IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

HONORABLE STUART R. POLLAK

DEPARTMENT 8

BROWN & WILLIAMSON TOBACCO CORPORATION, A DELAWARE CORPORATION,

Plaintiff,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, A PUBLIC ENTITY, AND DOES 1 THROUGH 10,

Defendants.

No. 967298

THURSDAY, MAY 25, 1995

FOR THE PLAINTIFF:
BARBARA A. CAULFIELD
ATTORNEY AT LAW
LATHAM & WATKINS
505 MONTGOMERY STREET
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SAN FRANCISCO. CALIFORNIA 94111

FOR THE REGENTS OF THE UNIVERSITY OF CALIFORNIA:
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THE CLERK: BROWN & WILLIAMSON TOBACCO CORPORATION VERSUS REGENTS OF THE UNIVERSITY OF CALIFORNIA, 967298.

THE COURT: MAY I HAVE YOUR APPEARANCES FOR THE RECORD, PLEASE?

MS. CAULFIELD: BARBARA A. CAULFIELD, YOUR HONOR, FOR BROWN & WILLIAMSON.

MR. PATTI: CHRISTOPHER PATTI FOR THE UNIVERSITY OF CALIFORNIA.

THE COURT: OKAY. GOOD AFTERNOON. WELL, I SUPPOSE THE FIRST THING TO ENSURE WE ARE ALL CLEAR ON, IN VIEW OF THE FACT, I THINK, AS THE PAPERS HAVE GONE BACK AND FORTH, UP THROUGH A COUPLE OF LETTERS WHICH I RECEIVED FROM COUNSEL ONE DAY -- I CAN'T REMEMBER IF THE OTHER ONE WAS TODAY OR YESTERDAY -- WE WANT TO BE CLEAR ON EXACTLY WHAT THE APPLICATION OF BROWN & WILLIAMSON IS, WHICH IS BEING CONSIDERED. THERE IS A MOTION FROM THE UNIVERSITY TO -- PUT THAT TO ONE SIDE. BUT, IN TERMS OF THE APPLICATION OF BROWN & WILLIAMSON, PERHAPS, MS. CAULFIELD, YOU SHOULD STATE IT, AT THIS POINT, SO WE'RE ALL CLEAR EXACTLY WHAT IT IS YOU ARE REQUESTING OF THE COURT THIS AFTERNOON.

MS. CAULFIELD: THANK YOU, YOUR HONOR. BROWN & WILLIAMSON IS REQUESTING A WRIT OF POSSESSION FOR ALL OF THE COPIES IN THE UNIVERSITY'S POSSESSION, OR IN ANY OF THE EMPLOYEES' POSSESSION, OF DOCUMENTS THAT WERE STOLEN FROM BROWN & WILLIAMSON BY MERRILL WILLIAMS AND TRANSPORTED TO THE UNIVERSITY'S LIBRARY, AND OTHER PERSONS, ACCORDING TO

THE FACTS THAT WE HAVE STATED IN THE RECORD. IT NEVER OCCURRED TO BROWN & WILLIAMSON, YOUR HONOR, THAT THE UNIVERSITY WOULD WRITE A LETTER AND SAY THAT THE WRIT OF POSSESSION HAD NO EFFECT, UNLESS WE ALSO ASKED FOR AN INJUNCTION, BECAUSE THEY, AS A STATE AGENCY, DON'T HAVE TO POST A BOND GUARANTYING THE WRIT OF POSSESSION.

SO, IN LIGHT OF BEING INFORMED OF THAT, WE NOW REQUEST, FIRST, YOUR HONOR, THE WRIT OF POSSESSION; SECOND, THAT THE PROPERTY BE PLACED WITH THE RECEIVER, WHICH WE HAVE A RIGHT TO DO, UNDER THE LAW, IF WE FEEL THAT THE PROPERTY IS NOT GOING TO BE PROPERLY CARED FOR BY THE UNIVERSITY. IN OTHER WORDS, THERE MAY BE A FAILURE HERE TO PRESERVE THE IDENTITY AND CHARACTER OF THE PROPERTY. AND I THINK THAT IS A POSSIBLE ISSUE, BECAUSE OF THE UNIVERSITY'S LETTER. THIRD, IF A RECEIVER IS NOT APPOINTED, THEN WE WOULD ASK FOR A LIMITED PRELIMINARY INJUNCTION, WHICH PLACES THE DOCUMENTS IN THE STATUS QUO, THAT IS, THAT THE PRIVILEGE AND CONFIDENTIALITY AND WORK PRODUCT WILL BE PRESERVED, UNTIL SUCH TIME AS WE ARE ABLE TO GO TO A HEARING ON THE CONVERSION, WHICH WOULD BE THE NATURAL EVENT, AFTER THE WRIT OF POSSESSION IS RESOLVED. IF THE PARTIES CAN'T RESOLVE IT BETWEEN THEMSELVES AND YOUR HONOR, WE WOULD BE READY, SINCE WE HAVE DONE DISCOVERY IN THIS CASE, TO BEGIN THE CONVERSION HEARING AS SOON AS TOMORROW, OR ANY DATE THE COURT WOULD SET IT, IF THERE IS ANY PREJUDICE AT ALL TO THE UNIVERSITY.

THAT'S WHAT BROWN & WILLIAMSON REQUESTS. WE DID NOT THINK THAT WE HAD TO ASK FOR PRELIMINARY INJUNCTION, AND THERE WAS AN UNDERSTANDING THAT IS WHAT IT IS. WE DID NOT

THINK THE UNIVERSITY WOULD REFUSE TO ABIDE BY A WRIT OF POSSESSION, AND ALSO REFUSE TO POST BOND.

THE COURT: WELL, I DON'T THINK THE UNIVERSITY IS ACTUALLY TAKING THE POSITION THEY WOULDN'T COMPLY WITH IT. BUT I THINK THEIR MOTION WAS THAT THE BOND REQUIREMENT WAS WAIVED UNDER THE STATUTE BECAUSE THEY ARE A PUBLIC BODY.

THAT DOESN'T MEAN THEY CAN DISREGARD THE ORDER; IT DOESN'T SAY THAT THEY HAVE TO POST THE BOND IN ORDER TO ACCOMPLISH WHAT PRIVATE PARTIES CAN ONLY DO BY POSTING A BOND. BUT, IN ANY EVENT, WE UNDERSTAND THIS. AT LEAST, I THINK THAT I UNDERSTAND WHAT THE APPLICATION IS.

BASICALLY, WHATEVER THE PRECISE FORM OF RELIEF IS, ALL THREE OF THOSE POSSIBILITIES THAT YOU MENTIONED ARE ALL BEING REQUESTED AS A FORM OF INTERLOCUTORY RELIEF, I TAKE IT. I MEAN, YOU ARE TALKING ABOUT THE WRIT OF POSSESSION WHICH IS A TERM THAT APPEARS IN A COUPLE OF PLACES IN THE CODE OF CIVIL PROCEDURE. THE SECTIONS WHICH YOU CITE, I TAKE IT YOU ARE REQUESTING THAT AS A FORM OF INTERLOCUTORY RELIEF, SUBJECT TO SOME FINAL DETERMINATION ON YOUR CLIENT'S RIGHTS.

MS. CAULFIELD: THAT'S CORRECT. YOUR HONOR, WE WOULD BE, OF COURSE, BE WILLING TO GO TO FULL-BLOWN HEARING ON THE TORT OF CONVERSION. WE ALSO DID BY THAT COMPLAINT, WITH THE REQUEST FOR A WRIT OF POSSESSION.

THE COURT: I THINK THAT IS PROBABLY CLEAR TO ME. MR. PATTI, DO YOU HAVE ANY QUESTIONS IN THAT REGARD?

MR. PATTI: WELL, I GUESS -- I KNOW NOW, GIVEN I NOW KNOW, FIVE MINUTES BEFORE THIS HEARING STARTED, WHAT

THEY'RE REQUESTING, BUT I DON'T UNDERSTAND THE SUGGESTION THAT IT COMES AS SOME SURPRISE TO BROWN & WILLIAMSON THAT THERE IS THIS COUNTER-BONDING PROVISION IN THE WRIT OF POSSESSION STATUTE.

THE COURT: LOOK, I REALLY DON'T THINK THAT IS THE ISSUE WE OUGHT TO GET OFF ON. I THINK THERE IS A MORE FUNDAMENTAL QUESTION HERE THAT HAS GOT TO BE RESOLVED. AND WE SHOULD ADDRESS THE QUESTION OF WHETHER THERE APPEARS TO BE, AT THIS POINT, A RIGHT ON THE PART OF BROWN & WILLIAMSON TO HAVE THE UNIVERSITY RETURN ALL COPIES OF THIS INFORMATION WHICH HAS COME INTO ITS POSSESSION. IF THE DETERMINATION IS THAT THERE IS A STRONG SHOWING THAT THEY MAY BE ENTITLED TO PREVAIL ON THE CLAIM FOR THAT FORM OF RELIEF, THEN WE CAN DEAL WITH PRECISELY WHAT THE APPROPRIATE FORM OF INTERLOCUTORY RELIEF WOULD BE. ON THE OTHER HAND, IF THE DETERMINATION IS THAT THEY ARE NOT LIKELY TO PREVAIL IN THAT POSITION, THEN ALL THE REST OF IT ISN'T GOING TO MAKE MUCH DIFFERENCE.

MR. PATTI: WELL, THERE IS ONE THING, THOUGH. THE REASON THAT BROWN & WILLIAMSON ABANDONED ITS REQUEST FOR PRELIMINARY INJUNCTION, AND FOCUSED ON THE WRIT OF POSSESSION, IS BECAUSE THEY KNEW THAT AN INJUNCTION TO PREVENT US FROM DISSEMINATING INFORMATION HAS SEVERE FIRST AMENDMENT PROBLEMS; SO THAT WE ARE SHIFTING BACK TO THAT. I THINK IT SIGNIFICANTLY CHANGES THE FIRST AMENDMENT CALCULUS HERE, AND I THINK THAT NEEDS TO BE RECOGNIZED.

THE COURT: WELL, FRANKLY, I TEND TO THINK THE FIRST AMENDMENT ISSUES ARE HERE, NO MATTER WHAT FORM OF

RELIEF WE ARE TALKING ABOUT. BUT, BASICALLY THE QUESTION, I THINK, THAT IS PRESENTED IS WHETHER BROWN & WILLIAMSON IS ENTITLED TO REQUIRE THE RETURN OF ALL COPIES OF THIS INFORMATION, THESE DOCUMENTS. WE ARE NOT TALKING ABOUT A SITUATION WHERE THEY ARE SIMPLY REQUESTING THE RETURN OF THE ORIGINALS OF THE DOCUMENTS, OR OF ONE SET OF COPIES OF THE DOCUMENTS, LEAVING THE UNIVERSITY TO KEEP WITHIN ITS POSSESSION OTHER COPIES OF THE SAME DOCUMENTS. BUT THEY ARE SEEKING AN ORDER WHICH WOULD COMPEL THE RETURN OF ALL COPIES TRACEABLE TO THE SET THAT THE UNIVERSITY RECEIVED FROM MR. BUTTS, OR WHOEVER.

THAT'S THE QUESTION. AND I THINK WHATEVER PROCEDURAL CONTEXT YOU WANT TO PLACE THAT QUESTION INTO, THERE ARE FIRST AMENDMENT CONSIDERATIONS THAT HAVE TO BE TAKEN INTO ACCOUNT.

OKAY. I THINK WE UNDERSTAND WHAT WE'RE DEALING WITH, THE PAPERS WHICH YOU'VE ALL SUBMITTED. AND WE HAVE TWO SETS OF AMICUS BRIEFS. AND I CONSIDERED THOSE AS WELL, WHICH OBVIOUSLY DISCUSS A NUMBER OF ISSUES, OR A NUMBER OF QUESTIONS.

I SUPPOSE, AT THE OUTSET, I MIGHT MAKE A COUPLE OF THINGS CLEAR. THERE WAS A REQUEST MADE THAT THE COURT PERMIT SOME ORAL TESTIMONY THIS AFTERNOON AND, AS YOU FOLKS WERE ADVISED, I AM SURE I HAD INDICATED THAT I WAS NOT GOING TO PERMIT THAT. THE REASON IS SIMPLY THIS: IT SEEMS TO ME, FOR PRESENT PURPOSES, IT APPEARS TO BE CLEAR AND, IN ALL EVENTS, I AM CERTAINLY GOING TO BE ASSUMING THAT THE DOCUMENTS WHICH ARE IN THE POSSESSION OF THE UNIVERSITY AT

THIS TIME, IN FACT, ORIGINATED WITH THE PLAINTIFF, WITH BROWN & WILLIAMSON, AND THAT THEY WERE IN FACT DOCUMENTS THAT WERE REMOVED FROM THE POSSESSION OF BROWN & WILLIAMSON'S ATTORNEYS BY MR. WILLIAMS, AND THOSE DOCUMENTS REMOVED WITHOUT AUTHORITY BY MR. WILLIAMS, ARE THE SOURCE OF THE DOCUMENTS WHICH FOUND THEIR WAY INTO THE HANDS OF THE UNIVERSITY.

AND IT SEEMED TO ME THAT THE EVIDENCE THAT WAS OFFERED ALONG THOSE LINES, THE TESTIMONY THAT WAS SUGGESTED, WOULD SIMPLY HAVE GONE TO THAT POINT. AND I DON'T CONSIDER THAT TO BE A POINT IN DISPUTE, AT LEAST NOT FOR PURPOSES OF THE HEARING THIS AFTERNOON. AS I SAY, I AM ASSUMING THAT IS WHAT WE ARE DEALING WITH.

THE QUESTION IS: THOSE DOCUMENTS, HAVING BEEN REMOVED BY MR. WILLIAMS, WITHOUT AUTHORITY ONE WAY OR THE OTHER, FINDING THEIR WAY INTO THE HANDS OF THE UNIVERSITY, CAN THE UNIVERSITY NOW BE COMPELLED TO RETURN, NOT ONLY THE ORIGINALS OF WHAT THEY RECEIVED, BUT ALL COPIES? NOW, AS I SAY, THERE HAS BEEN A LOT OF ARGUMENT, AND I THINK WHAT I WOULD LIKE TO DO IS JUST GIVE YOU BOTH AN OPPORTUNITY, IF YOU WANT TO ADD ANYTHING TO YOUR ARGUMENT, TO EMPHASIZE ANYTHING. I THINK I'VE FOLLOWED YOUR ARGUMENTS AND I'VE READ A GOOD MANY OF THE CASES THAT HAVE BEEN CITED, AND I WOULD BE HAPPY GIVE YOU BOTH AN OPPORTUNITY TO SPEAK BRIEFLY TO THOSE QUESTIONS.

I SUPPOSE I SHOULD ASK THE PETITIONER, THE MOVING PARTY, FIRST.

MS. CAULFIELD: THANK YOU, YOUR HONOR. ON THE

ISSUE OF THE REACH OF THE FIRST AMENDMENT AND THE COPIES THAT THE UNIVERSITY HOLDS, THE FIRST ISSUE IS THAT, UNDER CALIFORNIA LAW, COHN VERSUS SUPERIOR COURT, AS WELL AS THE INTANGIBLE PROPERTY CASES WE CITED, THERE IS A RIGHT TO RETAIN THE PROPERTY OF PRIVILEGED DOCUMENTS, WHICH ARE THE PRIVILEGE THEMSELVES, AS AGAINST ALL PERSONS IN THE WORLD. AND THIS INCLUDES THE ATTORNEY-CLIENT PRIVILEGE, THE PHYSICIAN-PATIENT PRIVILEGE, THE PSYCHIATRIST-PATIENT PRIVILEGE. AND JUSTICE HARLAN, A LONG TIME AGO, SAID THAT HIGH-PROFILE CASES MADE BAD LAW, WITH ALL DUE RESPECT TO JUSTICE HARLAN, BECAUSE THE INTEREST GETS SKEWED, BECAUSE OF WHATEVER SIDE IS BEFORE THE COURT. AND IN THIS CASE A LOT HAS BEEN SAID IN MR. PATTI'S BRIEF THAT SOMEHOW THE INDUSTRY THAT IS CURRENTLY VILIFIED -- AND THIS IS ONE OF THE COMPANIES IN THAT INDUSTRY -- THAT THAT MAKES A DIFFERENCE IN HOW THIS CASE SHOULD TURN OUT ON A PRIVILEGE OR A PROPERTY ANALYSIS. AND, YOUR HONOR, NOTHING COULD BE FURTHER FROM THE TRUTH.

IN FACT, THERE IS A PROPERTY RIGHT IN PRIVILEGE. WE HAVE SHOWN THAT IN THE BRIEF.

AND, SECOND, THE FIRST AMENDMENT DOES NOT PREVENT ALL RETENTION OF DOCUMENTS, NOR DOES IT PREVENT OR ALLOW ACCESS TO ALL DOCUMENTS, REGARDLESS OF PRIVACY OR PRIVILEGE. AND IN THE SEATTLE TIMES VERSUS RHINEHART CASE, WHERE, IN 1984, THE UNITED STATES SUPREME COURT FACED AN ISSUE SIMILAR TO THIS, WHERE THE COURT HAD PUT A PROTECTIVE ORDER TO DOCUMENTS THAT HAD BEEN RECEIVED THAT WERE PRIVATE, THAT HAD BEEN RECEIVED, AND IN DISCOVERY, THE SEATTLE TIMES SOUGHT TO

PUBLISH THEM; THE SUPREME COURT OF THE UNITED STATES SAID THAT IT DOES NOT VIOLATE THE FIRST AMENDMENT TO PROHIBIT DISSEMINATION OF INFORMATION, IF IT IS GAINED BY OTHER MEANS THAT DOES NOT VIOLATE THE FIRST AMENDMENT.

IN THIS CASE, THE MEANS THAT THESE DOCUMENTS GOT TO THE UNIVERSITY OF CALIFORNIA WERE BY THEFT. AND PEOPLE CAN SAY, WITHOUT PERMISSION, MR. WILLIAMS TOOK THEM FROM BROWN & WILLIAMSON, BUT HE STOLE THEM. THEN HE DEMANDED TWO AND A HALF MILLION DOLLARS FOR THEM. AND THEN HE TOOK TWO HUNDRED THOUSAND, AND THEN THEY APPEARED IN PUBLIC. AND THAT IS ALL IN THE FACTS IN OUR CASE. THE UNIVERSITY HAS NO RIGHTS TO ACCESS TO LAWYERS' FILES, DOCUMENTS THAT BELONG TO BROWN & WILLIAMSON, THAT ARE PRIVILEGED, AND THAT ARE ATTORNEY WORK PRODUCT, BECAUSE THEY WERE STOLEN AND GOT THERE ILLEGALLY, AND ARE PROPERTY THAT IS PROTECTED BY THE LAW OF CONVERSION -- THE FIRST AMENDMENT DOES NOT REACH AND PROTECT THAT ISSUE. JUST AS IN THE SEATTLE TIMES VERSUS RHINEHART, THE PUBLIC POLICY OF THE PROTECTIVE ORDER THAT WAS ISSUED BY THE COURT WAS SAID NOT TO VIOLATE THE FIRST AMENDMENT RIGHTS OF A NEWSPAPER, THE SEATTLE TIMES, IN THIS CASE, THE UNIVERSITY PUTS ITSELF IN THE POSITION OF A NEWSPAPER, WHICH IS PLAINLY WRONG UNDER THE FIRST AMENDMENT, YOUR HONOR. IT IS TRUE THAT UNIVERSITY, PRIVATELY OWNED STUDENT NEWSPAPERS HAVE BEEN GIVEN THAT PROTECTION. BUT THE UNIVERSITY IS A STATE AGENCY, AND THE FIRST AMENDMENT WAS DEVELOPED, AT ITS BEGINNING, TO PROTECT PRIVATE CITIZENS FROM THE GOVERNMENT.

THIS IS A CASE WHERE A GOVERNMENT AGENCY SEEKS TO

RETAIN AND DISSEMINATE. IT IS NOT CASE WHERE A NEWSPAPER, WHICH HAS ALL OF THE PROTECTIONS, SEEKS TO GET INFORMATION AND PUBLISH IT. AND MR. PATTY SAYS THIS IS A PENTAGON PAPERS CASE, AND IT IS IS NOT, YOUR HONOR, BECAUSE THE PARTIES ARE NOT IN THE SAME POSITION AS THE PENTAGON PAPERS CASE, WHERE IT WAS THE GOVERNMENT THAT SOUGHT TO KEEP SOMETHING SECRET FROM ITS OWN PUBLIC. AND HERE THE ANALYSIS UNDER THE FIRST AMENDMENT, IF YOU READ THE CASES SINCE THE NEW YORK TIMES CASE, WHICH IS ALSO KNOWN AS THE PENTAGON PAPERS CASE, REALLY HAVE GONE IN THAT DIRECTION. PELL VERSUS PROCUNIER SAYS THAT YOU CAN'T GET ACCESS TO PRICE AND POLICY ABOUT JOURNALISTS TO PERSONS WHO ARE CONVICTED UNDER THE FIRST AMENDMENT, BECAUSE ACCESS IS NOT THE QUESTION. DISSEMINATING MAY BE THE QUESTION, BUT ACCESS IS NOT. SEATTLE TIMES SAYS THE SAME THING. SEATTLE TIMES, AS A NEWSPAPER, GOT ACCESS TO THE DOCUMENTS THAT --

THE COURT: SEATTLE TIMES WAS REALLY A VERY DIFFERENT CASE, WASN'T IT? THAT CASE WAS DEALING WITH WHETHER OR NOT A PROTECTIVE ORDER COULD BE PLACED IN AN ORDER BY WHICH THE COURT COMPELLED THE PRODUCTION, IN THE FIRST PLACE.

MS. CAULFIELD: YES, YOUR HONOR. AND --

THE COURT: AND THE COURT THERE, NOT SURPRISINGLY, HELD THAT WHEN THE COURT ORDERS A PARTY TO DISCLOSE OTHERWISE CONFIDENTIAL DOCUMENTS, IT MAY IMPOSE PROTECTIVE PROVISIONS, SO THAT THAT INFORMATION GETS USED ONLY IN THE CONTEXT OF LITIGATION, AND NOT OUTSIDE LITIGATION. THAT IS NOT A VERY SURPRISING PROPOSITION, AND

IT IS CERTAINLY VERY DIFFERENT FROM WHAT WERE TALKING ABOUT HERE.

MS. CAULFIELD: WELL, THE COURT KNOWS THAT THE FIRST AMENDMENT, EVEN AS AGAINST A NEWSPAPER, WHEN THERE IS A PUBLIC POLICY INVOLVED, AND AN INDEPENDENT STATUTE, AND THE PROTECTIVE ORDER CAME FROM THE POWER OF THE COURT, FROM AN INDEPENDENT STATUTE, HAS A RIGHT TO BE PUT INTO EFFECT AGAINST A CLAIM OF A FIRST AMENDMENT AS LONG AS IT IS NOT A PRIOR RESTRAINT, OR AS LONG AS IT IS NOT PURPOSEFUL TO CONTROL SPEECH AND TO CONTROL THE CONTENT OF SPEECH.

THAT IS THE OVERALL PRINCIPLE OF SEATTLE TIMES. HERE, YOUR HONOR, WE ARE SAYING THAT ACCESS WAS RECEIVED BY THEFT. SOMEONE ACCIDENTALLY GOT THE DOCUMENTS. WE ARE A PRIVATE PARTY SEEKING TO PURSUE OUR RIGHTS, UNDER THE INDEPENDENT STATE STATUTE ALLOWING FOR RETURN OF CONVERTED OR STOLEN PROPERTY. AND, AS SUCH, THERE IS NO EFFECT ON THE FIRST AMENDMENT BY THE EXISTENCE OF THE STATUTE, JUST LIKE THERE WAS NO EFFECT ON THE FIRST AMENDMENT BY THE EXISTENCE OF THE STATUTE, AND IT HAD TO BE EVALUATED UNDER THE CIRCUMSTANCES THAT THE COURT ANALYZED THERE.

BUT HERE, IF THERE IS NO PROTECTION UNDER CONVERSION FOR THIS FACT SITUATION, YOUR HONOR, THEN WHAT WOULD HAPPEN IS ANYBODY THAT RECEIVED A PSYCHIATRIST'S PRIVATE RECORD OF A PRIVATE CITIZEN, AND PUT OUT A DISK, AND PUT IT IN THE UNIVERSITY'S LIBRARY, WOULD NOT BE ABLE TO PROTECT THAT INFORMATION. NOW, IT IS TRUE WE ARE A CORPORATION, BUT WE HAVE THE SAME RIGHTS AS A PRIVATE CITIZEN, IN TERMS OF PRIVILEGED DOCUMENTS. AND THAT'S WHAT

THE PSC GEOTHERMAL CASE IS ABOUT, WHICH IS A CALIFORNIA CASE, FROM 1994.

IF WE CHANGE THE FACTS TO TAKE IT OUT OF HIGH PROFILE, REALLY, AND MAKE IT ELLEN BROWN, WHOSE PSYCHIATRIST'S RECORDS WERE STOLEN FROM HER PSYCHIATRIST'S OFFICE, AND GIVEN TO A LIBRARY, A PUBLIC UNIVERSITY, STATE OWNED LIBRARY IN THIS STATE, SHE WOULD NOT BE ABLE TO GET THOSE DOCUMENTS BACK IF SOMEBODY SAID THERE WAS A FIRST AMENDMENT INTEREST IN HER PSYCHIATRIC RECORDS. AND IT IS THE SAME PRIVILEGE, YOUR HONOR. IT IS THE ATTORNEY-CLIENT PRIVILEGE AND IT IS THE WORK PRODUCT PRIVILEGE. THERE IS TWO INVOLVED, BUT IT IS THE SAME PRINCIPLE. IF THE FIRST AMENDMENT CONCERNS RETURN OF ALL COPIES OF THESE DOCUMENTS, THEN THERE IS NO PRIVILEGE AS SOON AS SOMEBODY STEALS IT AND PUTS IT IN THE LIBRARY. AND, AS WE'VE SAID IN OUR BRIEF, THAT IS THE PUBLIC POLICY AT ISSUE HERE, JUST AS IN THE SEATTLE TIMES, THE PUBLIC POLICY WAS, IF YOU MAKE SOMEBODY TURN OVER CONFIDENTIAL INFORMATION, YOU HAVE A RIGHT AS A COURT TO SAY IT IS PROTECTED AND IT CAN'T BE MADE PUBLIC.

HERE, UNDER CONVERSION, WE HAVE A RIGHT TO GET STOLEN PROPERTY BACK. EVEN IF IT IS INTANGIBLE INFORMATION, IT IS PROTECTED BY PRIVILEGE.

THE COURT: BUT THE COURT IN THE SEATTLE TIMES CASE, IT SEEMS TO ME, WENT TO LENGTH TO POINT OUT THE DISTINCTION OF WHAT YOU ARE TALKING ABOUT HERE AND WHAT WAS INVOLVED THERE. JUST READING ONE PLACE IN THAT OPINION, THE COURT STATED THAT THE PARTY "MAY DISSEMINATE THE IDENTICAL INFORMATION COVERED BY THE PROTECTIVE ORDER AS LONG AS THE

INFORMATION IS GAINED THROUGH MEANS INDEPENDENT OF THE COURT'S PROCESSES". AND, IF ANYTHING IS CLEAR, IT IS THAT THE INFORMATION IN THIS CASE CERTAINLY CAME INTO THE HANDS OF THE UNIVERSITY, INDEPENDENT OF THE COURT'S PROCESSES.

THAT IS YOUR WHOLE POINT.

MS. CAULFIELD: WELL, YOUR HONOR IF I COULD, I THINK THE WAY THE ANALOGY WORKS, IF I COULD EXPLAIN MY THINKING, WAS IN THIS CASE IT WOULD BE THAT THE INFORMATION CAME INTO THE UNIVERSITY'S HANDS, INDEPENDENT OF THE THEFT AND CONVERSION. AND THAT'S WHAT'S NOT HERE. AND CONVERSION IS THE INDEPENDENT STATUTE, JUST AS THE PROTECTIVE ORDER WAS THE INDEPENDENT STATUTE.

THE COURT: BUT THAT IS WHAT WAS INVOLVED WITH THE OTHER CASES THAT YOU WERE TALKING ABOUT. THE ABC CASE --

MS. CAULFIELD: FMC.

THE COURT: FMC WAS THE NAME OF THE CASE. ABC WAS THE MEDIA THAT HAD WHAT IN THAT CASE WAS STOLEN COMMERCIAL INFORMATION DOCUMENTS IN THEIR POSSESSION. AND WHILE, AS YOU EMPHASIZE IN YOUR BRIEF THE COURT THERE REQUIRED THE ABC AFFILIATE, I THINK IT WAS, TO RETURN TO THE COMPANY FROM WHICH THE INFORMATION WAS STOLEN, THE ORIGINAL, OR A COPY OF THE INFORMATION, BECAUSE IN THAT CASE THE COMPANY DIDN'T EVEN HAVE A SET LEFT FOR THEMSELVES, THE COURT NONETHELESS EXPLICITLY REFUSED TO REQUIRE ABC TO DELIVER BACK ALL THE COPIES THAT IT HAD, OR TO PROHIBIT IT FROM USING THAT INFORMATION.

THE COURT SAID, SURE, THAT THE COMPANY WAS ENTITLED TO GET A SET OF THEIR OWN INFORMATION BACK. AND ABC

COULDN'T REFUSE THAT. BUT THE COURT WAS NOT GOING TO PROHIBIT ABC FROM USING THAT INFORMATION, EVEN THOUGH, AS IN THIS CASE, IT WAS STOLEN AND EVEN THOUGH, IN THAT CASE, IT WAS INFORMATION THAT APPARENTLY HAD AN ONGOING COMMERCIAL SIGNIFICANCE.

MS. CAULFIELD: WELL, YOUR HONOR, THERE IS TWO DIFFERENCES. ONE IS THAT THE INFORMATION IN FMC WAS CLEARLY NOT PRIVILEGED, ATTORNEY-CLIENT OR WORK PRODUCT. IT WAS CONFIDENTIAL BUSINESS INFORMATION, NOT EVEN TRADEMARK, BUT CONFIDENTIAL BUSINESS INFORMATION THAT WAS IMPORTANT TO THE COURT. THIS CASE IS A STEP HIGHER IN THE PRIVACY RIGHTS THAT ARE SOUGHT TO BE PROTECTED BY BROWN & WILLIAMSON, BECAUSE IT IS BOTH ATTORNEY-CLIENT AND WORK PRODUCT. AND WORK PRODUCT, YOUR HONOR, IS PURELY WORK THAT HAS BEEN DONE BY ATTORNEYS OF RECORD FOR THE PURPOSES OF LITIGATION. AND THAT ALSO WAS STOLEN. THAT WAS NOT IN THE FMC CASE.

SO OUR POSITION IS FMC IS RIGHT, AS FAR AS IT GOES. BUT WHEN YOU ADD PRIVILEGE AND WHEN YOU ADD ON WORK PRODUCT TO THE MIX, THEN YOU GET ALL OF THE COPIES BACK. BECAUSE IF YOU DON'T GET ALL THE COPIES BACK, THERE ISN'T A PRIVILEGE AND THERE ISN'T WORK PRODUCT. AND, YOUR HONOR, IF I MAY POINT OUT, MARIN INDEPENDENT JOURNAL VERSUS MUNICIPAL COURT, WHICH WE ALSO CITED, WHERE THE COURT ORDERED THE NEWSPAPER TO RETURN THE PHOTOGRAPHS WHICH THEY WERE PROHIBITED UNDER THE COURT RULES FROM RECEIVING, AND THEY WANTED TO PUBLISH THEM, AND THE MARIN INDEPENDENT JOURNAL SAID YOU RECEIVED THEM IN VIOLATION OF COURT RULES, YOU MUST RETURN THEM.

AND HERE, INSTEAD OF A COURT RULE, WE HAVE THE RIGHT TO PRIVILEGE UNDER THE STATUTE, AND GET THE COPIES BACK UNDER A WRIT OF POSSESSION, BECAUSE THIS IS A VIOLATION OF THE CONVERSION STATUTE, WHICH WE ARE PRESENTING TO YOUR HONOR UNDER A WRIT OF POSSESSION ANALYSIS. AND BECAUSE IT IS AN INDEPENDENT STATUTE, WE HAVE THE RIGHT TO SYNDICATE OUR PRIVACY RIGHTS UNDER THAT STATUTE, AS AGAINST A CLAIM BY THE UNIVERSITY OF THE RIGHT TO DISSEMINATE BECAUSE THEY'RE PRIVILEGED AND WORK PRODUCT.

ALSO, YOUR HONOR, WE DID SAY IN OUR BRIEFS, AND WE STAND BY THIS POSITION, THE UNIVERSITY IS NOT A NEWSPAPER. THEY ARE A LIBRARY, AND THEY ARE NOT IN THE BUSINESS, UNDER THE FIRST AMENDMENT, OF ESTABLISHING PUBLIC ISSUES, OR THEY ARE NOT DESERVING. AND THEY ARE A STATE AGENCY. THEY DON'T HAVE THE SAME FIRST AMENDMENT RIGHTS, EVEN AS THE MARIN INDEPENDENT JOURNAL OR ABC. AND THAT IS SOMETHING THAT IS AN IMPORTANT ISSUE.

THE COURT: VERY FRANKLY, I HAVE TROUBLE WITH THAT PROPOSITION, ALSO. THEY ARE CERTAINLY DIFFERENT FROM THE MEDIA; BUT, IN TERMS OF THE NATURE OF THE FIRST AMENDMENT INTERESTS THAT ARE INVOLVED, IT SEEMS TO ME THAT, IN MANY CASES, THEY ARE AS GREAT, IF NOT GREATER. I DON'T THINK THAT ANY OF THE CASES THAT YOU CITE REALLY CAN BE STRETCHED TO SAY THAT BECAUSE THIS IS A PUBLIC INSTITUTION, IT DOESN'T HAVE ANY FIRST AMENDMENT RIGHTS.

THE CASE THAT YOU REALLY RELY UPON, WITHOUT GETTING INTO THE DETAILS, I THINK IS DEALING WITH SOMETHING VERY, VERY DIFFERENT THAN DEALING WITH THE RADIO LICENSE.

BUT I THINK, IN TERMS OF THE INTERESTS UNDERLYING THE FIRST AMENDMENT, THE INTERCHANGE OF IDEAS, AND SO FORTH, THIS IS AN ACADEMIC CENTER, AN INTEREST IN ACADEMIC FREEDOM, IF NOT FREEDOM OF THE PRESS.

AFTER ALL, WHAT THE RESULT OF WHAT YOU ARE ASKING WOULD BE -- WOULD BE, TO THE EXTENT IT WAS SUCCESSFUL, TO THE EXTENT IT IS DOABLE AT ALL, IN VIEW OF WHERE THINGS STAND AT THE MOMENT, WOULD BE TO SUPPRESS INFORMATION AND TO PREVENT INFORMATION FROM BEING USED IN A PUBLIC DIALOGUE IN VARIOUS WAYS. AND IT SEEMS TO ME THOSE ARE EXACTLY THE FIRST AMENDMENT INTERESTS THAT WE ARE CONCERNED WITH. AND, SURE, THE UNIVERSITY ISN'T A NEWSPAPER, BUT IT'S THE SAME UNDERLYING CONCERN, I THINK, THAT WE HAVE TO BE DEALING WITH.

MS. CAULFIELD: IT IS THE SAME UNDERLYING CONCERN, YOUR HONOR, IF THE STATUTE IS DESIGNED, EITHER ON A CONTENT BASIS OR ON AN EFFECT BASIS, TO AFFECT FIRST AMENDMENT RIGHTS. BUT AS WE SAID, THE FIRST AMENDMENT IS ONE OF OUR MOST IMPORTANT FUNDAMENTAL RIGHTS. BUT IT DOESN'T ALLOW PRIVATE CITIZENS OR NEWSPAPERS TO CANCEL OUT THEIR OBLIGATION TO FOLLOW OTHER LAWS. AND THAT'S WHAT THE CONVERSION LAW IS ABOUT.

THE COURT: BUT THE UNIVERSITY -- IT SEEMS TO ME IT IS VERY IMPORTANT TO KEEP IN MIND NOBODY IS SUGGESTING THAT THE UNIVERSITY HAD ANYTHING TO DO WITH THE REMOVAL OF THIS INFORMATION, IN THE FIRST PLACE. THIS IS NOT AN ACTION HERE WHERE BROWN & WILLIAMSON IS SEEKING REDRESS AGAINST MR. WILLIAMS, WHO APPARENTLY WALKED OFF WITH THESE DOCUMENTS.

IT SEEMS TO ME IT IS QUITE DIFFERENT. IT MAY WELL BE THAT BROWN & WILLIAMSON HAS SOME REMEDIES AGAINST MR. WILLIAMS FOR WHAT HE DID. AND THAT DOESN'T MAKE THE UNIVERSITY A WRONGDOER.

MS. CAULFIELD: YOUR HONOR, THE RECEIPT AND HOLDING OF PROPERTY THAT IS STOLEN IS ALSO CONVERSION, BECAUSE IT IS THE POSSESSION THAT IS THE CONVERSION, NOT THE ACT OF THEFT.

THE COURT: YES, BUT THAT BEGS THE QUESTION. AND THE QUESTION IS, IF THEY ARE HOLDING THE ORIGINALS AND REFUSE TO GIVE THEM BACK, THAT'S ONE THING. THEY ARE VERY HAPPY TO GIVE THEM BACK TO YOU. WHAT WE ARE TALKING ABOUT IS WHETHER THEY ARE ENTITLED TO MAKE USE OF THIS INFORMATION, WHETHER THEY ARE ENTITLED TO KEEP COPIES, WHETHER THEY ARE ENTITLED TO -- YOU KNOW, WHETHER THEIR DOING SO DOES CONSTITUTE RETAINING SOMETHING WHICH CAN SUPPORT A CONVERSION, AND I MEAN THAT IS THE VERY QUESTION.

AND IT SEEMS TO ME THAT IS SOMEWHAT OF A CIRCULAR ARGUMENT. BECAUSE IF THERE IS NO RIGHT TO DO WHAT YOU ARE SEEKING TO DO, WHAT YOUR CLIENT IS SEEKING TO DO HERE, THEN CLEARLY THE UNIVERSITY IS NOT A WRONGDOER. ON THE OTHER HAND, IF YOU ARE ENTITLED TO WHAT YOU ARE AFTER, THEN I SUPPOSE, BY DEFINITION, IF THEY DON'T DO IT, THEY ARE DOING SOMETHING WRONG. BUT THAT IS THE VERY QUESTION.

MS. CAULFIELD: I MEAN IN OUR -- OUR ARGUMENT IS THAT CONVERSION OF INFORMATION, WHICH IS PRIVILEGED, CONFIDENTIAL AND WORK PRODUCT, LIKE A PSYCHIATRIST'S FILE, ALL COPIES OF THAT FILE IS THE INFORMATION THAT IS

PROTECTED, AND THAT'S WHAT IS PROTECTED IN THE CONVERSION.

YOUR HONOR'S POINT THAT WE ARE TRYING TO STOP DISSEMINATION, THERE ARE AT LEAST THREE COURTS IN OTHER CASES, YOUR HONOR, THAT ARE GOING TO REACH THIS ISSUE, THAT ARE GOING TO RESOLVE WHETHER THERE WILL BE PROTECTIVE ORDERS OR NO PROTECTIVE ORDERS, OR PRIVILEGE OR NOT. AND THERE IS GOING TO BE ACCESS, AS THOSE COURTS SEE FIT, UNDER A DUE PROCESS ANALYSIS. BUT WHAT HAS HAPPENED HERE IS THEFT HAS JUMPED AHEAD OF EVERY COURT THAT HAS THIS ISSUE BEFORE IT.

AND WE COME TO THIS COURT, AS AN EQUITY COURT, TO TRY TO SAY WE WOULD LIKE TO HAVE THE DAY IN COURT THAT IS ALLOWED UNDER THE PRIVILEGE LAWS WITHOUT HAVING THEFT TAKE AWAY THE PRIVILEGE. BECAUSE IN THE INFORMATION SUPERHIGHWAY, YOUR HONOR, ONCE THIS DOCUMENT IS STOLEN, IT GOES ON THE INTERNET. THERE ISN'T A PRIVILEGE THAT EXISTS. IT MAY EXIST IN A COURT OF LAW, LATER DOWN THE ROAD, BUT THE WAY THE PRIVILEGE WAS DESIGNED, FOR A PSYCHIATRIST OR PHYSICIAN OR AN ATTORNEY, IT DISAPPEARS ON THE INTERNET. AND THAT IS WHAT THE UNIVERSITY HAS SAID THEY WANT TO DO WITH THE DOCUMENT; NOT RESERVE THEM, YOUR HONOR, PUT THEM ON THE INTERNET.

THE COURT: WELL, THAT'S RIGHT. BUT THAT IS NOT FOR THEIR OWN COMMERCIAL ADVANTAGE, BUT TO MAKE THEM AVAILABLE FOR WHOEVER WISHES TO MAKE USE OF THE INFORMATION IN A WHOLE VARIETY OF WAYS, WAYS THAT MAY AFFECT LITIGATION, WHICH MAY WELL BE WHAT YOUR CLIENT IS MOST CONCERNED WITH, BUT MAY ALSO AFFECT THE PUBLIC DEBATE. IT MAY ALSO AFFECT LEGISLATION, EITHER STATE OR FEDERAL -- HAS RAMIFICATIONS IN

A WHOLE VARIETY OF CONTEXTS. IF IT IS PUT OUT ON THE INTERNET, IT IS OUT THERE FOR PEOPLE TO USE IN ANY OR ALL OF THOSE FILES. IF THE COURT GRANTS WHAT YOU ARE REQUESTING, AND IF THE COURT ORDER THAT YOU ARE REQUESTING COULD EVER BE SUCCESSFUL AT THIS POINT IN THE GAME, ALL OF THAT WOULD BE PREVENTED.

BUT LET ME ASK THIS QUESTION. ISN'T IT FAIR TO SAY THAT THESE THREE COURTS, OR THREE COURTS, AT LEAST, THAT HAVE THUS FAR BEEN ASKED TO DO ESSENTIALLY WHAT YOU ARE ASKING HERE -- AROSE FROM SLIGHTLY DIFFERENT PROCEDURAL CONTEXT IN EACH OF THE THREE -- BUT ISN'T IT FAIR TO SAY THAT A SIMILAR REQUEST, THAT HAS ALREADY BEEN MADE TO THREE DIFFERENT COURTS AROUND THE COUNTRY, AND THUS FAR ALL THREE OF THEM HAVE TURNED IT DOWN?

MS. CAULFIELD: NO, YOUR HONOR. THAT IS NOT CORRECT. JUDGE COLTON, IN FLORIDA, RULED THAT OF A NUMBER OF DOCUMENTS, SOMETHING LIKE 4,000, THAT THEY COULD NOT BE DISSEMINATED, EXCEPT FOR THE 300 THAT THE ATTORNEY FILED IN A COURT RECORD IN FLORIDA. BUT HE DID FORBID THE DISSEMINATION ANY FURTHER AND CALLED THE FILING OF THE DOCUMENT IN AN OPEN COURT RECORD IN FLORIDA A RUSE. A RUSE.

THE COURT: THAT'S RIGHT. BUT THAT FLORIDA OPINION SEEMED TO DRAW A VERY HELPFUL DISTINCTION. AS I RECALL, THE COURT MADE CLEAR THAT IT WAS NOT RULING, AND IN DUE COURSE MIGHT RULE ON THE ADMISSIBILITY OF ANY OF THESE DOCUMENTS INTO EVIDENCE IN ANY TRIAL IN WHICH THEY MIGHT BE

WOULD BE EXCLUDED FROM EVIDENCE. BUT HAVING RECOGNIZED THAT, THE COURT DECLINED TO GO FURTHER AND ENTER AN ORDER THAT WOULD HAVE REQUIRED THE RETURN OF THE DOCUMENTS OR PROHIBITED, YOU KNOW, ANY DISSEMINATION OR -- TYPE OF RELIEF THAT YOU ARE FOR RIGHT HERE.

MS. CAULFIELD: WELL, YOUR HONOR, MAY I JUST READ FROM JUDGE COLTON'S ORDER, BECAUSE I THINK THIS CAN CLARIFY. THAT IS TRUE, ABOUT THREE HUNDRED DOCUMENTS THAT WERE PLACED IN THE COURT'S RECORD, AND THE COURT SAYS THAT IS A RUSE. BUT ON PAGE 3, WHICH IS EXHIBIT D TO OUR BRIEF -- AND I COULD HAND IT UP TO YOUR HONOR, THROUGH THE CLERK, IF YOU WOULD LIKE. I CAN SHOW YOU THE DIRECT QUOTE.

THE COURT: IT IS HERE IN THE FILE. BUT IF YOU HAVE --

MS. CAULFIELD: THE COURT SAYS, "AS TO THE REMAINING 3,200 OR SO ALLEGEDLY PRIVILEGED, OR WORK PRODUCT DOCUMENTS, THE COURT ORDERS PLAINTIFFS TO NOT FURTHER DISSEMINATED THESE DOCUMENTS OR TO PLACE THEM IN THE COURT FILE WITHOUT FIRST PRESENTING THEM TO THE COURT IN CAMERA, WITH APPROPRIATE NOTICE TO BMW OF ANY REQUESTED COURT TO ENSURE THAT DUE PROCESS OF LAW IS AFFORDED TO ALL PARTIES." SORRY, YOUR HONOR. I WAS READING, NOT HANDING UP, BECAUSE IT IS MY ONLY COPY. SO --

THE COURT: LET ME SEE. I --

MS. CAULFIELD: IT --

THE COURT: THIS IS EXHIBIT D. LET ME GIVE YOU BACK YOURS. I HAVE THE SAME THING HERE. THERE WE GO.

MS. CAULFIELD: IT IS PAGE 3.

THE COURT: I'VE GOT IT.

MS. CAULFIELD: LINE 7. SO WHAT THE -- WHAT JUDGE COLTON DID WAS -- ACTUALLY DO, HE DID NOT HAVE A CONVERSION ACTION BEFORE HIM. HE HAD A REQUEST TO SUPPORT THE PRIVILEGE, AND PRESERVE THE PRIVILEGE IN 4,000 DOCUMENTS. AND SO AS TO 3,200 THAT WERE NOT PUT IN, UNDER A RUSE, AS HE CALLS IT, INTO THE PUBLIC RECORD BY PLAINTIFF'S COUNSEL, MR. MONTGOMERY, HE SAID, "YOU'LL NOT DISSEMINATE AND YOU'LL BRING THEM TO COURT FOR AN IN CAMERA INSPECTION."

THE COURT: THAT'S CORRECT. THAT IS WHAT HE DID, ALTHOUGH A LITTLE EARLIER IN THE ORDER, WITH RESPECT TO THE OVER 800 STOLEN DOCUMENTS THAT HAD BEEN FILED, HE MADE THE OBSERVATION THAT THE PUBLIC AND PRESS CANNOT BE DENIED ACCESS TO INFORMATION WHICH IS ALREADY WITHIN THE PUBLIC DOMAIN, AND ON THAT BASIS, DENIED THE MOTION TO SEAL THOSE DOCUMENTS.

MS. CAULFIELD: AND THAT WAS JUST TO THE 800, YOUR HONOR. AND WE'RE TALKING ABOUT 4,000 ADDITIONAL PIECES OF PROPERTY THAT WE WOULD SUBMIT IS THE SAME AS THE 3,200 ADDITIONAL PIECES OF PROPERTY THAT JUDGE COLTON SAID SHOULD BE NOT DISSEMINATED. NOW, YOUR HONOR, ALSO THERE -- THERE IS A DIFFERENCE. THEY HAVE A SPECIAL SUNSHINE STATUTE THAT SAYS, ONCE SOMETHING IS FILED, IT CANNOT BE SEALED BY COURT ORDER, IF IT HAS TO DO WITH HEALTH AND PUBLIC SAFETY ISSUES. SO IT IS NOT IN JUDGE COLTON'S ORDER, BUT IS A PARTICLE LAW IN FLORIDA, AND WE DO NOT HAVE THAT LAW IN CALIFORNIA, AS FAR AS SEALING OF COURT RECORDS IS CONCERNED. BUT THE 3,200 PAGES, HE CLEARLY PRESERVED AN ORDER, AND SAID THEY SHOULD

NOT BE DISSEMINATED, UNDER HIS POWERS TO SUPERVISE THE CASE, WHICH IS WHAT THE COURT WAS ALSO DOING IN COHN VERSUS SUPERIOR COURT, THE LAW THAT WE ALSO RELY ON HERE IN CALIFORNIA, AND WE ARE HERE ASKING, UNDER THE COURT'S JURISDICTION, UNDER A CONVERSION THEORY, WHERE POSSESSION IS AN ISSUE, AND WHAT SHOULD BE DONE ABOUT POSSESSION.

THE COURT: IT DOES SEEM TO ME THERE ARE SOME DIFFERENCES. YOU'RE DEALING THERE WITH PARTIES WHO ARE INVOLVED IN LITIGATION BEFORE THE COURT, BUT, IN ADDITION TO THAT, IN ADDITION TO THAT, I MEAN, QUERY. YOU SEE, THE COURT HERE POINTS OUT THAT THOSE 800 DOCUMENTS THAT THEY REFUSED TO SEAL HAD BEEN PART OF THE PUBLIC DOMAIN, BEFORE THEY WERE FILED IN THE COURT. THAT'S NOT ENTIRELY CLEAR IN OUR RECORD, AS TO WHAT EXTENT THESE DOCUMENTS HAVEN'T ALREADY BEEN DISPERSED FAIRLY WIDELY.

MS. CAULFIELD: YOUR HONOR, JUDGE COLTON RULED ON APRIL 27, 1995. THAT WAS LESS THAN A MONTH AGO.

THE COURT: RIGHT.

MS. CAULFIELD: AND, YOU KNOW, HE SAID THAT WHERE DOCUMENTS SUCH AS THESE ARE NOT ONLY FACIALLY PRIVILEGED, BUT ALSO KNOWN TO HAVE BEEN BEEN SIGNED UNDER SUSPICIOUS OR ILLEGAL CIRCUMSTANCES, THEY SHOULD BE PRESENTED TO THE COURT FOR A RULING. AND WHY WE'RE HERE, WE ARE HERE BECAUSE WE DON'T HAVE A PENDING CASE, BECAUSE NO ONE SUED US HERE IN CALIFORNIA, BECAUSE WE WOULD BE HERE IN CALIFORNIA, ASKING FOR A JUDGE COLTON TYPE OF RULING. BUT PEOPLE, PURPOSEFULLY OR BY ACCIDENT, GOT DOCUMENTS INTO CALIFORNIA WHERE THERE WAS NO PENDING CASE. AND WE MUST TRY TO GET OUR LEGAL

RIGHTS JUSTIFIED UNDER A WRIT OF CONVERSION, AND THAT'S WHY WE HAD TO BRING IN THE PEOPLE WHO HAD POSSESSION OF THE DOCUMENTS, WHICH WAS THE UNIVERSITY.

AND IT DOESN'T CHANGE THE ANALYSIS OF THE PRIVILEGE, OR WHETHER THINGS SHOULD BE DISSEMINATED OR NOT, WITHOUT DUE PROCESS. IT SIMPLY CHANGED THE PARTIES. AND, YOUR HONOR, THERE IS SOME INFERENCE IN THIS CASE THAT PEOPLE MAY HAVE CHOSEN THE UNIVERSITY AS A DEPOSITORY, TO RAISE THIS ISSUE IN THIS WAY. BECAUSE THE COURTS, IF PEOPLE WERE PRESENT AND PARTIES BEFORE THE COURT, WOULD LOOK AT WHETHER THEY HAD GOTTEN THESE DOCUMENTS LEGITIMATELY IN DISCOVERY, AND WHAT THE PRIVILEGE WAS. AND THE UNIVERSITY'S POSITION IS THAT THE PRIVILEGE DOESN'T MATTER, BECAUSE WE HAVE A RIGHT TO DISSEMINATE DOCUMENTS EVEN IF THEY ARE STOLEN OR PRIVILEGED, IF WE SAY THEY ARE COMPELLING OR INTERESTING. THAT'S THEIR POSITION. AND THEY BELIEVE THE FIRST AMENDMEN SUPPORTS THEM IN THAT POSITION. AND, YOU KNOW, OUR ANALYSIS, YOUR HONOR, SAYS IF THAT IS THE POSITION, AND ANY ARE STOLEN DOCUMENTS, THAT IS OF CURRENT PUBLIC INTEREST, WITH THE WINDS OF INTEREST BEING WHAT THEY ARE, COULD BE SENT TO CALIFORNIA, TO ANY PUBLIC LIBRARY, AND NO ONE WOULD BE ABLE TO RECOVER THEM. THAT IS THE BOTTOM LINE FOR WHAT WOULD HAPPEN, IF THEY ARE PRIVILEGED, EVEN IF THEY ARE PRIVATE MEDICAL RECORDS. YOU CANNOT SUE TO GET THEM BACK, UNDER CONVERSION, IF SOMEONE SAYS I WANT TO PUT THEM ON THE INTERNET, IF IT IS A PRIVATE PARTY.

THE COURT: HOW DO THESE DOCUMENTS WE ARE TALKI ABOUT COMPARE WITH THE DOCUMENTS THAT WERE BEFORE THE

DISTRICT COURT IN WASHINGTON, THAT JUDGE GREEN WAS CONSIDERING IN THE APPLICATION BEFORE HIM?

MS. CAULFIELD: THE JUDGE GREEN DOCUMENTS WERE THE ONES THAT THE NEWSPAPERS HAD ACCESS TO. AND, YOUR HONOR, WE'VE NEVER SEEN THOSE, BECAUSE THE SUBPOENAS WERE NOT -- WE WERE NOT ALLOWED TO HAVE A LOOK AT THE DOCUMENTS THROUGH THE SUBPOENAS. WE ONLY KNOW WHAT WAS QUOTED IN THE NEWSPAPERS, AND WE'VE ACTUALLY GIVEN YOUR HONOR AN AFFIDAVIT SHOWING THE RELATIONSHIP BETWEEN THOSE DOCUMENTS. AND THERE ARE APPROXIMATELY, IN MR. CLEMENT'S DECLARATION, THERE ARE APPROXIMATELY 33 PAGES OF DOCUMENTS THAT WERE QUOTED, WITH PART OF QUOTES, NOT 4,000 TEXT PAGES, EACH PAGE BEING PROPERTY. SO, QUOTES, YES, WERE GIVEN IN THE NEWSPAPER UNDER THE FIRST AMENDMENT RIGHTS -- TOOK QUOTES AND HAD A COMMENT ABOUT THEM. AND WE ARE NOT QUARRELING ABOUT THAT IN THIS CASE. WHAT WE ARE ASKING BACK ARE OUR PROPERTY, WHICH IS 4,000 SEPARATE PAGES. AND THOSE 4,000 SEPARATE PAGES HAVE NOT BEEN QUOTED IN TEXT, IN THE NEWSPAPERS.

THE COURT: WELL, THERE THE DOCUMENTS HAD FOUND THEIR WAY INTO THE HANDS OF CONGRESS, AND BROWN & WILLIAMSON WAS TRYING TO GET THEM BACK, AND MAKING THE SAME ARGUMENT THAT YOU ARE MAKING HERE, THESE ARE STOLEN DOCUMENTS, WE'RE ENTITLED TO THEM BACK.

MS. CAULFIELD: YOUR HONOR, FIRST --

THE COURT: GO AHEAD.

MS. CAULFIELD: I WAS GOING TO SAY THAT THE FIRST ARGUMENT WAS THAT, WAS UNDER THE SPEECH AND DEBATE CLAUSE OF THE UNITED STATES CONSTITUTION, WHICH WAS A DIFFERENT

ANALYSIS. AND THAT IS ON APPEAL AND WAS ARGUED TWO WEEKS AGO BEFORE THE D.C. CIRCUIT AND THE CIRCUIT HASN'T RULED ON THAT ISSUE.

THE COURT: THE D.C. CIRCUIT COULD CONCEIVABLY DISAGREE WITH JUDGE GREEN. EVEN THOUGH THAT AROSE UNDER A DIFFERENT PROVISION OF THE CONSTITUTION, THE ANALYSIS, IT WOULD SEEM TO ME TO BE VERY SIMILAR. JUDGE GREEN, IN RATHER ELOQUENT LANGUAGE, POINTED OUT THAT THE MERE FACT, NOT THE MERE FACT, BUT THE FACT THAT THEY WERE STOLEN DOCUMENTS WAS NOT SUFFICIENT TO OVERRIDE OTHER COMPELLING PUBLIC INTERESTS THAT EXISTED IN THE STUDY OF THOSE DOCUMENTS.

I ATTEMPTED TO READ FROM HIS OPINION, BUT I'M SURE YOU HAVE, AND YOU ARE FAMILIAR WITH IT. BUT BASICALLY THAT IS WHAT HE WAS SAYING.

THE FACT THAT THEY ARE STOLEN DOESN'T END THE ANALYSIS. YOU HAVE TO LOOK AT MORE THAN THAT. AND IN THIS PARTICULAR SITUATION, EVEN ON THE ASSUMPTION THAT THEY ARE STOLEN, PRIVILEGED DOCUMENTS, THERE IS SUCH AN OVERWHELMING PUBLIC INTEREST IN THOSE DOCUMENTS, THAT THAT INTEREST OVERRODE THE PURELY PRIVATE CLAIM TO GET THOSE DOCUMENTS RETURNED. I MEAN, IF THE COURT OF APPEAL IN WASHINGTON SHOULD UPHOLD JUDGE GREEN'S REASONING, DON'T YOU THINK THAT WOULD GO A LONG WAY TO -- WOULDN'T THAT REASONING APPLY HERE AS WELL?

MS. CAULFIELD: WELL, IN THAT CASE, AGAIN, IT WAS THE SPEECH AND DEBATE CLAUSE, AS AGAINST A MOTION TO DEPOSE MEMBERS OF CONGRESS. AND IN THIS CASE, IT IS A -- WE SEEK TO RETURN PROPERTY UNDER A CONVERSION THEORY AND A WRIT OF

POSSESSION FROM AN INSTITUTION THAT IS NOT PROTECTED BY THE SPEECH AND DEBATE CLAUSE.

I REALLY THINK THERE IS A DIFFERENT CONSTITUTIONAL ANALYSIS THAT GOES INTO IT WHEN YOU BALANCE -- IS THE FIRST AMENDMENT IMPERMISSIBLY AFFECTED BY SOMEBODY SEEKING TO RETURN STOLEN PROPERTY THAT IS PRIVILEGED? THE PROPERTY OF -- EACH AND EVERY COPY OF THOSE, VERSUS THE RIGHT OF CONGRESS TO DEBATE AND PUBLISH IN THE PUBLIC RECORD SOME DOCUMENT?

NOW, IF THE UNIVERSITY GETS DOCUMENTS OUT OF THE PUBLIC RECORD FROM THE CONGRESS OF THE UNITED STATES, THAT IS ONE THING, BECAUSE THAT'S A PUBLIC ACCESS RIGHT, BUT THAT IS NOT HOW THEY RECEIVED IT.

THE COURT: SUPPOSE THEY WANT TO GIVE THEM TO CONGRESS?

MS. CAULFIELD: THE UNIVERSITY WANTS TO GIVE THEM TO CONGRESS. WELL, YOUR HONOR, THAT IS ONE OF THE REASONS -- WHAT WE ARE HERE TO DO IS TRY TO EXERT OUR PROPERTY RIGHTS.

THE COURT: YOU ARE TRYING TO PREVENT; YOU ARE TRYING TO PREVENT. THEY WOULDN'T BE ABLE TO GIVE THEM TO THE CONGRESS OR THE PUBLIC, OR ANYBODY.

MS. CAULFIELD: WELL, YOUR HONOR, THERE IS A DISCOVERY PROCESS. AND THEY COULD BE MADE PUBLIC, THROUGH A PROPER DISCOVERY PRODUCTION, WHICH IS ANALOGOUS IN THESE KINDS OF CASES. AND, JUDGE, SAY THESE ARE PRIVILEGED AND THEY GO TO CONGRESS AND EVERYONE ELSE. WHAT WE ARE TALKING ABOUT IS AN INCOMPLETE END RUN AROUND IT. TO SAY THAT THERE

IS NO RECOURSE MEANS ANY PERSON CAN STEAL, IF THERE IS ENOUGH MONEY INVOLVED OR ENOUGH SUPPORT OR HELP INVOLVED, AND THE PRIVILEGES DON'T MATTER. NOW, THE PENTAGON PAPERS CASE WAS DIFFERENT, BECAUSE IT INVOLVED THE GOVERNMENT OF THE UNITED STATES, WITH GOVERNMENT SECRETS, AS AGAINST THE NEW YORK TIMES, IN A WAR THAT WAS AN INCREDIBLY IMPORTANT POLITICAL QUESTION IN THIS COUNTRY. THIS IS PRIVATE PARTY --

THE COURT: I DON'T UNDERSTAND, MS. CAULFIELD, WHY THAT DISTINCTION DOESN'T CUT EXACTLY THE OPPOSITE DIRECTION. EVEN THE INTERESTS OF THE UNITED STATES GOVERNMENT IN NATIONAL SECURITY WAS NOT SUFFICIENT TO JUSTIFY THE PRIOR RESTRAINT THAT WAS BEING REQUESTED IN THAT CASE.

IF THAT'S TRUE, WHY ISN'T THIS SITUATION A FORTIORI? IF THE NATIONAL INTEREST, IF NATIONAL SECURITY WASN'T ENOUGH, WHY SHOULD THE INTERESTS OF BROWN & WILLIAMSON IN AVOIDING LIABILITY IN DAMAGE SUITS BE SUFFICIENT?

MS. CAULFIELD: YOUR HONOR, IN THE NEW YORK TIMES' FIRST CASE, THE GOVERNMENT OF THE UNITED STATES, GRISWOLD, ASKED FOR AN INJUNCTION AGAINST PUBLICATION, VERY SIMPLY. NOTHING MORE. THEY DID NOT ASK FOR THE RETURN OF THE DOCUMENTS. AND, IN FACT, THERE IS A DISCUSSION IN THE FIRST CONCURRING OPINION TALKING ABOUT THE FACT THAT WHEN YOU ASK FOR AN INJUNCTION AGAINST PUBLISHING -- THAT IS NOT WHAT WE ARE ASKING FOR. WE ARE ASKING FOR A RETURN OF COPIES IN THIS CASE. THERE ARE OTHER COPIES THAT MAY BE OUT

THERE. WE ARE ONLY ASKING FOR THE RETURN OF UNIVERSITY -- WHEN YOU ASK FOR AN INJUNCTION AGAINST PUBLICATION OF A NEWSPAPER, IT MUST SURVIVE THE POSSIBLE SCRUTINY OF THE CONSTITUTION. AND THAT'S WHAT WAS ANALYZED IN THIS CASE.

WE ARE ASKING, UNDER AN ALREADY EXISTING STATE STATUTE, WHICH IS CONVERSION, FOR RETURN OF COPIES OF DOCUMENTS.

NOW, YOUR HONOR MAY SAY, WELL, IF I DO AN END RESULT ANALYSIS, WHICH I THINK IS WHAT YOUR HONOR WAS JUST DOING, THEN THE END RESULT MAY IMPACT, SOMEHOW, DISSEMINATION. BUT THAT IS NOT THE ANALYSIS THAT THEY DID IN THE SEATTLE TIMES, NOR THAT THE SUPREME COURT HAS REQUIRED FOR A FIRST AMENDMENT TEST IN THE PENTAGON PAPERS CASE. THEY HAVE SAID THAT YOU HAVE TO LOOK AT PRECISELY WHAT RELIEF IS BEING SOUGHT AND IS IT BEING SOUGHT UNDER A STATUTE WHICH IS -- ALTHOUGH IT MIGHT AFFECT THE INSTITUTION THAT YOU BELIEVE HAS A FIRST AMENDMENT RIGHT -- IS A STATUTE THAT IS DRAWN, NOT FOR THE PURPOSES OF REGULATING THE CONTENT OF SPEECH OR STOPPING DEBATE, BUT IS FOR ANOTHER PURPOSE THAT DOESN'T DIRECTLY IMPACT THE CONTENT OF SPEECH.

AND THAT'S ALL THE GOVERNMENT WAS DOING IN THE PENTAGON PAPERS. THEY SAID WE DON'T LIKE THE CONTENT OF WHAT YOU ARE GOING TO PRINT. YOU MUST NOT PRINT IT. AND THE SUPREME COURT SAID NO, THAT'S NOT WHAT WE ARE DOING HERE. WE ARE SAYING WE HAVE AN OBLIGATION TO TRY TO PRESERVE PRIVILEGE UNDER A CONVERSION STATUTE, AND IT IS A DIFFERENT IMPACT.

THE COURT: I THINK YOU ARE USING THE CONTENT

DIFFERENTLY. IT WAS CONTENT IN THE SENSE THAT THE GOVERNMENT FELT IT WAS INFORMATION THAT HAD AN IMPACT ON NATIONAL SECURITY. THAT IS AS FAR AS IT WENT. IT WASN'T THAT THEY WERE SELECTING OUT SOME IDEAS, AS OPPOSED TO OTHER IDEAS. THE WHOLE THING WAS CONSIDERED TO BE CLASSIFIED INFORMATION AFFECTING NATIONAL SECURITY. THAT WAS NOT A SUFFICIENT INTEREST TO JUSTIFY ITS SUPPRESSION, WHICH WOULD HAVE BEEN THE EFFECT OF TELLING THE PRESS NOT TO PUBLISH IT. HERE IT'S THE SAME. I MEAN, THE ASSERTION, THE INTEREST THAT YOU ARE TALKING ABOUT IS NOT NATIONAL SECURITY; IT IS THE INTERESTS OF PRESERVING INTEREST OF CLIENT CONFIDENCES, OR ATTORNEY WORK PRODUCT. THAT IS CONTENT NEUTRAL, TOO, IN A SENSE. BUT IT SEEMS TO ME THAT IS THE SAME LEVEL OF INTEREST THAT WAS INVOLVED IN THE PENTAGON CASE.

MS. CAULFIELD: YOUR HONOR, IF I COULD CALL THE COURT'S ATTENTION TO ALEXANDER VERSUS UNITED STATES, WHICH IS A 1993 CASE, THERE IS NO CASE RIGHT ON POINT WITH THIS, YOUR HONOR -- I WISH IT WERE -- BUT I CAN CAN SHOW YOU WHAT I THINK IS A FAIR ANALYSIS. IN THE ALEXANDER VERSUS UNITED STATES CASE THE UNITED STATES GOVERNMENT GOT A FORFEITURE OF PUBLISHED MATERIAL, INCLUDING, FIRST OF ALL, PORNOGRAPHIC MATERIAL, BECAUSE IT WAS A VIOLATION OF A STATUTE; AND, SECOND OF ALL, NON-PORNOGRAPHIC MATERIAL THAT A BOOKDEALER HELD. AND THEY CONFISCATED THE ENTIRE INVENTORY.

AND THE CASE WENT UP TO THE SUPREME COURT OF THE UNITED STATES ON THE ISSUE OF WHETHER OR NOT THE CONFISCATION OF THE INVENTORY THAT WAS NOT PORNOGRAPHIC WAS AN IMPROPER IMPACT ON THE BOOKSTORE OWNER'S FIRST AMENDMENT

RIGHTS. AND THE COURTS SAID NO. BECAUSE EVEN THOUGH IT TAKES BOOKS AWAY FROM DISSEMINATION, AND TOOK THIS MAN'S BOOKS AWAY, DID NOT IMPACT HIS FIRST AMENDMENT RIGHTS, BECAUSE THE STATUTE WAS MEANT TO BE CONTENT NEUTRAL AND IT WAS MEANT TO ENFORCE THE RIGHT OF THE GOVERNMENT TO TAKE AWAY PROPERTY THAT HAD BEEN USED FOR ILLEGAL GAINS.

AND ALSO, YOUR HONOR, THE OTHER CASE THAT IS SIMILAR TO THAT IS, IF YOU LOOK AT THE UNIVERSITY OF PENNSYLVANIA CASE, WHERE THE UNIVERSITY SAID, UNDER AN ACADEMIC FREEDOM ANALYSIS, WHICH IS RELATED TO THE FIRST AMENDMENT, WE DO NOT HAVE TO TURN EEOC RECORDS OVER TO THE EEOC BECAUSE IT WILL CHILL OUR ACADEMIC FREEDOM IF WE TELL YOU WHO WE ARE HIRING AND NOT HIRING, AND WHY. AND THE SUPREME COURT OF THE UNITED STATES SAID THAT THEY HAVE TO TURN THOSE RECORDS OVER.

THE COURT: NOW, WAIT A MINUTE. ALL OF THOSE CASES ESTABLISH IS THAT THERE CAN BE LEGITIMATE PUBLIC INTEREST, WHICH WILL SUPPORT A STATUTE OVERRIDING A FIRST AMENDMENT INTEREST. AND THOSE MAY BE TWO INSTANCES WHERE THAT WAS FOUND TO BE TRUE. THE FIRST AMENDMENT DOESN'T NECESSARILY TRUMP EVERY OTHER INTEREST THAT MAY BE OUT THERE. BUT, YOU KNOW, WHERE IS THE -- YOU KNOW -- OVERRIDING PUBLIC INTEREST HERE, THAT OVERRIDES THE FIRST AMENDMENT INTERESTS THAT ARE AFFECTED AND WOULD BE AFFECTED, IF THE ORDER THAT YOU ARE ASKING FOR WERE TO BE GRANTED?

MS. CAULFIELD: YOUR HONOR, THE REASON WHY I BROUGHT THOSE CASES UP IS IT IS NOT JUST ANY IMPACT ON THE FIRST AMENDMENT. YOU HAVE TO LOOK AT WHAT THE STATUTE WAS

DESIGNED TO DO, NOT EXACTLY WHAT IT IS DOING UNDER THE CIRCUMSTANCES. THAT IS WHAT ALEXANDER IS SAYING, AND WHAT SEATTLE TIMES IS SAYING.

SO IN LOOKING AT WHAT THE STATUTE, THE CONVERSION STATUTE IS DESIGNED TO DO, AND THE WAY WE ARE SEEKING TO APPLY IT UNDER THOSE CIRCUMSTANCES, WE ARE SEEKING THE RETURN OF PROPERTY. SO YOU DON'T HAVE TO BALANCE AGAINST THE FIRST AMENDMENT, BECAUSE IT DOESN'T AFFECT THE FIRST AMENDMENT RIGHT. IT IS A NEUTRAL APPLICATION OF A STATUTE, JUST LIKE THE RICO STATUTE WAS, EVEN AS AGAINST CONFISCATING SOMEBODY'S PUBLISHABLE DOCUMENTS. AND, YOUR HONOR, COPYRIGHT IS A VERY GOOD EXAMPLE OF THIS. TRADE SECRETS IS A VERY GOOD EXAMPLE OF THIS. AND WE ARE ASKING THIS COURT TO APPLY IT IN THE CONVERSION AREA. IT IS TRUE, IF THIS WAS A FORMULA FOR COCA COLA, THAT HAD THIS BEEN STOLEN AND GIVEN TO THE LIBRARY AND THE LIBRARY WAS GOING TO PUT IT ON THE INTERNET, THE QUESTION WOULD BE CAN YOU DISSEMINATE AS TO PROPERTY RIGHTS LIKE THAT? WE ARE STATING THE SAME ANALYSIS. AND THE COURTS HAVE REPEATEDLY SAID NO. BUT THERE IS A PROPERTY RIGHT IN THAT FORMULA. THERE IS A PROPERTY RIGHT IN RESERVE, THAT ONE STUDENT DOES THAT CAN'T BE STOLEN AND DISSEMINATED. WHAT WE ARE SAYING IS THAT THERE IS A PROPERTY RIGHT IN PRIVILEGE.

THE COURT: WELL, I THINK THE ONLY CASE UNDER THE CALIFORNIA LAW THAT I'VE SEEN THAT REALLY COMES CLOSE TO DEALING WITH THIS ISSUE REJECTS YOUR PROPOSITION, AND I'M REFERRING TO THE FMC CASE. AND THE COURT THERE WAS DEALING

INFORMATION CONTAINED IN THE STOLEN DOCUMENTS COULD CONSTITUTE A CONVERSION. AND IT HELD NO.

MS. CAULFIELD: WELL, YOUR HONOR, THE -- I THINK -- I THINK WE HAVE TO BRING TOGETHER THREE THINGS TO UNDERSTAND THE FMC CASE. ONE IS COHN VERSUS SUPERIOR COURT, WHICH DOES SAY STOLEN PRIVILEGED DOCUMENTS GO BACK. NOW, I UNDERSTAND IT WAS NOT THE CONTENTION OF THE CASE DIRECTLY BEFORE THE COURT. BUT THAT IS A JURISDICTION AND POWER QUESTION. THAT IS NOT A DISSEMINATION OR PRIVILEGE QUESTION. AND THIS COURT HAS JURISDICTION BECAUSE WE FILED A WRIT OF POSSESSION. AND IN AN ACTION FOR CONVERSION -- AND COHN VERSUS THE SUPERIOR COURT WENT FARTHER -- AND WE ARE ASKING -- THIS COURT SAYS THE NOTES OF THE LAWYERS GO BACK BECAUSE IT IS AS MUCH OF A VIOLATION OF PUBLIC POLICY AND -- TO STEAL INFORMATION AND TRY TO USE IT AGAINST THE PERSON WHO HOLDS THE PRIVILEGE. THAT IS COHN VERSUS THE SUPERIOR COURT. IF YOU LOOK AT FMC, WHICH WAS THE SEVENTH CIRCUIT CASE, TRYING TO UNDERSTAND CALIFORNIA LAW, THEY DID NOT CONSIDER WHAT THEY WOULD DO IF THE PROPERTY RIGHT WAS A CONVERSION ACTION AND THE PROPERTY RIGHT INVOLVED PRIVILEGE AND WORK PRODUCT, WHICH IS WHAT COHN VERSUS SUPERIOR COURT WAS TALKING ABOUT. AS FAR AS THE PUBLIC PROPERTY WAS TALKING ABOUT, ABC, IN 1994, THE ABC ETHICS SECTION TALKS ABOUT -- SAYS ANY LAWYER THAT SEES DOCUMENTS ON THEIR FACE ARE PRIVILEGED, HAS TO RETURN THEM. THEY CAN'T KEEP THEM SECRET. IT IS AN AUTOMATIC RECOGNITION OF COHN VERSUS SUPERIOR COURT, IN ETHICAL RULES FOR LAWYERS. AND WE ARE HERE TRYING TO SAY THAT THE RIGHT THAT WAS ESTABLISHED IN

COHN, AND THE RIGHT THAT IS RECOGNIZED IN PRIVILEGE, SHOULD BE ABLE TO BE FORTIFIED. AND YOU CAN GET THOSE COPIES BACK UNDER A CONVERSION THEORY. BECAUSE OTHERWISE COHN, AS LONG AS SOMEBODY ELSE GETS THE STOLEN DOCUMENTS, COHN VERSUS SUPERIOR COURT IS AN EMPTY RULING, AND THE ETHICAL RULES ARE EMPTY, BECAUSE, AS LONG AS SOME THIRD PARTY PUTS IT ON THE INTERNET, THE PRIVILEGE IS KNOWN TO THE WORLD. IT IS NOT WAIVED FOR ANY KIND OF FUTURE COURT PROCEEDING. BUT IF YOU ARE GOING TO ANALOGIZE THE PSYCHIATRIST'S RECORDS, THE HARM DONE OF PEOPLE'S PRIVATE RECORDS BEING PUT ON THE INTERNET, BECAUSE A THIRD-PARTY RECEIVES STOLEN DOCUMENTS, IS A TREMENDOUS HARM, THAT WHETHER YOU EVER FILE A LAWSUIT, OR NOT, IS NOT GOING TO MAKE A DIFFERENCE. THIS IS A PRIVILEGE, YOUR HONOR, WHETHER IT INVOLVED A TOBACCO COMPANY, OR SOME PERSON WHOSE PSYCHIATRIST'S RECORDS HAVE BEEN STOLEN. THANK YOU.

THE COURT: THANK YOU. NEEDLESS TO SAY, IT IS AN A VERY INTERESTING SERIES OF QUESTIONS. I WOULD BE INTERESTED IN HEARING MR. PATTI.

WHAT DO YOU HAVE TO SAY, MR. PATTI?

MR. PATTI: YOUR HONOR, I THINK THERE ARE ESSENTIALLY FOUR PROBLEMS WITH THE RELIEF THAT BROWN & WILLIAMSON IS REQUESTING.

THEY HAVE LEGAL PROBLEMS, THEY HAVE FACTUAL PROBLEMS. THEY HAVE EQUITABLE PROBLEMS, AND THEY HAVE CONSTITUTIONAL PROBLEMS. AND I WOULD LIKE TO DISCUSS THEM KIND OF INDIVIDUALLY, RATHER THAN MIXING THEM ALL UP.

FIRST OF ALL, THE LEGAL REMEDIES THAT THEY'RE TRYING

TO ASSERT HERE JUST DON'T APPLY TO THE CONTEXT THAT IS IN FRONT OF THE COURT NOW, FIRST OF ALL, BECAUSE THERE IS NO CAUSE OF ACTION FOR CONVERSION OF COPIES OF DOCUMENTS. AND YOUR HONOR CITES THE FMC CORPORATION CASE, IN WHICH THE SEVENTH CIRCUIT WAS APPLYING THE LAW OF THE STATE OF CALIFORNIA. AND IT VERY CLEARLY SAID THERE IS NO CAUSE OF ACTION FOR CONVERSION OF COPIES OF DOCUMENTS. AND THAT CASE, IN THE VERY SPECIALIZED CIRCUMSTANCE WHERE THE COMPANY DIDN'T HAVE ITS OWN DOCUMENTS, THE COURT SAYS, OKAY, YOU HAVE TO GIVE A COPY BACK. BUT, AS YOUR HONOR NOTED, THE COURT WAS VERY CLEAR. THE FIRST AMENDMENT WOULD NOT ALLOW THE COURT TO REQUIRE THAT ALL COPIES GO BACK TO THE COMPANY.

SO, I THINK THAT CASE IS REALLY THE CASE THAT IS MOST ON POINT HERE, AND VERY CLEARLY ANSWERS THE QUESTION THAT THE COURT POSED AT THE BEGINNING OF THE ARGUMENT AS TO WHETHER THERE CAN BE A CAUSE OF ACTION FOR CONVERSION OF COPIES.

MS. CAULFIELD TRIED TO MAKE A DISTINCTION BETWEEN THAT CASE AND THIS ONE, SEEING THAT THIS CASE DEALT WITH CONFIDENTIAL TRADE SECRET TYPE INFORMATION, AND THIS CASE DEALS WITH ATTORNEY-CLIENT PRIVILEGE INFORMATION. BUT THAT'S A QUESTION THAT HURTS, NOT HELPS, BROWN & WILLIAMSON'S POSITION, BECAUSE COURTS AND STATUTES OF CALIFORNIA HAVE REPEATEDLY RECOGNIZED A PROPERTY INTEREST IN TRADE SECRET INFORMATION, BUT THEY'VE NEVER RECOGNIZED A PROPERTY INTEREST IN ATTORNEY-CLIENT INFORMATION.

AND THAT BRINGS ME TO THE NEXT POINT, WHICH IS THERE SIMPLY ISN'T SUCH A PROPERTY INTEREST. I MEAN, THEY PRETTY

MUCH INDICATE THEY ARE ASKING THE COURT TO CREATE THIS PROPERTY AS ATTORNEY-CLIENT INFORMATION. IN FACT, THEIR ATTORNEY-CLIENT WORK PRODUCT ISSUES ARE VERY LIMITED BY THE FACT THAT THEIR CLAIMS RELATE TO DISCOVERY IN LITIGATION AND TO ADMISSION IN EVIDENCE IN PROCEEDINGS. THEY THEREFORE CONTROL THE USE OF INFORMATION IN COURT AND OTHER TYPES OF PROCEEDINGS IN THE STATE OF CALIFORNIA. ALL OF THE CASES THAT THEY CITE, COHN, PSC GEOTHERMAL, THOSE CASES ARE ALL DEALING WITH THE COURT'S POWER TO CONTROL THE USE OF PRIVILEGED INFORMATION IN PROCEEDINGS BEFORE IT.

IN NONE OF THOSE CASES IS THE COURT REACHING OUT TO A THIRD PARTY WHO IS NOT A PERSON IN THE LITIGATION, SAYING THAT THERE IS A PROPERTY INTEREST IN THIS KIND OF INFORMATION AND RESTRICTING THAT PERSON'S USE OF THAT TYPE OF INFORMATION. IT IS A SUPPOSED PROPERTY INTEREST THAT JUST DOES NOT EXIST UNDER THE LAW OF THE STATE OF CALIFORNIA.

NOW, IF BROWN & WILLIAMSON WAS TO PROTECT ITS INTERESTS IN ITS ATTORNEY-CLIENT WORK AND ITS WORK PRODUCT MATERIAL, THERE IS, MATERIALLY, WAYS IT HAS TO DO THAT IN THE CONTEXT OF THE LITIGATION. IF THEY ARE ASSERTING THOSE PRIVILEGES, THEY CAN ASK THAT THE INFORMATION NOT BE ADMITTED. THEY CAN ASK THAT IT BE DISGORGED BY THE PLAINTIFF'S COUNSEL. THEY CAN EVEN ASK THAT COUNSEL BE DISQUALIFIED FROM THE CASES AND PROTECT THEMSELVES IN ALL THOSE DIFFERENT WAYS. BUT THOSE, THOSE ISSUES ARE ISSUES FOR THOSE COURTS, IN THOSE CASES, TO WORK OUT. AND THIS COURT ISN'T HERE TO PROTECT BROWN & WILLIAMSON'S ASSERTED

ATTORNEY-CLIENT INTEREST IN THESE OTHER CASES.

AND, FINALLY, I WOULD SAY THAT I THINK THE COURT HAS TO RECOGNIZE THESE DOCUMENTS ARE IN THE PUBLIC DOMAIN. I MEAN, THE NEW YORK TIMES HAS THEM, THE WASHINGTON POST HAS THEM, USA TODAY HAS THEM. A NUMBER OF NETWORKS HAVE THEM, ALL OVER THE COUNTRY. AND I THINK THERE SHOULD BE A WHITE LINE TEST FOR WHETHER SOMETHING IS IN THE PUBLIC DOMAIN. IN THE NEW YORK TIMES, IT IS IN THE PUBLIC DOMAIN. TO TELL THEM THERE WAS ANY PROPERTY INTEREST THAT BROWN & WILLIAMSON HAD TO EXCLUDE THE WHOLE WORLD FROM OBTAINING THIS INFORMATION, I THINK THAT INTEREST HAS BEEN EXTINGUISHED BY THE FACT THAT IS ALREADY DONE. IT HAS ALREADY LOST THE ABILITY TO DO THAT.

THE SECOND, THE SECOND PROBLEM, AS I MENTIONED, IS A FACTUAL ONE. AND THAT IS THE VERY EXISTENCE OF THE PRIVILEGES COVERING THESE DOCUMENTS. AND THE REMARKABLE THING IN THIS CASE IS THAT BROWN & WILLIAMSON HAS NOT PROVED, FOR THE MOST PART, WITH VERY SMALL EXCEPTIONS, THAT THESE DOCUMENTS ARE PRIVILEGED AT ALL.

IF YOU LOOK AT THE WRIT OF POSSESSION FROM THE STATUTE, THE STATEMENT, ALL THAT THE PLAINTIFF MUST ESTABLISH IS THE PROBABLE VALIDITY OF THIS CLAIM OF POSSESSION OF THE PROPERTY. THEREFORE, IT IS BROWN & WILLIAMSON'S BURDEN, CLEARLY, TO SHOW THESE DOCUMENTS ARE PRIVILEGED. THEY'VE TRIED TO REVERSE THAT BURDEN BY CITING SECTION 917 OF THE EVIDENCE CODE. AND ALL THAT SAYS IS THAT THERE IS A PRESUMPTION OF CONFIDENTIALITY IN CERTAIN TYPES OF COMMUNICATIONS. BUT IT DOESN'T SAY THAT THE PERSON

ATTEMPTING TO ATTACK THE PRIVILEGE IS THE ONE THAT HAS THE BURDEN OF PROVING THAT THE PRIVILEGE DOESN'T EXIST, AND CERTAINLY NOT IN THE CONTEXT WHERE THEY ARE ASKING THE COURT FOR AFFIRMATIVE RELIEF AND DETERMINATION THAT THEY HAVE A PROPERTY RIGHT.

NOW, REMARKABLY, THE ONLY EVIDENCE THAT I SUPPORT, THAT THEY HAVE GIVEN US FOR A COUPLE OF CATEGORIES OF DOCUMENTS, FIRST OF ALL, THEY DO HAVE DECLARATIONS REGARDING ABOUT 10 PIECES OF THE DOCUMENTS WHICH WE REFER TO AS RESOURCE MATERIALS. THESE ARE DOCUMENTS THAT WERE PREPARED BY BROWN & WILLIAMSON'S PARALEGAL TO ASSIST THEM IN THIS DOCUMENT COLLATION AND COLLECTION EFFORT. BUT IF YOU LOOK AT THESE DOCUMENTS, MOST OF THEM ARE JUST LISTS OF BROWN & WILLIAMSON'S PERSONNEL LISTS OF PROJECTS, SPECIAL PROJECTS, PROJECTS THAT WERE DONE BY THE COUNSEL, AND TOBACCO RESEARCH, AND STUFF LIKE THAT. THEY DON'T CONTAIN TYPICAL WORK PRODUCT INFORMATION. THEY'VE TRIED TO PROVE THE LITIGATION SELECTION PRIVILEGE, WHICH I'LL DEAL WITH IN A MINUTE, AND THEN THEY'VE -- WITH THEIR REPLY BRIEF, SUBMITTED A DECLARATION FROM MR. FREEDMAN THAT SAYS NINE OF THE DOCUMENTS ARE PRIVILEGED.

SO ASIDE FROM THOSE CATEGORIES, THEY HAVEN'T REALLY DONE ANYTHING TO PROVE THAT THE VAST MAJORITY OF THESE DOCUMENTS ARE PRIVILEGED. AND THAT SHOULD BE FATAL TO THEIR CLAIM. I MEAN, THEY HAVE GOT TO PROVE THAT THESE ARE PRIVILEGED. THEY TALK ABOUT THEM, BUT THEY NEVER PROVED IT IN THIS CASE, AND NOT IN ANY OTHER. I WOULD LIKE TO TALK ABOUT THE LIGATION SELECTION PRIVILEGE, SPECIFICALLY BECAUSE

THAT IS THE ONLY PRIVILEGE THEY CLAIM WITH RESPECT TO MORE THAN A THIRD OF THE DOCUMENTS. AND AS FAR AS I CAN TELL IN THE REPLY BRIEF, THEY ARE NOT EVEN TRYING TO DEFEND THAT ANY MORE. THEIR CLAIM IS THAT IF AN ATTORNEY DECIDES THAT THESE DOCUMENTS ARE BROADLY RELEVANT TO LITIGATION, THEN SOMEHOW THE DOCUMENT ITSELF WAS PRIVILEGED, AND THAT CLEARLY IS NOT ACCEPTABLE UNDER CALIFORNIA LAW. AND THEN, WITH RESPECT TO THEIR OTHER PRIVILEGE CLAIMS, THEY ARE BASICALLY CLAIMING THAT ANY DOCUMENTS THAT ARE PASSED IN FRONT OF A LAWYER, THAT WAS OF INTEREST TO A LAWYER OR SENT FROM A LAWYER, IS NECESSARILY PRIVILEGED. BUT IN FACT MANY OF THEM SHOW THAT THE LAWYERS ARE DOING SORT OF THE TYPICAL BUSINESS OF THE PUBLIC, INCLUDING MARKETING, AND A LOT OF OTHER THINGS, AND THEREFORE THE PRIVILEGE THAT THEY MAKE UNDER THE PRIVILEGE LAW IS I THINK UNRELIABLE. THEY REALLY HAVEN'T SHOWN, I MEAN, THE FACTUAL ANCHOR OR IMPORTANCE. THEIR WHOLE REQUEST FOR RELIEF HERE IS THAT THE DOCUMENTS ARE PRIVILEGED.

THE THIRD PROBLEM THAT THEY HAVE IS AN EQUITABLE ONE, AND AT THIS POINT I WANT TO RAISE THE UNCLEAN HANDS ISSUE. I THINK BROWN & WILLIAMSON, IN THEIR PAPERS, SORT OF PASS THIS OVER IN MAKING THEIR ARGUMENT.

I DON'T THINK IT IS -- I THINK IT IS EXTREMELY IMPORTANT HERE. BECAUSE WHAT BROWN & WILLIAMSON HAS BEEN DOING FOR 30 YEARS IS DENYING A LOT OF FACTS THAT IT KNEW ABOUT OF THE HARMFULNESS OF SMOKING, ABOUT THE ADDICTIVENESS OF NICOTINE, WHAT IT WAS REALLY DOING TO INVESTIGATE THESE ARTICLES, AND THE INFORMATION THAT IT WAS GIVING THE PUBLIC.

COMMITTED BY BROWN & WILLIAMSON, AND THE TOBACCO COMPANIES, AND WHAT THEY ARE TRYING TO GET THIS COURT TO DO IS ESSENTIALLY ALLOW THEM TO CONTINUE IT. IT HAS NOW COME TO LIGHT, PEOPLE ARE UNEARTHING EVIDENCE THAT WHAT THEY HAVE SAID ALL ALONG IS FALSE AND WHAT THEY WANT YOUR HONOR TO DO IS SAY, SORRY, THIS INFORMATION CAN'T BE PRODUCED, I AM GOING TO HELP YOU PREVENT THAT. AND I THINK THAT IS JUST A COMPLETE MISAPPROPRIATE USE OF AN EQUITABLE COURT'S POWERS.

AND THEREFORE I THINK THE COURT SHOULD REALLY STAY AWAY FROM THE TYPE OF RELIEF THAT BROWN & WILLIAMSON IS ASKING FOR HERE. BROWN & WILLIAMSON HAS COPIES OF RESPONSES TO THIS, AND I DON'T THINK ANY OF THEM MEAN VERY MUCH.

FIRST THEY SAY THE SOURCE OF THEIR CLAIM IS FOR QUOTE APPLICATION OF PLAINTIFF'S ATTORNEY. THAT ISN'T TRUE. IT IS THE DOCUMENTS THEMSELVES. WE SUBMITTED DEPOSITIONS TO THE COURT THAT, COMPARED TO BROWN & WILLIAMSON'S PUBLICATIONS, OR TO WHAT IS IN THE DOCUMENTS, SHOW THAT FOR MANY, MANY YEARS BROWN & WILLIAMSON HAS BEEN SAYING ONE THING, WHEN IT WAS SOMETHING ELSE. THEY SAY MAYBE THE SELECTION OF THE DOCUMENTS IS BIASED TOWARDS SHOWING THAT THEY REALLY THOUGHT THERE WERE PROBLEMS, THAT THERE WERE HARMS IN SMOKING, AND THERE IS SOME BIAS IN THE SELECTION OF THE DOCUMENTS. WELL, MAYBE, MAYBE NOT. WE DON'T KNOW. BUT, I MEAN, THEY'RE PERFECTLY FREE TO SHOW US WHAT OTHER DOCUMENTS THEY HAVE IN THEIR FILES AND TRY TO PROVE THAT IN FACT THERE IS SOME BIAS OR SELECTION IN THE DOCUMENTS. IN FACT, IF THEY WANT TO, WE'LL TAKE THESE DOCUMENTS, PUT THEM

THEN THEY COMPLAIN ABOUT THE BEHAVIOR OF COUNSEL IN OTHER LITIGATION. MR. BUTTS'S NAME COMES UP A LOT. I THINK THAT IS COMPLETELY IRRELEVANT TO THE ISSUES THAT ARE IN FRONT OF THE COURT AND THE PARTIES THAT ARE IN FRONT OF THE COURT. AND THEY CITE A BUNCH OF CASES THAT SAY THERE MUST BE A LINK BETWEEN THE ISSUE IN FRONT OF THE COURT AND THE SUPPOSED MISCONDUCT OF THE PARTY. AND I THINK IT COULDN'T BE MORE CLEAR IN THIS CASE THAT THERE HAS BEEN MISREPRESENTATIONS FOR DECADES, THAT THEY ARE NOW TRYING TO PERPETUATE THROUGH THEIR ACTS IN COURT.

FINALLY, I WANT TO REACH WHAT I THINK IS THE MOST IMPORTANT ISSUES, ACTUALLY, WHICH IS THE CONSTITUTIONAL ONE, THE FIRST AMENDMENT PROBLEMS THAT ARE THE RELIEF BROWN & WILLIAMSON REQUEST. THERE ARE A COUPLE THINGS ABOUT WHICH THERE AREN'T ANY DISPUTE. I THINK, FIRST OF ALL, THAT THESE DOCUMENTS ARE EXTREMELY IMPORTANT TO INFORM THE PUBLIC DEBATE ON THIS ISSUE, AND THEY HAVE ACADEMIC IMPORTANCE AND THEY ARE THINGS THAT THE PUBLIC AND THE GOVERNMENT, AND MANY PEOPLE ARE VERY, VERY INTERESTED IN. THIS IS A NEWSWORTHY, EXTREMELY PUBLICLY IMPORTANT ISSUE. SECONDLY, I DON'T THINK THERE IS ANY DISPUTE THAT THE UNIVERSITY OF CALIFORNIA DID NOTHING WRONG OR ILLEGAL TO GET THE DOCUMENTS. WE DIDN'T GO OUT AND SEEK THEM. IN FACT, IT WAS NOTHING BUT DUMB LUCK. THEY LANDED IN A BOX IN OUR OFFICES, AND THEREFORE WE HAVEN'T ENGAGED IN ANY MISCONDUCT IN OBTAINING THE DOCUMENTS. IN FACT, WHAT BROWN & WILLIAMSON IS TELLING US IS THAT THE DOCUMENTS GOT TO US AS A RESULT OF AN UNAUTHORIZED LEAK BY ITS OWN AGENT, WHICH IS -- I THINK IS

AN IMPORTANT FACT.

FINALLY, I THINK THAT THE COURT HAS TO RECOGNIZE AGAIN, AS I SAID PREVIOUSLY, THAT THE DOCUMENTS ARE CLEARLY NOW IN THE PUBLIC DOMAIN. THEY HAVE BEEN SPREAD ALL OVER THE COUNTRY. THERE ARE MANY SOURCES FOR THEM. FOR EXAMPLE, IF BROWN & WILLIAMSON DOES GET THE RELIEF THAT IT IS REQUESTING HERE, WHAT IS PREVENTING US FROM GOING TO THE NEW YORK TIMES, OR WHOEVER ELSE HAS THE SET, AND GETTING ANOTHER SET AND PUTTING THEM IN THE LIBRARY? I MEAN, ANY ORDER OF THE COURT WOULD HAVE TO DO MORE THAN JUST DELIVER POSSESSION TO BROWN & WILLIAMSON IN ORDER TO PREVENT THE LIBRARY FROM HAVING THEM.

BROWN & WILLIAMSON'S PRIMARY ARGUMENT IS THAT ALL WE ARE DOING IS ENFORCING A GENERALLY APPLICABLE LAW, AND THEREFORE WE DON'T HAVE TO OBEY THE FIRST AMENDMENT AT ALL. AND IF WHAT THEY WERE TRYING TO DO IS SIMPLY OBTAIN THE ONE SET OF THE DOCUMENTS THAT IS IN THE LIBRARY, AND GET THEM BACK, THAT MIGHT BE -- THERE MIGHT BE SOME MERIT TO THAT. BUT THAT IS NOT WHAT THEY ARE TRYING TO DO. WHAT THEY ARE TRYING TO DO HERE IS OBTAIN ALL COPIES OF THE DOCUMENTS THAT THE UNIVERSITY HAS, ANYTHING THAT THE UNIVERSITY HAS THAT QUOTES THE DOCUMENTS, ALL COPIES OF THE DOCUMENTS THAT MIGHT BE IN THE HANDS OF UNIVERSITY EMPLOYEES, AND PRESUMABLY TO PREVENT US FROM GETTING POSSESSION OF THE DOCUMENTS IN THE FUTURE, DISSEMINATING THEM, OR DOING ANYTHING ELSE WITH THEM. I MEAN, THAT IS CLEARLY THE GROSSEST TYPE OF INFRINGEMENT ON THE RIGHTS OF SPEECH AND DISSEMINATION OF INFORMATION THAT CAN BE IMAGINED. THEY ARE NOT ONLY TO --

TRYING TO STOP US FROM DISSEMINATING THE INFORMATION; THEY ARE TRYING TO RIP IT OUT OF THE HANDS OF A PUBLIC LIBRARY. AND I THINK THAT IS CLEARLY AN ISSUE THAT RAISES FIRST AMENDMENT CONCERNS.

I ALSO THINK IT IS IMPORTANT IN THE CONTEXT OF THE FIRST AMENDMENT TO RECOGNIZE THAT WHAT HAS HAPPENED HERE IS NOT SOMETHING THAT IS REMARKABLY UNUSUAL OR UNKNOWN TO FIRST AMENDMENT JURISPRUDENCE. I MEAN, BROWN & WILLIAMSON TALKS OVER AND OVER ABOUT HOW THE DOCUMENTS ARE STOLEN, AND IF THE COURT ALLOWS US TO KEEP THE DOCUMENTS, THAT MEANS ANYBODY HAS A RIGHT TO PUBLISH STOLEN INFORMATION. IN FACT, THIS KIND OF THING HAPPENS ALL THE TIME. IT'S INCREDIBLY FREQUENT THAT A WHISTLE-BLOWER, A DISGRUNTLED EMPLOYEE, OR SOMEBODY ELSE, LEAKS INFORMATION. IN FACT, IT IS A WAY THAT WE, AS A SOCIETY, FIND OUT A LOT OF STUFF THAT HAPPENS. A LOT OF THE INFORMATION THAT WE RECEIVE IN SOCIETY IS LEAKED INFORMATION, INFORMATION THAT IS PERHAPS NOT AUTHORIZED TO BE DISCLOSED, BUT THE NEWSPAPERS OR OTHER ORGANS OF THE PRESS FIND OUT ABOUT IT, AND THEY PUBLISH IT. AND I WOULD REVERSE BROWN & WILLIAMSON'S WHAT-IFS AND SAY, IF WHAT THE COURT SAYS HERE IS THAT -- IS THAT THE PERSON FROM WHOM THE INFORMATION ORIGINATED HAD A RIGHT TO PREVENT IT FROM BEING DISSEMINATED, WHAT WOULD HAPPEN TO WHAT WE NORMALLY THINK OF AS THE FREE FLOW OF INFORMATION IN OUR SOCIETY WOULD BE RADICALLY CURTAILED. AND THAT IS WHY THIS IS A REALLY DRAMATIC IMPOSITION ON FIRST AMENDMENT RIGHTS THAT BROWN & WILLIAMSON IS ATTEMPTING TO IMPOSE HERE.

NOW, THE OTHER THING THAT THEY HAVE DONE IS CITE

A BUNCH OF CASES RELATING TO ACCESS TO INFORMATION, FOR EXAMPLE, THE SEATTLE TIMES CASE AND THE ALEXANDER CASE, AND CASES THAT SAY, FOR EXAMPLE, THAT THE PRESS HAS NO RIGHT TO OBTAIN ACCESS TO GOVERNMENT INFORMATION, NO CONSTITUTIONAL RIGHT TO OBTAIN ACCESS. AND THAT'S THE SOURCE OF ALL OF THAT LAW THAT BROWN & WILLIAMSON IS CITING. BUT THE COURT HAS BEEN VERY CLEAR THAT, ONCE THE -- A NEWSPAPER OR OTHER MEDIA ORGAN OBTAINS ACCESS TO THE INFORMATION, THEN THE GOVERNMENT CANNOT PREVENT IT FROM BEING DISSEMINATED. THERE IS NO ABILITY, ONCE THE INFORMATION IS OUT, FOR THE GOVERNMENT TO LIMIT ITS DISSEMINATION. AND I THINK THE COX CASE THAT WE CITE IN OUR PAPERS IS A GOOD EXAMPLE OF THAT. I THINK ALSO THE PENTAGON PAPERS CASE IS A CLEAR EXAMPLE OF THAT, WHERE THERE WAS NO QUESTION IN THE PENTAGON PAPERS CASE BUT THAT THE DISSEMINATION OF THE INFORMATION TO THE NEW YORK TIMES AND THE WASHINGTON POST WAS UNAUTHORIZED AND PERHAPS ILLEGAL, BECAUSE THE INFORMATION HAD BEEN CLASSIFIED. BUT THE COURT NEVERTHELESS SAID, LOOK, ONCE THE INFORMATION IS OUT THERE, THESE ORGANIZATIONS HAVE A RIGHT TO PUBLISH IT. AND THERE IN FACT HAVE BEEN A NUMBER OF OTHER CASES, SINCE THE PENTAGON PAPERS CASE, THAT SAY THE SAME THING. AND THESE AREN'T CITED IN THE BRIEFS, AND I HAVE COPIES OF THEM, AND COULD GIVE THEM TO THE COURT. FOR EXAMPLE, LANDMARK COMMUNICATIONS VERSUS VIRGINIA, THE LEAK OF STATUTORILY CONFIDENTIAL INFORMATION REGARDING JUDICIAL PROCEDURES WAS, HERE THE COURT HELD THAT THE STATE COULD NOT PREVENT THE PAPERS FROM GETTING DISSEMINATED INFORMATION, EVEN THOUGH THE LEAK WAS UNAUTHORIZED. THE SAME IN FLORIDA

STAR VERSUS BJF: THE NAME OF A RAPE VICTIM WAS IMPROPERLY LEAKED BY THE POLICE TO THE PRESS. THE STATE LAW PREVENTED THE POLICE FROM DISCLOSING IT AND THE COURT SAID THAT DOESN'T MATTER. IF THE NEWSPAPER THAT GETS THE INFORMATION DID NO WRONG IN OBTAINING IT, THE FACT THAT ITS SOURCE WAS UNAUTHORIZED DOES NOT ALLOW -- DOES NOT ELIMINATE THE FIRST AMENDMENT RIGHT OF THE NEWSPAPER TO DISSEMINATE THE INFORMATION.

THEREFORE, ALL OF THE ACCESS CASES THAT THEY CITE IN THEIR BRIEF, I THINK, ARE IRRELEVANT.

THERE ARE A COUPLE OF OTHER LITTLE POINTS THAT CAME UP IN THE PREVIOUS DISCUSSION THAT I WOULD LIKE TO COMMENT ON. THE FIRST IS THIS ISSUE OF WHETHER WHAT THEY ARE TRYING TO DO IS CONTENT NEUTRAL OR NOT. AND I THINK THAT BROWN & WILLIAMSON IS MIXING UP CONTENT NEUTRALITY AND VIEWPOINT NEUTRALITY.

THE OPINIONS OF THE COURT SAY THAT WHEN WHAT YOU ARE DOING IS DIRECTING SOMETHING TO CONTENT, THAT GETS A CERTAIN LEVEL OF SCRUTINY, WHICH IS QUITE HIGH, WHICH THEY COULDN'T MEET. VIEWPOINT NEUTRALITY GETS A GOOD LEVEL OF SCRUTINY. IT DOESN'T MATTER AT THIS POINT. THEY ARE SAYING WE ARE NOT CONTENT NEUTRAL. WE ARE VIEWPOINT NEUTRAL. THAT'S TRUE. IT IS CLEARLY NOT CONTENT NEUTRAL, BECAUSE THE WHOLE BASIS OF THEIR CLAIM THAT THE INFORMATION SHOULD GO BACK TO THEM IS THAT IT CONTAINS INFORMATION THAT IS SUPPOSEDLY PRIVILEGED. AND THAT'S EXACTLY THE SAME SITUATION, AS YOUR HONOR NOTES, THAT EXISTED IN THE PENTAGON PAPERS CASE.

AND, FINALLY, I WANTED TO DEAL WITH THE ALEXANDER CASE. THAT CASE DEALT WITH GOODS. I MEAN, THE BOOKS WERE IN THEMSELVES VALUABLE GOODS. THE CASE DID NOT SAY THAT UNDER THE RICO FORFEITURE STATUTE THE GOVERNMENT COULD GO AFTER THE OWNER OF THE BOOKSTORE OR ANY OF ITS EMPLOYEES TO RECOVER ANY DOCUMENT THAT HAD ANY OF THE INFORMATION IN THEM THAT WAS CONTAINED IN THOSE BOOKS.

THAT CLEARLY WOULD HAVE BEEN A RESTRICTION ON SPEECH, BASED ON CONTENT. THAT'S WHAT BROWN & WILLIAMSON I THINK ATTEMPTS TO DO HERE. AND THAT WAS NOT AT ISSUE IN ALEXANDER.

AND THEN THE VERY LAST THING IS THAT BROWN & WILLIAMSON TRIES TO MAKE THIS DISTINCTION, TRIES TO SAY THAT THE UNIVERSITY IS NOT COVERED BY THE FIRST AMENDMENT BECAUSE WE ARE A STATE ACTOR. AND I THINK THAT ISSUE HAS BEEN RESOLVED IN THE PELL CASE, AT LEAST IN CALIFORNIA.

SO, THAT'S ALL, UNLESS THE COURT HAS QUESTIONS.

THE COURT: I DON'T THINK I HAVE ANY SPECIFIC QUESTIONS, MR. PATTI. DID YOU HAVE ANY COMMENTS OR OBSERVATIONS, IN TERMS OF WHAT HAS HAPPENED, IS HAPPENING IN THE FLORIDA LITIGATION?

MR. PATTI: ON, YEAH. I THINK THE FLORIDA LITIGATION ACTUALLY IS SIMILAR TO THE SITUATION IN COHN. IN THAT CASE, WHAT THE COURT IS DOING IS CONTROLLING THE LAWYERS THAT ARE BEFORE IT. IT IS NOT SAYING -- THE COURT DID NOT SAY THAT NO PARTY OUT THERE CAN DISSEMINATE THIS INFORMATION, OR HAVE IT. THE COURT WAS NOT VERY HAPPY, OBVIOUSLY, WITH THE LAWYER IN THAT CASE, WHO KIND OF MADE IT

A FAIT ACCOMPLI, AND FILED THE 800 PAGES OF DOCUMENTS, AND SAID I DON'T WANT YOU TO DO THAT AGAIN TO A LAWYER WHO IS SUBJECT TO MY JURISDICTION AS THE COURT. BUT THE FACT THAT THE COURT DID THAT DOES NOT MEAN THAT THERE IS A PROPERTY RIGHT IN THE ATTORNEY-CLIENT PRIVILEGE ABOUT INFORMATION.

IT CERTAINLY DOESN'T MEAN THAT THERE IS ONE IN CALIFORNIA.

THE COURT: THANK YOU.

MS. CAULFIELD: BRIEF REBUTTAL.

THE COURT: PLEASE, PLEASE.

MS. CAULFIELD: FIRST, ON THE ISSUE OF COPIES AND CONVERSION, FIRST OF ALL, MR. PATTI DIDN'T TALK TO THE A&M RECORDS CASE, WHICH SAYS COPIES OF PROPERTY, SOUND RECORDINGS -- AND THIS WAS AS EARLY AS 1977 -- CAN ABSOLUTELY BE RECOVERED. AND I'M NOT GOING TO TALK ANY MORE ABOUT THE FMC CASE, BECAUSE I THINK IT SIDESTEPS THE WHOLE ISSUE OF PRIVILEGE. IT WAS CONFIDENTIAL RECORDS THAT DID NOT HAVE TO DO WITH TRADE SECRETS, BUT WITH CONFIDENTIAL BUSINESS RECORDS. SO THE TRADE SECRETS ANALOGY THAT WE USE STILL HOLDS.

SECOND, ON THE ISSUE OF ACCESS QUESTION, THE SEATTLE TIMES CASE IS DIFFERENT THAN WHAT MR. PATTI SAYS. THE SEATTLE TIMES GOT ACCESS TO THE INFORMATION BECAUSE OF COURT ORDER ABOUT DISCOVERY, WHICH WAS THE MEMBERSHIP RECORDS OF THE GROUP THAT WAS SUING THE SEATTLE TIMES FOR DEFAMATION. AND THEY SOUGHT TO PUBLISH THAT INFORMATION.

THEY ALREADY HAD ACCESS, BECAUSE THEY HAD GOTTEN IT UNDER COURT-ORDERED DISCOVERY, BECAUSE THEY WERE THE

DEFENDANT IN THE DEFAMATION CASE, AND SO THEY WERE SEEKING TO PUBLISH IT. AND THAT'S, I'M SAYING, IS A DISTINCTION TO WHAT MR. PATTI WAS SAYING. IT WAS A DISSEMINATION CASE; IT WASN'T AN ACCESS CASE.

THE COURT: NO, IT WAS AN ACCESS CASE. BUT THE QUESTION WAS WHETHER, IN GRANTING THE DISCOVERY ORDER, WHICH WAS ACCESS, THE COURT WOULD PROPERLY IMPOSE A CONDITION RESTRICTING DISSEMINATION. BUT FOR THE COURT'S ORDER, THERE WOULDN'T HAVE BEEN ACCESS IN THE FIRST PLACE.

MS. CAULFIELD: AND WE ARE SAYING HERE, YOUR HONOR, IS IF YOU CHANGE THEFT, AND DROP INTO THE LAP OF THE UNIVERSITY, AS MR. PATTI SAYS, STOLEN DOCUMENTS FROM COURT-ORDERED ACCESS, IT IS NOT LESS HEINOUS AND NOT LESS OF AN IMPACT ON THE FIRST AMENDMENT BECAUSE THERE IS A -- THERE IS A PROPERTY RIGHT THAT IS NOT TO BE REACHED BY ANYBODY ELSE. AND THE ONLY REASON IT WAS REACHED IS BY THE STAFF. AND I KNOW MR. PATTI SAID LIKELY YOUR AGENT THERE IS PERSON THAT DEMANDED TWO AND A HALF MILLION DOLLARS FOR THE RETURN OF DOCUMENTS.

THE COURT: HE MAY HAVE BEEN YOUR AGENT AT ONE TIME. BUT I BELIEVE THAT WE CAN ALL AGREE HE WAS NOT ACTING WITHIN THE SCOPE OF HIS AUTHORITY.

MS. CAULFIELD: THAT IS TRUE. THAT WAS MY POINT. I DO APPRECIATE IT. SO, I DO THINK THIS IS NOT AN EASY AREA, YOUR HONOR, WHEN YOU GET TO THE FIRST AMENDMENT, OF ACCESS VERSUS DISSEMINATION. IT IS BOTH WHAT MAKES EMPLOYERS, YOU KNOW, WANT THESE TYPES OF LAWYERS, AND I AM SURE MAKES JUDGES DREAD THESE LINES OF CASES, BECAUSE THE

LINES ARE SO EVEN. AND I KNOW MR. PATTI AND ARE BOTH TRYING TO MAKE OUR BEST CASE.

BUT IN ALL FAIRNESS, I MEAN, SEATTLE TIMES DID NOT HAVE TO STEAL TO GET TO DISSEMINATION, HOWEVER IT GOT TO THE SEATTLE TIMES. I AGREE WITH YOUR HONOR. BUT I AGREE IF THE SEATTLE TIMES HAD STOLEN, IF THERE WAS A QUESTION OF THEFT HERE AND IT WAS PROTECTED BY CONVERSION OR BY A PROTECTIVE ORDER OF THE COURT, SOMEBODY STOLE A DOCUMENT THAT WAS UNDER A PROTECTIVE ORDER OF COURT. THE ONLY DIFFERENCE, THE COURT HAD THE JURISDICTION TO SAY YOU HAVE VIOLATED A PROTECTIVE ORDER BY DISSEMINATING. AND THAT IS WHAT THE LAW OF CONVERSION GIVES US THE RIGHT TO ASK FOR.

MR. PATTI SAYS GENUINELY, I'M SURE, THAT THE CONTENT OF THESE DOCUMENTS, OR WHAT PEOPLE THINK IS THE CONTENT OF THESE 4,000 PAGES, IS AN END THAT JUSTIFIES THE MEANS OF ALLOWING THESE STOLEN DOCUMENTS TO GO FURTHER AND FURTHER.

AND I THINK, YOUR HONOR, THAT THAT IS NOT WHAT THE FIRST AMENDMENT IS ABOUT. THE FIRST AMENDMENT DOESN'T SAY THAT ANY TIME YOU WANT TO SPEAK, YOU CAN SPEAK, REGARDLESS OF THE ISSUE, OR REGARDLESS OF THE IMPACT.

IN FACT, THE FIRST AMENDMENT SAYS QUITE THE OPPOSITE. THE FIRST AMENDMENT IS VERY IMPORTANT TO US. BUT WHEN THERE IS AN IMPACT THAT IS IMPERMISSIBLE, THAT IS NOT THIS CASE, OR WHEN IT REALLY IS A STATUTE THAT HAS OTHER REASONS, WHICH IS THE ALEXANDER CASE. AND IN ALEXANDER IT WAS THE MAN'S RIGHT TO DISSEMINATE HIS BOOKS, WHICH THE

IS, YOU KNOW, A FUNDAMENTAL FIRST AMENDMENT ISSUE, BUT THAT THE WAY THAT THE LAW WAS BEING APPLIED IN THAT CASE WAS NEUTRAL. THEY WEREN'T AFTER THEIR MAN'S BOOKS. THEY WERE AFTER THE RIGHT TO TAKE PROPERTY BACK THAT WAS THE RESULT OF ILLEGAL MEANS. AND THEY HAVE A RIGHT TO GET THAT PROPERTY BACK.

ON THE UNCLEAN HANDS ISSUE, I CANNOT REMAIN SILENT ON THIS ISSUE, OTHER THAN TO SAY THERE IS A LOT OF ACCUSATIONS THAT HAVE BEEN TRADED IN THESE CASES, AND IT ALL COMES DOWN TO NOTHING THAT HAS BEEN PROVEN IN ANY OF THESE BRIEFS. WE WENT TO GREAT LENGTHS TO SHOW OUR DISCOVERY, AND NOW WE ARE SAID TO BE MISREPRESENTING THINGS. WE KNOW WHO HAS LOOKED AT ALL OF THE DOCUMENTS. AND NO ONE KNOWS UNTIL WE GET OUR DAY IN COURT WHAT THE TRUE STORY IS. AND WE'LL GET OUR DAY IN COURT. ALL WE SEEK TO DO IS PRESERVE A PRIVILEGE WHICH WE HAVE A RIGHT TO PRESERVE.

ONE OTHER ISSUE, I THINK, YOUR HONOR, IS THAT OUR RIGHT IS VERY CLEAR THAT THE UNIVERSITY BELIEVES, AS LONG AS YOU CALL THE OTHER SIDE EVIL, BAD, HIDING, SECRETIVE, THAT THAT GIVES THEM A FIRST AMENDMENT RIGHT TO PUBLISH THAT DATA, IRRESPECTIVE OF WHAT STATUTE IT COMES UNDER, OR WHAT PRIVACY RIGHTS. AT LEAST, THAT IS WHAT IT COMES DOWN TO. I KNOW THERE ARE SOME FINE POINTS MADE IN THESE BRIEFS, BUT WE HAVE ALWAYS COME BACK TO THE ISSUE OF BROWN & WILLIAMSON DOESN'T DESERVE EQUITY.

BUT THAT IS NOT ISSUE. THE FIRST ISSUE IS A FIRST AMENDMENT ISSUE. IT IS NOT A TRIAL OF WHO HAS BONA

ABOUT HOW THESE DOCUMENTS GOT TO THE UNIVERSITY. AND IT WILL BE SAID, IN TERMS OF THE THEFT THAT WAS INVOLVED HERE.

RECOGNIZE THAT THESE DOCUMENTS ARE ALL IN THE PUBLIC DOMAIN, MR. PATTI SAYS, AND I THINK YOUR HONOR POINTED OUT THE POINTS OF JUDGE COLTON'S ORDER, WHERE THEY ARE, AND THE NEW YORK TIMES' DOCUMENTS. THEIR SET OF DOCUMENTS, WHATEVER THEY MAY BE, ARE NOT IN THE PUBLIC DOMAIN, AND QUOTES AND OTHER COMMENT HAS BEEN MADE BY THAT NEWSPAPER, THAT THAT NEWSPAPER HAS CHOSEN NOT TO PUBLISH THOSE DOCUMENTS ON THE INTERNET, THOSE DOCUMENTS THAT THAT NEWSPAPER HAS, THAT ARE PROTECTED BY THE FIRST AMENDMENT RIGHTS THAT NEWSPAPERS HAVE, HAVE NOT BEEN PUT ON THE INTERNET, NOR HAVE THEY THREATENED TO PUT THEM ON THE INTERNET, THE WAY THE UNIVERSITY HAS THREATENED TO PUT THEM ON THE INTERNET.

FAIR COMMENT HAS BEEN MADE AND SOME QUOTES HAVE BEEN GIVEN. BUT THAT IS NOT PUBLIC DOMAIN -- OF 4,000 PRIVILEGED DOCUMENTS. BUT THE INDIVIDUAL DOCUMENT IS EACH PAGE OF THOSE INDIVIDUAL DOCUMENTS. TO CITE, AND NOT MAKE COMMENT, IT IS NOT ACCURATE TO SAY THAT ALL OF THOSE DOCUMENTS ARE IN THE PUBLIC DOMAIN, BECAUSE A NEWSPAPER CHOSE TO PUBLISH A PUBLIC ACCOUNT ABOUT IT, AND USE FAIR COMMENT ABOUT IT.

THANK YOU, YOUR HONOR.

THE COURT: WELL, THANK YOU. AS I THINK WE ALL RECOGNIZE, THE LEGAL ISSUES HERE ARE FASCINATING, AND THE SITUATION, IN MANY WAYS, IS DIFFICULT.

I THINK WHAT I WOULD LIKE TO DO IS TAKE A SHORT

RECESS, AND THEN I THINK I'LL BE PREPARED TO COME BACK AND MAKE A DECISION ON THIS APPLICATION. SO, I WOULD LIKE TO TAKE, LET'S SAY, A 10-MINUTE RECESS. 4:30 ON MY WATCH. WE'LL BE IN RECESS UNTIL 4:40.

(Whereupon, a recess was taken.)

THE COURT: WELL, ONCE AGAIN, I REALLY DO WANT TO THANK YOU, COMMENT ON THE SUPERB LAWYERING, AND THE PAPERWORK AND THE ARGUMENT.

IT IS, AT BOTTOM, A FASCINATING QUESTION, I THINK, IN TERMS OF THE ISSUES THAT ARE PRESENTED. AND IT IS REALLY HELPFUL TO HAVE THE VARIOUS POSITIONS PRESENTED AS WELL AS THEY HAVE BEEN.

LET ME TELL YOU THE CONCLUSIONS TO WHICH I COME, AND BRIEFLY, HOPEFULLY, EXPLAIN MY THINKING.

FIRST OF ALL, IT SEEMS TO ME IMPORTANT TO EMPHASIZE THE VARIOUS THINGS THAT ARE NOT INVOLVED IN THIS CASE, OR IN THIS APPLICATION. THIS IS NOT AN ACTION BROUGHT AGAINST MR. WILLIAMS, THE PERSON WHO WALKED AWAY WITH, STOLE, WHATEVER WORD YOU WANT TO USE, WITHOUT AUTHORITY REMOVED THESE DOCUMENTS. AND I THINK IT IS VERY IMPORTANT TO KEEP IN MIND THAT THE COURT IS NOT BEING ASKED TO, NOR IS IT PASSING UPON IN ANY WAY THE PROPRIETY OF HIS CONDUCT, OR WHATEVER THE CONSEQUENCES OF HIS CONDUCT MAY BE, AS FAR AS HE'S CONCERNED. SO ANY RULING THE COURT MAY MAKE HERE IS CERTAINLY NOT APPROVING OF THE COURSE OF ACTION WHICH HE TOOK.

SECONDLY, WE ARE NOT DEALING WITH THE QUESTION OF THE ADMISSIBILITY OF ANY OF THESE DOCUMENTS INTO EVIDENCE

DURING THE COURSE OF A PARTICULAR JUDICIAL PROCEEDING. ANY QUESTION THAT PARTICULAR DOCUMENTS SHOULD NOT BE RECEIVED IN EVIDENCE BECAUSE THEY ARE PRIVILEGED, BECAUSE THE PRIVILEGE HAS NOT BEEN WAIVED, ARE FOR DETERMINATION IN ANOTHER CONTEXT, AT ANOTHER TIME. IT MAY WELL BE THAT THE DEFENDANT IS ENTITLED TO EXCLUDE SOME OR ALL OF THESE DOCUMENTS FROM EVIDENCE ON THAT BASIS. WE'RE NOT CONSIDERING THAT QUESTION EITHER; NOR ARE WE CONSIDERING ANY QUESTION ABOUT THE PROTECTIBILITY OF TRADE SECRET OR CONFIDENTIAL BUSINESS INFORMATION OF THE TYPE WHICH HAS BEEN PROVIDED PROTECTION IN A VARIETY OF CONTEXTS.

BROWN & WILLIAMSON MAKES THE ARGUMENT THAT THE ATTORNEY-CLIENT PRIVILEGE SOMEHOW IS ENTITLED TO GREATER PROTECTION THAN THOSE TRADE SECRETS. I'M NOT SURE I AGREE WITH THAT PRIORITIZATION. I MEAN, WE CAN AGREE THAT THIS IS DIFFERENT. WE CAN AGREE THAT THE CASES WHICH BROWN & WILLIAMSON RELIES UPON, WHERE PROTECTION WAS IN FACT PROVIDED, INVOLVED INFORMATION OF THAT COMMERCIAL NATURE, WHERE SOMEBODY WAS TRYING TO PUT THAT INFORMATION TO THEIR OWN COMMERCIAL ADVANTAGE.

WHAT WE'RE DEALING WITH HERE IS SOMETHING DIFFERENT. AND I THINK, AGAIN, WHEN YOU LOOK AT THE DISCUSSION AT THE END OF THAT FMC OPINION, THE INDICATION THERE, AND THINK IT IS ONE TO WHICH I WOULD SUBSCRIBE, IS THAT THAT TYPE OF INFORMATION WOULD BE ENTITLED TO GREATER PROTECTION THAN WHAT WE'RE DISCUSSING HERE.

BUT, IN ANY EVENT, IT IS CERTAINLY DIFFERENT. AND THEN IT'S ALSO, I THINK, WORTH OBSERVING -- WE'LL TALK

ABOUT, A LITTLE MORE EXACTLY, WHAT WEIGHT THIS SHOULD RECEIVE, AND HOW THIS FITS INTO THE WHOLE ANALYSIS. BUT IT IS WORTH OBSERVING THAT AT THIS POINT.

IT IS FAR FROM CLEAR TO WHAT EXTENT EITHER THE ATTORNEY-CLIENT OR THE WORK PRODUCT PRIVILEGE APPLIES TO THE DOCUMENTS THAT ARE UNDER DISCUSSION. CERTAINLY, IT IS TRUE THAT, LOOKING AT THE DESCRIPTION OF THE DOCUMENTS, ON THE FACE OF IT, THERE WOULD APPEAR TO BE, FACIALLY, A NUMBER OF DOCUMENTS THAT WOULD COME WITHIN THE PRIVILEGE. IT WOULD APPEAR THAT THERE ARE SOME WHICH PROBABLY DO NOT. IT MAY BE THAT THERE IS A WORK PRODUCT PRIVILEGE THAT COULD PROPERLY BE ASSERTED WITH RESPECT TO SOME OF THEM.

BUT, AS WE SIT HERE AT THIS TIME, THE NUMBER OF DOCUMENTS PROPERLY SUBJECT TO THE PRIVILEGE REMAINS AN OPEN QUESTION. AND, INDEED, EVEN IF SOME OF THESE DOCUMENTS COME WITHIN THE BASIC CONTOURS OF THE ATTORNEY-CLIENT PRIVILEGE, THERE IS ALSO A QUESTION, AS YET UNRESOLVED, AS TO WHETHER ANY EXCEPTIONS TO THAT PRIVILEGE MIGHT APPLY.

THE ARGUMENTS MADE IN THE PAPERS THAT THE EXCEPTION FOR COMMUNICATIONS THAT ARE MADE FOR THE PURPOSE OF COMMITTING OR PLANNING A FRAUD DO NOT COME WITHIN THE PRIVILEGE, A CONTENTION HAS BEEN MADE THAT THAT EXCEPTION WOULD APPLY HERE. I'M NOT CERTAINLY RULING ON WHETHER THAT EXCEPTION WOULD OR WOULD NOT APPLY. THE ARGUMENT HAS BEEN MADE.

THE ONLY POINT I'M MAKING, INITIALLY, IS THAT THAT, TOO, HAS NOT BEEN DEMONSTRATED AT THIS POINT, AND I DO THINK THERE IS SOME MERIT TO MR. PATTI'S ARGUMENT THAT THE

BURDEN IN THAT RESPECT IS ON THE MOVING PARTY. AND SINCE THE MOVING PARTY IS AWARE OF ALL OF THE DOCUMENTS THAT ARE IN ISSUE, IT PRESUMABLY WAS IN A POSITION TO MAKE SUCH A SHOWING.

BUT I WOULD NOT WANT TO REST A RULING ON THAT BASIS. I THINK, FOR PURPOSES OF ANALYZING THE ISSUE THAT IS HERE THIS AFTERNOON, WE SHOULD ASSUME THAT AT LEAST SOME OF THESE DOCUMENTS MAY COME WITHIN THE SCOPE OF A PRIVILEGE, AND WE SHOULD ANALYZE THE VARIOUS QUESTIONS PRESENTED ON THAT ASSUMPTION.

IF, GOING FORWARD, IT WERE DETERMINED THAT THIS FORM OF RELIEF SHOULD BE GRANTED, SOME FORM OF RELIEF SHOULD BE GRANTED, OBVIOUSLY, BEFORE A FINAL DETERMINATION WITH RESPECT TO THE UNIVERSITY'S OBLIGATION TO RETURN THE DOCUMENTS WAS MADE, I THINK IT WOULD BE NECESSARY TO LOOK AT DOCUMENTS ONE AT A TIME, AND MAKE THE DETERMINATION AS TO WHETHER OR NOT THERE WAS IN FACT A LEGITIMATE BASIS FOR AN ASSERTION OF ANY SUCH PRIVILEGE. BUT RECOGNIZING THE QUESTION THAT IS THERE, IN THAT REGARD, I THINK WE CAN PROCEED FORWARD ON THE ASSUMPTION THAT ONE OR MORE SUCH DOCUMENTS WOULD AT LEAST BE ENTITLED TO THAT PROTECTION.

I THINK THE SECOND THING THAT IS IMPORTANT TO RECOGNIZE IS THAT THE PLAINTIFF'S ARGUMENT FOR THE RETURN OF ALL COPIES OF THESE DOCUMENTS, AS DISTINGUISHED FROM SIMPLY SEEKING A SET OF THE DOCUMENTS FOR ITSELF, BUT THE REQUEST TO GET EVERY DOCUMENT BACK, AND TO DENY THE UNIVERSITY THE RIGHT TO RETAIN A SET OF THESE DOCUMENTS IN ITS POSSESSION, AND MAKE USE OF IT AS IT SEES FIT, IS GROUNDED ON THE

CONTENTION WHICH BROWN & WILLIAMSON MAKES THAT THE RETENTION OF PRIVILEGED INFORMATION CONSTITUTES A CONVERSION, AND THAT THERE IS SUCH A PROPERTY INTEREST IN ATTORNEY-CLIENT INFORMATION, OR WORK PRODUCT INFORMATION, THAT IT SUPPORTS A CONVERSION.

AND ON THAT PREMISE, BROWN & WILLIAMSON ASKS FOR AN ORDER, THIS SO-CALLED WRIT OF POSSESSION TO RETURN THE DOCUMENTS AND ALL COPIES.

I DON'T BELIEVE THAT THE LAW SUPPORTS THAT THEORY. I DON'T BELIEVE THAT THERE REALLY IS ANY AUTHORITY WHICH GOES SO FAR AS TO SAY THAT THE RETENTION OF A COPY OF A PRIVILEGED DOCUMENT CONSTITUTES A CONVERSION OF THE INFORMATION BELONGING TO THE HOLDER OF THE PRIVILEGE.

AND I THINK REALLY THE CASE WHICH IS MOST ON POINT IS THE CASE THAT WE SPENT A LOT OF TIME TALKING ABOUT DURING THE ARGUMENT. THAT IS THE FMC CORPORATION CASE.

TRUE, THE INFORMATION THERE WAS NOT ATTORNEY-CLIENT INFORMATION. IT WAS CONFIDENTIAL BUSINESS INFORMATION, WHICH I THINK NORMALLY HAS BEEN ENTITLED TO GREATER PROTECTION. BUT, IN ANY EVENT, IT WAS INFORMATION WHICH, WHETHER IT IS ENTITLED TO MORE PROTECTION OR LESS PROTECTION, CLEARLY IT WAS ENTITLED TO PROTECTION.

YET THE COURT, APPLYING CALIFORNIA LAW, HELD THAT, ALTHOUGH THE RETENTION OF THE ONLY COPIES OF THAT INFORMATION MIGHT CONSTITUTE A CONVERSION, SO LONG AS THE ORIGINALS WERE RETURNED, THE RETENTION OF A COPY DID NOT CONSTITUTE A CONVERSION. AND ABC, OR ITS AFFILIATE, WHICH WAS IN POSSESSION OF STOLEN INFORMATION, THEREFORE WAS NOT

SUBJECT TO AN ORDER TO RETURN ALL COPIES OF THE INFORMATION, OR NOT TO DISSEMINATE THE INFORMATION FURTHER.

AS I SAY, I THINK THAT CASE IS THE CLOSEST IN POINT TO ANY OF THE MANY, MANY CASES THAT HAVE BEEN CITED ON THAT ISSUE. ALL OF THE OTHER CASES THAT HAVE BEEN CITED, I THINK, CAN BE DISTINGUISHED IN ONE WAY OR THE OTHER.

I'M NOT GOING TO SPEND TIME GOING THROUGH THEM AND DISTINGUISHING THEM; BUT I THINK THE FACT OF THE MATTER IS THAT WHAT OCCURRED HERE SIMPLY IS NOT A CONVERSION.

WHICH REMINDS ME, ONE OTHER THING I WANT TO EMPHASIZE. WHEN WE TALK ABOUT WHAT IS NOT INVOLVED IN THIS CASE, I THINK IT IS ALSO IMPORTANT TO EMPHASIZE THAT WHAT IS NOT INVOLVED IS A SITUATION WHERE THERE IS ANY CONTENTION OR EVIDENCE THAT THE UNIVERSITY NOW HOLDING THE INFORMATION PARTICIPATED IN ANY WAY IN THE THEFT OF THE INFORMATION.

IF THE UNIVERSITY HAD IN FACT BEEN A WRONGDOER IN OBTAINING THE INFORMATION, THEN WE WOULD HAVE A VERY DIFFERENT SITUATION. BUT HERE THERE IS NO SUGGESTION THAT THE UNIVERSITY HAS DONE ANYTHING WRONG.

THE ONLY CONTENTION ARISES WITH RESPECT TO WHETHER OR NOT THEIR CONTINUED RETENTION OF THE INFORMATION, NOT HAVING PARTICIPATED IN OBTAINING IT INITIALLY, WHETHER THAT IN ITSELF IS TORTIOUS, AND WOULD SUPPORT A CLAIM FOR CONVERSION. AND, AS I SAY, I SIMPLY DON'T THINK THE LAW SUPPORTS THAT CONTENTION, NOR DO I THINK IT IS LIKELY TO DO SO.

THE PROBLEM, IN A SENSE, WITH THAT RESULT, AND IT IS SORT OF THE ARGUMENT THAT MS. CAULFIELD IS PUSHING WITH

THE COURT, VERY UNDERSTANDABLY, IT SEEMS TO ME ONE WOULD BE UNCOMFORTABLE WITH A CONCLUSION THAT THE COURT SIMPLY HAD NO AUTHORITY, UNDER ANY CIRCUMSTANCES, TO PROHIBIT A PARTY FROM DISSEMINATING PRIVILEGED INFORMATION, EVEN IF THAT PARTY WAS NOT RESPONSIBLE FOR OBTAINING IT IMPROPERLY.

THE SORT OF HYPOTHETICALS THAT WERE BEING SUGGESTED DURING THE ARGUMENT, SUPPOSE SOMEBODY BREAKS INTO A PSYCHIATRIST'S OFFICE OR A LAWYER'S OFFICE, AND WALKS OFF WITH CONFIDENTIAL INFORMATION, WHICH GETS TURNED OVER TO THE UNIVERSITY OR SOME OTHER INNOCENT PARTY. IS THE COURT POWERLESS TO PROHIBIT THE DISSEMINATION OF THAT INFORMATION?

AND IT SEEMS TO ME WE WOULD BE UNCOMFORTABLE IF THE ANSWER TO THAT QUESTION WERE IT IS SIMPLY IMPOSSIBLE FOR THE COURT TO DEAL WITH THAT SITUATION IN AN APPROPRIATE CASE. BUT I THINK WHERE THAT LEADS US IS NOT TO ACCEPT THE ARGUMENT THAT BROWN & WILLIAMSON IS MAKING, THAT SOMEHOW THIS CONSTITUTES A CONVERSION, AND CAN BE DEALT WITH BY A WRIT OF POSSESSION.

BUT I THINK THE ANSWER TO THE CONUNDRUM, IF YOU WILL, LIES IN THE EQUITABLE AUTHORITY OF THE COURT. I THINK, NO MATTER HOW PLAINTIFF MAY TRY TO CAST THIS, IT REALLY HAS NO CHOICE TO -- BUT TO COME BACK TO AN APPLICATION FOR EQUITABLE RELIEF, WHETHER IT IS AN APPOINTMENT OF A RECEIVER TO TAKE HOLD OF THE INFORMATION, WHETHER IT IS A PRELIMINARY INJUNCTION OR, ULTIMATELY, A PERMANENT INJUNCTION.

IT IS BASICALLY A REQUEST FOR EQUITABLE RELIEF TO ENJOIN THE DISSEMINATION OF THIS INFORMATION, AND I WOULD

THINK THAT IN AN APPROPRIATE CASE THE COURT WOULD HAVE AUTHORITY TO GRANT RELIEF OF THAT NATURE.

BUT I THINK THAT INEVITABLY WHAT IS PRESENTED IS A WEIGHING PROCESS. AND IN A SITUATION WHERE THERE IS NO GREAT PUBLIC INTEREST IN THE INFORMATION AND, AGAIN, GOING BACK TO THE HYPOTHETICAL THAT WAS SUGGESTED, SOME INDIVIDUAL'S PSYCHIATRIC RECORDS, LEGAL RECORDS, WHICH DON'T HAVE MUCH OF AN IMPACT ON ANYBODY, OTHER THAN THE PARTICULAR PERSON, THERE MIGHT BE A PRETTY CLEAR WEIGHING OF THE BALANCE, AND THE COURT MIGHT BE INCLINED TO GRANT SUCH RELIEF IN A CASE OF THAT NATURE.

I THINK WHAT WE'VE GOT TO DO IS LOOK AT THOSE TYPE OF CONSIDERATIONS IN THIS PARTICULAR CONTEXT, AND DECIDE WHETHER, IN LIGHT OF THOSE CONSIDERATIONS, EQUITABLE RELIEF IS OR IS NOT APPROPRIATE.

IT SEEMS TO ME THAT THERE ARE A NUMBER OF PRETTY STRONG CONSIDERATIONS WHICH WEIGH AGAINST THE GRANTING OF SUCH RELIEF IN THIS PARTICULAR SITUATION.

FIRST OF ALL, THERE ARE THE FIRST AMENDMENT CONCERNS TO WHICH WE -- WERE ALLUDED, HOWEVER IT WAS CAST. BUT THE NATURE OF WHAT IS BEING REQUESTED WOULD IN FACT IMPINGE UPON PUBLIC DISCUSSION, PUBLIC STUDY OF THIS INFORMATION, WHICH HAS A BEARING ON ALL KINDS OF ISSUES OF PUBLIC HEALTH, PUBLIC LAW, DOCUMENTS WHICH MAY BE TAKEN TO SUGGEST THE ADVISABILITY OF LEGISLATION IN ALL KINDS OF AREAS.

SO, THERE IS, IT SEEMS TO ME, A VERY STRONG PUBLIC INTEREST IN PERMITTING THIS PARTICULAR INFORMATION,

JUDGING FROM WHAT HAS BEEN SHOWN IN THE PAPERS, AS TO WHAT IT CONCERNS, PERMITTING THIS INFORMATION TO REMAIN AVAILABLE FOR USE BY THE UNIVERSITY, OR BY OTHERS WHO MAY OBTAIN IT FROM THE UNIVERSITY.

ON THE OTHER HAND, AT THIS POINT IN TIME, PARTICULARLY, THE INTERESTS OR THE STRENGTH OF THE INTERESTS OF THE DEFENDANT, IT SEEMS TO ME, HAVE TO BE QUESTIONED. AND IT SEEMS TO ME, AT THIS POINT, THEY ARE PARTICULARLY QUESTIONABLE.

FIRST OF ALL, AT MOST THEIR INTEREST AT THIS POINT, I THINK, IS IN AVOIDING POTENTIAL LIABILITY OF ONE SORT OR ANOTHER. AND I DON'T MEAN TO SAY THAT IS INSIGNIFICANT. BUT, IN AND OF ITSELF, WHEN COMPARED WITH THE OTHER COMPETING INTERESTS, IT MAY NOT BE AS GREAT.

BUT WHAT I'M REALLY REFERRING TO IS THE FACT THAT MUCH, IF NOT ALL OF THIS INFORMATION, HAS ALREADY GOTTEN OUT. IN A SENSE, IT IS NOW TOO LATE, WHATEVER THE SITUATION MIGHT HAVE BEEN ON DAY ONE, WHEN SOMEBODY WALKED OFF WITH THESE DOCUMENTS.

IT MAY BE THAT THE NEW YORK TIMES AND OTHER PUBLICATIONS HAVE NOT YET PUBLISHED EVERY PAGE OF THESE DOCUMENTS, BUT IT IS CLEAR FROM THE RECORD THAT ALL OF THESE DOCUMENTS ARE IN THE HANDS OF A NUMBER OF NEWS MEDIA.

ONE HAS TO ASSUME THAT THOSE DOCUMENTS WHICH HAVE BEEN REPRINTED IN THE PAPERS MUST REPRESENT SOMEBODY'S CULLING OF THE DOCUMENTS, YOU KNOW, FOR THE JUICIEST PIECES OF INFORMATION.

HAVEN'T YET BEEN ACTUALLY PUBLISHED PUBLICLY SEEMS TO ME DOUBTFUL, ALTHOUGH THAT IS, TO BE HONEST, SOMEWHAT OF A SPECULATIVE OBSERVATION. BUT WHAT IS NOT SPECULATIVE IS THAT ALL OF THE DOCUMENTS ARE OUT THERE, WHETHER THEY HAVE BEEN PUBLISHED OR NOT. AND ANY ORDER THAT THE COURT MIGHT ENTER SEEMS TO ME ULTIMATELY WOULD BE OF VERY QUESTIONABLE BENEFIT TO THE PLAINTIFF, BECAUSE THERE ARE SO MANY OTHERS THAT ARE ALREADY OUT AND IN CIRCULATION.

AND AN ADDITIONAL CONSIDERATION, IT SEEMS TO ME AS IMPORTANT IN TRYING TO ENGAGE IN THIS EQUITABLE BALANCING, IS WHERE WE WOULD GO, WERE THE COURT TO GRANT THE RELIEF TODAY THAT IS BEING REQUESTED? THE NEXT STEP, AS BROWN & WILLIAMSON HAS INDICATED -- AND WE'VE ACTUALLY BIFURCATED ISSUES, SO WE COULD TAKE THINGS ONE AT A TIME -- BUT IF BROWN & WILLIAMSON WERE TO PREVAIL, THIS STEP, THE NEXT STEP WOULD BE TO ATTEMPT TO PURSUE AND TRACE ALL OF THE COPIES OF THE DOCUMENTS THAT HAVE GONE FROM THE UNIVERSITY ELSEWHERE, AND WE HAVE ALREADY BEEN PRESENTED WITH APPLICATIONS TO DEPOSE FACULTY MEMBERS, DEPOSE OTHER PEOPLE, TO FIND OUT WHICH DOCUMENTS THEY HAVE, WHEN THEY GET THEM, WHO THEY GIVE THEM TO. AND, REALLY, THE SPECTER OF PUTTING THAT PROCESS IN MOTION, I THINK, IS A QUITE DISTURBING ONE. THE WORD THAT COMES TO MIND IS "WITCHHUNTS". I DON'T KNOW THAT THAT IS FAIR.

I DON'T MEAN TO USE HYPERBOLE. BUT IT WOULD BE SETTING IN PROCESS SOME STEPS THAT I THINK WOULD BE VERY, VERY TROUBLESOME, AND CERTAINLY WOULD PRESENT A GOOD MANY ADDITIONAL FIRST AMENDMENT CONCERNS, INTRUDING INTO THE

RESEARCH OF OTHERS, AND WHAT OTHERS HAVE DONE, LOOKING AT THE INFORMATION, WHO THEY GAVE THEM TO, AND TRACING THE WHOLE THING THROUGH. A VERY DISTURBING PROSPECT.

AND I SUPPOSE ANOTHER WAY OF LOOKING AT THAT IS THAT IT JUST TENDS TO EMPHASIZE THE FACT THAT IT IS SIMPLY TOO LATE, AT THIS POINT. THE GENIE IS OUT OF THE BOTTLE. THESE DOCUMENTS ARE OUT.

AND THE ENTRY OF AN ORDER BY THIS COURT DIRECTING THE UNIVERSITY TO RETURN EVERY COPY, NOT TO DISSEMINATE ANYTHING THAT THEY HAVE OBTAINED FROM THESE DOCUMENTS TO OTHERS, WOULD DO NOTHING BUT CREATE ADDITIONAL PROBLEMS.

JUST ONE MORE THING IN THAT REGARD. THE POINT THAT MR. PATTI MADE, I THINK, IS A GOOD ONE.

SUPPOSE THAT THE UNIVERSITY DID SEND BACK ALL OF THESE DOCUMENTS TO BROWN & WILLIAMSON, AND THEN WERE TO OBTAIN ANOTHER SET BACK FROM THE NEW YORK TIMES. THEN WHAT? ARE THEY UNDER AN ORDER TO PASS A SET ALONG? AND, IF NOT, WHAT IS THE POINT OF THE WHOLE EXERCISE? OF COURSE, THE NEW YORK TIMES MAY OR MAY NOT DECIDE TO GIVE THEM TO THE UNIVERSITY. BUT THEY MIGHT. THEY WOULD HAVE THE ABILITY TO. WE KNOW THEY'RE OUT THERE. AGAIN, JUST ANOTHER WAY, IT SEEMS TO ME, OF UNDERSCORING THE FACT THAT, WHATEVER THE DAMAGE IS, IT HAS BEEN DONE IN TERMS OF LETTING THE INFORMATION OUT INTO THE PUBLIC. IT HASN'T BEEN DONE IN TERMS OF USING THE INFORMATION DURING THE COURSE OF LEGAL PROCEEDINGS AGAINST BROWN & WILLIAMSON.

AND I MENTIONED THAT AT THE BEGINNING, BUT IT

INSIGNIFICANT.

AND ONE OF THE REAL PURPOSES BEHIND THE ATTORNEY-CLIENT PRIVILEGE IS THAT WE DON'T DISCOURAGE PEOPLE FROM DEALING WITH THEIR LAWYERS CANDIDLY, LEST THAT INFORMATION COME BACK IN LITIGATION, AND BE USED AGAINST THEM, AND POSE NEW LIABILITY, OR WHATEVER. AND THAT IS NOT THE EXTENT OF IT.

I DON'T MEAN TO SAY THAT THERE ISN'T MORE TO THE PRIVILEGE THAN THAT, BUT THAT IS A VERY BASIC PART OF THE PRIVILEGE. AND THAT POSSIBILITY CAN STILL BE PROTECTED BY THE EXCLUSION OF PRIVILEGED DOCUMENTS DURING THE COURSE OF LEGAL PROCEEDINGS, IF THE COURT FINDS THAT THE PRIVILEGE DOES EXIST AND HAS NOT BEEN WAIVED.

AND, INDEED, AT SOME POINT OR OTHER IN BROWN & WILLIAMSON'S PAPERS, I BELIEVE THERE WAS AN INDICATION THAT ONE OF THE THINGS THEY WERE CONCERNED ABOUT WAS THAT OTHER COURTS NOT CONSTRUE THEIR FAILURE TO SEEK THE RETURN OF THESE DOCUMENTS AS ITSELF CONSTITUTING A WAIVER OF THE PRIVILEGE.

AND TO WHATEVER EXTENT THAT WAS AN OBJECTIVE OF THEIR APPLICATION, I SUPPOSE IT HAS BEEN ACHIEVED. CERTAINLY, THEY HAVE MADE THEIR REQUEST. CERTAINLY, THEY HAVE DONE WHAT THEY COULD IN THESE PROCEEDINGS TO OBTAIN THE RETURN. AND SO I WOULD SUPPOSE THAT ANYBODY'S JOB IN TRYING TO SHOW THAT THEY VOLUNTARILY ACQUIESCED IN THE DISCLOSURE, THEY'RE GOING TO HAVE A HARD TIME WITH THAT.

BUT, IN ANY EVENT, IT DOES SEEM TO ME THAT,

ISSUE AN INJUNCTION HERE, WHEN YOU WEIGH THE VARIOUS CONSIDERATIONS, DESPITE THE IMPORTANCE OF THE ATTORNEY-CLIENT PRIVILEGE, DESPITE THE FACT THAT THE COURT CERTAINLY DOES NOT WANT TO BE UNDERSTOOD AS CONDONING THE IMPROPER REMOVAL OR DISCLOSURE OR THEFT OF CONFIDENTIAL DOCUMENTS, NONETHELESS, WHAT HAS HAPPENED HAS HAPPENED. AND, RESPECTIVELY, WHEN YOU WEIGH THE VARIOUS FACTORS THAT I'VE MENTIONED IN THE BALANCE, I DON'T THINK THAT ISSUING A PRELIMINARY INJUNCTION, OR ANY OTHER TYPE OF EQUITABLE RELIEF, WOULD BE APPROPRIATE.

AND THAT, AS BEST I CAN EXPLAIN IT IN A FEW MINUTES, IS MY THINKING, AND THE BASIS UPON WHICH I'M GOING TO DENY THE APPLICATION.

I DON'T KNOW WHETHER I WOULD RECEIVE A REQUEST OR NOT -- I VERY POSSIBLY WOULD -- BUT, IN ANY EVENT, RECOGNIZING THE DIFFICULTY OF THESE ISSUES, I AM GOING TO STAY THE EFFECTIVENESS OF MY ORDER FOR 20 DAYS, WHICH WILL GIVE BROWN & WILLIAMSON THE OPPORTUNITY TO SEEK RELIEF FROM THE COURT OF APPEAL, IF IT SHOULD WISH TO DO SO.

AND THAT WILL MEAN THAT THE TEMPORARY RESTRAINING ORDER, WHICH WAS ENTERED PREVIOUSLY, WILL REMAIN IN EFFECT FOR THAT TIME. I DO THINK THERE SHOULD BE AN OPPORTUNITY FOR THE COURT OF APPEAL TO LOOK AT THIS, IF BROWN & WILLIAMSON WISHES TO SEEK RELIEF AT THAT LEVEL.

THE OTHER THING THAT IS ON THE CALENDAR HERE, WHICH I DON'T THINK WE SHOULD SPEND ANY TIME ARGUING, BUT I THINK I SHOULD DISPOSE OF THIS AFTERNOON, IS THE DISMISSAL OR, RATHER, THE MOTION TO STRIKE, WHICH THE UNIVERSITY

BROUGHT UNDER SECTION 425.16, ALSO AN INTERESTING MOTION.

BUT I AM NOT INCLINED TO GRANT THAT MOTION. I DON'T BELIEVE THAT THIS SUIT CAN PROPERLY BE CHARACTERIZED AS ONE THAT IS BROUGHT AGAINST A PERSON -- I'M READING FROM THE STATUTE -- "AGAINST THE PERSON, ARISING FROM ANY ACT OF THAT PERSON IN FURTHERANCE OF THE PERSON'S RIGHT OF PETITION OR FREE SPEECH".

AN INTERESTING ISSUE, AND I'M SURE BOTH SIDES COULD ARGUE IT; THEY HAVE ARGUED IT IN THE PAPERS. BUT MY CONCLUSION IS THAT THIS ACTION SHOULD NOT BE CLASSIFIED AS COMING WITHIN THAT STATUTORY PROVISION.

SO, I'M GOING TO DENY THE MOTION TO STRIKE. I THINK THAT COVERS EVERYTHING, DOES IT NOT?

MS. CAULFIELD: YES, YOUR HONOR.

MR. PATTI: I THINK SO.

THE COURT: THANK YOU.

MR. PATTI: THANK YOU, YOUR HONOR.

(PROCEEDINGS ADJOURNED)