

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE JOHN K. STEWART, JUDGE PRESIDING

DEPARTMENT NUMBER 505

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6	JOSEPH AND MARY GARZA,)	
7	Plaintiffs,)	Case No. CGC-05-438144
8	vs.)	
9	ACL,)	
10	Defendant.)	Pages 1 - 29

Reporter's Transcript of Proceedings

Thursday, May 19, 2011

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Official Court Reporter

1 THURSDAY, MAY 19, 2011

2 P R O C E E D I N G S

3 **THE COURT:** Good afternoon, Counsel. State your
4 appearances, please.

5 **MR. COOK:** David Cook on behalf of Joseph and Mary Garza.

6 **MR. DUNN:** Nathaniel Dunn also appearing on behalf of Joseph
7 and Mary Garza. We are collection attorneys also with
8 plaintiff's counsel.

9 **MS. GAMBINO:** Good afternoon, Your Honor. I'm Mary Ellen
10 Gambino with Asbestos Corporation Limited.

11 **MR. EISEN:** David Eisen also for ACL.

12 **MS. MADDEN:** Good afternoon, Your Honor. Joanne Madden also
13 appearing on behalf of ACL.

14 **MS. GAMBINO:** Thank you, Your Honor. In addition to
15 representing ACL, I'm also representing Wilson Elser.

16 **THE COURT:** What's at issue today is Wilson?

17 **MR. EISEN:** We all are, Your Honor.

18 **THE COURT:** All right. This is a rather unusual motion.
19 Normally you would expect that the type of information sought
20 here would be obtained from the client, not the law firm, so
21 have efforts been made to obtain this information from the
22 client?

23 **MR. COOK:** Assuming that's addressed to us, Your Honor, the
24 answer is that we have served on ACL multiple sets of discovery,
25 principally consisting of a first and second set of
26 interrogatories and request for production of documents. ACL
27 has declined to respond to both. There are orders compelling
28 discovery on the first and second set of interrogatories and the

1 document request. In fact, the first set has gone to the point
2 that we not only have an order compelling, and now we have a
3 disentitlement order against ACL from attempting to defend
4 against any asset which otherwise would have been revealed by
5 discovery. So we've done everything possible.

6 ACL is, ostensibly, a citizen of Quebec here and, as such,
7 under Quebec law, it would be near impossible for us to initiate
8 a foreign proceeding, and we decline to do so for a multitude of
9 financial reasons here, but we've exhausted everything we can
10 within the confines of the laws of the State of California to
11 pursue judgment remedies.

12 Before my tenure there was even an order of examination
13 directed at ACL, who declined to appear. There's an order of
14 judgment of contempt. So I don't know what more else we can do
15 as to ACL here.

16 **THE COURT:** All right.

17 **MS. GAMBINO:** Your Honor, may I respond?

18 **THE COURT:** Yes, but that's just with -- we haven't talked
19 about the motion yet.

20 **MS. GAMBINO:** Right. I was just going to respond to your
21 specific question.

22 **THE COURT:** All right.

23 **MS. GAMBINO:** Thank you, Your Honor.

24 As a matter of fact, the question that you ask is really
25 what the issue is here, and it all depends on what the question
26 is or what the interrogatory is that should have been served on
27 ACL. But yes, there are some questions that have been asked of
28 ACL and ACL has responded to. There are the questions about

1 insurance. That is a question that can be directed to ACL and
2 that ACL has responded in the past in answers to
3 interrogatories.

4 ACL also responded to some of the post-judgment
5 interrogatories and, as a matter of fact, they were asked to
6 state the name and address of all persons who hold any monies,
7 funds, cash, or property in trust or for the benefit of ACL,
8 including any attorneys located in the United States. And they
9 answered, in addition to making some objections, they answered
10 that no person in the United States holds any monies, funds,
11 cash, or property in trust or for the benefit of ACL, including
12 any attorneys located in the United States.

13 And I'm reading Asbestos Corporation Limited's responses to
14 post-judgment interrogatories set number 2, which was served
15 January 18th, 2011.

16 **THE COURT:** Okay. I don't think that specific question is
17 asked here, though, but if it is and it's been answered, then
18 there's no need to be redundant.

19 If I gather here, it appears to me as though you're trying
20 to obtain information about banks that have issued checks or
21 money orders of some sort to the law firm defending ACL.

22 **MR. COOK:** Correct. The answer to Your Honor's statement is
23 correct. The first predicate is that we have various assignment
24 orders in our favor that say various groups of property belong
25 to the Garzas. In other words, it's been assigned to Garza,
26 money in banks, money in law firm of Goldfein & Joseph. That is
27 now the property of Garza. We presume, as an experiential
28 matter, that funds from ACL are now being sent to two law firms.

1 One is Goldfein & Joseph in Philadelphia, and the other one is
2 Wilson, sitting here today. And that the funds which are being
3 funneled to those two law firms to defend them in a multitude of
4 lawsuits, those funds originate from assets of ACL. We presume,
5 in this dialogue here, that we have, essentially, an assignment
6 of all of its liquid assets for this dialogue here.

7 Now, given all that being true here the question is how do
8 we find out that information.

9 Backtracking just a little bit, if I seek to depose adverse
10 counsel and I say words to the effect: So, what did ACL your
11 client tell you where the funds came from?, that's a standard
12 attorney-client objection. I'm probably not going to get too
13 far with that. We will concede that for this, like who said
14 what to whom in a very precise manner here.

15 However, what's not privileged is two items. One is
16 information as to a third party, such as checks, wire transfers.
17 That is, those disclosures which are necessarily made to a third
18 party, such as depositing a check or, more likely, given that we
19 are dealing with money across borders, it's probably what we
20 call ACH, or wire transfer.

21 **THE COURT:** What is ACH?

22 **MR. COOK:** It's a form of wire transfer. It's a way you can
23 move money from A to B. How's that? And my generation, we used
24 to call it wire transfer, but there are very many variations: T
25 swift or fed wire. But they are all wire transfers, which that
26 means a person who wants to send money sits in a bank in one
27 place, directs a bank to send money to another bank, usually
28 through The Federal Reserve. So the other person goes to the

1 bank and it deposits the wire transfer. So because that
2 information is disclosed to a third party it's not subject to
3 privilege.

4 I also hasten to add that we actually served a garnishment,
5 class of garnishment upon Wilson early on, and Judge Kahn heard
6 the matter and the question there was whether or not funds in
7 the hands of a lawyer are subject to privilege, per se.

8 And Judge Kahn, on 9-14-10 stated -- I'm looking for a quote
9 here. Reading from the September 14th, "Wilson Elser Moskowitz
10 Edelman & Dicker LLP motion to quash notice of levy is denied.
11 As much as the Court finds it distasteful for
12 plaintiffs/judgment creditors to serve a notice of levy on
13 attorneys for a defendant/judgment debtor, nothing in the
14 enforcement of judgment statutes precludes judgment creditors
15 from doing so. Wilson Elser's assertion of the attorney-client
16 privilege is unfounded, since disclosing whether it has money or
17 property belonging to ACL in its possession is not the type of
18 subject that is covered by the privilege. Evidence code section
19 952."

20 Now, so the broad invocation of privilege does not apply.
21 This is a post-judgment order, the 914 order, and therefore,
22 would be only subject to attack by way of appeal under CCP
23 914.1, in a post-judgment order. Because this order has not
24 been appealed, it is now final. And a post-judgment order is a
25 type of form of judgment. And, therefore, whether or not the
26 funds, per se, are in the hands of the law firm is subject to
27 privilege, it's not, because that's what Judge Kahn ruled and,
28 therefore, under the traditional doctrine of collateral

1 estoppel, *Bernard versus Bank of America*, it's binding upon
2 ACL's subsequent enforcement proceedings.

3 As each enforcement proceeding is an independent minitrial,
4 each is a discrete chunk, so to speak, of law and facts, so to
5 speak. So because I have this 914 order, the law firm cannot
6 say: Well, I just won't tell you what I have from the client,
7 you know, just per se I'm not going to tell you. It's secret.
8 Doesn't work that way.

9 So the question is how do we find that out? And the answer
10 we find that out, easiest way, by looking at how it got there
11 and whether it's a check or wire transfer -- however the wire
12 works, that is what we call the medium of payment. So again,
13 without being discourteous to the Court, if I was to hand a
14 check to somebody, my medium of payment is the check. If it's a
15 wire transfer, then I call my bank up and I say: Wire it to so
16 and so. If it's cash, barter, whatever it would be. So we are
17 really looking at the medium of payment.

18 So to the extent the Court says, with due respect, Your
19 Honor, says to itself: Why isn't the money privileged, per se?
20 The answer is: Judge Kahn said it's not, which is correct.
21 It's now appealed. The question is: How do we find that out?
22 And the answer is: Well, summarizing, let's see the conduit and
23 how it got there.

24 And because we have such a huge universe here of assignment
25 orders -- let me just share with you, this is not your standard
26 post-judgment, third-party OEX where we say: Oh, here's an OEX
27 and here's a third party, and we think this third party has some
28 assets belonging to my debtor. What's my good-faith belief? We

1 are one step beyond that. Garza is the owner of this property.
2 It's their stuff. I have four orders which says it's their
3 stuff, and those orders are now final.

4 Back to the most important thing, which is their they are
5 final, they are judgments, it's now collateral estoppel. So if
6 there's money, in say -- there's a Philadelphia firm, just to
7 illustrate this. If money in the hands of Goldfein & Joseph is
8 now the property of Garza. It's their property. It's theirs.
9 If that property is in the hands of Wilson, I'm entitled to
10 discover it.

11 So if you look at that answer to that interrogatory, sure,
12 that's what they said, but I'm not bound to take ACL's response.
13 I've been at enforcement of judgments for a long time, so we
14 really take anything we get from the debtor at face value.
15 That's contrary to my experience, how's that? It doesn't work
16 that way.

17 So I don't know how they are getting paid. So, obviously,
18 Wilson is not working for free, and I understand there are
19 multiple cases here. And we would be very disheartened to find
20 out that they are financing their litigation of other ACL cases
21 on my client's nickel. It is the client's, my guy's money here.
22 So I'm sort of encapsulating where it is.

23 And what Judge Kahn ordered us to permit the Court the
24 ability to focus on what precise question so the Court can,
25 essentially, predetermine well, is this going to be a useful
26 process or not, is we have structured 53 questions here. And
27 basically, they have all been structured in a way that Your
28 Honor can say: Yeah, I think it's a good question. You can ask

1 them this question. Or no, I don't think it is. So, you know,
2 we can avoid, you know, the fisticuffs, for lack of a better
3 expression. You're over that. So that's why we are here.

4 **THE COURT:** All right. Counsel.

5 **MS. GAMBINO:** Thank you, Your Honor.

6 Your Honor, it's unfortunate that you have not been involved
7 in this from the beginning.

8 **THE COURT:** I think it's fortunate that I have not been
9 involved in this from the beginning.

10 (Laughter)

11 **MS. GAMBINO:** All right. Submitted. No.

12 Your Honor, I realize that you may have the opportunity to
13 discuss Judge Kahn's rulings with him, but as long as it was
14 raised here, I do have to say that his ruling back in September,
15 I guess it was September 14th of last year, yes, he did make
16 that determination, but he also said that there was only one
17 question that Wilson Elser had to respond to, and that was: Are
18 you in possession of any funds payable to ACL? And he actually
19 put me, personally, under oath in his courtroom and had me
20 answer that courtroom, and the answer was no. That issue has
21 been dealt with. He did not require Wilson Elser to respond to
22 any other questions regarding fees being paid by AC and L.

23 Before we get to the issue of the privilege, though, I'd
24 like to talk about a threshold issue that we haven't addressed
25 yet, and that's the question of whether the Garzas are entitled
26 to any third-party examination of me or my partner or Wilson
27 Elser. And that right is governed by the CCP section 708.120,
28 which requires proof by affidavit or otherwise that the third

1 party has possession or control of property in which the
2 judgment debtor has an interest or is indebted to the judgment
3 debtor in an amount exceeding \$250.

4 So far, the only proof that the plaintiffs have offered is
5 that the Wilson Elser doesn't work for free. Counsel basically
6 just said that again. He's presuming that Wilson Elser is being
7 paid for their services. That is a conclusion based on
8 information and belief. That's not evidence according to the
9 law, and we cited authority on that. It's the *Conservatorship*
10 *of Hart* case, 228 Cal.App.3d 1244.

11 So the plaintiffs, to begin with, should not be allowed to
12 go forward with these examinations, specifically based on the
13 fact that they believe that Wilson Elser is paid. They have not
14 shown proof that Wilson Elser is indebted to the judgment debtor
15 or that it has any funds of ACL that belong to the Garzas.

16 That being said, we turn to the issue of the privilege. And
17 even if the plaintiffs are entitled to take our depositions, the
18 information that they are seeking is protected, whether it's
19 being transmitted through another party or not, because it's
20 information that is necessary to the communications between my
21 law firm and my client. They want to take my deposition. They
22 want to ask me about the fee arrangement between Wilson Elser
23 and Asbestos Corporation Limited. That is information that I
24 cannot disclose. I cannot discuss the fee arrangement, I cannot
25 discuss the amounts, I cannot discuss the source, the manner of
26 payment, or any third parties that the funds might be passing
27 through.

28 We have satisfied -- Wilson Elser has satisfied its factual

1 burden under evidence code section 917 to show that there is a
2 presumption of privilege, because we have shown that ACL is our
3 client and any information that we have received from -- that we
4 have received has come through ACL, any of the information that
5 the plaintiffs are asking for.

6 The plaintiff, on the other hand, has not fulfilled their
7 evidence code section 606 burden, which is to show that the
8 information sought about the fee arrangement is not protected.
9 There is really no California case on point. Plaintiffs have
10 raised one case, one California case, in their papers, and
11 that's the State Farm case. But that case can be distinguished
12 on its facts.

13 That's a case where the State Farm employee is the one who
14 was going or who actually made the disclosure, and that employee
15 had dual roles with the company. She was the interface between
16 the attorneys and the company, but she also worked for State
17 Farm. So information that she gave out, that she provided to
18 the other side when she was an employee, then had become an
19 ex-employee, that had to do with communications she had had with
20 other people in her company other than attorneys, that obviously
21 was not privileged.

22 We have a different situation here. Wilson Elser does not
23 have any dual role with ACL. We have one role. Our
24 relationship is only based on the attorney-client privilege.
25 There's no other way that we can get information from ACL except
26 through those communications.

27 The other cases that the plaintiff cited are all federal
28 cases and they are based on federal common law, they are not

1 based on California law. In fact, they specifically reject the
2 application --

3 **THE COURT:** One case did.

4 **MS. GAMBINO:** Okay. That's fine.

5 **THE COURT:** *Harris* did.

6 **MS. GAMBINO:** I thought there were two, but okay.

7 **THE COURT:** At least I read one. *Harris* did.

8 **MS. GAMBINO:** All right. Your Honor, I apologize if I made
9 a mistake on that. But my understanding is that -- okay,
10 there's one case that rejects California law.

11 And the reason why this Court should not apply the reasoning
12 that they apply to the federal courts is because in California,
13 the protection is very much broader. And that is illustrated by
14 business and profession code section 6149, which specifically
15 protects fee arrangements between attorneys. And, in fact, the
16 business and profession code section 6068 says that it's my duty
17 to maintain inviolate the confidences of my clients. And that
18 is what I'm up against here. As Your Honor knows, I am in trial
19 in this courtroom in about 50 cases. I still represent ACL in
20 these cases and I have a duty to my client to not disclose
21 privileged information. And that information includes the fee
22 arrangements. So the financial --

23 **THE COURT:** I don't think they are asking for the fee
24 arrangement.

25 **MS. GAMBINO:** Well, Your Honor, if the fee arrangements are
26 protected, then any information pertaining or that is involved
27 in what that arrangement is would be protected.

28 **THE COURT:** Well, is a check part of the fee arrangement? A

1 check is a negotiable instrument.

2 MS. GAMBINO: Well, the check is a necessary -- it's a
3 necessary communication.

4 THE COURT: It's not a communication in that sense.

5 Anyway, let me go back. I left something back in my office
6 that I need to get, which are all those questions.

7 MS. GAMBINO: Okay.

8 MR. COOK: I have another set, Your Honor.

9 THE COURT: No --

10 MR. COOK: Okay.

11 (Pause in proceedings)

12 THE COURT: I think the difference is is that a check or a
13 money transfer, these have lives of their own. They are not
14 communications. They are instruments of commerce. They are
15 negotiable instruments. A letter accompanying a check would be
16 a communication, but a check is really a communication to a
17 bank. It's telling the bank to pay a certain amount of money on
18 behalf of a client. So I think the *Harris* analysis, to me, is
19 the most appropriate and on point.

20 And that's the Ninth Circuit Court of California -- Ninth
21 Circuit Court in California. It's 413 F.2d 316. But they say,
22 and they are quoting another case, but they say "The canceled
23 checks and bank statements are not within the attorney-client
24 privilege. These items were negotiable instruments in commerce
25 and were never confidential from the time of their creation.
26 Their transfer from the client to the attorney did not
27 constitute a confidential communication."

28 In those cases, they were trying to subpoena those records

1 from a bank. And again, if those documents ultimately end up in
2 a bank, and they do, when the check comes into your firm, you
3 endorse it, and it goes back to the bank. The original
4 sometimes is referred to the person who signed the check.

5 Now, for example, my own bank account, I get little
6 microfiche reprints and the originals are either in my bank or
7 else they are kept on microfiche somewhere. But they are
8 ultimately in the bank.

9 Now, do you know the names of the banks?

10 **MR. COOK:** No, I do not. Let me frame it this way. We have
11 an assignment order against most Canadian banks as to ACL, and
12 those banks are in Canada and we have jurisdictional issues, not
13 important. We think we have a grip of Goldfein & Joseph's bank
14 because my client -- my predecessor, Brayton Purcell, has other
15 cases they have settled. So a Joseph & Goldfein check from
16 their bank, to Wilson's bank, their bank, that, we he do not
17 know.

18 **THE COURT:** Have you tried to subpoena those records from
19 the banks?

20 **MR. COOK:** Well, we can do that. I think we'd end up with
21 the same issue here before Your Honor.

22 **THE COURT:** Well, but they don't have copies of the checks.
23 I'm sure they don't have copies of the checks sitting around in
24 their office.

25 **MR. COOK:** Well, what should be, which is normal banking
26 practice for a law firm is that you have a check or wire
27 transfer, just normal bookkeeping, then make a copy, you know,
28 good business practice they would keep a copy of it here, and

1 they would say this is the check we got. Just normal
2 bookkeeping here, keep a copy of it, and this is where it came
3 from and then ultimately deposit it, because they would have to
4 deposit it in their bank, Wilson's bank. And it would go
5 through the Federal Reserve system. It's transmitted to the
6 paying bank, which is either Goldfein or Joseph, and their bank
7 would pay.

8 If it was a wire transfer, which is a different matter,
9 which would probably emanate from Canada to here, it would be
10 very unlikely a check would be mailed, just normal business
11 practice. Therefore, you'd see a wire transfer, and you'd see
12 what's called the fed wire receipt. So the person who receives
13 a wire transfer would see who it came from and for what purpose.
14 It's normal, standard, wired information which we get and
15 everybody else gets.

16 So we think that the Wilson firm should have this material.
17 It would be contrary to business experience if they don't,
18 particularly for a law firm with normal trust issues here.

19 **THE COURT:** It seems to me that, in these questions, some of
20 them are duplicative and redundant. But ultimately, if what
21 they are seeking is information contained on checks or
22 information contained on wire transfers, they are entitled to
23 that. But you're going have to go through and parse these out a
24 little bit to get to that level. To me, it's really not any
25 different than if they were subpoenaing the documents from the
26 bank. If they knew what they were and went to the bank and
27 subpoenaed them, then they'd get that information. They'd know
28 who signed the check, they'd know the drawing bank. I'm not

1 familiar with all those terms. But to the extent that your law
2 firm has that information that would be contained on the checks
3 they'd get from the bank, then I think you're obligated to turn
4 it over.

5 I don't think, though, just asking them the question, for
6 example, "How much money did you get from ACL?", I don't think
7 that's a proper question. Because you may not get any
8 information about the checks or you may not get the actual
9 checks. And just for them they have to come up with that
10 answer, I think it's kind of a breach of privacy, aside from any
11 attorney-client issue which probably attaches anyway, but it's
12 just a privacy matter.

13 Again, the amount of the check, although if you got the
14 actual check, like they said in one of these case, if you had
15 the actual check, you wouldn't have to redact the amount because
16 it's there. But just to ask somebody what it was without having
17 the actual check is just -- it's kind of breaching of privacy
18 concerns in addition to any attorney-client issue.

19 So I'm not going to require them to answer any questions
20 about the amount of the check or the total amounts of money they
21 received. But all the information that would be found on a
22 check or any other monetary instrument, such as a wire transfer
23 or anything else, I think should be disclosed.

24 Now, the person who should do that shouldn't be an attorney.
25 The attorneys aren't going to know that. So how are you
26 intending to get this information? Who was going to be the
27 person who was supposed to provide it?

28 **MR. COOK:** Well, in responding to your statement, Your

1 Honor, we presume that in rendering this order, that I think we
2 have a specific time line that we would ask either in writing
3 or, alternatively, in a deposition to say, "Did you get a check
4 from Goldfein & Joseph?" First question.

5 **THE COURT:** Tell me how Goldstein and Joseph works into
6 this. I'm not sure how they fit into ACL and the Wilson Elser
7 firm.

8 **MR. COOK:** Goldfein & Joseph here is a law firm in
9 Pennsylvania and, we will represent to you, stands as the
10 general counsel for purposes of settlement and resolution and/or
11 management of ACL litigation. That's what we are informed. And
12 presume I'm correct. And therefore, given their status, would
13 be a custodian of funds which they would disburse either to law
14 firms to finance the litigation or pay settlements. Again,
15 presuming I'm correct. So we are going to call them in this
16 hearing "custodian of funds." Presume I'm correct.

17 So as to that entity, we would say -- we would inquire, A,
18 Did you get checks from them? How many checks did you get from
19 them? What is the name of -- the person who writes the check is
20 called the drawer. If it's your check, you're the drawer. Your
21 bank is the drawee because you draw on your bank. And the
22 person you write the check to is called the payee. So if I have
23 a bank account with whoever I have a bank account with, I write
24 a check on a bank payable to XYZ company, I hand it to XYZ
25 company and they cash the check by depositing it and they go to
26 my bank, who's the drawee, because the check is drawn on the
27 bank. So it's the drawer/drawee/payee, and maker which is not
28 really relevant, and endorser.

1 So I would say: Did you receive any checks in which the
2 drawer was Goldfein & Joseph? They would say: Yes. How many
3 checks was that? That was 10 checks or 15 checks.

4 **THE COURT:** The person who would answer that, though, would
5 be somebody in the bookkeeping department.

6 **MR. COOK:** It would be somebody at the law firm here.

7 **THE COURT:** I want to address who, from the law firm's
8 standpoint, would be the person most knowledgeable to answer
9 those kinds of questions, and should it be done in writing, like
10 a form of interrogatory, or should it be done in a deposition?

11 **MR. COOK:** Well, it can be done in one of two ways here. It
12 would be --

13 **THE COURT:** I think there also ought to be a protective
14 order.

15 **MR. COOK:** All right. Well, taking one at a time, either
16 this can be done by interrogatories or it can be done by
17 deposition. The person, obviously, on behalf of the bookkeeping
18 department of the law firm, usually there's a chief financial
19 officer, controller, chief bookkeeper, for lack of a better
20 expression here, and that person would be responsible for
21 dollars going in, dollars going out. Large law firms by Wilson
22 have somebody, either a resident CPA, somebody with a lot of
23 accounting experience to manage these funds.

24 As to protective order as to third parties, we generally
25 don't have an issue with a protective order as long as the
26 protective order doesn't basically extinguish the information by
27 being too onerous here. That's always an issue.

28 We would say: Who wrote the checks? Who was the drawer?

1 Who was the payee? Who was the maker on the check? Did you get
2 these checks here? That would tell me a lot. ACL, at that
3 point, that's a lot easier, because we'd say: Well, just turn
4 over all of, we'd call for lack of this discussion, either the
5 fed wire or the T swift or the ACH, and they are pieces of paper
6 that are very well-understood, and they would have all of this
7 information. Oh, it came from ACL. Let me know where it came
8 from, because it was called the originator, the person who
9 originated the wire transfer.

10 So we can -- obviously, deposing this person without the
11 documents in hand would be a waste of time. It would be just
12 not productive. So having the documents in hand would be
13 appropriate, or otherwise we can do it by interrogatories. You
14 know, I'm willing to work -- not work with the court, but
15 fashion a remedy that would be consistent with everybody's
16 interest here.

17 **MS. GAMBINO:** Your Honor, it sounds to me like there's going
18 to be very few questions, basically, all information on any
19 checks or monetary.

20 **THE COURT:** They have 50 questions, most of which cover that
21 topic. They broke it down into separate questions for the
22 drawer, the payee, the originator, beneficiary, but they have
23 50-some questions. But they are basically going towards
24 obtaining that information with respect to each, I'm calling
25 them financial instruments or monetary instruments.

26 **MS. GAMBINO:** Your Honor, you asked about the Goldfein &
27 Joseph law firm. And as far as I know, I don't think they have
28 any formal position as general counsel for ACL. They are

1 another law firm, just like Wilson Elser, that represents ACL in
2 asbestos litigation and they have, from time to time, served as
3 what some people might call their national counsel, and that's
4 really what they are.

5 Now, it sounds like plaintiffs have some idea of the name of
6 their bank, because they have received settlement checks written
7 on Goldfein & Joseph's bank accounts. It seems to me like it
8 would make more sense to have them try to get the information
9 from that bank before coming after Wilson Elser, considering the
10 position we are in, as far as our client instructing us not to
11 waive any attorney-client privilege.

12 **THE COURT:** Well, I'm saying with respect to these monetary
13 instruments, I don't think there is any attorney-client
14 privilege. So you've got to start somewhere. And these
15 questions really, once you have the documents, they are not that
16 onerous. You need the documents to have them, and I don't know
17 whether you have them or you don't. I don't know what kind of
18 records your firm keeps. If you keep copies of canceled checks,
19 then that's great, but I don't think any one of the lawyers can
20 do it. So from your standpoint, who would be the proper person
21 to answer these questions?

22 **MR. EISEN:** That's something we'd to have look into, Your
23 Honor.

24 **THE COURT:** It's got to be somebody in your bookkeeping
25 department. We had a law firm and we had a person who was in
26 charge of the bookkeeping department, and that was the person we
27 went to whenever we had a question.

28 So you've got to get the right person, and that person is

1 not going to be able to answer questions without having
2 documents.

3 **MR. COOK:** Your Honor, might I make a suggestion here so we
4 can do this incrementally? And given the Court's ruling here is
5 if Wilson Elser would produce these documents to us and
6 redacting out the amount, as Your Honor indicated, within, say,
7 15 days, something like that, we can take a look at the
8 documents themselves and find out whether or not that answers
9 our questions here, whether or not that's enough.

10 At that point, we can come back to Your Honor and say no, we
11 really need to sit down and start asking specific post-judgment
12 interrogatories, or sit down and depose this person. So
13 documents-in-hand might solve most of it and that, I think,
14 would be the least intrusive here. And then again, with
15 documents, we can go through a deposition in a very efficient
16 manner. But I think that would probably be the best solution
17 here.

18 **MR. EISEN:** Your Honor, I'm not certain that there are
19 documents, and I think it would take more than 15 days to
20 determine what we have. I think first we have to go back to the
21 client and let the client --

22 **THE COURT:** Go back to the client? You go back to your
23 office.

24 **MR. EISEN:** But we also have a responsibility to our client
25 to let the client know the direction of things, Your Honor. And
26 also go back to our firm and figure out what we have, and we
27 will certainly meet and confer with counsel on that. I can't
28 imagine that we can do -- that 15 days is reasonable. It's not

1 something that I've seen --

2 **THE COURT:** No, 15 days -- a normal request for production
3 of documents is for how long?

4 **MR. COOK:** It would be 30 days plus 5.

5 **THE COURT:** All right. This wasn't cast in the form of a --

6 **MR. COOK:** No, this was not cast. These were cast as
7 interrogatories. But if I was to send a document request today
8 through the mail, it would be typically be 30 plus 5.

9 **THE COURT:** So that makes more sense.

10 **MR. COOK:** That's fine, Your Honor. Today is May 19th, so
11 assuming that today is my day, I serve this document request at
12 this hearing, then it would be June 27th, have documents
13 produced consistent with the Court's order here and then, at
14 that point, we'd see what they are and then convene another
15 hearing on an ex parte basis, see how we wish to proceed from
16 here. We might be happy with what we have. That might
17 answer --

18 **THE COURT:** Why don't I schedule to you come back here, say,
19 on the 24th?

20 **MR. COOK:** June 24th? That's fine.

21 **THE COURT:** Just have a status report.

22 **MR. EISEN:** That would be great, Your Honor.

23 **MR. COOK:** Documents in our hands when?

24 **THE COURT:** Well, we will order them produced by the 27th,
25 but we will have a status report on the 24th. But I just want
26 to say I don't want to hear any further objections based upon
27 attorney-client privilege or privacy. I think I've covered all
28 those, so I don't know what objection there would be.

1 **MR. COOK:** Your Honor, I'd like, if we are going to come
2 back on the 24th, I'd like the documents in hand first.

3 **THE COURT:** Well, I want to see whether there are any
4 problems. That's why I'm doing it the 24th.

5 **MR. EISEN:** Your Honor, could I make the following request
6 to accommodate a vacation I've got? Could we talk about coming
7 back to court the week after that and, at that point, we would
8 be prepared to respond to the Court with respect to what it is
9 that Counsel's going to serve on us?

10 **THE COURT:** No, no, no, no, no. Right now they are due the
11 27th.

12 **MR. EISEN:** I understand, Your Honor. I just want the
13 record to be clear that we aren't in a position, as we sit here
14 today, to stipulate on the record that we have documents and
15 that those documents will be produced.

16 **THE COURT:** That's why, but if you don't have documents, I
17 want to hear about it sooner. I don't want to wait until the
18 middle of July to find out you don't have any documents. If you
19 don't have any documents, you ought to be able to tell me that
20 in a couple of weeks.

21 **MR. COOK:** Why don't we do this, so we don't have a big
22 surprise at the end. If there are documents here, we need to be
23 advised in writing. Today's the 19th. Figure out if one does
24 or doesn't have in business, we should figure that out by
25 June 1st.

26 **MR. EISEN:** Again, Your Honor, we talked about the 15 days.
27 I think that's --

28 **THE COURT:** In 15 days you'll know whether you even have

1 any.

2 **MR. EISEN:** I'm not sure that's true, given the way
3 electronics work. It's not like a situation where you go to the
4 bookkeeping department and they have copies of things. I don't
5 know because I haven't inquired yet.

6 **THE COURT:** That's why I want to set up an earlier status
7 conference. Talk to your bookkeeping department and come back
8 and tell me what they are going to say, but you'll know what
9 they are going to tell you by, say -- the 16th of June you know
10 what they are going to tell you. If it's a matter of getting
11 things after they tell you --

12 **MR. EISEN:** Correct.

13 **THE COURT:** -- but you'll know what you'll be able to get by
14 June 16th. So right now I'm going to say the documents are due
15 the 27th and we will have a status conference on June 16th.

16 **MR. EISEN:** Could I propose the 17th, Your Honor?

17 **THE COURT:** Okay, 17th.

18 **MR. COOK:** For my own bookkeeping here, June 17th for status
19 conference at this time, Your Honor?

20 **THE COURT:** Yes. I also want to know what is the best way
21 to proceed. I think your suggestion makes sense to me, get the
22 documents and then maybe you need a deposition, maybe you don't.
23 But by the 16th, when you come back here on the 17th, you ought
24 to be able to tell me then who was the person who would be
25 produced for a deposition in the event that there has to be one.
26 We should be able to know that by then.

27 **MR. COOK:** So for my bookkeeping here, it would be June 17th
28 2:30 for status, June 27th here for the production of documents

1 here.

2 **THE COURT:** Yes.

3 **MR. COOK:** In clarity, the Court is overruling the objection
4 of attorney-client privilege to documents, which would be checks
5 and wire transferred data?

6 **THE COURT:** With respect to information that would otherwise
7 be contained in checks and wire transfers. I'm thinking, in
8 other words, what there would be in a bank. If you went and put
9 a subpoena on a bank, that isn't privileged.

10 **MR. COOK:** Correct.

11 **THE COURT:** And that's the information that I believe they
12 should be required to produce.

13 **MR. EISEN:** Your Honor isn't ordering us to go to the banks
14 to obtain information?

15 **THE COURT:** No. I'm just saying that's how I'm sorting
16 through all these complexities of this issue is looking at it as
17 if they were subpoenaing records from the bank. And whatever
18 documents the bank would have on the information that would be
19 contained in those documents I'm ordering you to produce from
20 what you have in your own file or what you have based on your
21 own information. I'm not requiring to you go to the bank. So
22 whatever documents you have, you produce. If you don't have
23 documents but you have information that would provide
24 information concerning who wrote checks, who was the drawer, who
25 was the beneficiary, that information, without having the actual
26 documents themselves, but if you had that information, then I'm
27 requiring you to provide that. And the question would be then
28 what's the best way to provide it.

1 **MR. COOK:** Your Honor, I do want to address on a check or
2 wire transfer, there's about six pieces of information, the
3 drawer, the person who's writing the check --

4 **THE COURT:** I know. Whatever is on the check I think they
5 should turn over.

6 **MR. COOK:** That would include the amount of the check?

7 **THE COURT:** Not the amount.

8 **MR. COOK:** That would be redacted?

9 **THE COURT:** If they have the actual check, I don't think
10 they have to redact it.

11 **MR. COOK:** Okay. But they should have the check so we could
12 see the amount on the check.

13 **MR. EISEN:** Your Honor, I think I heard the Court say that
14 privacy concerns would cover amounts of checks.

15 **THE COURT:** Well, I said this in the event you didn't have
16 the check. In other words, just asking you in deposition how
17 much money did you get from ACL, I think that's an improper
18 question. Asking you in a deposition, "How much money did you
19 get?, were you paid for this case" or "paid for this" or "paid
20 for that," I think that's an improper question. But if you have
21 actual documents that have dollar amounts on them, then I think
22 you have to turn those over. It's not different than if you
23 went to a bank. If they went to a bank and subpoenaed the
24 checks, they would get the checks and the checks would have the
25 dollar amounts on them. And I wouldn't order the bank to redact
26 it.

27 **MR. COOK:** That would be our take, because the check itself,
28 whatever is on the check front or back --

1 ✓ **THE COURT:** Whatever is on the check is on the check.

2 **MR. COOK:** That would not be subject to redaction.

3 **THE COURT:** But asking someone the question "how much did
4 you get?", I don't think that's a proper question in a
5 deposition.

6 **MR. COOK:** Okay. And also would apply to ACH because ACH,
7 likewise, goes to the bank.

8 **THE COURT:** Right.

9 **MR. COOK:** It's called a fed wire. It doesn't look like a
10 check, but it's the same information.

11 **THE COURT:** Okay. Anyway, we are going to come back the
12 17th and see where we are on all this.

13 **MR. COOK:** Thank you very much, Your Honor. I'll prepare a
14 form of order, send it to the other side.

15 **MS. GAMBINO:** Thank you, Your Honor.

16 **MR. EISEN:** Thank you, Your Honor.

17 **THE COURT:** All right. It's an unusual situation, so we
18 just have to work our way through it.

19 **MR. COOK:** Thank you, Your Honor.

20 **MS. GAMBINO:** Thank you.

21 **THE COURT:** For example, there's some questions here, "Who
22 authorized the payment?" Well, maybe that's somebody that's not
23 the person whose name appears on the check, so I wouldn't order
24 them to answer that. Just whatever is on the check.

25 **MR. COOK:** Or the fed wire.

26 **THE COURT:** Whoever is on the financial instrument, I'm
27 calling it.

28 **MR. COOK:** Thank you. Thank you, sir.

1 **THE COURT:** And you will prepare an order?

2 **MR. COOK:** Yes, sir.

3 **THE COURT:** While we are all here, you looked through these
4 questions?

5 **MS. GAMBINO:** Yes.

6 **THE COURT:** Is there any specific question you have an issue
7 with, apart from these issues of privacy and attorney-client
8 privilege, and so on, we talked about? Some of them appear to
9 me to be kind of duplicative and overlapping.

10 **MR. COOK:** We will lay claim to that one. Your Honor, there
11 are many pieces to a check.

12 **THE COURT:** Rather than put you on the spot right now,
13 that's something you can bring up when you come back on the
14 17th.

15 **MS. GAMBINO:** Thank you, Your Honor.

16 (Whereupon, the proceedings were concluded.)

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1 State of California)
2 County of San Francisco)

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5 I, Joanne M. Farrell, Official Court Reporter for the
6 Superior Court of California, County of San Francisco, do hereby
7 certify:

8 That I was present at the time of the above proceedings;

9 That I took down in machine shorthand notes all proceedings
10 had and testimony given;

11 That I thereafter transcribed said shorthand notes with the
12 aid of a computer;

13 That the above and foregoing is a full, true, and correct
14 transcription of said shorthand notes, and a full, true and
15 correct transcript of all proceedings had and testimony taken;

16 That I am not a party to the action or related to a party
17 or counsel;

18 That I have no financial or other interest in the outcome
19 of the action.

20

21

22 Dated: May 20, 2011

23

24

25 Joanne M. Farrell, CSR No. 4838

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