



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DEKALB COUNTY PENSION FUND,	:
	:
Plaintiff,	:
	:
v	: Civil Action
	: No. 6993-VCP
GOOGLE INC.,	:
	:
Defendant.	:

- - -

Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Wednesday, February 29, 2012
9:41 a.m.

- - -

BEFORE: HON. DONALD F. PARSONS, JR., Vice Chancellor.

- - -

REDACTED TRANSCRIPT FROM ORAL ARGUMENT ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT and RULINGS OF THE COURT

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

1 APPEARANCES:

2 CARMELLA P. KEENER, ESQ.
Rosenthal, Monhait & Goddess, P.A.

3 -and-

4 DARREN T. KAPLAN, ESQ.
CAROL S. SHAHMOON, ESQ.
of the New York Bar
5 Chitwood Harley Harnes LLP

-and-

6 MOLLY A. HAVIG, ESQ.
of the Georgia Bar
7 Chitwood Harley Harnes LLP
for Plaintiff

8 STEPHEN C. NORMAN, ESQ.
9 TYLER J. LEAVENGOOD, ESQ.
Potter, Anderson & Corroon LLP

10 -and-

11 BORIS FELDMAN, ESQ.
of the California Bar
Wilson, Sonsini, Goodrich & Rosati, P.C.
12 for Defendant

13

14

- - -

15

16

17

18

19

20

21

22

23

24

1 MR. NORMAN: Good morning, Your Honor.

2 THE COURT: Okay, good morning.

3 MS. KEENER: Good morning, Your Honor.

4 May it please the Court, Carmella Keener of Rosenthal,
5 Monhait & Goddess on behalf of the plaintiff. I'd
6 like to introduce to the Court my cocounsel, all from
7 the Chitwood Harley Harnes firm, Darren Kaplan, who
8 will make the presentation today on behalf of the
9 plaintiff --

10 MR. KAPLAN: Good morning, Your Honor.

11 THE COURT: Good morning.

12 MS. KEENER: -- Carol Shahmoon --

13 THE COURT: All right. Good morning.

14 MS. SHAHMOON: Good morning.

15 MS. KEENER: -- and Molly Havig.

16 MS. HAVIG: Good morning.

17 THE COURT: Good morning.

18 MS. KEENER: I'd also like to
19 introduce to the Court, Sheriff Thomas Brown. He is a
20 board member of the DeKalb County Pension Fund, and he
21 is here to observe today.

22 THE COURT: Okay. Welcome.

23 MS. KEENER: Thank you, Your Honor.

24 MR. NORMAN: Good morning, Your Honor.

1 THE COURT: Good morning.

2 MR. NORMAN: I'd like to introduce
3 Boris Feldman from the Wilson firm. With Your Honor's
4 permission, he's going to present on behalf of Google
5 today.

6 THE COURT: All right, fine.

7 MR. FELDMAN: Good morning, Your
8 Honor.

9 THE COURT: Okay. Can we get an idea
10 as to how much time we're thinking of taking this
11 morning, and so on?

12 MR. FELDMAN: Good morning, Your
13 Honor. So for the moving party, I think my opening
14 presentation is about 10 minutes.

15 THE COURT: Okay.

16 MR. KAPLAN: Good morning, Your Honor.
17 And for the responding party, I can't imagine that
18 we're going to go more than 10 minutes, either. And
19 then I believe there may be some other issues, as we
20 discussed in the teleconference, that we want to raise
21 with the Court that are more sort of tertiary and not
22 focused on the core issue. So maybe another 10
23 minutes.

24 THE COURT: So you don't see us going

1 beyond the lunch hour.

2 MR. KAPLAN: I certainly hope not.

3 THE COURT: All right. Fine. Okay.

4 Oh, just -- did you have something --

5 MR. KAPLAN: Yeah. Just as a
6 housekeeping, Your Honor, I've taken the liberty of
7 compiling a binder of all the exhibits that have been
8 submitted into the record, and I thought that might be
9 more convenient for Your Honor. And with your
10 permission, I'd like to hand it up.

11 THE COURT: Thank you. You can hand
12 it up.

13 MR. KAPLAN: I also have a copy for
14 the court reporter.

15 THE COURT: Okay. Thank you.

16 All right. Go ahead.

17 MR. FELDMAN: May it please the Court.

18 THE COURT: Sure.

19 MR. FELDMAN: Boris Feldman for
20 Google.

21 I'd like to address the Court in three
22 parts. First, I'd like to go to the dates and context
23 of this Section 220 request. Second, I'd like to
24 address Request 1, and then, finally, I'll address

1 Request 2.

2 THE COURT: Okay.

3 MR. FELDMAN: The standard here, as
4 Your Honor knows, is well-established. In fact, Your
5 Honor had something to do with establishing it in the
6 HP case, where I understand my colleagues were before
7 you yesterday. Sorry I missed -- I hope they left the
8 place clean.

9 In the Espinoza against HP decision
10 our Supreme Court stated that the issue is plaintiff
11 has met its burden of showing "... that the specific
12 books and records are ... 'essential to the
13 accomplishment of the stockholder's articulated
14 purpose for the inspection.'" And it's almost like
15 studying the Talmud. Each word there has meaning,
16 "specific," "essential," and "articulated purpose."

17 As the Court has repeatedly advised
18 practitioners, this is not merits discovery. There --
19 there are a number of derivative suits about this out
20 there. We'll talk about them in a minute. And if
21 those get past the motions to dismiss, then they may
22 get very broad discovery; but sometimes it -- it feels
23 to people answering it -- you may have noticed from
24 the correspondence -- Mr. Norman was handling all the

1 220 requests here. Sometimes it feels in drafting the
2 response for the corporation as if one is drafting
3 responses to document production requests, they get so
4 elaborate.

5 But the Court of Chancery has made
6 clear that's not the case. You may recall the XO
7 Communications decision in 2005 where this Court
8 admonished the investigation of wrongdoing in a 220
9 proceeding as "to determine whether you need to go
10 further with some sort of action."

11 Again, "If you already have enough to
12 file a complaint, then your needs have been satisfied
13 for purposes of the statute."

14 And we believe that what Google
15 provided here in connection with what was in the
16 public record was sufficient for that purpose. It
17 certainly was for every other plaintiff's lawyer who
18 made a 220 request.

19 So let me turn, first, to -- to just a
20 handful of dates. I don't want to bore the Court with
21 too many, but this is just sort of to bracket it.

22 So the first date is May 10th of 2011.
23 On that day -- and I believe it was a 10-Q filing --
24 Google announced the DOJ investigation into Canadian

1 Pharmacy and announced that it had accrued a \$500
2 million reserve for a potential settlement. So that
3 was on May 10th. Not surprisingly, at the end of that
4 month the first 220 request came in. That was on
5 May 31st, 2011.

6 The actual announcement of a
7 settlement with the government in the form of a
8 nonprosecution agreement was on August 24th of last
9 year. And we've attached as Exhibit A to our opening
10 papers the nonprosecution agreement. It's relevant --
11 I think so the plaintiffs believe it's relevant
12 because it goes to whether there's a proper purpose,
13 which we haven't challenged here. We think it's
14 relevant to show there was actually more detail out
15 here based on which a shareholder could decide whether
16 or not to bring a derivative action than there usually
17 is.

18 The first derivative suit was filed
19 five days later in federal court, August 29th. And
20 those derivative suits have been sailing forward.
21 There are a number of them. They're consolidated.
22 We've moved to dismiss. In the hearing on the motion
23 to dismiss the consolidated federal derivative suits
24 will be in April.

1 THE COURT: And have you moved to
2 dismiss on the -- on the merits? I mean, 12(b)(6)
3 plus 23.1?

4 MR. FELDMAN: Principally demand
5 futility. I think -- and to be honest, I don't
6 remember, because I always have a debate with my
7 colleagues as to whether we should do it on the
8 individual claims or not. But the thrust of it
9 absolutely is demand futility.

10 THE COURT: All right.

11 MR. FELDMAN: And -- and as you can
12 imagine, the central issue there is are the directors
13 under the control of the founders.

14 There were then derivative suits filed
15 in California Superior Court. Those began on
16 August 31. All of those have been stayed, a few
17 voluntarily; and the one that wasn't stayed
18 voluntarily was stayed by court order.

19 Then in this matter DeKalb issued its
20 220 request. We received it on September 14th. I
21 think they sent it out a couple days before. We
22 produced documents to DeKalb about a month later, on
23 October 19th. And then after that the next thing we
24 heard from DeKalb was a complaint on October 28th. So

1 that's when this action was filed.

2 And -- and the other relevant date --
3 I think plaintiffs put in the transcript -- on
4 February 6th Chancellor Strine stayed the Delaware
5 derivative suits. There were three. One of them had
6 made a 220 request, gotten basically the same
7 materials as we gave to DeKalb. They argued that
8 their action in the Court of Chancery should not be
9 stayed because, unlike the federal actions, they had
10 the 220 materials. And Chancellor Strine,
11 nevertheless, said that it didn't really -- the
12 materials didn't add much to the mix and he stayed the
13 derivative action. So that's where we're at.

14 In terms of other 220 requests,
15 Mr. Norman has been living in 220-ville. There were
16 nine other shareholders that sent 220 requests to
17 Google. Google ultimately produced documents to four
18 of the nine, including DeKalb. So DeKalb plus three
19 others.

20 Of the five that did not receive 220
21 documents, four never responded. In other words,
22 Potter Anderson wrote them back and said "Please
23 provide proof that you're a shareholder." Four of
24 them never responded. One of them did respond but

1 refused to sign the confidentiality agreement that
2 everybody else did. So they didn't get documents.

3 Of the nine that initially demanded
4 inspection, four actually went forward and filed
5 derivative suits. Of the nine who demanded
6 inspection, no one other than DeKalb brought a 220
7 action.

8 So that's sort of the lay of the land.

9 Let me turn first to Request No. 1.
10 It's sort of like the \$64,000 question, except I think
11 it's the 4.2 million question, not the 64,000
12 question. And we submit that -- I'm sure we're going
13 to have discussion about do you need a trial. It just
14 isn't clear to me, given the burdens that the Supreme
15 Court said in Espinoza, and the factual record here,
16 it's not clear to me what you would try in a trial
17 beside the record here. I actually would have
18 expected cross motions for summary judgment as many of
19 these 220 matters are presented.

20 But the reason we believe the Court
21 should reject Request No. 1 is that plaintiffs have
22 failed to establish their burden and -- and the
23 Supreme Court made clear it is their burden -- of
24 showing that the discovery is essential and not

1 overbroad. It's not essential for three reasons, Your
2 Honor. There are massive amounts of information in
3 the public record. Part of that is the nonprosecution
4 agreement. Part of it is what plaintiffs refer to in
5 showing a proper purpose, after the nonprosecution
6 agreement, the U.S. attorney in Rhode Island went off
7 the reservation and gave a long interview about all
8 the evidence and why it was he was so excited about
9 the case. It ended up being so far off the
10 reservation that the justice department apologized to
11 Google for it and muzzled him. But there were
12 Congressional hearings. There's a lot of stuff. This
13 isn't one of these situations where as a shareholder
14 you have no idea if there was something that went
15 wrong or not. Here, the record, the public record, is
16 full of what happened.

17 Second, it is -- it is not dispositive
18 but it's, I think, informative to the Court that all
19 the other shareholders were able to file derivative
20 suits and didn't need to bring a 220 action.

21 And finally, if -- if the plaintiffs
22 here wanted to sort of glean what everybody else had
23 gotten, we do have a 50-page-long consolidated federal
24 complaint with a lot of detail. And there's a 70-page

1 Delaware complaint with a lot of detail. So I know
2 that after I sit down, we're going to hear how few
3 pages and how many redactions; but the truth is every
4 other plaintiff's lawyer in the world felt that they
5 had enough to bring the action here. And so that's --
6 that's the important line that we must not cross.

7 The test, as the court said in XO
8 Communications, is they have enough information to
9 decide whether you want to file suit. The test is not
10 would it be useful for you in framing that suit to
11 have a lot of discovery. So that's why it's not
12 essential.

13 Why is it overbroad? It's actually --
14 it's not just the most overbroad 220 request I've ever
15 seen; it actually might be -- it's hard to -- I'm
16 searching a lot of data, and the old retrieval isn't
17 as good as it used to be; but I'm not sure I've ever
18 seen a more overbroad discovery request in any lawsuit
19 I've done. All government subpoenas and everything
20 produced in response. So that can't possibly, can't
21 possibly --

22 THE COURT: I've seen it in discovery.

23 MR. FELDMAN: You have?

24 THE COURT: Yes, I have.

1 MR. FELDMAN: I've had -- maybe I've
2 just been more fortunate.

3 THE COURT: Right, maybe.

4 MR. FELDMAN: Or maybe most of the
5 responses weren't formally in documents; they were
6 more narrow than that. But this is very far from what
7 the Supreme Court required in Espinoza, where it said,
8 "... our courts must circumscribe orders granting
9 inspection 'with *rifled precision*.'"

10 If this is a rifle, it's the largest
11 bore rifle in artillery history.

12 Your own Honor's decision in the
13 Joseph A. Bank case -- a store I remember fondly from
14 when it was one little store, not a big chain on
15 commercials. In Joseph A. Bank you said, "... '[t]he
16 scope of inspection should be circumscribed with
17 precision and limited to those documents that are
18 necessary, essential and sufficient to the
19 stockholder's purpose.'"

20 So just saying "Give us everything you
21 gave the government" doesn't -- can't possibly be
22 viewed as that. The 4.2 million pages that Google
23 produced to the government are not limited to issues
24 of board involvement or executive culpability.

1 They're everything that related. As you know, in
2 responding to a grand jury subpoenas, multi grand jury
3 subpoenas, it's everything about the AdWords program
4 and Canadian Pharma. This would set a very
5 unfortunate precedent. People follow what the Court
6 of Chancery does. And if this works here, then every
7 future 220 request, where there's been a government
8 investigation, will say "Please give us the government
9 requests for information and all your responses."

10 Finally -- and then I'll be quiet and
11 sit down -- Request No. 2 is for board materials. I
12 don't -- I don't actually think there's a disagreement
13 here. Mr. Norman agreed immediately, as he had with
14 all the other requesters, to provide relevant
15 nonprivileged board materials from 2008 forward.
16 DeKalb did not contest this. There's a September 30,
17 2011, letter from Mr. Kaplan to Mr. Norman agreeing,
18 without waiving any future rights, agreeing to that
19 date. In fact, one reason he may have agreed to it is
20 because of the issue of contemporaneous ownership, how
21 far back did DeKalb own Google stock. So to avoid
22 that, Mr. Kaplan said, "All right. We'll go with the
23 September 1, 2008, date," which they did.

24 There -- they never came back and said

1 "Okay. We've got these, but we need to go back six
2 months." What they did instead is sued and brought
3 the 220 action.

4 Mr. Norman --

5 THE COURT: Well, let me -- where can
6 I find the second request again? You know, I've got
7 all these papers, but I --

8 MR. FELDMAN: Yes. It's Exhibit ...

9 THE COURT: Or maybe with respect to
10 your binder ...

11 MR. KAPLAN: Your Honor, if I may,
12 it's Tab A of the binder. And the portion of the
13 demand that includes the actual categories appears on
14 page 4 of 6, "Identification of Books and Records
15 Demanded." I apologize in advance for the typo in the
16 second category.

17 THE COURT: All right. Just give me a
18 second, Mr. Feldman. I'll read No. 2 over to myself.

19 Okay.

20 MR. FELDMAN: And then I don't know if
21 this is in the book. It's the correspondence between
22 Mr. Norman and Mr. Kaplan. It was a letter from
23 Mr. Kaplan to Mr. Norman dated September 30, 2011.

24 Mr. Kaplan, do you know if that's in

1 the tab?

2 MS. SHAHMOON: Yes. It's Tab E.

3 MR. FELDMAN: Tab?

4 MR. KAPLAN: Tab E, as in Echo, Your
5 Honor.

6 THE COURT: All right.

7 MR. FELDMAN: So if Your Honor will
8 turn, please, to Tab E --

9 THE COURT: All right.

10 MR. FELDMAN: -- page 3 -- I'm happy
11 to hand it up if --

12 THE COURT: No. I've got it.

13 MR. FELDMAN: At the first full
14 paragraph, "Notwithstanding the above," blah, blah,
15 "the fund will agree solely as an initial matter to"
16 --

17 THE COURT: Okay. Now, hold on a
18 second.

19 My Tab E, as in Edward, is a Chitwood
20 Harley Harnes document.

21 MR. KAPLAN: I believe that is what
22 counsel is referring to.

23 MR. FELDMAN: Yes, Your Honor.

24 MR. KAPLAN: It's a letter from me on

1 Chitwood Harley Harnes letterhead to Mr. Norman.

2 THE COURT: All right. Okay. I've
3 got it. "Notwithstanding the above."

4 MR. FELDMAN: Yeah. So that's where
5 DeKalb came back and said "All right. For now, we'll
6 take minutes from 2008 to the present." "... inspect
7 relevant and non-privileged portions of the minutes of
8 the meeting of," and then I assume it means "or
9 presentations of the Company's Board of Directors in
10 which pharmacy advertising policies were discussed for
11 the period of January 1, 2008 to the present."

12 So I'm not a big waiver guy. I
13 don't -- they didn't waive anything, but -- but the
14 point is there's an interactive process on 220.
15 Mr. Norman said, "We'll give you what we gave the
16 others." He -- Mr. Kaplan said, "Okay for now." And
17 then the next thing we knew, it was an
18 "I'll-see-you-in-court moment." We got sued the
19 following week.

20 So that's what we've produced. In
21 fact, Mr. Norman sent several letters subsequent to
22 the suit, advising DeKalb that this is all that Google
23 found, that they did a search -- they're pretty good
24 at searching. It's in their nature. They did a

1 search under those parameters. These are the parts.
2 And they redacted out things that had nothing to do
3 with Canadian Pharma, and they redacted out things
4 that were privileged. It didn't --

5 THE COURT: Now, I'm a little unclear.
6 Does that -- so in the end are you saying this is all
7 there is going back to 2003?

8 MR. FELDMAN: To 2008.

9 THE COURT: To 2008. Right. I
10 understand that. It seemed like in the briefing that
11 there was some suggestion that there wasn't anything
12 even back to 2003.

13 MR. FELDMAN: So that -- we produced
14 under the 2008. Just to double-check before we came
15 before Your Honor, we had Google go back this week and
16 double-check. In going back to 2003, there's nothing
17 else in the minutes about Canadian Pharma, correct.
18 But I don't -- I don't think we've told that to them
19 previously. We went back in preparing for the hearing
20 to do it.

21 So it -- I know -- I know it looks bad
22 when you produce documents that have a lot of white on
23 them; but when you ask about a topic -- and here,
24 unlike request 1, which was everything, this was much

1 more focused, board materials related to Canadian
2 Pharma. There are a lot of things in Google minutes
3 that are very sensitive that have nothing to do with
4 that. We redacted them out. And then the reality is
5 most, if not all, of the discussions of the DOJ
6 investigation by their nature were privileged because
7 that's who presents on this. You either have outside
8 counsel, who was negotiating with the government
9 report -- it's not my firm -- or you have general
10 counsel of the company update the board on it. But
11 there were -- the redactions were principally of
12 things that had nothing to do with this. And we have
13 gone back to check to 2003.

14 With that, if -- if you have
15 questions, I'm happy to answer them; but otherwise,
16 I'm out of ammo.

17 THE COURT: Well, let's hear from the
18 other side, and we'll see what discussion we have.

19 MR. FELDMAN: Thank you, Your Honor.

20 THE COURT: All right.

21 MR. KAPLAN: Your Honor, before I
22 begin, you sort of anticipated where I was going when
23 looking directly at what the actual wordage of the,
24 for lack of a better word, the demand portion of the

1 demand was. And with Your Honor's permission, I've
2 taken the liberty of reproducing in full the section
3 that contains the actual categories of the 220 demand.

4 THE COURT: All right.

5 MR. KAPLAN: I'm going to show it to
6 defense counsel. If they have no further objection,
7 I'm just going to place it up here on the easel --

8 THE COURT: Okay.

9 MR. KAPLAN: -- for Your Honor's
10 convenience.

11 May it please the Court. We've heard
12 a lot of things from Google today. We've heard
13 4.2 million documents. We have heard all the other
14 plaintiffs' lawyers in the world had enough
15 information to bring their 220 case -- or to bring
16 their derivative case without a 220 demand. And of
17 those that made 220 demands, nobody brought an action
18 to enforce their 220 demand after receiving what we
19 are led to believe are the very same documents which
20 DeKalb received in response.

21 And my response to that is simple. I
22 think all the other plaintiffs' lawyers in the world
23 are wrong. I don't think they have enough, given what
24 has been produced to them by Google. And I don't

1 think they have enough, given what is in the public
2 record with which I am very familiar, having lived
3 with this case for a period of time.

4 I spent a lot of time in dealing with
5 my client DeKalb -- it's DeKalb County -- the DeKalb
6 County Pension Fund. They're a large shareholder of
7 Google. They own almost \$6 million worth of stock.
8 And they have owned that stock since 2004, about a
9 month and a half or two months after the initial
10 Google IPO.

11 DeKalb has responsibilities to the men
12 and women who are employees of DeKalb County, who are
13 beneficiaries of the fund. They are an institutional
14 shareholder that is involved. They are not
15 necessarily what I would call an activist shareholder,
16 but they pay very close attention to what transpires
17 in corporations in which they have large positions.
18 And in particular, DeKalb County Pension Fund is very
19 concerned when a corporation, in which they have a
20 \$6 million investment, enters into a no-prosecution
21 agreement with the government, where the company
22 essentially concedes liability for being a interested
23 party, at the very least, if not a enabling party of
24 drug dealing, which is what this was. It's not simply

1 a question of the \$500 million fine that Google paid
2 out, although that's a lot of money and I think Your
3 Honor sort of intimated that during the
4 teleconference, even for Google, which has billions of
5 dollars in annual revenue. It's more than being about
6 the money. It's what Google did.

7 And corporations -- I'm certain I
8 don't need to tell anybody here -- don't act on
9 autopilot. It is employees, executives, officers,
10 board members of corporations that make decisions.
11 And there is evidence in the public record -- limited
12 evidence in the public record, I might add -- that
13 board members of Google knew about this practice of
14 permitting rogue Internet Canadian pharmacies --
15 Canadian Pharma -- I think we can agree on the
16 shorthand -- to advertise on Google's network. We
17 know that because The Wall Street Journal reported it.
18 My adversary described the U.S. Attorney of Rhode
19 Island as going off the reservation. I don't know
20 what the limits of the reservation are, but he
21 certainly did tell The Wall Street Journal that -- and
22 if I could respectfully direct Your Honor's attention
23 to Tab U -- there's an article called "New Heat [on]
24 Google CEO." Third paragraph. "'Larry Page knew what

1 was going on,' Peter Neronha, the Rhode Island U.S.
2 Attorney who led the probe, said in an interview, 'We
3 know it from the investigation. We simply know it
4 from the documents we reviewed, witnesses that we
5 interviewed, that Larry Page knew what was going on.'"

6 Second paragraph down following that,
7 "Mr. Neronha didn't say when the Justice Department
8 believes Mr. Page learned of the matter, though people
9 familiar with the investigation allege it was several
10 years ago."

11 And if Your Honor will turn to the
12 following page, fourth paragraph from the top.
13 "'Suffice it to say that this is not two or three
14 rogue employees at the customer service level doing
15 this on their own' 'This was a corporate
16 decision to engage in this conduct.'"

17 Now, that is juicy stuff. It's red
18 meat to throw out in front of shareholder plaintiffs'
19 lawyers, but it's not enough to get past demand
20 futility. It simply isn't. Nor is there anything in
21 the nonprosecution agreement that indicates that a
22 board member had any knowledge of what was
23 transpiring. In fact, that's also reported in The
24 Wall Street Journal. Defendant makes that argument in

1 their briefing. Well, that's precisely the problem.
2 If you're going to show demand futility, you have to
3 show board knowledge. That information is not in the
4 public record. And given what was produced to us by
5 the defendants in response to the 220 demand -- that
6 would be the 10 entirely blank or all but entirely
7 blank pages -- there's nothing in there that gives us
8 any further knowledge as to whether or not the board
9 knew of what was going on. It doesn't help us in
10 making our demand futility argument.

11 The following tab, Tab V, contains
12 another article in The Wall Street Journal which lays
13 out some more information that perhaps would be
14 helpful to an attorney in crafting a complaint and in
15 successfully alleging demand futility. It gives
16 hints. It says that "The [Google] case also contained
17 potentially embarrassing allegations that top Google
18 executives, including co-founder Larry Page, were told
19 about legal problems with the drug ads." So now we
20 know it was more than Larry Page who knew about the
21 ads.

22 And in the following paragraph, the
23 last sentence on that first page says, "'We simply
24 know from the documents that we reviewed,'" going on

1 to the following page, "'and witnesses interviewed
2 that Larry Page knew what was going on'"

3 Next paragraph, "Mr. Neronha declined
4 to detail the evidence, which was presented in secret
5 to a federal grand jury. Other people familiar with
6 the case said internal emails showed Sheryl Sandberg,
7 a former top Google executive ..., had raised concerns
8 about the ads." That's helpful, but it doesn't tell
9 you who Sheryl Sandberg raised her concerns with.

10 Following paragraph, "Prosecutors
11 could have used that evidence to argue Google
12 deliberately turned a blind eye to lawbreaking to
13 protect a profit stream estimated by the government in
14 the hundreds of millions of dollars." "deliberately
15 turned a blind eye." That sounds like Caremark to me,
16 Your Honor. But I don't have enough from this
17 article.

18 "Google says it has strict policies,"
19 following paragraph, "in place to prevent criminals
20 from using its ad services and it bans advertisers who
21 repeatedly violate its guidelines." I don't have
22 those policies. Those policies are not identified.
23 Certainly they've never been produced.

24 So the argument that Google has

1 favored us with this morning is incredibly circular.
2 Other plaintiffs' lawyers brought a 220 demand and
3 were satisfied and one hadn't filed their action. And
4 our response was to move to dismiss that action
5 because they could not adequately allege demand
6 futility.

7 Even with those documents, the
8 Delaware plaintiffs -- the cases that were brought in
9 Delaware were the ones where they did receive their
10 220 documents. In Delaware they moved to stay that
11 action, and they were successful primarily because
12 they were able to convince Chancellor Strine that the
13 documents that these plaintiffs received in response
14 to their 220 demands didn't add anything more to what
15 was already in the public record. There were no
16 allegations in their complaint that were any better
17 that were than the allegations in the consolidated
18 complaint in the Southern District of California. And
19 Judge Strine took the plaintiffs who made the 220
20 demand and then filed the action to task. He took
21 them to task because they took Google's word for the
22 fact that these were all the documents they had.
23 Chancellor Strine says, "I tend to be suspicious" --
24 this is the transcript of the hearing. Exhibit 2, a

1 document that we provided to Your Honor prior to the
2 hearing, "ORAL ARGUMENT AND ... COURT'S RULING,"
3 Louisiana Municipal Police Employees Retirement System
4 versus Larry Page, Action No. 7041, Chancellor Strine.

5 "I tend to be suspicious" -- page 37,
6 line 2. "I tend to be suspicious of the plaintiffs in
7 the federal case, the state cases in California and
8 here. I tend to think, for example, that 110
9 documents -- when I hear that I would want to send
10 letters where I give verification. 'You swear this is
11 only the 110? You swear that? The board never did
12 anything else? General counsel, nobody else did
13 anything? Fine. I'll beat you over the living head
14 with it.'" That's Chancellor Strine's words, not
15 mine.

16 They didn't get enough. Oh, and by
17 the way, those plaintiffs got a hundred more pages
18 than we did, because notwithstanding the fact that
19 Category 2 reads "All documents provided or presented
20 to any current or former board member" -- "or director
21 or directors either individually or collectively"
22 Google decided that when it was offering to give us
23 board minutes, that that request didn't also ask for
24 meetings of the board in committee. So Google

1 unilaterally decided that we would not get a hundred
2 pages of audit committee minutes.

3 Nevertheless, it doesn't really matter
4 here because those pages didn't give those plaintiffs
5 anything more than did the plaintiffs who got nothing
6 from Google on the 220 demand.

7 Oh, I'm sorry. Those are -- they
8 didn't get anything more than --

9 THE COURT: I understand.

10 MR. KAPLAN: -- the plaintiffs in the
11 220 demand.

12 Chancellor Strine went further. He
13 said, "The reason why people do it is, frankly,
14 nothing to do with the real interested investors. It
15 has everything to do with stuff like today: who gets
16 to be lead counsel, who is in charge. That leaves
17 somebody like me to do something imperfect but
18 sensible. And given the California action ... where I
19 think [the] company and its directors are entitled not
20 to have been sued over the same thing in three places
21 at once, ... and where I can't see any demonstrable
22 advantage to Delaware plaintiffs, I'm going to enter
23 the stay."

24 But he went further. He said, "I will

1 say this. I am not going to dismiss the case at this
2 point. I would encourage the Delaware defendants to
3 cooperate with [the] federal plaintiffs, and I would
4 encourage the federal plaintiffs to cooperate with the
5 Delaware plaintiffs. And if there's something -- the
6 utility to be had about the 110 pages and what you can
7 do with them, then it ought to be used on behalf of
8 the best interests of the investors of Google."

9 So Chancellor Strine didn't dismiss
10 the case. He has a feeling that something -- there's
11 something here, but he knows it hasn't been brought
12 forward yet, and it hasn't been brought forward as a
13 result of a 220 demand.

14 Now, I think it's important to take
15 another look at Category 1, with Your Honor's
16 permission. Every time this has been discussed in
17 papers from Google or on the phone or even here,
18 they've talked about the first two words of the
19 request and that's it, "All subpoenas." But that's
20 not the whole request, Your Honor. It's "All
21 subpoenas by the Government related to online Canadian
22 pharmacies advertising prescription drugs in the
23 United States through the AdWords advertising program
24 ..."

1 That's a lot more precise than saying
2 "All documents." I would venture to say that that is
3 rifled precision because we're not looking for every
4 subpoena that Google got. We're not looking for
5 aspects of the subpoena that don't touch on the area
6 of our concern. And for all I know, those subpoenas
7 may have been a lot broader. Google takes us to task
8 for asking for things that we don't even know exist.
9 Well --

10 THE COURT: Yeah. The problem is I --
11 I -- you know, I think -- I'm sympathetic to your
12 argument, but I have to deal with the case that's in
13 front of me. Request No. 1 I think is just too broad.
14 And "All subpoenas relating," that could include all
15 of the ads. It could include all of the
16 correspondence some low-level Google person had
17 with -- with the pharmacies in Canada, all those kind
18 of things. It -- it could include millions of pages
19 of documents that have nothing to do with the proper
20 purpose here.

21 So it's a nice try, but I don't think
22 so. And I -- I know that the case related to
23 countrywide that you referred to from Vice Chancellor
24 Noble, you know, that was not a focus of that case as

1 to what -- whether the scope of the request was too
2 broad or not too broad. The focus was was there a
3 proper purpose. He said there was. And then he went
4 along with that request. But I -- I don't think that
5 request matches up to cases like Espinoza that came
6 out of the Supreme Court recently.

7 No. 2, I'm sympathetic. I don't think
8 they've provided everything that was supposed to be
9 provided. So what -- let's talk about No. 2. You
10 know, I'm inclined to order additional production in
11 response to No. 2. But then the issue is what does it
12 ask for? And you seem to say that it's -- it's
13 everything that was given to either the board or any
14 committee of the board dating back to 2003. I'm also
15 sympathetic to 2003. If your client was owning stock
16 in 2004 or even later, our case law recognizes when it
17 looks like there might be wrongdoing that goes back
18 earlier than that, that you, in the appropriate case,
19 would be entitled to it.

20 Here, we've got a situation where
21 Google has admitted that they committed these wrongs.
22 This is not going to be easy to ferret out, this kind
23 of information.

24 So what we ought to be talking about

1 is that -- is that, No. 2.

2 MR. KAPLAN: Very good, Your Honor.
3 So with regard to 2 and 2 only, "All documents
4 provided or presented to any current or former
5 director or directors of Google either individually or
6 collectively relating to online Canadian pharmacies
7 advertising prescription drugs in the United States
8 through the AdWords advertising program."

9 The idea of the board minutes being
10 the only thing that Google has that is responsive to
11 this request, that idea came from Google. Google
12 responded to that and said "I'm not going to give you
13 anything. Nothing. But I will give you board minutes
14 dating back to January 1 of 2008."

15 And in the Tab D, D as in Delta, that
16 offer is made by Mr. Norman. Page 2. Request 1, you
17 don't get anything. Request 2, "The Company will
18 produce any relevant and non-privileged portions of
19 the minutes of the meetings and presentations to the
20 Company's Board of Directors at which pharmacy
21 advertising policies were discussed for the period of
22 January 1, 2008 to the present."

23 I said, "Yes, I will take those,
24 Mr. Norman. Thank you very much, but I'm not waiving

1 my right to come back and ask for more, and I'm
2 certainly not waiving my right to bring a 220 demand
3 or to bring a 220 action to enforce my demand."

4 So that's where the idea that
5 responsive documents to this would be board minutes.
6 And I will agree that some small aspect of that would
7 be board minutes because it would involve the board
8 members meeting and communicating with each other,
9 presumably.

10 I don't agree that the 2008
11 limitation, as Your Honor has indicated, we're
12 entitled to go much further than that in pursuing how
13 far the wrongdoing goes, even to prior to our
14 ownership of stock. But what we've got back in the
15 form of board minutes, aside from the fact that it's
16 redacted to the point of being entirely blank, which
17 doesn't give us any context for what those redactions
18 are, doesn't tell us anything about what's being
19 discussed, redacting all the discussions up to the
20 moment where somebody mentions the word "Pharma" or
21 "Canadian Pharma" --

22 THE COURT: All right. So where are
23 those documents?

24 MR. KAPLAN: Those documents appear --

1 and those are confidential documents. So I guess
2 there is -- I'm not sure how we're going to handle
3 that with this part being videotaped --

4 THE COURT: Well, we could --

5 MR. KAPLAN: -- but we're not going to
6 show the document.

7 THE COURT: If we're going to talk
8 about those documents, we'll have them kill the video
9 feed until we're finished talking about them.

10 MR. KAPLAN: It is Tab B in the
11 binder. And beyond just -- we delivered those
12 documents to you in camera a few weeks ago. It is an
13 exhibit -- it is the first exhibit to our opposition
14 to motion for summary judgment. I think the documents
15 speak for themselves as far as how they've been
16 produced, what's here. At some point I'd like to talk
17 about my view that to call these documents
18 confidential and deserving of confidential protection
19 is a little bit silly insofar as they're entirely
20 blank pages or just about blank pages. But for right
21 now, why don't we just look at the documents.

22 So GB0002 -- well, let's start with
23 GB001. REDACTED

24 It starts -- by

1 the way, the date on GB0001 is July 14th, 2010. This
2 is the earliest board minute -- minutes that we
3 received from Google, notwithstanding the fact that we
4 had negotiated, I thought, for minutes from 2008 going
5 forward. First thing we get is July 14, 2010.

6 If there's any question as to why that
7 date was chosen, it seems to me that question has been
8 answered by the fact that the only thing that Google
9 could produce was the 2010 minutes. 2008 seems to be
10 just sort of an arbitrary date that they picked. They
11 asked us to provide evidence of ownership up to that
12 date. We did it, but we never said we didn't own it
13 on an earlier date, which we do.

14 July 14, 2010, GB00001.

15

16

17

18

19

REDACTED

20

21

22

23

24

1 REDACTED

2 Your Honor, I don't see how anybody is
3 supposed to understand what is being discussed here.
4 I don't understand how -- there's no context
5 whatsoever. REDACTED

6

7

8 REDACTED

9

10 Next page is the board of directors'
11 Q2 2010 CEO report. That's not -- that's the cover
12 page. So it's not redacted.

13 The next part completely redacted.
14 The only terms that are not redacted -- again, this is
15 confidential so I don't know how we're going to handle
16 it --

17 THE COURT: Well, we make the portion
18 of the transcript confidential.

19 MR. KAPLAN: Very good. So we're
20 going to -- it's confidential?

21 MR. FELDMAN: Whatever the Court.

22 MR. KAPLAN: Whatever.

23 THE COURT: I mean, what we usually do
24 is that the transcript -- you'll see the transcript.

1 And then you can, if there's any pages that you think
2 need to stay confidential, you don't have much time to
3 do it, but a day or two, you designate them. And if
4 you do, then we have a confidential transcript and we
5 have a public transcript. And the one that's
6 confidential is filed under seal.

7 MR. KAPLAN: Okay.

8 THE COURT: The way we normally
9 proceed with respect to it is if you're referring me
10 to certain pages and you're not quoting from those
11 pages, then normally there isn't much of a
12 confidentiality issue with respect to that. As far as
13 the video feed, keep that off, you know, on the --
14 that that is not being transmitted while we talk about
15 these documents.

16 MR. KAPLAN: I apologize. I forgot
17 this was being videotaped until I got to page 4. But
18 I don't need to read it to Your Honor.

19 THE COURT: Right.

20 MR. KAPLAN: I think they speak for
21 themselves as far as what's there and, more
22 importantly, what's not there.

23 THE COURT: I don't -- so if there are
24 any other ones that you wanted to point out. But I

1 will flip through them, also. I see the extent of it.

2 MR. KAPLAN: Thank you, Your Honor.

3 Well, we know what we got was not what
4 we asked for. We know that they agreed to provide
5 board minutes, but there were other documents they
6 could have produced. We know there are letters to
7 Mr. Page, letters from third parties, telling him that
8 Google has a problem with Canadian advertising --
9 Canadian pharmacies advertising on Google's network,
10 that Google search results will pull those ads up, and
11 that those companies will be happy to sell you drugs,
12 which would require a prescription in the United
13 States, without a prescription.

14 And if Your Honor were to look at some
15 of the -- those letters, we have a -- at Tab R in our
16 index. We have a letter to then-Google CEO, current
17 chairman of the board, Eric Schmidt, from the National
18 Center for Addiction and Substance Abuse at Columbia
19 University, describing this problem and enclosing a
20 report entitled "You've Got Drugs!" It's back on
21 July 7, 2008. I can't believe that Google did not
22 produce that letter in response to Category 2.

23 THE COURT: Right. I'm looking at the
24 document. I'll read the Document Request No. 2 into

1 record. It says, "2., All documents provided or
2 presented to any current or former director or
3 directors of Google either individually or
4 collectively relating to online Canadian pharmacies
5 advertising prescription drugs in the United States
6 through the AdWords advertising program."

7 It is phrased "documents provided or
8 presented to any current or former director or
9 directors of Google." So I would take that as not
10 including, you know, e-mails, things of that nature at
11 this point. But I don't think that it's fairly
12 limited to provided or presented in connection with
13 any meeting of the Google board or board committee.
14 It could have been provided or presented by a third
15 party. It could have been provided or presented by a
16 Google employee, anything of that nature. And as far
17 as I'm concerned, anything going back to 2003 that
18 meets that requirement in the circumstances of this
19 case where we're talking about two issues, one,
20 whether there's any liability, possible liability or
21 claims for liability on the part of individual
22 directors of Google, and also whether there's demand
23 futility, you know, the investigation of that.

24 To get to those kinds of issues for

1 demand futility, you'd have to know what individual
2 directors knew and what was going on when and when
3 they knew it and what was done. So I think that
4 that's a sufficiently targeted request, and that's
5 what ought to be produced.

6 Now, I'm not ruling at this point.
7 We're having a conversation so that Mr. Feldman knows
8 what the stakes are and what we're arguing about --
9 and he hasn't had a chance yet to respond to that
10 view. But as far as my preliminary view is Request
11 No. 1 is too broad. It's more in the nature of a
12 discovery request. And I'm not going to authorize
13 that because I think it's inconsistent with the case
14 law in our state relating to 220.

15 As far as No. 2, I think that that is
16 closer to the mark. It could be construed too
17 broadly, and I want to be careful to avoid that. So,
18 for example, it talks about "to any current or former
19 director or directors." It doesn't talk about
20 officers or anything like that and, therefore, it
21 doesn't include officers. It's just directors, and so
22 on, and it would be limited to what is stated.

23 All right.

24 MR. KAPLAN: Your Honor, I just wanted

1 to make sure I understood. You had mentioned that
2 it -- it would include e-mails?

3 THE COURT: Would not.

4 MR. KAPLAN: Would not.

5 THE COURT: I say that because I think
6 the way it is drafted, it's not completely, quote,
7 "off the reservation" for Google to think "Well, maybe
8 this is just talking about provided or presented in
9 connection with formal board meetings, formally
10 provided to a director." That may be a reasonable
11 interpretation. I don't think it's the only fair
12 interpretation of that request. But when you use
13 terms like "provided or presented," it really sounds
14 to me more formal than mentioned in any e-mail or
15 related to or those kinds of things.

16 So, No. 1, the request doesn't ask for
17 it.

18 No. 2, if we did start getting over
19 into all the e-mails and that kind of thing, that
20 gets, to me, into areas that probably are not
21 necessary and essential to get into for purposes of a
22 220 demand.

23 MR. KAPLAN: I -- I understand, Your
24 Honor. And I -- those are, to be sure, very important

1 concerns.

2 I would, if I may, respectfully direct
3 Your Honor's attention to Tab A, page 5 of 6, which is
4 the paragraph that immediately follows the text that
5 is currently up on the easel. And it gives a
6 definition of the word "documents," which would
7 include e-mail -- it's -- I will grant it is a -- it's
8 certainly a more expansive definition than paper
9 documents.

10 But the concern that we have, Your
11 Honor, is this is, after all, Google. They are, I am
12 certain, paperless. I am certain that when they
13 communicate internally with the board, when people
14 report to the board, that they don't do so with a
15 paper document. It is, I think -- it is vital that we
16 have e-mails as well as simple paper documents. I
17 would be shocked if there was any reportage up to the
18 board that wasn't in e-mail form.

19 THE COURT: That may be. Well, there
20 are two issues. One, the fact that you include a
21 several-page set of definitions in your 220 request,
22 which, to my mind, gets it closer and closer to a
23 discovery request, which is not what 220 is about,
24 that is not something that I take all that seriously.

1 So I'm going to look more to the words of the request
2 that you are propounding to the other side. But I
3 think it is a fair point that a company like Google
4 probably -- well, undoubtedly has much more emphasis
5 on electronic communication than otherwise.

6 But I am focused on the "provided or
7 presented to any current or former director." So I am
8 interested in things like if there is a letter that
9 goes to an officer of the company and then the officer
10 e-mails that, pdf's it and e-mails it as an attachment
11 to one of the directors, that fits into that kind of a
12 requirement. Whether we get to another thing that
13 there might have been an e-mail within the company --
14 let's say that that scenario I just described goes to
15 Director No. 1 and then Director No. 1 sends an e-mail
16 to five other directors that might make some reference
17 to it but it does not send along the document. Then I
18 would think that that would be outside the scope of
19 what I'm talking about. The documents, these things
20 weren't presented to him, were not ...

21 Now, it may be as a practical matter
22 that Google has no way to search and not include the
23 e-mails. And without, you know, reviewing them all
24 itself -- and it's up to Google. If it wants to incur

1 the expense to review all the e-mails and strictly
2 adhere to what I just alluded to as a differentiation
3 that I'm making, they can go ahead and do that. And
4 if they decide that "No; it would be cheaper for us to
5 just turn over all the e-mails. We'll turn over all
6 the e-mails" -- I mean, "run the search," that's up to
7 them.

8 But the fact that that may result in
9 some additional documents getting out into the hands
10 of the plaintiffs in this 220 action is just the cost
11 of getting to the documents that undoubtedly, in my
12 mind, are within what 220 is intended to accomplish.
13 And this is an insult to 220, the 10 pages that were
14 produced here. And it's a cynical response, as far as
15 I'm concerned.

16 MR. KAPLAN: Your Honor, while we're
17 on the subject of documents that are presented to
18 board members, there's been a lot of reportage in the
19 press about internal Google policies, policies that
20 relate to who's allowed to advertise with Google,
21 policies related to --

22 THE COURT: No.

23 MR. KAPLAN: No.

24 THE COURT: No. I'm saying no to

1 the -- I anticipate that you're next going to be
2 asking for that. I'm stuck with the plaintiffs I have
3 before me. Obviously you're a very talented lawyer,
4 and you've chosen to go the route that you've chosen
5 and to try to hit a grand slam with the "All
6 subpoenas." It would have been great if it worked.
7 It didn't.

8 You certainly know that you could have
9 read those papers and come in with a request for the
10 policies that are referred to. You could have come in
11 with a request for things that were more narrowly
12 tailored to exactly what you need to try to move
13 forward. You didn't do it. And so you're not getting
14 it, anyway. This 220 request didn't include it.
15 There was no amendment to the complaint. So I'm not
16 going there.

17 MR. KAPLAN: My only concern is I
18 don't want to end up back in front of Your Honor on --
19 with another dispute about what's to be produced and
20 what's not to be produced. I want to ...

21 THE COURT: You know, if there is some
22 e-mail or document that, let's say, goes from the
23 director to the rest of the members of the board that
24 "I got" -- "Here's something that was presented to me

1 relating to this. I'm attaching our policy so we
2 can" -- and it's all part of that document, well,
3 then, the whole document ought to be produced. If the
4 policy serendipitously for you comes up as one of the
5 things that's produced in that context, fine. You did
6 not make a request for the policies that would have
7 related to this that are, you know, referred to, that
8 kind of thing.

9 MR. KAPLAN: Right. I must confess it
10 was my hope that we would get that through Category 1.

11 THE COURT: No. I recognize. And
12 that was the approach you took, and nice try; but it
13 didn't work, at least here. Maybe it will work at the
14 Supreme Court.

15 MR. KAPLAN: I -- I have the sense
16 that my time is up, Your Honor.

17 THE COURT: No. Your time is not up,
18 but we might as well hear from the other side, and
19 maybe it will help us and I'm not wedded to a one,
20 two, three and then we're done. If we have to keep
21 talking, you have to bounce back up again, fine.

22 MR. KAPLAN: Very good, Your Honor.
23 Thank you.

24 THE COURT: Okay.

1 MR. FELDMAN: I hear and accept Your
2 Honor's ruling.

3 THE COURT: All right.

4 MR. FELDMAN: So we'll go back and do
5 that. I don't know if you ever read -- there's a
6 kids' book called If You Give a Mouse a Cookie. I
7 don't know if you're familiar -- you give a mouse a
8 cookie, he'll want a glass of milk. So welcome to our
9 world.

10 You try in a very realistic way to say
11 well, maybe somebody distributed X to the board and it
12 goes right to these issues but it's not a minuted
13 issue. No problem, but that becomes "Well, what about
14 policies? What about all the e-mails? What about Joe
15 Califano sending a letter to somebody in the company?"

16 That's why -- just so you understand,
17 our intent was not to demean the 220 process. The
18 requests were coming, and each one is a little bit of
19 a different flavor. So -- so Potter Anderson said,
20 "Okay. Here's what we're going to offer. We're going
21 to give them the minutes going back to that."

22 I understand that in this case they
23 went to the effort of filing an action. You want us
24 to give them more. We'll do it. I fear that sending

1 us off, as courts often do, to negotiate the exact
2 language is going to spill a lot of ink, if not blood,
3 and that, from our standpoint, it would be better for
4 you just to write down in the order how you interpret
5 No. 2 and then we'll go and do it.

6 But what -- what I hear you outlining
7 is doable, and we're happy to do it.

8 THE COURT: Well, I appreciate that.
9 My concern is that I'm not familiar with -- I'm not
10 enough familiar with everything that's going on here.
11 So my intention is definitely to give weight to the
12 documents provided or presented to any current or
13 former director or directors. So I am focusing on
14 that kind of information. And as we just went
15 through, it doesn't include the policies. It doesn't
16 include the offhand reference.

17 All right. The other way I'd like to
18 look at it is this -- and you can sit down, if you --

19 MR. FELDMAN: Thank you.

20 THE COURT: -- care to, Mr. Feldman.
21 Thank you.

22 I set aside -- I've got a number of
23 other things, as I'm sure you gentlemen and ladies do
24 as well, today. But I had set aside today for a trial

1 on this. I would like to have you leave today with
2 language agreed as to what -- as to an order coming
3 out of here. And I'll be working downstairs in my
4 office; but if I had to bounce back here five times
5 during the course of the day to make sure that we're
6 all understanding what I'm talking about, then that's
7 fine. I'd rather do that.

8 So I'll stay involved in the process,
9 but -- but it's not going to be easy. And I'd like to
10 try to get it pinned down today so that I don't send
11 you away and then have you trying to read my mind or
12 some kind of thing in that regard.

13 So I don't envy you the task. I know
14 exactly what you're talking about in terms of it's
15 never enough. I view this as a -- I'm not fully
16 comfortable giving as much information as I have
17 indicated so far with respect to the 220, that it is,
18 to me, at somewhat of the outer limits of what is
19 necessary and essential; but I do recognize it's
20 critical to know the directors and the directors who
21 might have touched this or had information about this
22 come across their desk but in their role as directors.
23 And the Request No. 2, in my view, is sufficiently
24 narrowly focused that it meets the standards that we

1 have.

2 And so you need to work with that
3 language to try to come up with something that is not
4 the equivalent of "Give me every single communication
5 relating to this topic that might ever have come
6 across some director's desk." It's less than that.

7 All right. Thank you.

8 MR. KAPLAN: Your Honor, if I may.

9 THE COURT: Yes.

10 MR. KAPLAN: I understand that you've
11 given us very clear instruction. I just -- given the
12 tenor of what has transpired thus far with regard to
13 negotiations between the parties, I just want to make
14 certain that I have some clarity on a couple of issues
15 that I know are going to be sticking points and that
16 we're going to have to discuss at some point.

17 One is with regard to these massive
18 redactions for purposes of responsiveness or
19 relevancy. The confidentiality issue, if they produce
20 things that are truly confidential, that's not an
21 issue, but the redactions are. And I'm interested in
22 getting whatever --

23 THE COURT: My view with respect to
24 the redactions is if they're really important for some

1 reason because of huge sensitivity or something like
2 that, okay, but normally I'm not a fan of widespread
3 redaction. But I don't know these documents. When
4 you're talking about the minutes and things of that
5 nature, you know, obviously there are many other
6 important issues that get discussed at those board
7 meetings. And so redactions make more sense to me in
8 the context of board minutes and things like that than
9 they do in a particular communication, you know, where
10 a document is being provided or presented. I would
11 not expect widespread redactions there.

12 There was like a privilege-type issue,
13 a Garner-type issue. I don't -- I mean, if we really
14 have those kinds of issues, then I guess we'll have to
15 address them; but for me to address them, I need to
16 know whether I'm dealing with redactions that are
17 based on privilege or redactions that are based on
18 relevance.

19 And sometimes those things can get
20 handled by a disclosure to maybe the lead attorney or
21 one attorney or where we have multiple firms involved,
22 maybe they don't all need to see it. I don't know,
23 but certainly not the client. You could exclude the
24 client from seeing a document in a first wave where

1 it's been redacted. You might be able to show the
2 full unredacted document to the other side so they get
3 a sense that this is fair. Or if you've redacted a
4 hundred documents or a thousand documents or something
5 like that, let them pick 20 documents that they'd like
6 to see just so that they assure themselves that this
7 redaction looks like it's a fair thing and that you're
8 both on the same page as to what's trying to be
9 accomplished. So I'd encourage you to try to work
10 those things out that way.

11 The one tougher thing is if we really
12 get down into a Garner-type situation, then you have
13 to tee it up in terms of identifying the documents and
14 agreeing to some way it's going to get brought to my
15 attention. I'd have to see the document, all that
16 sort of thing.

17 MR. KAPLAN: I understand, Your Honor.
18 I think it makes sense to sort of cross that bridge
19 when we get to it.

20 THE COURT: Right.

21 MR. KAPLAN: With regard to what was
22 the -- majority -- my understanding is that
23 redactions, pages 1 through 8 were for purposes of
24 relevancy; and the other -- only the last two pages

1 were redacted on the basis of attorney-client
2 privilege or work product. Those pages had to do with
3 them agreeing to the settlement or the final terms of
4 the settlement. It's not really what we're looking
5 for, anyway.

6 THE COURT: Okay.

7 MR. KAPLAN: I do -- one more thing,
8 Your Honor, because it's -- it's starting to trouble
9 me, and in the back of my mind I can see this becoming
10 an issue. We've now spent a lot of time about we're
11 not getting policies. We've clarified that we're not
12 getting policies. My concern is that if those
13 policies are circulated among the directors in a
14 communication, I -- my understanding is we would still
15 be getting that; right?

16 THE COURT: Yes. That's what I'm
17 saying. If the communication --

18 MR. KAPLAN: Very good.

19 THE COURT: You know, if they're
20 having a communication related to the pharmacy issue,
21 Canadian Pharmacy, and so on, and in that context
22 somebody is attaching the policy, or giving a link to
23 the policy or telling them where it is or something,
24 then that's probably enough that, you know, you should

1 get them -- you get that policy.

2 MR. KAPLAN: Thank you very much, Your
3 Honor.

4 THE COURT: Right.

5 MR. FELDMAN: Thank you, Your Honor.
6 The guidance you've given is very helpful. And hope
7 springs eternal; but on the off chance that after you
8 leave and they have their cookie and their glass of
9 milk they want a toothbrush, which I think is Phase 3
10 of the mouse book, can I propose to the Court we'll
11 try in good faith -- I've got language that I think
12 captures what you want. But if we can't do it, can we
13 just go back and each send you a one-line description
14 of what we think is right and you'll pick?

15 THE COURT: I don't mind that. I
16 mean -- but I don't want you to go back -- you know, I
17 don't care if you handwrite it. You can both
18 handwrite it and I'll -- you can send it back to me --

19 MR. FELDMAN: Great.

20 THE COURT: -- here. I'd like to
21 just -- let's wrap this thing up --

22 MR. KAPLAN: Today.

23 THE COURT: -- today.

24 MR. FELDMAN: Thank you, Your Honor.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

THE COURT: All right.

MR. KAPLAN: Thank you, Your Honor.

MR. NORMAN: Thank you, Your Honor.

(Court adjourned at 10:50 a.m.)

- - -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 56 contain a true and correct transcription of the redacted proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 40 through 56, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 12th day of March 2012.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent