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IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Tammy J. Kitzmiller, et al. :  
: vs : 04-CV-02688  
: :  
Dover Area School :  
District, et al. :

BEFORE: Honorable John E. Jones III  
PLACE: Williamsport, Pennsylvania  
PROCEEDINGS: Oral Argument  
DATE: Thursday, July 14, 2005

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1 (1:30 p.m., convene.)

2 THE COURT: We have several matters before the  
3 Court this afternoon, the first of which I believe by  
4 agreement is the application to intervene by the Foundation  
5 for Thought and Ethics, followed by a motion to quash, which  
6 we'll hear second.

7 Is that everybody's agreement? Is that acceptable  
8 to everybody or are we lined up differently?

9 MR. BENN: I think that was the initial intent,  
10 Your Honor. Somewhere down the pike we were advised that  
11 the newspapers would be going first and the intervenors  
12 would be going second. It doesn't matter to me.

13 THE COURT: It doesn't matter to me. Are we lined  
14 up to go with the newspapers first? All right, that's  
15 perfectly fine with me.

16 MR. BENN: I think it will be a briefer argument.

17 THE COURT: All right, we can certainly do that.

18 Why don't we have counsel enter your appearances,  
19 please, then, in the matter of the newspaper reporters.

20 MR. BENN: My name is Niles Benn, attorney in York,  
21 Pennsylvania. I'm here with my co-counsel, Terry Barna. We  
22 represent the York Daily Record as well as the York  
23 Dispatch. We also represent the reporters in issue, Joseph  
24 Maldonado and Heidi Bernard-Bubb.

25 MR. GILLEN: Patrick Gillen for the defendant, Your

1 Honor.

2 THE COURT: All right.

3 MR. ROTHSCHILD: Good afternoon, Eric Rothschild  
4 for the plaintiffs with my co-counsel Witold Walczak with  
5 the ACLU, and Tom Schmidt from Pepper Hamilton.

6 THE COURT: Nice to see some of you again, some of  
7 you I haven't seen previously in this litigation.

8 All right. We have the, as I noted, the motion to  
9 quash filed on behalf of Mr. Maldonado and Ms. Bernard-Bubb.  
10 And in reviewing the submissions by the parties, it's -- I  
11 believe that I well understand how the issues frame out, and  
12 I also understand, I think, pretty comprehensively what your  
13 arguments are. But let me first then turn to counsel for  
14 the movants, and if you want to make an additional  
15 presentation I'll certainly give you the opportunity to do  
16 that.

17 MR. BENN: Thank you. Would you like me to be  
18 here?

19 THE COURT: Wherever you're comfortable.

20 MR. BENN: Your Honor, I would like to say  
21 something for the record initially to clarify I think some  
22 area of confusion with regard to something that we had done  
23 on behalf of both the newspapers as well as our reporter  
24 clients.

25 When we were first served with a subpoena relative

1 to a deposition that Pepper Hamilton had served upon us, we  
2 had taken the position that it was far better to try to  
3 amicably resolve the matter and not have the Court's  
4 intervention with respect to the issue that is before the  
5 Court today. So what we attempted to do was to provide  
6 affidavits wherein the reporters would otherwise indicate  
7 that if they were called to testify the nature of their  
8 testimony would be to verify the statements set forth in  
9 their articles and the veracity of the articles, meaning if  
10 they were quotes, that is what the quotes were that they  
11 took from somebody else; if they there were not quotes, then  
12 that was the general information that they received when  
13 they were attending the school district meetings.

14           Likewise there was an issue in terms as to whether  
15 there was any request of retractions or corrections. So  
16 both reporters indicated in their affidavits that they had  
17 never been served with a request for retraction or  
18 corrections. And the newspaper editors likewise indicated  
19 the same, I think with one exception that being that I think  
20 we made reference to intelligent design in a manner in which  
21 it shouldn't have been made, and corrected it in a  
22 subsequent newspaper article. But it wasn't as a result of  
23 trying to avoid being cross-examined. And I think that has  
24 been an allegation that's been made by the defendants in  
25 this case that the purpose under which we submitted the

1 affidavits was to circumvent the issue of cross examination.

2 THE COURT: Well, if I understand your submission,  
3 and maybe I don't, what apparently you're seeking is to have  
4 the -- at least for the purpose or discovery, you want to  
5 have the affidavits supplant, for example, a discovery  
6 deposition of your client, is that correct?

7 MR. BENN: We took the position that if the  
8 affidavits were accepted by both sides, that that would  
9 preclude the need to depose them. If the affidavits were  
10 not accepted by both sides -- and we wrote this in  
11 correspondence -- then we recognize that we would have to  
12 proceed with a motion to quash because it was our position  
13 that the reporters were otherwise protected by a reporter's  
14 privilege and not be compelled to testify.

15 THE COURT: Well, the privilege is a concept that  
16 at times is difficult to get -- for lawyers and judges to  
17 get our arms around. But having read the cases and  
18 certainly your good submissions, we have a situation where  
19 it's a mixed bag in terms of what the requests are.

20 It appears to me that one of the things we have is  
21 a request that your clients testify concerning what they saw  
22 and heard, particularly what they heard, during public  
23 meetings.

24 MR. BENN: That's correct.

25 THE COURT: Now, if I understand your position, it



1 isn't necessarily that that in and of itself is protected by  
2 privilege, although it may be. I don't want to  
3 mischaracterize your argument, you seem to say that there  
4 could be some privilege there, I guess, but also that, for  
5 example, the prong is not met in that this information that  
6 is sought could be obtained from others, and there's been no  
7 showing that it hasn't been obtained from others. Is that a  
8 fair statement?

9 MR. BENN: That's a fair statement, yes.

10 THE COURT: Are you taking a position that to the  
11 extent the deposition would be a -- a deposition or  
12 depositions of your clients would be limited to what they  
13 saw and heard at a public meeting --

14 MR. BENN: We're saying --

15 THE COURT: -- and to the extent -- just to  
16 finish -- and to the extent that it doesn't involve  
17 confidential sources, that that's not something that your  
18 clients are amenable to?

19 MR. BENN: We've taken the position that what it is  
20 that we wrote is protected in the sense that the defendants  
21 or whomever is deposing us or calling us as a witness at the  
22 trial has to establish the fact that our testimony is  
23 relevant and crucial, and that for the most part we are the  
24 only parties that can otherwise testify to what it is that  
25 was printed.

1           And in this particular instance, that's far from  
2 reality. These --

3           THE COURT: How do we know it's not relevant?

4           MR. BENN: It may be relevant, but the issue is  
5 one, are there other sources where this information can be  
6 obtained.

7           THE COURT: I'm sorry, clearly there are --

8           MR. BENN: That's right.

9           THE COURT: Clearly there were other attendees at  
10 the meetings. I don't think anybody would controvert that;  
11 however, it's difficult for me to see how we, for example,  
12 chill a news gathering or cause difficulty if in fact -- and  
13 I understand that you can make the argument that the  
14 information can be obtained from others, but the parties can  
15 take the position they want to depose everybody who is in  
16 the room, I suppose, and then we get into, well, they can  
17 depose others first, and get to you later on. But it's  
18 difficult for me to see how we implicate the privilege or we  
19 chill the news gathering if they're questioned about what  
20 they saw and heard exclusive of confidential sources, which  
21 seems to me the parties are saying they don't want to get  
22 into, at least in terms of the depositions.

23           And I think the materials that are sought are a  
24 different area, and I want to get to that. But you're  
25 saying, finally, you don't want that, you don't want to

1 subject them to depositions about what they saw and heard.

2 MR. BENN: No, what I'm saying, Your Honor, is if  
3 the Court determines that what you just said is how you  
4 feel, then in the alternative I would ask for a protective  
5 order such that if there were depositions they would be  
6 limited --

7 THE COURT: I see.

8 MR. BENN: -- to what you just said, and not be  
9 exposed to a myriad of questions that I don't think would  
10 be --

11 THE COURT: I understand. All right. But you  
12 particularly object to -- again, I don't want to  
13 mischaracterize your argument -- but you particularly object  
14 to that -- those inquiries, traipsing into confidential  
15 sources and other areas that might clearly come under the  
16 protection of the reporter's privilege.

17 MR. BENN: Well, let me just respond to the  
18 confidential source issue, because I can put that to bed. I  
19 don't believe that there are confidential sources in this  
20 case, and I'm not alleging that in my pleadings in terms of  
21 the shield law.

22 THE COURT: Well, tell me -- tell me if in fact the  
23 Court framed an order that would allow the reporters to be  
24 questioned as to, as we just discussed, what they saw and  
25 heard, where do you want the line drawn?

1           MR. BENN: That is where I would want the line  
2 drawn, not beyond that testimony.

3           THE COURT: All right.

4           MR. BENN: What it is they saw and what it is that  
5 they heard, and that the quotes that they made are the  
6 quotes that they heard.

7           THE COURT: All right.

8           Now, let's then segue for a moment into the  
9 materials sought. Continue.

10          MR. BENN: With all due respect, I'm not conceding  
11 that.

12          THE COURT: I understand.

13          MR. BENN: In terms of what I just said, I'm not  
14 conceding.

15          THE COURT: I understand you're not conceding the  
16 point. This is for the sake of argument, and I recognize  
17 what your position is, and I appreciate your candor in that  
18 regard. And I know you don't concede the essential point,  
19 and I want to hear everybody on this, but with respect to  
20 the materials that are sought, what looks to me to be  
21 particularly problematic from your standpoint are the notes,  
22 reporters' notes, drafts, et cetera. Is that a fair  
23 statement?

24          MR. BENN: That is correct. And, again, I would  
25 like to tell the Court what it is they have so that we

1 understand what's in issue here.

2           With respect to Mr. Maldonado, I believe I have  
3 four e-mails. That's all I have that occurred I believe in  
4 March of 2005, so almost a year subsequent to when the  
5 articles in issue were printed. He has no notes. It's his  
6 policy to destroy notes within 30 days of the printing of  
7 the articles, so there are no notes.

8           With respect to Ms. Bernard-Bubb, I do have drafts  
9 of the articles that were written. I have the notes that  
10 were taken at the school board meetings, in other words she  
11 retained that information, and I have that in my position.

12           It's my position, however, that if hypothetically  
13 she were called to testify under the guise of what you just  
14 enunciated, none of that becomes relevant because she's  
15 testifying to what it is she heard, and what notes she took  
16 and what drafts of the articles she prepared have nothing to  
17 do with the final article in terms to what she's testifying.

18           THE COURT: So you would seek to protect the  
19 e-mails and the notes and drafts.

20           MR. BENN: That is correct. And if the Court took  
21 the position that they may be relevant predicated upon what  
22 my opposing counsel argues, then I would ask for an in  
23 camera review prior to turning over to counsel. And I  
24 believe the defendants in their brief have likewise  
25 indicated that that may be appropriate.

1           They have also raised the issue that when we had  
2 initiated our objection, our written letter to them  
3 indicating why we were objecting to that which they were  
4 requesting by means of the motion to produce, we failed to  
5 object to several items set forth in that motion to produce  
6 or the subpoena to produce, and that is correct, we didn't  
7 respond to it because we don't have it, but --

8           THE COURT: That would go to the, for example, the  
9 disciplinary areas, the --

10          MR. BENN: Personnel files.

11          THE COURT: -- personnel files. When you say you  
12 don't have it, what do you mean?

13          MR. BENN: There are no personnel files. The two  
14 reporters are independent contractors. They are not  
15 employed by our paper on a per diem basis. They're not  
16 employed by our paper on a weekly basis. They're employed  
17 on a per article basis.

18          THE COURT: Given how comprehensive your submission  
19 was, my assumption, which now you're telling me is correct,  
20 is that you didn't respond because you didn't have those  
21 things.

22          MR. BENN: That's exactly right, they don't exist.

23          THE COURT: All right. All right, go ahead.

24          MR. BENN: Getting back to my argument, and I  
25 believe the Court is now well aware in terms as to where we

1 are, and obviously you are very much familiar with the case  
2 law. We believe that there are two cases in Pennsylvania --  
3 or excuse me, in the Third Circuit, one in Pennsylvania in  
4 the Commonwealth Court, and one in the Third Circuit in  
5 Delaware, that really go to the very issue at hand.

6           The Parsons case, which we cited in our reply  
7 brief, was a case wherein there were four individuals  
8 speaking, and a reporter who heard what it is that they were  
9 discussing. And the individual correction officer, who  
10 otherwise was demoted in rank and suspended for some period  
11 of time without pay, had filed a complaint requesting that  
12 he be reinstated at his higher rank and receive his  
13 backpay. And he subpoenaed the reporter to testify because  
14 he thought she misconstrued some of that which she had heard  
15 and presented it wrong in a false light that otherwise  
16 adversely affected the disciplinary action. The Court  
17 concluded that he had to first go to the other three people  
18 that were present before he went to the reporter; and  
19 therefore they sustained the motion to quash.

20           The same kind of thing happened in the state court  
21 case. There was a trial court decision where a motion to  
22 quash was sustained. It went to the Commonwealth Court, and  
23 in McMenamain the Commonwealth Court said that wherein there  
24 are other persons present at the press conference, before  
25 they can go to the reporters, they had to first go to the

1 other parties.

2 In this particular instance we have said in our  
3 pleadings and you have already indicated these were public  
4 meetings. There were approximately 100 persons present from  
5 the public, in addition to all the school board members,  
6 both current as well as past, and they haven't even  
7 attempted to depose the other persons from the public. They  
8 deposed some of the school board members, and then they  
9 deposed or they requested to depose my reporter.

10 The concern that I have there, Your Honor, is that  
11 I find it somewhat incongruous when in fact this particular  
12 school district decides to tape record its meetings, and  
13 therefore has in effect its own record with regard to what  
14 was stated, and then chooses to overtape those meetings  
15 after the minutes are prepared, and the minutes clearly  
16 don't reflect the dialogue that had occurred. Don't raise  
17 an issue with regard to corrections after the articles are  
18 printed, don't raise an issue with regard to retractions  
19 after the articles are printed, and the only time the issue  
20 comes into play is after they're sued and after counsel gets  
21 involved, and then all of a sudden everybody conveniently  
22 forgets what it is that they may have said, and now they  
23 come to the press and say what did we say or how did we say  
24 it.

25 And I guess my concern is, why not go to the other



1 members of the public, why not go to all of the members of  
2 the school board, past and present, before you come to us,  
3 because I think that's what those two cases are saying.

4           The reporters' privilege is such that, A, the  
5 testimony that we're going to offer if in fact we have to  
6 offer it has to be crucial, it has got to be material, it's  
7 got to be relevant, and we have to be the court of last  
8 resort, so to speak; and we're not.

9           And to the extent that we're basically being asked  
10 to do the job that they could do for themselves by  
11 interviewing other parties, I think that that's wrong, and I  
12 think that that's violative of what my privilege is. I  
13 think the same goes with respect to the notes. I think the  
14 notes are likewise privileged, unless they can prove the  
15 materiality of it, the relevancy of it, et cetera. And  
16 nowhere in the pleadings have they done that.

17           I find it further interesting that they now raise  
18 the issue in terms of how crucial this testimony is when in  
19 fact I believe the latest day to depose parties or conclude  
20 discovery was July the 15<sup>th</sup>, and that's the date of my  
21 deposition. And having said that -- or excuse me, I guess  
22 it was earlier this month, but having said that -- the  
23 deposition of the various school board members who are  
24 alleging that they don't remember saying whatever,  
25 particularly Mr. Buckingham, occurred many months before.

1 And if in fact our testimony was so terribly crucial, why  
2 weren't we deposed many months before? Why wasn't that  
3 request made of us previously? The defendants in this case  
4 are piggybacking on what the plaintiffs attempted to do.  
5 And when the plaintiffs asked for a deposition, and we  
6 communicated with them by means of providing that affidavit,  
7 and they were willing to accept that affidavit --

8 THE COURT: Let me ask this, if -- if your clients  
9 are not deposed, because I won't let them be deposed, and in  
10 that hypothetical situation, what about -- what happens if  
11 they're called as witnesses in the case in chief?

12 MR. BENN: I will file my same objection.

13 THE COURT: Same basis?

14 MR. BENN: You got it.

15 THE COURT: All right.

16 MR. BENN: So my position being that after -- after  
17 the plaintiffs had indicated that they were willing not to  
18 pursue the subpoena and address the issue at trial, that's  
19 when defense said, you know, they want the right to  
20 cross-examine so they could learn beforehand in terms of  
21 what it is that we might otherwise testify to. But the  
22 reality of life is, maybe it's going to be determined by the  
23 plaintiffs that they're not even going to call us at trial,  
24 so why do we need to do the deposition now?

25 THE COURT: All right.

1 MR. BENN: Thank you.

2 THE COURT: Thank you for your argument. I  
3 appreciate it. Let's hear from defendant's counsel.

4 MR. GILLEN: Thank you, Your Honor. Pat Gillen for  
5 the defendants.

6 A couple of preliminary matters first. I think  
7 you've properly indicated that the core of the privilege is  
8 confidential sources. And we have indicated that we have no  
9 interest in getting at any, so it appears that is not an  
10 issue. Likewise --

11 THE COURT: Well, but is it? You know, it may be  
12 the core sense of what the privilege is, but certainly the  
13 stripe that runs through the case law, as indicated by the  
14 movant's counsel, is that there may be some obligation to  
15 depose others before you get to the reporters. What do you  
16 say about this?

17 MR. GILLEN: What I say about that, Your Honor, is  
18 we did not drag them into this. We had -- we understood  
19 that there were witnesses. We know there are other  
20 witnesses, and we've deposed some of those.

21 When they weren't witnesses, when they were on the  
22 sidelines, we were content with that. As you know, also by  
23 way of the reason for our late subpoena, in May a subpoena  
24 was served on them to get testimony by the plaintiffs on  
25 June 8<sup>th</sup>. Naturally we expected that. We subpoenaed

1 documents that would allow us to conduct a meaningful cross  
2 examination of the reporters when they offered their  
3 testimony. So we didn't bring them into this.

4 Our position, the purpose of our subpoena and our  
5 motion to compel is very simple. It's really to secure due  
6 process, fundamental fairness. If they are going to come  
7 forward, if they are going to testify against our clients,  
8 then all we want is a fair ability to conduct a meaningful  
9 examination into their bias, their motive, et cetera.

10 THE COURT: What about the notes?

11 MR. GILLEN: The notes I think go to all of that.  
12 I mean from the standpoint of my clients' interests, giving  
13 their deposition testimony, these reports were consistently  
14 false and placed things in false light. The notes are very  
15 material to that.

16 THE COURT: Well, what about the privilege?

17 MR. GILLEN: The privilege -- I believe that the  
18 privilege, at least so far as it's, you know, secure, it's  
19 clear, doesn't extend to that material.

20 THE COURT: Because?

21 MR. GILLEN: The only holding in the Third Circuit  
22 that relates to that sort of secondary material is  
23 Cuthbertson, and it required disclosure. It recognized, as  
24 I believe to be what is true, and is true in this case, that  
25 those kind of notes of statements made, reported by a

1 reporter, are unique in and of themselves. That's what the  
2 Third Circuit said, that that's right.

3 Now, I think that Cuthbertson wrongly extended the  
4 privilege beyond that. And I think Judge Rambo's  
5 concurrence in the subsequent case, Criden, is right. And I  
6 think that it's very interesting that Cuthbertson did not  
7 mention Herbert v. Lando decided by the Supreme Court  
8 shortly before Cuthbertson was decided and holding that  
9 there is no editorial process privilege.

10 So my position is if they're going to be allowed to  
11 testify, then that's the purpose of our subpoenas, that's  
12 the purpose of our examination.

13 THE COURT: Where does it -- does the privilege  
14 affect this case at all on these facts?

15 MR. GILLEN: Not based on the representation that  
16 there were no confidential sources involved.

17 THE COURT: So you say the privilege, really, at  
18 its essence, applies only to confidential sources?

19 MR. GILLEN: Yes. I say that that's the holdings.  
20 That narrow view is what is most secure. Beyond that, the  
21 cases from the Supreme Court and the Third Circuit indicate  
22 it's just confidential sources, perhaps information that  
23 would lead to the discovery of the identity of confidential  
24 sources. Beyond that --

25 THE COURT: But we don't know -- well, of course

1 counsel says there are no confidential sources, but I think  
2 you read the privilege too narrowly. We may disagree on  
3 that, and I think, again, another stripe that runs through  
4 the cases, or at least a theme is that we run the risk of  
5 chilling the ability of reporters to do their work,  
6 particularly if we examine their notes.

7 MR. GILLEN: The only thing I can say to that,  
8 Judge, is the U.S. Supreme Court considered all of those  
9 objections in Herbert v. Lando. It said no. If these  
10 reporters were defendants in a defamation action brought by  
11 my clients, they would have to turn that stuff over.

12 THE COURT: Well they might, but they're not.

13 MR. GILLEN: Well, I mean that's the question for  
14 you to decide. But my point is, those notes are not  
15 protected. I firmly believe that under the Beterman  
16 (phonetic) cases and in light of their holdings.

17 THE COURT: All right. Thank you.

18 MR. GILLEN: You're welcome.

19 THE COURT: To the plaintiffs.

20 MR. WALCZAK: Your Honor, Witold Walczak, ACLU of  
21 Pennsylvania for the plaintiffs.

22 The plaintiffs' interests, as I think the Court has  
23 correctly identified them, are fairly narrow. But before I  
24 get to those, it might -- I mean I would like to focus on  
25 this privilege issue because I'd like to reconceptualize it

1 a little bit differently.

2 THE COURT: Well, you say they've waived it.

3 MR. WALCZAK: Well, it is an argument in there, and  
4 how this works out in practice if we don't get the  
5 affidavits in, and whether the reporters get called at  
6 trial --

7 THE COURT: I'm not sure the movants feel very good  
8 about your argument that they've waived it, but you've made  
9 that argument nonetheless, is that right?

10 MR. WALCZAK: We have, Your Honor. We also argue,  
11 as I will in just a moment, that the information we're  
12 seeking stops at the line of privilege.

13 Just from the comments I've heard it seems to me  
14 that it is appropriate and makes sense under the law to look  
15 at it as two separate privileges related to news reporters.  
16 One is the confidential source privilege, which is quite  
17 clear, everybody understands. The other is a news gatherers  
18 privilege. And, again, Cuthbertson is really the leading  
19 case on this. And on page 147 the Court writes, We hold the  
20 privilege extends to unpublished material in the possession  
21 of CBS.

22 So that there's the confidential source privilege,  
23 and there's the news gathering privilege, which gives the  
24 media that sort of -- that breathing space, and it could be  
25 analogized to an attorney work product privilege.

1           THE COURT: And part of the rationale, obviously,  
2 as I just stated to Mr. Gillen, I think the rationale has  
3 the tendency to chill efforts by the media to do their work.  
4 Is that not correct?

5           MR. WALCZAK: That's absolutely correct, and  
6 that -- and that is the justification. And with all due  
7 respect to Mr. Gillen, who we've gotten to know quite well,  
8 I don't think that his assertion that Cuthbertson is kind of  
9 way out there on the fringe is correct. In fact --

10          THE COURT: What is it that you want? Let's try to  
11 line up first of all --

12          MR. WALCZAK: Very narrowly, Your Honor, in our  
13 complaint filed on December the 14<sup>th</sup>, we alleged in there  
14 that the defendants made numerous statements at public  
15 meetings, or agents of the defendants, Mr. Buckingham  
16 primarily, head of the curriculum committee.

17          THE COURT: I understand.

18          MR. WALCZAK: For instance that, "We need to  
19 balance the teaching of evolution with creationism. This  
20 country wasn't founded on Muslim beliefs or evolution. This  
21 country was founded on Christianity, and our students should  
22 be taught as such." That's at paragraph 29.

23                 Paragraph 30. "2000 years ago someone died on a  
24 cross. Can't someone take a stand for him."

25                 And those comments are important under the Lemon



1 test. And I remember back in February or March Your Honor  
2 had some question about whether Lemon is the applicable  
3 test. As noted in a quick reading of the summary judgment  
4 brief defendants filed last night, they are now conceding  
5 that Lemon is the applicable test. And I think under  
6 McCreary County versus ACLU that's probably right. We don't  
7 need to decide that today.

8 THE COURT: No, we don't. We'll have a lot to say  
9 about that.

10 MR. WALCZAK: And I want to just take this  
11 opportunity to apologize because it's not as if we don't  
12 have enough interesting constitutional issues in this case,  
13 and now we have additional ones that are coming to light  
14 today, and we kind of got us into this. But the reason this  
15 has become so important and this has become an issue is that  
16 these comments are important to the plaintiffs' case, they  
17 go both to the purpose/motive prong, and the effects prong.

18 THE COURT: Well, I understand that, but let me try  
19 to make sure that I understand, and I recognize what it is  
20 that you're saying and why you need to say it, but my  
21 question is fairly basic. If I understand Mr. Gillen, the  
22 defendants seek pretty much unfettered ability to not only  
23 conduct an examination of the movants, but also to get into  
24 the notes, and, I assume, Mr. Gillen, the e-mails as well,  
25 to the extent that they're relevant to the proceedings.

1           Now, do I understand that you stop short of the  
2 notes and the e-mails -- I want to just make sure I  
3 understand everybody's position -- and you want the ability  
4 to depose, or you do not, and that's what I'm trying to --

5           MR. WALCZAK: Well, it depends on how all this  
6 plays out, but just -- let me just explain historically. On  
7 June -- on January 3<sup>rd</sup> we began taking depositions of the  
8 defendants. And somewhat to our surprise, one by one they  
9 uniformly denied the quotes attributed to them in the two  
10 different newspapers. And, you know, and it wasn't the  
11 wording is wrong; we never used the word creationism at any  
12 public meeting. So there really is a factual dispute there.

13           Under Rule 902(6), I believe it is, these newspaper  
14 articles are self authenticating; so that's not a problem.  
15 But we still need to lay a foundation. And the only thing  
16 we want from the newspapers is the ability to lay a proper  
17 foundation so that we can get these newspaper articles into  
18 evidence. The affidavits that the reporters and that the  
19 editors have given to us, and the stipulation that in fact  
20 was signed and submitted in court covers everything we're  
21 looking for.

22           THE COURT: So do I understand then that to try to  
23 answer the question that I asked you, that Mr. Gillen  
24 obviously wants to depose these two reporters. You're  
25 content to stand on what you have, but if there is a

1 deposition you're going to join in?

2 MR. WALCZAK: Your Honor, that is correct. We are  
3 content with what we have now. If we don't get the  
4 stipulation entered or get some type of affidavits in, which  
5 I don't believe we can get in without defendant's consent,  
6 then we would want either to participate in the deposition  
7 to ask the foundational questions, and I can -- I can give  
8 assurance to the Court that's the only thing we would ask  
9 unless there's some reason to rehabilitate or something  
10 comes up in the examination. So, again, I can't promise  
11 that we would stop at that point.

12 THE COURT: All right, I understand. All right.

13 MR. GILLEN: Your Honor, may I respond briefly?

14 Two things, the newspaper articles are hearsay. I  
15 mean those are Ms. Maldonado --

16 THE COURT: We're not going to argue evidence.

17 MR. GILLEN: Okay, I understand.

18 THE COURT: The admissibility and the self  
19 authentication, I'm not --

20 MR. GILLEN: Very well.

21 THE COURT: We don't need to discourse about that  
22 today.

23 MR. GILLEN: That's fine, and I accept that, Your  
24 Honor.

25 That said, the next thing is, you know, it's no

1 comfort to my clients that the reporters can come forward  
2 and selectively testify and not be exposed to meaningful  
3 examination.

4           As you know, opposing counsel indicates, many  
5 statements have been attributed to my clients which they  
6 flat out deny. They believe statements were taken wholly  
7 out of context, words were put in their mouth. That is  
8 their testimony, and I've shown you that. And what's more,  
9 the reporters say no one ever talked to us about it. That  
10 is not the testimony in front of you from the depositions.  
11 They say we went to them, we tried to get a fair hearing and  
12 we didn't.

13           So from their standpoint, the notion that the  
14 reporters have a limited right to come forward, you know,  
15 say what they like and shield that, their -- the process and  
16 their notes from any meaningful scrutiny, that is no  
17 comfort. That would deprive them of due process. They need  
18 a chance to really examine them. What do those notes say?  
19 What words were used? What statements were omitted from the  
20 articles? I mean that's part of the concern of my clients.

21           Creationism was a term that was largely put into  
22 their mouth by these reporters. There were times when they  
23 said under the heated argument, maybe they misspoke, because  
24 people were charging them with that. That's not the point.  
25 These statements they deny flat out. We want an opportunity

1 to look at this process, to look at its reliability, and to  
2 examine what else was said. Moreover, without knowing  
3 what's in the notes, there could be other statements there  
4 by third parties and so on that are highly relevant to our  
5 defense. It's kind of peekaboo discovery. We stand up and  
6 say yeah, what I said is true, and we have to settle for  
7 that. Judge, that would be fundamentally unfair.

8 THE COURT: Let me ask Mr. Walczak, do I understand  
9 your position to be that all other things being equal, if  
10 the reporters would not be deposed at this time, and, for  
11 example you would stand on the stipulated affidavits, that  
12 nonetheless you would intend to call the reporters in your  
13 case in chief, or at least in terms of right?

14 MR. WALCZAK: Let me put it another way. It is our  
15 intention, and there's just no doubt, it is our intention to  
16 introduce the full panoply of newspaper articles into the  
17 record. And ultimately it would be Your Honor's evidentiary  
18 call whether or not the stipulations or the affidavits could  
19 come in. I have --

20 THE COURT: So you would only call them, if I  
21 understand correctly, if you couldn't get a stipulation as  
22 to the admissibility of -- or the authenticity of particular  
23 articles which you say under the rule self authenticate and  
24 we need not get to that, I don't think, today.

25 MR. WALCZAK: No, it's not just the authentication,

1 it's the foundation that in fact what was reported there  
2 is -- that they were present, and it was accurate.

3 THE COURT: But there are a certain set of  
4 stipulations or facts that would cause you not to have to  
5 call the reporters in aid of your case in chief. There's a  
6 certain set of circumstances that would cause you to have to  
7 call the reporters. And if I understand your argument  
8 that -- gently made, and your submission that the privilege  
9 has been eviscerated by the affidavits of the reporters,  
10 that would go to, it seems to me, your ability to call the  
11 reporters during your case in chief if you really had to.  
12 Do I have that right?

13 MR. WALCZAK: Yes, plus, one, there is a -- rather  
14 than eviscerated, I would say arguably a waiver here, but  
15 the second --

16 THE COURT: Too strong a word by me?

17 MR. WALCZAK: We have great respect for the press.  
18 I don't want to eviscerate any of their rights. But the  
19 second point is, that between Riley and Cuthbertson in the  
20 Third Circuit, the privilege extends either to confidential  
21 sources or to unpublished materials editorial process.  
22 Every court that has looked at it says it does not extend to  
23 published information, and so if we were to call them it's  
24 the -- there either is no privilege or it's waived, and we  
25 would call them at trial and simply ask, did you write these

1 articles, were they based on firsthand information, are they  
2 accurate, have you gotten any corrections or retractions,  
3 thank you very much, that's the end of it.

4 THE COURT: All right, I understand.

5 MR. GILLEN: Judge, if I may, my position is, if  
6 those affidavits, other information from these reporters is  
7 going to be used against my clients, then you've got to give  
8 me a chance to look at the material I've asked for just out  
9 of fundamental fairness.

10 THE COURT: Give you a chance to do what?

11 MR. GILLEN: To examine them about what they saw  
12 and heard.

13 THE COURT: I understand. All right.

14 MR. GILLEN: The notes they took there.

15 THE COURT: You said look at materials, I'm --

16 MR. GILLEN: Materials I've requested, the  
17 materials I've subpoenaed.

18 THE COURT: Let me ask Mr. Benn, on the issue of  
19 what apparently are a set of e-mails and the notes and  
20 drafts, e-mails in the case of your one client and notes and  
21 drafts in the case of the other, how can I rule them out of  
22 bounds without looking at them?

23 MR. BENN: Oh no, I'm proposing that, what I'm  
24 saying to you, Your Honor, is that if there's some concern  
25 on your part that maybe they're admissible, that I would

1 respectfully request that you look at them in camera,  
2 determine the relevancy, and if they are relevant and you  
3 make an order to that effect, I'm going to have to live with  
4 that.

5 THE COURT: I understand.

6 MR. BENN: But in the alternative if you determine  
7 that they're not relevant, I don't see any basis to turn  
8 them over to anybody. I think they are protected.

9 THE COURT: I think under the case law, because  
10 it's less than clear I think we can all agree, and I think  
11 it can be argued different ways, you may see it differently,  
12 it is problematic for me to, sight unseen, simply say that  
13 the notes and drafts and e-mails come under a privilege  
14 without an examination. It is probably better for everybody  
15 if the Court conduct some in camera examination, it seems to  
16 me.

17 Now, how do you propose that I do that?

18 MR. BENN: I'll turn them over to you next week.

19 THE COURT: I think what I would suggest to wrap  
20 this up is -- go ahead.

21 MR. BENN: Before you wrap it up, I would like to  
22 have comment with respect to arguments of both counsel.

23 THE COURT: By all means.

24 MR. BENN: Defense have raised in their pleadings  
25 and in their brief that -- and in their argument that the



1 reporters have been biased in terms of the reporting. I  
2 need the Court to be cognizant of the fact that York has two  
3 newspapers, the York Daily Record, which is owned by Media  
4 News Group, and the York Dispatch, which is run by Butner  
5 News Alliance. They are two separate distinct newspapers,  
6 two separate editorial staffs. They have nothing to do with  
7 the other. And if there's bias then we're alleging some  
8 element of conspiracy here as it relates to the two  
9 reporters because the reporters wrote two separate articles  
10 for each meeting they attended, and ironically they all  
11 heard the same thing.

12 THE COURT: I understand.

13 MR. BENN: That's number one.

14 Number two, I believe that counsel has indicated  
15 that we've used the word creationism and that that never  
16 came out of the school board member's mouth and that that's  
17 part of what this problem is in terms as to the language we  
18 used in our article. Not to suggest that you need to get  
19 another media in this case, but there is a Fox 43 record on  
20 the Internet where Mr. Buckingham is interviewed and  
21 specifically used the word creationism.

22 Thank you.

23 THE COURT: How does that help me today?

24 MR. BENN: Well, I think it discredits somebody's  
25 argument.

1           THE COURT: And I -- and I take those somewhat  
2 ancillary points as arguments, and I'm not sure that they  
3 are helpful to me today. Everybody has got a position. The  
4 position obviously the defendants have is that certain  
5 things weren't said, and they want to have the ability to  
6 examine the reporters on those points, I recognize that.

7           MR. BENN: But again, and this will be my final  
8 statement, I promise you, although that's pretty daring when  
9 it comes out of a lawyer's mouth, if the argument is that my  
10 clients wrote whatever, and it was contradictory or not in  
11 conformance with or not exactly what was said by the board  
12 members, again my posture is, very clearly, that there were  
13 other independent parties not associated with the newspaper,  
14 not associated with the school board, but rather members of  
15 the general public, parents of students that attended those  
16 school board meetings, they are the sole possessors of the  
17 names of those individuals because they maintain the sign-in  
18 list, and those parties I would presume would likewise be  
19 able to evidentiary state what it is that they heard, saw  
20 and observed.

21           THE COURT: I understand.

22           MR. WALCZAK: I'm sorry, Your Honor.

23           THE COURT: We'll have to end this sometime, but  
24 give you a couple more comments.

25           MR. WALCZAK: We started down the road of, is this

1 information really necessary, and I think Mr. Benn is  
2 correct, that in order for plaintiffs or either of the  
3 parties to overcome that privilege, we have to show that  
4 it's really necessary, that it can't be gotten from other  
5 parties.

6 Just in case this Court is thinking that maybe none  
7 of this should be admissible, the plaintiffs would focus on  
8 a statement in Cuthbertson that they said referring to TV  
9 tape, these are unique bits of evidence that are frozen at a  
10 particular place and time.

11 And yes, it's true we have several other witnesses  
12 including plaintiffs who will come in and say we were at  
13 those meetings and, yes, we recall statements about  
14 creationism, we recall statements about Muslim beliefs, we  
15 recall statements about Darwinism, but that is all based on  
16 recollection. What we have here is contemporaneously  
17 recorded statements; and that is unique. No other  
18 individuals can testify to that.

19 Also, and I don't know if Your Honor has had a  
20 chance to read McCreary County versus ACLU yet, but the  
21 Court goes to great lengths to talk about sort of the  
22 gestalt of the situation, what is the environment; and when  
23 the reasonable observer looks at a situation, do they  
24 perceive an endorsement of religion. So you have to really  
25 look at the historical record. These news reports in

1 totality are part of the historical records. So this is --  
2 this is unique evidence that's really important to our case.

3 THE COURT: If you won't let me use the word  
4 eviscerate, I won't let you use the word gestalt.

5 MR. WALCZAK: Thank you.

6 THE COURT: Last word.

7 MR. GILLEN: Thank you, Your Honor. Two things.  
8 With respect to the sign-in sheets, they do exist. Plainly  
9 they're unreliable in this sense, there's a handful of  
10 signatures on each one. They've been produced. These are  
11 meetings at which I know some people say 70 or 100 were  
12 present.

13 THE COURT: I understand.

14 MR. GILLEN: Second, if the sign-in sheets are to  
15 be credited by counsel for the reporters, I mean, it's not  
16 at all clear that reporters were present at all of the  
17 meetings, and it's -- it wouldn't be the first time that  
18 reporters borrowed quotes from one another.

19 I mean, I don't mean to say that that somehow is  
20 wholly improper, but I cannot foreclose that there was some  
21 cooperation because --

22 THE COURT: I understand your position, Mr. Gillen.  
23 I think the longer you argue it, the more you're going to  
24 beg another comment from Mr. Benn, and this will become  
25 endless.

1 MR. BENN: I have several for that one.

2 THE COURT: I bet you do.

3 I would like to examine the -- and I think it's  
4 incumbent upon me to examine the e-mails and the notes and  
5 drafts, and I guess we can do it two ways, Mr. Benn. We can  
6 either have you file them under seal or we can have you  
7 simply provide them for an in camera inspection. I would  
8 prefer the latter, I think.

9 MR. BENN: That's what we'll do.

10 THE COURT: Why don't you provide those to me, to  
11 my chambers, I would say -- well, how long is it going to  
12 take you?

13 MR. BENN: Can I give them to you next Tuesday?

14 THE COURT: Let's say by the close of business  
15 Tuesday, that will be fine. And I will conduct an  
16 examination in camera and rule then pursuant to argument  
17 heard today and the submissions of the parties and my  
18 examination of the materials.

19 Now, let me -- before we close this portion of  
20 today's proceedings, Mr. Gillen, do you accept -- do we have  
21 any issue with respect to Mr. Benn's assertion that, to the  
22 extent you don't get anything else, it doesn't exist?

23 MR. GILLEN: Certainly. I'm not going to impugn  
24 his integrity. If he says there are no documents that  
25 exist, Your Honor, I have to be content with that.

1           THE COURT: I simply don't want to have another  
2 proceeding on a motion to compel or some other vehicle  
3 because you say that you're entitled to something that you  
4 didn't get. It seems to me that the only materials  
5 requested as a portion of your subpoena of the individual  
6 reporters that exist according to Mr. Benn are the e-mails  
7 and the notes and drafts. All other matters, including the  
8 employment records, to the extent that these are independent  
9 contractors, simply don't exist. So speak now or --

10           MR. GILLEN: Well, I would say --

11           THE COURT: -- hold your peace.

12           MR. GILLEN: -- Judge, and I thank you for the  
13 opportunity. I think that everything we've asked for is  
14 proper. To the extent it doesn't exist, I have noted that,  
15 and that's represented to me by counsel for the papers.

16           THE COURT: Have you represented that formally  
17 other than perhaps on the record today?

18           MR. BENN: The first time that I represented those  
19 items don't exist is in today's argument. I can do it in a  
20 letter.

21           THE COURT: I think you should so that we're all  
22 clear. And I think Mr. Gillen certainly respects your  
23 integrity, it's clear, but I think you ought to spell it out  
24 and -- so that everybody understands. So then the in camera  
25 inspection of those matters that we just spoke about would

1 suffice for the materials sought via the subpoenas. So we  
2 have that, and we have the actual issue of the testimony of  
3 the reporters and, if so, what the boundaries are.

4 MR. BENN: There's one other thing that I have in  
5 my file, that I didn't mention only because it's a letter  
6 from Mr. Bonsell, who I believe was the school board  
7 president. He wrote a letter to the editor that he asked to  
8 be published. So I have that letter together with the  
9 letter that he wrote that he wanted published together with  
10 the editorial that was published.

11 THE COURT: Are you going to turn that over?  
12 You're going to submit that to me?

13 MR. BENN: That's all I have, so I'll give you what  
14 I have.

15 THE COURT: What is the problem with turning that  
16 over?

17 MR. BENN: I don't have a problem with it.

18 THE COURT: Why don't you just turn it over. I  
19 don't think it's helpful to have me review something that  
20 is, under the circumstances, would appear to be innocuous  
21 and in their possession anyway likely, so I would -- perhaps  
22 when you send your missive to Mr. Gillen that indicates what  
23 you have and what you don't have, you ought to just send  
24 it --

25 MR. BENN: I'll send it to both counsel.

1 THE COURT: -- to both counsel, to all counsel, to  
2 the many counsel we have in this case, copies to everyone.

3 MR. BENN: You're dealing with more counsel than I  
4 am.

5 THE COURT: So I am.

6 Anything else before we close the record in this  
7 portion of the proceeding? All right.

8 Then we'll excuse you. That concludes --

9 MR. BENN: Thank you.

10 THE COURT: Thank you, Mr. Benn. Let's have  
11 counsel I guess for the Foundation for Thought and Ethics  
12 will take their seats.

13 While you're setting up we'll take five minutes and  
14 I'll be right back.

15 THE DEPUTY CLERK: All rise.

16 (Whereupon, a recess was taken from 12:12  
17 p.m. to 12:23 p.m.)

18 THE COURT: Part two of today's proceeding is the  
19 application for intervention filed by the Foundation for  
20 Thought and Ethics for the plaintiff, and the defendant  
21 obviously we have the same counsel.

22 Counsel, would you enter your appearances for --  
23 on behalf of the applicant.

24 MR. BOYLE: Yes, Your Honor, Dennis Boyle on behalf  
25 of Foundation for Thought & Ethics.



1           MR. BROWN: Leonard Brown. Good afternoon, nice to  
2 see you.

3           THE COURT: All right, nice to see you.

4           All right. You filed the application. It's my  
5 understanding that you may have some testimony that you want  
6 to present.

7           MR. BOYLE: That's correct, Your Honor.

8           THE COURT: You may proceed.

9           MR. BOYLE: At this time, Your Honor, I would call  
10 Jon Buell, the president of the Foundation for Thought and  
11 Ethics.

12   JON A. BUELL,  
13 called as a witness on behalf of the petitioner, having been  
14 duly sworn or affirmed according to law, testified as  
15 follows:

16           THE DEPUTY CLERK: State your name and spell your  
17 last name please for the record.

18           THE WITNESS: My name is Jon Buell, Jon A. Buell,  
19 J-O-N, B-U-E-L-L.

20           THE COURT: All right, you may proceed.

21   DIRECT EXAMINATION

22 BY MR. BOYLE:

23           Q     Mr. Buell, what is your current address?

24           A     6401 Embers Road, E-M-B-E-R-S Road, Dallas, Texas,  
25 75248.

1 Q And by whom are you currently employed?

2 A I am employed by the Foundation for Thought and  
3 Ethics.

4 Q And what is your position there?

5 A My position is as president.

6 Q And prior to working there where did you work?

7 A I worked at Probe Ministries prior to the  
8 Foundation.

9 Q And was Probe Ministries a publication-type  
10 ministry?

11 A Lectures in classrooms, but publications as well,  
12 and I was the editor of the publications.

13 Q Okay. What is the Foundation for Thought and  
14 Ethics?

15 A The Foundation for Thought and Ethics is organized  
16 to promote freedom of choice for young people in the  
17 classroom, especially as it pertains to matters of world  
18 view and philosophy and character and the like.

19 Q How about with respect to science?

20 A And with respect to science, we've had a burden  
21 that -- that natural -- that -- I'm sorry, that intelligent  
22 cause, which is so at home in various branches of science,  
23 might also extend to biology.

24 Q And how does the Foundation for Thought and Ethics  
25 fulfil this job, this mission?

1           A       Well, we've organized some scientific symposia and  
2 we do some teacher training, but primarily through  
3 publication of supplemental textbooks for the public school  
4 classroom.

5           Q       And where does the Foundation for Thought receive  
6 its support from?

7           A       Well, we sell our books, market our books to the  
8 schools.

9           Q       What percentage of your income comes from marketing  
10 books?

11          A       Well, at this point it's probably about 40 percent.

12          Q       Is that a growing percentage every year?

13          A       Yes, it is.

14          Q       And why is that?

15          A       Well, because in order to really make independent  
16 reps who are out making contacts with teachers productive,  
17 you have to have a pipeline of product. And as we -- at  
18 this point we don't have as much product as the average  
19 publisher does, so we have to produce more product which  
20 would be text -- supplemental textbooks and teachers guides  
21 and peripherals that make them attractive and easy to use  
22 for the teachers. And as we do that, as we accomplish that,  
23 then we'll have more reps and be able to contact more  
24 schools.

25          Q       Okay. Is the Foundation for Thought and Ethics a

1 religious organization?

2 A No, it's not.

3 Q What kind of organization is it?

4 A Well, it's an educational organization.

5 Q And does it seek to provide any -- promote any  
6 Christian message in that education?

7 A No, it does not.

8 Q Any religious message at all?

9 A No, none at all.

10 Q Your corporate charter mentions a Christian  
11 purpose, does it not?

12 A The articles of incorporation.

13 Q Okay. And when were they founded, when --

14 A They were -- they're -- I think it was 1980.

15 Q And since 1980 have you operated as a Christian  
16 organization at all?

17 A Not at all. We have, you know, a 25 year plus  
18 track record of what we've done, which does -- you know,  
19 which you can easily compare or look for Christian  
20 activities, it's not there.

21 Q Do you seek to promote any sort of Evangelical  
22 message in any way?

23 A No, we don't.

24 Q Do you publish -- are you familiar with the book  
25 Pandas and People?

1 A Yes.

2 Q What is your relationship to the book Pandas and  
3 People?

4 A Well, we are the publisher of Pandas and People.

5 Q And what is Pandas and People?

6 A It's a book designed to supplement basal biology  
7 textbooks in public school classrooms and present the  
8 scientific rationale for intelligent design.

9 Q I guess we better be clear on what a basal textbook  
10 is.

11 A A basal textbook is a textbook that's designed to  
12 cover all the material in a course. Each state has its  
13 required benchmarks, if you will, of what has to be covered  
14 in American History, what has to be covered in biology,  
15 et cetera, and so a basal textbook is going to fare on the  
16 market in that state according to how much -- if it has a  
17 large percentage or all of those benchmarks so that the  
18 teacher can use that basal textbook and be fulfilling his  
19 responsibility.

20 Q And how would a supplemental textbook like Pandas  
21 and People be used in that curriculum?

22 A Well, the layout of Pandas and People is -- follows  
23 the -- topically follows the basal textbook. So we would  
24 like for our book to be used during the entire course, but  
25 practically speaking many people, many teachers will take it

1 and use it for say a two week period. So it's flexible.

2 Q And what is the rationale for Pandas and People;  
3 what is the -- why is it different?

4 A Well, it's different because it presents the view  
5 of intelligent design. And the view of intelligent design  
6 is that -- it's the view that intelligent cause, which is so  
7 at home in various branches of science, examples would be  
8 the search for extraterrestrial intelligence, forensic  
9 science, archeology, in all of these branches of science  
10 we're very much at home in searching for, recognizing and  
11 having confidence that we can identify the product of  
12 intelligence.

13 Now, it's taking that same -- that same kind of  
14 confidence and that same purpose and looking, for example,  
15 in biology. When we look at biological organisms and  
16 especially their genomes, we recognize the same intelligent  
17 cause. And because we extend a uniform application of the  
18 principles of science, there's good warrant to say that this  
19 intelligent -- this designed entity is the product of  
20 intelligence. So it's a plausible warranted hypothesis when  
21 we look at the information that we see.

22 Q Now, prior to deciding to engage in the product  
23 that resulted in Pandas and People, did you do any marketing  
24 studies or any studies for secondary schools?

25 A Yes, in fact, while we were doing our first book

1 prior to Pendas, we engaged a professor actually who was a  
2 former professor of anthropology on a doctoral level at SMU,  
3 Southern Methodist University, who had a polling business.  
4 And we engaged him, he was a Darwinist, we met with him and  
5 discussed questions and let him take our questions and  
6 re-express them, and then conducted a poll. And the results  
7 were all turned over to him and he used the computer center  
8 at SMU to draw a large number of correlations. And it  
9 showed a very strong, a very high percentage of interest  
10 among biology teachers -- this was all biology teachers --  
11 in having textbook or curricular help and assistance in  
12 teaching a hypothesis that was an alternative to Darwin's.

13 And it also asked the question, if there is a  
14 dominant hypothesis and a secondary hypothesis, which should  
15 you teach. And the options given to the teachers were, just  
16 teach your personal viewpoint, teach the dominant hypothesis  
17 and the secondary hypothesis, or teach the secondary  
18 hypothesis, teach the dominant hypothesis. The overwhelming  
19 majority said teach both, 70 some percent.

20 Q The individual who conducted this study for you,  
21 was he a Christian?

22 A No, he wasn't.

23 Q And you referred to him as a Darwinist?

24 A He was a Darwinist.

25 Q Perhaps we should define that term for the Court.

1 A The term Darwinist?

2 Q Yes.

3 A Well, a Darwinist is one who adheres to Darwinian  
4 or neo Darwinian evolution.

5 Q So who then was commissioned to write the book  
6 Pandas and People?

7 A So the authors of the book were P. William Davis,  
8 who had authored -- previously co-authored books -- major  
9 books of biology with McGraw-Hill and W. B. Saunders in his  
10 book with Claude Villee, published by W. B. Saunders is the  
11 best selling, most widely used college level biology major's  
12 major textbook in the world.

13 And then Dean Kenyon was the other co-author. And  
14 Dr. Kenyon was the co-author of the best selling book on the  
15 origin of life prior to our book, previous, the book before  
16 Pandas. And it also was a McGraw-Hill title, and it was  
17 called Biochemical Predestination. And Dr. Kenyon was  
18 recognized as one of the top, you know, five or ten origin  
19 of life researchers in the world.

20 Q So this book was written by individuals who were  
21 biologists by profession?

22 A Biologists and origin of life researchers.

23 Q Okay. After the book was prepared was it submitted  
24 for peer review?

25 A Yes, it was extensively.



1 Q Would you submit it just to Christian scientists  
2 or --

3 A Oh no. No, we sent it to -- we sent it to people  
4 who we had reason to believe might be receptive or in  
5 agreement. We sent it to people who we knew were not --  
6 would not be receptive to it. We sent it to people because  
7 of their academic credentials in a variety of sciences. It  
8 was an extensive project, certainly lasted over a year,  
9 working -- just working in terms of the input of the peer  
10 review.

11 Q And what did you do then when you got the results  
12 of the peer review?

13 A We would take -- the peer review informed (sic) the  
14 final edit of the book in a very serious -- to a very  
15 serious degree.

16 Q When was Pandas and People first published?

17 A It was first published in 1989.

18 Q And how many books have been sold since that time?

19 A Somewhere between thirty-five and 38,000.

20 Q And what has the average price of a book been?

21 A Well, the average price over that lifetime has  
22 been -- the average discounted selling price, not the  
23 retail, has been between 12 and \$13. But presently the  
24 current print run is -- the price was adjusted, the retail  
25 is 24.50. So the average selling price in this case is

1 16.22.

2 Q And how many books do you have remaining to be  
3 sold?

4 A I'm sorry?

5 Q How many books do you have in inventory to be sold?

6 A Oh, about 1300 copies.

7 Q And is there another edition of the Pandas and  
8 People in the works at this time?

9 A There is, yes.

10 Q And what is that, the title of that book?

11 A The title of that book will be The Design of Life.

12 Q And how does that differ from Pandas and People?

13 A Well, since the second edition of Pandas, you know,  
14 we're almost 15 years down the road, and of course the  
15 debate has matured a great deal. A lot of science has been  
16 done, and so it's been necessary to update quite a bit of  
17 material. A lot of the original Pandas will be retained,  
18 but a lot will be removed, and we've added three authors.  
19 They're certainly among the top intelligent design  
20 scientists in the world.

21 Q When do you anticipate this book being released?

22 A Next year, in '06.

23 Q And how many -- how many books will you produce in  
24 your first printing?

25 A We'll print 10,000.

1 Q Do you anticipate any printings of that book after  
2 that?

3 A We certainly hope so. No publisher, you know,  
4 anticipates or wants to stop at, you know, the first print  
5 run, especially if it's a small one like that. So of course  
6 we hope that there will be many print runs like Pandas  
7 before it, and anticipate that, but, you know, in terms of  
8 our fiscal responsibility, we have to be conservative and do  
9 a small print run.

10 Q Are Pandas and People and The Design of Life both  
11 based upon the rationale of intelligent design?

12 A Yes, they are.

13 Q How would a judicial determination equating  
14 intelligent design to religion affect the sale Of Pandas and  
15 People and The Design of Life?

16 A Oh, it would be -- it would be catastrophic for the  
17 sales. It would be -- would make that book radioactive.  
18 The teachers would not buy it. It would not be used in the  
19 classroom. The market for which the book is being prepared  
20 would just effectively evaporate.

21 Q And the market for who the book is prepared, where  
22 is that, what is that market?

23 A That market is in high school biology classes, AP  
24 biology classes, and in some introductory level biology in  
25 college.

1 Q How would a decision affecting the sale of that  
2 book affect FTE -- or those books affect FTE?

3 A Well, we're several years into the process of  
4 preparing this book. It would be a dramatic blow to FTE and  
5 could go to our viability -- probably would, because we've  
6 been working since 1998 to develop this book. We've  
7 involved a lot of, a lot of scientists. And in addition to  
8 the economic hit that it would provide for us, it would be a  
9 very scary experience for other authors that we might  
10 approach in the future to ask them to write for us, to see  
11 what's happened to this book.

12 Q And what would the total figures that you've  
13 calculated for loss be, just from -- through the first  
14 printing of Design of Life?

15 A The revenues for the first printing of The Design  
16 of Life would be 310,000 plus some.

17 Q And when you add that to the other costs that you  
18 have, or expenses you have, what would the total loss be?

19 A Well, we have, as I say, 1300 -- roughly 1300  
20 copies of Pandas presently which are selling at 19 -- let's  
21 see, 19.16, excuse me. And then the next print run of  
22 Pandas will sell at a little bit more. So the combined  
23 present remainder of the present print run and the next  
24 print run together would total \$213,000 in revenues,  
25 projected revenues. And then when you add that to the 300

1 plus thousand dollars, \$310,000 for The Design of Life,  
2 we're talking now 524,000.

3 Q Mr. Buell, what is intelligent design?

4 A Intelligent design is the view that, just as  
5 intelligent causes are well accepted in branches of science,  
6 and I mentioned this a while ago, that forensic science and  
7 the search for extraterrestrial intelligence or SETI, and  
8 you might picture the Arecibo Observatory in the movie  
9 Contact that was about Carl Sagan's work and so forth, those  
10 were the implements, the tools of SETI, as well as in  
11 archeology.

12 These branches of science are very accustomed to  
13 and comfortable with the assignment to identify the product  
14 of intelligent design. And so if we take that same  
15 rationale and we start with the observation that in  
16 biological organisms, in the genome, there is dramatically  
17 highly organized, mathematically highly improbable  
18 organization along the spine of the DNA molecule, so that  
19 the genome as a whole is something that defies, that boggles  
20 our mind. So this would be I think a good starting place  
21 for the definition of intelligent design.

22 Q Would you say that the coding of things is evidence  
23 of intelligence?

24 A Yes, I would. I would -- I'm not sure if this is  
25 admissible or not, but recently in the press it was widely

1 reported that the famous British Atheist Anthony Flew,  
2 throughout a lifetime of advocating atheism, he had been to  
3 a symposium in Dallas in 1985. He had been in touch with  
4 intelligent design scientists, read several of them, and he  
5 had -- he came out in the press, I think it was in December,  
6 and he said this. He said a lot of my friends are going to  
7 be very angry with me that I'm doing this, but he said, I've  
8 always said that you follow the evidence wherever it leads,  
9 and that's what I'm doing. And he put his finger on the  
10 central argument of intelligent design, that DNA molecule,  
11 and the highly unexpected improbable arrangement of the  
12 coding of the codon on the DNA spine. And he said that  
13 is -- that persuades me. He won't say that the agent, the  
14 intelligent agent is even personal, and he doesn't accept  
15 the God of the Bible, he doesn't accept the God of the  
16 Koran, but he says, it is inescapable to me. And so he's  
17 changed, as an 81 year old man, he's thrown out his atheism.

18 Q Now, you say that the theory originates, or the  
19 rationale originates with scientific observation.

20 A Yes, it does, it originates with this observation  
21 that is widely made in science.

22 Q And this rationale is simply a conclusion from that  
23 observation?

24 A Yes, it is. It's a conclusion, once you realize  
25 that we have artificially removed intelligent cause from one

1 branch of science, it's welcome in several others, if it  
2 were necessary or we saw evidence of intelligence in another  
3 branch of science, it would be welcomed overnight, but it is  
4 artificially removed from biology.

5 Q What does intelligent design tell us about who the  
6 creator or designer might be?

7 A Well, first of all, intelligent design can't tell  
8 us anything beyond intelligence. If you accept the well  
9 accepted principles of analogical thinking without which  
10 science could not be done, the principles that were given to  
11 us by David Hume, philosopher David Hume, then you realize  
12 that science cannot go from the material realm, from  
13 observations of the material, to the supernatural. And this  
14 is -- this is an integral part of the teachings of David  
15 Hume that have been -- that were accepted into science at  
16 that time, the stage that it was, and have been a part of it  
17 ever since.

18 Q Can you tell us if this, this intelligence is a  
19 natural or supernatural event?

20 A No, intelligent design cannot tell us whether it's  
21 natural or supernatural.

22 Q Or even personal in nature?

23 A And it can't tell us if it's personal.

24 Q Or even if it still exists?

25 A That would be right, yes.

1 Q Are you familiar with creation science?

2 A Yes, I am.

3 Q What is creation science?

4 A Creation science was defined in the mid '80s by the  
5 National Academy of Sciences in their booklet, Science and  
6 Creationism, a View from the National Academy, as entailing  
7 three teachings. Number one, that creation occurred  
8 sometime between six and ten thousand years ago; number two,  
9 that it was a supernatural creation, simultaneously creating  
10 all of the life forms independently of each other, including  
11 man; and number three, invoking flood geology or  
12 catastrophism to explain the order of the fossils in the  
13 fossil record.

14 Q Now, does creation science begin, is it premised  
15 upon scientific observation or upon something else?

16 A It begins with the observation of the complexity of  
17 the information in the genome.

18 Q Creation science.

19 A Oh, I'm sorry, I'm sorry. I was thinking  
20 intelligent design.

21 Would you rephrase the question?

22 Q Does creation science begin with scientific  
23 observation of the natural world --

24 A No, creation science --

25 Q -- as it --



1           MR. ROTHSCHILD: Your Honor, objection. Counsel is  
2 leading the witness continuously.

3           THE COURT: Well, I'm going to allow some leading  
4 in the interest of time. But I want to say that -- so I'll  
5 overrule the objection. But I will say I'm not sure,  
6 counsel, with all appropriate and due respect to your  
7 efforts to be as comprehensive as possible, under Rule 24,  
8 I'm not sure how this line of questioning helps me.  
9 Enlighten me.

10           MR. BOYLE: Your Honor, we have to show -- as the  
11 Court is aware, there are several things we have to show,  
12 one of which is the interest in the litigation that is not  
13 being protected.

14           THE COURT: Well, you have to show timeliness, you  
15 have to show the significant legal interest.

16           MR. BOYLE: That's correct.

17           THE COURT: You have to show the impairment of that  
18 interest, and you have to show the lack of adequate  
19 representation by existing parties, at least as -- if we're  
20 as of right, which it appears that we are at least by this  
21 line of questioning.

22           So I'd ask you to move through this and try to get  
23 to the other parts. I am particularly interested in  
24 timeliness, I'm interested in the area of lack of adequate  
25 representation by the existing parties as well.

1           So -- and I don't -- I don't want to drastically  
2 limit your case. You have to do what you have to do, I  
3 recognize, but you should move through this.

4           MR. BOYLE: I understand, Your Honor. I think this  
5 does go to the adequacy of representation and the different  
6 interests between the school board.

7           THE COURT: All right.

8           MR. BOYLE: In essence we've heard that the  
9 plaintiffs are alleging that the school board had a creation  
10 science policy. Apparently there are press reports where  
11 the terms creationism and religion were used to justify the  
12 policy. And that, we will submit, is the interest that the  
13 defendants have to defend in this particular case. Our  
14 interest is more academic and more a financial interest  
15 considering intelligent design.

16           THE COURT: And I don't think that -- a great deal  
17 of that does not seem to be controverted. And I'm not sure  
18 that there is a strenuous contention that some sales of a  
19 text could be lost.

20           Now, there is an issue as to the number, and I  
21 recognize we're going to hear cross examination, and there  
22 will be points undoubtedly made as to that. But as to your  
23 line of questioning that gets into the broader principles of  
24 intelligent design and the subject of the Pandas and People,  
25 I think the Court is pretty familiar with a lot of these

1 areas. And I'm just saying, I think you can move through  
2 and build the record you think you need to, but I'm --

3 MR. BOYLE: I'll move through.

4 THE COURT: -- I'm not sure that you need to stay  
5 in this area that long.

6 BY MR. BOYLE:

7 Q What are the differences between creation science  
8 and intelligent design?

9 A Well, creation science, the driving impetus is to  
10 affirm the genesis narrative in the Bible. And the driving  
11 impetus in intelligent design begins with observation,  
12 observation of the genome, and the obvious product of  
13 intelligence that we see in living systems. So . . .

14 Q Are there prominent scientists who agree with the  
15 theory of intelligent design?

16 A Oh yes.

17 Q Could you give us an example?

18 A Well --

19 Q Prominent scientists who are not Christians, if I  
20 didn't make that clear.

21 A Dr. Fred Hoyle and Chandra Wickramasinghe published  
22 together an article in the journal, a technical journal  
23 called Icarus. The title of the article was Directed  
24 Panspermia. And they believe that the evidence for  
25 intelligence, for intelligent origin of life is so great

1 that they wagered a scenario where some intelligent  
2 civilization in deep space sent sophisticated rocketry to  
3 the earth loaded with life spores, seeded the earth, and has  
4 been watching like a laboratory experiment.

5 It -- and then Dr. Hoyle, who is one of the  
6 co-authors of one of the three major theories of the origin  
7 of the universe in the last century, it's since been  
8 eliminated from the running, but in -- and he is a Nobel  
9 prize winner, wrote a book entitled the Intelligent  
10 Universe. And it does say what we -- what it sounds like.  
11 He is showing that we cannot explain the genome apart from  
12 intelligence.

13 Q To whom is -- in fact, if I could have just one  
14 second?

15 Are you aware of the Dover School Board policy in  
16 this particular case?

17 A I saw it quoted in the complaint. I believe it was  
18 the complaint, or the force document.

19 Q Do you support using the book Of Pandas and People  
20 to advance a religious agenda?

21 A Oh, no. We've opposed that throughout the sale or  
22 throughout the -- both editions of Pandas.

23 Q Were you ever contacted by anybody from the Dover  
24 School Board before the institution of the policy?

25 A No, we were not.

1 Q Were you ever contacted by anybody from the Dover  
2 School Board after the policy was instituted?

3 A No.

4 Q Do you know how they got ahold of your book Pandas  
5 and People?

6 A We don't, we have no idea how they got ahold of the  
7 book.

8 Q Did Thomas More Law Center ever contact you about  
9 the policy before it was implemented?

10 A No, they didn't.

11 Q Did they ever contact you about the policy after it  
12 was implemented?

13 A No.

14 Q Did you ever call the Thomas More Law Center?

15 A Yes, I did. I called Mr. Thompson, Richard  
16 Thompson, on April 15. I was concerned that we had a few  
17 things that he may not have, that are not widely circulated  
18 among intelligent design scientists and educators, and I  
19 wanted to offer them to him if he thought they would be  
20 useful.

21 Q Now, when you called on April 15<sup>th</sup>, was that  
22 because of some recent knowledge you gained of what was  
23 going on?

24 A It was because my -- our academic editor,  
25 Dr. William Dembski, told me that he had been in touch with

1 Mr. Thompson. And we felt that it was strange and, frankly,  
2 very uncomfortable that we had not had contact with the  
3 Dover School Board, we had not had contact with the Thomas  
4 More Law Center, and yet we were the publishers of the book,  
5 the producers of the book, we knew more about the book than  
6 anybody. And so, you know, I did -- I did ask Dr. Dembski  
7 for the phone number, and he e-mailed Mr. Thompson and  
8 introduced me, and then I called him.

9 Q After that, were you ever able to talk to the  
10 Thomas More Law Center or anybody there about the theory of  
11 intelligent design?

12 A No, we never did discuss it.

13 Q Did you ever discuss what your interest in this  
14 suit might be?

15 A No, we did not.

16 Q Did you ever discuss your standing concerning  
17 school board policies with respect to the use of your book?

18 A No.

19 Q With respect to school board policies and the use  
20 of your book, who do you market your book to?

21 A Well, we have from the beginning marketed our book  
22 to teachers. That's the one thing that unifies a lot of  
23 different marketing methodologies. For example, we exhibit  
24 the book at science and education conventions. We place  
25 space ads in education journals.

1           Now, we're not doing all of these things  
2 simultaneously, but over the years we've done that. We've  
3 done direct mail to biology teachers. We have been building  
4 a network of independent reps who go and they contact  
5 directly with individual science teachers.

6           Q     Why do you market it to science teachers instead of  
7 school boards?

8           A     Well, we market to science teachers because they're  
9 the people that have the expert -- the training and  
10 expertise to evaluate the book. And we don't believe that  
11 if the book is handed down from above, from an authority  
12 structure like a school board, that there's going to be a  
13 positive educational experience, especially if the school  
14 board requires that the teacher or teachers use the book.

15                     And so we've always counselled -- when we get a  
16 call from a school board member, we'd always counsel them to  
17 turn the book over to the teacher, just hand it casually,  
18 don't say, you know, I really think this is a great book or  
19 whatever, just give it to the teacher, the science teacher,  
20 and just say, you know, I would like to know what you think  
21 of it, and with your background and expertise, I would like,  
22 you know, I would like to hear about that.

23           Q     When -- has there ever been a time when you have  
24 refused to send a book to a school district because of a  
25 school board policy?

1           A       Yes, there have been two notable instances where  
2 the school board was ready, was poised to pass a resolution  
3 requiring the use Of Pandas and People, one in Louisville,  
4 Ohio, and one right up the road from us in Plano, Texas.  
5 And because in Louisville there was a confusion between  
6 creation science and intelligent design, and they wanted to  
7 get the school board to pass a policy that it would be used,  
8 we wrote them a letter and said we will not sell you copies  
9 Of Pandas and People. We did the same thing in the case of  
10 a Plano school district.

11           Q       Getting back to your conversations and your contact  
12 with Thomas More, after that conversation with Richard  
13 Thompson in April of this year.

14           A       Yes.

15           Q       Did Thomas More ever contact you concerning the  
16 documents you had sent them?

17           A       I'm sorry, concerning the --

18           Q       The documents that you had sent them.

19           A       No.

20           Q       Did they ever contact you to find out what your  
21 position was on the policy?

22           A       No, I was never asked about my -- our position on  
23 the policy.

24           Q       Were you ever asked about your legal interest?

25           A       No.



1 THE COURT: I think he said he had no contact, is  
2 that correct?

3 THE WITNESS: Well, I think -- were you asking  
4 about afterwards, later?

5 MR. BOYLE: I believe there was one contact, Your  
6 Honor.

7 THE COURT: All right.

8 BY MR. BOYLE:

9 Q Did you at some point in time receive a contact  
10 from Mr. Gillen?

11 A Yes.

12 Q And when would that have been?

13 A That was on April 21<sup>st</sup>, I got three phone calls  
14 that day. One was from Bill Dembski, our academic editor,  
15 and he said that you are going to be served a subpoena. And  
16 I got a call from Pepper Hamilton, and they said, you know,  
17 will you process a subpoena if it's sent by mail or do you  
18 need to be served. And my reply was that I'll take it  
19 either way, but I'll go to prison before I turn this book  
20 over to you -- referring to the Design of Life. And then  
21 the third call was from Thomas More, from Patrick Gillen.

22 Q And was that just an informational call?

23 A Yeah, letting me know that we would be subpoenaed.

24 Q Did he offer to represent your interests at that  
25 point in time?

1           A     No, I don't believe so, I don't remember that he  
2 did, no.

3           Q     Did you have any further conversations with  
4 Mr. Gillen after that?

5           A     Yes, there were -- there were very, very brief  
6 contacts, but not anything of the nature of defending our  
7 interests or what are your concerns, what are your  
8 interests, you know, what is your exposure, nothing like  
9 that.

10          Q     Okay. After you heard about the subpoena, when was  
11 the subpoena served upon you?

12          A     Well, the subpoena -- I'm still confused about that  
13 because I was told that effectively the day the phone call  
14 was made that's when the clock started ticking on the  
15 subpoena. But I didn't -- I was on my way out of town  
16 within a few days of the 21<sup>st</sup>, and I was unable to cancel  
17 my trip. So I spent the first two or three days of my trip  
18 actually trying to locate an attorney. And then this -- and  
19 the subpoena was delivered to our office on the 28<sup>th</sup> of  
20 April, and then I saw it when I returned to town another day  
21 or two later.

22          Q     Were you able to locate an attorney?

23          A     Yes, I was.

24          Q     And who was that?

25          A     It was Jeff Mateer of Mateer & Shaffer.

1 Q And did Mr. Mateer get a copy of the complaint and  
2 the lawsuit for you?

3 A Yes.

4 Q And prior to that, that date I guess would have  
5 been early May, had you ever seen the complaint before?

6 A No, I had not seen anything about the lawsuit other  
7 than the subpoena.

8 Q What actions did you take with respect to the  
9 subpoena after that? What legal actions did you take?

10 A Well, following Mr. Mateer's advice, we submitted a  
11 motion to quash and a motion for a protective order.

12 Q Where were those motions filed at?

13 A Well, one was filed in this Court, and one was  
14 filed in the northern Texas district.

15 Q And a hearing on the motion to quash in this Court  
16 was held on May 12<sup>th</sup> of '05?

17 A Yes, that's right.

18 Q And the hearing in the Northern District of Texas  
19 was held subsequent to that?

20 A Yes.

21 Q Did anybody from the Thomas More Law Center show up  
22 for the hearing in northern Texas?

23 A No, they didn't, nor any written communication  
24 or -- no, there was no presence from Thomas More.

25 Q And I think we've covered it, but through these

1 conversations had Thomas More ever sought your interest?

2 A No, they had not solicited our interest or our  
3 concerns or our exposure.

4 Q Okay. And they did not show up to the hearing in  
5 Texas?

6 A That's right.

7 Q Do you have any confidence in -- that the school  
8 board is representing your interest at this point in time?

9 A No, I don't have any confidence in that at all.

10 I think, you know, that we are -- we are certainly  
11 the primary stakeholder in this, and we are -- our interests  
12 are -- you know, as a nonparty to the lawsuit, our interests  
13 are highly at risk, at least. And just the economic part of  
14 this, much less the reputation among potential authors in  
15 the future, this would cost us a great deal.

16 Q Do you have any confidence that the Thomas More Law  
17 Center is representing your interests in this matter?

18 A No, no, there's not any evidence that they are.

19 Q Who is William Dembski? I believe you mentioned  
20 his name earlier.

21 A Yes. Dr. William Dembski is our academic editor,  
22 and he's the editor of the book *The Design of Life*, and one  
23 of the new -- the three new co-authors.

24 Q And how would you describe Dr. Dembski's position  
25 in the intelligent design movement?

1           A       Well, there are many people that would say that he  
2 is the premiere intelligent design scientist at this point.  
3 Some would say Michael Behe is, who is another one of our  
4 co-authors. But Dr. Dembski is prolific, he's produced --  
5 either edited or authored, roughly ten books since the  
6 intelligent design thing got underway. He debated -- he and  
7 Behe debated two Darwinists at the American Museum of  
8 Natural History. He published a book with Cambridge  
9 University Press. He travels really around the world  
10 speaking and debating.

11           Q       And he holds multiple Ph.D.s, is that correct?

12           A       Yes, he's got a Ph.D. in mathematics from the  
13 University of Illinois, and a Ph.D. in philosophy from the  
14 University of Chicago at Illinois -- I mean Illinois at  
15 Chicago, pardon me.

16           Q       Does he have a relationship -- did he have a  
17 relationship with the Thomas More Law Center?

18           A       He did. He was an expert witness for them at one  
19 point.

20           Q       And is he an expert witness at this point in time?

21           A       No, he's not; he's not an expert witness now. He  
22 was fired.

23           Q       By whom?

24           A       By Mr. Thompson.

25           Q       And how does that, his lack of involvement in this

1 case, affect your interest if at all?

2 A Well, he's the leading authority and expert on the  
3 book. And so he would be tremendously important to making  
4 the points, answering the allegations, establishing the  
5 book, establishing its scientific status and so forth.

6 Q Are you familiar with John A. Campbell?

7 A Yes, I am.

8 Q Who is Dr. Campbell?

9 A Dr. Campbell is a professor at Memphis State, I  
10 believe, of the -- his area is the science -- I'm sorry, the  
11 rhetoric of science. And he's very very conversant with the  
12 intelligent design/Darwinist debate.

13 Q Did he have a relationship with the Thomas More Law  
14 Center?

15 A Yes, he did.

16 Q Do you know if that relationship has continued?

17 A He was hired as an expert witness, and then he was  
18 let go, he was fired.

19 Q Do you know by whom?

20 A I don't know.

21 Q By the Thomas More Law Center?

22 A By the Thomas More Law Center, right.

23 Q Does his discharge affect FTE's interests in this  
24 litigation?

25 A He's -- he's a leading authority, and so, yes, I

1 mean it puts us in greater jeopardy. We -- we need the  
2 scientists that, you know, are willing to be expert  
3 witnesses.

4           You have to understand that there are many  
5 scientists who have tremendous credentials who have no  
6 stomach for this kind of thing. And we don't have access to  
7 everybody that, you know, that has -- that believes in  
8 intelligent design or has done great things in science.

9           So yes, this is an extremely disappointing loss,  
10 it's invaluable to us.

11           Q     Now, the plaintiffs in their lawsuit have alleged  
12 that this policy of Dover's had a religious agenda or  
13 motive. Do you have a religious agenda or motive for the  
14 book Pandas and People?

15           A     No, I don't.

16           Q     Is your interest solely educational and scientific?

17           A     My interest is scientific and educational, that's  
18 correct.

19           Q     How does that differ from Dover's interest in this  
20 case?

21           A     Well, I think that the comments that I heard about,  
22 you know, from the Dover press reports of comments indicate  
23 religious purposes to me.

24           MR. BOYLE: If I could have just one second, Your  
25 Honor?

1 (Pause.)

2 MR. BOYLE: Cross-examine.

3 THE COURT: Let's go to plaintiffs.

4 CROSS EXAMINATION

5 BY MR. ROTHSCHILD:

6 Q Good afternoon, Mr. Buell.

7 A Good afternoon.

8 Q My name is Eric Rothschild and I represent the  
9 plaintiffs.

10 You indicated that you were familiar with  
11 Dr. Campbell and Dr. Meyer.

12 A No, Dr. Campbell and Dr. Dembski.

13 Q I'm sorry. And are you familiar with Steven Meyer?

14 A Yes, I am.

15 Q Do you understand that he was also an expert in  
16 this case?

17 A Yes, I do.

18 Q And do you understand that he also is no longer an  
19 expert in this case?

20 A Yes, I do.

21 Q Now, you said Dr. Dembski is affiliated with the  
22 Foundation for Thought and Ethics, right?

23 A That's right.

24 Q Dr. Campbell is not, correct?

25 A That's correct.



1 Q And Dr. Meyer is not, correct?

2 A That's true.

3 Q Okay. The precipitating event for those three  
4 experts being removed from the case is that they requested  
5 private representation at their depositions by counsel for  
6 the Foundation, isn't that right?

7 A I know that to be true in the case of Bill Dembski,  
8 Dr. Dembski.

9 Q Is it not true for Dr. Campbell and Dr. Meyer?

10 A I'm not denying that, I just don't know.

11 Q Do you understand that in the -- in one of the  
12 pleadings that the Foundation submitted in support of its  
13 intervention that it represented that certain experts  
14 requested private representation by counsel for FTE?

15 A Yes.

16 Q And that request -- that request by those experts  
17 for representation by counsel for FTE was not accepted by  
18 counsel for the defendants, correct?

19 A I'm sorry, would you restate that?

20 Q Yes. The request that these three experts made for  
21 representation by counsel for the FTE was not agreed with by  
22 counsel for the defendants, Thomas More, correct?

23 A Are you saying that these three are named in the  
24 document you quoted?

25 Q What I'm reading from is the reply brief that the

1 Foundation submitted in support of intervention. It says,  
2 "When certain experts requested private representation by  
3 counsel for FTE, defendants, paren, amazingly fired several  
4 experts because they insisted on that representation."

5 Do you understand that to be the case?

6 A I understand that, yes.

7 Q And ultimately they were not allowed to have that  
8 second representation, correct?

9 A Right.

10 MR. BOYLE: I'm going to object to the term "second  
11 representation."

12 THE COURT: What do you want me to do inasmuch as  
13 he said it, and this is a bench proceeding?

14 MR. BOYLE: Well, just to clarify for the record  
15 that they requested their own representation.

16 THE COURT: Well, it's so noted. You may proceed.  
17 BY MR. ROTHSCHILD:

18 Q Now, you acknowledge that you were not aware of  
19 when the Pandas books were purchased for Dover, correct?

20 A Not at all.

21 Q Okay. And, in fact, when school districts or other  
22 purchasers purchase Pandas, it's not always directly through  
23 the Foundation, correct?

24 A Yeah, I would say it's not always. I mean we have  
25 no way of knowing how much -- you know, we have no way of

1 knowing about purchases that aren't directly from us.

2 Q Some are done through on-line vendors.

3 A There are -- you know, there are distributors.  
4 Normally we would expect them to call us, at least the vast  
5 majority over the years would call us.

6 Q In the case of Dover, you weren't aware of how the  
7 book was going to be used in that school district or high  
8 school, correct?

9 A We weren't aware that the book was being  
10 considered.

11 Q Okay. And so therefore you weren't aware of  
12 whether it would be, for example, in the curriculum -- in  
13 the classroom or in the library?

14 A We -- before they did this, before the press  
15 reports came out reporting what they had done, we were not  
16 aware that the book was even being considered in Dover.

17 Q And is that sometimes the case for other school  
18 districts, that you're not aware that the book is being  
19 purchased?

20 A It has been the case on some occasions, it  
21 certainly is the extraordinary. But I'm certain that over  
22 the years that's happened.

23 Q And is it sometimes the case that even when you are  
24 aware of who purchased it, you don't know how the book is  
25 going to be used in the school district?

1           A       We try and contact the school district if we know  
2 there is an interest or they're making a purchase or they've  
3 made a purchase, to find out, you know, what their  
4 intentions are. We know that having talked to as many  
5 teachers and administrators in schools as we have, we might  
6 be able to help them.

7           Q       And am I correct that, for example, one of the  
8 on-line vendors that the book is sold through is a home -- a  
9 vendor who provides support to people who are home schooling  
10 their children?

11          A       Yes.

12          Q       And so that -- and I take it that some of the  
13 purchasers of the Pandas books are people who are home  
14 schooling their children?

15          A       Yes, that's right.

16          Q       And I take it it's also the case that private  
17 schools or sectarian schools sometimes purchase the books?

18          A       I'm sure they do.

19          Q       Just to make sure I understand your testimony on  
20 direct, your estimate of the loss of profits that could  
21 occur depending on how this Court rules, is based on the  
22 amount of inventory that you have of Pandas, the books you  
23 have?

24          A       In part. In part on the inventory.

25          Q       And one printing of -- one subsequent printing of

1 Pandas?

2 A One subsequent printing of Pandas and a first  
3 printing of The Design of Life.

4 Q Okay. You never have been told by anybody at Dover  
5 that they're going to ask for their money back if they lose  
6 this lawsuit, have you?

7 A No.

8 Q You filed your petition to intervene on May 23<sup>rd</sup>?

9 A That sounds right.

10 Q And you're aware that the complaint in this case  
11 was filed on December 14<sup>th</sup>.

12 A No, I wasn't aware of that.

13 Q Are you aware of that now?

14 A Since you just said it, yes.

15 Q Okay. Prior to that you were not?

16 A No.

17 Q Okay. You were aware sometime around December of  
18 2004 or the beginning of 2005 of the lawsuit, weren't you?

19 A I was aware early in the year, early in '05 that  
20 there was -- there were some -- you know, there was some  
21 talk in the media.

22 Q And the reason you were aware is you were actually  
23 going onto the Internet and looking for articles about this  
24 lawsuit, right?

25 A Actually, no, I wasn't. You know, I mean I

1 certainly had an article or two sent to me.

2 Q You were not following it on the Internet?

3 A No.

4 Q You were also aware that Pandas was part of the  
5 controversy?

6 A I heard that somewhere in the, you know, in the  
7 spring.

8 Q Mr. Buell, you remember having your deposition  
9 taken by my colleague Chuck Wilcox last week?

10 A Yes, I do.

11 Q And I'm going to --

12 MR. ROTHSCHILD: If I may approach the witness,  
13 Your Honor?

14 THE COURT: You may.

15 MR. BOYLE: Your Honor, could I see a copy?

16 MR. ROTHSCHILD: Certainly. Your Honor, would you  
17 like a copy?

18 THE COURT: Are you going to take him to a brief  
19 passage?

20 MR. ROTHSCHILD: Yes, I am.

21 THE COURT: I don't think I need a copy. I'll ask  
22 for one if I do.

23 BY MR. ROTHSCHILD:

24 Q Do you see on page 98 of the deposition, if you  
25 could flip through it. These versions of the deposition

1 have four numbered pages on each single page.

2 Do you see on page 98 my colleague, Mr. Wilcox,  
3 asked when you became generally aware of the lawsuit; it's  
4 on line 16 at page 98?

5 A Yes, ah-hah.

6 Q And you answered that around the turn of the year  
7 or my guess was that it was in December, correct?

8 A I'm sorry?

9 Q When he asked you when you became generally aware  
10 of the lawsuit, you answered, close to the turn of the year,  
11 and then you went on to say, my guess is that it was in  
12 December.

13 A Okay, I see that.

14 Q That was your testimony, correct?

15 A Right.

16 Q And then he asked you whether you knew the book  
17 involved was Pandas, didn't you -- and this is on page 99,  
18 at line 13.

19 A Yes, ah-hah.

20 Q And you answered yes. Right on that next --

21 A I think at that point we're talking about line ten,  
22 I said, from what I saw in press reports I wasn't clear --  
23 it wasn't clear to me that the school board knew the  
24 difference between creation science and intelligent design,  
25 but they knew -- but you knew the book involved was Pandas,

1 didn't you.

2           So I don't know exactly when I became aware that  
3 Pandas was involved. I also don't know to this point, I've  
4 heard conflicting information as to whether Pandas is -- has  
5 been -- the policy selected Pandas for use in the classroom  
6 or put copies in the library.

7           Q     But you knew that Pandas was involved?

8           A     Yes, at some point I became aware of that.

9           Q     And if you continue over to page 100, you state, I  
10 read the articles as they, you know, as we pulled them off  
11 the Internet, isn't that right?

12          A     Yes.

13          Q     So you did pull articles off the Internet?

14          A     Yeah, but we were not researching, we were not  
15 going to Google and searching on it. We didn't Google it.  
16 Somebody would say, you know, there's an article in such and  
17 such, and so I would go there.

18          Q     Okay. And during that time that you were becoming  
19 aware of the lawsuit through the articles, you didn't try to  
20 get a copy of the complaint, correct?

21          A     No, I didn't.

22          Q     By now you have read the complaint?

23          A     Yes, I have.

24          Q     And if I understand the reason you're intervening  
25 here is because you think FTE's economic interests are



1 threatened by the position that the plaintiffs are urging  
2 the Court to take, is that right?

3 A Yes, among others things. I think also our -- our  
4 interests in terms of publishing and being a participant in  
5 the process of education and science are also at risk here.

6 Q And the reason you think those interests are at  
7 issue is because plaintiffs are arguing that intelligent  
8 design is a religious concept not a scientific concept?

9 A Yes, that's right, that is a -- that is a very  
10 large concern to us because that would cause the market for  
11 the book to evaporate.

12 Q And another concern you've expressed that would  
13 affect your economic interest and the educational interest  
14 is that plaintiffs are equating intelligent design to  
15 creationism or creation science, is that right?

16 A Yes, that's right.

17 Q And if I understand your briefs and your testimony  
18 today, you weren't aware of that until the Foundation became  
19 involved in the litigation through the subpoenas.

20 A That's really what made it clear to us that we were  
21 in the crosshairs.

22 Q Now, you would agree that if you had read the  
23 complaint you would have realized those were the plaintiff's  
24 contentions?

25 A Yes, I would have if I had read the complaint. I

1 didn't even know that a lawsuit involved a complaint that  
2 was public and accessible.

3 Q But you agree that having now looked through the  
4 complaint, those propositions that you're concerned about  
5 that intelligent design is a religious concept not a  
6 scientific concept, and that intelligent design is akin to  
7 creationism, those are apparent in the complaint, correct?

8 A I believe so.

9 MR. ROTHSCHILD: Your Honor, I would like to  
10 introduce an exhibit. May I approach the clerk?

11 THE COURT: Give a copy to opposing counsel.

12 MR. ROTHSCHILD: Would you like a copy, Your Honor?

13 THE COURT: Yes, please.

14 BY MR. ROTHSCHILD:

15 Q Mr. Buell, what I've given you is an article in the  
16 New York Times dated January 16, 2005, or a copy that was  
17 printed from the Internet entitled, An Alternative to  
18 Evolution Splits a Pennsylvania Town.

19 If you could turn to the second page of the  
20 document, and look at the second full paragraph.

21 A All right.

22 Q Do you see there it says, in mid December 11 local  
23 parents represented by the American Civil Liberties Union  
24 and Americans United for Separation of Church and State sued  
25 the school board contending that discussing intelligent

1 design is a way to hoist religion on their children; do you  
2 see that?

3 A Yes.

4 Q So that makes clear that the ACLU and the Americans  
5 United, they always forget my law firm, was taking the  
6 position in the complaint, in the lawsuit that intelligent  
7 design is religious?

8 A Yes.

9 Q And you recognize this as an article that came out  
10 of the Foundation's production of documents?

11 A Yeah, I think I do.

12 By the way, if I might add, we did not read  
13 everything that came to us in this regard because over the  
14 years we have seen certainly thousands of articles, and they  
15 all follow a very similar scheme, schema. So I can tell you  
16 that I saw this article. I can tell you also that I didn't  
17 read it. I probably scanned down the first, you know,  
18 several paragraphs.

19 Q Now, you testified today that the Foundation does  
20 not have a religious agenda or motive, correct?

21 A That's right.

22 MR. ROTHSCHILD: Your Honor, I would like to mark  
23 another exhibit.

24 BY MR. ROTHSCHILD:

25 Q Mr. Buell, do you recognize the document I've given

1 you, which is the second exhibit today, a Form 990, Return  
2 of Organization Exempt from Income Tax for 2003 to be a  
3 document filed by the Foundation?

4 A Yes, I do.

5 Q Okay. And if you could turn to the last page of  
6 that exhibit. Are you on that page?

7 A I am.

8 Q And if you go about 60 percent down the page,  
9 there's an entry for Statement of Organization's Primary  
10 Exempt Purpose.

11 A Um-hum, um-hum.

12 Q And the explanation that the Foundation provides to  
13 the IRS is that its primary exempt purpose is promoting and  
14 publishing textbooks presenting a Christian perspective,  
15 isn't that right?

16 A That's what it says.

17 Q Okay. And Pandas is one of those publications,  
18 isn't it?

19 A No, Pandas doesn't fit this because this is not an  
20 accurate statement.

21 Q Okay. This --

22 A This statement was -- we had a new CPA do our 990  
23 and audit we had never used before. He wasn't even from the  
24 state of Texas. He was not familiar with us. You know, I  
25 neither saw that statement, nobody gave him that

1 information, and I didn't -- I certainly didn't approve it.

2 Q Okay. So -- and so this statement that's filed  
3 with the IRS so that the Foundation can be exempt from  
4 paying income tax is false; is that what you're saying?

5 A Well, I'm saying that I didn't see that statement.

6 Q And just if you could turn to the preceding page of  
7 the document, those are your initials on the page, aren't  
8 they, towards the bottom of the page?

9 A Yes.

10 Q Now, your counsel brought up your articles of  
11 incorporation and I'd like to show those to you as well.

12 These are the articles of incorporation that the  
13 Foundation filed with the state of Texas.

14 THE COURT: I'm not sure that was recognized as a  
15 question.

16 THE WITNESS: Oh, I'm sorry, yes, I'm sorry.

17 THE COURT: Let's keep this moving.

18 MR. ROTHSCHILD: Sorry, Your Honor.

19 BY MR. ROTHSCHILD:

20 Q And on the second page of the document there's a  
21 signature space with your signature on it?

22 A On the second page of the document? Yes, uh-huh, I  
23 see it.

24 Q If you go to the third page of the document, it  
25 identifies the purposes for the -- for which the corporation

1 was formed?

2 A Right.

3 Q And what it states is that the primary purpose is  
4 both religious and educational, and then it talks about  
5 making known the Christian gospel and understanding of the  
6 Bible?

7 A Yes.

8 Q Is it your testimony that that's also an inaccurate  
9 submission?

10 A It was boilerplate that the attorney that was  
11 helping us become established used. I felt that it was  
12 inappropriate. He said we need to be clear in identifying  
13 yourself as having a genuine nonprofit purpose, and so the  
14 language that originated with me is the phrase, "but is not  
15 limited to."

16 Q And everything else was the attorney's?

17 A Yes, most of it, I think nearly all of it, possibly  
18 all of it.

19 Q So the accountant got it wrong and the attorney got  
20 it wrong?

21 A It's true.

22 MR. ROTHSCHILD: I would like to mark another  
23 exhibit, Your Honor.

24 BY MR. ROTHSCHILD:

25 Q Mr. Buell, this document is something that was

1 pulled off the Internet, but you recognize it as a purpose  
2 statement for the Foundation that used to be distributed?

3 A Yes. I don't actually -- I don't actually remember  
4 this statement, but it's obviously an FTE statement.

5 Q And in this statement it says, "The Foundation for  
6 Thought and Ethics has been established to introduce  
7 Biblical perspective into the mainstream of America's  
8 humanistic society, confronting the secular thought of  
9 modern man with the truth of God's word."

10 A Yes, that's right.

11 Q And then it talks about how there would be a  
12 public -- a textbook published which will present the  
13 scientific evidence for creation side by side with  
14 evolution.

15 A Yes, and this, by the way, was written before -- I  
16 can just tell from the language, this was very early, before  
17 the National Academy defined the term creation science. So  
18 the terms of art that are in play today were not in  
19 existence at that time.

20 Q This was just your use of the word creation?

21 A Yes, right.

22 Q And into the third paragraph it describes the  
23 Foundation as a Christian think tank, correct?

24 A Yes. I would say in contrast to that, there's what  
25 we've done for over 25 years, which is not to be a Christian

1 think tank, but to actually engage in primary works of  
2 science.

3 Q And that includes Pandas, correct?

4 A It includes Pandas, yes.

5 MR. ROTHSCHILD: Next exhibit, Your Honor.

6 BY MR. ROTHSCHILD:

7 Q You recognize this as a letter that you wrote to  
8 raise funds for the Foundation?

9 A Yes, I do.

10 Q And this is written in 1995, well into the  
11 Foundation's 25 year existence?

12 A Ah-hah, um-hum.

13 Q And just, Mr. Buell, so the record is clear, if you  
14 can say yes.

15 A I'm sorry, yes.

16 Q Not a problem.

17 And this letter was written after both editions of  
18 Pandas had been published, correct?

19 A That is correct.

20 Q And in fact it mentions Pandas, right, the letter?

21 A Yes, it does.

22 Q And at the bottom of the first page, what it says  
23 is, "Our commitment is to see the monopoly of naturalistic  
24 curriculum in the schools broken. Presently school  
25 curriculum reflects a deep hostility to traditional



1 Christian views and values, and indoctrinates students to  
2 this mindset through subtle but persuasive arguments."

3 Do you see that?

4 A I see that.

5 Q That's what you wrote, correct?

6 A Yes.

7 Q And your view one of the areas of curriculum that  
8 is a primary offender in terms of showing hostility to  
9 Christian views and values is the subject of biology, isn't  
10 that right?

11 A Yes, that's right. I think that anybody should  
12 oppose this from an education -- should oppose that stature  
13 or the status of education being lopsided, just from an  
14 educational standpoint.

15 Q Because the teaching of biology you consider to  
16 show a deep hostility to traditional Christian views and  
17 values?

18 A I think that the teaching of biology is done with  
19 an artificial removal of biology from the sciences which can  
20 legitimately entertain intelligent cause. I think that is  
21 an artificial truncation of science.

22 Q And then if you go over to the next page, in the  
23 first paragraph, you blame -- you blame the current  
24 deplorable condition of our schools resulting in large part  
25 in denying the dignity of man created in God's image,

1 correct?

2 A Yes, correct.

3 Q And the rest of the paragraph builds on that  
4 concept, right?

5 A That's right. Many teachers tell me they have  
6 difficulty with -- in the classroom with student behavior  
7 because there is no -- there's no sense of respect or  
8 accountability to the teacher, to the school, or to  
9 authority.

10 Q And effectively what you're advocating in this  
11 fundraising letter is that the FTE's publications are an  
12 antidote or a partial antidote to these problems of  
13 hostility to Christian views and the cultural decay in our  
14 schools, isn't that right?

15 A I would say that they're not an antidote to the  
16 hostility to Christian views, but they are an antidote to  
17 the hostility toward positive character qualities and moral  
18 traits and a positive outlook and philosophy.

19 Q And you think Pandas would contribute to that  
20 cause?

21 A I think Pandas would reestablish a level playing  
22 field where in science we're free to entertain intelligent  
23 causation wherever we find it.

24 Q And also it would be a remedy or antidote to these  
25 issues of character that you're talking about?

1           A     You know, that would be up to individual --  
2 individuals and their own choices.

3           Q     Isn't that what you're advocating here, Mr. Buell?

4           A     What I'm saying here is that I think that many  
5 would, once they see that it's a plausible option for them.  
6 But that would be their choice. That would be how they may  
7 respond.

8           Q     Mr. Buell, this is not the first time that you have  
9 recognized that a court decision could affect the financial  
10 fortunes of your company, isn't that right?

11          A     That is right.

12                   MR. ROTHSCHILD: If you'd just give me one moment,  
13 Your Honor.

14                                   (Pause.)

15 BY MR. ROTHSCHILD:

16          Q     Mr. Buell, do you recognize the document we've just  
17 introduced as an exhibit?

18          A     Yes.

19          Q     It's a letter that you wrote to a potential  
20 publisher of Pandas?

21          A     Yes.

22          Q     And just to prod ourselves here, if you turn to the  
23 second page, there's mention of a book called Biology and  
24 Origins, is that right?

25          A     Yes.

1 Q And Biology and Origins was the working title for  
2 the book that became Pandas, correct?

3 A Well, it was the field test edition that was used  
4 prior to the publication of the book.

5 Q There aren't two different books. This is the book  
6 that eventually, after field testing, became Pandas,  
7 correct?

8 A Right.

9 Q And turning to the front page, there is some  
10 mention here of polls showing that three quarters of the  
11 public want creation taught in schools, and it's about half  
12 way down the page, and another poll about biology teachers.  
13 Do you see that?

14 A I see the first -- yes, I see them both.

15 Q And are these the polls you were talking about in  
16 your direct testimony?

17 A The second one is.

18 Q Okay. And the first one --

19 A No, I wasn't referring to that.

20 Q Now, this first page talks about a decision out of  
21 the United States Fifth Circuit Court of Appeals on the  
22 Louisiana Balanced Treatment Act that was on appeal to the  
23 United States Supreme Court, correct?

24 A Correct.

25 Q And that's a decision known as Edwards versus

1 Aguillard?

2 A Yes, um-hum.

3 Q It was eventually decided by the Supreme Court?

4 A Right.

5 Q This letter was written before that decision?

6 A I believe that's right.

7 Q Okay. And what you said was at issue for the  
8 United States Supreme Court was whether there could be state  
9 mandated teaching of creation, correct?

10 A I don't know. Would you point me to that passage?

11 Q Yeah, I'm sorry, it's on -- the paragraph that  
12 begins "The U.S. Fifth Circuit." And if you --

13 A On the -- okay. All right.

14 Q That's what you wrote the decision was about,  
15 right, whether the United States Supreme Court would allow  
16 state mandated teaching of creation or not?

17 A Didn't I write that that was what it was about?

18 Q Yes.

19 A Yes.

20 Q And then if you go down to the bottom of the page,  
21 you have some projections of how this book, then called  
22 Biology and Origins, would do if the Supreme Court reversed  
23 the decision and did not allow state mandated teaching of  
24 creation, you said modest expectations, correct?

25 A Yes.

1 Q Even those modest expectations were not actually  
2 realized, correct?

3 A Right.

4 Q And then you say that if they uphold it, if they  
5 allow state mandated teaching of creation, you could throw  
6 out these projections, the nationwide market would be  
7 explosive, right?

8 A I said that, but that does not mean that I would  
9 favor that.

10 Q Okay. But what you are saying is, if state  
11 mandated teaching of creation is not allowed, we have these  
12 modest expectations; and if it is allowed, then the market  
13 for this book is explosive, right?

14 A Yeah, I think that was just, you know, good  
15 salesmanship and honest analysis.

16 Q Do you recognize the document that I just gave you?

17 A I recognize that it's our document and that it's my  
18 handwriting on it.

19 Q And was this -- this document was a part of a  
20 drafting of either Biology and Origins or Pendas?

21 A Yes, it played some role in that, that's right.

22 Q And if you could turn to page three, headed Summary  
23 Chapter.

24 A Yes.

25 Q If you look in the second paragraph, about half way

1 down it says, "Evolution is the theory that natural causes  
2 are adequate to account for everything in the natural world,  
3 including life itself. Creation is the theory that certain  
4 phenomena must be explained by intelligent causes. In this  
5 book we counterpose these two theories about life's origin."

6 A Yes.

7 Q Okay?

8 A That's right, that would be -- pardon me.

9 Q This was what was written in this draft of either  
10 Biology and Origin or Pandas?

11 A Yes. At that point the term creationist did not  
12 mean what it does now. It referred to creation in general,  
13 not to -- today it is a synonym for creation science.

14 Q So today creation means creation science and before  
15 creation means --

16 A Before the National Academy of Sciences gave it the  
17 specific definition, which I quoted earlier, and that  
18 definition was affirmed by the U.S. Supreme Court, it did  
19 not carry that meaning.

20 Creation, in general, was a word used in -- even in  
21 scientific literature, for centuries. And then when you say  
22 a creationist, prior to those terms of art, the origin of  
23 those terms of art, you were just talking about somebody who  
24 holds to a general view of creation, not -- this is not a  
25 reference to creation scientists or, you know, a specified

1 viewpoint.

2 Q So this is the term in operation before the court  
3 defined it and before the NAS defined it?

4 A Yes, it is.

5 Q And at that time -- and just a general usage of the  
6 word creation or creationist, right?

7 A I'm sorry, would you ask me again?

8 Q At that time what you meant by creation was just  
9 how creation was used in the general public, right?

10 A Yes, it was just a general -- a broad general term,  
11 not a reference to creation science.

12 Q Okay. And similarly, the term creationist was just  
13 intended as how it was used generally in the public before  
14 it was defined by the NAS and the Supreme Court?

15 A I'm sorry, I thought that's the question we just  
16 discussed.

17 Q I used the word creation, and now I'm on  
18 creationist.

19 A A creationist in that sense would be like an  
20 evolutionist. I mean an evolutionist is not a synonym for  
21 evolution science. It's one who adheres to creation in that  
22 broad -- you know, in a broad sense, not defined as later it  
23 was defined by the National Academy.

24 Q So, for example, Henry Morris is just holding  
25 himself out as a creationist, right?



1 A I'm sorry?

2 Q Henry Morris holds himself out as a creationist?

3 A It would -- it was not -- it was not a represent --  
4 it was not a representation to Henry Morris's thought or  
5 thought like Henry Morris's.

6 Q But he described himself as a creationist, right;  
7 is that right?

8 A Yes. What we're talking about here is a choice of  
9 words when the vocabulary was not as precise as it is now.  
10 And I offer as an example of why you can count on that, is  
11 because before we ever started this book at all, we  
12 published a book that has been acknowledged as one of the  
13 top books ever published on the origin of life, published by  
14 a secular publisher, outsold the previously best selling  
15 book by McGraw-Hill. And, you know, so it would be  
16 difficult for me to imagine, having achieved something like  
17 that that receives accolades from the highest levels of  
18 science, and turn around and talk about creation science,  
19 and try and publish a track or a book or, you know, some  
20 kind of a subterfuge promoting creation science.

21 Q Actually in this version of the book it describes  
22 who creationists are, doesn't it, if you look at pages 22  
23 and 23 and 24. It says there's different types of  
24 creationist's literature. There are older creationists,  
25 younger creationists, agnostic creationists, right?

1           A     Yes.  We were trying to give some articulation to  
2 the breadth of what that term means.

3           Q     And then if you could turn back to page 22, you  
4 explain that "Creation is the theory that various forms of  
5 life began abruptly, with their distinctive features already  
6 intact:  Fish with fins and scales, birds with feathers and  
7 wings, mammals with fur and mammary glands."

8                     That's how you defined creation, correct?

9           A     Yes.

10          Q     All right.  And I would like to take -- you to take  
11 a look at an excerpt from Pandas and People.  Turn to page  
12 99 in the excerpt I gave you.

13          A     All right.

14          Q     Says, "Intelligent design means that various forms  
15 of life began abruptly through an intelligent agency, with  
16 their distinctive features already intact:  Fish with fins  
17 and scales, birds with feathers, beaks and wings, et  
18 cetera."

19                     Do you see that?

20          A     I see it.

21          Q     So that's pretty much the exact same sentence  
22 substituting creation for intelligent design, isn't that  
23 right?

24          A     The reason that you find the similarity in the two  
25 passages is because this obviously was at a time when we

1 were developing the manuscript. We had not chosen the term  
2 "intelligent design" at that point. We were trying to --  
3 this was just a place holder term until we came to grips  
4 with which of the plausible two or three terms that are in  
5 scientific literature we would settle on. And that was the  
6 last thing we did before the book was revise -- I mean was  
7 sent to the publisher.

8 Q It was creation, creation, creation until the end  
9 and then it was intelligent design.

10 MR. BOYLE: Your Honor, I'm going to object to this  
11 line of questioning based upon relevance.

12 As the Court will recall, we attempted to describe  
13 the difference between intelligent design and creation  
14 science, and the Court indicated that that really wasn't the  
15 issue for today's hearing; or at least that was my  
16 understanding, and ask that we move along.

17 MR. ROTHSCHILD: First of all, I'm finishing up,  
18 Your Honor, in case you're concerned about that. But first  
19 of all, that was still a substantial subject of the direct  
20 testimony. And on the issue of timeliness and the interest,  
21 the Foundation has come in here and claiming that they were  
22 surprised to find that plaintiffs would characterize  
23 intelligent design as being akin to creationism, that they  
24 are surprised that we have suggested that it is a religious  
25 proposition that being promoted for religious reasons. And

1 the evidence that has been introduced here, particularly  
2 relevant given the nature of direct, clearly addresses that  
3 point.

4 THE COURT: Well, I'll overrule the objection. I'm  
5 happy to hear that you're nearing an end. I think you've  
6 made your point. I'll allow the answer to the question, but  
7 I think you're going to run the risk soon of being in this  
8 area too long. And you're also going to run the risk of  
9 lapsing over excessively into your case in chief. And I  
10 know you don't want to do that, and I don't want you to do  
11 that. So let's move through this. And I'll tell you that  
12 we can sit today until five o'clock. I was hoping that we  
13 wouldn't have to, but we may have to.

14 Do you have another witness?

15 MR. BOYLE: I don't have another witness, Your  
16 Honor, but there are some points I would like to clarify on  
17 redirect.

18 THE COURT: Well, particularly if and -- and you  
19 certainly will have that right, and to the extent that  
20 there's a question that hasn't been asked yet, and I can't  
21 imagine what that would be, but we're going to give  
22 Mr. Gillen an opportunity to ask questions as he needs to  
23 have as well, so let's wrap it up.

24 We'll overrule the objection. And I'm not sure.  
25 Do you remember the question, sir?

1 THE WITNESS: I would love to hear it again.

2 THE COURT: I would too. So why don't we read that  
3 back.

4 (Question read.)

5 THE WITNESS: That misrepresents the actual fact of  
6 the matter because creationism took on a specialized meaning  
7 while the book was being developed.

8 There was a new position that was being determined  
9 through dense extensive interaction between scientists and  
10 philosophy science. We knew that it was fundamentally  
11 different from creation science. And then when the National  
12 Academy came out with their definition, we knew that we had  
13 to choose a term that would distinguish between the two.  
14 And as evidence of what I'm saying I offer you this, that  
15 we, on our own dime, flew to Little Rock, Arkansas, after  
16 McClain went down, and tried to appeal to the Attorney  
17 General not to appeal the verdict, because we felt that it  
18 was wrong -- wrong minded. And the same is true before the  
19 case with Edwards v. Aguillard, we flew to Atlanta, we met  
20 with the attorney, the lead attorney. We tried to persuade  
21 him to drop creation science. And it is true that among --  
22 in the literature, intelligent design was a term that  
23 appeared now and then.

24 These terms go back to a previous century.  
25 E. J. Ambrose, a British cell biologist and cancer

1 researcher, used the term creative intelligence. That was  
2 one of the things that we thought about. We picked this  
3 term.

4           We knew well before we were -- I don't know, maybe  
5 a year before we were through with the manuscript, editing  
6 it, that we would not use the term that had been assigned  
7 while we were doing the book with specialized terminology,  
8 and now you're coming now and saying that this terminology  
9 as it applies today is what we had in mind. That just is  
10 not the fact.

11 BY MR. ROTHSCHILD:

12           Q     Mr. Buell, one of the authors you mentioned for  
13 Pandas is Dean Kenyon?

14           A     Yes.

15           Q     And you're aware that Dean Kenyon submitted an  
16 affidavit in Edwards?

17           A     Yes, I am.

18           Q     And that affidavit was in support of creation  
19 science, wasn't it?

20           A     Yes, it was.

21           Q     And he actually said in that affidavit those are  
22 the only two explanations for origins of life, evolution and  
23 creation science.

24           A     Dr. Kenyon changed his view after he interacted  
25 with us. We went to Davis and Kenyon for the nuts and bolts

1 of science in Davis' case of biology, and in Kenyon's case  
2 in the origin of life.

3 Dr. Thaxton, Charles Thaxton, who was the academic  
4 editor, was the one who had been steeped in the history of  
5 science and philosophy of science and was working out the  
6 framework that -- through which these would be laid out. So  
7 we did not hire Kenyon for his view on creation science.

8 Q And Nancy Pearcey, she also contributed to the  
9 drafting of Pandas?

10 A Yes, under Dr. Thaxton's direction.

11 Q And you recognize that she holds herself out as the  
12 owner of Creations?

13 A I didn't know that.

14 MR. ROTHSCHILD: I have no further questions, Your  
15 Honor.

16 THE COURT: Mr. Gillen.

17 MR. GILLEN: I have no questions, Your Honor.

18 THE COURT: Redirect.

19 MR. BOYLE: Perhaps we will finish by four, Your  
20 Honor.

21 MR. ROTHSCHILD: Your Honor, I would like to move  
22 the exhibits into evidence.

23 THE COURT: Any objection?

24 MR. BOYLE: No objection.

25 THE COURT: Any objection, Mr. Gillen?

1 MR. GILLEN: No objection.

2 THE COURT: All right, exhibits P-1 through 8, is  
3 that correct?

4 THE DEPUTY CLERK: I think it's 7.

5 THE COURT: The last one I have is marked 8.

6 MR. ROTHSCHILD: I gave you a draft of Pandas, that  
7 was the last one.

8 THE COURT: It's P-8 on mine.

9 THE DEPUTY CLERK: That's okay.

10 THE COURT: So 1 through 8 are admitted. P-1  
11 through 8 are admitted. Redirect.

12 REDIRECT EXAMINATION

13 BY MR. BOYLE:

14 Q Mr. Buell, when was exhibit 8 produced to the -- in  
15 response to the subpoena?

16 A Exhibit 8?

17 Q Yes, that would be the introduction chapter. The  
18 exhibit before that.

19 A When was it produced?

20 Q Yeah, when was it produced in this case?

21 THE COURT: Are you referring to P-7 or P-8?

22 MR. BOYLE: Sorry, Your Honor.

23 THE COURT: I can see we have two different tags  
24 and that's what's causing us -- my tag for today's hearing,  
25 apparently it was a deposition exhibit 8, I think.



1 MR. ROTHSCHILD: That's right.

2 MR. BOYLE: That's correct, Your Honor.

3 THE COURT: It looks like to me, but for our  
4 purposes today you are referring to P-7 for this hearing?

5 MR. BOYLE: And that's correct, Your Honor, I'm  
6 sorry.

7 THE COURT: All right, go ahead.

8 MR. BOYLE: I looked at the wrong number. This  
9 document.

10 THE WITNESS: All right. I have that -- all right,  
11 I have that as 8, but that's, that's fine.

12 THE COURT: Well, it's P-7 for today. Just assume  
13 that. We all have the right document. Go ahead.

14 THE WITNESS: In May.

15 BY MR. BOYLE:

16 Q In May of this year?

17 A Yes.

18 Q Prior to this had this document been circulated  
19 outside of your office, to your knowledge?

20 A No, it had not.

21 Q Now, you indicated on your initial examination that  
22 there were non-Christians that held to the theory of  
23 intelligent design.

24 A Right.

25 Q Are there Christians scientists that come up with

1 other scientific theories in the modern day Christian  
2 scientists of note?

3 A Yes.

4 Q Could you give us some examples?

5 A You mean theories of origins?

6 Q Or other scientific theories, outside the theory of  
7 origins.

8 A Sure, oh yeah, many.

9 Q Could you give us a couple examples?

10 A Well, yeah, I think two recent examples that are I  
11 think outstanding, one is Dr. Townes, who is the  
12 co-discoverer or the co-inventor, however you want to word  
13 it, of the laser. He received a Nobel prize for it.  
14 Dr. Francis Collins, the head of the human genome project is  
15 a Christian. That would be a couple of good examples.

16 Q And were their views discounted because they were  
17 Christian?

18 A No. You know, I will say that they probably were  
19 motivated to do good science because they were -- because  
20 they were Christians, just like I've heard a Jewish talk  
21 show host talk about being motivated by his faith to do well  
22 in his field.

23 Q Now, on exhibit 5, it's going to bear the tag  
24 exhibit 7 from the deposition, that's in front of you.

25 A Got it.

1 Q Okay, and the first sentence says, "We are a  
2 non-profit organization working in the field of education."

3 A Yes.

4 Q Is that true?

5 A Yes.

6 Q Was it true at the time this was written?

7 A Yes, it was.

8 Q "Our goal it to provide supplemental textbooks to  
9 teachers in the public schools, giving them well documented  
10 information so they can teach the truth in the classroom."

11 Is that true?

12 A Yes.

13 Q Is the truth there synonymous with Christianity?

14 A I'm sorry?

15 Q Is the term "truth" that you use synonymous with  
16 Christianity?

17 A Oh, no.

18 Q What do you mean by "truth"?

19 A Well, I meant that we -- I'm going back to the  
20 artificial removal of biology among those sciences where we  
21 are permitted to consider intelligent cause.

22 Q Okay. And did you ever -- was there ever a  
23 discussion of producing Pandas and People as a religious  
24 book?

25 A Never was, there never was.

1 Q With any religious tones at all?

2 A No.

3 MR. BOYLE: I have nothing further, Your Honor.

4 MR. ROTHSCHILD: Nothing further, Your Honor.

5 MR. GILLEN: Nothing.

6 THE COURT: I have some questions.

7 EXAMINATION

8 BY THE COURT:

9 Q I am a little unclear. This lawsuit was filed in  
10 December, specifically December 14<sup>th</sup> of 2004. Tell me  
11 when you first became aware of the existence of this  
12 lawsuit?

13 A I know that it was close to the turn of the year.

14 Q So is it a fair statement to say in January of  
15 2005?

16 A That would be fine, yes.

17 Q Well, I don't want to put words in your mouth. I  
18 want you to tell me when you found out.

19 A Well, I don't really remember exactly. The end of  
20 the year is a very very intense time, and there was just a  
21 lot crammed into a short period.

22 Q And how did you find out about the lawsuit?

23 A First in press reports, and only then much later in  
24 April did I get any more specific information.

25 Q Did you understand in January of this year what the

1 basic parameters of the lawsuit were?

2 A If you include within that that they were coming at  
3 our interests, no, I did not understand that.

4 Q Well, that's not my question. Did you understand  
5 that a group of parents had brought suit against a school  
6 board in this case alleging that a particular policy by the  
7 school board that featured the mention of intelligent  
8 design, that that was -- that those parents allege that that  
9 was an infringement or an unconstitutional infringement  
10 under the First Amendment?

11 A I don't think that I recognized it as specifically  
12 as you express it. I recognized --

13 Q What did you know? What did you know?

14 A I knew that the books were put in a library and  
15 that students were told that they could go check the book  
16 out.

17 Q Well, that was my next question. So is it fair  
18 that as early as January you knew that Of Pandas and People  
19 somehow figured in this dispute?

20 A Yes, that's true.

21 Q All right. Now, it's your contention, if I  
22 understand it correctly, that your company or your  
23 not-for-profits interest are not adequately protected by the  
24 defendants in this case, is that correct?

25 A That's true. Correct.

1 Q Tell me why.

2 A Well, because we found out late in the case that  
3 the intention was to take intelligent design back to the  
4 Supreme Court and have it declared to be creation science,  
5 and therefore included in the -- as a religion in the  
6 constitutional prohibition against creation science. And we  
7 didn't know until well on, until April that we were going to  
8 be required to turn over a work in process.

9 Q Well, you believe that the thrust of the defense in  
10 this case is that? Is that what you're saying?

11 A I'm sorry?

12 Q You said that you found out that creation science  
13 is going to be part of a defense. Elaborate on that for me.

14 A Well, I found out that the intent of the  
15 plaintiff --

16 Q I see, the intent of the plaintiff.

17 A -- was to take intelligent design back to the  
18 Supreme Court and have it included in the creation science.

19 Q Well, I'm not asking you about what the plaintiff's  
20 intent is --

21 A I'm sorry.

22 Q -- or their intentions are, I'm asking you about  
23 the defendant in this case.

24 You are saying, by your motion, that you don't  
25 think your interests are adequately represented. Now, would

1 you agree that your goal would be the same as the  
2 defendant's goal, that is, to have the policy of the Dover  
3 School Board remain in place as it's presently cast?

4 A No, I don't think the Dover School Board policy  
5 is -- I think that is the very thing that we have opposed on  
6 the part of school boards in the past.

7 Q All right. But that's what's at issue in this  
8 case, is it not?

9 A Well, my understanding is that we've been led to  
10 believe in the documents -- and I'm sorry, Your Honor, I  
11 couldn't pinpoint which one, but in the legal documents,  
12 that it's the intention of the ACLU to take intelligent  
13 design back to the Supreme Court and have them declare it to  
14 be religion or creation science or both.

15 Q So your belief as to what you claim to be an  
16 unprotected interest is based largely upon what you -- what  
17 you think the thrust of the plaintiff's arguments are?

18 A Yes, but not exclusively, because \$525,000 is more  
19 than any of our annual budgets have ever been.

20 Q I understand that. And I'm not sure that you  
21 understood my question.

22 A I'm sorry.

23 Q Perhaps it wasn't clear.

24 If the Dover school board prevails in this  
25 litigation, in the sense that the policy remains in place,

1 that gets you where you need to be, doesn't it?

2 A If -- if it prevails, I can't imagine that the  
3 ACLU's other goal would be actualized, so yes, I guess on  
4 appeal it might change, but yes.

5 Q What do you know of the Thomas More Law Center?

6 A I don't know a lot. I know that we received their  
7 mailings for some period of time, and that I generally feel  
8 collegial feelings for them.

9 Q Do you know how many attorneys have entered their  
10 appearance on behalf of the Thomas More Center representing  
11 the defendants in this case -- or the defendant in this  
12 case?

13 A I don't know. The only thing that I know was that  
14 I believe it was in this Court there was one, it was  
15 Mr. Gillen.

16 Q Would it surprise you if I told you that there  
17 might be four attorneys?

18 A From Thomas More at this hearing?

19 Q And local counsel.

20 A Yes, I didn't know that.

21 Q I guess then I'm interested in understanding why  
22 you don't think your interest can be protected when you're  
23 not sure how many counsel are involved, and because you  
24 can't tell me anything about counsel who are representing  
25 the defendants.



1           A     I think, you know, part of the reason is because  
2 we -- we gave rise to this viewpoint. We've worked on it  
3 for more than a quarter of a century. We are intimately  
4 connected with and have worked with the two leading  
5 scientists who have provided the theoretical underpinnings  
6 for intelligent design as science.

7           Q     If you were allowed to intervene, would Mr. Dembski  
8 be brought back into this litigation through that  
9 intervention?

10          A     I hope so. We haven't talked about it.

11          Q     Do you understand that if Mr. Dembski would be  
12 brought back into this process, that that might lead to that  
13 which you sought to protect before, which is the  
14 introduction of the manuscript of the volume three of which  
15 is now, as I understand it, Design of Life? Do you  
16 understand that?

17          A     In the court proceedings?

18          Q     Yes.

19          A     Yes.

20          Q     And you said earlier that you would go to jail  
21 before you'd release that, is that correct?

22          A     Yes.

23          Q     And do I understand correctly that -- it appears to  
24 me from what I've seen, that it was Mr. Dembski's removal  
25 from this litigation as an expert witness that appeared to

1 trigger your desire to intervene, is that correct?

2 A No, no, it isn't.

3 Q Well, what caused you, having known about the  
4 lawsuit since January of '05 and then having known about  
5 certainly Mr. Dembski's involvement for some time prior to  
6 your motion to intervene, what triggered in May of this year  
7 your filing of a motion to intervene?

8 A Your Honor, I can't be precisely specific, but I  
9 know that it was a combination of what we read when we read  
10 the legal documents. It took me a while to read those  
11 documents because at the same time we were required by the  
12 Northern District of Florida to produce over 25 years of  
13 documents, which our office is less than a thousand square  
14 feet. They were in boxes unmarked, and so we had to bring  
15 in workers and supervise that and be precise about that.

16 So it was when I could read those -- all of those  
17 legal documents, I saw that we were really in the  
18 crosshairs, and that's why. And we were trying to do  
19 everything that was expected of us.

20 THE COURT: Thank you. All right. You may step  
21 down, sir. That will conclude the examination.

22 Now, you say you do not have another witness?

23 MR. BOYLE: I have no further witnesses, no, sir.

24 THE COURT: All right. I'll allow you to make some  
25 closing remarks, if you'd like.

1           MR. BOYLE: Your Honor, I want to focus upon two  
2 facts at this point in time, and that is the adequacy of the  
3 representation in this particular case, and the timeliness  
4 of the intervention. Let me deal with the timeliness first.

5           This case was filed late last year. At that point  
6 in time it involved a small school district in central  
7 Pennsylvania.

8           THE COURT: I know all of that.

9           MR. BOYLE: Okay.

10          THE COURT: I'm not sure that that helps me. What  
11 I am interested in is, the suit was filed on December 14<sup>th</sup>.  
12 It's quite clear now that your client understood that the  
13 suit was filed as early as January of '05. Discovery is  
14 closed in the suit. We're moving inextricably towards a  
15 trial at some point in the late summer/fall -- actually the  
16 fall as previously set by the Court.

17          I am trying to understand why there was no motion  
18 to intervene prior to the filing of this motion to  
19 intervene.

20          MR. BOYLE: I think there was no movement to  
21 intervene because the press reports did not give the true  
22 nature of the suit or the nature of FTE's involvement in the  
23 suit. And that this was not a matter that affected the FTE  
24 at all until they received a subpoena from this court.

25          THE COURT: But wasn't Mr. Dembski involved from a

1 point in time, it seems to me -- and I don't know the exact  
2 point in time -- but at some point after January of '05  
3 Mr. Dembski was clearly involved as, at least at that time,  
4 the defendant's expert. Mr. Dembski works hand in glove,  
5 obviously, with Mr. Buell and with his not-for-profit.

6 Are you telling the Court that the only source of  
7 information that your client had was through press accounts?

8 MR. BOYLE: That's what the testimony I believe  
9 indicates, Your Honor, that --

10 THE COURT: That strains credulity. I can't  
11 believe that. In a matter that is -- that is this important  
12 to your client, and certainly had some notoriety that  
13 transcended simply the community of Dover, and even  
14 Pennsylvania, and it was -- and Mr. Buell just told me that  
15 he understood -- if I understood his answer correctly, and I  
16 think I did -- as early as January he understood that Of  
17 Pandas and People was something that was the subject, or a  
18 subject of the lawsuit.

19 Now, I am having difficulty understanding what the  
20 trigger point was for the motion to intervene. It looks to  
21 me like the trigger point came after Mr. Dembski was dropped  
22 as an expert. And to me it looks like Mr. Dembski was  
23 dropped as an expert because he didn't want to produce, or  
24 because his employer didn't want to produce the manuscript  
25 of The Design of Life. And it was only after that that I

1 saw the motion to intervene.

2 MR. BOYLE: Well, I think that we have no reason to  
3 know or no reason to know why Thomas More dropped  
4 Mr. Dembski as an expert.

5 THE COURT: Well, we can -- we can connect the  
6 dots. Go ahead.

7 MR. BOYLE: Perhaps I connect the dots differently,  
8 Your Honor.

9 THE COURT: Well, tell me how you connect the dots.

10 MR. BOYLE: I think what happened in this case is  
11 there was a policy in Pennsylvania, and I think that that  
12 policy received a variety of news coverage that may or may  
13 not have been accurate around the country. I believe that  
14 Mr. Buell saw some of that news coverage, did not connect  
15 the fact that that implicated FTE's interest that much. And  
16 Mr. Buell testified that the school district policy is not  
17 the way they market the book. They have no interest in a  
18 policy that mandates the use of the book.

19 THE COURT: But that's the very subject of this  
20 lawsuit.

21 MR. BOYLE: Well, that's one of the subjects of the  
22 lawsuit. I think the other subject is whether or not  
23 intelligent design is creation science.

24 I think that the position the plaintiffs take in  
25 this case is there was a mandatory policy under the Lemon

1 test with a religious purpose. But I think they also in  
2 their complaint clearly equate intelligent design with  
3 creation science under Edwards v. Aguillard, and for that  
4 reason alone sort of as a separate basis the policy should  
5 be unconstitutional.

6 THE COURT: Defendants say it's not.

7 MR. BOYLE: Pardon?

8 THE COURT: The defendants say it's not.

9 MR. BOYLE: Well, the defendants, though, Your  
10 Honor, have to defend the political policy of the Dover  
11 school board. That's where the defendant's case rises or  
12 falls. It's on that political determination by the Dover  
13 school board.

14 THE COURT: Well, you may say it's a political  
15 policy. It is an explicit policy that calls for something  
16 to be said, as the Court understands it, as a precursor to  
17 the biology curriculum. Now, you call it a political  
18 policy. It's a policy. It's a statement. It's being  
19 vigorously defended by the school district, by, I might say,  
20 experienced and accomplished counsel who have at every turn  
21 litigated this case zealously.

22 Now, tell me what you would do, both before today  
23 and hence forth, that they haven't done?

24 MR. BOYLE: What we would do, Your Honor, is we  
25 would retain William Dembski and Dr. Campbell as experts in

1 this case.

2 THE COURT: Well, and Mr. Dembski would then  
3 reappear in the litigation. And Mr. Buell just said that if  
4 Mr. Dembski's manuscript -- if their manuscript is dragged  
5 back into the mix, that he would rather go to jail than  
6 reveal that. So where does that get me if Mr. Dembski comes  
7 back in?

8 MR. BOYLE: Well, in terms of the production of the  
9 document, I don't know that there's been a ruling on that or  
10 the relevance of that has been determined.

11 THE COURT: Well, when you put it in an expert  
12 report and you name that as the basis for your expert  
13 report, then you have a problem if you don't want to produce  
14 it.

15 MR. BOYLE: Well, it's a handicap, Your Honor, to  
16 try to litigate the case, a case of intelligent design  
17 without using the foremost experts in the field.

18 THE COURT: Well, you want to unring a bell, and  
19 I'm not sure that that can be done in the case of  
20 Mr. Dembski, and I think you get into a, be careful what you  
21 wish for, it may come true, if in fact intervention is  
22 granted in this case.

23 MR. BOYLE: If intervention were granted, Your  
24 Honor, we would -- we would take a different tact with  
25 respect to the policy, the Dover policy. Our approach is --

1 THE COURT: What?

2 MR. BOYLE: -- to litigate intelligent design.

3 THE COURT: What would you do?

4 MR. BOYLE: Pardon?

5 THE COURT: What would you do? I still haven't  
6 heard it. You say you would take a different tact. I don't  
7 understand what it is.

8 MR. BOYLE: Well, we would attempt -- we would  
9 establish to separate the difference between intelligent  
10 design and creation science.

11 THE COURT: And you don't think that the defendants  
12 are doing that?

13 MR. BOYLE: I think the defendants are, by the  
14 statements made by their clients, are limited to -- I think  
15 they have to defend a policy. I think they have to decide  
16 to defend a political --

17 THE COURT: And that's the very subject of this  
18 litigation. And it seems to me by your comments that you  
19 want to make this a broader litigation by the intervention,  
20 and I'm not sure --

21 MR. BOYLE: I think --

22 THE COURT: -- that that makes sense.

23 MR. BOYLE: If the case only involved the Dover  
24 policy and not the theory of intelligent design, it would be  
25 a narrow case, but the plaintiffs have taken the view, as I



1 understand it, that intelligent design is creation science,  
2 irrespective of the policy. And that is where our interest  
3 is.

4 THE COURT: And how am I going to rule differently  
5 on that if you're in or if you're not in?

6 MR. BOYLE: Well, because our interest is in  
7 presenting the scientific evidence and the legal arguments  
8 in that case.

9 THE COURT: And you don't think the defendants are  
10 going to do that?

11 MR. BOYLE: I think the defendants are limited to  
12 what -- I think they're limited to the depth of the policy  
13 the board has enacted and what that policy is. I don't  
14 think the Dover policy and intelligent design are  
15 synonymous.

16 THE COURT: Your client just told me he didn't know  
17 how many attorneys were in this mix from the Thomas More Law  
18 Center, he knew very little about the attorneys who were in,  
19 quite obviously. He had a collegial relationship with  
20 Thomas More, but didn't know that much about them. How can  
21 you come before this court and indicate to me that the  
22 interests aren't adequately protected when you can't even  
23 tell me about counsel -- not you, but your client?

24 MR. BOYLE: Well, I think on the flip side of that,  
25 Your Honor, the reason why he can't is because he's never

1 had any calls from Thomas More. Thomas More has never  
2 sought out what his interest is.

3 THE COURT: Well, think about what that argument  
4 implies. That is that there is an obligation on the Thomas  
5 More Law Center to, in the midst of their representation of  
6 the Dover school board, make contact with every  
7 potentially -- like a class action suit, every potentially  
8 affected entity or person. They don't have that burden, do  
9 they?

10 MR. BOYLE: I don't think they have that burden to  
11 contact everybody in the universe, but certainly, Your  
12 Honor, the publisher of the book that's at issue would seem  
13 to be a primary person they would contact.

14 THE COURT: Well, they used Mr. Dembski as their  
15 expert. And it was only when an objection was raised to the  
16 revelation of the transcript, it seems to me, that the twain  
17 separated here.

18 MR. BOYLE: I think that the twain separated when  
19 Mr. Buell received the subpoena, when he had no notice or no  
20 assistance from Thomas More in how to respond to that  
21 subpoena, when he hired separate counsel at that point in  
22 time to protect his interests, when motions were filed and  
23 when the Thomas More Law Center did not show up in Texas to  
24 present --

25 THE COURT: And I might agree that his interests

1 diverge as it relates to the disclosure of the manuscript  
2 and the need to keep that confidential; and I completely  
3 understand that, and we were very careful about that in the  
4 prior proceedings. And there's no question that that's the  
5 case. But I'm not so sure that the interests diverge as it  
6 gets to the merits of the lawsuit. All right.

7 MR. BOYLE: Thank you. Thank you, Your Honor.

8 THE COURT: Any closing comments?

9 MR. ROTHSCHILD: Yes, and I will be brief, Your  
10 Honor.

11 On the issue of timing, even if Mr. Buell and the  
12 Foundation had not sat on their rights in this case, which I  
13 feel very strongly they did, it's too late in this case to  
14 bring them in. We are at the close of discovery, and now  
15 what they are talking about is not simply just participating  
16 in trial, but that experts whose depositions were scheduled  
17 and prepared for, would be brought into the case.

18 And what is particularly extraordinary about this  
19 is that -- and I don't need to vouch for Mr. Gillen or his  
20 firm, but they're complaining about adequacy of  
21 representation because these experts were removed from the  
22 case. But if you look at their representation in their  
23 brief it was because FTE counsel was going to represent  
24 them.

25 Mr. -- Dr. Meyer has no affiliation with FTE.

1 Mr. -- Dr. Campbell has no affiliation with FTE. And here  
2 is FTE counsel insisting on representing them in this  
3 litigation. They should not be rewarded by meddling with  
4 defendant's case by being allowed to intervene and then  
5 bringing those same experts back in whose depositions would  
6 have to be taken and the preparation renewed. That's all I  
7 have.

8 THE COURT: I understand.

9 Mr. Gillen.

10 MR. GILLEN: Your Honor, if I may, a few comments.

11 I'm struggling with my personal pride because to  
12 some extent I feel like the efforts we made on behalf of the  
13 defendants have been impugned here. But I want to --

14 THE COURT: Well, to the extent that they have, and  
15 I didn't necessarily see that, that may be an overly  
16 sensitive reaction to it, but I well understand, and my  
17 comments should imply that I understand the zealous  
18 representation that you've provided. And inasmuch as I'm  
19 the final arbiter, at least as this stage, that is well  
20 established. But go ahead.

21 MR. GILLEN: Thank you, Your Honor. I appreciate  
22 that very much.

23 I want to also be fair and make it clear that I  
24 have made it abundantly clear to Mr. Buell that I do not  
25 represent FTE. They are strangers to my defendants. We did

1 not contact them when we purchased the book because we  
2 believed then and believe now we purchased a science  
3 textbook. I see no reason why we would have to contact them  
4 and that's why we didn't.

5 It's also true that we did in fact have some  
6 feeling of insecurity when the notion of separate counsel  
7 was introduced on behalf of some of the experts based on  
8 affiliations we did not know about, and we did not want to  
9 suffer by reason of those. There was some sense of, we  
10 hired experts to serve the interests of our clients.

11 This new factor, intervening into the litigation,  
12 gave us reasonable grounds for insecurity concerning the  
13 zealousness with which we could expect that representation.  
14 I just want to make it clear for the record that's why we  
15 needed not to retain those --

16 THE COURT: Understood.

17 MR. GILLEN: Finally, as your comments indicate,  
18 Judge, it is the position of the Dover Area School District,  
19 the defendants in this case, that intelligent design is a  
20 scientific theory. To the extent that that is an issue in  
21 this case, we will fully and fairly and vigorously defend  
22 that interest.

23 THE COURT: All right, thank you.

24 All right, that will conclude part two, and the  
25 final part of our hearing this afternoon.

1           Now, I understand from Liz, counsel, that you had  
2 some concerns about scheduling, and that you might want to  
3 discuss those.

4           I think what we ought to do, as the hour grows  
5 somewhat late, and it's a legitimate concern, is probably  
6 set up at some appropriate time a scheduling conference  
7 call, and then we can all be heard on scheduling.

8           I will tell you that -- well, let me ask you first  
9 of all, the sense of the inquiry, as I understood it, was  
10 not that you wanted to delay, it was simply that you wanted  
11 to have some idea of where we go after the start date of the  
12 trial; and that's certainly fair.

13           It would not be my intention, because I simply  
14 can't, given your recent estimate of the duration of the  
15 trial, I can't go from start to finish in straight days.  
16 That wouldn't work for any of us, I suspect. Everyone is  
17 busy and I have other matters that I have to attend to. So  
18 what we'll look at, when we have a scheduling conference, is  
19 to designate certain days.

20           I am going to do my best to be in Harrisburg for as  
21 many days as I can. However, as Liz may have advised you,  
22 it appears to me that given the expected duration, we simply  
23 are not going to be able to avoid having some trial days in  
24 Williamsport. I'll try to schedule those back to back, and  
25 I wouldn't run you around unnecessarily from one place to

1 the other, and nor do I want to do that, but we'll work  
2 through that.

3 So I'll, by separate order, schedule a scheduling  
4 conference. And I'll ask you to get your schedules out for  
5 that, and let's try to work through that.

6 I can't promise that it will be in the next week or  
7 so, but we'll do it in due time and we'll try to get a  
8 schedule so that everybody has a little predictability.  
9 It's my policy that I -- I think that courtesy dictates to  
10 counsel, although this courtesy was not always afforded to  
11 me when I was practicing, but courtesy dictates to counsel  
12 that we have some sense of where we're going so that,  
13 particularly for those who are travelling in, they can see  
14 what they need to do.

15 MR. ROTHSCHILD: Thank you.

16 THE COURT: Anything else before we close the  
17 record?

18 MR. ROTHSCHILD: No.

19 MR. BOYLE: No, Your Honor.

20 THE COURT: We'll close the record. We will render  
21 a decision with respect to the intervention matter promptly.  
22 I will render a decision with respect to the motion to quash  
23 after I've had an opportunity to view in camera the  
24 documents which will be submitted, as I understand it, no  
25 later than the close of business next Tuesday.

1           With that, the record is closed and we're  
2 adjourned.

3           THE DEPUTY CLERK: All rise.

4                   (4:24 p.m., court adjourned.)  
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Joan D. Spearing, RMR  
Official Court Reporter

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