

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 11-15059-mg

4 - - - - - x

5 In the Matter of:

6 MF GLOBAL HOLDINGS, LTD.,

7 Debtor.

8 - - - - - x

9 Adversary No.: 11-02880-mg

10 In the Matter of:

11 TODD THIELMANN,

12 Plaintiff,

13 v

14 MF GLOBAL FINANCE USA, INC., ET AL.

15 - - - - - x

16 United States Bankruptcy Court

17 One Bowling Green

18 New York, New York

19

20 July 28, 2015

21 10:03 a.m.

22

23 B E F O R E :

24 HON MARTIN GLENN

25 U.S. BANKRUPTCY JUDGE

1 **Status Conference**

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25 **Transcribed by: Sherri L. Breach, CERT*D-397**

1 A P P E A R A N C E S :

2 O U T T E N & G O L D E N , L L P

3 A t t o r n e y s f o r P l a i n t i f f

4 3 P a r k A v e n u e

5 N e w Y o r k , N e w Y o r k 1 0 0 1 6

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7 B Y : J A C K A . R A I S N E R , E S Q .

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9 K L E H R , H A R R I S O N , H A R V E Y , B R A N Z B U R G , L L P

10 A t t o r n e y s f o r P l a i n t i f f

11 1 8 3 5 M a r k e t S t r e e t , S u i t e 1 4 0 0

12 P h i l a d e l p h i a , P e n n s y l v a n i a 1 9 1 0 3

13

14 B Y : C H A R L E S A . E R C O L E , E S Q .

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16 M O R R I S O N & F O E R S T E R , L L P

17 A t t o r n e y s f o r D e f e n d a n t s

18 2 5 0 W e s t 5 5 t h S t r e e t

19 N e w Y o r k , N e w Y o r k 1 0 0 1 9

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21 B Y : J A M E S J . B E H A , I I , E S Q .

22 M E L I S S A A . H A G E R , E S Q .

23

24 A L S O A P P E A R I N G :

25 M A R Y O L S E N (T E L E P H O N I C)

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

2 THE COURT: First matter this morning is Thielmann
3 versus MF Global Finance USA, et al. It's adversary
4 proceeding number 11-02880.

5 Okay. I have the list of appearances in front of
6 me. This is a case management conference. We have the
7 trial on class certification scheduled for August 20 -- to
8 start August 24th. So I would like to find out today what
9 your progress is. I know that the defendant's counsel
10 stipulated to the amendment to the complaint being filed,
11 and that was done.

12 Mr. Raisner, why don't you start out?

13 MR. RAISNER: Jack Raisner, the firm of Outten &
14 Golden for the plaintiffs.

15 Your Honor, the conference was actually called at
16 the instance of the defendants. We really didn't see the
17 need for a conference at this juncture. Generally speaking,
18 we like to have an orderly process in --

19 THE COURT: Well, I'm going to --

20 MR. RAISNER: -- resolving issues --

21 THE COURT: -- give you some guidance about that
22 today, so. Let's go ahead.

23 MR. RAISNER: So I would say that from our
24 perspective we understand that this is a class certification
25 motion. Your Honor said on the record in -- at the last

1 management conference I guess it was in February that class
2 certification should move forward. If we needed to take any
3 discovery we should do so. If any contested factual issues
4 would arise, then Your Honor would hold an evidentiary
5 hearing and make factual findings.

6 To this point we have filed our papers. We don't
7 know of any factual issues that are contested because
8 defendants have not filed their opposition --

9 THE COURT: Right.

10 MR. RAISNER: -- papers. So I'm not in a position
11 to say what is needed in terms of --

12 THE COURT: Okay.

13 MR. RAISNER: -- an evidentiary hearing or what
14 the factual contested issues are as to class certification.
15 I was apprised of the desire to have this conference by
16 defendants because they said they would like to expand the
17 trial to include single employer issues. And we don't think
18 that's appropriate given Your Honor's emphasis that this is
19 not a single employer liability contest at this point. This
20 is a class certification motion that is -- that -- for which
21 we have taken discovery and briefed the issues.

22 THE COURT: Well, let me hear from the other
23 side. I -- I'm not going to agree or disagree with what you
24 just said, Mr. Raisner. The single employer issue could
25 feature quite prominently on the issue of class

1 certification as to who is an adequate class representative.

2 But we'll -- let me hear from defendants' counsel.

3 MR. BEHA: Good morning, Your Honor. James Beha

4 from Morrison & Foerster on behalf of the defendants.

5 And Mr. Raisner is absolutely right. We did

6 request this conference because we wanted some just

7 clarification about the hearing. So as far as where we are

8 they have filed their papers. Our opposition brief is due

9 on Friday. We will file it as due. So certainly there's no

10 discussion of changing any dates.

11 Throughout this process our understanding was the

12 Court has been focused on the issue that you just mentioned,

13 whether certain of the plaintiffs who we -- we say were

14 employed by MFGI are appropriate class representatives. And

15 focus -- we have been focused on resolving that issue.

16 We've had discovery -- extensive discovery as to that issue.

17 For the first time in their motion papers the

18 plaintiffs have taken the position that that issue does not

19 need to be resolved on class certification.

20 Second --

21 THE COURT: I haven't read their papers yet. I

22 saw them filed, but I didn't read them yet.

23 MR. BEHA: And setting aside the merits of that

24 argument, which we certainly will address, you know, our

25 main focus is on resolving this issue. And we do

1 understand, and I believe that Your Honor has in the past
2 said whatever happens here, that won't dispose of the case
3 and there would need to be a subsequent summary judgment
4 motion or some other motion that we would likely make.

5 We just want to make sure that we're not
6 duplicating efforts going forward. We certainly are not
7 expecting Your Honor to decide -- make a final merits
8 determination on that issue in connection with a decision on
9 the class certification motion.

10 Our concern is simply about whether the evidence
11 that is presented on this motion will then ultimately
12 suffice for deciding that issue on the merits. We've done
13 extensive discovery on this issue. We believe that they've
14 had all the discovery that they could want or -- and have
15 asked for on this issue. And the suggestion has now been
16 that they're going to want to sort of litigate this issue
17 further after whatever happens in the class certification
18 process.

19 So that is our concern and we were hoping for some
20 guidance from Your Honor --

21 THE COURT: Sure.

22 MR. BEHA: -- about this hearing in that regard.

23 THE COURT: Let me ask first, and I should have
24 asked Mr. Raisner this, but let me ask you, Mr. Beha. Mr.
25 Raisner can add what he wants. Is all discovery done with

1 respect to the class certification?

2 MR. BEHA: Yes, Your Honor. We've completed
3 discovery.

4 THE COURT: Okay.

5 MR. BEHA: You would agree with that, yes?

6 MR. RAISNER: Correct. Sure.

7 MR. BEHA: Yeah.

8 THE COURT: And do you believe that there are
9 contested issues of fact with respect to class certification
10 for each of the named plaintiffs in the case?

11 MR. BEHA: Yes. I believe that there are
12 contested issues out there.

13 THE COURT: Okay. What I would like to do is to
14 talk about the trial procedures and -- well, let me address
15 first the issue, Mr. Beha, about the defendants desire to
16 have the Court try the single -- I'll shorthand this as the
17 single employer issue. I've made clear, I believe, in the
18 prior hearings -- and you both have gone forward with
19 discovery. This is a class certification hearing. I have
20 not bifurcated the merits issues of the case or trial.

21 With that said, to the extent that the Court is
22 required to make findings of fact during the class
23 certification hearing, I have little doubt that one way or
24 the other the findings of fact will bear upon other merits
25 issues, the same employer issue being one.

1 I do not need to decide now, I'm not going to
2 decide now and you all can argue about it at some later
3 point what's the preclusive effect on findings of fact that
4 the Court makes at this contested hearing on class
5 certification.

6 The issue -- I mean, it's been clear all along and
7 I've made clear all along that the issue of whether specific
8 named plaintiffs are -- were, past tense, employees of MFGI.
9 Barring unforeseen circumstances I fully expect to have to
10 resolve that factual issue in connection with class
11 certification.

12 And I will certainly listen to arguments later as
13 to if someone argues that that is or isn't preclusive, but,
14 I mean, it is the same issue that I think will have to be
15 resolved at some point. I'm not going to go through a trial
16 and make factual findings and have somebody come back later
17 and say, oh, that was a class certification. We're entitled
18 to a redo. Okay.

19 So you all ought to fully expect, assuming that I
20 hear evidence on the issue, and both sides should present
21 whatever evidence they have on the issue, I will make
22 findings of fact about the issue. It's been clear to me and
23 I've made clear to all of you that that bears -- is directly
24 relevant to class certification. It's relevant to the
25 merits issues.

1 But this is not the trial -- this is not a trial
2 on the merits of the claims per se. If I make -- if -- if
3 issues are properly -- you know, factual -- if evidence is
4 presented and issues are presented for resolution in
5 connection with class cert they will be resolved. Those
6 issues may well bear on the underlying merits of the claim.

7 What I would like to see if I can learn from you
8 today is -- so what I plan to do -- we tentatively blocked
9 out three days alone. It didn't seem -- it has never seemed
10 to me it's going to take three days. What I ordinarily do,
11 and I want to ask you both about is have the direct
12 testimony presented in written narrative form or if the
13 parties agree to the depositions being used for that purpose
14 by deposition testimony, and then with the declarant
15 available in court for cross-examination.

16 Do either of you have a problem with proceed --
17 well, how many witnesses do you expect to call, Mr. Beha?

18 MR. BEHA: We expect to call three witnesses, Your
19 Honor.

20 THE COURT: Okay.

21 MR. BEHA: And --

22 THE COURT: Go ahead.

23 MR. BEHA: So I should clarify. We have three
24 party witnesses. We may seek to call a representative of
25 MFGI as well.

1 THE COURT: Okay.

2 MR. BEHA: On that, if -- you know, both parties
3 have had the opportunity to take a 30(b)(6) deposition --

4 THE COURT: Uh-huh.

5 MR. BEHA: -- from MFGI. You know, I suspect that
6 we would be happy to just use that transcript and leave it
7 at that. But if the plaintiffs objected to that and we had
8 to formally call the MFGI witness, and then we would -- we
9 would do that. I don't think we would be in a position to
10 present a written narrative testimony from that person
11 because it's not someone we control. We have three of our
12 own witnesses --

13 THE COURT: Okay.

14 MR. BEHA: -- and then --

15 THE COURT: Potentially a fourth witness.

16 MR. BEHA: Potentially MFGI's --

17 THE COURT: Okay.

18 MR. BEHA: -- representative.

19 THE COURT: All right. Mr. Raisner, how many
20 witnesses do you anticipate calling?

21 MR. RAISNER: Your Honor, we don't have any
22 witness list because we don't know of any factually
23 contested issues, and I'm not being coy. I don't know --

24 THE COURT: I think you are.

25 MR. RAISNER: -- what they are -- I do not know

1 what the issues are.

2 THE COURT: Well, the issue of who they work for
3 is central to this whole dispute and whether they get
4 certified as class representatives.

5 MR. RAISNER: They --

6 THE COURT: Okay. If you don't want to call --
7 Mr. Raisner, if you don't want to call any witnesses, that's
8 fine with me. Is that --

9 MR. RAISNER: I --

10 THE COURT: -- what you're telling me? No
11 witnesses? You're not calling --

12 MR. RAISNER: No. I --

13 THE COURT: -- any witnesses?

14 MR. RAISNER: -- just don't know who they were.
15 If we had this conference prior to the hearing we could make
16 an informed statement as to whether they're different from
17 the witnesses that Mr. Beha asked us for.

18 THE COURT: Okay. How many named plaintiffs do
19 you have?

20 MR. RAISNER: There are six.

21 THE COURT: You plan to call them as witnesses?
22 Well, why --

23 MR. RAISNER: No.

24 THE COURT: -- aren't you presenting -- do you
25 plan to offer any direct testimony in written narrative form

1 of the class representatives?

2 MR. RAISNER: We always prefer if we can do it
3 proffer or --

4 THE COURT: I don't --

5 MR. RAISNER: -- use the --

6 THE COURT: Let me -- I don't take proffers, the
7 reason being is that I want -- bankruptcy proceedings are
8 public proceedings. I want the sworn testimony -- I'm not
9 questioning that you wouldn't proffer -- that anything you
10 would proffer wouldn't be what they would testify. But I --
11 you'll -- when we go through the procedures I require that
12 the written narrative testimony be filed in advance of the
13 trial. It speeds up the trial. It makes clear to the other
14 side, just as they would have to do with you, exactly what
15 you're cross-examining, what testimony you're cross-
16 examining.

17 So you need to tell me --

18 MR. ERCOLE: Your Honor, if I -- if I might for a
19 minute?

20 THE COURT: Yes.

21 MR. ERCOLE: I don't think Mr. Raisner --

22 THE COURT: You have to identify yourself.

23 MR. ERCOLE: This is Charles Ercole --

24 THE COURT: Yes, Mr. Ercole.

25 MR. ERCOLE: -- co-counsel. I don't believe Mr.

1 Raisner meant a proffer in the common use. I think what
2 he's suggesting is we would rely -- each of these plaintiffs
3 were deposed for a full day.

4 THE COURT: Well, but you can't use the deposition
5 of your own clients. You need to -- you know, you --

6 MR. ERCOLE: Well, if defendants are going to ask
7 us to stipulate to allow them to use deposition testimony,
8 we're going to make the same request. I mean, that's -- I
9 think when you read our briefs that's our point about we
10 don't think there's any factual issues in dispute. There's
11 a way that the sides look at the issue and argue it as to
12 whether it satisfies or doesn't satisfy both class cert
13 standards and who the employer was.

14 And I think what Mr. Raisner is suggesting is
15 between the documents and that testimony we are prepared to
16 rely on that.

17 THE COURT: And the other thing I just thought I
18 would make clear to both sides is if you use depositions I
19 don't permit entire transcripts to just -- you know, we mark
20 the deposition of Joe Smith. I require designations,
21 counter-designations, and objections in advance, you know,
22 designations by page and line references. I don't permit --
23 you'll excuse me. I'm not referring to what you might have
24 intended, but I always make clear I don't permit deposition
25 transcripts to be dumped into evidence because I read all of

1 the evidence and I don't want to have to waste my time
2 reading deposition testimony that it's unnecessary for me to
3 read.

4 So, Mr. Beha --

5 MR. RAISNER: So let me --

6 THE COURT: Hold on.

7 MR. RAISNER: I'm sorry.

8 THE COURT: Mr. Beha, go ahead.

9 MR. BEHA: I just wanted to clarify. For our
10 three witnesses who we control, our intention had been to
11 submit --

12 THE COURT: Written.

13 MR. BEHA: -- written direct testimony in
14 accordance with --

15 THE COURT: Okay.

16 MR. BEHA: -- the Court's --

17 THE COURT: They've been deposed? The witnesses
18 have been deposed?

19 MR. BEHA: They have been.

20 THE COURT: Okay.

21 MR. BEHA: Yes. And with respect to the MFGI
22 witness, we could either present direct in the form of
23 designating deposition testimony or we can just bring the
24 witness here and do a live direct.

25 THE COURT: Okay.

1 MR. BEHA: Whichever --

2 THE COURT: Let me just -- Mr. Ercole, let's focus
3 on the named plaintiffs.

4 MR. ERCOLE: Also, on the name -- but on the named
5 plaintiffs I think we would do the same thing. I think
6 you'll see again in our briefing that we've already made
7 very specific line designations to each one of their -- so
8 if you want a written narrative, we will put that in just
9 the way Mr. Beha is proposing that he wants to --

10 THE COURT: That's what I usually get.

11 MR. ERCOLE: Yeah.

12 THE COURT: So it's -- you know, everybody knows
13 exactly -- you do a declaration of them and, you know,
14 sometimes I get objections to what's -- to page and line
15 references in the declaration, usually not. Okay. I'll
16 give the testimony such weight as it's entitled to receive,
17 you know, keep the hearsay out, keep the speculation out and
18 make it factual.

19 Are you going to present declaration testimony of
20 each -- the six witnesses?

21 MR. ERCOLE: Again, I think it -- I think it -- I
22 suppose we would.

23 THE COURT: Okay, because I'm going to give you a
24 deadline. You're both going to file your testimony at the
25 same time.

1 MR. ERCOLE: Right.

2 THE COURT: So if you -- you know, it seems to me
3 if you want all six to be class representatives, I need to
4 hear your testimony from all six. Whether they decide to
5 cross-examine all six or not is a different issue. But --

6 MR. ERCOLE: Okay. Then we will submit
7 declarations for all six.

8 THE COURT: Okay. Anyone other than your named
9 plaintiffs?

10 MR. RAISNER: Your Honor, if there's a contested
11 issue for which we do need the witness we will --

12 THE COURT: But --

13 MR. RAISNER: I mean --

14 THE COURT: Come on. You've been through
15 discovery. This is no secret what this is all about. If by
16 now you don't know, that's -- if you don't know --

17 MR. RAISNER: Well --

18 THE COURT: -- what issues you plan to present
19 testimony on. You've got the burden on class certification.

20 MR. RAISNER: Yeah.

21 THE COURT: Okay. What witnesses do you expect to
22 present, sponsor, either in written narrative form if you
23 don't control the witness by subpoena if necessary or having
24 -- you know, having them testify live --

25 MR. RAISNER: Well, two witnesses that we --

1 testimony -- deposition testimony figures prominently in our
2 brief are Mr. Connolly, who is the Global HR head of the
3 defendants and also James Koback (ph), who is the
4 representative of MFGI. Those are two prominent --

5 THE COURT: Okay.

6 MR. RAISNER: -- witnesses in the case. We cite
7 to their testimony throughout our brief.

8 THE COURT: Okay. I haven't read your --

9 MR. RAISNER: And --

10 THE COURT: -- brief yet, Mr. Raisner.

11 MR. BEHA: Well, I --

12 MR. ERCOLE: So Mr. Connolly is the one that --

13 MR. RAISNER: And that's -- and that's --

14 THE COURT: Hold it. Stop. Stop. One at a time.
15 One at a time.

16 Go ahead, Mr. Raisner.

17 MR. RAISNER: And this is premature. If we --

18 THE COURT: It's not premature.

19 MR. RAISNER: Okay. We --

20 THE COURT: We're going to trial next month.

21 MR. RAISNER: No. But if we're able to finalize
22 our list, if we're not precluded from amending what we're
23 saying here in court. For the purposes of understanding the
24 procedure, Your Honor, we're happy to comply and to
25 understand what we need to do.

1 THE COURT: Okay.

2 MR. RAISNER: But in terms of the final list of
3 who we're calling --

4 THE COURT: Okay. But you -- as of -- as of now
5 you anticipate examining Mr. Connolly and Mr. Koback at
6 trial.

7 MR. RAISNER: Potentially, yes.

8 THE COURT: Okay. Anybody else?

9 MR. RAISNER: Those are the two who come to mind
10 at the moment.

11 THE COURT: Okay. Mr. Beha, you -- you're going
12 to offer direct testimony from Connolly?

13 MR. BEHA: Yes. Mr. Connolly is --

14 THE COURT: Okay.

15 MR. BEHA: -- is one of our witnesses. Mr. Koback
16 is the MFGI representative that I was referring to.

17 THE COURT: Okay.

18 MR. BEHA: We -- so we've -- both parties have
19 taken his deposition.

20 THE COURT: Okay. Connolly is one of the three
21 witnesses and --

22 MR. BEHA: Connolly is one of --

23 THE COURT: -- Koback is the possible MFGI
24 witness?

25 MR. BEHA: Exactly.

1 THE COURT: Okay.

2 MR. BEHA: And I'm -- I mean, I'm happy to tell
3 you or tell the plaintiffs, to the extent anyone cares at
4 this point, who the other two witnesses are. I'm not being
5 --

6 THE COURT: Okay. Why don't you tell --

7 MR. BEHA: -- coy. It's Sean Gumbs.

8 THE COURT: How do you spell it?

9 MR. BEHA: Sean, S-E-A-N --

10 THE COURT: Yah.

11 MR. BEHA: -- Gumbs, G-U-M-B-S from FTI.

12 THE COURT: Okay.

13 MR. BEHA: And Teresa Flynn, and I believe it's
14 Teresa T-E-R-E-S-A without an H.

15 THE COURT: Tell me Mr. Gumbs first name again.
16 I'm sorry.

17 MR. BEHA: Sean.

18 THE COURT: Sean. Right. Yeah. Okay.

19 MR. BEHA: And Ms. Flynn is at the company and --

20 THE COURT: Okay.

21 MR. BEHA: -- would essentially be our witness on
22 the flow of funds issues that the Court has --

23 THE COURT: Okay.

24 MR. BEHA: -- referred to.

25 THE COURT: And Connolly, what is his position?

1 MR. BEHA: Connolly was the head of HR --

2 THE COURT: Okay.

3 MR. BEHA: -- for the MF Global organization.

4 THE COURT: All right. What's his first name?

5 MR. BEHA: Thomas.

6 THE COURT: All right.

7 So let me ask with respect to Mr. Koback, I
8 understand you don't control him, but in the event -- and
9 I'm not forcing you and Mr. Raisner now to tell me whether
10 you agree to use his deposition or not. But if you can't --
11 you both have to agree in order for -- to be able to use it
12 as your direct.

13 But if you can't agree on using his deposition, do
14 you anticipate being able to get -- to have direct testimony
15 in declaration form from Mr. Koback?

16 MR. BEHA: I do not anticipate being able to have
17 direct testimony in written form. No. I do --

18 THE COURT: Okay.

19 MR. BEHA: -- anticipate being able to obtain his
20 presence here for the --

21 THE COURT: Yeah. I understand.

22 MR. BEHA: -- for the hearing.

23 THE COURT: No. I just wanted to inquire --

24 MR. BEHA: But, no, I do not think that we'll be
25 able to -- we can try it, but --

1 THE COURT: I mean, if you ask you may well do it,
2 you know, because it will --

3 MR. BEHA: Sure.

4 THE COURT: -- shorten the amount of time he has
5 to spend in the courtroom if you --

6 MR. BEHA: I will -- we will --

7 THE COURT: I'm not --

8 MR. BEHA: -- we will endeavor to do so.

9 THE COURT: Obviously I can't force you to do it.
10 I'm not trying to force you to do it.

11 MR. BEHA: We are happy to do so if we can. I
12 just don't want to make a promise that I can't keep. And I
13 --

14 THE COURT: I understand.

15 MR. BEHA: -- haven't had that discussion with
16 anyone over there, and certainly nobody is volunteering it.

17 THE COURT: So I think the first order of business
18 is after we -- you leave here is for you and plaintiffs'
19 counsel to talk about whether you can agree on the use of
20 Mr. Koback's deposition. And I'm not forcing anybody to
21 agree or not agree. If you can't agree, you don't have to
22 tell me who -- it -- I don't need to know more than that,
23 that you couldn't agree.

24 And then the next thing to do is to see whether
25 you can obviously with Mr. Koback's consent get his

1 agreement, put his direct in through -- well, actually, it's
2 a -- you know, I guess on this -- the plaintiffs are going
3 to go first in the case and I -- find out whether you can
4 get your -- he'll be here. You'll be able to add. If he
5 puts in a declaration, it just tends to speed things up.
6 You'll get to examine him. Mr. Raisner will have what his
7 direct is and be able to cross-examine him based on that or
8 anything else he wants to because he's going to be calling
9 him as a witness. And then you can do your -- you know,
10 your examination. Okay.

11 MR. BEHA: Yes, Your Honor.

12 THE COURT: All right. I'm going to enter an
13 order establishing procedures for trial. And it will
14 include my conclusion that the case is ready for trial on
15 the issue of class certification.

16 What I ordinarily require -- and I'm going to ask
17 both of you because it may be, Mr. Raisner, that you believe
18 that the memorandum of law that you filed in support of
19 class certification accomplishes what I'm looking for. I
20 know you're going to file yours on Friday, Mr. Beha.

21 MR. BEHA: I think I had misspoke. It's actually
22 next Monday, but --

23 THE COURT: Next -- okay.

24 MR. BEHA: -- we will file it as --

25 THE COURT: Okay. Next Monday. That's --

1 MR. BEHA: -- as scheduled.

2 THE COURT: That's fine. So -- because I
3 ordinarily require a pretrial memorandum including a
4 statement of the elements of each claim or defense. Here it
5 would be concerning class certification together with a
6 summary of the facts relied upon to establish each element,
7 and addressing any evidentiary issues anticipated to arise
8 during trial.

9 Now if you're -- Mr. Raisner, do you think your --
10 the memo that you already filed satisfies that or --

11 MR. RAISNER: To a large degree, yes. But I think
12 for us we would like to see what the --

13 THE COURT: Okay.

14 MR. RAISNER: -- opposing papers are and reply, if
15 necessary, and maybe use that reply to --

16 THE COURT: Well, here's --

17 MR. RAISNER: -- formulate --

18 THE COURT: -- here's --

19 MR. RAISNER: -- even a sharper --

20 THE COURT: Okay.

21 MR. RAISNER: -- focus on the issues.

22 THE COURT: So by Monday, August 17th, that's one
23 week before trial, I'm going to require the pretrial
24 memorandum -- you'll see what my order -- I just summarized
25 it. If you're satisfied that your -- whatever briefs you're

1 filing now, you just don't file anything else. Okay. But
2 if you feel like you need to address it, okay.

3 That one week prior to trial is also proposed
4 findings of fact and conclusions of law with respect to
5 class certification. And you'll see that the submissions
6 have to be both in hard copy and in diskette or CD-Rom.
7 And, again, not later than one week prior to the date set
8 for trial, so that's the same August 17th date.

9 Two copies of the final witness list and exhibit
10 list; two copies of all premarked -- of all of premarked
11 exhibits, and you'll see how I want that done. We don't
12 have a reporter who marks exhibits, so everything needs to
13 be marked.

14 And let me make this clear. No witnesses or
15 exhibits -- if you don't list the witnesses or exhibits,
16 you're not going to get to use them. And you should --
17 you'll see the order provides that you need to provide the
18 Court with a copy of any depositions which are intended to
19 be offered into evidence, marked to show all designations,
20 counter-designations, and the unresolved objections. And a
21 copy of deposition transcripts used for impeachment or
22 refreshing recollection shall be provided to the Court and
23 opposing counsel at the time the transcript is used at
24 trial.

25 So if you just -- you anticipate using a

1 deposition transcript to impeach or refresh recollection,
2 you just give them to me at the start of the trial.

3 And you're responsible for marking your own
4 exhibits. And the plaintiffs should use numbers and the
5 defendants should use letters. Every exhibit has to have a
6 unique identifier. It cannot be previously marked as an
7 exhibit something else. It has to have a trial exhibit tag,
8 every exhibit uniquely numbered or lettered.

9 I'm also requiring by that same August 17th
10 deadline that utilizing the template for my joint pretrial
11 order, it's on the Court's website under my chamber's rules,
12 recognizing that this is a pretrial order concerning class
13 certification only.

14 And there are sections of this template that ask
15 you to set forth any stipulations of fact. And I really --
16 I mean, I think -- there's lots of stuff you ought to be
17 able to agree on. And what I would like is, you know, this
18 requires you collaborate on this joint pretrial conference
19 or to put your stipulations in there. So you ought to be
20 pretty soon exchanging your proposed -- what each of you
21 would like the other to stipulate to and see whether you can
22 iron out as much as possible. Okay.

23 I have to believe that most of the facts are going
24 to be uncontroverted. Okay. So include them in the
25 stipulation.

1 And then there's a section in the pretrial order
2 for parties' contentions. And, again, this focuses on class
3 certification, not on -- and the issues to be tried, that's
4 issues to be tried for class certification. You've got to
5 list your plaintiffs' exhibits, defendants' exhibits, and
6 any -- you know, any exhibits that you don't list you're not
7 using except for cross-examination purposes. So if you've
8 got an impeachment document you don't have to list it. But
9 usually I find there's no surprises in these cases. Just
10 list all the exhibits. It simplifies life.

11 And you have to indicate stipulations and exhibit
12 -- and objections with respect to exhibits. I would
13 anticipate you ought to be able to agree on authenticity of
14 exhibits. If you can't, you know, you'll know about it in
15 advance.

16 So that template is on the court website. And,
17 again, this is not the entire trial, but use it for --
18 concerning class certification.

19 So I'm requiring that everything be in hand no
20 later than noon on August 17th. That's one week before the
21 trial.

22 MR. BEHA: And just a --

23 THE COURT: Sure.

24 MR. BEHA: -- question. I don't think I heard you
25 mention the written direct testimony.

1 THE COURT: Yeah. And I should have --

2 MR. BEHA: Is that on that day as well?

3 THE COURT: -- mentioned it. Yes.

4 MR. BEHA: Is it -- okay.

5 THE COURT: So everybody's got a week to study the
6 written direct and figure -- you know, figure out what you
7 want to cross on.

8 So I'll enter the order establishing procedures
9 for trial today. The joint pretrial order, the template is
10 on the website. If you have any problem getting it just let
11 one of my law clerks know.

12 From listening to both of you, it sounds like
13 there are going to be ten witnesses which is a lot of
14 witnesses. Now there's some overlap, all right -- well, the
15 lack of overlap is the six plaintiffs, right, but that's --
16 so there's ten witnesses. You know, if the direct is
17 presented in written narrative form it goes pretty quickly.

18 Am I -- I'll tell you. The -- my reaction usually
19 is unless there is -- if you can't control -- if you don't
20 have control over a witness that's a different issue. But
21 if you have control in the sense that you can get the
22 declaration, it -- you know, you know what you're cross-
23 examining. You know the points you want to make and you go
24 ahead and do it and things tend to move fast.

25 I read the direct before I take the bench. So you

1 will assume that I've read all that and looked at your
2 exhibits before and see are there -- you know, are there
3 objections to exhibits that have to be resolved. But ten
4 witnesses is a lot of witnesses, even for just cross-
5 examination.

6 What I'm hemming and hawing about is I frequently
7 do my case -- any trial that's over a day I frequently do as
8 time trials where I allocate a total number of hours for
9 each side. I'm reluctant to do that here. But we're not
10 going beyond three days. We're starting at 9:00 each day
11 for trial. And, you know, you're all good lawyers. I
12 expect you to be efficient in using the time.

13 Do you have questions, either side?

14 Mr. Beha, do you?

15 MR. BEHA: No, Your Honor.

16 THE COURT: Mr. Raisner? Mr. Ercole?

17 MR. RAISNER: No, Your Honor.

18 THE COURT: Okay. I'll -- you know, with ten
19 witnesses it -- availability and order of witnesses
20 sometimes becomes an issue. I have no problem about taking
21 witnesses out of order. You ought to indicate -- you ought
22 to disclose to each other the order in which you intend to
23 call witnesses. And if you got problems about scheduling,
24 work it out. Okay.

25 Because it's a bench trial I also -- you know, if

1 Mr. Raisner is calling Mr. Connolly, do your whole
2 examination of Mr. Connolly. I don't want him -- you know,
3 I try to avoid having witnesses recalled if it can be
4 avoided. Okay. So figure even though it might be you're
5 presenting your case during Mr. Raisner's case, put the
6 whole -- let's try to do it as efficiently as possible, do
7 your -- and it goes both ways. Do your complete examination
8 of the witnesses. So -- okay.

9 Other questions?

10 Okay.

11 MR. BEHA: Thank you, Your Honor.

12 MR. RAISNER: Thank you, Your Honor.

13 THE COURT: Thanks very much.

14 (Whereupon, these proceedings were concluded at 10:40
15 a.m.)

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I N D E X

RULINGS

| | Page | Line |
|-------------------------------|------|------|
| Order establishing procedures | | |
| for trial | 28 | 9 |

1
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C E R T I F I C A T I O N

I, Sherri L. Breach, certify that the foregoing transcript
is a true and accurate record of the proceedings.

**Sherri L
Breach**

 Digitally signed by Sherri L Breach
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SHERRI L. BREACH

AAERT Certified Electronic Reporter & Transcriber CERT*D-397

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