UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT
2009 JAN 12 P 2:34
DISTRICT OF UTAH
DEPUTY CLERK

Central District of Utah

UNITED STATES OF AMERICA
V.
Juan Jaime Suastegui-Ramirez

JUDGMENT IN A CRIMINAL CASE

Case Number: DUTX 2:08-cr-00743-001

USM Number: 15875-081

Viviana Ramirez
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) I-Indictment

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
8USC§1326	Re-Entry of a Previously Removed Alien		I

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/8/2009
Date of Imposition of Judgment

Dee Benson
Signature of Judge

Dee Benson — U.S. District Judge
Name of Judge — Title of Judge

1/12/2009
Date

DEFENDANT: Juan Jaime Suastegui-Ramirez
CASE NUMBER: DUTX 2:08-cr-00743-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Juan Jaime Suastegui-Ramirez
CASE NUMBER: DUTX 2:08-cr-00743-001

PROBATION

The defendant is hereby sentenced to probation for a term of :

24 months.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Juan Jaime Suastegui-Ramirez
CASE NUMBER: DUTX 2:08-cr-00743-001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not reenter the United States illegally. In the event that the defendant should be released from confinement without being deported, he shall contact the United States Probation Office in the district of release within 72 hours of release. If the defendant returns to the United States during the period of supervision after being deported, he is instructed to contact the United States Probation Office in the District of Utah within 72 hours of his arrival in the United States.

DEFENDANT: Juan Jaime Suastegui-Ramirez
CASE NUMBER: DUTX 2:08-cr-00743-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Juan Jaime Suastegui-Ramirez
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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages ___ - ___
are the
Statement of Reasons,
which will be docketed
separately as a sealed
document

FILED
U.S. DISTRICT COURT
2009 JAN 12 P 3:01
BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ALEJANDRO LOPEZ-CASTRO, Defendant.	**ORDER TO CONTINUE JURY TRIAL** Case No. 2:08 CR 747 TC

Based on the motion to continue trial filed by defendant in the above-entitled case, and good cause appearing,

It is hereby ORDERED that the trial previously scheduled for January 12, 2009, is hereby continued to the 16 day of March, 2009, at 8:30 a.m. Pursuant to 18 U.S.C. § 3161(h), the Court finds the ends of justice served by such a continuance outweigh the best interests of the public and the defendant in a speedy trial. Accordingly, the time between the date of this order and the new trial date is excluded from speedy trial computation.

Dated this 9th day of January, 2009.

BY THE COURT:

Tena Campbell

HONORABLE TENA CAMPBELL
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA **Plaintiff,** **TODD LOURENS LEEFLANG** **Defendant**	:	**ORDER FOR PSYCHOSEXUAL EXAMINATION & TESTING** **2:08-CR-00748-001-TS**

It appears that psychosexual examination and testing of the defendant is necessary in order that a more complete presentence report may be prepared pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure.

IT IS THEREFORE ORDERED that the defendant submit to an examination conducted by a qualified practitioner as directed by the Probation Office to provide information to the Court pursuant to 5 U.S.C. § 3109.

IT IS FURTHER ORDERED that investigative information may be released to the provider for purposes of testing and evaluation.

IT IS FURTHER ORDERED that the United States Probation Office shall pay all reasonable and necessary expenses from funds allocated for such purposes.

DATED this 12th day of January, 2009.

BY THE COURT:

Ted Stewart
United States District Judge

Jennifer A. James (#3914)
CLYDE SNOW & SESSIONS, P.C.
Attorneys for Defendant Francisco Mendoza
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FILED
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2009 JAN 12 P 1:36
DISTRICT OF UTAH
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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, STATE OF UTAH

UNITED STATES OF AMERICA, Plaintiff, vs. FRANCISCO MENDOZA, and LETICIA BUENO, Defendants.	**ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE MOTIONS** Case No. 2:08CR00805 Judge Dee Benson

Based on the foregoing Motion for Extension of Time to File Motions, the parties have until and including January 28, 2009, to file motions in this case.

Dated this 12th day of January, 2009.

Dee Benson
Judge Dee Benson

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ANNA S. PADLO, Defendant.	**ORDER EXTENDING MOTION CUT-OFF DATE** Case No. 2:08 CR 00812 DB

Based on the motion filed by the defendant and good cause appearing,

IT IS HEREBY ORDERED the motion cut-off date be extended to the 23rd day of January, 2009.

DATED this 12th day of January, 2009.

BY THE COURT:

Dee Benson

DEE BENSON
United States District Court Judge

United States District Court
for the District of Utah

Criminal Pretrial Instructions

The prosecution has an open file policy.

Issues as to witnesses do not exist in this matter, but defense counsel will make arrangements for subpoenas, if necessary, as early as possible to allow timely service.

Counsel must have all exhibits premarked by the clerk for the district judge before trial.

If negotiations are not completed for a plea by the plea deadline, the case will be tried.

In cases assigned to Judge Cassell, counsel are directed to meet and confer about the possibility of a plea, and before the deadline report to chambers whether the matter will proceed to trial.

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DISTRICT OF UTAH
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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

ALBION LABORATORIES, INC., a Utah corporation, and ALBION INTERNATIONAL, INC., a Utah corporation, Plaintiffs, v. LANNETT COMPANY, INC., a Pennsylvania corporation, Defendant.	Case No. 2:08cv00515DB **ORDER GRANTING STIPULATED MOTION FOR EXTENSION OF TIME** Judge Dee Benson

Based upon the Stipulated Motion for Extension of Time, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiffs may have to and including Monday, January 12, 2009, in which to file their Amended Complaint.

DATED this 12th day of January, 2009.

BY THE COURT:

Dee Benson

Honorable Dee Benson
U.S. District Court Judge

1017207v1

Robert L. Janicki, #5493
Lance H. Locke, #9440
STRONG & HANNI
Attorneys for Defendants
3 Triad Center, Suite 500
Salt Lake City, Utah 84180
Telephone: (801) 532-7080
Facsimile: (801) 323-2090

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

DONALD R. FORD and TASHA M. FORD, Plaintiffs, vs. ONTECH DELAWARE, INC., ONTECH OPERATIONS, INC., and WAL-MART STORES, INC., Defendants.	**ORDER ON STIPULATED MOTION FOR MUTUAL EXTENSION OF TIME FOR PLAINTIFF AND DEFENDANTS TO RESPOND TO WRITTEN DISCOVERY REQUESTS** Civil No.: 2:08-cv-547 Magistrate Judge: Dale A. Kimball

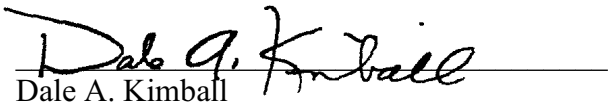
The Court, having received the parties' stipulated motion for a mutual extension of time to respond or object to the written discovery requests which have been served in this action, hereby Orders:

1. The stipulated motion is hereby granted;
2. Plaintiff Donald Ford has until February 6, 2009, to respond or otherwise object to Defendants' First Set of Interrogatories and Request for Production of Documents; and

3. Defendants OnTech Delaware, Inc., and OnTech Operations, Inc., have until February 6, 2009, to respond or otherwise object to Plaintiff's First Set of Interrogatories, Request for Production of Documents, and Requests for Admissions.

DATED this 12th day of January, 2009.

BY THE COURT:



Dale A. Kimball
District Court Judge

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH-CENTRAL DIVISION

FILED
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2009 JAN 12 P 2: 19
DISTRICT OF UTAH
BY: DEPUTY CLERK

FRANCES M. FLOOD, Plaintiff, v. CLEARONE COMMUNICATIONS, INC., a Utah Corporation, Defendant.	**ORDER GRANTING PRELIMINARY INJUNCTIVE RELIEF** Case No. 2:08-CV-631

Before the Court are Plaintiff's Motion for Summary Judgment and Defendant's Motion to Dismiss or alternatively for Summary Judgment. The Court heard oral argument on November 12, 2008. Ms. Flood was represented by Rodney Parker, Richard Van Wagoner, and Samuel Harkness. ClearOne Communications was represented by Brian Cousin and James Magelby. The Court took the matters under advisement. Since that time, the Court has held several status conferences in an effort to encourage the parties to settle. Due to the time constraints and the equities involved, the Court will not issue a final ruling on the above motions at the present time. However, to preserve the rights of the parties involved, and in particular to ensure that Ms. Flood's constitutional and trial rights are protected, the Court grants a preliminary injunction as follows.

BACKGROUND

Frances Flood is a past employee and officer of the defendant, ClearOne Communications, Inc.. On January 15, 2003, the United States Securities and Exchange

Commission commenced a civil suit against ClearOne, Ms. Flood, and Susie Strohm, another ClearOne employee, alleging violations of the federal securities laws. The suit led to additional proceedings, including a criminal indictment against Ms. Flood and Ms. Strohm. Ms. Flood and Ms. Strohm sought from ClearOne indemnification and advancement of attorneys' fees and costs incurred by them in the SEC action and all other related proceedings.

On December 5, 2003, Ms. Flood and ClearOne entered into an Employment Separation Agreement. Pursuant to the agreement, Ms. Flood agreed to resign from her position as ClearOne's CEO and Chairman of the Board of Directors. Additionally, Ms. Flood forfeited numerous stock options and transferred shares of ClearOne's common stock back to the Company. In exchange for these and other actions, the Company paid Ms. Flood $350,000 and agreed to indemnify Ms. Flood for liability, legal fees, and costs.

The indemnification provision provides that ClearOne will indemnify Ms. Flood for "any liability and all reasonable attorneys' fees and costs . . . whether incurred before or after the effective date of [the] agreement." Employment Separation Agreement at ¶ 8. ClearOne agreed it would "continue to pay for the reasonable defense costs incurred by Flood in defending matters or future matters, if any, which may arise from or relate to her tenure as an officer or director of ClearOne." *Id.* ClearOne's indemnification obligations were contingent on Ms. Flood's duty to cooperate with ClearOne in the ongoing investigations as well as limitations imposed by Utah Code Ann. § 16-10a-902 and ClearOne's articles of incorporation and bylaws. *Id.*

Utah Code § 16-10a-902 provides that a corporation may indemnify a director only if (1) the director's "conduct was in good faith," (2) the director's conduct was reasonably believed to be "in the corporation's best interests," and (3) the director "had no reasonable cause to believe

his conduct was unlawful." Utah Code Ann. § 16-10a-902(1). ClearOne's bylaws also condition indemnification "on a conclusion that the expenses are reasonable, the corporation has the financial ability to make the payment, and the financial resources of the corporation should be devoted to this use rather than some other use by the corporation." ClearOne's BYLAWS § 5.1(a)(2).

Ms. Flood and Ms. Strohm were indicted by a federal grand jury in this district on July 25, 2007.

Before Ms. Flood and ClearOne executed the Employment Separation Agreement, Ms. Flood retained current counsel–Max Wheeler and the law firm of Snow, Christensen & Martineau–to represent her in all matters relating to the SEC investigation and related proceedings. As soon as the agreement was signed, ClearOne paid Mr. Wheeler and his firm's legal fees that were incurred previously, and continued to pay all fees and costs as they became due.

Not only did ClearOne establish a pattern of advancing legal fees, but additionally the Company made various statements concerning its obligation to advance fees for Ms. Flood's legal defense and to indemnify her. For example, on April 25, 2008, Raymond Etcehverry, counsel for ClearOne, provided a letter to Ms. Flood's counsel stating "[t]he Company has and will continue to meet its obligation to advance reasonable and necessary defense costs." Plaintiff's Memorandum in Support, Ex. P. On July 27, 2007, ClearOne stated in a public filing that "the Company has a direct financial obligation to indemnify each former officer for any liability and for all reasonable attorney's fees and costs incurred in defending against the charges brought by the United States Attorney." *Id.* Ex. B. On September 30, 2007, the Company made a similar statement in another public filing and also estimated the Company would be liable for

approximately $1.8 million "through trial, [for] the advancement of funds related to the indemnification agreements," of Ms. Flood and Ms. Strohm. *Id.* Ex. C. The Company reiterated these statements in multiple press releases, *id.* Ex. D, E, & F, although the estimates for ClearOne's total liability increased steadily until ClearOne stated that it had "a $3.3 million accrual for a contingent liability associated with the advancement of funds related to indemnification agreements with two former officers, whose trial has been scheduled for October 2008." *Id.* Ex. G.

Beginning with ClearOne's refusal to pay for a focus group which Ms. Flood's counsel thought necessary for her defense, and culminating in ClearOne's refusal to pay any invoices following a partial payment of an April 2008 invoice, the Company has ceased advancing funds. The Company's primary claim is that the fees and costs are unreasonable. In response, Ms. Flood's attorneys in the criminal case claim all of their actions and fees are reasonable, and that they will need to withdraw unless their fees are paid. They point out that in any event, they are not ethically permitted to advance costs, and that Ms. Flood is financially unable to do so, or to pay their fees on her own. As a consequence of their impasse, Ms. Flood filed the present lawsuit in the midst of her ongoing criminal case, alleging various causes of action against ClearOne, including a cause of action for breach of contract and requesting remedies including a preliminary injunction. After a motion hearing on September 19, 2008, the parties agreed to file cross motions for summary judgment. Oral argument was heard on these motions on November 12, 2008.

Recognizing that Ms. Flood is facing a trial date in her criminal case of February 2, 2009, and the fact that any ruling by this Court may be delayed by appellate proceedings, the Court strongly encouraged the parties to resolve their disputes through settlement negotiations. At a

status conference on January 8, 2009, the Court informed the parties that it was considering issuing a preliminary injunction if the parties could not reach a mutually agreeable settlement. Unfortunately, settlement has not occurred. In order to guarantee Ms. Flood's right to a speedy trial, the right to effective assistance of counsel and continuity of counsel of her choice, and all other facts and circumstances attendant to the matter, the Court finds it necessary to invoke its equitable powers to issue a preliminary injunction that is designed to protect the rights of both parties to this action.

In fashioning an appropriate remedy, the Court is mindful of the interests of each party. From ClearOne's perspective, statements of counsel have clearly communicated to the Court that ClearOne's chief complaint is that counsel for both Ms. Flood and Ms. Strohm have charged excessive and unreasonable fees and have incurred unnecessary and excessive costs. ClearOne claims to simply want the benefit of its bargain–to pay reasonable attorneys' fees and costs, but no more. From Ms. Flood's perspective, she believes the fees to be necessary and reasonable and she, too, simply wants the benefit of her bargain–to have continued payment of her legal fees and costs so she can go to trial in a timely manner with the counsel of her choosing. Recognizing that these are the parties' primary concerns, the preliminary injunction will seek as much as possible to maintain the status quo and allow each side to the dispute to have access to adequate legal recourse in the future for the full protection of their contractual and constitutional rights.

This Order will require ClearOne to continue advancing fees and costs as they become due, through completion of Ms. Flood's criminal trial. This will ensure Ms. Flood continuing representation of her current legal counsel, and protect her constitutional and statutory rights to a speedy trial and effective assistance of counsel. In order to protect ClearOne's interests,

however, forty percent of the money advanced will be held in escrow, payable to Snow, Christensen, & Martineau, subject to a reasonableness determination to be made by the Court shortly after completion of Ms. Flood's criminal trial. This will ensure that ClearOne will have a source of funds available to be returned in the event any of the fees or costs are found to be unreasonable.

DISCUSSION

I. Preliminary Injunction Standard

Although a preliminary injunction is an extraordinary remedy, a district court does not abuse its discretion by issuing a preliminary injunction where the party seeking the injunction shows

> (1) a substantial likelihood of success on the merits; (2) irreparable harm [if the injunction does not issue]; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest.

General Motors Corp. v. Urban Gorilla, LLC, 500 F.3d 1222, 1226 (10th Cir. 2007). Moreover, where irreparable harm will occur, where the balance of harms favors the party seeking the injunction, and where the public interest will not be adversely affected, the "'probablility of success' prerequisite becomes more lenient. . . . [Q]uestions going to the merits [must only be] so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation." *Keirnan v. Utah Transit Authority*, 339 F.3d 1217, 1221 (10th Cir. 2003) (quoting *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1199 (10th Cir. 1992)).

(A) Likelihood of Success on the Merits

Ms. Flood is substantially likely to succeed on the merits of her claim that the Employee Separation Agreement requires ClearOne to advance payment of legal fees. The contract language requiring advancement appears unambiguous. Whether a contract or a contract term is

ambiguous is determined as a matter of law. *Novell, Inc. v. Canopy Group, Inc.*, 2004 UT App 162, ¶ 20, 92 P.3d 768. In construing a contract, the intention of the parties is controlling and is to be determined by the four corners of the agreement where possible. *Id.* (quoting *WebBank v. American Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶ 17, 54 P.3d 1139 (quotations omitted)). If the language embodied within the contract is unambiguous, intent is determined by that language. *Id.* Where the language is ambiguous, however, intent can be gleaned from extrinsic evidence including the parties' actions and performance. *Id.* Ambiguity is found where a contractual provision is found to be susceptible to more than one reasonable interpretation. *Id.*

The pertinent contract provisions appear in paragraph 8 of Ms. Flood's Employment Separation Agreement. It states, "ClearOne shall indemnify Flood for any liability and for all reasonable attorneys' fees and costs incurred by her in connection with the SEC Action or any Related Proceedings." Employee Separation Agreement at ¶ 8. Furthermore, paragraph 8 provides that ClearOne will "<u>continue to</u> pay for . . . reasonable defense costs incurred by Flood." *Id.* (emphasis added). Based on this language, it appears clear the parties intended that ClearOne would not only indemnify Ms. Flood for all reasonable attorneys' fees and costs, but also that the Company would advance payment for all reasonable attorneys' fees and costs.

Even if the Court were to find that the language quoted above is susceptible to more than one interpretation, Ms. Flood would still be highly likely to prevail on the merits of her claim. As mentioned above, Utah courts will use extrinsic evidence that includes the parties' actions and performance to determine what the parties intended. In this case, the parties' course of conduct shows advancement was intended. ClearOne immediately engaged in a pattern and conduct of advancement. ClearOne only ceased paying fees when ClearOne thought they were unreasonable. As discussed above, the Company issued numerous public statements referencing

its practice of, and its duty to, advance fees for Ms. Flood's legal fees. Counsel for ClearOne—the same counsel that drafted the Employment Separation Agreement—stated that ClearOne "would continue . . . to advance reasonable and necessary defense costs." Plaintiff's Memorandum in Support, Ex. P.

Although ClearOne's primary argument is that counsel for Ms. Flood has billed an unreasonable amount of legal fees, ClearOne also argues that under the Employment Separation Agreement it retained the right to cease advancing funds, or even to refuse to indemnify Ms. Flood, if (1) "the corporation [does not have] the financial ability to make the payment," or (2) the Company determines that "the financial resources of the corporation should be devoted to . . . some other use by the corporation." ClearOne's BYLAWS, Article V, § 5.1 & 5.2. For a variety of reasons, Ms. Flood claims these bylaw provisions are unenforceable. It appears to the Court that Ms. Flood's position in opposition to ClearOne's interpretation is substantially likely to succeed.

A promise is said to be illusory "[w]hen there exists only the façade of a promise." *Pierce v. Pierce*, 2000 UT 7, ¶ 21, 994 P.2d 193. In the words of Samuel Williston, a promise is said to be illusory "where the promisor retains an unlimited right to decide later the nature or extent of his performance. This unlimited choice in effect destroys the promise and makes it illusory." Samuel Williston, *The Law of Contracts* § 43, at 140 (3d ed. 1957).

It appears to the Court at this early stage in the litigation that giving effect to the bylaw provisions cited by ClearOne would render ClearOne's indemnification and advancement obligations illusory. In essence, ClearOne argues that it is only required to indemnify or advance funds so long as the company has the financial ability to do so and/or does not have a better use

for the money. Were a court to give effect to these provisions, there appears to be no intelligible standard of performance to which the Company would be held.

ClearOne argues that the bylaw provisions do not render its obligations under the contract illusory. According to ClearOne, the business judgment rule and the duty of good faith and fair dealing inherent in every contract impose a standard upon which its performance and obligations can be measured and limited. These doctrines, however, do not appear to be workable here.

The business judgment rule essentially states that where a company's Board of Directors makes a business decision, a court of law will not second guess that decision so long as it appears that the decision was exercised in good faith, with due care, and in a manner that the Board reasonably believes to be in the best interests of the corporation. *See* Utah Code Ann. § 16-10a-840. Although the business judgment rule places limitations on the actions of directors, the doctrine is directed at protecting the interests of corporate shareholders, and as such has a baseline standard. In the context of this case, the question whether ClearOne's Board has made a business decision defensible under the business judgment rule is completely different. The Court wonders what the standard would, or could, possibly be. Indeed, the Company could certainly be deemed to exercise "prudent" business judgment in determining that its money would be better used to repurchase shares of its own stock rather than spent on Ms. Flood's defense, as its Board of Directors stated on September 8, 2008. If one were to focus only on the profitability of the Company, it seems that virtually any use of the Company's money other than the payment of Ms. Flood's attorneys' fees would be in the Company's best interests. Under the facts as the Court presently understands them, it appears that adopting ClearOne's invocation of this provision is at the sole discretion of the Company, with no clearly workable standard on

which to measure the Company's decision. This appears to be the case whether analyzed under the business judgment rule, the duty of good faith and fair dealing, or in any other way.

(B) Irreparable Harm

In the event the Court does not issue a preliminary injunction, Ms. Flood would suffer irreparable harm. Although irreparable harm is difficult to define, it has been described as injury that is "both certain and great, [but] not merely serious or substantial." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1262 (10th Cir. 2004) (quoting *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001)). Irreparable harm occurs where a "court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001). Finally, where a constitutional right is involved, irreparable injury is almost always found. *See id.*

The facts of this case show that Ms. Flood will suffer irreparable harm in the absence of an injunction. Ms. Flood faces a criminal trial in less than three weeks. In the absence of continued payment of fees and costs by ClearOne, Ms. Flood's counsel have represented to the Court that they cannot continue representation. Given the complex nature of Ms. Flood's criminal case and the looming trial date, it would seem impossible for Ms. Flood to procure effective assistance of counsel at this late juncture, particularly without a lengthy continuance of the trial date. It is well-settled that a criminal defendant is entitled to the effective assistance of counsel,[1] *United States v. Cronic*, 466 U.S. 648, 656 (1984), as well as the right to a speedy trial. U.S. Const. amend. VI. Accordingly, the Court finds that absent an injunction Ms. Flood will suffer certain and serious injury to her constitutional, statutory, and contractual rights that would

[1]Although this right is primarily concerned with guaranteeing an effective advocate, the Sixth Amendment does comprehend "the right to select and be represented by one's preferred attorney." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

not be compensable by a monetary reward after a full trial on the merits of her breach of contract claim.

(C) Balance of Harms

The threatened injury to Ms. Flood outweighs any harm that the preliminary injunction may cause to ClearOne. As discussed above, Ms. Flood would likely suffer grievous harm in the form of lost constitutional rights if an injunction does not issue. Any harm to ClearOne, on the other hand, would only be monetary or economic loss compensable by a damages award. Indeed, the preliminary injunction will not significantly alter the contractual obligations and rights of either party. In the event ClearOne prevails with respect to advancement, or indemnification, for that matter, Ms. Flood will be required to repay the Company for any funds improperly advanced or paid on behalf of the indemnification agreement. Furthermore, even if ClearOne may suffer some economic loss, which is highly unlikely given the nature of the injunction, such loss will not tip the balance of harms analysis in ClearOne's favor. Since simple economic loss is an insufficient basis for an injunction to issue, *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003), and loss of constitutional rights will easily support the issuance of an injunction, *see id.* at 1190, any economic loss to ClearOne cannot change the fact that the balance of harms analysis strongly favors Ms. Flood and issuance of the injunction.

Moreover, in this case issuing an injunction will merely maintain the existing status quo and will not require ClearOne to engage in any affirmative action. An injunction will only alter the status quo where "it changes the 'last peaceable uncontested status existing between the parties before the dispute developed.'" *See Summum v. Pleasant Grove City*, 483 F.3d 1044, 1049 (quoting *Schrier v. Univ. of Colorado*, 427 F.3d 1253, 1258 (10th Cir. 2005)).

Additionally, an injunction is considered mandatory where it will require a party to make an affirmative action beyond what it was already doing "during the last uncontested period preceding the injunction." *Dominion Video*, 269 F.3d at 1155. The present dispute arose when ClearOne ceased advancing legal fees. The last peaceable uncontested status existing between the parties involved ClearOne advancing legal fees as they became due. An injunction requiring ClearOne to continue advancing legal fees as fees become due will not alter the status quo, nor will it mandate that ClearOne take affirmative action beyond what it was already doing.

(D) Public Interest

Issuing an injunction will not adversely affect the public interest. The public interest favors a speedy resolution of criminal cases. The public interest also favors protection of a criminal defendant's constitutional rights. This is especially true where the injunction is as narrow and limited as in this case.

CONCLUSION AND ORDER

The Court finds that equity requires a preliminary injunction to issue as follows:

- ClearOne shall pay 100% of all Ms. Flood's costs and legal fees, based on invoices submitted by Snow, Christensen, & Martineau, as the fees and costs become due, through the conclusion of Ms. Flood's criminal trial. ClearOne shall also pay all past-due invoices.
- The payment of legal fees and costs shall be disbursed as follows:
    - 60% of the invoice amount shall be paid directly to Ms. Flood's attorneys, Mr. Max Wheeler, et al, at Snow, Christensen, & Martineau.
    - 40% of the invoice amount shall be sent directly to the Clerk of the Court for the United States District Court for the District of Utah, to be held in escrow

and payable to Snow, Christensen, & Martineau, subject to a reasonableness determination by the Court. This determination will address all issues of reasonableness raised by ClearOne from the beginning of the legal services, and be made shortly after completion of the criminal trial. To the extent fees or costs are found to be unreasonable, the monies held in escrow shall be refunded to ClearOne.

IT IS SO ORDERED.

Dated this 12th day of January, 2009.

Dee Benson
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

ROBERT BONTEMPO	**(Amended)** **SCHEDULING ORDER AND** **ORDER VACATING HEARING**
Plaintiff,	Case No. 2:08cv00750
vs.	District Judge Ted Stewart
BYDEX MANAGEMENT, LLC, a Utah Limited Liability Company, and BASIC RESEARCH, LLC, a Utah Limited Liability Company Defendants.	

Pursuant to Fed.R. Civ P. 16(b), the Magistrate Judge[1] received the Attorneys' Planning Report filed by counsel (docket #9). The following matters are scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause.

IT IS ORDERED that the Initial Pretrial Hearing set for 1/14/09, 2009, at 10:30 a.m. is VACATED.

ALL TIMES 4:30 PM UNLESS INDICATED

1.	PRELIMINARY MATTERS	DATE
	Nature of claim(s) and any affirmative defenses:	
a.	Was Rule 26(f)(1) Conference held?	12/18/08 and 1/6/09
b.	Has Attorney Planning Meeting Form been submitted?	1/7/09
c.	Was 26(a)(1) initial disclosure completed?	1/15/09

2.	DISCOVERY LIMITATIONS	NUMBER
a.	Maximum Number of Depositions by Plaintiff(s)	*10*

b.	Maximum Number of Depositions by Defendant(s)	10
c.	Maximum Number of Hours for Each Deposition (unless extended by agreement of parties)	7
d.	Maximum Interrogatories by any Party to any Party	50
e.	Maximum requests for admissions by any Party to any Party	25
f.	Maximum requests for production by any Party to any Party	

		DATE
3.	**AMENDMENT OF PLEADINGS/ADDING PARTIES[2]**	
a.	Last Day to File Motion to Amend Pleadings	3/15/09
b.	Last Day to File Motion to Add Parties	3/15/09
4.	**RULE 26(a)(2) REPORTS FROM EXPERTS[3]**	
a.	Plaintiff - 30 days after Court's decision on Summary Judgment, and if none filed, then by:	12/15/09
b.	Defendant - 60 days after Court's decision on Summary Judgment, and if none filed, then by:	1/15/10
c.	Counter reports - 90 days after Court's decision on Summary Judgment, and if none filed, then by:	2/15/10
5.	**OTHER DEADLINES**	
a.	Discovery to be completed by:	
	Fact discovery	9/15/09
	Expert discovery - 30 days of when rebuttal reports are provided under Rule 26(a)(2), or if no decision on Summary Judgment, then by:	3/1/10
b.	Final date for supplementation of disclosures and discovery under Rule 26 (e) - periodically, or as new or supplemental information becomes available, and no later than:	4/15/10
c.	Deadline for filing dispositive or potentially dispositive motions	10/30/09

6. SETTLEMENT/ ALTERNATIVE DISPUTE RESOLUTION

BASED ON THE PARTIES' STIPULATION, THE COURT WILL ENTER A DUCiv-R 16 ORDER OF REFERENCE FOR SETTLEMENT CONFERENCE WITHIN THIRTY (30) DAYS OF A RULING ON ANY DISPOSITIVE MOTION OR, IF NONE FILED, THEN ON OR BEFORE 11/15/09. THE PARTIES SHOULD SUBMIT A PROPOSED ORDER AT THE APPROPRIATE TIME.

a.	Referral to Court-Annexed Mediation	NO	
b.	Referral to Court-Annexed Arbitration	NO	
c.	Evaluate case for Settlement/ADR on		9/30/09
d.	Settlement probability:		Unknown

7. TRIAL AND PREPARATION FOR TRIAL:

a.	Rule 26(a)(3) Pretrial Disclosures[4]		
	Plaintiff		**05/07/10**
	Defendant		**05/21/10**
b.	Objections to Rule 26(a)(3) Disclosures (if different than 14 days provided in Rule)		
			DATE
c.	Special Attorney Conference[5] on or before		**06/04/10**
d.	Settlement Conference[6] on or before		06/04/10
e.	Final Pretrial Conference	2:30 p.m.	06/23/10

f. Trial	Length	Time	Date
i. Bench Trial	*# days*	_____	_____
ii. Jury Trial	*Three days*	*8:30 a.m.*	*07/07/10*

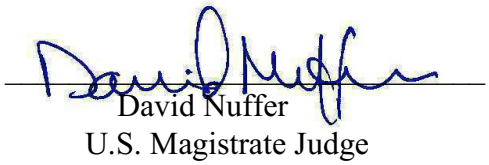
8. OTHER MATTERS:

Counsel should contact chambers staff of the District Judge regarding Daubert and Markman motions to determine the desired process for filing and hearing of such motions. All such motions, including Motions in Limine should be filed well in advance of the Final Pre Trial. Unless otherwise directed by the court, any challenge to the qualifications of an expert or the reliability of expert testimony under Daubert must be raised by written motion before the final pre-trial conference.

9. ALL DEADLINES MAY BE MET BY FILING ON OR BEFORE 11:59 P.M. OF THE DAY OF THE DEADLINE USING THE CM/ECF ELECTRONIC FILING SYSTEM.

Dated this 12th day of January, 2009.

BY THE COURT:



David Nuffer
U.S. Magistrate Judge

1. The Magistrate Judge completed Initial Pretrial Scheduling under DUCivR 16-1(b) and DUCivR 72-2(a)(5). The name of the Magistrate Judge who completed this order should NOT appear on the caption of future pleadings, unless the case is separately referred to that Magistrate Judge. A separate order may refer this case to a Magistrate Judge under DUCivR 72-2 (b) and 28 USC 636 (b)(1)(A) or DUCivR 72-2 (c) and 28 USC 636 (b)(1)(B). The name of any Magistrate Judge to whom the matter is referred under DUCivR 72-2 (b) or (c) should appear on the caption as required under DUCivR10-1(a).

2. Counsel must still comply with the requirements of Fed. R. Civ. P. 15(a).

3. A party shall disclose the identity of each testifying expert and the subject of each such expert's testimony at least 60 days before the deadline for expert reports from that party. This disclosure shall be made even if the testifying expert is an employee from whom a report is not required.

4. Any demonstrative exhibits or animations must be disclosed and exchanged with the 26(a)(3) disclosures.

5. The Special Attorneys Conference does not involve the Court. Counsel will agree on voir dire questions, jury instructions, a pre-trial order and discuss the presentation of the case. Witnesses will be scheduled to avoid gaps and disruptions. Exhibits will be marked in a way that does not result in duplication of documents. Any special equipment or courtroom arrangement requirements will be included in the pre-trial order.

6. The Settlement Conference does not involve the Court unless a separate order is entered. Counsel must ensure that a person or representative with full settlement authority or otherwise authorized to make decisions regarding settlement is available in person or by telephone during the Settlement Conference.

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Attorney for Plaintiff, Framed Wall Art, LLC.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

FRAMED WALL ART, LLC, an Arizona company, Plaintiff, vs. PME HOLDINGS, LLC, a Utah company PAUL EWING, an individual, and MELANIE EWING, an individual, Defendants.	**ORDER RE MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL RE DENIAL OF MOTION FOR PRELIMINARY INJUNCTION** Case No. 2:08cv00781 Judge Dale A. Kimball

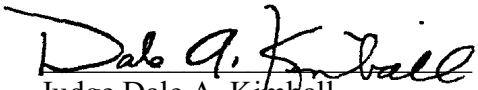
ORDER

THE COURT, having considered Plaintiff's Motion To Certify For Interlocutory Appeal Re Denial Of Motion For Preliminary Injunction, its Memorandum in Support thereof, and finding good cause, therefore:

IT IS HEREBY ORDERED that the Plaintiff's Motion is granted. Plaintiff may appeal the Court's denial of Plaintiff's Motion for Preliminary Injunction and the issues thereto pursuant to 28 U.S.C. § 1292(a).

IT IS SO ORDERED

DATED: __January 12, 2009.



Judge Dale A. Kimball
United States District Court

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Attorneys for Defendant DHL Express (USA), Inc.

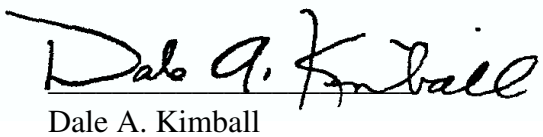
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UNISHIPPERS GLOBAL LOGISTICS, LLC, a Delaware Limited Liability Company, Plaintiff, vs. DHL EXPRESS (USA), INC., an Ohio Corporation, Defendant.	ORDER GRANTING PRO HAC VICE ADMISSION Case No. 2:08-cv-894 Honorable Dale A. Kimball United States District Judge

It appearing to the Court that Petitioner meets the pro hac vice admission requirement of DUCivR 83-1.1(d), the motion for the admission pro hac vice of

Christopher S. Ruhland in the United States District Court for the District of Utah is hereby GRANTED.

DATED this 12th day of January, 2009.



Dale A. Kimball
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNISHIPPERS GLOBAL LOGISTICS, LLC, a Delaware Limited Liability Company, **Plaintiff,** **vs.** **DHL EXPRESS (USA), INC., an Ohio Corporation,** **Defendant.**	**ORDER GRANTING IN PART UNISHIPPERS' MOTION TO ENFORCE INJUNCTION** **Case No. 2:08CV894 DAK**

This matter is before the court on Plaintiff Unishippers Global Logistics, LLC's ("Unishippers") Emergency Motion for Order Enforcing Preliminary Injunction & Request for Sanctions. A hearing on the motion was held on January 12, 2009. At the hearing, Unishippers was represented by Timothy C. Houpt and Lewis M. Francis. Defendant DHL Express (USA), Inc., ("DHL") was represented by Christopher Ruhland and John Ashton. The court has carefully considered the memoranda and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to this motion. Now being fully advised, the court enters the following Order, clarifying and enforcing its December 9, 2008 Order Granting Preliminary Injunction (the "Injunction").

1. The Injunction enjoins DHL from ceasing to provide U.S. domestic shipping services to Unishippers, its franchisees, and their customers

through January 30, 2009. It also requires DHL to provide the same level of U.S. domestic shipping service to Unishippers, its franchisees, and their customers that DHL has agreed to provide to customers who have used its international service at least once since January 2008.

2. Like Unishippers, the court contemplated that the level of service DHL had agreed to provide to customers who had used its international shipping at least once since January 2008 would not change between the date of the Injunction (December 9, 2008) and January 30, 2009. At the evidentiary hearing regarding the Injunction, there was no indication from DHL that prior to January 30, 2009, DHL intended to cease or reduce domestic services to customers who had used its international service at least once since January 2008. The only explicit representation was that " [c]ustomers who have used DHL's international shipping services at least one time during 2008, however, will be able to ship packages domestically through January 30, 2009. Fris Decl. ¶ 8. The reason for this exception is to accommodate DHL's critical international customers. *Id*." DHL's Mem. in Opp'n at 3.

3. Thus, because the issue was not explicitly addressed, the court did not explicitly state in the Injunction that DHL was required to maintain the same level of service to Unishippers, its franchisees, and their customers as DHL was providing *as of that date* to customers who had used its international service at least once since January 2008.

4 The court now makes such a requirement explicit. DHL is ENJOINED from taking any further measures to reduce in any manner its level of domestic service to Unishippers, its franchisees, and their customers until after January 30, 2009.

3. Even if the Injunction only implicitly contemplated that DHL would not continue to whittle down its domestic operations until after January 30, 2009, DHL's interpretation of the Injunction violates the spirit of the Injunction. The logical extension of DHL's interpretation of the Injunction is that DHL would be in compliance with the Injunction as long as it maintained even the slightest level of domestic service and as long as it treated all its customers the same. Such an interpretation is unreasonable and is contrary to the intent of the Injunction.

4. At this point, it would be unduly costly and burdensome for DHL to reverse the measures it has already taken to cease certain services in Charleston, West Virginia; Knoxville, Kentucky; and Marshall Texas. Consequently, the court will not require DHL to reverse its cessation of these services. DHL, however, is ORDERED not to cease or reduce any other domestic services in any other cities or other geographical areas in which Unishippers, its franchisees, or their customers are located until after January 30, 2009.

5. Violation of this Order (which hereby incorporates the Injunction) shall constitute contempt of Court, and DHL and/or its representatives shall be subject to sanctions for any such contempt.

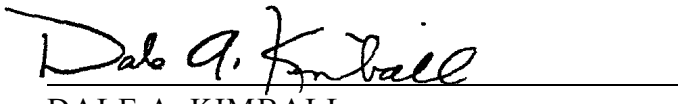
6. The parties appear to agree that the payment disputes discussed in the briefing are not ripe for court intervention. The court directs the parties to follow the payment-collection process set forth in the contract.

CONCLUSION

Accordingly, IT IS HEREBY ORDERED that Unishippers' Emergency Motion for Order Enforcing Preliminary Injunction and Request for Sanctions [docket # 46] is GRANTED in part and DENIED in part. The court finds that DHL violated the Injunction, but because the Injunction was not explicit as to the level of domestic service to be maintained by DHL, the court declines to impose sanctions. The court has now clarified the ambiguity in the Injunction. Further violations by DHL, however, will result in sanctions being imposed.

DATED this 12th day of January, 2009.

BY THE COURT:



DALE A. KIMBALL
United States District Judge

United States District Court
For The District of Utah, Central Division

United States of America, Plaintiff, vs. 29,122.5 Square Feet of Land in Salt Lake City, Salt Lake County, State of Utah; Shubrick Building, L.L.C., Brighton Bank; Anchor Investments Company, Port O' Call, Inc..; et al.; and any Unknown Other Owners, Defendants.	))))))))))))	Case No. 08-CV-895-WFD

ORDER DENYING MOTION FOR IMMEDIATE POSSESSION OF CONDEMNED PROPERTY

This matter comes before the Court on the United States' December 16, 2008 Motion for Immediate Delivery of Possession of Condemned Property. Having considered the parties' memoranda and affidavits submitted in support and opposition, and having heard testimony and argument in open court, the Court FINDS and ORDERS:

I. Background

This matter arises out of a motion by the United States for "immediate possession" of a property in Salt Lake City, Utah commonly known as the Shubrick

Building. The Shubrick Building occupies approximately two thirds of an acre of land in the southwest corner of a four and a half acre site to be used for the expansion of the Frank E. Moss United States Courthouse in Salt Lake City, a project which is a high priority for both the U.S. General Services Administration ("GSA"), and the federal judiciary. (Camp Aff. at 2.) The United States seeks full possession no later than January 15, 2009, but would consent to a delay of "one to two weeks" to complete the movement of trade fixtures out of the building.[1] The government asserts that immediate possession is necessary to begin testing for and abatement of hazardous materials, to demolish the structure, and to begin pre-construction archaeological work on the site, among other reasons. It asserts that any delay could have a measurable effect on both the ultimate cost of the project and the final completion date. The government supports its position with affidavits by Alan Camp, the GSA project manager for the courthouse expansion, and Leigh Ann Bunetta, Regional Counsel for the GSA's Rocky Mountain Region.

The Defendant business entities, Shubrick Building L.L.C.; its separately

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[1] Defendants assert that there is a significant dispute regarding what items in the Port O' Call space constitute trade fixtures, which must be moved and stored at government expense, as opposed to real fixtures, which the government included in its valuation of the building, and is not obligated to move. They further assert that this dispute justifies delaying ordering Port O' Call to vacate the Shubrick Building in the immediate future. However, during the January 7, 2009 hearing on the matter, this Court instructed the parties to attempt to reach resolution on the subject, and jointly report their progress to the Court no later than January 20, 2009.

incorporated anchor tenant, the Port O' Call social club; and Anchor Investments, which apparently serves as a management company for the building, object on equitable grounds. They seek to keep Port O' Call open through mid-April 2009, and seek an additional month to vacate the premises. In support, they offer affidavits by the majority owners of all three defendant business entities, Kent and Jannette Knowley.

The docket in this case does not begin to relate the long and drawn-out history behind the condemnation of the Shubrick Building. Plans to construct a new federal courthouse in Salt Lake City began as early as 1994. (Camp Aff. at 1.) In 1999, after initial building plans raised significant public controversy due to the expected impact on historic properties, the GSA reopened its site selection process. (Bunetta Dec. at 1.) Plans issued in 2002 called for the condemnation and destruction of the nearby Galley and DeWorth buildings (also owned by the Knowleys) but did not include the Shubrick Building.[2] (*Id.*) The Consolidated Appropriations Act of 2005 (signed into law by President Bush on December 8, 2004) directed the GSA to acquire and demolish the Shubrick Building as a part of the project. (*Id.* at 2.) This final change in the Salt Lake City courthouse plan came about at least partially as a result of increased threat protection requirements developed post-9/11. (January 7, 2009 Hr'g Tr. at 33.) Additionally, in May of 2003, the Knowleys, through their business entity, the Shubrick

[2] The Galley and DeWorth Buildings are included in the instant condemnation action, but are already vacant.

Building, filed suit seeking to have the building included in the plan, in addition to their other properties already scheduled to be condemned. (Bunetta Dec. at 2.)

According to the Knowley Affidavit, the GSA discussed condemning the Shubrick Building with them as early as 2001; the Knowleys assert that they were warned Port O' Call "would have to close down before the 2002 Winter Olympics," but the GSA never followed through. (Knowley Aff. at 4-5.) Similarly, the GSA provided the Defendants with a 90-day notice letter and relocation brochure on September 28, 2007, but took no further decisive action. (Bunetta Dec. at 2-3.) As a result of these and other similar false starts, Defendants assert that until the declaration of taking was finally filed in this case on November 18, 2008, they were not sure the building would ever be condemned. (Knowley Aff. at 5; January 7, 2009 Hr'g Tr. at 59.) However, the GSA provided Defendants with an "Official Notice to Vacate" in late-November 2008 requesting the removal of all personal property by December 31, 2008. (Pl.'s Memo at 4.) By that time much of the GSA's $41.5 million site acquisition and design fund had been spent, other properties related to the project had been condemned, and the nearby Odd Fellows Building had even been lifted from its foundations in preparation for movement to another site. (*See* January 7, 2009 Hr'g Tr. at 13-14.)

Due to the long history leading up to the GSA finally filing its declaration, little attempt was made to find another suitable business location for Port O'Call. (Knowley Aff. at 5.) Kent Knowley stated that he inspected three buildings in Salt Lake City, but

for a variety of reasons—including that the sites were smaller than the Shubrick Building, located on less ideal streets, and the Defendants' supposed lack of adequate financial resources—opted not to pursue them. (January 7, 2009 Hr'g Tr. at 57-59.) It also appears that the Defendants did not seriously considered leasing alternative space; Mr. Knowely stated that he didn't think it would be "necessary or fair to be pushed out of my own building that I own into a leased space." (*Id.* at 58.) Defendants assert that in reality "their hands were tied" and that they truly unable to seek a new location until the funds reflecting the appraised value of the property were released to them on December 19, 2008. (Def.'s Memo at 7.) Further, the Knowleys dispute whether the estimated compensation deposited with the Court is an accurate reflection of the property's value, even describing the $5,465,000 made available to them as "meager."[3] (January 7, 2009 Hr'g Tr. at 59.) The supposed shortcoming in compensation ostensibly reduced Defendants' ability to purchase a like space elsewhere.

In addition to arguing that they have been caught unaware through the GSA's allegedly dilatory tactics, Defendants point out that the construction funds have not yet

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[3] Whether the $5,465,000 deposited with the Court and withdrawn by Defendants on December 19, 2008 constitutes sufficient compensation for the condemnation of the Shubrick Building and Defendants' other associated property is not relevant to the Court's analysis of whether to delay possession. The Court has no authority to delay possession on such grounds. Rather, 40 U.S.C. § 3114(c) contemplates deficiency judgments where the estimated compensation does not adequately remunerate landowners for the value of their property. To the extent Defendants believe the compensation provided them thus far is inadequate, they are free to raise the issue separately.

been designated for the Salt Lake City project. Indeed, such funds may not be received until early Fiscal Year 2010.[4] (Camp Aff. at 2.) Forcing Port O' Call to cease operations and vacate the Shubrick Building before construction funds are even appropriated, Defendants assert, would result in an unnecessary detrimental economic impact on their business when they could simply be allowed to remain in operation until funds are available. This is especially the case since early spring is Port O' Call's busiest and most profitable period of the year, in part because it encompasses the NCAA basketball playoffs. (Knowley Aff. at 5.)

Defendants also point to the potential for harm to the community which could result if Port O' Call is forced to close in the immediate future. For instance, the social club employees some ninety individuals (forty of whom have been employed by the social club for more than five years) who would be left unemployed on short notice, and during a state of economic unrest which will undoubtedly make it difficult to find replacement jobs. (Knowley Aff. at 6.) Further, the property could become a blight on

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[4] Much was made by both the United States and Defendants during the January 7, 2008 hearing of the possibility that the 111th Congress and the Obama administration could produce an economic stimulus package early in their tenure. Such a package could either have funds specifically earmarked for the Salt Lake City courthouse project, or could at least contain funds destined for the GSA which could be applied to the project. The parties engaged in additional speculation about what stimulus funding would mean for the project's timeline. A certain degree of optimism that this will occur may well be warranted, but it is far from certain when or if such a package will be passed, that it will contain funding for this project, or how that would affect the construction schedule. Consequently, the Court must focus its attention and reasoning on more orthodox methods of GSA construction funding, even though a degree of prognostication is nonetheless necessary to assess when funding might be received through such channels.

the Salt Lake business district if it is vacated significantly prior to the start of construction and left unoccupied for months while the GSA awaits construction funding.[5]

The United States, however, asserts that if it does not receive immediate possession of the Shubrick Building, and if it does not adhere as closely as possible to the existing demolition and site preparation schedule, the GSA might not receive funding at the beginning of Fiscal Year 2010 as it now hopes. The potential for delay results from the fact that GSA construction projects must compete internally with one another for funding. (January 7, 2009 Hr'g Tr. at 16-18.) During his testimony, Mr. Camp stated that in his experience any deficiencies in a project's readiness for construction, or in its progress on pre-construction work could result in the GSA favoring another project.[6] (*Id*. at 18.)

It goes without saying, of course, that slowing the Moss courthouse expansion would have a significant effect on the judicial administration of the District of Utah; the project has been a long time in the making and is now a high priority for the courts and

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[5] Defendants provided several letters from county and city officials regarding the importance of Port O' Call to the "city fabric" and requesting that the bar be allowed to remain open until construction funding is received. (Knowley Aff., Ex. A.)

[6] During his testimony, Mr. Camp agreed that there was some potential for beginning construction on portions of the project while demolition of the Shubrick Building was still ongoing. However, he asserted that such steps would require adjustments to the project schedule which could yield significant cost increases. He also asserted that even if such adjustments were possible they might still reflect negatively on the project as it competed for construction funds. (January 7, 2009 Hr'g Tr. at)

the GSA. A delay in the project's progression could also, according to the project manager, produce an $11 million total cost increase based on the GSA's standardized annual escalation rates, (Camp Aff. at 3); slow the addition of some 2,000 jobs to the Salt Lake City economy, (Camp Aff. at 2.); and result in exactly the sort of prolonged vacancy and urban blight issues the Defendants (and some local officials) profess concern about.

II. Legal Issues

The conflict between the government and Defendants centers on the Court's discretion to delay GSA's actual physical possession of the Shubrick Building. It is undisputed that the property at issue here already belongs to the government; the statute under which the instant condemnation action was brought provides that legal title vests in the government on the date the declaration of taking is filed and estimated just compensation[7] is deposited with the Court. 40 U.S.C. § 3114(a). However, the same statute allows that the Court "may fix the time within which, and the terms on which, the parties in possession shall be required to surrender possession to the petitioner." 40 U.S.C. § 3114(d). § 3114(d) allows the Court to balance the parties' interests in a condemned property and adjust the terms and time of the government's

[7] "Just compensation," the Supreme Court has held "means in most cases the fair market value of the *property* on the date it is appropriated." *Kirby Forest Indus. v. United States*, 467 U.S. 1, 10 (1984) (emphasis added). A landowner is not normally entitled to the cost of acquiring a substitute facility. *See United States v. 50 Acres of Land*, 469 U.S. 24, 26 (1984).

possession where necessary.

III. Legal Analysis

Although legal title passes as soon as a declaration of taking is filed and estimated compensation is filed with the Court, there is a modicum of precedent for delaying the government's actual physical possession of property taken under § 3114. Farthest reaching, perhaps, is a 1948 case in which a North Dakota district court allowed farmers to remain on land to be inundated by a reservoir for the entirety of the 1948 growing season. *United States v. 6,576.27 Acres of Land*, 77 F.Supp 244 (D. N.D. 1948). The court in that case—applying an earlier but nearly identical federal condemnation statute, 40 U.S.C. § 258—reasoned first that because the farmers in question had no opportunity to seek alternate ground on which to pursue their livelihood until they were compensated, and because they could not equitably be expected to expeditiously move, some flexibility must be extended them. *Id.* at 246. Just as importantly, the government would not be harmed by allowing the farmers to remain on the land, since dam construction could continue unabated without floodwaters reaching the disputed land until well after the 1948 growing season. *Id.* at 246-47.

The logic of *6,576.27 Acres of Land* has been applied in but a few cases. *See e.g., East Tennessee Natural Gas Co. v. Sage,* 361 F.3d 808 (4th Cir. 2001) (comparing § 3114 and the Natural Gas Act and finding that both acts provide courts with a certain degree of discretion in supervising the taking of actual possession of condemned

property); *United States v. Certain Land in the Borough of Manhattan*, 332 F.2d 679 (2d Cir. 1964) (approving in theory allowing tenants of condemned buildings to remain in occupancy past the five days allotted by the government for their ouster, but remanding for further consideration of expert witnesses regarding the safety concerns of allowing continued occupancy during demolition of neighboring structures). In *Certain Land in the Borough of Manhattan*, unlike in *6,576.27 Acres of Land*, the government would have been clearly prejudiced by allowing continued occupancy; the resulting delay carried with it an estimated cost of $8,000 a day. 332 F.2d at 681. Additionally, expert testimony suggested that the demolition of neighboring buildings had rendered the properties at issue dangerously unstable. However, the tenants, some of whom were manufacturers with significant equipment and inventory, faced expenses of their own, and estimated that they couldn't possibly move their operations with less than six months lead time. *Id.* Ultimately, the Second Circuit determined that the abbreviated five day period allowed by the government was unreasonable, and that so long as continued occupancy was not unsafe it should be allowed. *Id.*

However, the preference—based on the overriding purpose of the Declaration of Taking Act—seems to be for allowing immediate, or nearly immediate possession by the government. *See United States v. Miler*, 317 U.S. 369, 381 (1943) (addressing the earlier version of the Declaration of Taking Act, 40 U.S.C. § 258(a)). The *Miller* Court did not address courts' equitable discretion specifically, but did make clear the

overriding two-fold purpose of the statute, which is:

> First, to give the Government *immediate possession* of the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate of the value of the property.

Id. (emphasis added). Given the purpose of the Declaration of Taking Act, it is logical that only where significant prejudice to the landowner and lack of prejudice to the government are both clearly established do the equities shift such that possession should be delayed. Again, *6,576.27 Acres of Land* provides the best example of this balancing act. Only because the prejudice to the defendant farmers, who would otherwise be forced off their land a few weeks before spring planting, leaving with them with no other way to earn a livelihood, was so extreme, and because the progress of the federal dam project would be wholly unaffected was the court so willing to grant relief.

IV. Application of Law to Facts

The facts of this case do not lend themselves to an easy balancing of the equities. First, the United States seeks possession some three years after a federal appropriations act *required* the acquisition of the Shubrick Building by the GSA; months after it has spent much of its $41.5 million site acquisition and design funds to acquire other adjacent properties and even uproot the Odd Fellows Hall from its foundation for movement to a new location; and nearly two full months after it first filed the declaration

of taking on November 18, 2008. These facts contradict Defendants' argument that because the condemnation of their property has been dragging on for seven years, they were justified in not taking seriously the warnings issued by the GSA last fall.

It is true that Defendants were not provided with compensation for their loss until December 19, 2008, and the Court agrees that the delay likely produced some hardship. However, once the declaration of taking was filed on November 18, Defendants could be certain that they would receive, *at a minimum,* the appraised value of the property in compensation for their loss. Armed with the certainty that compensation was forthcoming, Defendants likely could have arranged for a conditional contract to purchase or lease another space. Kent Knowley's testimony before this Court indicates that the Defendants still do not actually anticipate finding a replacement property to purchase, and appear unwilling to lease a space even if one were available. Indeed, Mr. Knowley described the buildings he looked at as too small, inadequately equipped, on less than ideal streets, or simply as being available only for lease rather than purchase, and thus unsuitable. Consequently Defendants anticipate that Port O' Call may go permanently out of business when it vacates the Shubrick Building. It appears to some extent that Defendants are merely asking for one last bite at the apple by seeking to remain in business for the busiest and most profitable months of 2009.

It also is clear that significant prejudice to the government may result from

allowing Port O' Call to stay in operation for a limited period of time. In order for demolition to occur, at least some hazardous materials testing and abatement work must first be performed before demolition. Additional archaeological surveying and site preparation must be completed before the land can be built on. To be sure, the earlier the Shubrick Building is demolished and the site readied for construction, the more likely it is that the courthouse expansion project will receive construction funding. Delays in performing pre-construction site work could yield significant overall delays in project completion and cost increases, among other impacts. While Defendants are correct in their assertion that such delays are not certain to result from continued occupancy of the Shubrick Building, they are nonetheless highly possible or even probable.

IV. Conclusion

The clear purpose of the Declaration of Taking Act, 40 U.S.C. § 3114, is to expeditiously allow for the condemnation and transfer of title to property critical to federal governmental plans. The Act does allow courts some degree of discretion in determining the time and manner in which actual possession of the property (as opposed to legal title, which transfers automatically on filing of a declaration of taking) is transferred to the government. Such a delay in possession should be based on a clear shift of the equitable balance in the landowner's favor.

Defendants received, at a bare minimum, two months actual notice that they

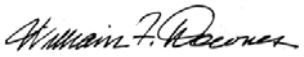
would be required to wrap up their operations in late 2008 or early 2009 when the government filed its declaration of taking and provided Defendants with an official notice to vacate in November 2008, and received constructive notice long before then that the Shubrick Building would be taken. This provided Defendants with significant opportunity to mitigate the harm caused by the condemnation of the Shubrick Building by seeking an alternate business location. While the United States is not wholly without fault—the history of this case contains ample illustration of the on-again, off-again nature of the GSA's plan to acquire the Shubrick Building—a delay in granting possession has the potential to greatly prejudice the timeline and ultimate cost of the Moss courthouse expansion.

Without a clear shift in the equities, the Court cannot allow Defendants to stay in possession of the Shubrick Building through mid-May 2009 as requested. Given the record before the Court, forcing Defendants to vacate the property by January 15, 2009, a mere eight days after this Court's hearing on the matter, is not practical or equitable either. Instead, having weighed the potential for prejudice to each side, the Court hereby orders that Defendants may continue their use of the disputed property until March 15, 2009, by which date the Shubrick Building shall be vacated. In the interim, however, the United States may enter the premises and perform such pre-demolition work, including but not limited to hazardous material testing and abatement, as does not

unreasonably interfere with the safe operation of Port O' Call.

Plaintiff's Motion for Immediate Delivery of Possession of Condemned Property is accordingly DENIED.

Dated this 12th day of January, 2009.



Honorable William F. Downes
Chief United States District Court Judge
Sitting by Special Designation

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UBS BANK USA, Plaintiff, vs. WOLSTEIN BUSINESS ENTERPRISES L.P., Defendant.	**ORDER FOR PRO HAC VICE ADMISSION** Case No. 2:08-CV-911-SA

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), **IT IS HEREBY ORDERED** that the motion for admission pro hac vice of Anthony J. Borrelli in the United States District Court, District of Utah, in the subject case (Docket Entry #14) is **GRANTED**.

DATED this 12th day of January, 2009.

BY THE COURT:

Samuel Alba
United States Magistrate Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UBS BANK USA, Plaintiff, vs. WOLSTEIN BUSINESS ENTERPRISES L.P., Defendant.	**ORDER FOR PRO HAC VICE ADMISSION** Case No. 2:08-CV-911-SA

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), **IT IS HEREBY ORDERED** that the motion for admission pro hac vice of Julian W. Wells in the United States District Court, District of Utah, in the subject case (Docket Entry #15) is **GRANTED**.

DATED this 12th day of January, 2009.

BY THE COURT:

Samuel Alba
United States Magistrate Judge

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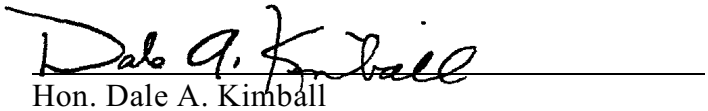
UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

UBS BANK USA, Plaintiff, vs. **CROWN INVESTORS, LLC,** Defendant.	**ORDER FOR PRO HAC VICE ADMISSION** Case No. 2:08cv00915 Judge Dale A. Kimball

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for admission pro hac vice of Julian W. Wells in the United States District Court, District of Utah in the subject case is GRANTED.

DATED this 12th day of January, 2009.



Hon. Dale A. Kimball
United States District Court Judge

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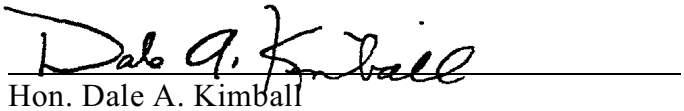
UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

UBS BANK USA, Plaintiff, vs. **CROWN INVESTORS, LLC,** Defendant.	**ORDER FOR PRO HAC VICE ADMISSION** Case No. 2:08cv00915 Judge Dale A. Kimball

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for admission pro hac vice of Anthony J. Borrelli in the United States District Court, District of Utah in the subject case is GRANTED.

DATED this 12th day of January, 2009.



Hon. Dale A. Kimball
United States District Court Judge

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FILED
U.S. DISTRICT COURT
2009 JAN 12 P 3:31
DISTRICT OF UTAH
BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

STORAGECRAFT TECHNOLOGY CORPORATION, a Utah corporation, Plaintiff, v. JAMES KIRBY, an individual, Defendant.	**~~[PROPOSED]~~ ORDER FOR PRO HAC VICE ADMISSION OF BRANDON H. PACE** Case No. 2:08-cv-00921-DB Judge: Dee Benson

It appearing to the Court that Petitioner meets the *pro hac vice* admission requirements of D.U. Civil Rule 83-1.1 (d), the Motion for the admission *pro hac vice* of Brandon H. Pace in the United States District Court, District of Utah, in the subject case is GRANTED.

DATED this 12th day of January, 2009.

Dee Benson

UNITED STATES DISTRICT COURT JUDGE

United States District Court
for the District of Utah

Criminal Pretrial Instructions

The prosecution has an open file policy.

Issues as to witnesses do not exist in this matter, but defense counsel will make arrangements for subpoenas, if necessary, as early as possible to allow timely service.

Counsel must have all exhibits premarked by the clerk for the district judge before trial.

If negotiations are not completed for a plea by the plea deadline, the case will be tried.

In cases assigned to Judge Cassell, counsel are directed to meet and confer about the possibility of a plea, and before the deadline report to chambers whether the matter will proceed to trial.