IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NORSE,	)	CV-02-1479-RMW
	)	
PLAINTIFF,	)	SAN JOSE, CALIFORNIA
	)	
VS.	)	NOVEMBER 5, 2012
	)	
	)	PAGES 355-439
CITY OF SANTA CRUZ, ET AL,	)	
	)	
DEFENDANT.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RONALD M. WHYTE
UNITED STATES DISTRICT JUDGE

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

FOR THE PLAINTIFF: ATTORNEY AT LAW
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SANTA CRUZ, CA 95062

FOR THE PLAINTIFF: LAW OFFICE OF DAVID J. EAUVAIS
BY: DAVID BEAUVAIS
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FOR THE DEFENDANT: ATCHISON, BARISONE, CONDOTTI KOVACEVICH
BY: GEORGE J. KOVACEVICH
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OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

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SAN JOSE, CALIFORNIA NOVEMBER 5, 2012

P R O C E E D I N G S

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD IN THE PRESENCE OF THE JURY:)

THE COURT: GOOD AFTERNOON, EVERYBODY.

DID YOU HAVE FURTHER EVIDENCE YOU WANTED TO PRESENT?

MR. BEAUVAIS: YES, YOUR HONOR.

THE COURT: MR. BEAUVAIS, CAN YOU TELL US WHAT YOU'RE GOING TO BE PLAYING.

MR. BEAUVAIS: YES, YOUR HONOR.

WE'RE GOING TO BE SHOWING SOME VIDEO FROM THE 2002 MEETING WHICH PRECEDES THE VIDEO THAT'S BEEN PREVIOUSLY SHOWN.

THE COURT: SO THIS IS MARCH 12TH, 2002?

MR. BEAUVAIS: RIGHT. WE ARE THEN GOING TO SHOW MORE FROM 2004.

(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT.)

MR. BEAUVAIS: THIS NEXT ONE IS THE 2004 MEETING.

THE COURT: THE JANUARY 13TH, 2004 MEETING?

MR. BEAUVAIS: YES, YOUR HONOR. YES.

(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT.)

MR. BEAUVAIS: THIS IS ALSO THE JANUARY 2004 MEETING.

(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT.)

MR. BEAUVAIS: YOUR HONOR, AT THIS TIME I WOULD LIKE TO MOVE THE RELEVANT VIDEOS INTO EVIDENCE INCLUDING THE ONES THAT WERE SHOWN EARLIER AT TRIAL.

THE COURT: ALL RIGHT.

MR. BEAUVAIS: I DON'T EVEN THINK THEY'VE BEEN MARKED. I THINK WE NEED TO DO THAT.

THE COURT: OKAY. VIDEOS TAKEN BY THE CITY OR WERE THEY THE ONES TAKEN BY --

MR. BEAUVAIS: I THINK IT'S A COMBINATION, SOME OF IT IS CITY VIDEO, SOME OF IT IS NOT.

THE COURT: DO YOU KNOW THE ONE TODAY --

MR. BEAUVAIS: THE ONE TODAY, I THINK -- THIS ONE IS THE CITY.

THE COURT: WHAT'S THE NUMBER OF THAT?

MR. BEAUVAIS: SC CITY COUNCIL 31202.

THE COURT: NO, THE EXHIBIT NUMBER.

MR. BEAUVAIS: I DON'T THINK WE'VE HAD ANY EXHIBITS MARKED YET.

THE COURT: YOU CAN MARK IT.

MR. BEAUVAIS: I GUESS IT WILL BE EXHIBIT 1.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER 1 WAS MARKED FOR IDENTIFICATION.)

AND IT'S A VIDEO TAPE.

THE SECOND VIDEO WILL BE MARCH 12TH, 2002 CITY COUNCIL ARREST OF ROBERT NORSE.

THIS I BELIEVE WAS PRODUCED BY BECKY JOHNSON.

THE CLERK: OKAY.

EXHIBIT 2.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER 2 WAS MARKED FOR IDENTIFICATION.)

MR. BEAUVAIS: THE THIRD ONE SAYS JANUARY 13TH, 04. AND I CAN'T REALLY MAKE OUT THE REST OF IT. THIS IS ALSO BECKY JOHNSON.

THE CLERK: EXHIBIT NUMBER 3.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER 3 WAS MARKED FOR IDENTIFICATION.)

MR. BEAUVAIS: AND THE FOURTH ONE IS DVD ALSO FROM BECKY JOHNSON OF THE MARCH 14TH, 2002, MEETING. FILE TWO.

THE CLERK: EXHIBIT 4.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER 4 WAS MARKED FOR IDENTIFICATION.)

MR. BEAUVAIS: PLAINTIFFS WILL MOVE THESE VIDEOS INTO EVIDENCE AT THIS TIME, YOUR HONOR.

THE COURT: ALL RIGHT. THEY ARE RECEIVED.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBERS 1-4 HAVING BEEN PREVIOUSLY MARKED FOR IDENTIFICATION, WERE ADMITTED INTO EVIDENCE.)

MR. BEAUVAIS: THE PLAINTIFFS REST AT THIS TIME, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. KOVACEVICH?

MR. KOVACEVICH: YES, YOUR HONOR.

I WILL RECALL MR. FITZMAURICE, PLEASE.

THE COURT: ALL RIGHT.

LET ME REMIND YOU, YOU ARE STILL UNDER OATH. PLEASE HAVE A SEAT.

DIRECT-EXAMINATION BY MR. KOVACEVICH

BY MR. KOVACEVICH:

Q. MR. FITZMAURICE, IF I COULD TAKE YOU BACK TO THURSDAY, THERE WAS A VIDEOTAPE THAT PLAYED SHOWING SOME PEOPLE SPEAKING IN THE BACK OF THE CHAMBERS; DO YOU RECALL THAT ONE?

A. I DO.

Q. DID YOU RECOGNIZE WHO THOSE PEOPLE WERE?

A. I DID, YES.

Q. AND I THINK SOME NAMES MIGHT HAVE BEEN USED DURING OF THE COURSE OF IT, COULD YOU GIVE ME THE NAMES OF THE PEOPLE?

A. THE GENTLEMAN WALKING AROUND WAS KRISTOFF SNYDER WHO IS IN CHARGE OF TRANSPORTATION AND PARKING ISSUES. AND HE WAS FIRST TALKING WITH MATT FARRELL THEN WENT TO THE BACK AND SPOKE WITH, I THINK WITH CEAL CERRILLO WHO IS THE REDEVELOPMENT AGENCY PERSON.

Q. OKAY. SO THE PEOPLE THAT WERE SPEAKING, WERE THEY ALL CITY STAFF AT THAT TIME?

A. YES, THEY WERE ALL CITY STAFF.

Q. NOW, WITH RESPECT TO -- AND BY THE WAY, DID YOU SEE THE VIDEO WHERE THE OFFICER WENT OVER TO SPEAK WITH A GENTLEMAN

WITH A TIE SEATED AT THE DAIS; DID YOU SEE THAT?

A. I'M NOT RECALLING. THE OFFICER WENT OVER TO SPEAK WITH A GENTLEMAN WHO HAD A TIE ON?

Q. AFTER HE TOOK THE ARREST --

A. TALKING TO THE CITY ATTORNEY.

Q. OKAY. THAT'S WHAT I WANTED TO ASK YOU. DO YOU KNOW WHO THAT INDIVIDUAL WAS?

A. JOHN BARISONE.

Q. AND HIS CAPACITY VIS A VI THE CITY?

A. HE'S THE CITY ATTORNEY, PRIMARY CITY ATTORNEY, I BELIEVE.

Q. NOW WITH RESPECT TO -- HOW DID YOU DEAL WITH PEOPLE THAT WERE SPEAKING IN LITTLE CONVERSATIONS IN THE CHAMBERS DURING THE COURSE OF THE MEETING?

A. WELL, IF THEY WERE OBSERVED OR IF THEY SEEMED OUT OF ORDER I, DISTURBING THE ORDER OF THE MEETING THEN I WOULD -- I AS MAYOR ON SEVERAL OCCASIONS AND OTHER MAYORS IN MY HEARING OVER EIGHT YEARS TOLD PEOPLE TO TAKE THEIR CONVERSATIONS OUTSIDE.

Q. SO WAS THAT ONLY DONE WITH RESPECT TO MR. NORSE OR IT WAS APPLIED BEYOND MR. NORSE?

A. BY NO MEANS.

HE WAS ASKED TO DO THAT I THINK ON THIS OCCASION, I'M NOT SURE, I DIDN'T HEAR IT IN THIS PARTICULAR TAPE BUT HE WAS NOT ASKED ON MANY OCCASIONS TO TAKE HIS CONVERSATIONS OUTSIDE. IT WAS APPLIED TO EVERYONE, INCLUDING STAFF MEMBERS.

Q. CITY STAFF?

A. YES. ON MANY OCCASIONS, ON SEVERAL OCCASIONS, I DON'T KNOW IF IT'S MANY. I AS MAYOR OR OTHER MAYORS WOULD SAY TO STAFF MEMBERS, COULD YOU STOP THE CONVERSATION OR TAKE IT OUTSIDE.

Q. ALL RIGHT.

THANK YOU. THAT'S ALL I HAVE.

THE COURT: ANYTHING FURTHER?

CROSS-EXAMINATION BY MR. BEAUVAIS

BY MR. BEAUVAIS:

Q. YOU WOULD TELL THEM TO TAKE THEIR CONVERSATIONS OUTSIDE BECAUSE THE NOISE OF THOSE CONVERSATIONS WAS INTERFERING WITH THE CITY COUNCIL?

A. I PERCEIVED IT IN MY CASE, I PERCEIVED THEM AS INTERRUPTING OR DISTURBING THE MEETING, YES.

Q. OKAY. BECAUSE THEY WERE MAKING AN AUDIBLE SOUND?

A. IT COULD BE THEY WERE STANDING THERE IN THE MIDDLE OF THE ROOM NEXT TO THE PEW AND BLOCKING VISION. THERE MIGHT BE OTHER REASONS WHY I WOULD SAY --

Q. IF THEY WERE BLOCKING THE VIEW YOU WOULD ASK THEM TO LEAVE, RIGHT?

A. THINGS LIKE THAT, YEAH.

Q. AND IF THEY WERE TALKING TOO LOUD EVEN IF THEY WERE ON THE SATURDAY OF THE ROOM YOU WOULD ASK THEM TO LEAVE, RIGHT?

A. IF THEY WERE -- IT WASN'T -- THESE WEREN'T LOUD

CONVERSATIONS THESE ARE PEOPLE ATTEMPTING TO HAVE CONVERSATIONS WITH EACH OTHER AND THEY COULD BE WHISPERED CONVERSATIONS AS WELL. IT JUST SEEMED TO DISTURB THE FLOW OF THE MEETING.

Q. IS IT YOUR TESTIMONY THAT WHISPERED CONVERSATIONS THAT PEOPLE WHO WERE WHISPERING BUT NOT BLOCKING THE VIEW YOU WOULD ASK THEM TO TAKE THEIR CONVERSATIONS OUTSIDE IS THAT YOUR TESTIMONY?

A. IF I THOUGHT THEY WERE DISTRACTING, YES.

Q. DISTRACTING TO YOU?

A. WELL, I'M THERE AS A REPRESENTATIVE OF THE PEOPLE. SO IF I THOUGHT THEY WERE DISTRACTING TO PEOPLE WHO ARE PARTICIPATING IN THE MEETING THEN I WOULD MAKE THAT DECISION.

Q. OKAY. WOULD THE DURATION OF THE CONVERSATION HAVE ANYTHING TO DO WITH IT AS WELL, IF IT GOES ON IF IT PERSISTS OVER TIME?

A. IT COULD. BUT THE INITIATION OF THE CONVERSATION COULD ALSO BE ENOUGH IF SOMEONE WERE TO START WHISPERING BACK THERE, IT COULD BE ENOUGH TO SAY TAKE IT OUTSIDE.

Q. WELL, WHAT IF THAT'S A WHISPER THAT'S NOTHING MORE THAN, THERE'S SOMEBODY FROM THE MEDIA WHO WANTS TO TALK TO YOU?

A. I'M SORRY?

Q. WHAT IF THE EXTENT OF IT IS TO TELL SOMEBODY A WHISPER IN SOMEBODY'S EAR THAT THERE'S A MEDIA PERSON OUTSIDE THAT WANTS TO TALK TO YOU?

A. WELL, I DON'T GENERALLY KNOW THE CONTENT OF THE CONVERSATION THAT ISN'T THE POINT. THE POINT IS WHETHER IT'S

TAKING PLACE OR NOT.

AND SO YOU KNOW --

Q. I KNOW YOU DEPONENT KNOW THE CONTENT?

A. I DON'T UNDERSTAND THE QUESTION.

Q. WELL, WHAT I'M POSING TO YOU IS THAT'S ALL THAT'S SAID, GIVES YOU SOME IDEA OF THE DURATION THAT WE'RE TALKING ABOUT, RIGHT?

A. RIGHT.

Q. OKAY.

SO GIVEN A CONVERSATION OF THAT DURATION WHERE YOU HAVE SOMEONE WHO IS IN THE ISLE, LEANS OVER ANOTHER PERSON, WHISPERS IN HIS EAR, THERE'S A REPORTER WHO WOULD LIKE TO TALK TO YOU AND THAT'S IT?

A. YES, RIGHT. WELL, I DON'T KNOW IF THAT'S IT.

Q. IS UNDER YOUR STRICT RULES, WOULD YOU WARN SOMEBODY ABOUT THAT?

A. WOULD YOU TELL SOMEONE TO TAKE THEIR CONVERSATION OUTSIDE.

Q. UNDER THOSE CIRCUMSTANCES?

A. YES.

Q. YOU WOULD?

A. DURATION HAD NOTHING TO DO WITH IT, IT'S THE ACT THAT HAD SOMETHING TO DO WITH IT.

Q. OKAY. HAVE YOU EVER HAD SOMEBODY ARRESTED FOR WHISPERING IN A CITY COUNCIL MEETING?

A. I NEVER HAD ANYBODY ARRESTED AS MAYOR FOR ANY REASON.

Q. YOU SAW THE VIDEO OF THE JANUARY 13TH MEETING WHERE THE STAFF MEMBERS THAT YOU'VE JUST TESTIFIED ABOUT WERE ENGAGED IN QUITE A BIT OF DISCUSSION?

A. YES.

Q. DO YOU RECALL IF ANY OF THOSE PEOPLE WERE TOLD AT THAT MEETING THAT THEY NEEDED TO TAKE THEIR CONVERSATION OUTSIDE?

A. I HAVE NO IDEA IF THEY WERE TOLD AT THAT MEETING. AS MAYOR IN THE MEETING BEFORE COUNSEL MEETINGS, I TOLD STAFF MEMBERS I DIDN'T WANT A LOT -- I DIDN'T WANT ANY MORE CONVERSATION. I DIDN'T WANT DISTURBING CONVERSATIONS.

Q. IT WAS A LOT MORE THAT YOU DIDN'T WANT OR IT WAS AN ABSOLUTE BAN ON CONVERSATION?

A. IT'S BASICALLY A BAN. BASICALLY I WOULD LIKE TO STOP IT, YEAH.

Q. OKAY. ANYWHERE IN YOUR DECORUM RULES THAT REFLECT THERE'S A RULE AGAINST WHISPERING OR EVEN CARRYING ON NONINTRUSIVE CONVERSATION IN THE COURSE OF A CITY COUNCIL MEETING?

A. THAT'S NOT THE WAY THE RULES WORK.

Q. EXCUSE ME --

A. WE DON'T LIST ALL THE INFRACTIONS.

Q. I ASKED YOU IF THERE'S ANYTHING IN THE RULES THAT?

A. YOU MEAN WHISPERING.

Q. THAT PROHIBITS -- THAT BANS WHISPERING OR EVEN CARRYING ON SUBDUED CONVERSATIONS IN A CITY COUNCIL MEETING?

A. I DON'T THINK THERE'S SPECIFIC MENTION OF THOSE THINGS.

Q. OKAY.

NOW, YOU HAVE THE ENTIRE TAPE OR VIDEO OF THE JANUARY 2004 MEETING, RIGHT?

A. I PERSONALLY? I DON'T HAVE --

Q. THERE'S A COPY OF THE ENTIRE MEETING?

A. I WOULD ASSUME SO, YES.

Q. HAVE YOU LOOKED AT THE WHOLE MEETING? OKAY.

ARE YOU AWARE OF ANYTHING ON THAT VIDEO THAT SHOWS THAT ANYONE OTHER THAN MR. NORSE WAS CALLED OUT FOR WHISPERING?

A. I'M NOT AWARE OF ANYTHING ON THAT VIDEO.

Q. OKAY.

I ASSUME THAT IF SUCH EVIDENCE EXISTED, WE WOULD BE -- YOU WOULD BE PRODUCING IT HERE TODAY, RIGHT?

A. I DON'T PRODUCE EVIDENCE, BUT YEAH, I DON'T KNOW.

MR. BEAUVAIS: YEAH, OKAY.

THANK YOU. I HAVE NO FURTHER QUESTIONS.

OH, EXCUSE ME.

(OFF-THE-RECORD DISCUSSION.)

MR. BEAUVAIS: JUST ONE MORE QUESTION.

Q. HAVE YOU EVER MADE A POINT OF ORDER TO HAVE SOMEONE REMOVED FROM A MEETING FOR WHISPERING?

A. I CAN'T RECALL.

Q. OKAY.

A. I'VE MADE MANY POINTS OF ORDERS AND IT'S QUITE POSSIBLE.

Q. WELL, YOU CAN MAKE A POINT OF ORDER, BUT MAKE A POINT OF

ORDER WHICH YOU ARE REQUESTING THAT SOMEONE BE EJECTED FROM THE MEETING FOR WHISPERING, HAVE YOU EVER DONE THAT?

A. I DON'T RECALL.

A POINT OF ORDER IS SOMETHING THE MAYOR DECIDES THEN THE MAYOR DECIDES WHETHER AN EJECTION IS REQUIRED USUALLY.

Q. YEAH.

MY QUESTION IS: YOU AS THE, NOT THE MAYOR BUT AS A COUNSEL MEMBER, HAVE YOU EVER MADE A POINT OF ORDER TO ASK THE MAYOR TO REMOVE SOMEONE FROM A MEETING FOR WHISPERING?

A. I DON'T RECALL.

MR. BEAUVAIS: THANK YOU.

THE COURT: DOES THE PLAINTIFF HAVE --

MR. KOVACEVICH: COULD I HAVE THIS MARKED AS EXHIBIT A?

THE WITNESS: AM I DONE?

THE COURT: MR. BEAUVAIS, ARE YOU RESTING NOW?

MR. BEAUVAIS: I'VE ALREADY RESTED.

THE COURT: I'M SORRY, THAT'S RIGHT. YOU CALLED. SO GO AHEAD WITH YOUR NEXT WITNESS

MR. KOVACEVICH: I DON'T HAVE ANY OTHER WITNESSES. I'M JUST GOING TO HAVE DOCUMENTS MARKED AND SHOW VIDEOTAPES.

THE COURT: OKAY.

MR. KOVACEVICH: AND THIS IS THE RULES OF DECORUM THAT WERE IN EFFECT DURING THESE TWO MEETINGS SO IF I COULD HAVE THAT MARKED AS EXHIBIT A.

(WHEREUPON, DEFENDANT'S EXHIBIT NUMBER A WAS MARKED FOR IDENTIFICATION.)

THE COURT: DO YOU AGREE THAT'S THE DECORUM?

MR. BEAUVAIS: I'M SORRY, YOUR HONOR?

THE COURT: DO YOU AGREE THAT'S THE DECORUM RULES?

MR. BEAUVAIS: I HAVEN'T LOOKED AT THIS PRECISE COPY, YOUR HONOR, BUT I'M SURE THEY ARE.

THE COURT: OKAY. SO YOU DON'T HAVE ANY OBJECTION TO THEIR ADMISSION?

MR. BEAUVAIS: LET ME JUST LOOK AT IT REAL QUICK, YOUR HONOR.

MR. KOVACEVICH: NEXT, YOUR HONOR, WHILE HE'S -- CAN WE DEAL WITH THAT LATER OR DO YOU WANT ME TO WAIT FOR HIM?

THE COURT: LET'S SEE IF HE WILL TAKE A MINUTE, IF SO WE WILL DO IT NOW.

IF YOU WANT MORE TIME, MR. BEAUVAIS, TELL ME AND I WILL GO ON TO SOMETHING ELSE.

MR. BEAUVAIS: I'M JUST -- THIS IS A LITTLE LONGER THAN THE RULES I'M USED TO SEEING.

THEY SEEM TO ADDRESS OTHER ISSUES AND THAT'S WHY I'M LOOKING AT THEM.

THE COURT: I WILL PASS ON IT FOR NOW.

MR. KOVACEVICH, DO YOU WISH TO OFFER YOUR NEXT EXHIBIT?

MR. KOVACEVICH: YES, BUT COULD I SPEAK TO HIM JUST BRIEFLY.

(OFF-THE-RECORD DISCUSSION.)

MR. KOVACEVICH: IF I COULD HAVE THIS DVD MARKED AS DEFENDANT'S NEXT IN ORDER, I GUESS B.

THIS IS A DVD OF THE MARCH 12TH, 2002, MEETING EXCERPTS THEREOF.

(WHEREUPON, DEFENDANT'S EXHIBIT NUMBER B WAS MARKED FOR IDENTIFICATION.)

YOUR HONOR, I THINK MS. JOHNSON IS GOING TO ASSIST ME AS THE IT PERSON HERE.

THANK YOU FOR THAT WILLINGNESS TO DO SO.

MR. KOVACEVICH: AND YOUR HONOR, THIS HAS BOTH THE CITY'S TAPE, VIDEOTAPE OF THE MEETING AND THEN ALSO WHAT MS. JOHNSON VIDEOTAPED AND WE'VE ALREADY SEEN THAT.

SO I'M JUST INTERESTED IN SHOWING THE CITY'S VERSION, SO -- I THINK IT'S NUMBER 2, SO YOU DON'T HAVE TO GO ON TO NUMBER 2.

(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT.)

MR. KOVACEVICH: THAT'S BASICALLY IT.

YOUR HONOR, IF I COULD HAVE THIS NEXT DVD MARKED AS EXHIBIT C WHICH HAS ALREADY BEEN MARKED BY MS. GARCIA.

(WHEREUPON, DEFENDANT'S EXHIBIT NUMBER C WAS MARKED FOR IDENTIFICATION.)

MR. KOVACEVICH: THIS IS AN EXCERPT FROM THE MEETING OF MARCH 26, 2002.

THE COURT: THIS IS TWO WEEKS AFTER THE MEETING WHICH

IS --

MR. KOVACEVICH: IT'S TWO WEEKS, BUT THEY MEET EVERY TWO WEEKS.

THE COURT: SO IT'S TWO WEEKS AFTER THE MEETING WHERE ONE OF THE CHARGED ACTS IS TAKEN PLACE.

(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT.)

MR. KOVACEVICH: OKAY.

YOUR HONOR, I'VE HAD THE NEXT DVD MARKED AS EXHIBIT D.

(WHEREUPON, DEFENDANT'S EXHIBIT NUMBER D WAS MARKED FOR IDENTIFICATION.)

AND THIS IS AN EXCERPT FROM THE APRIL 23RD, 2002 MEETING.

(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT.)

MR. KOVACEVICH: YOUR HONOR, FOR THE RECORD I'VE HAD THIS NEXT DVD MARKED AS EXHIBIT E.

THIS IS ONE OF THE MASTER DISKS THAT HAS A NUMBER OF ENTRIES ON IT.

THE COURT: COULD YOU MAKE IT CLEAR TO THE JURY WHICH ONES YOU ARE PLAYING?

MR. KOVACEVICH: WHEN SHE GETS THE MENU UP THERE. THE FIRST ONE IS JULY 15TH, 2002 AND THE SECOND ONE IS JULY 23, 2002.

I DON'T KNOW HOW YOU HIT THAT ARROW THERE. IT WILL TAKE YOU OVER TO THE NEXT MENU. THERE YOU GO.

(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT.)

MR. KOVACEVICH: THE NEXT ONE I WANT TO HAVE MARKED

IN ORDER WHICH HAS BEEN MARKED, YOUR HONOR, IS THE JANUARY 13, 2004, MEETING.

I DON'T REALLY THINK WE NEED TO SHOW THIS, MR. BEAUVAIS, YOU WOULD AGREE? BECAUSE WE'VE SEEN IT ALL.

MR. BEAUVAIS: I DON'T HAVE AN ISSUE WITH IT, IT'S YOUR CASE.

MR. KOVACEVICH: I JUST TOOK THESE OFF OF THAT DISK THERE THAT HAD THEM IN DIFFERENT SEQUENCES AND I JUST PUT THEM ALL ON ONE DVD SO YOU DIDN'T HAVE TO GO TO A MENU.

SO I WOULD LIKE TO HAVE THAT MARKED AS NEXT IN ORDER.

THE COURT: MS. GARCIA, IS THAT F.

(WHEREUPON, DEFENDANT'S EXHIBIT NUMBER F WAS MARKED FOR IDENTIFICATION.)

THE CLERK: F, YEAH.

MR. KOVACEVICH: AND THE NEXT ONE IS AN EXCERPT FROM JANUARY 27, 2004.

AND THIS WOULD BE THE NEXT MEETING AFTER THE JANUARY 13TH INCIDENT WHICH IS THE SUBJECT OF THIS LAWSUIT.

(WHEREUPON, DEFENDANT'S EXHIBIT NUMBER G WAS MARKED FOR IDENTIFICATION.)

THE COURT: WHAT'S THE LETTER ON THAT EXHIBIT, G?

MR. KOVACEVICH: I'M SORRY, YOUR HONOR.

THE COURT: IS THAT G?

MR. KOVACEVICH: YES, IT IS G.

(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT.)

MR. KOVACEVICH: AND THE LAST ONE I'VE HAD MARKED AS EXHIBIT H, YOUR HONOR.

AND THIS WOULD BE FEBRUARY 10TH, 2004.

(WHEREUPON, DEFENDANT'S EXHIBIT NUMBER H WAS MARKED FOR IDENTIFICATION.)

THE COURT: FEBRUARY 10TH, 2004?

MR. KOVACEVICH: YES.

(WHEREUPON, A VIDEOTAPE WAS PLAYED IN OPEN COURT.)

MR. KOVACEVICH: YOUR HONOR, I HAVE NOTHING FURTHER EXCEPT THESE RESOLUTIONS THAT -- FOR THE COURT'S PURPOSES. SO CAN I HAVE THOSE MARKED LATER?

THE COURT: SURE.

HOW ABOUT MR. BEAUVAIS, HAVE YOU LOOKED AT THE DECORUM?

MR. BEAUVAIS: I'M NOT SURE WHAT THE PURPOSE IS OF THE RECISION RESOLUTION. THIS PREDATES ALL OF THIS.

THE COURT: WHY DON'T YOU TALK TO --

MR. KOVACEVICH: I THINK THERE'S SOME CONFUSION HERE.

(OFF-THE-RECORD DISCUSSION.)

MR. BEAUVAIS: OKAY. I HAVE NO OBJECTION TO THIS, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. KOVACEVICH: I WOULD MOVE TO INTRODUCE ALL OF OUR EXHIBITS.

MR. BEAUVAIS: NO OBJECTION --

THE COURT: SO THAT'S A AND B? ALL RIGHT. THOSE ARE

ADMITTED.

(WHEREUPON, DEFENDANT'S EXHIBIT NUMBERS A AND B, HAVING BEEN PREVIOUSLY MARKED FOR IDENTIFICATION, WERE ADMITTED INTO EVIDENCE.)

MR. KOVACEVICH: AND WE WANT REST THEN, YOUR HONOR, EXCEPT FOR THE OTHER EXHIBITS WE NEED TO BE MARKED FOR THE COURT'S PURPOSES.

THE COURT: AND AS FAR AS EVIDENCE FOR THE JURY EVERYTHING HAS BEEN OFFERED?

MR. KOVACEVICH: YES, YOUR HONOR.

THE COURT: ANYTHING FURTHER FROM THE PLAINTIFF?

MR. BEAUVAIS: YES, YOUR HONOR.

WE CALL MR. NORSE BACK TO THE STAND.

THE COURT: OKAY.

FURTHER DIRECT EXAMINATION BY MR. BEAUVAIS

BY MR. BEAUVAIS:

Q. MR. NORSE, GIVEN ALL THE TIME YOU'VE BEEN BEFORE THE CITY COUNCIL, DID YOU EVER SEE ANYONE BE ARRESTED FOR WHISPERING?

A. NO.

Q. HAVE YOU EVER SEEN ANYBODY EXCLUDED FROM THE MEETING FOR WHISPERING?

A. NO.

Q. THERE WAS A CLIP THAT WE JUST WATCHED WHERE I GUESS YOUR

TIME TO RESPOND TO AGENDA ITEMS WAS CHANGED WHERE YOU HAD FIVE MINUTES TO SPEAK ON MULTIPLE ITEMS?

A. UH-HUH.

Q. DO YOU REMEMBER THAT PART?

A. YES, I DO.

Q. CAN YOU EXPLAIN TO THE JURY WHAT THE PROCEDURE WAS OF COUNSEL BEFORE THAT OCCURRED?

A. SURE.

IN SANTA CRUZ AT THAT TIME THE PROCESS FOR THE CONSENT AGENDA WHICH IS NORMALLY VOTED ON AS ONE BODY. AND THERE ARE MANY IMPORTANT ISSUES THAT ARE ON THE CONSENT AGENDA, BUT THEY ARE GENERALLY ISSUES THAT THE CITY COUNCIL AGREES ON SO THEY CAN TAKE 10, 15, 20 ITEMS, PUT THEM ALL TOGETHER AND SAY PASS IT OR DON'T. AND USUALLY IT'S -- THEY PASS IT.

IF A COUNSEL MEMBER WANTS TO REMOVE AN ITEM, THEY DO. AND THAT ITEM IS THEN CONSIDERED SEPARATELY. THE WHOLE AGENDA IS PASSED AND THEY GO BACK TO THAT ONE ITEM.

SIMILARLY, AT THAT TIME, MEMBERS OF THE PUBLIC AS ANOTHER CALIFORNIA CITY'S ALLOWED THEMSELVES IF THEY SAW AN ITEM THEY THOUGHT WAS IMPORTANT THEY COULD REMOVE IT FROM THE AGENDA AND IT COULD THEN BE DISCUSSED SEPARATELY.

CUSTOMARILY WHEN THAT HAPPENED, THERE WOULD BE A STAFF MEMBER WHO WOULD COME FORWARD AND GIVE A BRIEF REPORT ABOUT THE ITEM, OTHER MEMBERS. PUBLIC WOULD BE ALLOWED TO SAY SOMETHING FOR 2 OR 3 MINUTES AND THERE WOULD BE A 2 OR 3-MINUTE WINDOW

FOR THE INDIVIDUAL WHO REMOVED THE ITEM TO EXPRESS HER OR HIS CONCERNS ABOUT IT.

AND THAT WAS -- IT'S NO LONGER THE CASE IN THE SANTA CRUZ CITY COUNCIL, THE WHOLE THING HAS BEEN SHORTENED EVEN FURTHER.

BUT WHAT HAPPENED ON THAT PARTICULAR CLIP THAT YOU SAW IN 2002 WAS PART OF A SERIES OF RESTRICTIONS THE COUNSEL WAS ADOPTING I BELIEVE, FRANKLY, TO LIMIT MY SPEECH AND POSSIBLY THOSE OF SOME OTHER CRITICS.

AND WHAT WAS DONE WAS INSTEAD OF HAVING THOSE THREE ITEMS THAT I SPOKE ON, I BELIEVE IT WAS THREE, I'M NOT SURE, REMOVED FROM THE AGENDA AND THEN I WOULD COME UP AND SPEAK FOR 2 OR 3 MINUTES, THE COUNSEL WOULD VOTE ON IT, I WOULD AGAIN COME UP AND SPEAK FOR 2 OR 3 MINUTES, THE COUNSEL WOULD VOTE.

THEN ON THE THIRD ITEM, THE SAME THING WOULD HAPPEN.

THEY TOOK ALL THESE ITEMS OFF AS A BLOCK AND SAID YOU HAVE FIVE MINUTES TO TALK ON ALL THESE ITEMS. NORMALLY IT WOULD BE ANYWHERE FROM 6 MINUTES TO 9 MINUTES AND YOU WOULD HAVE AN INDIVIDUAL DISCUSSION WITH EACH ITEM.

INSTEAD, AS YOU SAW I TALKED ABOUT THREE ITEMS. I TALKED ABOUT CORRECTING THE MINUTES AND I THINK I TALKED ABOUT TWO OTHER ITEMS AS WELL.

BUT THIS WAS AN EXTRAORDINARY PROCEDURE. I HAD NEVER SEEN IT DONE BEFORE WITH ANYONE ELSE. AND I SORT OF ASSUMED IT WAS TAILORED FOR ME BECAUSE THEY FOUND MY COMMENTS OFFENSIVE OR UNINTERESTING OR PERHAPS THEY FOUND THEM OVERLY CRITICAL.

I THINK THAT SORT OF COVERS IT.

Q. DO YOU KNOW IF AT THAT PARTICULAR MEETING ANYONE ELSE PULLED ANY OTHER ITEMS FROM THE AGENDA?

A. I DON'T REMEMBER.

Q. I WANT TO TALK TO YOU A LITTLE BIT MORE ABOUT DAMAGES BECAUSE THERE'S A STIPULATION THAT WE ENTERED INTO THAT YOU HAD BEEN ARRESTED FOR DIFFICULT DISOBEDIENCE ON MORE THAN ONE OCCASION?

A. UH-HUH.

Q. MY QUESTION TO YOU IS WHETHER THESE TWO ARRESTS WERE LIKE THAT, LIKE BEING ARRESTED FOR CIVIL DISOBEDIENCE OR WERE THEY DIFFERENT?

A. THEY WERE DIFFERENT.

Q. WHY IS THAT?

A. PARTICULARLY THE FIRST ONE BECAUSE THE ONE I WAS ARRESTED FOR DON'T ACT LIKE A BUNCH OF FASCISTS GESTURE BECAUSE IT WAS COMPLETELY UNEXPECTED.

IF YOU ARE GOING INTO A SITUATION WHERE AS IT SAY A SIT IN OR SOMETHING, IF YOU ARE PROTESTING RACIAL DISCRIMINATION OR SOME OTHER FORM OF DISCRIMINATION AND YOU MIGHT BE ARRESTED, THERE ARE PRECAUTIONS YOU WOULD TAKE.

THERE IS SORT OF AN INTERNAL PREPAREDNESS THAT YOU HAVE IN ORDER TO MAKE SURE YOU'RE VERY PEACEFUL, HAVE YOUR MIND CLEARLY TOGETHER, HAVE OTHER PEOPLE AVAILABLE AS SUPPORT PEOPLE IN CASE YOU'RE NEEDED -- IF YOU'RE GOING TO BE JAILED FOR

EXAMPLE YOU MIGHT WANT TO HAVE SOMEONE YOU COULD CONTACT.

YOU MIGHT HAVE ACCESS TO AN ATTORNEY.

NONE OF THESE THINGS WERE THE CASE ON EITHER OF THESE TWO OCCASIONS BECAUSE NONE OF US EXPECTED ANYTHING LIKE WHAT HAPPENED.

Q. OKAY.

A. SO IT WAS QUITE A SHOCK THAT THIS HAPPENED TO ME ON THIS OCCASION. IT WAS -- DOES THAT -- SHOULD I GO FURTHER?

Q. THAT'S FINE.

HOW DID YOU -- I MEAN, TRY TO TAKE YOURSELF BACK TO THE TIME THAT YOU WERE AT THE CITY COUNCIL IN MARCH OF 2002 AND HOW YOU FELT EACH STEP OF THE WAY, FIRST WHEN YOU WERE MAYOR -- COUNCIL MEMBER FITZMAURICE MADE HIS POINT OF ORDER, MAYOR KROHN TOLD YOU YOU HAD TO LEAVE THE MEETING AND YOUR INVOLVEMENT WITH SERGEANT BAKER, EXACTLY HOW THAT IMPACTED UPON YOU.

A. WELL, INITIALLY I, BEFORE THE ACTUAL POINT OF ORDER FROM FORMER COUNCIL MEMBER FITZMAURICE, I WAS DOING MY USUAL RECORDING OF THE SESSION WITH THE INTENTION OF BRINGING IT TO THE PUBLIC IN A COUPLE OF DAYS WITH SOME COMMENTARY, TALKING TO DIFFERENT MEMBERS OF THE AUDIENCE OUTSIDE, AND ALSO I HAD PREPARED AN ORAL COMMUNICATION SPEECH STANDING IN LINE, FEELING FAIRLY ORDINARY, HAPPY, NOT UNHAPPY, ALL RIGHT.

I LIKE PUBLIC GATHERINGS. I ENJOY GOING TO THEM, OR DID. AND SOMETIMES STILL DO.

AND SO WHEN I WAS TOLD I COULDN'T SPEAK AT THE COUNCIL

MEETING BECAUSE EVEN THOUGH I STOOD IN LINE FOR 15 MINUTES AND EVEN THOUGH I HAD RAISED MY HAND INITIALLY, I SORT OF -- I HAD SEEN THIS KIND OF PROCESS BEFORE.

I DON'T THINK IT COMPORTS WITH THE BROWN ACT WHICH IS THE PUBLIC MEETINGS ACT WHICH ALLOWS EACH PERSON TO SPEAK FIRST COME-FIRST SERVE. BUT IT'S DIFFICULT TO CHALLENGE THESE THINGS.

SO I WENT TO THE BACK OF THE LINE AND THEN I WAS RATHER AMAZED AND UPSET TO SEE THE TWO SPEAKERS IN FRONT OF ME TREATED SO BADLY.

ONE SPEAKER IS SORT OF A VERY FIERY LITTLE GUY WHO I THINK IN A WAY HE'S SORT OF TREATED AS SORT OF A MASCOT BY THE CITY COUNCIL, HE GETS VERY ANGRY AND HE GOES OUT AND MAKES COMMENTS THAT ARE KIND OF WILD, BUT PEOPLE DON'T REALLY TAKE HIM SERIOUSLY, THAT'S MICHAEL TOMASSI, BUT STILL IT'S NOT GOOD FOR SOMEONE TO BE TREATED THAT WAY. THAT CONCERNED ME. PARTICULARLY IF PEOPLE ARE GIVEN THE IMPRESSION THEY COULD SPEAK AND THEY HAD THEIR TIME CUT AND WERE WAITING IN LINE TO SPEAK AS HE WAS.

I BELIEVE THERE'S A PORTION OF THAT TAPE THAT SHOWS HE WAS ALSO TOLD TO GO TO THE BACK OF THE LINE. BUT I DON'T RECALL THAT FOR SURE. I KNOW I WAS BECAUSE I HEARD THAT AGAIN.

SO I FELT VERY EXACERBATED AND JUST ANGRY, I HAVE TO SAY, SOMEHOW ANGRY. BUT -- SO I GAVE THIS DON'T ACT LIKE A BUNCH OF FASCISTS SALUTE AND TURNED TO SUSAN ZIEMAN AS I THINK SHE WAS

OUTRAGEOUSLY DENIED AN OPPORTUNITY TO SPEAK.

SHE KEPT REMINDING THEM ONE MORE SPEAKER, AND THE MAYOR WENT ON LIKE A ROBOT AS THOUGH SHE WEREN'T THERE AND TREATED HER WITH COMPLETE DISRESPECT.

I WASN'T -- STILL, I WAS FRANKLY I WAS NOT AS SURPRISED AS I MIGHT HAVE BEEN BY THE CITY COUNCIL BEHAVIOR BECAUSE I HAD SEEN THIS KIND OF THING BEFORE TO SOME EXTENT. BUT IT WAS STILL RATHER SHOCKING TO SEE IT HAPPEN THIS OVERTLY.

SO, YOU KNOW, I TURNED TO SUSAN TO SEE HOW SHE WAS DOING AND SAY HEY, YOU KNOW, IT'S OKAY. AND THEN I REALLY WAS FLABBERGASTED WHEN COUNCIL MEMBER FITZMAURICE -- ACTUALLY WHAT HAPPENED WAS THE MEETING WENT ON AND, YOU KNOW, I WAS I DON'T RECALL SPECIFICALLY I THINK I WAS TALKING TO SUSAN BRIEFLY.

YOU KNOW, SHORT OF CONSOLING HER. AND THEN I HEARD FROM THE CHAIR, MR. NORSE HAS MADE A NAZI SALUTE HE SHOULD BE EJECTED FROM THE CHAMBER.

AND I THOUGHT, I THOUGHT THAT WAS REALLY UPSETTING.

SO I WENT FORWARD TO AGAIN, APPEAL TO THE COUNCIL NOT TO ACCEPT THIS, BUT MR. KROHN AUTOMATICALLY DID. AND TOLD ME TO LEAVE THE ROOM.

AND THIS REALLY SHOCKED ME. I BECAME MORE, MY BREATHING SPED UP. I WAS FLUSHED. I WAS AFRAID I WAS GOING TO SAY THE WRONG THING BECAUSE I WAS SPEAKING NOT JUST TO THE CITY COUNCIL I WAS ALSO THE COMMUNITY WAS WATCHING. AND I'M RESPONSIBLE TO MEMBERS OF THE COMMUNITY.

TO SOME EXTENT I'M NOT DELEGATED TO REPRESENT HOMELESS PEOPLE BUT I TRY TO DO A GOOD JOB AS FAR AS I CAN. I DO REPRESENT SOME HOMELESS PEOPLE.

SO I SAID, I'M NOT GOING TO LEAVE BECAUSE I WAS IN THIS STRUGGLE. BECAUSE WHEN YOU ARE TOLD SURRENDER YOUR RIGHTS, LEAVE THE ROOM OR WE WILL HAVE YOU ARRESTED IT'S BRINGING A LOT OF PRESSURE TO PUT ON SOMEONE, BECAUSE YOU HAVE TO DECIDE, AM I GOING TO SLINK AWAY AND DISAPPOINT PEOPLE OR AM I GOING TO RISK GOING TO JAIL, GETTING HANDCUFFED, NOT BEING ABLE TO ATTEND THE REST OF THE MEETING, BEING HELD THERE FOR I DO NOT KNOW HOW LONG BECAUSE YOU MAY HAVE TO DO BAIL.

GO THROUGH AN ENTIRE COURT PROCESS TO BE VINDICATED, WHICH DIDN'T TURN OUT TO HAVE TO BE THE CASE. BUT AT THAT TIME ALL THOSE THINGS WERE SORT OF AT PLAY IN HOW I WAS FEELING.

AND I FELT, I FELT SCARED, I FELT ON THE SPOT, I FELT -- I DON'T KNOW. I WAS CONFUSED AS TO WHAT TO DO. AND I SAW THAT AGAIN AS I ATTEMPTED TO -- I WAS ALSO TRYING TO RECORD WHAT WENT ON WITH MY TAPE RECORDER SO THAT THERE WOULD BE A RECORD GOING ON IN THE HOPES OF SOME DAY SOMEWHERE I WOULD GET VINDICATED AND PEOPLE COULD SEE I WASN'T THE ONE WHO WAS BEING DISRUPTED HERE.

SO IT WAS AN UNPLEASANT AND SHOCKING EXPERIENCE AT THAT MOMENT AS IT HAPPENED AND IN THE FEW MINUTES AFTERWARD, AND PARTICULARLY SINCE I COULDN'T BE TOLD -- I WASN'T TOLD WHAT I WAS BEING ARRESTED FOR. EVEN THE POLICE OFFICER DIDN'T SEEM TO

KNOW IT WAS LIKE IT WAS BEING COOKED UP ON THE SPOT. IT HAD THE FEEL OF, YOU DON'T KNOW WHAT'S GOING TO HAPPEN NEXT, WHAT KIND OF CHARGED ARE GOING TO BE LEVELLED. I HAVE NO IDEA WHAT THEY ARE GOING TO DO.

BECAUSE IT SEEMS STRANGE, WHEN I MADE THIS GESTURE I WAS STANDING A FOOD AWAY FROM THE OFFICER WHO WAS ARRESTING ME. HE HAD NO PROBLEM HE DIDN'T SEE ANYTHING DISRUPTING AT ALL IN WHAT WENT ON, SO IT MADE ME FILE LIKE I WAS IN A STRANGE KIND OF A, YOU DON'T KNOW WHAT'S GOING TO HAPPEN NEXT.

Q. MR. NORSE, WHAT ABOUT THE JANUARY 2004 MEETING, IS THAT THE SAME AS WHAT YOU'VE JUST DESCRIBED OR WERE THERE DIFFERENCES?

A. THERE WERE SOME DIFFERENCES.

IN THAT SITUATION I ALSO DIDN'T EXPECT THAT WE WERE THERE -- WE WERE THERE TO SPEAK AND READ THE NAMES OF THE HOMELESS DEAD. BECAUSE AS I SAID AT THAT TIME MAYOR KENNEDY INTENTIONALLY PUT THAT OPPORTUNITY TO SPEAK AT AN UNCERTAIN TIME AT THE END OF THE MEETING WHICH WE DIDN'T KNOW WHEN IT WAS.

SO INSTEAD WE KIND OF DECIDED WE WOULD HAVE TO GIVE UP OUR OPPORTUNITY TO SPEAK AS A GROUP TO THE ISSUE AND READ THE NAMES OF THE DEAD, INSTEAD WE WALKED AROUND THE ROOM WITH SIGNS AND LEFT.

AND I THOUGHT REALLY IT WAS PRETTY MUCH OVER BECAUSE THERE WERE NEWS MEDIA THAT WANTED TO KNOW HOW MANY MORE PEOPLE DIED THE PREVIOUS YEAR.

SO I -- I TOLD THEM WHAT I THOUGHT. AND THEN THEY SAID WELL WE WOULD LIKE TO SPEAK TO SOMEBODY WHO IS ACTUALLY HOMELESS AND I SAID SURE.

AND AS I TOLD YOU ALL BEFORE, THERE WAS A GUY CALLED DOUG MCGRATH AND HIS WIFE MARYLYN WHO WERE SITTING IN THE FRONT ROW OR SECOND ROW AND I WENT IN TO GET HIM AND I WAS TALKING TO HIM OUTSIDE. AND HE WENT OUT AND STARTED TO LEAVE.

I FOLLOWED HIM, AND AS I DID THE VOICE FOLLOWED ME BACK AND SAID, MR. NORSE THIS IS YOUR SECOND WARNING AND I TURNED TO HIM AND SAID, WHAT WAS MY FIRST WARNING.

I WAS SHOCKED, TAKEN ABACK. WHAT NEXT?

AND HE SAID, THAT'S YOUR THIRD WARNING, YOU WILL HAVE TO LEAVE.

AND I -- I DID. I LEFT. BUT AGAIN, OUTSIDE I WAS FACED WITH THE SAME ISSUE. DO I GO BACK IN AND ESSENTIALLY SAY FOR THE COMMUNITY, YOU CANNOT THROW SOMEONE OUT OF A MEETING FOR -- BECAUSE YOU DON'T LIKE WHAT THEY REPRESENT OR HOW THEY ARE SPEAKING OR WHAT THEY ARE SAYING. YOU CAN'T DO THAT.

AND IF WE LET OURSELVES DO THIS WE ARE ASSISTING IN THAT KIND OF PROCESS WHICH IS JUST WRONG. AND SO IT WASN'T EASY, THOUGH, IN THE SENSE THAT AGAIN, I HADN'T EXPECTED THIS TO HAPPEN.

I HAD A LITTLE MORE TIME TO PREPARE BECAUSE AT THIS TIME I WENT OUTSIDE I SORT OF TALKED TO A FEW THEM. THERE WERE OTHER PEOPLE THERE THAT WERE AWARE I MIGHT BE ARRESTED BUT IT

STILL WAS NOT SOMETHING THAT MADE ME FEEL POSITIVE IN ANY WAY. I FELT, YOU NEVER COULD TELL WHAT KIND OF MULTIPLE CHARGES ARE GOING TO BE LEVELLED AGAINST YOU.

SO I FELT FEARFUL.

BUT YOU HAVE TO CONQUER THAT FEAR IF YOU ARE GOING TO SOMETIMES DO WHAT YOU NEED TO DO. I MEAN, I HAVE -- THERE HAVE BEEN TIMES WHEN I HAVE LEFT THE COUNCIL CHAMBERS UNDER THREAT BY COUNCIL MEMBER FITZMAURICE OR SOME OTHER MAYOR AND I FEEL ILL LEGITIMATELY. BUT I THINK I DECIDED THAT THIS TIME I HAD -- I FELT I HAD TO DO OTHERWISE.

BUT IT PUT STRESS A LOT OF STRESS ON ME. IT WAS A SITUATION WHERE I HAD TO GO TO JAIL I HAD TO BE HANDCUFFED AND FOR SOME PEOPLE WALK AWAY IN HANDCUFFS WHEN THEY SEE THAT YOU LOSE CREDIBILITY YOU LOSE RESPECTABILITY, THEY CONSIDER YOU TO BE, WELL, WHERE THERE'S SMOKE THERE'S FIRE, YOU'RE A CRIMINAL. AND THAT'S A PROBLEM, PARTICULARLY IF YOU ARE A HOME ADVOCATE WHO IS TRYING TO TALK TO DIFFERENT PEOPLE ABOUT DIFFERENT ISSUES.

SO THAT WAS --

Q. WHEN YOU WENT BACK IN THE MEETING, YOU HAD LEFT THE MEETING AFTER YOU HAD BEEN TOLD BY MAYOR KENNEDY THAT THAT WAS YOUR THIRD WARNING?

A. YES.

Q. DID YOU THINK WHEN YOU CAME BACK LATER INTO THE MEETING THAT SOMETHING WAS GOING TO HAPPEN?

A. WELL, MAYOR KENNEDY IS SORT OF AN AMBIVALENT FIGURE FOR ME. SOMETIMES I AGREED WITH HIM, SOMETIMES I DISAGREED WITH HIM, SOMETIMES HE'S MODIFIED THE CHAIR'S BEHAVIORS.

BUT I WAS UNCERTAIN OF WHAT WAS GOING TO HAPPEN. ALL I KNEW IS I HAD TO BE READY TO DEAL WITH A POSSIBLE ARREST, POSSIBLY BE HANDCUFFED TAKEN TO JAIL, HAVING NO RIGHT TO CONTINUE RECORDING WHAT WAS GOING ON AND PRESENTING THAT TO THE PUBLIC LATER.

GETTING THE PROSPECT OF PEOPLE MISINTERPRETING WHAT WAS GOING ON AS HERE'S SOMEBODY WHO DOESN'T CARE ABOUT THE DEMOCRATIC PROCESS, HERE'S SOMEBODY WHO DOESN'T MIND DISRUPTING THINGS WHEN I FELT I TAKE EXTRA ORDINARY PAINS NOT TO DISRUPT THINGS.

BUT I ALSO HAVE TO NOT ALLOW THE COUNCIL TO DISRUPT A SPEAKER OR A PERSON LIKE MYSELF WHO IS TRYING TO GET AN ISSUE OUT THAT THEY HAVE THE NO INTEREST IN WHATSOEVER OF WHAT I THINK IS GREAT IMPORTANCE TO THE COMMUNITY.

AND I THINK YOU'VE ALL SEEN SOME OF THE ISSUES I'VE RAISED.

AND SOME OF THEM ARE RATHER PEDESTRIAN, JUST LIKE HOW MUCH IS THIS ALL GOING TO COST BECAUSE IF YOU ARE SPENDING A LOT OF MONEY ON ONE THING THEN A -- SOME PEOPLE ARE GOING TO FREEZE OUTSIDE BECAUSE THEY HAVE NO WARMING FACILITIES AND THE COUNCIL WILL BLEED POVERTY.

MR. BEAUVAIS: THANK YOU.

FURTHER CROSS-EXAMINATION BY MR. KOVACEVICH

BY MR. KOVACEVICH:

Q. MR. NORSE?

A. YES.

Q. THESE OTHER TIMES OUTSIDE OF THESE TWO WE HAVE BEEN TALKING ABOUT WHERE YOU HAVE BEEN ARRESTED, DID YOU NOT ANTICIPATE THAT ARREST IN ANY OF THOSE INCIDENTS BASED ON WHAT YOU WERE DOING BEFOREHAND?

A. WHICH TIME ARE WE TALKING ABOUT?

Q. ANY OF THEM. I DON'T WANT TO GET --

A. THE TWO WE JUST HAD THAT WE ARE HERE FOR OR OTHER INCIDENTS?

Q. YOU EXPLAINED THERE WAS A DIFFERENCE BETWEEN THIS AND OTHER ARRESTS, BASICALLY.

A. YES.

Q. AND THAT WAS THAT YOU KIND OF, THIS WAS ALL UNEXPECTED. RIGHT?

A. YES.

Q. OKAY?

A. CERTAINLY THAT WAS PART OF IT.

Q. WITH RESPECT TO THESE OTHER ARRESTS WERE ANY OF THOSE UN EXPECTED OR WERE THOSE ONES WHERE YOU INTENTIONALLY WANTED TO GET ARRESTED BASICALLY?

A. YOU NEVER WANT TO GET ARRESTED. I MEAN, THAT DOESN'T HAPPEN. YOU RISK ARREST SOMETIMES, BUT YOU DON'T WANT TO GET ARRESTED. THAT'S NOT REALLY THE ISSUE.

Q. SO I GUESS MY QUESTION OF YOU THEN, IS DID YOU RISK GETTING ARRESTED IN THOSE OTHER TIMES?

A. THERE HAVE BEEN TIMES WHERE I'VE RISKED GETTING ARRESTED AND WAS BETTER PREPARED. THERE'S ALWAYS STRESS WHEN THAT HAPPENS, BUT THERE WAS CERTAINLY LESS STRESS ON THOSE OCCASIONS THAN ON THIS OCCASION.

Q. THIS OCCASIONS? OR JUST ONE?

A. BY THIS OCCASION I MEAN THESE TWO INCIDENTS.

Q. OKAY.

WHAT DO YOU MEAN YOU HAVE TO STOP THE COUNCIL FROM DISRUPTING OR INTERRUPTING A SPEAKER?

A. MAYBE I COULD PUT THAT BETTER. WHAT I MEAN IS THAT, AND YOU CAN'T SEE THIS IN ALL THESE CLIPS, YOU PREPARED A WHOLE BUNCH OF CLIPS ONLY SOME WHICH ARE INTRODUCED.

I THINK YOU SAW WITH MAYOR KENNEDY INTERRUPTING ME AT ONE POINT, THE NEXT TO THE LAST CLIP YOU SHOWED. IT MEANS THAT A PERSON WHO IS WATCHING OR COMING UP THERE FOR THE FIRST OR SECOND TIME, IF A MEMBER OF THE COUNSEL WHO IS IN AUTHORITY TELLS THEM TO BE QUIET OR INTERRUPTS THEM, MANY PEOPLE WITHOUT CONSIDERING WHAT THEIR RIGHTS ARE WILL OBEY FOR A NUMBER OF REASONS. THEY WANT TO SHOW RESPECT FOR THE COUNCIL EVEN IF THE COUNCIL ISN'T ACTING PROPERLY. THEY ARE AFRAID OF THE

CONSEQUENCES OF NOT DOING IT.

IT'S KIND OF A DIFFICULT SITUATION FOR THEM. AND I THINK IT'S GOOD TO LET PEOPLE UNDERSTAND THAT WHILE IT'S CERTAINLY IMPORTANT TO ALLOW A DEMOCRATIC PROCESS TO PROCEED, PART OF THE DEMOCRATIC PROCESS IS THE PUBLIC TESTIMONY THAT SHOULD NOT BE SHORT CIRCUITED BY HIGH-HANDED BEHAVIOR FROM THE CITY COUNCIL.

Q. SO YOU THINK YOU HAVE THE PREROGATIVE TO JUST TAKE THE COUNCIL OR COUNCIL MEMBER ON OR MAYOR AT THAT MOMENT AND DEFEND SOMEBODY WHO YOU THINK IS A LITTLE MORE DEFENSELESS; IS THAT A FAIR STATEMENT?

A. NOT REALLY.

I MEAN, I THINK WHAT I'M SAYING IS I WILL FINISH MY STATEMENT HOPEFULLY SO THAT PEOPLE WATCHING WILL UNDERSTAND THAT THEY HAVE THE RIGHT TO FINISH THEIR STATEMENT AND THEY CAN ALSO HAVE THE POWER TO FINISH THEIR STATEMENT.

BUT IT'S NOT EASY TO DO THAT.

Q. I DON'T UNDERSTAND, WHAT STATEMENTS ARE THEY STOPPING PEOPLE FROM GIVING OR FINISHING?

A. I THINK WE SAW A NUMBER OF TIMES ON THOSE CLIPS WHEN COUNCIL MEMBERS WANTED TO DISREGARD DISCREDIT OFTEN DISRUPT WHAT I WAS DOING, EITHER THROUGH A PRIOR PROCESS OF SHOVING A BUNCH OF THINGS TOGETHER AND CUTTING TIME OR BY DIRECTING ME TO GO TO THE BACK OF THE LINE AND THEN TELLING ME I COULDN'T SPEAK ANY WAY. OR BY INTERRUPTING ME DIRECTLY AT THE MICROPHONE AS MAYOR KENNEDY DID OR BY INTERRUPTING ME WITH POINTS OF ORDER AS

COUNCIL MEMBER FITZMAURICE DID.

Q. HAVE THEY INTERRUPTED YOU IN YOUR TERMINOLOGY A NUMBER OF TIMES BECAUSE THEY BELIEVED YOU WERE SPEAKING OFF TOPIC?

A. YOU CAN'T TELL --

MR. BEAUVAIS: OBJECTION.

CALLS FOR SPECULATION AS TO THEIR STATE OF MIND.

MR. KOVACEVICH: WELL, I THINK THEY'VE TOLD YOU THAT AT TIMES, RIGHT? THAT YOU WERE OFF TOPIC YOU ARE NOT STAYING TO THE TOPIC AT HAND.

THE WITNESS: THAT HAS BEEN SAID ON SOME OCCASIONS. BUT AGAIN, IT'S -- IT DEPENDS. I PRETTY CAREFULLY TRY TO STAY ON TOPIC.

MR. KOVACEVICH: OF COURSE.

THE COURT: WELL, OF COURSE THEY HAVE TOLD YOU YOU WERE OFF TOPIC.

THE WITNESS: IT'S HAPPENED ON A COUPLE OCCASIONS.

BY MR. KOVACEVICH:

Q. A COUPLE.

MR. NORSE I'VE GOT A LOT OF VIDEOS, DO YOU WANT ME TO GO THROUGH THOSE?

A. YOU CAN IF YOU LIKE.

Q. LET ME ASK YOU IF YOU WOULD RECONSIDER THE COUPLE ESTIMATION?

A. THEY HAVE A VARIETY OF DEVICES TO USE TO SILENCE A PERSON. ONE OF THEM IS TO CLAIM THINGS ARE OFF TOPIC.

SO I CAN'T TELL YOU WHICH PARTICULAR DEVICE HAS BEEN USED WHEN THEY CHOOSE TO DO THAT. AND IT DOESN'T HAPPEN ALL THE TIME. I'M NOT SAYING COUNCIL IS A BUNCH OF ENDLESSLY --

Q. HAVE YOU ACQUIESCED AND SAID YOU WERE RIGHT AND OFF TOPIC OR HAVE YOU ALWAYS DEBATED THEM AS TO WHETHER YOU ARE OFF TOPIC?

A. I DON'T -- I DON'T THINK I DEBATE WITH THE COUNCIL MUCH I THINK I TRY TO FINISH THE STATEMENTS THAT I MAKE, THAT'S ALL.

Q. NOW WITH RESPECT TO THOSE CONTENT ITEMS DID YOU KIND OF ROUTINELY TAKE A NUMBER OF ITEMS OFF THE CONSENT AGENDA AND ADDRESS THEM AS PART OF YOUR PARTICIPATION AT THE COUNSEL?

A. NOT ROUTINELY. OCCASIONALLY. I THINK YOU HAVE A LIST OF THEM YOU WERE SHOWING AT SOME POINT. I THINK I SAW I LOOKED OVER A LIST OF THOSE.

I THINK USUALLY I TALK ON 1 OR 2 ITEMS, SOMETIMES I TALK ON NO ITEMS.

Q. I'M TALKING ABOUT THE CONSENT ITEMS VERSUS THE AGENDA ITEMS?

A. 1 OR 2, I WOULD SAY, SURE.

Q. YOU KIND OF REGULARLY WOULD TAKE 1 OR 2 OFF?

A. UH-HUH.

Q. ALL RIGHT.

NOW, WITH RESPECT TO THE 2004 INCIDENT, YOU SAID YOU LEFT OUTSIDE AND YOU WERE FACED WITH THE SAME ISSUE AS TO WHETHER YOU WERE GOING TO BASICALLY ACQUIESCE OR WHETHER YOU WERE GOING

TO MAKE AN ISSUE OF THAT, BASICALLY, RIGHT?

A. WHETHER I WAS GOING TO ALLOW MYSELF TO SURRENDER THE RIGHT AS A CITIZEN TO BE PRESENT AT A CITY COUNCIL MEETING DURING BUSINESS, YES.

Q. OKAY. BUT YOU HAD MADE TO DECISION BEFORE YOU EVEN LEFT, RIGHT, BECAUSE YOU DID TELL THE MAYOR IN ADDITION TO WHATEVER YOU SAID TO HIM, YOU ADDED, I'M LEAVING BUT I WILL BE BACK, RIGHT?

A. I SAID I'LL BE BACK.

Q. DID YOU SAY THAT OR NOT?

A. I DID SAY I WILL BE BACK AND THE RESPONSE OF THE COUNCIL WAS, NOT TODAY, I DON'T THINK SO.

Q. OKAY.

SO NOW -- SO THEY INTERRUPTED YOU IS THAT WHAT YOU ARE TRYING TO TELL US BY ADDING WHAT YOU SAID AT THE END?

A. I JUST THINK THEY SHOWED THEIR ATTITUDE THAT THEY HAD FELT THEY SUCCESSFULLY DECIDED THAT I WAS EXCLUDED FROM SPEAKING AND EXCLUDED FROM BEING AT THE COUNCIL AND THEY WERE KIND OF CONGRATULATING THEMSELVES.

Q. OKAY.

SO WHY DID YOU TELL THEM THAT ON THE WAY OUT, I'M GOING TO BE BACK?

IS THAT KIND OF LIKE THE NAZI SALUTE? UP YOURS, YOU'RE NOT GOING TO DO THIS TO ME.

IS THAT THE KIND OF STATEMENT YOU WERE MAKING?

A. I THINK YOU ARE MISSTATING WHAT I MEANT WITH THIS MOCK NAZI SALUTE.

AGAIN, IT WAS A BRIEF, FLEETING GESTURE THAT WAS SPONTANEOUS AND IT HAD TO DO WITH THE TREATMENT OF THESE TWO PEOPLE.

BUT I REALLY WASN'T --

Q. WHY WERE YOU SAYING IT THEN WAS MY QUESTION?

A. WELL, LET ME TRY TO ANSWER THAT.

Q. PLEASE TRY.

A. SURE.

I REALLY WASN'T SURE WHAT I WAS GOING TO DO. I THINK I WANTED TO, I WANTED TO RETURN BECAUSE AGAIN I FELT AN OBLIGATION TO DO IT. BUT I DON'T THINK I KNEW WHAT I WAS GOING TO DO UNTIL I MADE THAT DECISION A THE LATER.

Q. IN THE FIRST INSTANCE WHEN YOU WERE ASKED TO LEAVE YOU PROCEEDED TO SIT DOWN ON A BENCH, RIGHT?

A. THAT'S TRUE.

Q. WHY DID YOU DO THAT?

A. BECAUSE I DECIDED AT THAT MOMENT IT WAS IMPORTANT FOR ME TO STAY.

Q. DID YOU INDICATE IN YOUR DEPOSITION THAT YOU SAT DOWN BECAUSE YOU DIDN'T WANT TO GET ARRESTED, DO YOU REMEMBER THAT?

A. I DON'T REMEMBER THAT BUT THAT COULD WELL HAVE BEEN TRUE TOO.

Q. OKAY. SO AS YOU SIT HERE TODAY, WAS THE REASON BECAUSE YOU

WEREN'T GOING TO BACK DOWN OR BECAUSE YOU DIDN'T WANT TO GET ARRESTED?

A. WELL I THINK IT'S BOTH. I THINK THAT IF YOU'RE -- YOU CAN MAINTAIN YOUR POSITION BUT IF YOU'RE STANDING UP AND BEING -- CAN BE CONSTRUED BY SOMEBODY AS BEING DISRUPTIVE, I WANTED TO SIMPLY MAINTAIN MY RIGHT TO STAY IN THE CITY COUNCIL AND NOT BE DRAGGED OFF.

Q. OKAY. SO KNOWING -- YOU KNOW, THE COUNCIL AS YOU DO, DID YOU REALLY THINK THAT SITTING DOWN AFTER YOU HAVE BEEN TOLD TO LEAVE WAS GOING TO END THE SITUATION, MR. NORSE, SERIOUSLY?

A. WELL, MAYOR KROHN AND I HAD DISCUSSED THIS ISSUE SOME PEEKS BEFORE, THE ISSUE OF MR. FITZMAURICE'S CONCERNS ABOUT VERY, VERY DISTRICT DECORUM.

AND I REALLY HAD HOPED THAT MAYOR KROHN WOULD SHOW SOME INDEPENDENCE AND SOME GOOD SENSE ON THE ISSUES. AND AGAIN, IN FACT, IT WAS ULTIMATELY HIS DECISION TO MAKE A CITIZEN'S ARREST.

HE COULD HAVE WALKED OVER TO ME AND SAID, COME ON MR. NORSE, COME ON, ROBERT, WHAT'S GOING ON, ARE WE -- ARE YOU GOING TO BE -- YOU ARE UPSETTING COUNSEL MEMBER FITZMAURICE, YOU COULD HAVE MADE SOME PLEA, AND YOU KNOW, HE COULD HAVE DONE OTHER THINGS THAN HAVE ME ARRESTED.

SO THAT WAS A POSSIBILITY.

Q. OKAY. LET'S TALK ABOUT OTHER THINGS?

A. YEAH.

Q. YOU COULD HAVE DONE OTHER THINGS TOO, LIKE E-MAIL THE COUNCIL, RIGHT?

A. OH, I DID AND I DO.

Q. IN REAL TIME?

A. I DO ALL THE TIME.

Q. DID YOU E-MAIL THEM ABOUT THE NAZI SALUTE?

A. YEAH, I E-MAILED MR. KROHN ABOUT THAT SALUTE AND WE TALKED ABOUT IT, IT WAS THE SUBJECT OF A MEETING AND SUBSEQUENT DIALOG BY E-MAIL BACK AND FORTH.

Q. OKAY. BUT I'M TALKING ABOUT AT THE TIME. DO YOU REMEMBER AN ADMONITION ON THE VIDEOTAPES THAT YOU CAN E-MAIL IN REALTIME THE COUNCIL?

A. UH-HUH, SURE.

Q. AND THEY WILL SEE THE E-MAILS; DO YOU REMEMBER THAT? YOU KNOW THAT HAPPENS, RIGHT?

A. YEAH, OH, YEAH, SURE.

Q. HAVE YOU DONE THAT AT THE TIME DURING THE COURSE OF THE MEETING WHEN YOU'RE NOT HAPPY WITH SOMETHING THEY'VE DONE, USE THAT RECOURSE AS OPPOSED TO SOME OF THE OTHERS WE'VE SEEN?

A. WELL, YOU CAN'T BOTH ATTEND THE MEETING AND E-MAIL THEM AT THE SAME TIME, AT LEAST IN 2002, UNLESS YOU WERE A VERY WEALTHY PERSON AND HAD A LAPTOP AND SOME KIND OF SPECIAL DEVICE, SO I DON'T QUITE KNOW WHAT YOU MEAN BY THAT.

IF YOU'RE AT HOME YOU CAN CERTAINLY E-MAIL THEM, BUT I DON'T THINK YOU COULD DO THAT WHILE YOU'RE ATTENDING A MEETING,

AND YOU CERTAINLY CAN'T DO THAT FROM JAIL.

SO I'M NOT REALLY CLEAR WHAT YOU MEAN.

Q. YOU DIDN'T HAVE A LAP TOP BACK THEN?

A. NO.

Q. ALL RIGHT. WHAT ABOUT COMING TO THE NEXT MEETINGS AND DURING ORAL COMMUNICATION VOICING YOUR DISPLEASURE YOUR CONTEMPT, WHATEVER ELSE? THAT'S A FORM FOR YOU TO RAISE THE ISSUE, ISN'T IT?

A. WELL, I THINK YOU SAW ON THE VIDEO, THAT'S EXACTLY WHAT I DID.

Q. RIGHT.

A. I TRIED TO CLARIFY WHAT I DID FOR THE COMMUNITY, FOR SURE. I THINK THAT'S A GOOD THING AND PEOPLE SHOULD DO THAT.

Q. COULD YOU POINT OUT TO US WHAT YOU SAW ON THOSE POST MEETING VIDEO TAPE EXCERPTS THAT WOULD REFLECT THAT YOU WERE CHILLED OR SCARED, I THINK YOU TESTIFIED THE OTHER DAY OR ANYTHING ALONG THOSE LINES?

A. IT BECOMES HARDER TO GO TO CITY COUNCIL MEETINGS AND WHEN ONE DOES, WHEN YOU ARE SPEAKING PUBLICLY, YOU TRY TO CONCEAL HOW YOU FEEL. IF YOU'RE AFRAID YOU DON'T WANT TO SHOW THAT YOU'RE AFRAID, YOU WANT TO SHOW THAT YOU'RE FEELING TOGETHER, SELF CONFIDENT.

AND ALSO, A LOT OF THE FEAR COMES FROM WHETHER YOU ARE GOING TO ACTUALLY RETURN TO THE CITY COUNCIL MEETING ONCE YOU GET THERE -- I MEAN, ACTUALLY, ONCE YOU'RE THERE IT BECOMES --

IT'S STILL AN ISSUE.

WHEN YOU GO UP TO THE MICROPHONE AND YOU HAVE TO FACE THE COUNCIL THAT HAD YOU ARRESTED BEFORE AND ALSO FACE THE POSSIBILITY THAT THIS IS GOING TO HAPPEN AGAIN, I MEAN, THAT WAS WITH ME AGAIN, I DON'T HAVE AN ENTIRELY CLEAR MEMORY OF EACH OF THOSE SUBSEQUENT CLIPS.

AND I CAN'T REALLY POINT OUT TO YOU, BUT I THINK IT'S A GENERAL FEELING OF APPREHENSION, OF TENSION, IT ALSO DISINCLINES YOU TO COME BACK TO CITY COUNCIL MEETINGS OR TO LIMIT WHAT YOU HAVE TO SAY BECAUSE NO ONE WANTS TO GO TO JAIL OR FACE THE THREAT OF GOING TO JAIL AND HAVING TO LEAVE A MEETING AND BE PUBLICLY HUMILIATED.

Q. OKAY. WELL, ARE YOU TELLING US THAT AT LEAST THROUGH 2005 YOU WERE DISINCLINED AND WENT TO LESS MEETINGS AS A RESULT OF WHAT HAPPENED ON THESE TWO?

A. I DON'T REMEMBER HOW MANY MEETINGS I WENT TO OR DIDN'T GO TO. I TRY TO GO TO AS MANY MEETINGS AS I CAN.

MR. KOVACEVICH: THANK YOU, SIR.

I DON'T HAVE ANYTHING FURTHER.

THE COURT: MAY HE STEP DOWN?

MR. BEAUVAIS: NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. BEAUVAIS: WE REST.

THE COURT: ANYTHING FURTHER, MR. KOVACEVICH?

MR. KOVACEVICH: CAN I HAVE ONE SECOND, PLEASE.

THE COURT: ALL RIGHT.

MR. KOVACEVICH: WE WOULD RECALL MR. KROHN.

THE COURT: YOU ARE STILL UNDER OATH.

DIRECT EXAMINATION BY MR. KOVACEVICH

BY MR. KOVACEVICH:

Q. MR. KROHN, I WANT TO REFER YOU TO THE VIDEO CLIP OF THE DVD --

THE COURT: BEFORE WE START HOW MUCH LONGER DO YOU HAVE?

MR. KOVACEVICH: JUST THIS ONE SUBJECT HAVING TO DO WITH THE CONSENT.

THE COURT: THAT WILL TAKE ABOUT HOW LONG? I'M JUST WONDERING WHETHER WE SHOULD --

MR. KOVACEVICH: THREE MINUTES.

THE COURT: OKAY.

BY MR. KOVACEVICH:

Q. THAT DVD CLIP WHERE YOU ASKED MR. NORSE TO COVER -- I COUNTED FIVE, BUT THE JURY CAN DECIDE. THE SUBJECT MATTER IT IS TAKEN OFF THE CONSENT AGENDA DO YOU REMEMBER THAT?

A. YES, SIR.

Q. YOU'VE SEEN THAT. DO YOU HAVE ANY INDEPENDENT RECOLLECTION OF THAT AS YOU SIT THERE OUTSIDE OF WHAT YOU JUST SAW ON THE VIDEO?

A. GOING BACK TEN YEARS, I DON'T RECALL -- JUST GOING ON THE WAY WE TRIED TO MOVE THE MEETINGS ALONG, GOING FROM 1:00 P.M. TO FREQUENTLY MIDNIGHT OR 1:00 A.M., I WAS ALWAYS LOOKING FOR WAYS OF EXPEDITING THE MEETING.

THAT WAS ANOTHER REASON THAT WAS POINTED OUT, FOR EXAMPLE IF WE HAD 30 MINUTES OF ORAL COMMUNICATION AND THERE WAS MORE THAN TEN PEOPLE, WE WOULD GO TO TWO MINUTES SO 15 PEOPLE COULD SPEAK.

SO WE WERE TRYING TO LOOK TO MAXIMIZE THE AMOUNT OF COMMUNICATION, AT LEAST I WAS WHEN I WAS MAYOR, BETWEEN THE COMMUNITY AND THE COUNCIL.

Q. ALL RIGHT.

SO BASED ON WHAT YOU SAW THERE ON THE VIDEO CLIP, COULD YOU TELL US WHETHER YOU WERE TRYING TO GET AT MARKETPLACE AND MUZZLE HIM OR SILENCE HIM?

A. I DO NOT BELIEVE SO. I THINK THAT WE LOOKED AT THE FIVE ITEMS THAT HE SEEMED TO HAVE TAKEN OFF THE AGENDA.

IF I CAN RECALL, I WOULD HAVE GIVEN HIM ONE MINUTE PER ITEM IN THAT CASE, GIVE HIM FIVE MINUTES TO ADDRESS THE COUNCIL, WHICH I OFTEN SPEAK, HAVE SPOKEN PUBLICLY AND, YOU KNOW, TRIED TO FIGURE OUT WHAT YOU CAN SAY IN ONE MINUTE, 2 MINUTES, 3 MINUTES. AT THAT TIME I BELIEVE 5 MINUTES WAS A GOOD AMOUNT OF TIME.

Q. ALL RIGHT. THANK YOU, MR. KROHN?

MR. KOVACEVICH: I DON'T HAVE ANYTHING FURTHER.

THE COURT: OKAY. MAY HE STEP DOWN?

MR. BEAUVAIS: ONE MOMENT, THERE MAY BE A QUESTION.

THE COURT: ALL RIGHT.

THE COURT: DO YOU HAVE A QUESTION?

MR. BEAUVAIS: YES, I DO.

CROSS EXAMINATION BY MR. BEAUVAIS

BY MR. BEAUVAIS:

Q. DID YOU EVER DO THIS WITH ANYONE ELSE, COMBINE THE TOPICS LIKE THIS AND ALLOW A SPECIFIC AMOUNT FOR THE TOTAL?

A. I CANNOT RECALL.

Q. OKAY.

A. I VERY WELL COULD HAVE BUT I JUST DON'T RECALL, IT'S BEEN A WHILE.

MR. BEAUVAIS: OKAY. THANK YOU.

THE COURT: OKAY. NOW YOU CAN STEP DOWN.

THE WITNESS: THANK YOU, SIR.

MR. KOVACEVICH: NOTHING FURTHER.

THE COURT: MR. BEAUVAIS, ANYTHING FURTHER?

MR. BEAUVAIS: NOTHING FURTHER.

THE COURT: ALL RIGHT. THAT COMPLETES THE EVIDENCE IN THE CASE.

I'M REQUIRED NOW TO GO OVER THE LEGAL INSTRUCTIONS THAT I INTEND TO GIVE YOU WITH THE ATTORNEYS AND THEN AFTER THAT I

WILL INSTRUCT YOU AND THEN THEY WILL MAKE THEIR CLOSING ARGUMENTS.

GIVEN THE TIME, I'M GOING TO LET YOU GO TODAY NOW AND JUST SEE YOU TOMORROW MORNING AT 8:30. AND I WOULD ESTIMATE THAT THE CASE WILL BE TO YOU FOR DELIBERATIONS SOMETIME IN MID TO LATE MORNING.

SO WITH THAT YOU'RE EXCUSED FOR THE DAY.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD OUT OF THE PRESENCE OF THE JURY:)

THE COURT: I'M GOING TO GIVE YOU A FEW MINUTES TO LOOK OVER THE INSTRUCTIONS AND VERDICT FORM AND THEN WE CAN COME BACK AND SEE IF THERE ARE ANY OBJECTIONS.

MR. BEAUVAIS: COULD WE HAVE ANOTHER SET, YOUR HONOR? WE ONLY HAVE ONE.

THE COURT: SURE.

THE CLERK: I WILL RUN OFF A COPY.

MR. KOVACEVICH: DO YOU WANT TO MARK THESE NOW, YOUR HONOR?

THE COURT: LET'S DO THAT FIRST, YEAH.

MR. KOVACEVICH: OKAY.

YOUR HONOR, THIS IS A CERTIFIED COPY OF CITY CHARTER SECTION 604 THROUGH 617. I'VE SHOWN IT TO COUNSEL ALREADY. SO IF I COULD MAKE THAT -- DO YOU DO COURT EXHIBITS HERE

THE COURT: JUST MARK IT AS NEXT IN ORDER.

MR. KOVACEVICH: NEXT IN ORDER, OKAY.

THE CLERK: I.

(WHEREUPON, DEFENDANT'S EXHIBIT NUMBER I WAS MARKED FOR IDENTIFICATION.)

THE COURT: WHY DON'T YOU FOLLOW THE LETTER THAT'S GIVEN BY --

MR. KOVACEVICH: SO IF WE COULD HAVE THIS MARKED NEXT IN ORDER WHICH IS A RESOLUTION OF THE CITY COUNCIL WITH ATTACHED RULES OF DECORUM. AND THAT ONE IS RESOLUTION NUMBER 24070, DATED 1998.

AND JUST TO MAKE SURE THAT IT'S CLEAR, HOW LONG A PERIOD OF TIME THAT RESOLUTION AND THOSE RULES WERE IN EFFECT I WOULD ALSO LIKE TO HAVE MARKED AS NEXT IN ORDER THE ENSUING RESOLUTION NUMBER -- NO, I'M SORRY -- WHICH WAS PASSED IN 2005.

THE CLERK: OKAY. AND THAT'S ALL.

THE COURT: IS THERE ANY PARTICULAR ASPECT FOR THE CHARTER YOU WANT TO CALL MY ATTENTION TO?

MR. KOVACEVICH: YES, YOUR HONOR.

(WHEREUPON, DEFENDANT'S EXHIBIT NUMBERS J AND K WERE MARKED FOR IDENTIFICATION.)

MR. KOVACEVICH: SECTION 604 IS ENTITLED PRESIDING OFFICER-MAYOR.

THE MAYOR SHALL PRESIDE AT THE MEETINGS OF THE COUNCIL AND SHALL BE RECOGNIZED AS THE TITULAR HEAD OF THE CITY GOVERNMENT FOR ALL CEREMONIAL PURPOSES AND BY THE GOVERNOR FOR PURPOSES OF MILITARY LAW BUT SHALL HAVE NO REGULAR ADMINISTRATIVE DUTIES.

AND THEN -- I'M SORRY, I DIDN'T HIGHLIGHT THIS HERE.

THE COURT: WHY DON'T WE JUST TAKE A BREAK AND YOU CAN HIGHLIGHT AT THE BREAK WHAT YOU WANT ME TO LOOK AT.

MR. KOVACEVICH: ON THE DOCUMENT I'M ADMITTING?

THE COURT: YES.

HOW MUCH TIME DO YOU WANT BEFORE WE RECONVENE?

MR. BEAUVAIS: HOW ABOUT MAYBE LIKE 40 MINUTES.

THE COURT: OKAY. IS THAT AGREEABLE?

MR. KOVACEVICH: YES, YOUR HONOR.

THE COURT: OKAY. 40 MINUTES.

(WHEREUPON A RECESS WAS TAKEN.)

THE COURT: HOW I WOULD LIKE TO GO ABOUT THIS IS THAT I WOULD ASK FIRST PLAINTIFF WHAT INSTRUCTIONS THAT I PROPOSE TO GIVE THAT YOU OBJECT IF ANY, AND WHAT INSTRUCTION DO YOU PROPOSE THEN DO THE SAME WITH THE DEFENSE.

MR. BEAUVAIS: YOUR HONOR, THE ONLY ONES, AND THESE ARE RELATIVELY MINOR POINTS, BUT ESPECIALLY NUMBER NINE, AND THE ONLY THING I WOULD ASK IS THAT THE WORDS OR SHE IS -- OKAY.

AN ATTENDEE AT A CITY COUNCIL MEETING DISTURBS OR IMPEDES A MEETING WHERE HE OR SHE, WE WOULD ASK THE WORD PREVENTS BE THE NEXT WORD. WHEN HE OR SHE PREVENTS THE COUNSEL FOR ACCOMPLISHING ITS BUSINESS IN A REASONABLY EFFICIENT MANNER.

NOW IT'S IN THE DISJUNCTIVE.

THE COURT: LET ME READ IT TO MYSELF.

THE COURT: AND WHAT'S YOUR SUGGESTION.

MR. BEAUVAIS: WELL, IT WOULD SAY IMPEDES A MEETING WHEN HE OR SHE PREVENTS THE COUNCIL FROM ACCOMPLISHING ITS BUSINESS IN A REASONABLY EFFICIENT MANNER.

THE COURT: WHAT'S THE PROBLEM WITH THE WAY IT'S WRITTEN?

MR. BEAUVAIS: WELL, IF YOU SAY THAT HE OR SHE IS DISRUPTIVE, IT MAKE ITS SEEM LIKE A PERSON COULD BE DISRUPTIVE WITHOUT PREVENTING THE COUNCIL FROM ACCOMPLISHING ITS BUSINESS IN A REASONABLY EFFICIENT MANNER, THAT THERE'S TWO WAYS TO DISTURB THE MEETING.

ONE IS TO BE DISRUPTIVE AND IT'S NOT EXPLAINED WHAT THAT MEANS. ALTHOUGH THE SECOND PART OF IT REALLY IS THE DEFINITION OF DISRUPTION IN THE CONTEXT THAT WE'RE OPERATING TODAY.

AND I GUESS THE OTHER PART OF IT WOULD JUST BE THAT WHEN YOU SAY AN ATTENDEE DISTURBS OR IMPEDES THE MEETING, WELL --

MS. WELLS: PERHAPS IT COULD BE HE OR SHE IS DISRUPTIVE MEANING -- WHICH IS CONSTITUTED BY PREVENTING -- I DON'T KNOW. IT HAS KIND OF A DEFINITION OF DISRUPTIVE INSTEAD OF OR.

IT'S DISRUPTIVE THEREBY PREVENTING THE COUNCIL FROM ACCOMPLISHING ITS BUSINESS.

MR. BEAUVAIS: THEN CAN YOU BE DISRUPTIVE WITHOUT PREVENTING THE COUNCIL FROM ACCOMPLISHING ITS BUSINESS.

IS THERE SOME OTHER ELEMENT OUT THERE THAT OPERATES INDEPENDENTLY THAN PREVENTING THE COUNCIL FROM ACCOMPLISHING

ITS BUSINESS.

AND I THINK THIS MAKES IT JUST A LITTLE FUZZY. THAT'S BASICALLY THE ONLY PROBLEM I HAVE WITH NUMBER NINE.

THE COURT: OKAY. JUST A SECOND.

THE ACTUAL LANGUAGE IN THE OPINION IS ACTUALLY, DISTURBS OR IMPEDES A MEETING.

ARE YOU COMFORTABLE WITH THAT LANGUAGE?

MS. WELLS: YEAH.

MR. BEAUVAIS: THAT'S FINE.

THE COURT: ARE YOU ALL RIGHT WITH IT?

MR. KOVACEVICH: NOT NECESSARILY.

FIRST OF ALL, I KNEW THE NORTH CASE DID HAVE THE DISJUNCTIVE, BUT WE TOOK OURS ALSO FROM WHITE, AND WHITE USES THE DISJUNCTIVE AND IT USES ACCOMPLISHES BUSINESS IN A REASONABLY EFFICIENT MANNER.

I THINK WHAT YOU DO IS WHEN YOU PUT THE WORD IMPEDE WITH DISRUPTION YOU'VE GAINED NOTHING. IT'S A NO SUM GAIN BECAUSE YOU JUST PUT ONE MORE GENERAL --

THE COURT: HOW ABOUT IF WE JUST SAY WHEN HE OR SHE ACTUALLY DISRUPTS THE COUNCIL FROM ACCOMPLISHING ITS BUSINESS IN A REASONABLY EFFICIENT MANNER.

MR. KOVACEVICH: YEAH.

THE COURT: DOES THAT WORK?

MR. BEAUVAIS: THAT'S FINE.

MR. KOVACEVICH: BUT I DO HAVE OTHER ISSUES WITH

NUMBER NINE AND I KNOW IT'S NOT MY TIME TO SPEAK I JUST WANTED TO MAKE IT CLEAR.

THE COURT: OKAY.

MR. BEAUVAIS: SHALL I GO ON, YOUR HONOR?

THE COURT: YEAH, PLEASE.

MR. BEAUVAIS: INSTRUCTION NUMBER TEN. THE ELEMENTS FOR THE FIRST AMENDMENT CLAIM TALKS ABOUT PROTECTED EXPRESSION UNDER THE FIRST AMENDMENT, FREE SPEECH.

BUT IN THIS PARTICULAR INSTANCE, THE FIRST PART OF THIS EVENT WAS THE PROCESSION, WHICH CERTAINLY FALLS WITHIN THE SECOND ELEMENT.

BUT THERE WAS A THIRD ELEMENT THAT RELATED TO THE WHISPER AND THE MAYOR'S REACTION TO THE WHISPER. AND I THINK THAT REQUIRES THAT THERE BE AN ELEMENT OF PEACEABLE ASSEMBLY BEING VIOLATED. BECAUSE IF HE WHISPERED WITHOUT DISRUPTING THE MEETING THEN HIS RIGHT OF PEACEABLE ASSEMBLY UNDER THE FIRST AMENDMENT WAS VIOLATED WHEN HE WAS EJECTED.

SO I THINK THAT ELEMENT NEEDS TO COME IN HERE SOMEHOW.

AND THEN THE SECOND PART WOULD BE THAT THIS INSTRUCTION IS SILENT AS TO RETALIATION, BUT MAYBE THAT NEEDS A SEPARATE INSTRUCTION SO IT DOESN'T GET TOO CONFUSING

THE COURT: THERE'S NOWHERE IN YOUR COMPLAINT THAT RETALIATION IS MENTIONED, IF I RECALL CORRECTLY.

MR. BEAUVAIS: THAT MAY BE TRUE. I DRAFTED IT SO LONG AGO, I DON'T REMEMBER. I THINK THAT THE NINTH CIRCUIT

THOUGHT IT WAS AT PLAY.

AND EVERYONE SEEMS TO HAVE CONSIDERED IT TO BE AT PLAY. SO I WOULD ASK FOR THE RIGHT TO AMEND TO CONFORM TO PROOF.

THE COURT: WELL, LET'S START WITH YOUR PROPOSING AN INSTRUCTION, WHAT YOU DON'T LIKE ABOUT WHAT I'M GIVING.

MR. BEAUVAIS: OKAY. I THINK NUMBER TWO COULD SAY, MR. NORSE'S CONDUCT ON JANUARY 13TH, 2004, FOR WHICH HE WAS EJECTED CONSTITUTED PROTECTED EXPRESSION UNDER THE FIRST AMENDMENT OR VIOLATED HIS RIGHT TO PEACEABLY ASSEMBLE. AND I THINK THAT WOULD TAKE CARE OF THAT.

THEN NUMBER THREE, WE NEED TO GET THE IDEA OF PEACEABLE ASSEMBLY IN NUMBER THREE AS WELL. LET'S SAY INTERFERENCE WITH THE RIGHT TO PEACEABLY ASSEMBLE, OR INTERFERENCE WITH PROTECTED EXPRESSION WAS A SUBSTANTIAL OR MOTIVATING FACTOR FOR MAYOR KENNEDY'S ACTION.

THE COURT: MR. KOVACEVICH?

MR. KOVACEVICH: I DIDN'T -- COULD YOU REPEAT. COULD I ASK HIM TO REPEAT THE LAST STATEMENT.

THE COURT: SURE.

MR. BEAUVAIS: INTERFERENCE WITH MR. NORSE'S RIGHT TO PEACEABLY ASSEMBLE OR VIOLATION OF HIS RIGHT TO FREE SPEECH WAS A SUBSTANTIALLY MOTIVATING FACTOR, SOMETHING THAT INCORPORATES BOTH OF THOSE IDEAS IN NUMBER THREE.

MR. KOVACEVICH: IT'S ENCOMPASSED WITHIN THE FIRST AMENDMENT RIGHTS. SO I DON'T HAVE A PROBLEM WITH IT.

MR. BEAUVAIS: I JUST NEED LANGUAGE THAT IS SMOOTHER.

THE COURT: LET ME JUST TRY.

HOW DID YOU MODIFY NUMBER THREE?

MR. BEAUVAIS: I WOULD MODIFY NUMBER THREE -- WELL, NUMBER THREE IS JUST THE CAUSATION ISSUE. AND IT JUST NEEDS TO BE BROAD ENOUGH TO EMBRACE THE QUESTIONS OF --

THE COURT: I'M JUST ASKING HOW YOU WORDED IT.

MR. BEAUVAIS: YEAH, I DIDN'T LIKE THE WAY I WORDED IT. LET ME SEE IF I CAN TRY TO DO IT.

MR. KOVACEVICH: WHY DON'T WE JUST SAY, MR. NORSE'S PROTECTED FIRST AMENDMENT RIGHTS.

I MEAN, AREN'T WE JUST LUMPING ASSEMBLY AND SPEECH AS THE RIGHTS?

MR. BEAUVAIS: YEAH, WE COULD DO THAT. WE CAN INCORPORATE THE CHANGE IN NUMBER TWO TO ADD THE SECOND ELEMENT.

THEN NUMBER 3 WOULD BE BROADER THAN IDENTIFYING THE FIRST AMENDMENT AS AN UMBRELLA IDEA.

THE COURT: OKAY.

MR. BEAUVAIS: SO NUMBER 2 WOULD SAY, MR. NORSE'S CONDUCT ON JANUARY 13TH, 2004 FOR WHICH HE WAS EJECTED CONSTITUTED PROTECTED EXPRESSION -- WELL -- UNDER THE FIRST AMENDMENT RIGHT OF --

MR. KOVACEVICH: HOW ABOUT PROTECTED EXPRESSION AND PEACEFULLY -- HOW IS IT -- PEACEABLE ASSEMBLY BUT WHAT'S THE CORRECT WORD BEFORE THAT? PEACEABLE ASSEMBLY.

MR. BEAUVAIS: CONSTITUTED PROTECTED EXPRESSION OR PEACEABLE ASSEMBLY UNDER THE FIRST AMENDMENT.

MR. KOVACEVICH: YEAH.

MR. BEAUVAIS: UNDER THE FIRST AMENDMENT, NUMBER THREE SHOULD SAY, IT WOULD JUST SAY MR. NORSE'S EXERCISE OF HIS FIRST AMENDMENT RIGHTS WAS A SUBSTANTIAL OR MOTIVATING FACTOR.

MR. KOVACEVICH: I DON'T HAVE A PROBLEM WITH THAT.

THE COURT: SO IF WE COULD ON NUMBER 2, MR. NORSE'S CONDUCT ON JANUARY 13TH, 2004 FOR WHICH HE WAS EJECTED CONSTITUTED PROTECTED EXPRESSION OR CONSTITUTED HIS RIGHT TO PEACEABLY ASSEMBLE UNDER THE FIRST AMENDMENT, WAS A SUBSTANTIAL MOTIVATING FACTOR.

MR. BEAUVAIS: WELL, YOU JUST BLENDED 2 AND 3. DID YOU WANT TO DO THAT?

THE WAY TWO WOULD READ IS MR. NORSE'S CONDUCT ON JANUARY 13TH, 2004, FOR WHICH HE WAS EJECTED CONSTITUTED PROTECTED EXPRESSION OR PEACEABLE ASSEMBLE UNDER THE FIRST AMENDMENT.

THE COURT: OKAY.

MR. BEAUVAIS: THEN NUMBER 3, MR. NORSE'S EXERCISE OF HIS FIRST AMENDMENT RIGHTS WAS A SUBSTANTIAL OR MOTIVATING FACTOR FOR MAYOR KENNEDY'S ACTION.

THE COURT: OKAY.

WHAT'S NEXT?

WHAT'S NEXT?

MR. BEAUVAIS: THE OTHER THING I WONDERED ABOUT IS THERE'S NO JURY INSTRUCTIONS RELATING TO MONELL. AND ALSO I DON'T KNOW THAT THERE NEED TO BE, BUT IN LIGHT OF --

THE COURT: I FELT THE DECISION AS INSTITUTED BY THE MAYOR IS THE FINAL POLICY DECISION OF THE MAYOR AND CITY COUNCIL, THEREFORE THERE'S NO NEED TO INSTRUCT.

MR. BEAUVAIS: BUT IT'S ALSO, THERE'S NOTHING ON THE VERDICT FORM THAT RELATES TO THE CITY ITSELF.

AND I DON'T KNOW THE ANSWER TO THIS QUESTION AND I DON'T KNOW IF THERE'S A PROBLEM THAT THEY'RE NOT --

THE COURT: I DON'T THINK SO BECAUSE I WOULD JUST ENTER THE WHATEVER THE JUDGMENT IS IF THERE IS ONE AGAINST THE CITY.

MR. BEAUVAIS: OKAY.

THOSE ARE THE ONLY ISSUES WE HAVE.

THE COURT: OKAY.

ANY ADDITIONAL? OKAY. SO THE ONLY THING THAT IS OPEN WITH YOU IS WHETHER THERE SHOULD BE SOME MENTION OF RETALIATION OR --

MR. BEAUVAIS: RIGHT.

THE COURT: WHY DON'T YOU DRAFT SOMETHING OUT WHILE WE'RE GOING OVER MR. KOVACEVICH'S CONCERNS AND I WILL CONSIDER ADDING IT.

OKAY. DO YOU WANT TO TAKE YOUR TURN?

MR. KOVACEVICH: YES, YOUR HONOR. FIRST OF ALL WITH

RESPECT TO NUMBERS 7, 10 AND 11, CONCLUSION OF THE CITY OF SANTA CRUZ AS A POTENTIAL LIABLE DEFENDANT, I WOULD OBJECT BECAUSE I THINK THE CITY'S ONLY POTENTIAL LIABILITY HERE WOULD BE BASED ON YOUR FINDING THAT THE MEMBERS WERE FINAL POLICY MAKERS AND I THINK THAT'S INCORRECT AND CONTRARY TO LAW.

SO I NEED TO MAKE MY OBJECTION.

THE COURT: RIGHT.

MR. KOVACEVICH: AND I ASSUME YOU DID LOOK OVER MY PAPERWORK ON THE CHARTER AND STUFF.

THE COURT: I DID.

MR. KOVACEVICH: OKAY.

AND THEN ON NUMBER 9, I HAVE A PROBLEM WITH THIS IN TERMS OF -- I DON'T THINK THEY OFFERED ONE ON DEFINITION OF INSTRUCTION.

AND I OFFERED IT AND THEN YOU PICKED IT APART AND TOOK OUT, I THINK, IMPORTANT FACTORS THAT ARE HELPFUL, APPROPRIATE AND RELEVANT, BUT HELPFUL TO ME AND LEFT IN ONES THAT ARE NOT.

YOU KNOW, THE LANGUAGE OF RELEVANCE TO MEANING THE HOT TOPIC AT HAND UNDULY REPETITIOUS OR TAKE TOO LONG CAME FROM THE KINDT CASE. BUT THAT WASN'T AN EXHAUSTIVE LIST, IT'S JUST I THROUGH IN THOSE AS WELL AS OTHERS.

AND YOU EVEN THOUGHT, WE AGREED, ALTHOUGH YOU DIDN'T DISCUSS IN TERMS OF DISTRIBUTION, BUT SPEAKING TIME ALLOTTED FOR PUBLIC COMMENT WAS A FACTOR. THAT'S NOT LISTED HERE

THE COURT: I STILL THINK IT IS. I JUST THINK IT'S

COVERED UNDER RELEVANCE TO THE MEETING TOPIC AT HAND.

MR. KOVACEVICH: WELL, I APPRECIATE THAT.

I THINK I KNOW WHAT YOU MEAN AND I CAN UNDERSTAND THAT. BUT I'M NOT SURE THAT LANGUAGE IS GOING TO CONVEY THAT TO THE JURY.

AND I HAD THE -- I USED INCLUDING TIME, PLACE AND MANNER WHICH IS THE BASIC STANDARD FOR ANY KIND OF RESTRICTION OF FIRST AMENDMENT RIGHTS. GRANTED IF IT'S ON THE STREET, YOU KNOW, IT'S MORE SCRUTINIZED AND HARDER TO RESTRICT. BUT -- SO I WOULD STILL --

THE COURT: WHAT IS YOUR PROPOSED INSTRUCTION, WHICH ONE IS IT?

MR. KOVACEVICH: 19.

THE OTHER TWO THINGS, YOUR HONOR, I THINK YOU'RE STRIPPING FROM THE BENEFIT GIVEN MY CLIENTS IN ALL OF THE CASES IN TERMS OF THE DISCRETION THAT THEY HAVE, I MEAN I ASKED --

THE COURT: OKAY. THE INSTRUCTION YOU HAD 19 IS STILL WHAT I'M LOOKING AT. WAS THAT ONE YOU AMENDED.

MR. KOVACEVICH: NO.

THE COURT: FACTORS BEARING ON WHETHER SPEECH OR EXPRESSION IS DISRUPTIVE INCLUDES ITS NATURE RELEVANCE TO THE MEETING TOPIC.

MR. KOVACEVICH: I'M SORRY, YOUR HONOR. I DID AMEND THAT. YOU ARE LOOKING AT THE OLD ONE.

THIS WAS FILED ON 11-2. THAT'S TRUE. I DID AMEND THAT.

THE COURT: WOULD YOU HAND ME UP A COPY OF IT. I DIDN'T BRING IT IN.

I CAN'T QUARREL WITH THAT BEING ESSENTIALLY ACCURATE. DO YOU HAVE ANY OBJECTION TO THAT INSTRUCTION?

MR. BEAUVAIS: YOUR HONOR, I NEED TO TAKE A LOOK AT IT, I DON'T HAVE IT IN FRONT OF ME. THIS IS ONE OF THE ONES THAT CAME IN LATE.

CAN I TAKE A LOOK AT YOURS?

THE COURT: I WILL HAND IT TO YOU.

MR. BEAUVAIS: THIS WAS FILED 11-2.

THE COURT: CORRECT.

MR. BEAUVAIS: I DON'T KNOW IT'S ACCURATE TO SAY THE PRESIDING OFFICER MUST BE GIVE GIVEN A GREAT DEAL OF DISCRETION IN DECIDING WHETHER A DISRUPTION HAD OCCURRED.

THE COURT: I THINK THAT WAS STRAIGHT OUT OF ONE OF THE CASES, ISN'T IT?

MR. KOVACEVICH: TWO OF THEM.

MR. BEAUVAIS: AND I DON'T KNOW THAT IT PROVIDES MUCH OF A MODEL FOR THE JURY TO KNOW WHAT A GREAT DEAL OF DISCRETION MEANS.

THE COURT: WHAT IF WE JUST SAY, MUST BE GIVEN DISCRETION?

MR. BEAUVAIS: WELL, IF IT EMBODIES THE IDEA OF REASONABLE USE OF DISCRETION, IT WOULDN'T BE A PROBLEM.

BUT IF THE JURY HEARS THAT --

THE COURT: HOW ABOUT GIVEN REASONABLE DISCRETION?

MR. BEAUVAIS: GIVEN REASONABLE DISCRETION -- THAT MIGHT SOLVE IT.

I MEAN, I THINK IT HAS TO BE LEFT OPEN FOR THE ARGUMENT THAT THE DISCRETION WAS ABUSED.

THE COURT: SO REASONABLE DISCRETION WOULD TAKE CARE OF IT, WOULDN'T IT?

MR. BEAUVAIS: PROBABLY. I'M LOOKING FOR BETTER WORDS, BUT I THINK WE ARE MOVING IN THE RIGHT DIRECTION WITH IT.

THAT MIGHT BE GOOD, I KNOW IT'S NOT IN THE CASE LAW, BUT MUST ACT PRUDENTLY IN DECIDING WHETHER DISRUPTION HAS OCCURRED.

THE COURT: I THINK THAT DOESN'T GIVE -- I THINK IT'S A DISCRETIONARY CALL. WHY DON'T WE SAY REASONABLE DISCRETION AND IF YOU CAN THINK OF SOMETHING BETTER BEFORE WE BREAK UP THE DAY I WILL CONSIDER IT.

MR. BEAUVAIS: MAYBE -- OKAY.

REASONABLE DISCRETION -- HOW ABOUT REASONABLE DISCRETION CONSISTENT WITH THE FIRST AMENDMENT IN DECIDING WHETHER DISRUPTION HAD OCCURRED.

THE COURT: I'M NOT SURE WHAT THAT MEANS.

MR. BEAUVAIS: WELL --

MS. WELLS: HE DOESN'T HAVE THE DISCRETION TO VIOLATE HIS RIGHTS.

MR. BEAUVAIS: HE DOESN'T HAVE THE DISCRETION TO

VIOLATE A PERSON'S RIGHTS, THAT'S RIGHT.

THE COURT: HOW CAN IT BE REASONABLE IF HE VIOLATES HIS RIGHTS?

MR. BEAUVAIS: IT WOULDN'T BE REASONABLE, BUT A JURY MIGHT BE CONFUSED IF THEY DON'T UNDERSTAND THAT THE FIRST AMENDMENT IMPOSES A LIMIT ON THE DISCRETION.

MR. KOVACEVICH: CAN I SAY SOMETHING, YOUR HONOR?

THE COURT: YES.

MR. KOVACEVICH: WE SEEM TO HAVE COME A LONG WAY FROM WHAT THE CASES SAY.

AND YOU KNOW, THE PROBLEM I HAVE IS EITHER JURORS DON'T KNOW THE IMPLICATIONS OF WHAT THEY ARE SAYING OR THEY MEAN WHAT THEY SAY.

WHY WOULD YOU SAY, SHOULD HAVE A GREAT DIAL OF DISCRETION IF YOU'RE GOING TO THEN WHITTLE IT DOWN AS THEY ARE TRYING TO WHITTLE IT DOWN?

I MEAN, I THINK THEY MEANT TO SAY IT BECAUSE OF THE CIRCUMSTANCES.

SO THE SCRUTINY IS NOT A STRICT SCRUTINY. BECAUSE WE ALL HAVE BEEN IN SITUATIONS WHERE WE MAKE JUDGMENT CALLS, SOME OF US AT LEAST HAVE.

SO AT ANY RATE, THAT'S MY KIND OF TAKE ON IT.

MR. BEAUVAIS: THE CASES, OF COURSE, DIDN'T REALLY HAVE THIS ISSUE PARTICULARLY IN MIND BECAUSE IT WAS PRETTY CLEAR FROM BOTH WHITE AND KINDT, THAT THESE PEOPLE WERE NOT

OPERATING REMOTELY WITHIN THE ZONE OF PROTECTED ACTIVITY.

MR. KOVACEVICH: THE PROBLEM THERE IS ONE OF THE EJECTIONS WAS THE --

THE COURT: OKAY. I GOT YOUR POINT.

MR. KOVACEVICH: THE -- YEAH. THE THOUGHT PERSON FLIPPED THE FINGER.

I DON'T SEE THAT IT'S SO CLEAR AS YOU'RE MAKING IT OUT TO BE.

THE COURT: I COULD SAY THE PRESIDING OFFICER AT A CITY COUNCIL MEETING MUST BE GIVEN A GREAT DEAL OF DISCRETION WITHIN THE CONFINES OF THE FIRST AMENDMENT IN DECIDING WHETHER A DISRUPTION HAS OCCURRED.

MR. BEAUVAIS: PERFECT.

THE COURT: WHAT DO YOU THINK OF THAT?

MR. KOVACEVICH: I THOUGHT YOU ASKED EARLIER WHAT'S THAT MEAN.

THE COURT: I DID.

MR. KOVACEVICH: I'M TRYING TO FIGURE OUT MYSELF.

BUT, IF I COULD JUST LODGE AN OBJECTION WITHOUT IT BEING WAIVED AND LEAVE IT AT THAT, IF THAT'S WHAT YOU WANT TO DO.

THE COURT: WELL, I WANT TO CONSIDER WHAT YOU WANT, UNLESS THERE'S ANYTHING YOU DON'T WANT TO VARY AT ALL FROM THE LANGUAGE YOU PROPOSED.

MR. KOVACEVICH: THAT'S WHAT I'M ASKING FOR IS THE LANGUAGE I PROPOSED, YES.

THE COURT: WELL, LET'S GO AHEAD AND I WILL THINK A LITTLE BIT FURTHER ON THAT ONE.

MR. KOVACEVICH: OKAY.

WITH RESPECT TO NUMBER 10, ON NUMBER 2 WHERE IT SAYS MR. NORSE'S CONDUCT ON THAT DATE FOR WHICH HE WAS EJECTED CONSTITUTED PROTECTED EXPRESSION UNDER THE FIRST AMENDMENT.

MY PROBLEM IS, I INDICATED THIS EARLIER, YOU INDICATED I COULD ARGUE IT, IS THAT HE DISRUPTED -- THE JURY, WHETHER SHE DISRUPTED AT THE FINAL POINT IN TIME OR BEFORE, AS LONG AS HE DISRUPTED THE MEETING AT THAT MEETING, THEN HE COULD BE EJECTED.

AND WHETHER THERE WAS COMPLIANCE WITH MAYOR SELF IMPOSED WARNINGS OR NOT IS NOT A CONSTITUTIONAL VIOLATION. THE CONSTITUTIONAL VIOLATION IS IF HE WAS EJECTED WITH NO DISRUPTION.

SO THE WAY THIS IS WORDED FOR WHICH HE WAS EJECTED, THE JURY MAY SEE THAT AS MEANING THE LAST WARNING. AND I AGAIN CITE THE COURT TO THE CASE KINDT WHERE KINDT INDICATED THEY DON'T NECESSARILY CONDONE THE COUNCIL VIOLATING THEIR OWN RULES, HOWEVER IT DOESN'T RISE TO CONSTITUTIONAL.

SO IT'S LIKE THE COPS STOP SOMEBODY FOR PROBABLE CAUSE THEY ARTICULATE IT ACTUALLY ISN'T PROBABLE CAUSE BUT THERE IS OTHER PROBABLE CAUSE BASIS, ALL THE LAW CARES ABOUT IS WHETHER THERE WAS AN INDEPENDENT BASIS TO STOP THE PERSON NOT THE PARTICULAR REASON THAT THE COP HAD IN HIS MIND, AND I'M

ANALOGIZING FROM THAT TO THIS SITUATION WHERE THE MAYOR HAD A GROUNDS, ARGUABLY HAD GROUNDS --

THE COURT: WHAT IN THE WORDING OF TWO SUGGESTS THAT.

MR. KOVACEVICH: FOR WHICH HE WAS EJECTED.

I THINK THE TAPE VERSION SEEMED TO INDICATE THAT HE EJECTED HIM BECAUSE OF THE WHISPER AT THE END. BUT HE DID THAT BECAUSE HE HAD THIS WEIRD WARNING SYSTEM THAT HE SET UP.

BUT I DON'T THINK IT'S A CONSTITUTIONAL VIOLATION. THE EJECTION DOESN'T -- ISN'T EXACTLY CONTEMPORANEOUS WITH THE DISRUPTIVE CONDUCT.

MR. BEAUVAIS: I DON'T THINK THERE'S ANY LANGUAGE IN THERE THAT IMPLIES THAT IT IS CONTEMPORANEOUS. AND I THINK IT JUST COMES DOWN TO A MATTER OF ARGUMENT.

MR. KOVACEVICH: WELL, I JUST THINK YOU CAN OMIT THE WORD FOR WHICH HE WAS EJECTED.

I THINK IT COULD READ MR. NORSE'S CONDUCT ON JANUARY 13, 2004 CONSTITUTED PROTECTED BLAH BLAH BLAH.

THE COURT: WE COULD DO THAT. I DON'T SEE A PROBLEM WITH THAT.

MR. KOVACEVICH: MAY I GO ON TO THE NEXT, OR --

THE COURT: YEAH.

MR. BEAUVAIS: COULD I GET THE READING ON THAT?

THE COURT: 2 WOULD READ: MR. NORSE'S CONDUCT ON JANUARY 13TH, 2004, CONSTITUTED PROTECTED EXPRESSION, ET CETERA.

MR. BEAUVAIS: OKAY.

THE COURT: OKAY. WHAT'S NEXT?

MR. KOVACEVICH: AND THEN I DO NEED TO GO BACK TO THE LANGUAGE THAT WAS PROPOSED WHEN I SAID I COULD GO WITH WHATEVER YOU WERE AGREEING AT, I DIDN'T ADD I STILL HAVE OBJECTIONS I WAS JUST TRYING TO GET THAT LANGUAGE IN FRONT OF US THEN I COULD MAKE MY OBJECTION WHICH I'M GOING TO DO NOW.

I DON'T SEE HOW THE RIGHT TO ASSEMBLE IS -- THE REASON KENNEDY ACTED THE WAY HE DID WAS NOT BASED ON SOME RIGHT TO ASSEMBLE. ARE YOU SAYING THE PROCESSION IS PART OF THE RIGHT TO ASSEMBLE?

MR. BEAUVAIS: NO, HIS RIGHT TO BE AT THE MEETING IS REALLY WHAT WE ARE TALKING ABOUT.

MR. KOVACEVICH: I UNDERSTAND.

BUT THE PROBLEM IS, IS YOU'RE PUTTING THE CART BEFORE THE HORSE. THAT'S COLLATERAL DAMAGE.

BUT THE BASIS ON WHICH HE'S BEING JUDGED BY KENNEDY IS THE OTHER PART OF THE FIRST AMENDMENT, EXPRESSIVE CONDUCT. NOT THE ASSEMBLAGE.

HE ARRESTED HIM BECAUSE HE CAME BACK INTO THE MEETING WHICH YOU MIGHT BE ABLE TO SAY WELL THERE HE WAS TRYING TO ASSERT HIS RIGHT TO ASSEMBLE. BUT HE WASN'T EJECTED IN THE FIRST INSTANCE BASED ON THAT RIGHT. I DON'T SEE ANY EVIDENCE OF THAT.

THE COURT: YOU DIDN'T MAKE A PEEP OF THIS WHEN WE WERE JUST TALKING ABOUT THE LANGUAGE. I THOUGHT YOU SAID YOU

DIDN'T HAVE INTERFERED WITH HIS RIGHT TO PEACEFULLY ASSEMBLED.

MR. KOVACEVICH: WELL, HE WAS TRYING TO GET IN, I DON'T KNOW WHAT HE WAS TRYING TO DO, MR. BEAUVAIS, BUT I WAS JUST TRYING TO HELP HIM FOR THE LANGUAGE SO THAT WE COULD MOVE ON.

BUT I HAVE A BASIC PROBLEM WITH INTERJECTING, AND I'M SORRY IF IT SOUNDS INCONSISTENT AND I SHOULD HAVE RAISED IT AT THE TIME YOUR HONOR, I APOLOGIZE. BUT I AM OBJECTING TO IT AT THIS POINT. BECAUSE I DON'T SEE THE CAUSAL CONNECTION AT ALL IN THE EVIDENCE BETWEEN THAT PART OF THE FIRST AMENDMENT RIGHT AND MR. KENNEDY'S ACTIONS IN EJECTING HIM.

IT'S THE EJECTION THAT CAUSES THEN THE POSSIBLE INTERFERENCE WITH THE RIGHT TO ASSEMBLE. BUT IT ISN'T THE BASIS ON THE EJECTION IN THE FIRST INSTANCE.

SO I THINK YOU'RE BASICALLY RIGHT WHEN YOU SAID PROTECTED EXPRESSION.

MR. BEAUVAIS: WELL --

MR. KOVACEVICH: THE CONDUCT WASN'T --

THE COURT: LET'S ASSUME FOR THE MOMENT THAT THE ONLY REASON HE WAS EJECTED WAS BECAUSE HE WHISPERED. THAT WAS CONSIDERING TOSSING HEM OUT FOR SOMETHING THAT'S WANT A DISRUPTION, ASSUMING THE WHISPER THING DISRUPTED HIM.

MR. KOVACEVICH: RIGHT. AND THAT'S A FREE SPEECH ISSUE, ISN'T IT?

MR. BEAUVAIS: NO, I THINK IT'S A RIGHT OF ASSEMBLY.

THE ONLY SPEECH INVOLVED IN THIS IS THE WHISPER WHICH WAS A PRIVATE SPEECH AND --

THE COURT: ACCORDING TO THE EVIDENCE AS YOU SEE IT.

WHY ISN'T THE WHISPER A PROTECTED EXPRESSION IF IT DOESN'T DISTURB ANYBODY?

MR. BEAUVAIS: IS THAT DIRECTED TO ME?

THE COURT: YEAH.

MR. BEAUVAIS: I MEAN, IT MAY BE, BUT IT'S NOT WHAT YOU THINK OF CONVENTIONALLY.

I MEAN, TELLING SOMEBODY TO GO OUTSIDE BECAUSE THE MEDIA WANTS TO TALK TO THEM. TO ME PART OF THIS THAT I THINK IS MOST DISTURBING WITH RESPECT TO THAT IS THAT HE'S BOUNCED OUT OF THE MEETING NOT BECAUSE OF THE CONTENT OF HIS SPEECH BUT BECAUSE THE MAYOR IS DIRECTLY INTERFERING WITH HIS RIGHT TO PEACEABLY ASSEMBLE AT THAT POINT AND WANTS TO STAY AT THE MEETING.

THAT'S REALLY THE GIST OF IT.

I MEAN, I SUPPOSE AN ARCANE ARGUMENT COULD BE MADE ABOUT THAT BEING PROTECTED SPEECH. AND MAYBE IT IS PROTECTED SPEECH BUS IT DIDN'T CREATE A DISRUPTION.

BUT I THINK WHAT WOULD BE EASIER TO GRASP ABOUT THAT IS THE RIGHT TO REMAIN AT THE MEETING AND HIS RIGHT TO PEACEABLY ASSEMBLE SOUNDS MORE ON POINT. UNLIKE THE SALUTE WHICH IS CLEARLY EXPRESSIVE CONDUCT INTENDED TO BE PUT OUT THERE FOR OTHER PEOPLE.

MR. KOVACEVICH: SEE, MY POINT WOULD BE LIKE, IF HE

SAID YOU TWO GUYS YOU CAN'T COME INTO THIS MEETING TOGETHER. THEN THAT MAY BE SOME KIND OF ASSEMBLY. BUT HE BASICALLY SAID TAKE YOUR CONVERSATION OUTSIDE. HE DIRECTED IT AT THE SPEECH.

MR. BEAUVAIS: WELL, HE SAID TAKE IT OUTSIDE AND THEN RIGHT AFTER THAT HE SAID DON'T COME BACK.

MR. KOVACEVICH: THAT WAS ALSO BASED ON SUBSEQUENT SPEECH, RIGHT?

MR. BEAUVAIS: WELL, AFTER THE THIRD ONE.

MR. KOVACEVICH: IT WAS THE THIRD ONE.

THE COURT: IF MR. NORSE WAS THROWN OUT FOR NO REASON WHATSOEVER, WOULDN'T HAVE BEEN A VIOLATION OF HIS RIGHT TO ASSEMBLE BECAUSE HE WASN'T ALLOWED TO ASSEMBLE.

MR. KOVACEVICH: YEAH, BECAUSE WE WOULDN'T KNOW IF IT WAS ONE REASON OR ANOTHER. RIGHT.

SO I THINK IN THAT SITUATION I WOULDN'T DISAGREE. BUT HERE I THINK WE HAVE SOME CONDUCT AND THE CONDUCT IS SPEAKING.

SO THAT'S WHY I RAISE IT.

THE COURT: WELL, ISN'T IT REALLY TREATING A WHISPER AS IF IT WERE NO SPEECH?

I MEAN, KENNEDY DIDN'T TOSS HIM OUT BECAUSE OF THE CONTENT OF HIS SPEECH, AT LEAST ACCORDING TO HIM, HE -- THE IMPLICATION IS HE THOUGHT THAT HE WAS MAKING NOISE THAT UPSET OR DISRUPTED THE MEETING.

MR. KOVACEVICH: RIGHT.

THE COURT: AND HE WAS MAKING NOISE THAT DISRUPTED

THE MEETING, HE COULD BE KICKED OUT IF HE WAS MAKING NOISE THAT WAS SO SOFT THAT IT COULDN'T BE HEARD, THEN WOULDN'T HE BE INTERFERING WITH HIS RIGHT TO ASSEMBLE?

MR. KOVACEVICH: WELL, I GUESS MY POINT WAS IF YOU'RE TALKING ABOUT BECAUSE HE HAD TO LEAVE THE MEETING, THAT CAME AFTER.

IF YOU'RE SAYING THAT HIM TALKING TO SOMEBODY IN THE MEETING IS PART OF HIS RIGHT TO ASSEMBLE, THEN I MIGHT NEED TO CONCEDE THAT. DO YOU UNDERSTAND MY DISTINCTION?

THE COURT: YEAH, BUT I DON'T UNDERSTAND WHY IT ISN'T HIS RIGHT TO ASSEMBLE. ASSUMING THAT THE WHISPER IS NOT DISRUPTIVE AND THERE'S NO OTHER BASIS FOR TOSSING HIM OUT.

MR. KOVACEVICH: WELL, I JUST, AND MAYBE IT'S BECAUSE I HAD BEEN FOCUSSING ALL ALONG ON THE SPEECH ASPECT AND IT WAS THE VERBAL COMMUNICATION ASPECT AND SO IF WE NUANCE IT DOWN TO THAT POINT, I GUESS TRYING TO TALK TO SOMEBODY IN A PUBLIC MEETING, YOU COULD SAY IS TRYING TO ASSEMBLE WITH PEERS OR SOMETHING LIKE THAT.

SO WHY DON'T WE JUST SAY THEN, AS OPPOSED TO PROTECTED EXPRESSION, JUST SAY, WELL, WE HAVEN'T DEFINED FIRST AMENDMENT RIGHTS AT ISSUE HERE ANYWHERE ELSE. I HAD IT IN MY INSTRUCTIONS BUT I DIDN'T SEE IT ANYWHERE ELSE BEFOREHAND HERE.

THE COURT: YEAH, I DON'T THINK THERE'S A SEPARATE ONE.

HOW ABOUT IF WE JUST SAID, MR. NORSE'S CONDUCT ON

JANUARY 13TH -- THIS IS TALKING ABOUT SOMETHING HE HAS TO PROVE. MR. NORSE'S CONDUCT ON JANUARY 13TH, 2004, --

MR. KOVACEVICH: YOUR HONOR, IF I COULD JUST GO BACK. YOUR INSTRUCTION NUMBER EIGHT YOU JUST DEFINE PROTECTED EXPRESSION. SO I DON'T KNOW WHETHER YOU WANT TO BROADEN THAT TO INCLUDE ASSEMBLY.

I'M SORRY IF I'VE MAYBE INTERJECTED. BUT THAT WAS JUST A THOUGHT. BECAUSE THEN YOU REPEAT THE PROTECTED EXPRESSION LANGUAGE IN THIS ENSUING INSTRUCTION.

THE COURT: DID YOU HAVE A DEFINITION IN YOUR INSTRUCTIONS AS TO THE WRITE OF ASSEMBLY?

MR. KOVACEVICH: WELL, I FORGET HOW I PHRASED IT OR WHERE I PUT IT. LET ME LOOK, YOUR HONOR.

YOU KNOW, IT'S INTERESTING BECAUSE IN OUR PRELIMINARY INSTRUCTION WHICH THEY AGREED TO ONLY SPEAKS ABOUT FREEDOM OF SPEECH. OH, WE DO HAVE IT. WE DO HAVE IT.

IN THE PRELIMINARY INSTRUCTION SAYS PLAINTIFF CLAIMS THAT DEFENDANTS FITZMAURICE AND KROHN VIOLATED HIS FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH AND TO PETITION AND ASSEMBLE.

SO THAT'S KIND OF THE GENERAL WAY IT WAS DESCRIBED.

THE COURT: I'M ASKING FOR A DEFINITION OF THE RIGHT OF ASSEMBLY.

MR. KOVACEVICH: NO, NO, I DIDN'T DO A SEPARATE DEFINITION.

THE COURT: DID YOU DO ONE MR. BEAUVAIS.

MR. BEAUVAIS: WE DID YOUR HONOR, IT'S IN OUR INSTRUCTION NUMBER 8.

MR. KOVACEVICH: I THINK THERE'S A MORE SUCCINCT DEFINITION, RIGHT TO ASSEMBLE, BUT I DON'T HAVE IT AT HAND.

THE COURT: HOW ABOUT IF WE ADDED AN INSTRUCTION AND TITLED IT RIGHT TO ASSEMBLE AND SAID THE FIRST AMENDMENT -- FIRST AMENDMENT RIGHTS -- THE FIRST AMENDMENT INCLUDES THE RIGHT TO -- FIRST AMENDMENT RIGHT TO ASSEMBLE INCLUDES THE RIGHT TO BE PRESENT AND PARTICIPATE IN LOCAL GOVERNMENTAL MEETINGS.

MR. BEAUVAIS: THAT'S FINE.

THE COURT: AND THEN 10, SAY FOR NUMBER TWO, MR. NORSE'S CONDUCT ON JANUARY 13TH, 2004 CONSTITUTED PROTECTED EXPRESSION OR WAS AN EXERCISE OF HIS RIGHT TO FREELY ASSEMBLE UNDER THE FIRST AMENDMENT.

MR. BEAUVAIS: WE ARE OKAY WITH THAT, TOO.

MR. KOVACEVICH: MY ONLY CONCERN WITH THAT IS WHEN YOU SAID EARLIER -- SORRY -- WHAT DID YOU SAY -- PARTICIPATE. THERE ARE LIMITS TO PARTICIPATION. SO I JUST -- BUT I GUESS THERE'S LIMITS TO SPEECH TOO, SO THAT PROBABLY IS A GIVEN. I GUESS, YOUR HONOR.

THE COURT: OKAY, WHAT ELSE DO YOU HAVE?

MR. KOVACEVICH: OKAY. WITH RESPECT TO NUMBER THREE IN NUMBER TEN, THE WAY IT'S PHRASED SOUNDS TO ME LIKE A RETALIATION BECAUSE IT'S -- IT SAYS MR. NORSE'S EXERCISE OF

HOWEVER THE WORDAGE GOING TO BE, WAS A SUBSTANTIAL MOTIVATING FACTOR FOR MAYOR KENNEDY'S ACTIONS.

THE COURT: WHAT INSTRUCTION ARE YOU LOOKING AT?

MR. KOVACEVICH: NUMBER 10. YOUR NUMBER 10, ITEM NUMBER 3.

I KNOW WHAT YOU'RE KIND OF GETTING AT. THE PROBLEM IS IT SAYS TO ME OR COULD SAY TO SOMEONE THAT THE INTENT WAS AIMED AT THE PROTECTED RIGHTS WHICH SUGGESTS TO ME THE RETALIATION GOING TO THE CONTENT AS OPPOSED TO HE MAY HAVE THOUGHT THERE WAS A DISRUPTION BUT THERE WASN'T. HE'S WRONG, HE'S LIABLE.

SO THAT'S MY CONCERN. AND I THINK AS OPPOSED TO SAYING MR. NORSE'S CONDUCT WAS A SUBSTANTIAL OR MOTIVATING FACTOR. NOW YOU TAKE IT AWAY FROM THE SUGGESTION THAT WHAT MOTIVATED KENNEDY OR IN THIS CASE IT'S KENNEDY, WAS THE EXERCISE OF HIS RIGHTS.

AND I THINK UNDER THE EVIDENCE IT COULD BE THAT HE WASN'T REALLY TRYING TO DO THAT HE JUST MADE A CONSTITUTIONAL MISJUDGMENT.

THE COURT: WELL, INSTRUCTION 10 DEALS WITH THE ELEMENTS THAT MR. NORSE HAS TO PROVE.

MR. KOVACEVICH: RIGHT.

WELL, MAYBE I SHOULD JUST LEAVE IT THERE AND MAKE THAT ARGUMENT THEN TO THE JURY.

OKAY. I WILL LEAVE IT AT THAT.

THE COURT: WHAT ELSE?

MR. KOVACEVICH: NUMBER 11 AND 12, YOUR HONOR, GO TO PROBABLE CAUSE. I DID THINK IT WAS A LEGAL MATTER FOR YOU TO DECIDE. IT APPEARS TO ME YOU ARE PUTTING IT IN FRONT OF THE JURY. AND I WANT TO PUT IT IN PERSPECTIVE.

YOU KNOW, ONE OF MY ARGUMENTS TO YOU WOULD BE THAT IF TWO MEMBERS OF THE THREE PANEL, NINTH CIRCUIT COURT OF APPEAL COULD FIND THAT MY CLIENTS DID NO WRONG, THEN I THINK IT'S AXIOMATIC THAT A REASONABLE PRESIDING OFFICER WOULD HAVE THOUGHT X, Y AND Z.

THE COURT: THAT'S NOT THAT THE EN BANC PANEL SAID.

MR. KOVACEVICH: WELL, THE EN BANC PANEL DIDN'T SAY THAT THERE WAS A REASONABLE OFFICER COULD OR COULD NOT HAVE. THEY BASICALLY WERE TALKING ABOUT THAT IF HIS INTENT WAS THE BAD INTENT, AND YOU HAD TO HAVE A JURY MAKE A FINDING ON DISRUPTION.

BUT THEY DIDN'T SAY THAT THERE WAS NO PROBABLE CAUSE OR REASONABLE OFFICER WOULD NOT HAVE, A REASONABLE PRESIDING OFFICER WOULD NOT HAVE.

SO, BUT EVEN IF THEY HAD, I THINK WE'RE NOT TALKING ABOUT WHO IS ULTIMATELY RIGHT HERE, WE ARE TALKING ABOUT WHAT'S REASONABLE.

AND IF TWO NINTH CIRCUIT JUSTICES WENT TO THE POINT OF SAYING NO LIABILITY, THAT'S SAYING MORE -- THAT'S SAYING MORE THAN THEY WERE REASONABLE, THEY WERE ABSOLUTELY RIGHT. I'M JUST SAYING IT'S EVIDENCE IN HINDSIGHT NOW THAT IT SHOULD BE

REASONABLE.

SO MY POINT IS THAT THAT'S SOMETHING FOR YOU TO CONSIDER. THE FACTS AREN'T IN DISPUTE.

THE COURT: WELL, I THINK THEY ARE.

MR. KOVACEVICH: ON PROBABLE CAUSE?

THE COURT: I THINK THERE ARE DISPUTED FACTS ON PROBABLE CAUSE.

MR. KOVACEVICH: I'M NOT -- ARE YOU SAYING IN TERMS OF THE DISRUPTION, THERE'S A DISRUPTION?

THE COURT: YEP.

MR. KOVACEVICH: WELL, THEN I THINK WHAT IT BECOMES IS A SUBJECT FOR IMMUNITY, QUALIFIED IMMUNITY THEN.

IF THE JURY FINDS THAT THERE WAS A DISRUPTION, THEN THE ISSUE BECOMES STILL WHETHER A REASONABLE OFFICER WOULD HAVE BELIEVED -- SEE, I'M JUST CONCERNED THAT THIS PROBABLE CAUSE IS A FINDING HERE IS GOING TO FORECLOSE THAT.

OBJECTIVELY REASONABLE PRESIDING OFFICER IN THE POSITION OF THE MAYOR WOULD HAVE CONCLUDED FAIR PROBABILITY.

MS. WELLS: YOUR HONOR, THE TWO JUDGES --

THE COURT: I'VE GOTTEN BEYOND THAT. HE'S ALREADY CONCEDED THAT.

MS. WELLS: OH, I'M SORRY.

MR. KOVACEVICH: I HAVEN'T CONCEDED THAT.

YOU ARE SAYING YOU DON'T THINK IT'S A MATTER OF LAW, AND I CAN'T DISABUSE YOU OF THAT NOTION THEN I'VE GOT TO LIVE WITH

THE INSTRUCTIONS BUT I WILL OBJECT TO THEM ON THAT BASIS.

THE COURT: OKAY.

MR. KOVACEVICH: THEN LASTLY ON 13, I THINK THIS IS A RETALIATORY THEORY.

AND NUMBER 2 SAYS THE REQUEST WAS MOTIVATED BY THE DISLIKE OF THE VIEWPOINT.

I THOUGHT YESTERDAY WHEN I BROUGHT UP THE SUBJECT OF IF THERE WAS REASONABLE CAUSE, IT'S A HIGH PROBABILITY, HIGHLY PROBATIVE AND YOU ASKED ME WHY WAS I SUBMITTING THAT.

AND THEN ULTIMATELY MR. BEAUVAIS SAID IF THERE'S A DISRUPTION, THEY WIN IF THERE'S NOT WE LOSE AND THAT'S IT.

SO I BACKED OFF AND SAID OKAY. WE WILL GO WITH THAT. BUT HE'S NOW CLAIMING HE WANTS TO AMEND TO CONFORM TO PROOF AND HE WANTS RETALIATION IN THERE.

SO I THINK IF YOU ARE GOING TO GO INTO THE MOTIVE OF A PARTICULAR PERSON THEN I THINK I WOULD GO BACK AND ASK YOU TO HAVE THAT CLAUSE THAT I HAD IN THERE IN MY PREVIOUS INSTRUCTIONS --

MR. BEAUVAIS: JUST TO BE CLEAR, THE RETALIATION IS REALLY THE 2004 MEETING, NOT THIS ONE, WE ARE NOT CLAIMING MARCH 2002.

AND OUR JURY INSTRUCTION NUMBER EIGHT LAYS OUT THE ELEMENTS FOR THAT SINCE WE WERE JUST THERE I WAS POINTING IT OUT BECAUSE THE COURT WANTED SOME LANGUAGE.

MR. KOVACEVICH: SO ARE YOU AGREEING WITH ME IT'S NOT

IN LINE WITH YOUR THEORY OF THE CASE TO SAY THE REQUEST WAS MOTIVATED BY COUNSEL MEMBER FITZMAURICE AGREEING WITH OR DISLIKE.

MR. BEAUVAIS: WELL, THIS IS MORE THE VIEWPOINT DISCRIMINATION IS CERTAINLY LIVE WITH RESPECT TO MARCH 2002.

MR. KOVACEVICH: WELL, I SUBMITTED A NUMBER OF INSTRUCTIONS THEN YOUR HONOR, WITH RESPECT TO THE RETALIATION WHICH I THINK IS WHAT YOU ARE TALKING ABOUT, I GUESS WHEN YOU ARE TALKING ABOUT DISCRIMINATION.

AND I WOULD ASK --

MR. BEAUVAIS: NO, THEY ARE REALLY NOT THE SAME THING. I KNOW WE HAD THIS CONVERSATION BEFORE AND I THOUGHT ABOUT IT SOME MORE.

RETALIATION IS NOT NECESSARILY BASED ON THE CONTENT OF THE MESSAGE OR WHAT THE GESTURE WAS OR WHAT THE MESSAGE WAS, IT'S REALLY SOMETHING THAT'S DIRECTED AGAINST AN INDIVIDUAL FOR HAVING EXERCISED A CONSTITUTIONAL RIGHT.

AND THAT I THINK IS A DIFFERENT ISSUE FROM VIEWPOINT DISCRIMINATION. I COULD SEE HOW THEY COULD BLEND AND DOVE TAIL, THEY ARE NOT NECESSARILY DISCREET PRINCIPLES OR DOCTRINES.

BUT WITH RESPECT TO THE KENNEDY MEETING, THERE DOESN'T SEEM TO BE ANY QUESTION THAT -- WELL AT LEAST FROM OUR POINT OF VIEW THAT KENNEDY WANTED HIM OUT OF THAT MEETING.

AND THEN HE WAS BEING TREATED DIFFERENTLY BECAUSE HE WAS

ROBERT NORSE AND I THINK THAT IS THE KIND OF RETALIATION WE'RE TALKING ABOUT.

AND IT'S MORE RETALIATION AGAINST HIS RIGHT TO PEACEABLY ASSEMBLE THAN IT IS THE WHISPERING. THE WHISPERING WAS JUST SIMPLY THE EXCUSE THAT WAS USED TO GET HIM OUT OF THERE.

THE COURT: WHAT DOES YOUR INSTRUCTION 8 ADD TO INSTRUCTION 10?

MR. BEAUVAIS: WELL, IT'S DESCRIBED A LITTLE DIFFERENTLY. I ASSUME THE PARAGRAPH YOU'RE FOCUSSING ON IS THE SECOND PARAGRAPH OF OUR INSTRUCTION NUMBER 8.

AND IT ACCURATELY STATES WHAT THE LAW IS THAT WHEN THERE IS RETALIATION IT DOES HAVE THE ELEMENT OF TOOK ACTION THE NUMBER ONE THERE WHICH WAS, TOOK ACTION THAT WOULD SHOW OR SILENCE A PERSON OF ORDINARY FIRMNESS FROM FUTURE FIRST AMENDMENT ACTIVITIES.

IT SEEMS LIKE IT'S A REASONABLE PERSON STANDARD, NOT NECESSARILY MR. NORSE HIMSELF. SO I THINK THAT CONCEPT IS NOT INCLUDED IN THE COURT'S INSTRUCTION NUMBER TEN.

NUMBER 2 IS --

MR. KOVACEVICH: WHICH ONE ARE YOU READING FROM.

MR. BEAUVAIS: NUMBER 8.

THE COURT: IS IT YOUR POSITION THAT THERE ARE TWO SEPARATE CLAIMS FOR VIOLATION OF CONSTITUTIONAL RIGHTS IN CONNECTION WITH THE WITH THE FIRST AMENDMENT RIGHTS IN CONNECTION WITH THE JANUARY 13TH, 2004 MEETING.

MR. BEAUVAIS: RIGHT.

IT CAN BE -- EVEN IF HE DIDN'T KNOW MR. NORSE OR HAVE ANY ANIMUS WHATSOEVER AGAINST MR. NORSE, AND HE DID THE THINGS THAT HE DID, IT WOULD STILL BE A FIRST AMENDMENT VIOLATION, BUT THE OVER LAY HERE IS THE RETALIATION WHICH IS A SECOND THEORY FOR FINDING A FIRST AMENDMENT VIOLATION.

THE COURT: HOW COULD YOU LOSE ON -- WIN ON THE FIRST ONE AND LOSE ON THE SECOND ONE?

MR. BEAUVAIS: THE JURY COULD DECIDE HE WASN'T -- THAT IT WASN'T RETALIATION BUT IT WAS STILL A VIOLATION OF HIS RIGHTS.

THE COURT: RIGHT. I SAID IT BACKWARDS.

BUT HOW COULD YOU -- I'M TRYING TO FIGURE OUT WHAT IT ADDS TO YOUR CASE?

MR. BEAUVAIS: THAT'S A REALLY GOOD QUESTION. BECAUSE THE RETALIATION, IF THERE WAS AN OBJECTIVE BASIS FOR REMOVING HIM ON THE GROUND THAT THERE WAS DISRUPTION THEN THE RETALIATION DOESN'T GET US HOME.

THE COURT: RIGHT.

MR. BEAUVAIS: SO I THINK WHAT THE COURT IS RAISING THAT'S A GOOD POINT AND MAYBE WE SHOULD HUDDLE HERE FOR A MINUTE AND DECIDE WHAT WE WANT TO DO WITH THAT.

THE COURT: OKAY.

MR. BEAUVAIS: IT MIGHT ACTUALLY SIMPLIFY THE CASE AND MAKE IT A LITTLE EASIER FOR THE JURY.

THE COURT: THAT'S WHAT I THOUGHT WHEN I WAS GOING THROUGH THIS.

(OFF-THE-RECORD DISCUSSION.)

MR. BEAUVAIS: WE ARE FINE WITH THAT, YOUR HONOR. RETALIATION IS OUT.

THE COURT: OKAY.

I THINK THE ONLY ONE THAT WAS LEFT HANGING AT ALL WAS NUMBER 9.

MR. KOVACEVICH: SO YOUR HONOR, I'M SORRY, WHAT DOES THAT MEAN HAPPENS THEN TO NUMBER 13?

THE COURT: 13 STAYS AS IT IS.

MR. KOVACEVICH: SO I'M CONFUSED WHAT DO WE LOSE THEN BY THEM SAYING RETALIATION IS OUT.

THE COURT: NOT ADDING INSTRUCTIONS ON RETALIATION.

MR. KOVACEVICH: BUT THIS NUMBER TWO IS A RETALIATION INSTRUCTION. THE REQUEST WAS MOTIVATED BY COUNSEL MEMBERS DISAGREEMENT WITH OR DISLIKE OF THE VIEWPOINT EXPRESSED.

MS. WELLS: THAT'S VIEWPOINT DISCRIMINATION.

THE COURT: I'M MAKING A DISTINCTION IN MY MIND BETWEEN THE CASE WHERE BECAUSE -- A BETTER WAY OF PUTTING IT, MAYOR KENNEDY THINKS THAT MR. NORSE IS A PAIN IN THE BUTT AND HE'S TIRED OF HEARING HIM TALK AND KICKS HIM OUT OF A MEETING BECAUSE OF THAT FEELING.

MR. KOVACEVICH: AND SO THAT'S MY PROBLEM. THAT'S NOT VIEWPOINT THEN, THAT'S PERSON.

THE COURT: THAT'S WHAT I'M TALKING ABOUT IS RETALIATION. THAT THEY'RE NOT PURSUING.

IF HE'S KICKED OUT BECAUSE THEY DON'T LIKE THE VIEWPOINT HE'S EXPRESSING AT THE JANUARY 13TH MEETING, THAT'S -- I SUPPOSE IN A WAY YOU COULD LOOK AT THAT AS RETALIATION, BUT THAT'S -- THAT CLAIM I THINK THEY ARE MAKING THAT BECAUSE OF HIS VIEWPOINT EXPRESSED AT THAT MEETING, NAMELY THE PARADING AND SO FORTH, MOTIVATED KENNEDY TO BOOT HIM.

MR. KOVACEVICH: OKAY. I UNDERSTAND THAT.

BUT THEN MY PROBLEM WITH THAT IS THEN YOU HAVE TO GIVE THE RETALIATION INSTRUCTION BECAUSE THAT'S EXACTLY WHAT THE INSTRUCTIONS IN THE MODEL INSTRUCTIONS GO TO IS THE CONTENT-BASED RETALIATION.

THE COURT: WHICH INSTRUCTION ARE YOU THINKING OF?

MR. KOVACEVICH: I'M LOOKING AT THE -- MY INSTRUCTION WHICH MAY HAVE BEEN REVISED, I WILL HAVE TO DOUBLE-CHECK.

THE COURT: THAT INSTRUCTION IS BASICALLY A MODIFICATION OF PRELIMINARY INSTRUCTION 9.10.

MR. KOVACEVICH: YEAH.

MINE WAS THE MODIFIED FILED ON NOVEMBER 2ND. INSTRUCTION NUMBER 12.

AND IT'S REPEATED BASICALLY BUT FOR A DIFFERENT DEFENDANT IN 13 AND 14. BUT THIS HAS TO DO WITH THE CHILLING AND THE DEFENDANT INTENDED BY HIS ACTION TO CAUSE A CHILLING EFFECT.

SO THERE'S SOME ELEMENTS THAT I THINK ARE MISSING IN THIS

BROAD BRUSH OF RETALIATION AS YOU HAVE IT HERE.

BUT THAT'S THE INSTRUCTION I CITED AS WELL. AS MODIFIED 9.10

THE COURT: THREE ELEMENTS.

PLAINTIFF ENGAGED IN SPEECH OR OTHER PROTECTED CONDUCT.

DEFENDANT TOOK ACTION AGAINST THE PLAINTIFF AND THE PLAINTIFF'S PROTECTED SPEECH OR CONDUCT, ONE CHOICE IS CHILLING PLAINTIFF'S PROTECTED SPEECH THE OTHER IS A SUBSTANTIAL MOTIVATING FACTOR FOR THE DEFENDANT'S ACTION.

MR. KOVACEVICH: I DON'T SEE ANYTHING HERE ABOUT CHILLING SPEECH.

THE COURT: THAT'S AN ALTERNATIVE. IT COULD BE JUST PLAINTIFF'S PROTECTED SPEECH.

MR. KOVACEVICH: WELL, I THINK ALL THE CASES WE CITED AND THE DIETRICH CASE, I MEAN, DOES GO INTO THE ISSUE OF THE CHILLING EFFECT.

I DON'T KNOW IF THEY PARSE THAT -- I'M NOT SURE WHY THAT DOESN'T APPLY HERE.

THE COURT: OKAY. WE GOT TO WRAP UP.

MS. WELLS: MAY I SAY SOMETHING?

I MEAN, IT IS A VIOLATION OF THE FIRST AMENDMENT TO DISCRIMINATE AGAINST SOMEONE BECAUSE OF THE CONTENT OR THE VIEWPOINT OF THE SPEECH.

REGARDLESS OF WHETHER OR NOT THAT HAS A CHILLING EFFECT. THAT'S NOT PART OF IT. THAT'S -- THE SIN, IF YOU WANT TO CALL

IT THAT, IS DISCRIMINATING AGAINST SOMEONE BECAUSE OF THEIR VIEWPOINT THAT IT'S NOT VIEWPOINT NEUTRAL.

I DON'T BELIEVE ANYWHERE IT SAYS THAT IT HAS TO BE VIEWPOINT NEUTRAL AND IT HAS TO CHILL SOMEONE'S SPEECH. IT JUST CAN'T BE -- IT HAS TO BE VIEW POINT NEUTRAL, PERIOD.

MR. KOVACEVICH: BUT THERE HAS TO BE A MOTIVATING FORCE. THE MOTIVATING FORCE HAS TO BE THE INTENT OR MOTIVE OF THE PARTY.

THE COURT: OKAY. WE'VE GOT TO FINISH UP.

AT THIS POINT I'M GOING TO LEAVE IT THE WAY IT IS AND I WILL TAKE A LOOK AT A COUPLE OF CASES AND IF I THINK IT CHANGES MY MIND I'LL DO THAT.

MR. KOVACEVICH: OKAY.

THANK YOU, YOUR HONOR.

THE COURT: BUT WE GOT TO LOOK AT, I THINK WE LEFT OPEN INSTRUCTION NUMBER --

MR. KOVACEVICH: AND YOUR HONOR, THEN I KNOW YOU WANT TO GET GOING, BUT ON THE VERDICT FORM THEN I JUST HAD AN ISSUE WITH NUMBER 5.

THE COURT: OKAY. LET'S FINISH --

MR. KOVACEVICH: I'M DONE WITH MY INSTRUCTIONS.

THE COURT: RIGHT.

BUT THERE'S ONE INSTRUCTION I LEFT HANGING, I THINK WAS THE ONE THAT INVOLVED REASONABLE DISCRETION OR THE ONE YOU HANDED UP TO ME WHICH.

MR. KOVACEVICH: RIGHT. YOU HAVE THAT THERE?

THE COURT: I WILL PUT IT SOME LANGUAGE ABOUT DISCRETION AND YOU WILL JUST HAVE TO LIVE WITH WHAT I PUT IN.

OKAY. DID YOU HAVE ANY PROBLEMS WITH THE VERDICT FORM?

MR. BEAUVAIS: NO, EXCEPT, I ALREADY ADDRESSED THAT.

THAT WAS THE ISSUE ABOUT HAVING THE CITY OF SANTA CRUZ ON THE VERDICT FORM. BUT THAT WAS IT. WE EXPLAINED IT.

IS IT POSSIBLE WE COULD GET A FINAL COPY TONIGHT?

THE COURT: SURE. I WILL E-MAIL IT TO YOU.

MR. BEAUVAIS: OKAY. GREAT. THANK YOU.

MR. KOVACEVICH: MINE WAS NUMBER 5, YOUR HONOR.

BECAUSE THE LANGUAGE CAUSING HIM TO BE ARRESTED IS APPLIED TO MR. FITZMAURICE. AND I JUST THINK THAT REALLY ASKEWS THE --

THE COURT: LET ME ASK A QUESTION, DO YOU THINK THERE'S EVIDENCE THAT MR. FITZMAURICE CAUSED ARREST. I WASN'T SURE THAT WAS PART OF YOUR CLAIM.

CERTAINLY KROHN CAUSED THE ARREST AND I THINK IT'S CLEAR THAT FITZMAURICE CONTRIBUTED TO THE BOOTING FROM THE MEETING, BUT I'M NOT SURE THAT THE EVIDENCE SHOWS THAT HE CAUSED THE ARREST.

MR. BEAUVAIS: NOT DIRECTLY, BUT IF YOU -- IF YOU USE THE BUT FOR TEST, MR. NORSE WOULD NEVER HAVE BEEN ARRESTED.

WE DON'T SEE -- YOU KNOW, WE DON'T SEE FITZMAURICE SAYING, THIS IS GOING TOO FAR NOW THAT YOU'VE DECIDED TO ARREST

MR. NORSE. HE PUTS INTO ACTION A CHAIN OF EVENTS AND DOESN'T TRY TO STOP IT.

THE WITNESS: HE REQUESTED THE ARREST.

MR. BEAUVAIS:

MS. WELLS: EJECT IS ONE THING, ARREST IS ANOTHER.

THE COURT: YEAH, I THINK HIS TESTIMONY AS A PRACTICAL MATTER WAS THAT HE NEVER, AS A PRACTICAL MATTER, RECOMMENDED THAT SOMEBODY BE ARRESTED.

AND THE QUESTION IS HE JUST SAID KICK HIM OUT AND IF HE DIDN'T GO HE -- THERE'S REALLY NO EVIDENCE ONE WAY OR ANOTHER AS TO WHETHER HE WOULD HAVE HAD HIM ARRESTED.

MR. BEAUVAIS: THERE ISN'T, BUT IF PEOPLE ARE JOINTLY ENGAGED IN CRIMINAL ACTIVITY, I'M JUST GOING TO USE THAT AS AN EXAMPLE, AND ONE OF THEM DOES PARTICULAR ACT AND ANOTHER ONE WHO IS ACTING, AIDING AND ABETTING THE FIRST ONE, DOES ANOTHER ACT, USUALLY WE WOULD FIND THAT THERE IS LIABILITY.

THE COURT: YEAH, THAT'S TRUE.

MR. BEAUVAIS: IT'S KIND OF A CIVIL, I DON'T WANT TO CALL IT CIVIL CONSPIRACY.

THE COURT: RIGHT. WHICH YOU DIDN'T PLEAD.

MR. BEAUVAIS: AND I DON'T HAVE TO. I DON'T HAVE TO PLEAD A CIVIL CONSPIRACY.

I MEAN, I THINK JOINT ACTION, JOINT PARTICIPATION --

THE COURT: DO YOU WANT THAT IN THERE?

MR. BEAUVAIS: I THINK I WOULD.

THE COURT: YOUR OBJECTION IS WHAT?

MR. KOVACEVICH: MY OBJECTION IS THAT BASICALLY YOURS, I DON'T SEE ANY CAUSAL CONNECTION.

I MEAN YOU'RE USING THE WORD CONSPIRACY, AIDING, ABETTING, BUT YOU HAVE TO HAVE THE COMMON INTENT. INTENT TO GET HIM ARRESTED. AND HE WAS JUST BRINGING A POINT OF ORDER AND SUGGESTING HE BE EJECTED.

NOW WE LEAP THROUGH CITIZENS ARREST WHICH IS AN INDEPENDENT CAUSE AND WE'RE TRYING TO BOOTSTRAP MR. FITZMAURICE INTO THAT.

THE COURT: I'M NOT ENAMORED WITH THE ARGUMENT THAT HE IS RESPONSIBLE, BUT I DO THINK THERE'S SOMETHING TO THE PUTTING IN MOTION THE ACTIONS IN THE -- WELL, I SUPPOSE MR. NORSE'S REFUSAL TO LEAVE COULD BE SAID TO BREAK THE CHAIN.

MR. KOVACEVICH: YEAH. WE GOT TWO INDEPENDENT ACTS HERE. WE GOT HIM REFUSING THEN WE GOT A MAYOR MAKING A DECISION TO GO AHEAD AND FURTHER ARREST HIM.

THE COURT: I DIDN'T DO ANY LOOKING ON CASES ON THAT. DO YOU THINK MR. NORSE'S ACTION COULD BREAK THE CHAIN?

MR. BEAUVAIS: I THINK IT'S -- I WOULD CALL IT NOT A SUPERSEDING CAUSATION, BUT MORE OF -- IT'S FORESEEABLE THAT HE WOULD HAVE REFUSED TO LEAVE THE MEETING.

IF YOU START FROM THE PREMISE THAT THEY VIOLATED HIS RIGHTS BY ATTEMPTING TO EJECT HIM, IT'S FORESEEABLE THAT HE WOULD FAIL TO COMPLY.

THE COURT: WELL, I'LL LOOK AT THAT.

OKAY. ARE WE READY TO GO?

MR. KOVACEVICH: THANK YOU, YOUR HONOR.

MR. BEAUVAIS: THANK YOU.

MS. WELLS: THANK YOU, YOUR HONOR.

THE COURT: I'LL E-MAIL THESE TO YOU.

WHAT'S YOUR ESTIMATE AS TO THE LENGTH OF YOUR CLOSE?

MR. BEAUVAIS: 40 MINUTES MAX, YOUR HONOR.

BUT I DON'T THINK I'LL GO THAT LONG, I DON'T LIKE TO BORE PEOPLE.

MR. KOVACEVICH: HOW MUCH TIME DO I HAVE LEFT?

THE COURT: YOU'RE FINE.

MR. KOVACEVICH: I THINK IT DOES GO TOWARDS IT. BUT YOUR HONOR, I WOULD THINK ANTICIPATING 30 TO 45.

THE COURT: OKAY. I'LL SAY MAX 45 A PIECE. YOUR REPLY CANNOT BE MORE THAN 15.

MR. BEAUVAIS: FINE.

THE COURT: OKAY.

MS. WELLS: AND WHAT TIME ARE WE HERE TOMORROW MORNING?

THE COURT: 8:30.

MS. WELLS: 8:30.

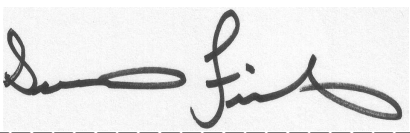
OKAY. THANK YOU.

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED TRANSCRIPTION TO THE BEST OF MY ABILITY.



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SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185 DATED: 1/9/13