

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE, WEST JUSTICE CENTER
DEPARTMENT W7

TRAVEL AMERICA, INC., A DELAWARE)
CORPORATION, ET AL.,)
)
PLAINTIFFS,)
)
VS.) CASE NO. 789743
)
CAMP COAST TO COAST, INC., A DELAWARE)
CORPORATION, ET AL.,)
)
DEFENDANTS.)
_____)

THE HONORABLE JOHN H. SMITH, JR., JUDGE PRESIDING

REPORTER'S TRANSCRIPT

JULY 25, 2000

APPEARANCES:

FOR THE PLAINTIFFS:

GERALD M. SHAW
ATTORNEY AT LAW

TERRY M. MOSHENKO
ATTORNEY AT LAW

FOR THE DEFENDANTS:

ALSCHULER, GROSSMAN, STEIN & KAHAN
BY: MICHAEL A. SHERMAN, ESQ.
CRAIG RUTENBERG, ESQ.

RUTAN & TUCKER
BY: IRA G. RIVIN, ESQ.

HEIDI K. STEWART, CSR #6058
OFFICIAL COURT REPORTER

1 WESTMINSTER, CALIFORNIA - TUESDAY, JULY 25, 2000

2 MORNING SESSION

3 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN
4 COURT OUT OF THE PRESENCE OF THE JURY:)

5 THE COURT: WHERE IS MR. SHAW? I ASKED HIM TO GIVE
6 ME A LITTLE BIT OF SYNOPSIS. DID HE BRING IT IN?

7 MR. MOSHENKO: I KNOW HE DID IT, AND -- I KNOW THAT
8 HE DID IT, AND I KNOW THAT HE WAS BRINGING IT TO COURT. I
9 JUST DON'T KNOW WHERE HE IS THIS VERY SECOND. AND
10 MR. DURAN IS OUT LOOKING FOR HIM RIGHT NOW.

11 THE COURT: OKAY.

12 MR. RIVIN: WE'RE READY TO BEGIN, YOUR HONOR, AND
13 WE HAD A COUPLE OF POINTS THAT WE WANTED TO ELABORATE ON,
14 THINGS WE TALKED ABOUT YESTERDAY, THE POINTS WE WANTED TO
15 FOCUS ON. PERHAPS WE CAN DO THAT AT THE OUTSET.

16 THE COURT: GOOD. LET'S DO IT.

17 MR. RIVIN: YESTERDAY I MENTIONED THAT ONE OF THE
18 REASONS WE BELIEVE NONSUIT IS APPROPRIATE IS BECAUSE
19 PLAINTIFFS HAVE FAILED TO PRESENT EVIDENCE TO ESTABLISH
20 CAUSATION. AND CAUSATION IS AN ELEMENT OF EVERY SINGLE ONE
21 OF THEIR LEGAL CAUSES OF ACTION. WITHOUT PROVING
22 CAUSATION, THE PLAINTIFFS CANNOT PREVAIL ON ANY CAUSE OF
23 ACTION; AND THEY MUST ESTABLISH CAUSATION.

24 WE THINK FOR ALL THE REASONS THAT WE'VE
25 DISCUSSED, THAT WE'VE HEARD ABOUT, PLAINTIFFS HAVE NOT
26 PROVED CAUSATION AND CANNOT PROVE IT. AND LET ME TALK

1 ABOUT THAT.

2 AND LET ME ALSO MENTION TO THE COURT THAT
3 WE'RE GOING TO ADDRESS ONE OTHER POINT THAT WE BELIEVE GOES
4 TO ALL OF THE REMAINING CAUSES OF ACTION IN THE CASE, AND
5 THAT'S UNCLEAN HANDS. I MENTIONED THAT YESTERDAY.
6 MR. SHERMAN IS GOING TO ADDRESS THAT ISSUE.

7 OUR COMMENTS WILL BE BRIEF, YOUR HONOR,
8 JUST A FEW MINUTES ON EACH POINT.

9 THERE ARE TWO CRITICAL FLAWS IN PLAINTIFFS'
10 CAUSATION CLAIM. ONE IS THE ATTEMPT EITHER INTENTIONALLY
11 OR UNINTENTIONALLY BY PLAINTIFFS TO CONFUSE WRONGDOING AND
12 CAUSATION. EVEN IF THERE IS AN ISSUE TO GO TO THE JURY ON
13 THE QUESTION OF WHETHER COAST DID ANYTHING WRONG -- WE
14 DON'T BELIEVE THERE IS, BUT EVEN IF THERE IS -- THAT'S A
15 SEPARATE ISSUE FROM CAUSATION. CAUSATION CLEARLY IS A
16 SEPARATE ELEMENT, AND THAT MUST BE PROVED SEPARATELY.

17 AND THE SECOND PROBLEM WITH THE PLAINTIFFS'
18 ARGUMENT ON CAUSATION IS THAT THEY INCORRECTLY ASSUME --
19 AND WE HEARD IT YESTERDAY IN THE COMMENTS MADE BY
20 PLAINTIFFS' COUNSEL -- THAT A MERE CONCLUSION, RESTATEMENT
21 REGARDING CAUSATION IS SUFFICIENT TO PROVE CAUSATION. AND
22 THAT'S WRONG. THERE HAS TO BE EVIDENCE.

23 LET ME ADDRESS EACH OF THESE POINTS. AND
24 LET'S TALK ABOUT PLAINTIFFS' CLAIM FOR INTERFERENCE WITH
25 RESPECT TO ADVANTAGE.

26 WE AGREE THAT IN ORDER FOR THE PLAINTIFFS TO

1 PROVE INTERFERENCE, THEY HAVE TO PROVE SEVERAL ELEMENTS,
2 INCLUDING CONDUCT WHICH IS WRONGFUL, APART FROM THE
3 DISRUPTION OF THE RELATIONSHIP. MR. SHAW ALLUDED TO THAT
4 YESTERDAY. THAT'S THE DELLA PENNA CASE OR PENNA CASE. WE
5 HAVE TO PROVE SEPARATE WRONGFUL CONDUCT. THAT'S NOT WHAT
6 WE'RE HERE TO TALK ABOUT RIGHT NOW, BUT THAT'S AN ELEMENT
7 OF THE INTERFERENCE CLAIM.

8 AND THEY MUST PROVE CAUSATION; THAT THE
9 POTENTIAL RELATIONSHIP WAS ACTUALLY DISRUPTED BY THE
10 WRONGFUL CONDUCT.

11 SO EVIDENCE -- AGAIN, EVIDENCE TO THE
12 WRONGFUL CONDUCT, UNLESS THEY CAN LINK IT TO THE LOSS OF
13 MEMBERS, UNLESS THEY CAN LINK IT TO DAMAGE, DOESN'T PROVE
14 CAUSATION.

15 AND THEY IDENTIFY FOUR WITNESSES WHO
16 TESTIFIED AS TO CAUSATION -- ALLEGEDLY TESTIFIED AS TO
17 CAUSATION; MR. MITCHELL, MR. RANDALL, MR. NOVELLI AND
18 MR. MALPASS. BUT AS WE POINT OUT IN OUR PAPERS, YOUR
19 HONOR, WE BELIEVE NONE OF THIS EVIDENCE ESTABLISHES THE
20 EVIDENTIARY LINK BETWEEN WRONGFUL CONDUCT AND THE INJURY.

21 THE TESTIMONY THAT THEY CITED -- THAT THE
22 PLAINTIFF CITED TO MR. MITCHELL, BOILED DOWN TO ITS
23 ESSENTIAL, AND CONSTRUED MOST FAVORABLY TO THE PLAINTIFF,
24 CONSISTED OF THREE POINTS. NUMBER ONE, CUSTOM AND USAGE
25 WAS THE DEVELOP -- THE CUSTOM AND USAGE IN THE INDUSTRY WAS
26 THAT DEVELOPERS OWNED THE MEMBERS BECAUSE THEY PAID TO

1 DEVELOPMENT. THAT REFERS TO CONDUCT, NOT CAUSATION.

2 AND EVEN IF THAT EVIDENCE DIDN'T VIOLATE THE
3 PAROL EVIDENCE RULE, AND EVEN IF IT WERE OTHERWISE RELEVANT
4 IN THE CASE, IT DOESN'T ESTABLISH CAUSATION, WHICH IS THE
5 POINT THAT WE'RE TALKING ABOUT.

6 PLAINTIFFS ALSO ARGUE THAT MR. MITCHELL
7 TESTIFIED THAT COAST LETTERS WERE NOT CONSISTENT WITH
8 COAST'S PRIOR CONDUCT, WITH ITS PRIOR LETTERS, TO
9 DISAFFILIATED -- TO MEMBERS OF DISAFFILIATED PARKS.

10 AND HE TALKED ABOUT THE MOTIVATION.
11 MR. MITCHELL SUPPOSEDLY TALKED ABOUT THE MOTIVATION, COAST
12 MOTIVATION, AND DESIRE TO PROTECT ITSELF FROM THE LOSS OF A
13 SUBSTANTIAL PORTION OF ITS MEMBERSHIP BASE.

14 THAT TESTIMONY ALSO RELATES TO CONDUCT. IT
15 DOESN'T RELATE TO CAUSATION. IT JUST RELATES TO CONDUCT.
16 AGAIN, THAT'S MR. MITCHELL'S TESTIMONY THAT THEY'RE RELYING
17 UPON TO PROVE CAUSATION, AND IT DOESN'T.

18 AND THEN, FINALLY, MR. MITCHELL'S
19 CONCLUSIONARY STATEMENT THAT THE SO-CALLED MASS TRANSFER
20 CAUSED DAMAGES TO PLAINTIFFS BASED ON HIS READING OF COAST
21 REPORTS THAT COAST SENT LETTERS TO 34,000 PEOPLE; AND
22 SUPPOSEDLY, BASED ON WHAT HE READ, 22,000 PEOPLE
23 TRANSFERRED TO OTHER RESORTS. THERE ARE SEVERAL
24 DEFICIENCIES IN THIS TESTIMONY.

25 FIRST, AS WE HAVE DISCUSSED REPEATEDLY
26 THROUGHOUT THE FIRST TWO MONTHS OF THIS TRIAL, COAST

1 RECORDS PROVE NOTHING WITH RESPECT TO CAUSATION. COAST
2 RECORDS CANNOT ESTABLISH THAT PLAINTIFFS LOST MEMBERS OR
3 OTHERWISE SUSTAINED INJURY AS A RESULT OF ANYTHING THAT
4 COAST DID. SO MR. MITCHELL'S TESTIMONY IS BASED ON A
5 FAULTY ASSUMPTION THAT SOMEHOW COAST RECORDS CAN PROVE
6 CAUSATION.

7 SECOND, EVEN IF MR. MITCHELL WERE CORRECT
8 ABOUT NUMBERS, THAT MIGHT BE EVIDENCE OF SOME INJURY, BUT
9 IT WOULDN'T LINK IT. IT WOULDN'T LINK THE CONDUCT TO THE
10 INJURY BECAUSE MR. MITCHELL HAS NO TESTIMONY AND NO
11 KNOWLEDGE AND PRESENTED NO EVIDENCE AS TO WHY PEOPLE LEFT.

12 AND THEN THIRDLY, YOUR HONOR, AND I THINK
13 MOST IMPORTANTLY, MR. MITCHELL'S STATEMENT IS NOTHING BUT A
14 CONCLUSION. AND A MERE CONCLUSION IS NOT SUFFICIENT TO
15 OVERCOME THE DEFICIENCY IN THE PLAINTIFFS' CASE WITH
16 RESPECT TO THE PROOF OF CAUSATION.

17 MR. RANDALL, WHO IS THE SECOND WITNESS WHO
18 SUPPOSEDLY PRESENTED EVIDENCE OR TESTIMONY REGARDING
19 CAUSATION, STATED THAT IF 34,000 OF PLAINTIFFS' MEMBERS
20 WENT AWAY, THAT POTENTIALLY COULD CAUSE SIGNIFICANT
21 DAMAGE. WELL, LOSING MEMBERS MIGHT CAUSE PLAINTIFF SOME
22 FINANCIAL LOSS. BUT THAT DOESN'T PROVE, AGAIN, ANY CAUSAL
23 CONNECTION; NOT ONLY THAT, MR. RANDALL'S TESTIMONY WAS
24 SPECULATION, BASED UPON A QUESTION THAT CALLED FOR
25 SPECULATION.

26 MR. NOVELLI'S TESTIMONY IS ALSO IRRELEVANT

1 ON THE ISSUE OF CAUSATION. AND EVEN TAKING HIS TESTIMONY
2 AT FACE VALUE, AND IGNORING, WHICH THE COURT MUST,
3 MR. NOVELLI'S LACK OF CREDIBILITY, THE TWO PASSAGES RELIED
4 ON BY PLAINTIFFS WITH RESPECT TO CAUSATION DON'T SUPPORT
5 THEIR CLAIM.

6 MR. NOVELLI TESTIFIED THAT SALES OF NEW
7 MEMBERSHIPS BECAME INCREASINGLY DIFFICULT AND STARTED TO
8 DECLINE IN 1995, TWO YEARS BEFORE COAST'S ALLEGED WRONGFUL
9 CONDUCT. AND MR. NOVELLI TALKED ABOUT THE LIMITED NUMBER
10 OF SALES IN 1998 AND 1999, AND HE ATTRIBUTED THAT TO COAST.

11 BUT THAT CONCLUSION IS DIRECTLY -- IT
12 DIRECTLY CONTRADICTS WHAT MR. NOVELLI SAID ABOUT THE
13 INDUSTRY-WIDE DECLINE. THERE WERE MANY DECLINES. IN FACT,
14 THERE'S NO DOUBT, THERE'S NO ISSUE IN THE EVIDENCE THAT THE
15 DECLINE IN SALES STARTED BACK IN 1995 OR EVEN EARLIER.
16 THERE IS NO WAY TO ESTABLISH THAT A DECLINE IN SALES
17 OCCURRED AS A RESULT OF ANYTHING THAT COAST DID.

18 MR. NOVELLI ALSO TESTIFIED THAT, AGAIN, JUST
19 LIKE MR. MITCHELL, IF 35,000 RECIPIENTS OF THE COAST
20 LETTERS, 22,000 OR 65 PERCENT STOPPED PAYING DUES TO
21 PLAINTIFFS, AS A RESULT OF THE LOSS OF DUES, PLAINTIFFS
22 LOST INCOME AND RESORTS. AND, AGAIN, NOVELLI'S TESTIMONY
23 IS ABSURD BECAUSE HE ASSUMES THAT EVERYBODY WHO STOPPED
24 PAYING -- EVEN IF YOU ACCEPT HIS TESTIMONY AS BEING
25 ACCURATE -- AND IT'S NOT -- BUT EVEN IF YOU DO ACCEPT IT,
26 IT DOESN'T ESTABLISH CAUSATION. IT DOES NOT.

1 AND, AGAIN, MR. MALPASS'S TESTIMONY THE
2 PLAINTIFFS CITE TO SUPPOSEDLY TO PROVE CAUSATION DOES NOT
3 PROVE CAUSATION. MR. MALPASS TALKED ABOUT AUTOMATIC STAY.
4 AND EVEN IF WE ACCEPT HIS TESTIMONY AS BEING CREDIBLE,
5 WHICH WE BELIEVE IT IS NOT -- NONETHELESS, FOR PURPOSES OF
6 THIS MOTION, IT MUST BE ACCEPTED AS CREDIBLE EVIDENCE -- IT
7 DOES NOT PROVE CAUSATION. ALL IT GOES TO THE QUESTION OF
8 WHETHER COAST DID SOMETHING IMPROPER. THAT'S
9 MR. MALPASS'S TESTIMONY.

10 AND IN SUMMARY, THEN, WITH RESPECT TO THIS
11 ISSUE OF CAUSATION, WHAT'S LACKING IS THE LINKAGE, THE
12 LINKAGE BETWEEN THE CONDUCT AND CAUSATION. WHERE IS, FOR
13 EXAMPLE, THE TESTIMONY OF A SINGLE FORMER MEMBER THAT HE OR
14 SHE RECEIVED THE COAST LETTER AND STOPPED PAYING BECAUSE OF
15 SOME STATEMENT IN THE LETTER WHICH WAS FALSE, MISLEADING OR
16 OTHERWISE WRONGFUL? WHERE IS SOME ANALYSIS OF A
17 STATISTICALLY SIGNIFICANT NUMBER OF FORMER MEMBERS SHOWING
18 WHY THOSE PEOPLE STOPPED PAYING?

19 HERE PLAINTIFFS HAVEN'T EVEN SHOWN HOW MANY
20 OF THEIR MEMBERS ACTUALLY STOPPED PAYING AT THE TIME OF THE
21 COAST LETTERS, LET ALONE BECAUSE OF THE COAST LETTERS. AND
22 EQUALLY IMPORTANT, YOUR HONOR, THE PLAINTIFFS CANNOT CURE
23 THAT DEFECT, BECAUSE PLAINTIFFS ACKNOWLEDGE THAT COAST
24 RECORDS UNDERSTANDABLY SAY NOTHING ABOUT WHETHER COAST
25 MEMBERS WERE PAYING DUES TO THE PLAINTIFFS.

26 AND FURTHER, THE PLAINTIFFS' RECORDS ARE IN

1 SUCH A SHAMBLES THAT THEY CAN'T USE THEIR OWN RECORDS TO
2 ESTABLISH WHY PEOPLE LEFT. AND ONE OF THE REASONS THIS IS
3 PARTICULARLY CRITICAL IN THIS CASE, AND THE REASON WHY
4 NEITHER MR. MITCHELL NOR THE TRIER OF FACT COULD REACH THE
5 CONCLUSION THAT ANY LOSS OF MEMBERS BY PLAINTIFFS WAS
6 CAUSED BY COAST, IS BECAUSE ANY SUCH INFERENCE WOULD BE
7 IMPERMISSIBLE, IN LIGHT OF THE STATE OF THE UNCONTROVERTED
8 EVIDENCE.

9 WHAT WE KNOW IS THAT PLAINTIFFS AND THEIR
10 PREDECESSORS WERE IN A STATE OF SHAMBLES IN 1997. THE
11 ORGANIZATIONS WERE COLLAPSING. THERE WERE NUMEROUS
12 REASONS -- THERE WERE NUMEROUS REASONS FOR THE DECLINE IN
13 MEMBERS, FOR THE LOSS IN MEMBERS, NUMEROUS REASONS WHICH
14 HAVE BEEN ESTABLISHED AS THE REASON WHY PEOPLE -- WHY
15 PEOPLE DECIDED TO STOP PAYING, WHY PLAINTIFFS' FORMER
16 MEMBERS DECIDED TO STOP PAYING.

17 AND ONE OF THE PRIMARY REASONS IS THE
18 DECISION BY THE PLAINTIFFS THEMSELVES TO WITHDRAW FROM
19 COAST TO COAST. AND AS WE SAW THROUGH NUMEROUS MEMBER
20 LETTERS, PEOPLE DECIDED THEY DIDN'T NEED THE PLAINTIFFS
21 ANYMORE BECAUSE OF PLAINTIFFS' UNILATERAL, VOLUNTARY
22 DECISION TO WITHDRAW FROM COAST TO COAST. THAT CAUSED
23 PEOPLE TO STOP PAYING.

24 BUT WE HAVEN'T SEEN ANY EVIDENCE, ANY
25 EVIDENCE THAT PEOPLE STOPPED PAYING BECAUSE OF COAST. SO
26 TO THE EXTENT ANY REASONABLE INFERENCE CAN BE DRAWN, THE

1 ONLY REASONABLE INFERENCE IS THAT PEOPLE STOPPED PAYING FOR
2 ALL OF THE OTHER REASONS, THE MURIAD OF REASONS THAT WE'VE
3 HEARD ABOUT, THE EVIDENCE THAT'S UNCONTROVERTED.

4 AND, YOUR HONOR, AS STATED IN JONES VERSUS
5 ORTHO PHARMACEUTICAL, WHICH IS CITED IN OUR MOVING PAPERS,
6 IT'S NOT SUFFICIENT FOR THE PLAINTIFFS TO ESTABLISH A
7 POSSIBILITY OF DAMAGE, A POSSIBILITY OF CAUSATION. IN
8 JONES VERSUS ORTHO PHARMACEUTICAL, PLAINTIFFS SUED A
9 PHARMACEUTICAL COMPANY CLAIMING THAT ITS BIRTH CONTROL
10 PILLS CAUSED CERVICAL CANCER. EXPERT TESTIMONY ESTABLISHED
11 A POSSIBILITY, BUT NOT A PROBABILITY OF A CAUSAL
12 CONNECTION. THE COURT HELD -- THE APPELLATE COURT HELD
13 NONSUIT WAS PROPER BECAUSE SUCH TESTIMONY CAN ENABLE THE
14 PLAINTIFFS' ACTIONS TO GO TO THE JURY ONLY IF IT
15 ESTABLISHES A REASONABLE, PROBABLE CAUSAL -- REASONABLY
16 PROBABLE CAUSAL CONNECTION BETWEEN AN ACT AND A PRESENT
17 INJURY. AND THERE IS NO EVIDENCE THAT WOULD ALLOW THE JURY
18 TO DRAW THAT -- TO FIND THAT CAUSAL CONNECTION EXISTS.

19 MR. SHERMAN: YOUR HONOR, AS MR. RIVIN NOTED AT THE
20 OUTSET, WE WANTED TO FOCUS THE COURT ON TWO ISSUES;
21 CAUSATION, WHICH MR. RIVIN ADDRESSED; **UNCLEAN HANDS,** WHICH
22 I'D LIKE TO ADDRESS BRIEFLY.

23 AND AS A PRELIMINARY MATTER, YOUR HONOR, I
24 SUPPOSE IT WOULD BE BEST LEFT FOR IDLE SPECULATION WHY
25 JUDGE THOMAS BACK IN MARCH DID NOT GRANT SUMMARY JUDGMENT.
26 OBVIOUSLY, WE'LL NEVER KNOW BECAUSE WE CAN'T APPEAL FROM

1 THAT ORDER DENYING SUMMARY JUDGMENT.

2 BUT FROM A BIG-PICTURE PERSPECTIVE, MY
3 CLIENTS HAVE SPENT MILLIONS OF DOLLARS SINCE THAT ORDER
4 DENYING SUMMARY JUDGMENT. AND THEY'RE CONTINUING TO SPEND
5 SIGNIFICANT SUMS OF MONEY. WE HAVE THE PROSPECT HERE OF
6 SEVERAL MORE WEEKS OF TESTIMONY, JURY INSTRUCTIONS,
7 ARGUMENT. AND WHAT REMAINS BEFORE THIS COURT IS ENOUGH FOR
8 THIS COURT TO SAY, ENOUGH. AND THAT'S WHAT UNCLEAN HANDS
9 IS ALL ABOUT.

10 BECAUSE THIS IS NOT A MOTION FOR NONSUIT.
11 THIS IS A MOTION FOR JUDGMENT. THIS IS A MOTION FOR
12 JUDGMENT DIRECTED TO THIS COURT. AND COAST HAS ARGUED THAT
13 UNCLEAN HANDS IS AN EQUITABLE DEFENSE. WE'VE ASSERTED THAT
14 AS AN EQUITABLE DEFENSE. AND PLAINTIFFS' DISMISSAL OF
15 THEIR EQUITABLE CLAIMS DO NOTHING -- DO NOTHING TO VITIATE
16 THAT EQUITABLE DEFENSE. THEY'RE NOT GONE, THAT EQUITABLE
17 DEFENSE IS NOT GONE. AND THIS COURT SHOULD DECIDE
18 DEFENDANTS' UNCLEAN HANDS CLAIM DIRECTED AGAINST PLAINTIFFS
19 NOW.

20 AND THE REASON THAT UNCLEAN HANDS DEFENSE IS
21 STILL IN THIS CASE IS SIMPLE. IN CALIFORNIA, UNCLEAN HANDS
22 IS A DEFENSE TO AN ACTION AT LAW. WE'VE CITED THE CASES IN
23 OUR PAPERS. AND THE DOCTRINE HAS BEEN USED TO DEFEAT LEGAL
24 CLAIMS.

25 FOR EXAMPLE, CASE WE CITE IN THE PAPER,
26 UNILOGIC VERSUS BURROUGHS, 1992, CALIFORNIA APPELLATE COURT

1 DECISION, A CLAIM FOR DAMAGES FOR CONVERSION OF A
2 PROPRIETARY COMPUTER TECHNOLOGY. BECAUSE THE PLAINTIFF HAD
3 BRIBED DEFENDANT'S EMPLOYEES TO ENTER INTO A JOINT
4 DEVELOPMENT AGREEMENT; HELD UNCLEAN HANDS DEFENSE APPLIES.

5 BLAINE VERSUS DOCTORS COMPANY, ALSO CITED IN
6 OUR PAPERS, 1990, CALIFORNIA APPELLATE COURT, AN ATTORNEY
7 MALPRACTICE CASE. WHEN THE PLAINTIFF CLAIMED THAT THE
8 PLAINTIFF HAD BEEN ADVISED TO LIE IN HIS DEPOSITION, WHEN
9 IT WAS THE CLIENT WHO ACTUALLY LIED, HELD UNCLEAN HANDS
10 DEFENSE COULD BE USED TO BAR THOSE CLAIMS.

11 AND THE UNILOGIC CASE IS AN IMPORTANT CASE
12 HERE BECAUSE THEY'RE TALKING ABOUT THE MISUSE OF
13 CONFIDENTIAL TECHNOLOGICAL INFORMATION, MUCH LIKE THE CASE
14 BEFORE THIS COURT.

15 SO THE ISSUE IS GOING TO BE WHETHER THE
16 PLAINTIFF IS ENGAGED IN MISCONDUCT THAT RELATES TO THE SAME
17 SUBJECT MATTER AS THE CLAIMS BEFORE THE COURT.

18 LET ME GIVE THE COURT A CONTINUUM, IF I
19 MAY. LET'S ASSUME THE CASE IS ONE FOR ASSAULT. PLAINTIFF
20 CLAIMS DEFENDANT ASSAULTED THE PLAINTIFF. AND THE
21 DEFENDANT RAISES AS AN ALLEGED UNCLEAN HANDS A BREACH OF
22 CONTRACT. WELL, THAT'S NOT CENTRAL TO PLAINTIFF'S ASSAULT
23 CLAIM. AND WE SUBMITTED THAT UNCLEAN HANDS WOULD NOT AND
24 OUGHT NOT APPLY HERE.

25 BUT IN OUR CASE, PLAINTIFFS -- AND I'M
26 FOCUSING NOW ESPECIALLY ON TRAVEL AMERICA. THEY ALLEGE

1 THAT THEY ACQUIRED THEIR CONTRACTUAL RIGHTS THAT THEY'RE
2 SUING ON IN THIS CASE. THESE CONTRACTUAL RIGHTS, AS THE
3 COURT HAS SEEN NOW JUST THROUGH PLAINTIFFS' CASE, UP
4 THROUGH PLAINTIFFS' CASE, WAS ACQUIRED THROUGH BLATANT
5 MISCONDUCT, THEFT OF MEMBER LISTS, FRAUDULENT CONVEYANCES
6 AND THE LIKE. PLAINTIFFS USE THEIR DISAFFILIATION FROM
7 COAST TO DERIVE A FINANCIAL GAIN FROM MEMBERS, WITH WHOM
8 THESE PLAINTIFFS HAD NEVER HAD A RELATIONSHIP. I'M
9 REFERRING NOW OBVIOUSLY TO TRAVEL AMERICA.

10 PLAINTIFFS PURPORTED TO TRANSFER MEMBER
11 CONTRACTS WITHOUT THE CONSENT OR EVEN THE KNOWLEDGE OF
12 MEMBERS AND IN DEROGATION OF MEMBERS' RIGHTS TO MAINTAIN
13 THEIR RELATIONSHIP WITH COAST. AND PLAINTIFFS THEMSELVES
14 ENGAGED IN UNFAIR COMPETITION BY USING DISAFFILIATION AS A
15 VEHICLE TO DISRUPT COAST'S EXISTING CONTRACTUAL
16 RELATIONSHIP WITH ITS MEMBERS, BY ATTEMPTING TO PRECLUDE
17 COAST FROM PROTECTING ITS RELATIONSHIP WITH COAST MEMBERS,
18 BY THREATENING COAST WITH LITIGATION, THAT EXHIBIT 39 THAT
19 THEY'RE SO FOND OF SHOWING, THE LAST PARAGRAPH WHERE THE
20 SCHOOL YARD BULLYING THREATS ARE MADE AGAIN, AND BECAUSE
21 THEY SUED COAST, BECAUSE COAST DIDN'T ROLL OVER, AS
22 PLAINTIFFS HAD HOPED.

23 AND SO THE ESSENCE OF THE UNCLEAN HANDS
24 DOCTRINE IS THAT ANY COURT WILL NOT COME TO THE AID OF A
25 WRONGDOER. AND IF THERE'S EVER A WRONGDOER, THAT'S
26 RAYMOND NOVELLI.

1 THE COURT: THANK YOU.

2 MR. SHAW: YOUR HONOR, MAY I BE HEARD?

3 IN THE LAST 30 MINUTES OF THE FILIBUSTER,
4 WHAT I'VE HEARD IS ARGUING THE EVIDENCE. AND THAT'S NOT
5 WHAT A NONSUIT IS. IS THERE EVIDENCE OR IS THERE NOT? AND
6 NOW LET ME JUST TURN TO CAUSATION BECAUSE MR. RIVIN STARTED
7 THERE AND THEN MR. MOSHENKO WANTS TO ADD A COUPLE OF
8 POINTS.

9 ON CAUSATION, WE ARE NOT ARGUING WRONGFUL
10 CONDUCT. WE'RE ARGUING CAUSATION. AND I THINK IT CAN'T BE
11 MORE CLEARLY STATED THAN MR. MITCHELL ON -- AT PAGE 1185,
12 LINES 14 THROUGH 19, OF THE TRANSCRIPT, WHEN I ASKED HIM:

13 "MR. MITCHELL, WITH YOUR
14 SPECIAL TRAINING, KNOWLEDGE,
15 SKILL AND EXPERTISE, WHAT
16 OPINION HAVE YOU FORMED IN THIS
17 CASE?

18 "ANSWER: IT IS MY
19 OPINION THAT THE ACTIONS AND
20 CONDUCT OF THE DEFENDANTS CAUSED
21 DAMAGE TO YOUR CLIENTS, THE
22 PLAINTIFFS."

23 THAT'S AN EXPERT OPINION IN THIS CASE.

24 AND AS FAR AS NONSUIT IS CONCERNED, THAT
25 SHOULD BE FULL STOP, BUT WE DEVELOPED IT FURTHER.

26 I ASKED HIM AT PAGE 1307, LINES 6 THROUGH

1 11:

2 "QUESTION: WHAT ACTS,
3 CONDUCT AND BEHAVIOR OF COAST
4 CAUSED THE DAMAGE TO PLAINTIFFS?

5 "ANSWER: THE MASS
6 TRANSFER OF THE MEMBERS."

7 THEN AT 1308 I DEVELOPED IT EVEN FURTHER.

8 1308, LINE 1:

9 "QUESTION: WHEN YOU SAY
10 'MASS TRANSFER,' DESCRIBE FOR ME
11 WHAT YOU MEAN.

12 "ANSWER: I'VE READ THE
13 REPORTS THAT COAST GENERATED
14 INDICATING THAT THEY SENT
15 LETTERS TO 34,000 PEOPLE. AND
16 OF THE 34,000 THAT THEY
17 TRANSFERRED IN THE MASS
18 TRANSFER, 22,000 OF THEM MOVED
19 TO OTHER RESORTS.

20 "QUESTION: AWAY FROM THE
21 PLAINTIFFS?

22 "ANSWER: RIGHT."

23 WHAT THIS DOES FOR PURPOSES OF A NONSUIT IS
24 ESTABLISH WHAT THIS COURT -- WITH THIS COURT THAT BASED ON
25 THEIR OWN EVIDENCE, THE CD, THE 34,000 LETTERS WENT OUT,
26 AND 22,000 PEOPLE LEFT THE PLAINTIFFS' RESORT AND WENT TO

1 ANOTHER RESORT. THAT'S CAUSATION.

2 MR. RIVIN CAN ARGUE ALL HE WANTS ABOUT
3 CONFLICTING EVIDENCE AND LETTERS FROM MEMBERS, WHICH WE DID
4 SUBMIT. THERE ARE LETTERS FROM MEMBERS THAT SAY, AND THE
5 COURT WILL RECALL, AND IT'S PART OF OUR GRID, BUT I
6 DIDN'T -- DIDN'T WANT TO PUT IN -- WE FILED 100 PAGES OF
7 OPPOSITION TO THE NONSUIT. I DIDN'T WANT TO PUT IN EVERY
8 CENTILLA OF EVIDENCE IN THE BRIEFS.

9 BUT THE COURT MAY RECALL THAT PARTIES SAID,
10 "WE GOT A LETTER FROM COAST. WE NO LONGER WANT TO BE A
11 PART OF YOUR RESORT. WE'VE TRANSFERRED TO ANOTHER RESORT."
12 THERE WERE LETTERS TO THAT EFFECT. THERE ARE SPECIFIC
13 LETTERS OF CAUSATION, BUT THIS SUMS UP THE CAUSATION ISSUE.

14 THEN MR. NOVELLI'S TESTIMONY WHERE HE
15 SAYS -- AND I QUOTE FROM PAGE 4717, LINE 25, TO 4718. HE
16 SAYS THAT YOU'LL NOTICE IN 1998 AND 1999 WE ONLY HAD 457
17 AND 314. AND THAT WAS AS A DIRECT RESULT OF WHAT HAPPENED
18 BETWEEN US AND COAST. IN OTHER WORDS, IT'S WHERE WE
19 JUST -- WE WERE DEVASTATED BY THIS ACTION.

20 AND HE IS REFERRING -- I'M READING IT OUT OF
21 CONTEXT OF THE ENTIRE PAGE, BUT HE IS REFERRING THAT WHAT
22 HAPPENED WAS MEMBER SALES DROPPED BECAUSE OF THE COAST
23 LETTERS THAT WENT OUT. SO HERE WE HAVE CAUSATION, NOT
24 WRONGFUL CONDUCT, BUT WHAT HAPPENED.

25 AND THEN FINALLY, YOUR HONOR, MR. NOVELLI'S
26 TESTIMONY AT 4819 WHERE HE SAYS:

1 "DO YOU HAVE PERSONAL
2 KNOWLEDGE OF THE APPROXIMATE
3 NUMBER OF COAST TO COAST
4 MEMBERS, THE 35,000 FIGURE, THAT
5 STOPPED PAYING THE PLAINTIFFS
6 DUES?

7 "ANSWER: YES."

8 AND THEN HE GOES ON TO TALK ABOUT -- AND I'M
9 SKIPPING A LITTLE BIT, BUT --

10 "QUESTION: AS A RESULT
11 OF THE STOPPED-PAYING-DUES
12 EVENT, DID THE PLAINTIFFS LOSE
13 INCOME?

14 "ANSWER: YES."

15 "QUESTION: DID THE
16 PLAINTIFFS LOSE RESORTS?

17 "ANSWER: YES, WE DID."

18 SO NOT WRONGFUL CONDUCT, AS MR. RIVIN WOULD
19 HAVE THE COURT BELIEVE, BUT THE RESULT OF THE WRONGFUL
20 CONDUCT. THE CAUSATION, THE CAUSAL CONNECTION. THE
21 LETTERS WENT OUT. AND WHAT WE HAVE IS THE LOST MEMBERS AND
22 THE LOST PAYMENT OF DUES FOR THE CAUSATION.

23 SO JUST TO SUM UP ON THE CAUSATION ISSUE --
24 AND THEN I WON'T EVEN GO INTO MR. MALPASS'S TESTIMONY
25 BECAUSE THAT TALKED ABOUT VIOLATION OF THE AUTOMATIC STAY
26 THAT CAUSED DAMAGE. AND HE TESTIFIES AS AN EXPERT THAT IT

1 CAUSED DAMAGE TO THE PLAINTIFF.

2 WE HAVE SIGNIFICANT, SUBSTANTIAL EVIDENCE
3 FOR A NONSUIT, TO GET OVER A NONSUIT OF CAUSATION FROM
4 MR. MITCHELL, MR. MALPASS, MR. NOVELLI, MR. RANDALL HIMSELF
5 SAYING THAT IT WAS GOING -- THAT THE LETTERS WOULD HAVE
6 CAUSED DAMAGE.

7 AND, YOUR HONOR, ON THE GRID THAT'S 2206,
8 I'VE ADDED OTHER TESTIMONY, IF THE COURT WANTED MORE
9 TESTIMONY ON THE ISSUE OF CAUSATION.

10 SO THE STANDARD IS -- AND MR. RIVIN TALKED
11 ABOUT INFERENCES. THE STANDARD FOR NONSUIT IS THE
12 PLAINTIFFS' EVIDENCE -- AND NOW I'M QUOTING -- MUST BE
13 ACCEPTED AS TRUE, AND CONFLICTING EVIDENCE MUST BE
14 DISREGARDED. THE COURT MUST GIVE TO THE PLAINTIFFS
15 EVIDENCE ALL THE VALUE TO WHICH IT IS LEGALLY ENTITLED,
16 INCLUDING EVERY LEGITIMATE INFERENCE WHICH MAY BE DRAWN
17 FROM THE EVIDENCE IN PLAINTIFFS' FAVOR.

18 IN THIS CASE, JUST BASED ON WHAT WE FILED IN
19 THE BRIEF, THERE'S MORE THAN ENOUGH, AND WE'VE ALSO ADDED
20 MORE ON TO THE GRID.

21 I DO WANT TO TALK ABOUT UNCLEAN HANDS FOR A
22 MOMENT, BUT I'LL LET MR. MOSHENKO ADDRESS CAUSATION. AND
23 THEN I'D LIKE TO FINISH WITH THE UNCLEAN HANDS.

24 MR. MOSHENKO: THANK YOU, YOUR HONOR.

25 YOUR HONOR, MR. RIVIN CONTENDS THAT THE
26 EVIDENCE OF CAUSATION SHOULD NOT BE CONSIDERED BY THE COURT

1 BECAUSE MR. RIVIN CONTENDS ITS CONCLUSIONARY. THAT IN
2 ITSELF IS AN ACKNOWLEDGEMENT AND AN ADMISSION THAT THERE
3 WAS EVIDENCE OF CAUSATION IN THE RECORD. SHOULD THE COURT
4 CONSIDER IT TO BE CONCLUSIONARY?

5 I SUBMIT TO THE COURT THAT GIVEN THE
6 STANDARD APPLICABLE TO THE COURT IN EVALUATING AND WEIGHING
7 WHAT IS BEFORE THE COURT, THE COURT SHOULD NOT DO THAT.
8 THE COURT SHOULD, AS THE LAW SAYS, GIVE EVERY REASONABLE
9 INFERENCE THAT CAN BE GIVEN TO THE EVIDENCE OF CAUSATION,
10 SHOULD BELIEVE THE EVIDENCE IS TRUE, SHOULD DISREGARD
11 CONFLICTING EVIDENCE, SHOULD VIEW THAT EVIDENCE IN THE
12 LIGHT MOST STRONGLY IN FAVOR OF THE PLAINTIFFS, AND SHOULD
13 VIEW IT IN THE -- AGAINST THE DEFENDANTS IN THE LIGHT MOST
14 STRONGLY.

15 AND SO THIS IS SOME OF THE EVIDENCE OTHER
16 THAN WHAT MR. SHAW HAS CITED TO THE COURT, AND OTHER THAN
17 WHAT MR. RIVIN HAS REFERRED TO.

18 YOUR HONOR, WE HAVE THE MARY URIOSTE
19 DOCUMENTATION THAT'S BEFORE THE COURT THAT TELLS THE JUDGE
20 AND THE JURY AND THIS WHOLE COURTROOM THAT SHE SPENT
21 SEVERAL MONTHS CAUSING THE TRANSFER OF 35,000 MEMBERS FROM
22 PLAINTIFFS' RESORTS TO OTHER RESORTS.

23 WE HAVE EXHIBIT 1808, WHICH IS THE
24 PLAINTIFF -- THE DEFENDANTS' OWN RECORDS TELLING US THAT
25 THERE WERE 35,000 TRANSFERS, AND IT GAVE THE FORMER RESORT
26 AND THE CURRENT RESORT. THAT IS A CONFESSION OF TRANSFERS

1 OF MEMBERS.

2 SHOULD THE COURT SAY, WELL, THAT'S
3 CONCLUSIONARY? THE COURT SHOULD VIEW THAT IN THE LIGHT
4 MOST STRONGLY FOR THE PLAINTIFFS AND GIVE IT EVERY
5 REASONABLE INFERENCE THAT CAN BE DRAWN FROM THAT EVIDENCE,
6 FROM THE URIOSTE EVIDENCE.

7 MR. RIVIN SAYS WE AGREE THAT THEIR
8 EVIDENCE -- THAT THEIR OWN RECORDS DON'T ESTABLISH
9 CAUSATION. WE AGREE WITH NOTHING OF THE SORT, YOUR HONOR.
10 AND THAT IS A DEFENSE SPIN PUT ON THEIR OWN CONTENTIONS.
11 AND YOUR HONOR SHOULD DISREGARD THEIR CONTENTION AND THEIR
12 SPINS PUT ON THE STATE OF THE EVIDENCE, BECAUSE THAT'S WHAT
13 THE LAW SAYS YOUR HONOR SHOULD DO.

14 NOW, THERE'S ALSO EVIDENCE -- I'LL CALL IT
15 MORE GENERAL EVIDENCE FROM THE HISTORY OF THE INDUSTRY AND
16 THE HISTORY OF WHAT HAPPENED TO THE PLAINTIFFS AND THEIR
17 MEMBERS. THIS COMES FROM A NUMBER OF DIFFERENT SOURCES,
18 YOUR HONOR.

19 BUT BASICALLY WHAT THE EVIDENCE SHOWS AS
20 DATING BACK TO THE LATE 1980'S, I'LL CALL IT THE NOVELLI
21 SYSTEM. ALTHOUGH IT HAD RECURRING BANKRUPTCIES, AND
22 ALTHOUGH IT WAS INVOLVED IN COMPANIES WITH CONTINUING
23 FINANCIAL DIFFICULTIES CONTINUED TO GROW AND THRIVE AND ADD
24 MEMBERS. AND THE MEMBER LEVELS WERE GAINING DURING THESE
25 HARD-TIME SITUATIONS.

26 AS OF THE MID-1990'S THEY BEGAN TO LEVEL

1 OFF. AND IF THERE WAS ANY FALL AT ALL, IT WAS A MINOR FALL
2 IN THE NUMBER OF MEMBERS.

3 THEN THE EVIDENCE IS CLEAR THE COAST LETTERS
4 WENT OUT IN OCTOBER, NOVEMBER, DECEMBER, JANUARY OF 1997
5 AND '98, AND THAT THERE WAS A 65-PERCENT DROP. YOU CANNOT
6 DISREGARD THE TESTIMONY THAT THERE WAS A 65-PERCENT DROP,
7 WHICH IS EXPLAINED AND BACKED BY THE PLAINTIFFS' RECORDS.
8 AND YOU CANNOT DISREGARD THE HISTORY THAT PRECEDED THAT
9 65-PERCENT DROP, YOUR HONOR.

10 AND SO WHAT IS THERE THAT WAS NEW IN 1997
11 THAT DIDN'T EXIST IN 1993, 4, 5, 6? BANKRUPTCIES WERE
12 ALWAYS THERE. RECEIVERS WERE ALWAYS THERE. FINANCIAL
13 DIFFICULTIES WERE ALWAYS THERE. WHAT'S NEW? THE COAST
14 LETTER, THE COAST RELEASE OF MEMBER LISTS. THE COAST
15 CALLING COMPETITORS AND SAYING, "WE WANT YOU TO TAKE THE
16 PLAINTIFFS' MEMBERS," THE COAST CONDUCT, ALL THE COAST
17 CONDUCT, NOT JUST THE LETTERS THAT WERE PRESENTED, BUT ALL
18 THE COAST CONDUCT.

19 THAT'S WHAT'S NEW IN '97. NO MATTER WHAT
20 HAPPENED IN THE PAST, NO MATTER HOW BAD THINGS GOT
21 FINANCIALLY, MR. RIVIN WANTS TO SAY THAT THE RESORTS WERE
22 IN SHAMBLES. IF THE RESORTS WERE IN SHAMBLES, THE
23 MEMBERSHIP DIDN'T ABANDON THE PLAINTIFF RESORTS THE WAY
24 THEY DID IN 1998 AND 1999. WHY? BECAUSE COAST CAUSED THEM
25 TO GO. COAST TOLD THEM TO GO. COAST OFFERED THEM A
26 SPECIAL DEAL. COAST GAVE THEM A WAY TO AVOID HAVING TO PAY

1 ON THEIR CONTRACT. COAST GAVE THEM REDUCTIONS OF DUES.
2 COAST WENT TO COMPETITOR DEVELOPERS AND SAID, "YOU WILL DO
3 THIS. YOU WILL GIVE THESE PEOPLE SPECIAL DEALS."

4 YOUR HONOR, THIS IS CONDUCT, BUT IT IS ALSO
5 CONDUCT THAT WHEN YOU LOOK AT THE HISTORY OF HOW THE
6 MEMBERSHIP WAS GROWING OR LEVELING AND THEN DROPPED
7 DRASTICALLY -- IT'S ALL IN THE RECORD -- THE COURT CAN ONLY
8 CONCLUDE THAT WHAT'S NEW? THE COAST CONDUCT.

9 IS IT A REASONABLE INFERENCE TO DRAW THAT
10 THE CONDUCT OF COAST CAUSED THE DROP-OFF OF 65 PERCENT? I
11 THINK IT'S A REASONABLE INFERENCE TO DRAW. THE COURT IS
12 OBLIGATED TO DRAW EVERY REASONABLE INFERENCE.

13 SHOULD WE CONCLUDE, AS MR. RIVIN ARGUES,
14 THERE ARE OTHER CAUSES OR THERE COULD HAVE BEEN OTHER
15 CAUSES? YES. YOU CAN CONCLUDE THERE COULD HAVE BEEN OTHER
16 CAUSES. BUT, YOU KNOW, YOUR HONOR, THE TEST IS SUBSTANTIAL
17 FACTOR. IT'S NOT SOLE CAUSE. IT'S NOT BUT FOR CAUSE.
18 YOUR HONOR ALREADY RULED THAT IT'S NOT BUT FOR CAUSE. THE
19 TEST IS WAS THE CONDUCT OF COAST A SUBSTANTIAL FACTOR IN
20 CAUSING SOME DAMAGE TO OCCUR.

21 NOW, I HEARD MR. RIVIN SAY WHAT'S MISSING IS
22 THE LINK BETWEEN THE CONDUCT AND THE DAMAGE, OR THE LINK
23 BETWEEN THE CAUSATION AND THE DAMAGE. WELL, YOU KNOW, WE
24 HAD DR. BIERLEY HERE, AND YOU KNOW THE ARGUMENT ABOUT
25 THAT. WE BELIEVE THAT THERE WAS CAUSATION LINK.

26 BUT EVEN WITHOUT DR. BIERLEY, THAT SAME

1 TESTIMONY THAT DR. BIERLEY WOULD HAVE OFFERED CAME IN
2 THROUGH THE HISTORY AND THROUGH MR. NOVELLI'S TESTIMONY OF
3 WHAT HAPPENED AFTER THE MAIN CHANGE THAT OCCURRED, THE
4 COAST CONDUCT IN 1997 OCCURRED.

5 MR. RIVIN TALKS ABOUT ONE OF THE PRIMARY
6 REASONS FOR MEMBERS LEAVING. YOUR HONOR, THAT'S AN
7 ADMISSION THAT MEMBERS LEFT AFTER OCTOBER OF 1997. IT
8 DOESN'T MATTER IF THERE IS A PRIMARY REASON OR A SECONDARY
9 REASON. MR. RIVIN TALKED ABOUT ALL THE OTHER REASONS.
10 THAT IS AN ADMISSION THAT COAST'S CONDUCT WAS ONE REASON.
11 AND THERE WERE OTHER REASONS.

12 YOUR HONOR, ALL THE PLAINTIFFS MUST DO TO
13 GET PAST THIS CAUSATION ISSUE IS SHOW SUFFICIENT EVIDENCE
14 FROM WHICH THE COURT CAN REASONABLY INFER OR CONCLUDE THAT
15 ONE MEMBER LEFT AND STOPPED PAYING. ONE MEMBER. AND
16 THAT'S CAUSATION OF SOME DAMAGE.

17 OBVIOUSLY WE SAY WHEN 22,000 PEOPLE WERE
18 SHOWN BY THE EVIDENCE TO HAVE JUMPED SHIP, SOME OF THOSE
19 PEOPLE WENT AWAY BECAUSE COAST -- OF WHAT COAST DID. SOME
20 OF THEM WENT AWAY BECAUSE OF THE LETTERS, THE 35,000
21 LETTERS, BECAUSE COAST GAVE AWAY LISTS, BECAUSE COAST
22 CALLED COMPETITORS AND SAID, "GO AFTER THESE PEOPLE,"
23 BECAUSE COAST HAD 500 TELEPHONE CALLS A DAY TELLING PEOPLE
24 THEY WERE TRANSFERRED, BECAUSE COAST THEMSELVES PRESENTED
25 LETTERS TO THE COURT AND TO THE JURY THAT SAID, "COAST
26 TRANSFERRED ME, I'M GOING AWAY," OR "COAST TOLD ME THAT YOU

1 ARE DISSOLVED. I'M GOING AWAY." BECAUSE OF THE -- BECAUSE
2 COAST DISREGARDED THE ANTI-RAIDING RULE, BECAUSE COAST
3 DISREGARDED AND BREACHED THE TRANSFER RULES, BECAUSE COAST
4 BREACHED THE PRIMARY PRODUCT RULE. THOSE ARE PARTS OF THE
5 REASONS ALSO THAT WE -- THAT DAMAGE WAS CAUSED.

6 THE PRIMARY PRODUCT RULE BASICALLY WAS
7 THROWN OUT THE WINDOW. WHO CARES WHETHER THE NEW RESORT
8 THAT COAST TRANSFERRED THEM TO WAS CONSIDERED OR NOT -- IT
9 WAS COMPLETELY NOT CONSIDERED. THE ONLY PRODUCT THAT COAST
10 WAS FOCUSED ON IN SENDING 35,000 LETTERS WAS THE COAST
11 MEMBERSHIP.

12 EVERY LETTER THAT SAYS, "I'M LEAVING BECAUSE
13 I WANT COAST" IS EVIDENCE THAT COAST BREACHED THE PRIMARY
14 PRODUCT RULE AND CAUSED PEOPLE TO DO THAT.

15 REMEMBER OUR MANAGERS, OUR RESORT MANAGERS
16 CAME BEFORE YOUR HONOR AND VERY EARLY IN THE TRIAL
17 TESTIFIED THAT THE MEMBERS CAME AROUND, AND THEY SAID THAT
18 THERE WAS CONFUSION. THEY SAID, "WE THOUGHT YOU WERE
19 CLOSED. WE GOT THIS LEFT FROM COAST. WE THOUGHT YOU WERE
20 CLOSED."

21 MR. RYMAN TESTIFIED THAT THOUSANDS OF
22 MEMBERS WOULD HAVE UNDERSTOOD THAT COAST MOVED THEM FROM
23 ONE OF OUR RESORTS TO ANOTHER RESORT FROM THE CONTENT OF
24 THE LETTER. THE LETTERS WERE FALSE. THEY TOLD PEOPLE
25 RAY NOVELLI TOOK A.S.R. OUT, WHEN HE DIDN'T. THAT CAUSED
26 PEOPLE TO BELIEVE THAT A.S.R. WAS OUT AND TAKEN OUT BY

1 RAY NOVELLI. THAT WAS FALSE, AND THAT CAUSED PEOPLE TO
2 LEAVE.

3 IF THEY LEFT BECAUSE THEY WANTED TO STAY
4 WITH COAST, IT DOESN'T CHANGE THE FACT THE FALSE LETTER
5 CAUSED PEOPLE TO MISUNDERSTAND THAT NOVELLI TOOK A.S.R. OUT
6 AND LEAVE.

7 THE COURT CANNOT CONCLUDE, GIVEN ALL OF THIS
8 MISCONDUCT, THE BREACHES, THE VIOLATIONS OF THE STAYS, THE
9 OFFERS OF SPECIAL DEALS AND CHEAPER DUES, DIDN'T CAUSE AT
10 LEAST ONE MEMBER TO QUIT AND GO AWAY BECAUSE OF WHAT COAST
11 DID. MR. BUTLER GOT TRANSFERRED 1200 MEMBERS FROM
12 SACRAMENTO AND NORTHERN CALIFORNIA DOWN INTO MEXICO. 80
13 TOOK THE DEAL. 60 STAYED AFTER A YEAR LATER. THESE
14 TRANSFERS CAUSED MEMBERS TO GO TO MEXICO RATHER THAN TO THE
15 PLAINTIFFS' RESORTS. THAT'S IN THE EVIDENCE.

16 AS TO THE ARGUMENTS ABOUT UNCLEAN HANDS, THE
17 PLAINTIFFS DIDN'T BRIBE THE DEFENDANTS' EMPLOYEES AS THE
18 CASE CITED BY DEFENSE STATES. THE PLAINTIFFS DIDN'T TELL
19 THE DEFENDANTS' EMPLOYEES TO LIE. THE PLAINTIFFS DIDN'T
20 ENGAGE IN ANY MISCONDUCT DIRECTED TO COAST. COAST WAS
21 ENGAGING IN A MISCONDUCT DIRECTED TOWARDS THE PLAINTIFFS.

22 THE PLAINTIFFS WERE NAIVE ENOUGH OR STUPID
23 ENOUGH OR TRUSTING ENOUGH TO BELIEVE THAT THEY COULD
24 DISAFFILIATE FROM THE DEFENDANTS WITHOUT PENALTY AND
25 WITHOUT THE DEFENDANTS RAIDING THEIR MEMBERS. AND HAD THEY
26 PERHAPS HAD ABILITY TO FORECAST THE FUTURE, THEY WOULD HAVE

1 ACTED DIFFERENTLY. THEY DIDN'T, AND COAST WAS ALLOWED TO
2 ACT -- REMEMBER MR. RYMAN SAYING, "WE HAD TO ACT QUICKLY.
3 WE HAD TO ACT IMMEDIATELY."

4 AND SO WHERE IS THE UNCLEAN HANDS? THERE'S
5 NO UNCLEAN HANDS ON THE PLAINTIFFS' SIDE. THERE'S NO
6 EVIDENCE OF THEFT OF MEMBER LISTS, AS COUNSEL STATES.
7 THERE'S NO EVIDENCE THAT THE PLAINTIFFS MISAPPROPRIATED
8 ANYTHING. THE MISAPPROPRIATIONS WENT THE OTHER DIRECTION,
9 YOUR HONOR.

10 AND EVEN -- IF THEY WANT TO ARGUE ABOUT
11 THAT, YOUR HONOR SHOULD DISREGARD IT, BECAUSE THE COURT IS
12 OBLIGATED TO DISREGARD THOSE CONFLICTING CONTENTIONS AND
13 THE CONFLICTING EVIDENCE AND VIEW THE EVIDENCE MOST
14 STRONGLY IN FAVOR OF THE PLAINTIFFS.

15 THEY EVEN WANT TO SAY THAT OUR WARNING,
16 "DON'T MESS WITH OUR MEMBERS," IS WRONG. YOUR HONOR,
17 THAT'S AN ELEMENT OF THE CAUSE OF ACTION OF WRONGFUL
18 INTERFERENCE AND ACTION TAKEN TO PROTECT THE
19 CONFIDENTIALITY OF YOUR MEMBER LIST. HOW CAN SOMETHING
20 THAT THE LAW OBLIGATES US TO DO BE CONSIDERED WRONGFUL AND
21 UNCLEAN?

22 SORRY FOR GETTING SO EXCITED.

23 MR. RIVIN: YOUR HONOR, ONE MINUTE, IF I MAY, ON
24 THE CAUSATION ISSUE.

25 PLAINTIFFS TOOK OVER A MONTH AND A HALF TO
26 PUT ON THEIR CASE, AND WHAT THIS ALL BOILS DOWN -- WHAT

1 THEIR CLAIM OF CAUSATION BOILS DOWN TO IS THE CONCLUSIONARY
2 STATEMENT BY ROBERT MITCHELL, BASED ON COAST RECORDS AND A
3 CONCLUSIONARY STATEMENT BY RAY NOVELLI THAT 65 PERCENT OF
4 THE PEOPLE STOPPED PAYING.

5 MR. NOVELLI DIDN'T EVEN SAY 65 PERCENT OF
6 PEOPLE -- HE DIDN'T EVEN SAY THERE WAS A 65-PERCENT DROP.
7 HE SIMPLY MADE THE CONCLUSIONARY STATEMENT THAT 65 PERCENT
8 STOPPED PAYING. NO LINKAGE. NO CAUSATION TO WHAT COAST IS
9 ALLEGED TO HAVE DONE.

10 WE'VE HEARD FROM NO MEMBERS. WE'VE SEEN NO
11 RECORDS TO BACK UP THESE CONCLUSIONARY STATEMENTS. THERE
12 SIMPLY IS NO EVIDENCE, OTHER THAN THESE TWO CONCLUSIONARY
13 STATEMENTS AS TO CAUSATION. AND THAT'S IT.

14 AND WHAT WE DO KNOW IS THE EVIDENCE -- THE
15 INCREDIBLE, OVERWHELMING AMOUNT OF OTHER EVIDENCE
16 ESTABLISHING THAT PLAINTIFFS WERE IN A FREE-FALL BECAUSE OF
17 THEIR BANKRUPTCIES, BECAUSE OF THE TERMINATION OF MEMBER
18 CONTRACTS, BECAUSE OF ALL THE WRONGFUL CONDUCT THEY ENGAGED
19 IN.

20 AND ONE OTHER COMMENT, YOUR HONOR, THAT, AS
21 I SAID EARLIER, THE TESTIMONY OR THE EVIDENCE REGARDING
22 MARY URIOSTE, SO-CALLED TRANSFERS, AGAIN, THAT'S COAST'S
23 INTERNAL RECORDS SHOWING WHAT COAST DID INTERNALLY. IN
24 ORDER FOR PLAINTIFFS TO ESTABLISH THE LINK, THEY HAVE GOT
25 TO SHOW IT THROUGH THEIR OWN RECORDS. THEY HAVE TO SHOW
26 THE PEOPLE THAT THEY LOST AS A RESULT OF WHAT COAST DID.

1 AND THEY HAVE TO SHOW IT WITH AT LEAST REASONABLE
2 PROBABILITY IN ORDER TO OVERCOME A NONSUIT MOTION.

3 THANK YOU.

4 MR. SHERMAN: YOUR HONOR, ONE MINUTE OF
5 UNCLEAN HANDS.

6 MR. MOSHENKO JUST GOT IT DEAD WRONG. THIS
7 COURT GETS TO WEIGH CREDIBILITY. THIS COURT GETS TO WEIGH
8 THE EVIDENCE.

9 WE'VE GOT THE BURDEN, ADMITTEDLY. BUT BY
10 THE CLOSE OF PLAINTIFFS' CASE, THERE ARE SEVERAL THINGS
11 THAT BECOME APPARENT. ONE OF THEM IS MR. NOVELLI AND HIS
12 COMPANIES COME INTO THIS COURT WITH UNCLEAN HANDS. AND
13 THIS COURT GETS TO JUDGE FOR ITSELF THE DEMEANOR AND
14 CREDIBILITY AND LACK OF CREDIBILITY OF THE PLAINTIFFS'
15 WITNESSES ON THESE ISSUES.

16 AND WE SUBMIT.

17 THE COURT: ALL SIDES SUBMIT?

18 MR. MOSHENKO: YOUR HONOR, JUST ONE LAST COMMENT,
19 AND THAT IS, AS TO MR. RIVIN'S ARGUMENT THAT THE TESTIMONY
20 ABOUT THE LOSS OF MEMBERS IS CONCLUSIONARY, WHERE IS THE
21 BACKUP EVIDENCE TO SHOW IT? UNLESS I RECALL IT WRONG, YOUR
22 HONOR RULED THAT THE BACKUP EVIDENCE THAT WE OFFERED
23 THROUGH DR. BIERLEY AND THROUGH LEO NOVELLI WAS NOT
24 NECESSARY TO PROVE CAUSATION; THAT IT WAS DAMAGES; THAT IT
25 WAS EVIDENCE OF THE AMOUNT OF THE DAMAGES BUT NOT NECESSARY
26 TO PROVE CAUSATION. WE WERE NOT ALLOWED TO PRESENT THE

1 BACKUP.

2 IT WILL BE IMPROPER NOW FOR THE DEFENDANTS
3 WHO ARGUED SO STRONGLY, "DON'T LET THAT BACKUP INFORMATION
4 COME IN," TO NOW SAY, "OH, YOU LOSE. YOU DIDN'T HAVE
5 BACKUP INFORMATION."

6 MR. SHAW: YOUR HONOR, JUST TO FINISH, 1808 IS THE
7 INFORMATION. MR. RIVIN SAYS, "WHERE IS THE PLAINTIFFS'
8 INFORMATION?" THE INFORMATION COMES FROM 1808, WHICH IS
9 THE DEFENDANTS' INFORMATION REGARDING THE NUMBERS OF
10 LETTERS THAT WERE SENT OUT AND WHO LEFT THE PLAINTIFFS'
11 RESORTS. THAT'S THE BASIS FOR MR. MITCHELL'S TESTIMONY AND
12 MR. NOVELLI.

13 FINALLY, ON UNCLEAN HANDS, ALL THE
14 PLAINTIFFS DID FOR TRAVEL AMERICA WAS TAKE OVER A COMPANY,
15 THOUSAND ADVENTURES, THAT WAS FAILING. AND WE'VE HEARD
16 ABOUT THE TOMMY CLOUD RANCH. THEY WANT TO NOW ATTACH ALL
17 THE THOUSAND ADVENTURES PROBLEMS WITH THE ATTORNEY GENERALS
18 AND THE SEVEN BOXES THAT WE SAW TO TRAVEL AMERICA FOR
19 UNCLEAN HANDS. CAN'T DO IT, BECAUSE IT WASN'T TRAVEL
20 AMERICA. IT WAS THOUSAND ADVENTURES.

21 AS FAR AS FIRST NATIONWIDE IS CONCERNED, AND
22 AS FAR AS APOLLO IS CONCERNED, THEY PURCHASED MEMBERSHIP
23 CONTRACTS OUT OF BANKRUPTCY. THE BANKRUPTCY COURT APPROVED
24 THIS. THAT CAN'T BE UNCLEAN HANDS. THAT'S THE EVIDENCE OF
25 HOW THEY GOT THESE MEMBERS.

26 MR. SHERMAN WANTS TO SAY THEY GOT THESE

1 MEMBERS THROUGH UNCLEAR HANDS AND STEALING MEMBERS LISTS.
2 I ECHO MR. MOSHENKO. THERE'S NO EVIDENCE OF STEALING ANY
3 LISTS. WHAT THE EVIDENCE IS, FROM MR. MALPASS AND
4 MR. JOSEPH AND MR. NOVELLI AND MR. MITCHELL, IS THAT THEY
5 GOT THESE MEMBERSHIP CONTRACTS OUT OF BANKRUPTCIES. THAT'S
6 WHERE THEY CAME FROM. BANKRUPTCY COURTS APPROVED THEM.
7 THERE ARE BANKRUPTCY COURT ORDERS THAT APPROVED THESE.
8 THAT'S NOT UNCLEAR HANDS. THAT'S WHAT YOU'RE -- UNILOGIC
9 TALKS ABOUT. UNILOGIC TALKS ABOUT -- AND I'M QUOTING FROM
10 THEIR OWN BRIEF -- THAT OBTAINING THE CONTRACTS BY IMPROPER
11 MEANS, BRIBERY AND NONDISCLOSURE.

12 THESE CONTRACTS WEREN'T OBTAINED BY IMPROPER
13 MEANS. THESE CONTRACTS WERE OBTAINED BY BANKRUPTCY COURT
14 ORDERS.

15 I DISAGREE WITH MR. SHERMAN THAT THE COURT
16 CAN WEIGH THE EVIDENCE ON THIS. I BELIEVE A NONSUIT IS
17 ACCEPTING THE PLAINTIFFS' EVIDENCE; BUT EVEN IF THE COURT
18 DID WEIGH THE EVIDENCE, THERE'S NO UNCLEAR HANDS OF HOW THE
19 PLAINTIFFS OBTAINED MEMBERS. THEY'RE ALL BANKRUPTCY COURT
20 ORDERS AND BUSINESS NEGOTIATIONS. NO EVIDENCE OTHERWISE.

21 MR. SHERMAN: YOUR HONOR, UNCLEAR HANDS IS A MOTION
22 FOR JUDGMENT. I JUST WANTED TO MAKE SURE IT WAS CLARIFIED.
23 NOT NONSUIT.

24 THE COURT: ALL SUBMIT?

25 MR. RIVIN: YES.

26 MR. MOSHENKO: YES.

1 THE COURT: DID YOU DO THAT LITTLE SYNOPSIS?

2 MR. MOSHENKO: YES, YOUR HONOR. MAY I HAND IT TO
3 EVERYONE?

4 THE COURT: DO YOU AGREE WITH THIS STATUS REPORT?

5 MR. SHERMAN: YEAH, EXCEPT FOR THE FACT THAT YOUR
6 HONOR DIDN'T ASK FOR THIS. IT'S FINE. BUT THIS ISN'T WHAT
7 WE DISCUSSED YESTERDAY, NOT AT ALL. IT'S NOT EVEN IN THE
8 SAME COURTROOM.

9 MR. SHAW: YOUR HONOR, I WAS ASKED TO GIVE A
10 SYNOPSIS OF THE CAUSES OF ACTION, AND I WENT OVER WITH THE
11 CLERK WHAT WAS LEFT AS YOUR HONOR REQUESTED.

12 MR. SHERMAN: YOUR HONOR, WHAT WE TALKED ABOUT
13 YESTERDAY -- AND I DON'T THINK YOUR HONOR COULD HAVE BEEN
14 ANY CLEARER -- IN THE LAST COLLOQUY WE HAD AT THE END OF
15 THE DAY, WAS AS WE READ TO THE COURT FROM THE RUTTER GUIDE
16 IN CONNECTION WITH THE MOTION FOR NONSUIT, SINCE PLAINTIFFS
17 HAVE THE ABSOLUTE RIGHT TO REOPEN WITH ADMISSIBLE EVIDENCE,
18 WE WERE GOING TO BE TOLD WHERE THEY WERE GOING TO GO WITH
19 THEIR ADMISSIBLE EVIDENCE. AND THE DISCUSSION THAT WE HAD
20 WAS AS TO ALL GROUNDS ASSERTED IN THE NONSUIT.

21 AND, I MEAN, THIS IS A VERY INTERESTING
22 SUMMARY. IT LOOKS ACCURATE. BUT IT'S NOT RESPONSIVE.

23 THE COURT: WELL, AS TO THE REMAINING DEFENDANTS,
24 LET'S TAKE THE AFFINITY GROUP. THAT GOES TO THE ALTER EGO.

25 MR. SHERMAN: I MISSED THAT. YOU'RE RIGHT. THAT'S
26 INACCURATE.

1 MR. SHAW: YOUR HONOR, MY UNDERSTANDING IS THAT IT
2 DOESN'T. AS I FINISHED MY ARGUMENT ON ALTER EGO, THE ALTER
3 EGO ISSUE HAS TO DO -- WHERE CAMP COAST TO COAST -- IS
4 AFFINITY GROUP LIABLE FOR CAMP COAST TO COAST ACTIONS,
5 THAT, THE COURT HAS RULED. THERE IS NO ALTER EGO. SO
6 AFFINITY GROUP ISN'T RESPONSIBLE FOR COAST TO COAST, BUT
7 AFFINITY GROUP IS RESPONSIBLE FOR THEIR OWN ACTIONS, AS
8 PROVEN.

9 AND THERE'S BEEN NO MOTION FOR NONSUIT AS TO
10 AFFINITY GROUP ON THEIR OWN ACTIONS. WE HAVE THE RIGHT TO
11 TAKE TO THE JURY DID AFFINITY GROUP ACT DIRECTLY IN THESE
12 VARIOUS ELEMENTS. AND UP OR DOWN ON THAT ISSUE.

13 SO THE TWO DIFFERENT ISSUES, ALTER EGO, THE
14 COURT HAS ALREADY RULED. AFFINITY GROUP IS NOT GOING TO BE
15 RESPONSIBLE FOR CAMP COAST TO COAST ACTIONS. BUT THEY DO
16 HAVE THEIR OWN RESPONSIBILITY, IF THE EVIDENCE IS
17 SUFFICIENT. AND WE BELIEVE IT'S VERY CLEARLY SUFFICIENT.

18 MR. MOSHENKO: AND, YOUR HONOR, ON WHAT MR. SHERMAN
19 SAID, I RECALL THAT -- HIM SUGGESTING TO THE COURT THAT WE
20 DO A SYNOPSIS OF WHAT WE'RE GOING TO OFFER, AND I STOOD UP
21 AND SAID, "THAT'S PREPOSTEROUS." AND YOUR HONOR SAID, "I
22 AGREE WITH YOU. I'M NOT GOING TO REQUIRE YOU TO DO THAT."

23 THE COURT: ALL RIGHT. HERE IS MY RULING,
24 GENTLEMEN.

25 I GRANT THE DEFENDANTS' MOTION FOR A NONSUIT
26 ON THE QUESTION OF CAUSATION. AND I FURTHER FIND THAT

1 THEIR THEORY OF UNCLEAN HANDS IS WELL TAKEN. THEREFORE, I
2 GRANT JUDGMENT ON THAT GROUND. THAT'S DISPOSITIVE OF THAT.

3 MR. SHERMAN: WE'D LIKE TO -- THE COURT TO BRING
4 THE JURY IN AND DISMISS THE JURY.

5 THE COURT: WE SHALL. THANK YOU.

6 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN
7 COURT IN THE PRESENCE OF THE JURY:)

8 THE COURT: GOOD MORNING, LADIES AND GENTLEMEN.

9 THE JURY: GOOD MORNING.

10 THE COURT: I HAVE ASSEMBLED YOU THIS MORNING TO
11 TELL YOU THAT YESTERDAY AFTERNOON AND THIS MORNING UP UNTIL
12 A COUPLE MINUTES AGO I'VE ENTERTAINED ARGUMENT REGARDING
13 NONSUIT IN THIS MATTER AND A JUDGMENT FOR THE DEFENSE. AND
14 I HAVE GRANTED THAT. AND SO AS FAR AS YOU FOLKS ARE
15 CONCERNED, THE CASE IS OVER WITH.

16 YOU NOW CAN TALK TO ANYBODY YOU WISH TO
17 ABOUT THE CASE. YOU'RE UNDER NO OBLIGATION TO TALK TO THE
18 ATTORNEYS, BUT IT MIGHT BE HELPFUL IF YOU DO GIVE THEM SOME
19 OF YOUR TIME.

20 BUT I DEMAND THE RIGHT TO SPEAK WITH YOU.
21 SO I WILL ASK MY BAILIFF TO TAKE YOU ALL INTO THE JURY ROOM
22 AND CONVERSE WITH YOU FOR A FEW MINUTES.

23 AND ON BEHALF OF MY STAFF AND EVERYONE
24 CONCERNED, I CERTAINLY APPRECIATE THE SACRIFICES THAT YOU
25 MADE TO BE HERE AND PERFORM YOUR CIVIC DUTY. AND IT'S
26 APPRECIATED. IT REALLY IS.

1 SO WITH THAT IN MIND, I'LL SEE YOU BRIEFLY
2 IN THE CONFINES OF THE JURY ROOM. SO THANK YOU VERY MUCH.

3 GENTLEMEN, PLEASE REMAIN.

4 (ADJOURNMENT.)

5

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