.

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

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

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

1 familiar with the relevant product line.

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

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

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

25 Apple Corps is a case coming out of this district,

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

3 "4.2 cannot apply where lawyers and/or their  
4 investigators, seeking to learn about current  
5 corporate misconduct, act as members of the general  
6 public to engage in ordinary business transactions  
7 with low-level employees of a represented  
8 corporation."

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

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

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

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

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

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

25 I am not going to repeat the entire standard in

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

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

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

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

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

6 A number of courts that have considered the topic  
7 have vitiated the privilege on a showing less than that of a  
8 crime or fraud and some even on the basis that "the conduct  
9 is fundamentally inconsistent with the basic premises of the  
10 adversary system." In re Sealed Case, 676 F.2d, 793, 812. In  
11 re Sealed Case, 754 F.2d, 395, Irving Trust Co. v. Gomez,  
12 100 F.R.d. 273, 277. In 2006 in this district, Watchel v.  
13 Guardian Life Ins., 2006 WL 1286189, the courts have held  
14 that "under federal law, the exception can encompass  
15 communications and attorney work product in furtherance of  
16 an intentional tort that undermines the adversary system  
17 itself." And, of course, we have the Ward v. Maritz case,  
18 where it states that "Protection of the work product  
19 doctrine may be vitiated by the unprofessional or unethical  
20 behavior of an attorney or party."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25           Okay. The final motion is a motion to amend to

1 assert a verified counterclaim in this case.

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

4 THE COURT: That's okay.

5 MR. EGGERS: -- just a question --

6 THE COURT: Sure.

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

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

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

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

3 MR. EGGERS: Thank you, your Honor.

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

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

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

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

24 THE COURT: Okay. I do have a few.

25 Although you know something? Maybe I will ask

1 these questions after I hear from the opposition.

2 MR. SKOLNIK: Okay.

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

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

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

10 THE COURT: Okay.

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

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

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

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

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

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

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

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

25 THE COURT: Thank you.

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

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

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

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

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

23 MR. SKOLNIK: Jurisdiction over --

24 THE COURT: Federal jurisdiction.

25 MR. SKOLNIK: Well, it all comes under a

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

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

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

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

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

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

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

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

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

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

10 THE COURT: Just checking.

11 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 Now, bear with me one second.

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

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

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

19           Bear with me one second, please.

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

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

1 As I stated, the defendant Ross, the counterclaim of Ross  
2 claims that New Jersey law applies, and the briefs do go  
3 into the choice of law analysis, and it is the Court's, once  
4 again, inclination, but not decision, that New Jersey law  
5 would apply to these facts, given the fact that this case  
6 was transferred here on the grounds of both 1404(a) and  
7 1406, and there was a jurisdictional component, which I  
8 think affects the choice of law analysis. In addition,  
9 there are various factors that both states use an interest  
10 test, and if New York law were to apply, then these two  
11 claims would be futile. If New Jersey law applied, we would  
12 have the issue that I will get to.

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

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

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

7 Ross relies on the Paternoster v. Schuster case,  
8 296 N.J. Super 544 to support his claim that harassment is a  
9 viable cause of action in Jersey. However, in Dluhos v.  
10 Strasberg, which is at 2000 WL 1720272, and ultimately in  
11 the Third Circuit at 321 F.3d 365, Judge Lifland dismissed  
12 plaintiff's harassment claim pursuant to 12(b)(6) because  
13 "he declined to create a civil cause of action for  
14 harassment while New Jersey had declined to do so." While  
15 reversing on unrelated grounds, the Third Circuit affirmed  
16 and specifically adopted Judge Lifland's rationale in this  
17 area.

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

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

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

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

9 THE REPORTER: You're very welcome, Judge.

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

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

14 THE COURT: Thank you for the fine papers.

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

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

24 MR. SKOLNIK: Yes.

25 MR. EGGERS: Fine.

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Thank you, your Honor.

MR. SKOLNIK: Thank you, your Honor.

(The matter concluded.)