UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Designer Skin, LLC, an Arizona limited liability company; et al., Plaintiffs, vs. S & L VITAMINS, INC., d/b/a BODY SOURCE d/b/a THESUPPLENET.COM, a New York corporation; and LARRY SAGARIN, an unmarried individual, Defendants.	CIV 05-3699-PHX-JAT Phoenix, Arizona July 15, 2008 8:33 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(**Jury Trial - Day 1 - Pages 1 - 237**)

BEFORE: THE HONORABLE **JAMES A. TEILBORG,** JUDGE

Official Court Reporter:

David C. German, RMR, CRR
Official U.S. Court Reporter
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, SPC-39
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PROCEEDINGS TAKEN BY STENOGRAPHIC COURT REPORTER
TRANSCRIPT PREPARED BY COMPUTER-AIDED TRANSCRIPTION

July 15, 2008 - Jury Trial - Day 1

MR. CROWN: May I address Court while we're together before the jury?

THE COURT: You may.

MR. CROWN: In terms of scheduling, it had been our intent to call one or both of the defendant representatives in our case in chief. There is an individually-named party, Larry Sagarin, whose testimony in the stipulation suggests he is the principal of S & L Vitamins. Secondly, there is Steve Mercadante, who in deposition testimony has said he is the sole principal of S & L Vitamins.

We communicated that fact to Mr. Coleman last night in a series of e-mails but the message back was that his clients would not be in court, he would not voluntarily produce them as witnesses in our case in chief, and that he cited us to subpoena power over these witnesses, yet we don't have their whereabouts now that they're here in Arizona. They're both New York residents.

All that being said -- and Mr. Coleman advised us that Mr. Sagarin is not in the state of Arizona. We're told Mr. Mercadante is in Arizona; we just don't know where, although we received information that he's very well here in Phoenix and probably within three miles of the courthouse at a hotel.

All that being said, if they are here in court when this Court says call your first witness, they will be our first witness. If not, we do have deposition transcripts of both of these gentlemen from other related cases, and in the final pretrial order we made that fact known to the Court that in the event they're not available we will look to substitute live testimony as adverse witnesses with focused deposition testimony

in this case.

I want to raise that to the Court now because as you told us on June 30th, before the jury comes we should be addressing some issues that might cause delay. So I raise that now.

THE COURT: All right. I appreciate that. I'm not sure what kind of delay you think that's going to cause.

MR. CROWN: May I address the Court?

We don't anticipate any delay assuming that we can easily just move right to sworn deposition testimony at the appropriate point in our case.

But, as I said, we made that specific reference in the final pretrial order and so -- and that being said, I'm addressing it now. I don't know if there's going to be a response. But with the series of e-mails that were exchanged last night, there's at least anticipation that there might be an issue raised by the defense and we don't want to cause delay once the jury is here.

THE COURT: I just don't -- as you were talking about that, I just don't remember any -- what particular reference in the pretrial order are you making?

MR. CROWN: Your Honor, on the deposition section, which I will tell you -

THE COURT: I've found it.

Well, the extent to which that complies with the Court's order with respect to deposition disclosures and the extent to which that may be an issue, I guess we'll have to wait and address at the time we get there.

MR. CROWN: Sure. Thank you.

THE COURT: We're in recess.

(Proceedings recessed at 8:50 a.m.)

THE COURT: We're going to take our evening recess at this time until 9 a.m. tomorrow morning.

Please remember the admonitions. I'll see counsel briefly. (Jury out at 4:36 p.m.)

THE COURT: The record will reflect the presence of the parties and counsel outside the presence of the jury. You may be excused.

I've been handed a copy of a subpoena and declaration by the server reflecting that Mr. Mercadante was served on July 15, '08 at 12:25 p.m., that presumably being today. I note that the subpoena commands him to appear at this courtroom on July 15, 16 and 17 and each day at 9 a.m.

That's what I've been handed.

MR. COLEMAN: I will represent to the Court that on inquiry from me my client reports that he was not given a witness fee. So this subpoena may be defective, Your Honor.

THE COURT: Well, all I know is what I have in front of me, and I guess Mr. Mercadante will have to decide whether or not to obey it and -

MR. COLEMAN: Well, Your Honor, we can move to quash, which is what I would propose to do right now, frankly. I wasn't exactly sure where the Court was going. Obviously, under the circumstances, it is not practicable for us to prepare papers, but certainly notice is deficient here. Certainly, the witness fee has not been paid, which is a requirement of the federal rule requiring a subpoena, and certainly this was something that could have been addressed weeks ago without surprise. So we submit that the subpoena should be quashed.

THE COURT: Your response?

MR. CROWN: Your Honor, there's a difference in the timing between a trial witness -- there's a difference in the advance

notice for a trial subpoena and a deposition subpoena, and so -

THE COURT: He's talking -- let's take things one at a time. He's talking about the failure to tender a fee, witness fee.

MR. CROWN: I have not had, in fact, even what the Court has in front of it because we've been in court while this has happened. Mr. Mercadante did not appear as the party representative for S & L Vitamins, nor did Larry Sagarin as a named defendant, and these are residents of New York state. So we really didn't have subpoena power that this Court could enforce until they came within the jurisdiction of this Court, which is the District of Arizona.

This morning I received information that Steven Mercadante was staying at the Hilton Suites Hotel in Phoenix, Arizona located at the intersection of Central and Thomas, the same hotel that Mr. Coleman is staying at for this trial, and so under the hope that we would locate him somewhere in a public space when we saw that he didn't show up and Mr. Coleman wouldn't voluntarily produce him we issued a prompt subpoena.

Mr. Mercadante's purpose for being in Arizona is one thing and one thing only, for the trial, but it seems that they don't want him testifying as a witness in the plaintiffs' case in chief.

So we served him with a subpoena, and given that it's a trial and not a deposition -- because if it was a deposition I would go to New York and I would ask this Court to issue the proper order that would allow me to apply in a District of New York where I would get him deposed, but that did not happen. So he is here in Arizona, this Court has power over him, and all we're asking for at this point in time is that he be ordered to be here, which is to travel three miles, before we rest. I would like to make him our last witness. If Mr. Sagarin was in the state, I would like to make Mr. Sagarin also a witness for us,

but that being said, I do have a subpoena on him.

Now, as far as the witness fee, we know that it is a small nominal fee. I -- I'm -- I will accept what Mr. Coleman has said that it wasn't tendered but I don't know that because my office would have handled the administrative aspects of it. I will personally avow to this Court that if Mr. Mercadante comes to this court the very first order of business will be to tender him a proper check for the witness fee as prescribed for in the Federal Rules of Procedure.

And let's not have form get over substance here, because in the end what we're asking for this Court to do is to just issue a reasonable order requiring him to be here. A proper witness fee, if it has not been tendered, which I don't know that, but again, I'll just assume for the moment that's an accurate representation by Mr. Coleman, we don't have Mr. Mercadante here to tell us that, but that being said, let's not put form over substance, we're in the middle of a jury trial, he's here for a very clear reason, to testify, and we're entitled as our rights as the plaintiff to call him now as a witness before we rest.

And so we ask this Court compel him to come at a reasonable time, which would be sometime tomorrow, because once Beth Romero's testimony is finished he would be our last witness and we would move further exhibits into evidence and the plaintiff will be resting.

THE COURT: How much is the witness fee that is supposed to be tendered and was not?

MR. COLEMAN: I'm not sure, Your Honor.

THE COURT: But you -- you know sufficient to represent to the Court that he was not tendered a fee?

MR. COLEMAN: Any fee at all.

Your Honor, if I may, the suggestion here is let us not put

form over substance. As the Court is well aware, in the course of this afternoon's testimony we've had a number of opportunities to test that axiom, and I, for example, despite launching what I thought were appropriate objections even in the pretrial order for a number of exhibits, nonetheless found that they were in the wrong column in the pretrial order and exhibits that should, in my view, have not been admitted were admitted because of the form of the pretrial order.

I will for the record state that under Ames Department Stores, Inc. versus Eden Center, 2004, Bankruptcy, Lexis 1027, the 100-mile or within-the-district restriction on trial subpoenas does not apply according to the Southern District of New York, and I'm not aware of any contrary authority having been presented.

THE COURT: What's your point?

MR. COLEMAN: It does not apply to parties or officers of parties.

In fact, reading between the lines, Mr. Crown seems to have suggested he's in the process of attempting to serve Mr. Sagarin anyway. Certainly, the attempt could have been made.

I will be frank, of course. Yes, I don't want my witness to be part of the case in chief if I don't have to have him be, and if there is a form - over - substance issue, which has been consistently cut in both directions up to this point, I would expect it to the remain the same. The rule is very clear about the tender of a witness fee.

THE COURT: Do you have authority that the failure to tender it excuses compliance with the subpoena as opposed to simply obligating the party to pay that fee?

MR. COLEMAN: I don't, Your Honor. My -- my understanding has always been that when a statute requires a number of things in order for an instrument to be valid that the absence of one

of those things makes the instrument invalid. That would seem to be particularly appropriate when the coercive power of the court is being employed over a person.

THE COURT: Well, that may be the difference between -- that may be the difference between the severity of the contempt. I don't know. I -

MR. COLEMAN: Your Honor, we're not -- there's no contempt in the cards. If the Court rules that the subpoena is not defective, my client will be here.

THE COURT: I understand that. But I don't know that -- I don't know that the failure to tender the fee ipso facto renders the subpoena void. And I acknowledge that Rule 45(b) regarding service specifies that serving a subpoena requires delivering a copy to the named person and if the subpoena requires the person's attendance, tendering the fees for one day's attendance and the mileage allowed by law.

Now, quite possibly what that means is the witness doesn't have to accept the subpoena -

MR. COLEMAN: Your Honor, why would -

THE COURT: -- if not -- it doesn't have to physically accept it, as opposed to here, I assume, the witness did accept it.

MR. COLEMAN: Of course, the witness is a lay person, Your Honor, and even the six or seven lawyers in the room don't know the answer to this question. So to suggest that the drafters of the federal rules contemplated that a person faced with a process server would check -- would first -- how would a person know about ascertaining whether the envelope contained a check without accepting it first? And if Congress had in mind -- I mean the judicial conference had in mind that compensation be given to witnesses, then it would not have been a prerequisite to the subpoena; it would simply be a statutory requirement that

witnesses be compensated appropriately.

THE COURT: Well, I'll deny the motion to quash without prejudice to re-urge it and demonstrate that indeed the subpoena is of no force and effect, but at least on the face of it it's been served. I gather that the witness has accepted it. So on the strength of what I've been told I'm going to deny the motion.

MR. CROWN: Your Honor, may I also offer one more thing or in a couple ways?

My understanding, subject to verification, is that a witness fee for a day is $40 plus mileage. I am prepared to give Mr. Coleman right now $50 that he will give to his client when he has dinner with him tonight. Because that's really what's happening. He's leaving here and he's going to the hotel to meet Mr. Mercadante. I will give Mr. Coleman the money.

Or I will give it to the Court's clerk and when

Mr. Mercadante walks in the money will be paid. I will do that right now in open court so we don't let form over substance.

Or thirdly, I'll have a messenger deliver for Mr. Mercadante personally in a sealed envelope $50, which should account for the $40 fee and the mileage, but -

MR. COLEMAN: Your Honor, I'll raise him $50 in order to take the distributor agreement out of evidence.

THE COURT: All right. We're in recess until nine o'clock tomorrow morning.

(Proceedings recessed at 4:49 p.m.)

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July 15, 2008

VIA ECF

Honorable James A. Teilborg, U.S.D.J.
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 523
401 West Washington Street, SPC 51
Phoenix, AZ 85003-2154

Re: Designer Skin, LLC v. S&L Vitamins
05-CV-3699 (PHX) (JAT)

Dear Judge Teilborg:

As Your Honor will recall, we represent the defendants. Earlier today the Court and counsel discussed the question of whether there is case law to support the suggestion, as defendants assert, that a failure to include a witness fee along with a trial subpoena under Rule 45 is fatal to the subpoena. Research indicates that in fact it is, and in fact the leading case in this area appears to be a decision in the Ninth Circuit:

> Fed. R. Civ. P. 45(c) provides, in relevant part: "Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law." The district court construed the conjunctive effect of "and by tendering to him" as requiring the **concurrent tender** of witness fees and an estimated mileage allowance with service. We agree.
>
> Although the correct reading of this portion of Rule 45(c) is an issue of first impression for this court, it requires little comment. The language is clear and the interpretation adopted by the district court is supported by widely accepted treatises on civil procedure. 5A J. Moore & J. Lucas, Moore's Federal Practice P45.06[1] (2d ed. 1982); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2461 (1971).
>
> Therefore, we hold the plain meaning of Rule 45(c) requires **simultaneous** tendering of witness fees and the reasonably estimated mileage allowed by law with service of a subpoena. [W]e affirm on the plain meaning of Rule 45(c) . . .

CF & I Steel Corp.. v Mitsui & Co., 713 F.2d 494, 496 (9th Cir. Cal. 1983) (emphasis added). *See also, First Card v. Hunt (In re Hunt)*, 238 F.3d 1098, 1100 (9th Cir. 2001)("At

trial, the bankruptcy court quashed First Card's subpoena of Hunt because of defective service—First Card had failed to include the witness fee and mileage required by Federal Rule of Civil Procedure 45(b)(1) . . . ").

Other courts are in accord; in the Southern District of New York only a month ago, but relying on precedent, applied the same straightforward analysis to the plain language of the Rule suggested by the undersigned at colloquy, as follows:

> The DA's Office also argues that service was defective because the subpoena was served without a witness fee, and there was no indication that the defendant made a prior showing of indigency. "Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law." FED. R. CIV. P. 45(b)(1). Service is invalid where no fee is tendered with the service of a subpoena requiring a witness's attendance. See *Costamar Shipping Co., Ltd. v. Kim-Sail, Ltd.*, 1995 U.S. Dist. LEXIS 18430, 1995 WL 736907, at *3 (S.D.N.Y. Dec. 12, 1995). Because the subpoena requested ADA Ferrara appear for a deposition, a fee should have been tendered with the service. Defendant Donnatin has not submitted any proof that such a fee was tendered.

Landrigan v. Kaytes, 2008 U.S. Dist. LEXIS 47133, 13-14 (S.D.N.Y. June 13, 2008). Other cases are in accord. Hence the Northern District of Illinois, in *United States EEOC v. Laidlaw Waste*, 934 F. Supp. 286, 290-291 (N.D. Ill. 1996) where they issue was the application of the exemption of the witness fee provision to certain government entities, cited *O.K. Machine & Tool Corp. v. Garcia*, 279 N.L.R.B. 474, 1986 WL 53791 at *10 (1986) (former employee subpoenaed by the employer was not required to appear where witness fees and mileage were not tendered) and *Rolligon Corp.*, 254 N.L.R.B. 22, 1981 WL 20092 at *2 (1981) (employer did not interfere with Section 7 rights of employees by telling them that they did not have to comply with subpoenas issued by union that were patently defective for failure to include witness fees and mileage) for the general proposition asserted by defendants here.

We located no contrary authority in any Circuit. For the foregoing reasons it appears that the subpoena served on Mr. Mercadante today was fatally deficient by virtue of the failure to tender a witness fee.

Respectfully submitted,

Ronald D. Coleman

cc: All counsel (ECF)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Designer Skin, LLC, an Arizona limited liability company; et al.,	)	
Plaintiffs,	)	
vs.	)	CIV 05-3699-PHX-JAT Phoenix, Arizona July 16, 2008 8:56 a.m.
S & L VITAMINS, INC., d/b/a BODY SOURCE d/b/a THESUPPLENET.COM, a New York corporation; and LARRY SAGARIN, an unmarried individual,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(**Jury Trial - Day 2 - Pages 238 - 404**)

BEFORE: THE HONORABLE **JAMES A. TEILBORG,** JUDGE

Official Court Reporter:

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PROCEEDINGS TAKEN BY STENOGRAPHIC COURT REPORTER
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July 16, 2008 - Jury Trial - Day 2

COURT: Thank you. Please be seated.

The record will reflect the presence of the parties and counsel outside the presence of the jury.

Last night before I even had a chance to sit down one of my externs presented me with an Eighth Circuit case which made me feel good because it supported my hypothesis that perhaps failure to tender a witness fee might simply be grounds to refuse to accept the subpoena, but before I could feel very good one of my other externs presented me with a Ninth Circuit case and reminded that we're in the Ninth Circuit, not the Eighth Circuit, and that's the CF & I case, which though dealing with a slightly different phraseology of Rule 45 I think is right on point in holding that the plain meaning of Rule 45(c), quote, requires simultaneous tendering of witness fees and the reasonably estimated mileage allowed by law with service of a subpoena, upholding the District Court's decision that the subpoenas were therefore invalid.

So based on that -- and then, coincidentally, this morning I have a letter from counsel calling to my attention the CF & I case as well as another case.

So it seems clear to me that I must reverse my ruling last night and quash the subpoena, but before I do so I would ask the plaintiffs if somehow there's authority that has eluded my staff and me.

MR. MIZRAHI: May I speak, Judge? THE COURT: You may.

MR. MIZRAHI: Judge, actually, I received

Mr. Coleman's letter late last night and I did some poking around on my own and I also confirmed with my office that

indeed in their hurry to get the witness subpoena out that the check was not included, and so on the record I'll state that that's a fact and even though Mr. Mercadante is not here I will confirm that the witness fee was not included with the service of the subpoena.

Now, having said that, and having read Mr. Coleman's letter and having read the CF & I case, which is a Ninth Circuit case, I agree that that stands for the proposition that at the time that you serve a subpoena you're supposed to also serve the witness fee and that those two things can happen -that those two things should happen at the same time.

Now, there are cases, however, including one case that actually cites the CF & I case, that says that you can subsequently cure that by tendering the witness fee at a time before the witness actually testifies. And there's even cases that say that tendering that upon the party's counsel once they've been served is a way of curing that defect.

And, Judge, if you recall, yesterday in open court we offered to pay that money to Mr. Coleman. We offered to tender it to the Court. We offered to pay it to Mr. Coleman.

And I can give you case cites for that.

One case is a case called PHE, Inc. versus the Department of Justice. It's 139 F.R.D. 249, DDC, 1991. That case stands for the proposition that the subsequent tender of a check can cure the defect.

There's a case called First City Texas-Houston, NA Rafidadan Bank, R-A-F-I-A-D-A-N, 197 F.R.D. 250, Southern District of New York, 2000, that stands for the proposition that service can be made on an attorney.

And then there's the case of Myer versus Foti, F-O-T-I, 720 F.Supp. 1234, Eastern District of Louisiana, 1989, that also stands for the proposition that the subsequent tenders of check

can cure the defect.

And then there's a couple of Ohio cases that are not published decisions, but to be honest with you, Judge, I looked and I didn't find any contrary rule anywhere that said that once the service is made that that can't be cured by the perfunctory tendering of what is just a witness fee afterwards once there's been actual notice and so on upon the attorney.

And those cases are Future Communications, Inc. versus Hightower. That's located at 2002 Westlaw 92679, Ohio App., and I had -- there was one other one that I think Hightower cites, but again, it's not a reported decision.

But I couldn't find any reported decision that stood for the contrary proposition that once a service is made that you can't just pay the lawyer, and with the body of cases that say that, number one, you can subsequently cure it and, number two, that you can pay the money to the lawyer, I would suggest that that should -- that same logic should apply here.

Because again, this is a situation where we thought that Mr. Mercadante was going to be here. He wasn't here. We couldn't really serve him in New York.

And I checked Rule 45 again about the out-of-state subpoena because it didn't really make sense that you could, you know, serve that subpoena out of state and haul somebody across the country, and basically, it said in the comments that you can serve that and haul somebody across the country but it has to be supported by, quote, super special cause.

And so, again, under that circumstance, under the circumstance that Mr. Mercadante has essentially been in town, he's been hiding in a hotel room, in an effort to try to cure this situation we actually tried to send process servers out last night, we were calling all over town, hotel rooms. He checked out of this hotel yesterday, by the information I

received, at 4:03, which is right when we were in court dealing with this issue, and he checked out of his hotel and essentially disappeared.

Mr. Coleman has basically represented that his client is not going to voluntarily appear even though he's in town.

And so I would suggest that under those circumstances the tender of those funds would have cured any technical defect. The funds were available, he would have them in advance of testifying, which is what -- which is what the cases stand for.

And so we would obviously leave that to the Court and hope that that is instructive in terms of deciding this issue.

Thank you, Your Honor.

THE COURT: The cases that you recited to me all sounded like District Court cases in circuits other than the ninth. Did I hear that right?

MR. MIZRAHI: That's correct, Your Honor.

And I did check the Ninth Circuit, and again, the case that Mr. Coleman relies upon, CF & I, stands for a proposition that is -- I think a proposition that's -- that -- aside from your Eighth Circuit case that you found, which I haven't read, but it sounds to me, based on my research, is generally accepted amongst the circuits in terms of being the law because it comes straight from the language of the statute.

And so the Ninth Circuit case seems to essentially recite that on the front end once the subpoena is served in order for it to be technically valid it has to have both of those elements, and I think that that's -- I think that that's the case. I'm not quarrelling with that case and I didn't find any -- like I said, I didn't find any other Arizona or Ninth Circuit cases that discuss the subsequent proposition about curing and curing by tender upon an attorney.

And so that's what -- I'm not disputing the Ninth

Circuit law. I'm just bringing up the other cases that I found.

THE COURT: All right. Thank you.

The Court will reverse its ruling from last night and vacate -- and grant the motion to quash.

I note that the CF & I case -- in the CF & I case, the opinion recites that on September 30, 1982, 34 days after service and one week after movant's attorney told them that service was defective, CF & I sent three checks for a hundred dollars each to movant's attorney. The checks were returned to CF & I because they were inadequate in amount and too late to satisfy the requirements of Rule 45(c).

I just quoted from the case.

And -- but in the CF & I case, the court says, quote, the District Court construed the conjunctive effect of, quote, and by tendering to him, end quote, as requiring the concurrent tender of witness fees and an estimated mileage allowance with service, period. We agree. Period. End quote.

And then finally, the court says, therefore, quote, we hold the plain meaning of Rule 45(c) -- and it was Rule 45© then. It's got a little different organization -- Rule 45 -we hold the plain meaning of Rule 45(c) requires simultaneous tendering of witness fees and the reasonably estimated mileage allowed by law with service of a subpoena, period. In so holding, we decline to reach how much CF & I was required to tender or whether the checks sent one month after service were adequate. Because we affirm on the plain meaning of Rule 45(c), we, like the District Court, do not reach the issue of whether movants were immune from service, end quote.

Well, it is clear to me that while the court in CF & I, I suppose, as a highly technical matter did not reach the issue of whether there was a cure, because apparently there was an issue as to whether the fees were adequate, it seems to me the

Ninth Circuit clearly views the conjunctive effect as requiring the concurrent tender.

So I'm not prepared to depart in the way of some district courts across the country and other circuits to find a cure, and accordingly, the motion to quash will be granted.

We're ready for the jury, then.

MR. CROWN: Your Honor, may I address the Court before the jury comes in?

THE COURT: You may.

MR. CROWN: In the interests of scheduling and pursuant to the final pretrial order submitted, now that it's clear that neither Larry Sagarin or Steven Mercadante are here in court for us to call them as witnesses, then we will be offering portions of their deposition transcripts that are identified in the final pretrial order as the final part of our case in chief.

My suggestion to the Court is, in light of this ruling, is that when Ms. Romero's testimony is finished we take a break, which may be a little bit before the Court's intended break, we will streamline but will publish to the jury portions of Mr. Mercadante's deposition and Mr. Sagarin's deposition and then at that point we will move additional exhibits into evidence and we will be prepared to rest.

So I just wanted the Court to have a heads up.

THE COURT: Is there any issue on the deposition reading, Mr. Coleman?

MR. COLEMAN: Not in theory but the fact that deposition segments are designated doesn't make them necessarily admissible or relevant. I'm going to want to know what they intend to offer and for what purpose and to be accorded the opportunity to make appropriate objections just like any other testimony.

THE COURT: Well, my pretrial order -- again, if there's no objection, then I'm not going to -- then I'll wait and deal with

what I'm faced with, but my pretrial order at page 4, paragraph G, says, "The parties shall list the depositions that may be used at trial. The portions to be read at trial shall be identified by page and line number. Counter-designations, if any, to proposed deposition testimony shall also be listed in this section. Additionally, the party offering the deposition shall provide the Court with a copy of the offered deposition testimony..."

And it goes on to talk about highlighted copies and so forth.

So I'm sure -

MR. COLEMAN: Well, Your Honor, I'm actually having trouble finding that section in the pretrial order. I'm sorry.

THE COURT: It's in the order setting final pretrial conference.

MR. COLEMAN: Okay.

MR. CROWN: Your Honor, we had addressed that yesterday. The parties stipulated to language that actually, with all due respect, as we acknowledge from the Court, has a superseding component to it, and that is in the final pretrial order in section G, page 18, this is what both parties told the Court. And it was in light of this very issue. That's why, again, I was clear to raise it before we even picked the jury because we knew there was going to be potential problems, and unfortunately, although we got lucky to find Mr. Mercadante in the lobby of the Hilton, not so lucky that we had the fee.

And here's my point.

We stated, "Defendant has indicated an intention to call Larry Sagarin and Steven Mercadante as witnesses. Plaintiff intends to use the depositions of those witnesses from the New York" -

THE COURT: I've read that. I can read and I did -

MR. CROWN: I'm sorry.

THE COURT: -- read that, but I'm not quite sure why you think that that just automatically supersedes my requirements.

MR. COLEMAN: Your Honor, I would also -- I didn't stipulate to anything that's in that paragraph. That's the plaintiffs' paragraph. That's not a stipulated section of the pretrial order.

THE COURT: Well, part of the reason that I require that is so that we don't waste time that is looking to be now about to be taken up with designations and counterdesignations.

MR. CROWN: Your Honor -

THE COURT: Have you worked out with Mr. Coleman what portions you're going to read?

MR. CROWN: We have not as of yet. I believe we can do that efficiently. Again, our hope was that I would -- we would have either Mr. Sagarin -

THE COURT: You're an experienced litigator and it is no mystery, no mystery at all, in any lawsuit where folks are out of state that if -- absent an ironclad agreement that the opposing counsel is going bring that witness here and make them available, that you've got to subpoena them.

And as you pointed out, you can't subpoena them across state lines so you've got to take their deposition and expect to use their deposition unless miraculously and fortuitously they show up, and even if they live in state you've got to subpoena them and if by the time of trial you haven't subpoenaed them and haven't taken their deposition, this is what happens.

So I -

MR. CROWN: Your Honor -

THE COURT: I mean, I'm just trying to say this is not a shock and surprise that somebody's not here in the courtroom.

MR. CROWN: Your Honor, we would ask under the circumstances

and for good cause and for the Court's discretion to allow us to put in a limited portion, and if nothing else, if I can make this representation or request of the Court, in the interest of justice, there is -- if I -- if we put nothing else in other than portions of two pages of Mr. Sagarin's testimony, which go directly to profits as damages.

And I will show this Court, it's literally page 71 and 72 of Mr. Sagarin's deposition, that if we do nothing else that will allow us with the evidence we do have from our witnesses and what is going to be admitted through the stipulation allowing us to, I think, easily meet a directed verdict standard. And while I'm asking for this Court to allow us under good cause to put in more transcript pages, and we did not specify them in advance, if we do nothing else, I'm asking for page 71 and 72 of Mr. Sagarin's deposition to avoid any argument that the evidence fails to meet the profits damages, and I can make a proffer what that testimony is if the Court wants.

THE COURT: Well, what we'll do is we'll take a brief break after this next witness. You can show counsel what you propose to offer, and maybe there's no objection, but we'll have a limited break to, in essence, do homework that should have been done a long time ago.

MR. CROWN: Thank you, Judge.

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REDIRECT EXAMINATION OF BETH ROMERO [(CEO of DESIGNER SKIN)]

BY MR. CROWN:

Q. Ms. Romero, yesterday when we adjourned Mr. Coleman was asking you various questions and you were pointing over to our table where you've been sitting and you have your own file and you have a number of documents and records that you have compiled in preparation for this trial and your testimony. Am I correct?

A. Yes.

Q. Would you tell the jury the types of documents that you reviewed to refresh your memory for today's testimony.

MR. COLEMAN: Your Honor, relevance. This doesn't -I didn't ask her on direct what documents she reviewed. And what's the relevance of this?

THE COURT: Overruled.

. . .

Q. And you also looked at sworn testimony of any of the principals of S & L Vitamins to allow you to answer Mr. Coleman's questions?

A: I looked at the testimonies of Mr. Sagarin and Mr. Mercadante.

Q: And when you looked at that testimony it allowed you to then look at seeing what they stated was their percentage of Designer Skin sales to allow you to then answer the question about the reduction in market value and the damage to Designer Skin.

MR. COLEMAN: Objection. Your Honor, it appears that -

THE COURT: Give me your legal objections.

MR. COLEMAN: Hearsay. The use of -- asking whether a document was reviewed in preparation for testimony does not render nonhearsay that which otherwise would be hearsay.

THE COURT: Sustained.

MR. CROWN: Your Honor, may I make a brief response?

THE COURT: No. You can ask your next question.

MR. CROWN: Thank you.

—

BY MR. CROWN:

Q. Among the deposition transcripts that you read, did you read the testimony of Larry Sagarin?

MR. COLEMAN: Your Honor, objection. This is the same

objection we already -

MR. CROWN: May I -- I didn't respond then and -

THE COURT: I don't need a response. This calls for a yes-or-no answer. The objection is overruled.

THE WITNESS: Yes.

BY MR. CROWN:

Q. Did you read it specifically to see when S & L Vitamins began to sell Designer Skin products and what percentage of their sales was Designer Skin products?

MR. COLEMAN: Your Honor, I'm objecting again because although this may -

THE COURT: Tell me your legal objection.

MR. COLEMAN: The legal objection is it's leading.

THE COURT: Sustained.

BY MR. CROWN:

Q. Why did you read Larry Sagarin's deposition testimony?

A. I wanted to get a clear understanding as to when they brought lotions on overall to sell at S & L and when they said that they brought Designer Skin on as part of that and then to see what percentages they said were their tanning lotion sales and what percentages were their Designer Skin lotion sales.

Q. And having read the answers of Larry Sagarin to those inquiries of yours, did that allow you to use as a basis their answers to tell the jury what the damages are in the reduction of the market value of Designer Skin's electronic renderings?

MR. COLEMAN: Objection. Calls for hearsay and speculation. The question was asked and answered. And as a result of the leading by counsel she's being -

THE COURT: Sustained.

BY MR. CROWN:

Q. Was it significant for you to confirm the percentage of S & L's sales of Designer Skin products?

MR. COLEMAN: Objection. Vague. Speculation.

THE COURT: Sustained.

BY MR. CROWN:

Q. Did you rely in part -- of all the materials you reviewed last night, did part of your reliance to be able to tell the jury the reduction in the market value of Designer Skin's electronic renderings in part rely on your reading of the sworn testimony of Larry Sagarin?

MR. COLEMAN: Your Honor, can we perhaps discuss this at sidebar?

THE COURT: What's your legal objection?

MR. COLEMAN: The legal objection is that counsel is leading, asking -

THE COURT: Sustained.

BY MR. CROWN:

Q. How is Mr. Sagarin's testimony on the percentage of Designer Skin products compared to total S & L sales used by you so that you can tell the jury Designer Skin's damages?

MR. COLEMAN: Objection. Leading. Hearsay.

THE COURT: Sustained.

. . .

MR. CROWN: Thank you. No further questions.

THE COURT: All right. You may step down.

MR. COLEMAN: Judge, no redirect?

THE COURT: I'm sorry?

MR. COLEMAN: No recross? THE COURT: No recross?

MR. COLEMAN: I would like to -THE COURT: Denied.

THE WITNESS: I can leave?

THE COURT: You may step down. THE WITNESS: Thank you.

THE COURT: You may call your next witness.

THE COURT: Thank you. Please be seated.

The record will reflect the presence of the parties and counsel outside the presence of the jury.

Issues?

MR. CROWN: Your Honor, we are at the point of depositions. We don't have any more live witnesses.

THE COURT: I understood that.

MR. CROWN: So we met with Mr. Coleman during the break and Mr. Coleman is going to raise both relevance to the areas that he knows we're going to go to, which is as much an argument for directed verdict as it is here and now. That apart, on the procedural point, Mr. Coleman has told me he's fully cognizant of the focused areas that I want to get from his clients in their two transcripts, the reasons for it, that there is no objection to form or that it's hearsay, because it's sworn testimony, they are admissions of party opponents, he's got none of that, and what he shared with me -- I said, "Do you want me to give you the specific page and line?" He said, "No, I don't need that. I know these transcripts. I've read these depositions. I have one procedural point to take up with the Court, and that is the formal technical requirement under the submission of the final pretrial order."

So it's not that he's saying surprise or anything like that.

So where we're at is -- and if I could really ask this Court -- and I guess it's fundamental discretion with the Court and fundamental justice. I believe that the focused areas, which go directly to profit damages as framed in the stipulated jury instruction, comes -- based on the limitations of what the rulings were with Ms. Romero, I need from their client the sworn testimony of what their percentage of their total profits, which is part of the tax returns, comes from their mouth. They're

saying it's -- they said 10 percent Designer Skin products.

With that testimony and a few other backgrounds points that Mr. Coleman understands so there's no surprise, we move in, and I will do this very, very efficiently.

THE COURT: Give me -

MR. CROWN: I'm sorry, Your Honor.

THE COURT: You were about to finish your sentence.

MR. CROWN: Yes.

Mr. Coleman's position is going to be -- and again, I'm not speaking for him but I'm just sharing with you what the meet and confer was.

MR. COLEMAN: So far so good.

MR. CROWN: Is that if there's a technicality and it can -- candidly, if it's going to benefit me, I'm going to use it. I'm asking this Court -- and I appreciate what I'm saying. In the interests of the fundamental fairness, if there is -and again, if I misstate why you have the procedural rules -and I understand what the specifications are in your order scheduling the final pretrial and designating transcripts, which includes delivering to the Court highlighted copies in different colors by plaintiff and defendant. We understand that. But if the point of all that is so that there is no surprise to the other side and to give the Court an opportunity to make evidentiary type objections and to avoid any delays with the jury, then those procedural requirements, and hopefully I'm not missing the main purpose of that requirement in advance, they don't exist here, and it would be, in our judgment -- that's why we urge the Court -- something wrong, if the justice of the case, the merits of the case are somehow limited by some technicality, and I'm not -- I don't -- I'm not in any way belittling the importance of that requirement, but I'm saying those main reasons don't exist here, and so it's a technicality under these circumstance Mr.

Coleman is going to raise, and we ask this Court under the limited reasons and the importance of the evidence -- again, this is not just some -that -- that you allow us to do that. And then if you look at how the parties frame the issue in the final pretrial where we fully expected -- and we can't ignore the whole issues with Mercadante. I mean, at some point, as I say, justice and fundamental fairness concerns would hopefully weigh in favor of the Court allowing limited publication of sworn testimony to meet these burden type issues.

. . .

MR. COLEMAN: Thank you.

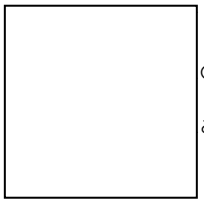
Mr. Crown is completely accurate in his characterization, which is merely that in this case both sides have lived and died by the orders that have been entered in terms of pretrial procedure and both sides have lived a little bit by them, died a little bit by it, and I would suggest that the -- actually, notwithstanding the arguments as to equity and justice, that -- those arguments obviously can be applied to any of the decisions the Court has made to depart from the pretrial orders. If the Court is inclined, nonetheless, to give leave in this case, then I would make substantive motions objecting to the evidence on substantive grounds.

THE COURT: And what would those be?

. . .

THE COURT: All right. The objections to the deposition testimony will be sustained. There's been no showing of good cause. Indeed, the failure to comply with this Court's order is breathtaking in its scope, and indeed, the now 45 minutes that have been consumed dealing with an issue that should have consumed virtually no time is simply indicative of why this

Court expects, as the order provides, that the parties identify page and line number and then identify counterdesignations d, of course, provide the Court with copies and highlighting at allow for the facilitation.



And any suggestion that somehow it was a shock and surprise that the witness or witnesses were not here or could not be brought here to testify live is a shock and -- a hollow shock and surprise because one cannot assume the presence of those witnesses.

Now, alternatively, I sustain the objections to this proffered testimony on substantive grounds. This testimony that would take the form of a percentage of profits that are attributable to the sale of this product simply is a further perpetuation of the conflation that has taken place throughout this trial between the sale of goods and the technical infringement that occurred when the image was apparently lifted from the designer website and pasted on the website of S & L.

But to suggest that somehow the jury should be allowed to speculate over the damages that would be -- the profits made by S & L that would be attributable to the copyright as opposed to the lawful sale of these goods would be, in the Court's judgment, rank speculation.

Do you have any other evidence or any other witnesses, counsel?

MR. MIZRAHI: Judge, we don't have any other evidence.