

1 SALT LAKE CITY, UTAH, THURSDAY, APRIL 5, 2018

2 PM SESSION

3 THE COURT: Counsel, I'm told that we got problems
4 with WiFi; is that right?

13:16:28 5 MR. GARRIOTT: I was the one that reported it. It
6 looks like it's back on.

7 THE COURT: It's back on?

8 MS. HEALY-GALLAGHER: I believe we're connected
9 with our equipment, so....

13:16:35 10 THE COURT: Okay. All right. I wanted to check
11 with you on the Exhibit 329 -- or 829, the affidavit of
12 nonappearance. We had a discussion yesterday about those
13 exhibits. Can we receive the affidavit?

14 MS. HEALY-GALLAGHER: I believe we sent it.

13:16:55 15 THE COURT: You've got it. I just want to know if
16 it should be received. It was marked as Exhibit 829.

17 MS. HEALY-GALLAGHER: Oh, it's more for
18 admissibility purposes, so that does not have to be admitted,
19 but we certainly can.

13:17:07 20 THE COURT: Okay. As to exhibits offered in the
21 depositions, we've been through them. We have objections that
22 have been overruled and sustained, but I had some questions,
23 and you may want to take this down.

24 In the Peter Gregg deposition there's a reference
13:17:28 25 to Exhibit 347. It's an e-mail from Greg Shepard. We don't

1 MS. HEALY-GALLAGHER: 82,000.

2 THE COURT: Okay.

3 MS. HEALY-GALLAGHER: So I have no idea why we got
4 this number from defendants through their counsel, but the
14:15:36 5 database has a different number.

6 THE COURT: Okay.

7 MS. HEALY-GALLAGHER: So, Your Honor, because we --

8 THE COURT: As a humanities major I have enough to
9 satisfy my curiosity. I'll apply an artful solution. I'm
14:15:49 10 about to hear what's wrong with the art.

11 MR. SNUFFER: Your Honor, Josh Egan is going to
12 address it because he's the one that briefed it, but I want to
13 address one matter, and that is my understanding of the
14 underlying database is that the only way that Glenda Johnson
14:16:07 15 could modify it is to make a new entry. She couldn't remove,
16 but she could add. And the gap between the 49,415 shown in
17 one database and the 82,000 in the other database is because
18 she could input but she couldn't remove, which was -- one of
19 the entries we looked at was I think it was Matt Shepard, one,
14:16:33 20 and it was Matt Shepard and it was two, and it had the same
21 number on both. He, in fact, did not buy one. He bought two.
22 Therefore, the second was the correction, but the first
23 remained.

24 My understanding is that that was the database that
14:16:50 25 she was working with, and we're going to when we get to our

1 part of the case call her as a witness to address what she
2 viewed as a massive database that she was trying to work with.

3 THE COURT: Okay. Well, I'll look forward to
4 hearing that. That's a good preview. Thank you.

14:17:10 5 MR. SNUFFER: But Josh will address it.

6 MR. EGAN: Judge, when you initially asked for a
7 commentary on this I believe you said you did not want to hear
8 about disgorgement, but that's sort of where the conversation
9 has gone to.

14:17:21 10 THE COURT: I don't want to hear about the document
11 disgorgement. I want to hear about how these numbers relate
12 to the eventual disgorgement question. But I want to know
13 what these numbers don't show. So you were cross-examining on
14 some weak points, and I want to run back through those, if we
14:17:36 15 can.

16 MR. EGAN: Absolutely. Gladly. Not only did I
17 cross-examine but also so did Mr. Garriott, and I think there
18 are a few things worth noting there, and that is that there's
19 comments, if we are relying on these comments, there are
14:17:49 20 comments that show that there wasn't a full amount paid. And
21 when we totaled the money in those columns, I don't have the
22 number in front of me, but it did reflect something
23 dramatically less than the total amount that the other
24 exercise showed.

14:18:05 25 And really, if we compartmentalize each of these

1 three different sources, there are in our view isn't
2 significant enough overlap to provide the reasonable
3 approximation certainty required under the law. Again, not to
4 go into what the law of disgorgement is, but disgorgement, a
14:18:27 5 person is only entitled to disgorgement to the extent that the
6 plaintiff can show there was a gain connected to the illicit
7 activity.

8 And here we have, in one compartment we have names
9 of customers' lenses sold and some data that can be
14:18:45 10 manipulated a number of different ways to show gross receipts
11 of anywhere from 17 million to over 50 million. And that's in
12 one compartment.

13 And then you look at the Miss Reinken's summaries
14 of the gross receipts. And in that category, you have
14:19:05 15 Miss Reinken counting deposit after deposit or anything coming
16 in that didn't fit the exclusion that she defined. But there
17 was no coordination with the -- with Mr. Roulhac's data.

18 So while, again, I think we would have a clearer
19 picture and a sounder understanding of how these numbers work,
14:19:31 20 and again, it's not the defendant's burden to do this, it is
21 the plaintiff's to come up with this number, and they had that
22 information because they're the only party so far that has
23 offered anything before this court.

24 And the last I'll say about the harm to the
14:19:44 25 Treasury, it does nothing to get us closer to disgorgement

1 because again, there's no evidence that any of the tax credits
2 that any of these individuals received actually was deposited
3 into any of the defendant entities or to the individuals. And
4 again, it can only be a measurement of disgorgement to the
14:20:06 5 extent that a wrongdoer alleged profited from this activity.
6 So there has to be that connection made.

7 And quite clearly, Your Honor, there wasn't because
8 that was not the scope of what that witness, Miss Perez was
9 asked to do. Ms. Reinken's scope was limited likewise, and
14:20:24 10 Mr. Roulhac also did not have any involvement in reviewing any
11 bank records. So we have three separate pictures but no one
12 person to bring it altogether.

13 THE COURT: Okay. That's very helpful for me. I
14 I'm glad we spent this time.

14:20:38 15 What time is it? We haven't been in session long
16 enough for a break, have we? Can we call the next witness?

17 MR. MORAN: Your Honor, the United States calls
18 Robert Rowbotham.

19 THE COURT: Just pause right there at the podium
14:21:06 20 for a second, and the clerk will administer an oath.

21 THE CLERK: Will you raise your right hand, sir?

22 ROBERT ROWBOTHAM,

23 called as a witness at the request of Plaintiff,

24 having been first duly sworn, was examined

14:21:15 25 and testified as follows: