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STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

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Telluride Asset Management,  
LLC,

Plaintiff,

MOTIONS HEARING

vs.

Eric Falkenstein,

FILE NO. 27-CV-07-4832

Defendant.

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The above-entitled matter came on for hearing before  
the Honorable Lloyd Zimmerman, one of the Judges of the  
above-named Court, on the 13th day of December, 2007, at  
the Hennepin County Government Center, City of  
Minneapolis, County of Hennepin, and State of Minnesota.

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Tara C. Norgard, Esq., and Russell J. Rigby, Esq.,  
appeared on behalf of the Plaintiff.

Nicholas S. Boebel, Esq., and Aaron A. Myers, Esq.,  
appeared on behalf of the Defendant.

REPORTER: Darlene Heinz.

1 THE COURT: Let's go on the record.  
2 This is the case of Telluride Asset  
3 Management, LLC, plaintiff, vs. Eric Falkenstein, the  
4 defendant. This is Court File 27-CV-07-4832.

5 And we're here today on two motions by  
6 the Plaintiff: One to extend the Scheduling Order; and  
7 one to adopt the Special Master's Order or, alternatively,  
8 or essentially, substantially the same, for an order  
9 compelling discovery.

10 And why don't you note your  
11 appearances for the record, please, beginning with counsel  
12 for plaintiff.

13 MS. NORGDARD: Good morning, Your  
14 Honor.

15 I'm Tara Norgard, on behalf of  
16 plaintiff, Telluride; I'm with Carlson, Caspers,  
17 Vandenburg & and Lindquist.

18 I have here with me today counsel,  
19 Russell Rigby, also on behalf of the plaintiff.

20 THE COURT: Good morning to you.

21 MS. NORGDARD: Good morning.

22 MR. RIGBY: Good morning, Your  
23 Honor.

24 MR. BOEBEL: Good morning, Your  
25 Honor.

1 Nick Boebel, from Myers Boebel  
2 MacLeod; with me today is my partner, Aaron Myers.

3 Also at counsel table is  
4 Eric Falkenstein.

5 THE COURT: Good morning, Your  
6 Honor.

7 MR. MYERS: Good morning, Your  
8 Honor.

9 THE COURT: Good morning.  
10 Who is going to argue for the  
11 plaintiff?

12 MS. NORGARD: I am, Your Honor.

13 THE COURT: Ms. Norgard, you can sit,  
14 you can stand, you can use the podium, you can do it any  
15 way you're comfortable.

16 MS. NORGARD: I prefer to use the  
17 podium, if that is okay.

18 THE COURT: That is fine.

19 And I'm going to try to make sure you  
20 all have equal time.

21 MS. NORGARD: Very good.

22 I will say that my watch battery  
23 stopped, so if I lose track of myself, feel free to let me  
24 know.

25 THE COURT: That always happens.

1 Good morning, Your Honor.

2 May it please the Court.

3 We are here this morning, as Your  
4 Honor noted, on two motions by my client Telluride.

5 The first is to adopt the Special  
6 Master's Discovery Order, and the second is to extend the  
7 Scheduling Order in this case.

8 And with Your Honor's permission, I  
9 will address Telluride's motion to adopt the Special  
10 Master's Order first, followed by the Discovery Order.

11 And I know that Your Honor has been  
12 presented with prolific briefing on this issue, and you  
13 have read that.

14 And I will limit my recitation of the  
15 facts only to those that relate to my comments that I will  
16 make here today.

17 THE COURT: I looked at the Court  
18 file, and everything relating to what has happened so far  
19 in this case, particularly it's just on discovery-type  
20 motions. And I was going to bring it in for a visual  
21 aid. But it is, literally, about two-feet high.

22 MS. NORGARD: It is. And that is  
23 after eight months of litigating.

24 And we really are no further today,  
25 than we were back in March.

1 THE COURT: Has any discovery been  
2 answered?

3 MS. NORGDARD: On November -- I  
4 believe it was November 16, the defendant finally produced  
5 some paper copies of published articles, published by  
6 Telluride, public information.

7 He has not produced one thing from his  
8 personal files. He has not produced one thing from his  
9 computers at all. Setting everything else aside,  
10 nothing.

11 And Telluride, for its part, has  
12 answered document requests and interrogatories in  
13 detail.

14 THE COURT: Have you served  
15 interrogatories?

16 MS. NORGDARD: We have, Your Honor.

17 THE COURT: Have they been answered?

18 MS. NORGDARD: They have not, Your  
19 Honor.

20 THE COURT: You're waiting on  
21 depositions?

22 MS. NORGDARD: That's right. That's  
23 right, we are.

24 THE COURT: I don't want to interrupt  
25 you again.

1 MS. NORGDARD: That is okay.

2 I don't want to get off point on the  
3 issue of the interrogatories, because we haven't brought  
4 it before Your Honor today.

5 I believe we will be back here on  
6 insufficiency of interrogatory responses.

7 But because that material was not  
8 addressed in our brief, I will keep it to what we've got  
9 here in the motion before Your Honor today.

10 THE COURT: I apologize for  
11 interrupting.

12 MS. NORGDARD: No problem. No  
13 problem at all.

14 Well, as Your Honor is probably very  
15 familiar, Telluride is a hedge fund based here in  
16 Minnesota.

17 The defendant is a former employee.  
18 And work that the defendant did, is subject to an  
19 employment contract.

20 And that employment contract really is  
21 the focal point of this dispute.

22 The defendant was paid to create and  
23 to run systematic trading models for Telluride funds.

24 He worked both at home, and at  
25 Telluride's offices.

1                   And I don't think this point can be  
2 underestimated; he became a multimillionaire as a result  
3 of his work for Telluride.

4                   He resigned in 2006, after working for  
5 about two-and-a-half years, and the parties parted  
6 amicably.

7                   This is not a case where Telluride  
8 followed him out the door and sued him instantly in  
9 retaliation for leaving.

10                   It's actually the opposite.

11                   It wasn't until five months later,  
12 when one of our competitors called us and said, hey, I've  
13 got one of your former employees here telling us that he  
14 fixed what he was doing at your shop.

15                   Do you have any IP concerns?

16                   So Telluride said, wow, we very well  
17 may.

18                   And at that point, offered the  
19 defendant the opportunity to explain himself.

20                   If there was a misunderstanding, that  
21 would be something that we wanted to know and to  
22 clarify.

23                   They're not in the business of  
24 lawsuits, they're in the business of investments.

25                   And, in fact, there was a meeting

1 between the defendant and Telluride's founder,  
2 Peter Hodges.

3 And things really only got worse  
4 there. It became more confusing when there were  
5 contradictory statements made by the defendant that really  
6 just didn't measure up.

7 And so Telluride was forced to file  
8 this lawsuit on March 21, of 2007.

9 And two days later, two things  
10 happened that really are key to why I'm standing here  
11 today.

12 First of all, Judge Schellhas entered  
13 a Preservation Order. And she ordered, at the very onset  
14 of this lawsuit, that the defendant's home computer hard  
15 drive, where he admits he worked, should be preserved.

16 And by preserved, they were copied.  
17 Basically a mirror image of the computer drive was made.

18 And from that point to today, resides  
19 with our expert.

20 He hasn't been able to access that for  
21 reasons that I will talk about today, but those copies  
22 were made.

23 Judge Schellhas recognized on that  
24 day, that this case was all about computer forensics.

25 And, again, I will discuss that a

1 little bit more in my remarks that follow.

2 But on that same day that she entered  
3 the Preservation Order, Judge Schellhas -- I'm sorry --  
4 Telluride served it's discovery requests, which is  
5 basically why we're here today. That was over eight  
6 months ago.

7 So, here we are. We've got eight  
8 months litigation, four rounds of briefing, this much  
9 paper, as Your Honor said, and Telluride is still  
10 empty-handed, after all of this time, and all of this  
11 work.

12 And I think what it boils down to, is  
13 this is really a textbook case for electronic evidence  
14 generally, and computer forensic evidence, specifically.

15 In the average case, electronic  
16 evidence may or may not be that important, but usually the  
17 documents, and what the documents say, that the case is  
18 all about. But what the documents say are really not the  
19 only thing that is important here.

20 It's when those documents were  
21 created, how they were created, when they were deleted,  
22 how they were obtained. Those are the types of  
23 information that clearly are critical here.

24 I mean, it boils down to this, the  
25 computers are the evidence.

1                   And I will just say, that even with  
2 the Sedona Principles, that I know the defendant has  
3 quoted prolifically in his brief, even the Sedona  
4 Principles, and every court in the country recognizes  
5 this:   And I'm just going to quote, "Where an employee  
6 leaves under suspicious circumstances, or theft, or  
7 misappropriation of trade secrets, or confidentiality may  
8 be involved, those are the circumstances where computer  
9 forensics are going to be key, and should be obtainable  
10 through discovery."

11                   So, on the basis of that premise  
12 alone, the electronic evidence is highly appropriate in  
13 this case.

14                   But there is more to it than just that  
15 issue.

16                   Your Honor, the defendant has  
17 submitted a sworn affidavit that says, and I quote, "At my  
18 departure, I did not remove any data, or any computer  
19 program from my work computer, or any network storage at  
20 Telluride."

21                   Your Honor, that is demonstrably  
22 false.

23                   We have done forensic analysis on our  
24 own computers which, obviously, we have in our own  
25 possession, and we have found that the defendant did, in

1 fact, delete a tremendous amount of material from his home  
2 computer.

3 That evidence directly contradicts his  
4 sworn affidavit.

5 He now says, in unsworn attorney  
6 argument, that, well, you know, the stuff I deleted really  
7 wasn't that important. And that also is false.

8 What we have found, through our  
9 forensic analysis is drafts, the sequential draft of a  
10 paper, what we call the Volatility Paper, the papers that  
11 we have submitted to Your Honor.

12 And Telluride's founder, Peter Hajas,  
13 who I referenced before, has submitted a sworn affidavit  
14 that says that Volatility Paper, which the defendant now  
15 claims is his own, that that Volatility Paper is based  
16 directly on Telluride's business, it is based directly on  
17 Telluride's volatility model, it directly falls within the  
18 four corners of the contract, and it is Telluride's  
19 property.

20 There is no basis, whatsoever, for the  
21 defendant to somehow suggest that the Volatility Paper is  
22 not based on our business.

23 We can tie it directly to a  
24 presentation that he made to us, which has been submitted  
25 as an exhibit to Your Honor, where defendant

1 marked, "Telluride Confidential and Proprietary  
2 Information". We can tie the paper to that, we can tie the  
3 paper to the models that were run.

4 And I just want to point out a second  
5 sworn affidavit statement that is very problematic here.

6 The defendant says that he attempted  
7 to delete all files relating to the plaintiff from his  
8 personal computer now, pursuant to plaintiff's demand.

9 Again, it's demonstrably false.

10 We sent the defendant a letter on  
11 September 5, within a week of when he resigned.

12 Please return all of Telluride's  
13 property.

14 And, again, the defendant will tell  
15 you, well, it's really inconsequential, it's not that  
16 important.

17 The facts really contradict him at  
18 every turn.

19 And, incredibly, there really is even  
20 more than that.

21 As recently as last month, the  
22 defendant was using his website which -- where he does a  
23 lot of things, to violate the Protective Order in this  
24 case, by posting Telluride's confidential information that  
25 has been filed under seal in this case, to violate

1 Mr. Hajas' copyrights, to defame Mr. Hajas in his business  
2 profession, and to engage in continuing violations of his  
3 employment contract.

4 We raised that issue with the  
5 defendant's counsel, and now Telluride is blocked,  
6 altogether, from access to those computers.

7 Which almost would be funny, if this  
8 weren't such a serious matter.

9 This is a very serious matter, not the  
10 least of which reason is this:

11 In Mr. Falkenstein's interrogatory  
12 responses, he directs Telluride and its counsel to that  
13 website, but now he blocks us from accessing it with a  
14 cute message. He is monitoring our RP addresses.

15 So, I think what it boils down to is  
16 Telluride is going to be entitled to an adverse inference  
17 on the merits, when the case gets to that point.

18 But for now, all of these facts are  
19 more than adequate to show that Telluride really does need  
20 access to the defendant's computer drives, to get to the  
21 truth of the matter here.

22 We're not going to get it from the  
23 defendant, himself.

24 And if eight months of litigation have  
25 shown anything, it's by the defendant's own conduct. He

1 has proven that we have to get to the bottom of this  
2 matter through means other than him.

3 We have to get his computer drives.

4 And, again, I will just reiterate,  
5 that Judge Schellhas recognized that very early on here.  
6 And that's why those computer drives were copied, and sit  
7 with our computer expert right now.

8 I will just address Judge Borg's Order  
9 briefly, to reaffirm that he sets forth a really fair, and  
10 very equitable, and very orderly procedure for discovery,  
11 that is fully in line with Minnesota Rules of Civil  
12 Procedure.

13 That procedure is what Telluride asks  
14 the Court to adopt here today.

15 And according to Rule 53.07(e) of the  
16 Minnesota Rules, the Court may set aside a Special  
17 Master's ruling on a procedural matter like this, only for  
18 an abuse of discretion.

19 And the controlling procedural law  
20 here is Minnesota Rule 26.02.

21 And I will just read, in relevant part  
22 here, on a motion to compel discovery, as Telluride does  
23 here, the party from whom discovery is sought must show  
24 that the information is not reasonably accessible because  
25 of undue burden or cost.

1                   If that showing is made, the Court  
2 may, nevertheless, order discovery from such sources, if  
3 the requesting party shows good cause, considering the  
4 limitations of 26.02(b)(3).

5                   So, first, I think we have to  
6 recognize that it's the defendant's burden here to show  
7 undue burden or cost. And he hasn't done that.

8                   There is no undue burden. The drives  
9 have been copied, they're waiting. He will not be  
10 disturbed in the least bit by our analysis of them,  
11 because it won't even happen in the same building.

12                   And there is no undo cost. Telluride  
13 paid for the copying of the computer drive, and it's going  
14 to pay for its own analysis of the computer drive.

15                   The defendant isn't incurring any  
16 costs that he wouldn't in any other normal case.

17                   And I just wanted to bump one thing  
18 right now.

19                   And that is, the defendant makes a big  
20 deal in his papers, that this is going to be millions of  
21 documents, millions of documents, a roomful. You think  
22 you have got a lot, that is nothing.

23                   And that is just ridiculous.

24                   I don't know how proficient Your Honor  
25 is with computers, I'm pretty basic here.

1 THE COURT: I can turn mine on.

2 MS. NORGDARD: What was that?

3 THE COURT: I can turn mine on.

4 MS. NORGDARD: You and I are probably  
5 operating at the same level.

6 But I think you and I would even know  
7 that a huge portion of somebody's computer is the  
8 operating system; whether you're using Windows, or Apple,  
9 it's going to be the operating system. It's going to be  
10 program files that don't, in and of themselves, contain  
11 the substantive data that this case is about, that just is  
12 how the computer works.

13 And to somehow suggest that all of  
14 that is going to be relevant in this lawsuit is  
15 ridiculous.

16 Another huge portion of the computer  
17 drive likely will be things like video files. And we  
18 know that, because we have already seen what  
19 Mr. Falkenstein did on the work computer. Tremendous  
20 portions, video files relating to his hobbies. That is  
21 fine.

22 But, frankly, I'm not interested in  
23 his personal videos. That takes out a huge chunk.

24 And other thing that I think really  
25 has to be focused on here, is that these are the

1 defendant's computers. He knows how he organizes things,  
2 he knows where his folders are.

3 If he had retained an attorney prior  
4 to this litigation, he knows what it was about, and he  
5 will be able to isolate that. He knows where his family  
6 pictures are. He can do that quickly. In fact, he can  
7 do that a lot faster than Telluride can, because it's his  
8 system, he knows where everything is.

9 So, I'm going to leave it at that,  
10 Your Honor, because I do want to leave time for questions,  
11 and then, obviously, the defendant's response.

12 But, you know, as to the second part  
13 of Rule 26.02, even if the defendant meets his burden,  
14 which he didn't, there is another host of questions that  
15 could be asked:

16 Is the discovery sought unreasonably  
17 cumulative or duplicative, or obtainable from some other  
18 source?

19 No.

20 The discovery that we're seeking is  
21 not available from any other source.

22 Has the party seeking discovery had  
23 ample opportunity to obtain the discovery sought?

24 No.

25 We have nothing. We have absolutely

1 nothing.

2 Finally, does the burden or expense of  
3 the proposed discovery outweigh the likely benefit?

4 And as I just explained, the answer to  
5 that question is no, too.

6 THE COURT: How much is at stake in  
7 this litigation, in terms of assessing the potential cost,  
8 this project versus the issue of litigation overall.

9 MS. NORGARD: The ultimate damages in  
10 the case?

11 THE COURT: Yes.

12 MS. NORGARD: Unknown at this  
13 point.

14 It could be tremendous.

15 As you know, hedge funds deal in  
16 multimillions, hundreds of millions of dollars.

17 We don't know the true extent of the  
18 damages here yet.

19 THE COURT: All right.

20 Well, how about if we give

21 Mr. Boebel --

22 MR. BOEBEL: Boebel.

23 THE COURT: I'm sorry.

24 Mr. Boebel, how about if we give you a  
25 chance --

1                   And you are going to want to reserve  
2 time for rebuttal?

3                   MS. NORGARD:    Please, Your Honor.

4                   THE COURT:    Mr. Boebel, good morning  
5 to you.

6                   I think pronunciation is key when  
7 you're talking to lawyers; you've probably heard that  
8 before with motions.

9                   MR. BOEBEL:    Thank you, Your Honor.

10                   There is something fundamentally wrong  
11 with the fact that we are, as Ms. Norgard said, eight  
12 months into this case, and Mr. Falkenstein still doesn't  
13 know what he has been accused of taking.

14                   The misappropriation of trade secrets  
15 is the claim, is the primary claim in this case.

16                   And, candidly, it's the claim that  
17 carries with it the possibility that Mr. Falkenstein could  
18 potentially be on the hook for attorney's fees.

19                   Which, you know, as much as  
20 Ms. Norgard tried to hedge, and assert to the contrary,  
21 that's the only possible damages that there are in this  
22 case.

23                   THE COURT:    Under the TRO motion in  
24 front of Judge Schellhas, I think, in looking at the  
25 record, that she had dismissed the counterclaim that the

1 defendant had brought.

2 I don't know, because I haven't looked  
3 at that part, it wasn't necessarily germane to this motion  
4 today, did you bring a Rule 12 motion, or a motion for a  
5 more definite statement clarifying, if you're saying that  
6 they're not clear enough on what they're seeking?

7 MR. BOEBEL: Here is the way that  
8 these procedures have happened out here:

9 Telluride initially moved for a TRO on  
10 alleged, basically, very broad general factors, such as  
11 profitability, accrual, volatility using those -- using  
12 measurements of kind of those factors to select, I  
13 believe, investment targets, that were somehow Telluride's  
14 trade secrets.

15 Mr. Falkenstein's prior counsel, at  
16 Dorsey & Whitney, you know, argued against the temporary  
17 restraining order, saying, you know, wait a second, that  
18 is incredibly overbroad; they cannot possibly be a trade  
19 secret.

20 Judge Schellhas agreed.

21 What happened in the two weeks after  
22 Judge Schellhas issued her Order, I believe it was on  
23 June 18, I -- again, prior counsel at Dorsey & Whitney,  
24 and the Carlson firm, attempted to negotiate the scope of  
25 the computer forensic discovery.

1                   And there is some of that  
2 correspondence attached to our briefs.

3                   Those negotiations broke down.

4                   Telluride moved to compel.

5                   Mr. Falkenstein got a motion date on  
6 his motion to compel with respect to a definition of trade  
7 secrets at issue.

8                   And then it all kind of got glomed  
9 together in an omnibus fashion at the August hearing. I  
10 believe it was in August.

11                   I, in addition, and just as relevant,  
12 we, as current counsel in these issues that were referred  
13 to Judge Borg, raised specifically the deficiency with  
14 respect to Telluride's trade secrets claims.

15                   So, all of these issues have been  
16 brought up repeatedly.

17                   And Telluride, at every turn, and this  
18 really is critical to their credibility here, at every  
19 turn they point to, peciune procedural deficiencies of one  
20 kind or another, whether well-founded or not, to try to  
21 keep the Court, or Special Master from addressing that  
22 question on its merits.

23                   THE COURT: Did you have an  
24 opportunity under the procedure before the Special Master,  
25 to ask him for findings or some narrative reasoning in

1 support of the proposed order that he issued?

2 MR. BOEBEL: Under Judge Schellhas's  
3 Order, she stated that the Special Master would only issue  
4 a written order if requested by one of the parties.

5 Judge Borg issued a written Order.

6 There was nothing more to request.

7 It was, you know, the issues were ripe  
8 for appeal at that point.

9 THE COURT: But did you have an  
10 ability, under the procedure, to ask for a statement of  
11 findings that Judge Borg made, whether he articulated them  
12 or not, in support of his order?

13 Because the Order is really short and  
14 sweet.

15 It might not be sweet for you, but  
16 it's short, and it tells you what he thinks should  
17 happen. It doesn't explain legal reasoning, it doesn't  
18 have analysis.

19 And I'm wondering, did you have the  
20 right to ask him for analysis and particularly findings,  
21 about what he thought of the arguments, because you  
22 briefed them extensively.

23 MR. BOEBEL: Indeed we did.

24 And the short answer is, we certainly  
25 could have asked.

1                   But the Referral Order to Judge Borg,  
2 the reference is to, you have the right to request a  
3 written order, not a right to request extensive findings  
4 of fact and conclusions of law.

5                   THE COURT:    Go ahead.

6                   One more thing, is this ripe, from  
7 your point of view, are you planning to file -- I couldn't  
8 totally tell -- there was some suggestion in the briefs  
9 that you perhaps were past the point that you might be  
10 filing further objections, or scheduling some further  
11 hearing on this issue.

12                   MR. BOEBEL:    Here is what happened:

13                   Judge Borg issued his written Order on  
14 November 21.

15                   We, that day, sent a letter to, I  
16 believe, Ms. Norgard and also Judge Borg, saying that we  
17 intended to object and file an appeal under Rule 53, which  
18 gives us 20 days to file such a motion.

19                   Telluride essentially preempted our  
20 appeal, by filing a motion to adopt the Special Master's  
21 Order, on November 29.

22                   We responded to their motion on  
23 December 6.

24                   But on December 11, we filed a motion  
25 essentially laying out, in detail, the objections to

1 Judge Borg's Order.

2 So, you know, we haven't requested a  
3 separate hearing date for that appeal.

4 We can either deal with that here, or  
5 we can schedule a future hearing.

6 It certainly is not an issue of  
7 concern to Mr. Falkenstein.

8 But --

9 THE COURT: By the way, one more  
10 quick question.

11 MR. BOEBEL: Sure.

12 THE COURT: I think that I deduced  
13 from the briefs, that as a result of this proceeding -- I  
14 don't know if it's Doctor or Mr. Falkenstein --

15 MR. BOEBEL: You could call him  
16 Doctor.

17 THE COURT: I get the impression he  
18 can't work because this proceeding is basically a  
19 deterrent to potential employers from hiring him because,  
20 they would be afraid that they would be sucked into a  
21 noncompete litigation.

22 MR. BOEBEL: That is absolutely  
23 right.

24 And the reason it's so nefarious is  
25 because there isn't even a noncompete clause in the

1 contract.

2           Essentially what has happened is that  
3 they have filed the lawsuit claiming breach of contract,  
4 misappropriation of trade secrets, and then they have  
5 refused to provide any specific delineation of the  
6 property that he is accused of having stolen.

7           And what they have defined, is so  
8 incredibly overbroad, and over time it's, frankly, been  
9 inconsistent and changing, that it encompasses literally  
10 everything that Mr. Falkenstein, or any other portfolio  
11 manager could do as a portfolio manager.

12           THE COURT: That is a discovery -- a  
13 summary judgment issue, rather than a discovery issue.

14           If you think that their claims are  
15 overbroad, that they can't be trade secrets, that's really  
16 a claim that there is no disputed issue of material fact  
17 in those areas, and that you should win.

18           For discovery, it seems to me that the  
19 rules are broad; they are entitled to discover what is  
20 relevant, or what could lead to the discovery of  
21 admissible evidence.

22           And, frankly, I will tell you that I'm  
23 shocked that this has been going on for as long as it  
24 has.

25           I'm shocked that the Special Master's

1 procedure, which I'm sure Judge Schellhas intended to  
2 comply with the spirit of Rule 1, which is the intent of  
3 timely and swift, this has resulted in this huge delay,  
4 where nothing is happening on a critical issue, while we  
5 are in the form of a deep freeze.

6 I'm shocked that is happening, and  
7 it's going to be over today, I will tell you that.

8 MR. BOEBEL: I am in absolute  
9 agreement with that, Your Honor.

10 THE COURT: Not the whole case, but  
11 the issue.

12 MR. BOEBEL: There are two basic  
13 problems here:

14 The first is that the definition of  
15 trade secrets, and of the information that Mr. Falkenstein  
16 is accused to have taken, is how you frame the scope of  
17 discovery.

18 Rule 26 says, discovery can be had on  
19 material relevant to a claim or defense.

20 You know, given the scope of their  
21 claim, in which it is utterly unbounded, we have no way to  
22 frame discovery.

23 There is no way to determine what is  
24 and what is not relevant.

25 THE COURT: But it's a breach of

1 contract claim, too, right?

2 MR. BOEBEL: It absolutely is.

3 THE COURT: And he is not suppose to  
4 be using, for his own benefit, information, or materials,  
5 or ideas, or strategies he developed while he was working  
6 for Telluride, right?

7 MR. BOEBEL: True.

8 THE COURT: And he's got this home  
9 computer which he is allowed to work at work and work at  
10 home, and they go back and forth, right?

11 MR. BOEBEL: All true.

12 THE COURT: If they want to see --  
13 Does he still have on his computer --  
14 Or if he was using his computer to  
15 gain or provide information that he acquired at Telluride,  
16 why shouldn't they be able to look at it, even leaving  
17 aside the trade secret?

18 MR. BOEBEL: Your Honor, there is a  
19 very important collateral point here.

20 We agree that they're entitled to  
21 electronic discovery. You know, even separate and apart  
22 from their failure to identify their trade secrets.

23 The problem isn't, you know, providing  
24 electronic discovery.

25 The problem, on the separate issue, is

1 the scope of what has been ordered by Judge Borg.

2 THE COURT: Is it the protection, or  
3 the nature of the protection, or you think it has to be  
4 more narrowly tailored?

5 MR. BOEBEL: It has to be more  
6 narrowly tailored.

7 Now, Ms. Norgard says, you know, it's  
8 not true that this implicates millions of documents.

9 It absolutely does implicate millions  
10 of documents.

11 On one of Mr. Falkenstein's backup  
12 drives, you know, no operating system files there, 70  
13 gigabytes of data, more than 20,000 files.

14 A single-spaced printout of the file  
15 directory, takes up 453 pages.

16 THE COURT: But is that a burden for  
17 you?

18 Because they have made an image of  
19 this -- I think it's the right phrase, harddrive --

20 MR. BOEBEL: Image of the harddrive.

21 THE COURT: They have made an image  
22 of the harddrive, they have it independently stored at  
23 their own expert, they're going to access this data with  
24 their expert at their cost, is what I hear them saying,  
25 right?

1 MR. BOEBEL: Yes.

2 THE COURT: So, where is the cost to  
3 your client?

4 MR. BOEBEL: Your Honor, in terms of  
5 financial costs, that's minimal, with two exceptions; the  
6 only information that Mr. Falkenstein withholds, is  
7 information that is identified on a privilege log as  
8 either being privileged or irrelevant.

9 It would take, I can't even imagine  
10 how long. It would take thousands of hours to go through  
11 300 gigabytes of data, again, you know, tens of millions  
12 of pages of material, to carve out what is irrelevant.

13 THE COURT: But they're saying it's  
14 his information, he knows what he put in the computer, if  
15 there is a video file, or if there is something else, he  
16 is in the best position to know what it is.

17 And it's also not normally an excuse,  
18 in any case, normally, that there might be thousands of  
19 documents, whether it's --

20 I don't think you're saying that you  
21 can shield a party from legitimate discovery obligations  
22 by storing what is otherwise produced by hard copy on a  
23 computer.

24 In fact, the computer is suppose to be  
25 a way to make it easier to serve the process.

1 MR. BOEBEL: Absolutely. And, in  
2 fact, that's exactly the procedure that Mr. Falkenstein  
3 proposed in July, I have proposed it since then.

4 The way the discovery --

5 The way electronic discovery has been  
6 conducted in every case that I have ever dealt with,  
7 including, I might add, a misappropriation of trade  
8 secrets case between two electronic discovery companies,  
9 is that you search the target media, you generate a list  
10 of potentially relevant information, and then the party's  
11 counsel searches or reviews that information for relevance  
12 and privilege.

13 THE COURT: You're talking about  
14 those keywords that you use to search?

15 MR. BOEBEL: Yes, Your Honor,  
16 absolutely.

17 THE COURT: And they're saying that  
18 won't work because of the operating system, or the nature  
19 of the files, that keywords are not going to elicit the  
20 relevant discovery.

21 Do you agree with that?

22 MR. BOEBEL: I absolutely do not  
23 agree with that.

24 The only type of file for which --

25 The only potentially relevant type of

1 file for which a key word search would not be adequate, is  
2 a PDF file.

3 And, you know, with respect to PDF  
4 files, if you search by the key word, dot PDF, you will  
5 come up with the list of them.

6 And that would be a key word in that  
7 specific instance, which I would be willing to agree to.

8 THE COURT: I have to tell you,  
9 Counsel, I thought your brief was a genius brief.

10 In fact, I read all the briefs in the  
11 file, and I thought, this is a great case to inherit from  
12 Judge Schellhas, because the issues are really, really,  
13 full of brilliance, and the lawyers are brilliant, too.

14 I mean, the way that you presented the  
15 issues of computer discovery, your recitation of national  
16 treatises, and studies, and case law, the eloquence of the  
17 arguments, the way their framed, the writing, it's all  
18 brilliant.

19 But I just disagree with you about all  
20 of your legal arguments here. I don't think you're  
21 right. I don't think it's the right application of the  
22 law, and I think that the Special Master did not abuse his  
23 discretion in making the recommendations he did, in  
24 framing the report the way he did.

25 And I will tell you this is not my

1 first computer discovery case. I have had others that  
2 have involved even more volumes.

3 And I have issued the same kind of  
4 protective orders, for the same kind of material.

5 And I have had the privilege of having  
6 them go off to the Court of Appeals for a Writ of  
7 Prohibition, and it's been denied.

8 And so I'm confident that I'm in an  
9 area of law where I have a reasonable ideas of what I'm  
10 doing.

11 I respect you completely, but I think  
12 it's a vast disrespect, not from you personally, but it's  
13 a disrespect of the way the rules are suppose to go, when  
14 here we are today, and all the procedures that have  
15 happened, and arguments now to three different judges, and  
16 volumes and volumes of briefings about hard drives, it's  
17 really made a huge mountain, it's made an avalanche of  
18 what should have been small.

19 And I'm not trivializing the  
20 importance of the issue.

21 But I see no abuse, whatsoever, in  
22 what Judge Borg put in his Order.

23 I have issued identical orders in  
24 similar cases, up to the Court of Appeals, no abuse of  
25 discretion, totally within the Judge's authority.

1                   So, you're not singing to the choir  
2 here on that issue.

3                   And I don't mean to cut you off, but  
4 I'm telling you that I have read all the briefs, I'm not  
5 hearing the arguments for the first time, and I'm learned  
6 in the law in these issues, too.

7                   I'm not as smart as you on these  
8 issues, I know that.

9                   But I feel that is what the law is,  
10 and I think that the plaintiff is right about it, and I  
11 think Judge Borg is right about it, too.

12                   I didn't mean to cut you off, but  
13 that's what I think right now.

14                   MR. BOEBEL:    Again, Your Honor, there  
15 are a couple of just practical problems here.

16                   One, with respect to the deleted space  
17 on Mr. Falkenstein's hard drives.

18                   There is no possible way for us to  
19 create a log with respect to deleted data.   It is not  
20 just difficult, it's actually impossible for us to do it.

21                   Again --

22                   THE COURT:    Who deleted this  
23 information?

24                   MR. BOEBEL:    Well, over the course of  
25 the last ten years, Mr. Falkenstein has deleted many

1 files.

2 THE COURT: I thought this covered a  
3 two-year period. The hard drives that we're talking  
4 about, I thought it covered a two-year period.

5 MR. BOEBEL: No. The Preservation  
6 Order applied to every hard drive in Mr. Falkenstein's  
7 possession.

8 THE COURT: But the discovery  
9 request, is that ten years?

10 MR. BOEBEL: The discovery request  
11 and Judge Borg's Order, applies, again, to every hard  
12 drive that was forensically copied. That's ten years  
13 worth of hard drives.

14 And, again, to carve out here, it  
15 would be astronomically --

16 THE COURT: But, Counsel, this is not  
17 the time for us to be talking about this, because they  
18 imaged the hard drive, these are things that experts are  
19 going to provide a report about, and then you have a  
20 deposition.

21 Somebody is going to take a deposition  
22 to try to find out what kind of personal knowledge --

23 I'm not here to say, nor can you, what  
24 personal knowledge any witness has in advance of being  
25 deposed.

1                   So, I don't think we need to create a  
2 problem before there even is one.

3                   If there is no personal knowledge, you  
4 have a Rule 60.02 issue for trial.

5                   And if something has been destroyed,  
6 or if there is an adverse inference, we will see whether  
7 there is a factual basis for that kind of inference.

8                   I don't think this is the forum or the  
9 time right now, to talk about whether -- what inference  
10 should flow, or what information Mr. Falkenstein would  
11 have about deletions.

12                   MR. BOEBEL:    I don't even disagree  
13 with respect to the substance.

14                   What I'm saying is that Judge Borg's  
15 Order has not, in any way, provided any protection for  
16 potentially privileged or irrelevant information.

17                   THE COURT:    But there is a log, that  
18 he specifically orders, for both relevant, quote, unquote,  
19 irrelevant personal information, and for privilege, which  
20 would then be attorneys' eyes only.

21                   Why isn't that protection?

22                   MR. BOEBEL:    Because a privilege log  
23 of 300 gigabytes of information --

24                   I mean, it's not just unduly  
25 burdensome, it would take ten years.

1 THE COURT: How many gigabytes are  
2 like in a video?

3 I mean, a gigabyte doesn't necessarily  
4 tell us very much.

5 Mr. Falkenstein can say, there are 200  
6 home movies. I don't know how many home movies we're  
7 talking about. I've got 200 home movies about my family  
8 and my trip to Europe, and my kids. I hope he has kids,  
9 whatever.

10 So, why is it so burdensome to say  
11 home movies?

12 MR. BOEBEL: You know, there are two  
13 related problems here.

14 And one of them ties back to  
15 Telluride's failure to identify trade secrets with  
16 particularity.

17 THE COURT: Well, this is a not going  
18 to be a bar to discovery.

19 That is another motion, on another  
20 day.

21 MR. BOEBEL: I understand that.

22 But the entirety of Mr. Falkenstein's  
23 professional life since the mid 1990s, has been, you know,  
24 papers, databases, analysis, related to equity investment.

25 THE COURT: It still is not a bar to

1 discovery.

2 I assume part of the defense here is  
3 that this man is a genius -- and I'm not saying that in a  
4 sarcastic way, he truly is -- that he has designed these  
5 different computer programs, he has worked at various  
6 places, he is a recognized major figure in his field, so I  
7 assume as part of your defense you're going to say, this  
8 is not information or trade secrets that he got from  
9 Telluride, this is what he had before, and this what he  
10 did after, and it's not fair to stop him from using it.  
11 So, I would think this is germane to issues in this  
12 case.

13 It's not a bar to discovery, what he  
14 did before or after. It's very relevant, probably both  
15 to your defense, and to the prosecution.

16 So, why shouldn't they get to discover  
17 that?

18 MR. BOEBEL: Indeed, maybe they  
19 should be able to.

20 THE COURT: And they will.

21 MR. BOEBEL: Again, there is a basic  
22 problem here.

23 You know, a log of irrelevant,  
24 personal information, could run 10, 15, 20,000 pages.

25 I mean --

1 THE COURT: Let's not worry about  
2 hypotheticals; it might be 50 pages.

3 But that is litigation. And I don't  
4 know that it's a problem until we get down to brass tacks,  
5 and see how long the log has to be.

6 And if you don't have a log, you have  
7 no practical way for having an independent review by a  
8 Court.

9 So, that's why it's certainly not an  
10 abuse of discretion for Judge Borg to require it; it just  
11 makes sense.

12 Frankly, if you were asking the  
13 plaintiff for information, and they don't produce 2,000  
14 documents, and they weren't based on privilege, you would  
15 want to have some kind of log, so an independent Court  
16 could have some way of looking at that, too. And it goes  
17 both ways.

18 MR. BOEBEL: And, again, we're not  
19 talking about 2,000 pages; we're talking about tens of  
20 millions. We really are.

21 I know that Telluride's counsel is  
22 poo-pooing that, but it's absolutely true. It's an  
23 astronomical amount of --

24 THE COURT: Is it on one home  
25 computer?

1 MR. BOEBEL: It's seven home  
2 computers, over the course of decades. It's not one home  
3 computer.

4 And, again, you know, Mr. Falkenstein  
5 lives on his computers, it's --

6 He's a quantitative portfolio  
7 manager.

8 THE COURT: I don't think this is  
9 going to be a bar to discovery, because I think he knows,  
10 this is his stuff. He can tell you by looking at a file,  
11 I think, probably what it's about.

12 He could say, it's a movie; this is  
13 from my, you know, my kid's school folder. I don't know,  
14 but he does. It's his stuff.

15 It's not asking him to look at  
16 something he didn't do.

17 And I'm not going to make a  
18 hypothetical a reasonable burden, a bar to discovery.  
19 It's totally hypothetical.

20 MR. BOEBEL: It really is not --

21 THE COURT: You're not singing to the  
22 choir on this one.

23 MR. BOEBEL: You know, here's --

24 Let me talk about this in a slightly  
25 different way.

1                   In Telluride's reply brief, they as  
2 much as admit that there is going to be a massive  
3 production of irrelevant personal information.

4                   What they say is --

5                   THE COURT: Well, who is the judge of  
6 what is relevant?

7                   That is the problem.

8                   Like, you know, they're already saying  
9 that Mr. Falkenstein has made certain statements that they  
10 think are false, demonstrably false, based on sworn  
11 affidavits.

12                   So, if Mr. Falkenstein is to think  
13 that certain information is relevant, say it's a scholarly  
14 paper that he thinks is irrelevant, and they think is  
15 directly germane to their claims, isn't there an important  
16 need to have a third party, like a Judge, be able to  
17 evaluate, and have some objective reality check, so it's  
18 not just Mr. Falkenstein saying, this isn't relevant, this  
19 is relevant.

20                   And aren't you going to have to go  
21 through that with him anyway?

22                   MR. BOEBEL: Absolutely.

23                   You know, in litigation, though, the  
24 judge of relevance is also the attorney, as an officer of  
25 the court, interpreting documents requests in good faith.

1 That is how I see it.

2 THE COURT: I have to tell you,  
3 timewise, at 9:30 the jury is back in the courtroom.

4 So, you need to get close to those  
5 magic words. Sometimes people say, I'm done, but I'm  
6 saying, in conclusion.

7 I'm not trying to be short with you,  
8 but that is the nature of life in the court system.  
9 We're extremely busy.

10 I have read every single document; I  
11 took them home, and I was up to midnight reading them  
12 twice.

13 So, not to short shift your argument,  
14 but this is what I do, too.

15 MR. BOEBEL: Again, there are two,  
16 three concessions in Telluride's reply brief, in which  
17 they acknowledge that this is going to lead to the  
18 production of a mass of irrelevant information.

19 And, you know, their comeback to that  
20 is, well, you know, we don't care about that.

21 Right, exactly, that's why they  
22 shouldn't be able to look at it.

23 THE COURT: The standard isn't  
24 irrelevant.

25 The standard is, will it lead to the

1 discovery of admissible evidence.

2 It might be irrelevant, but it might  
3 lead to the discovery of admissible evidence.

4 MR. BOEBEL: Exactly, Your Honor.

5 But one of the reasons, one  
6 justification that was in their rely brief, is that it's  
7 not admissible anyway.

8 Okay, if it's not admissible anyway,  
9 you don't get to look at it.

10 That's my problem.

11 THE COURT: That's not the standard.

12 I don't think that's the standard. The standard --

13 MR. BOEBEL: I think --

14 I apologize, Your Honor.

15 THE COURT: I don't think whether  
16 it's admissible.

17 I think we both agree it's, can it  
18 lead to discovery of evidence that may be admissible. By  
19 itself, it doesn't have to be necessarily.

20 MR. BOEBEL: I quite agree.

21 But it has to be relevant to a claim  
22 or defense, and it has to be reasonably calculated to lead  
23 to the discovery of admissible evidence.

24 THE COURT: Let me ask you, if my  
25 house is robbed, and you're the guy who did it, and you

1 took this stuff and you put it in your garage.

2 In order to get a search warrant to go  
3 look in your garage, do I have to remember every single  
4 thing that was taken from my house?

5 MR. BOEBEL: No. But the search  
6 warrant has to state, with reasonable particularity, what  
7 they're looking for.

8 Again, the only thing they have is  
9 this academic paper.

10 If it would make the case go away,  
11 Mr. Falkenstein would assign that copyright to them  
12 tomorrow.

13 I'm sure about that.

14 THE COURT: But who knows what else  
15 is on that computer which he used for his work?

16 MR. BOEBEL: Actually, Telluride  
17 knows what else is on that computer.

18 THE COURT: Have they accessed the  
19 image?

20 I thought that was the deal, that the  
21 experts are holding it, and they're waiting for the  
22 Court's order to allow them to access it.

23 MR. BOEBEL: That's right.

24 But Telluride knows, because of their  
25 forensic work on Mr. Falkenstein's work computer.

1                   They know what e-mails -- they know  
2 what documents he e-mailed back and forth; they know what  
3 documents were exchanged utilizing this program called  
4 GotomyPC.

5                   COURT:    I have to give Ms. Norgard  
6 two minutes, and you can have like a minute to address the  
7 Scheduling Order if you like.

8                   Although I think you wanted something  
9 like -- was it two weeks?

10                  MR. BOEBEL:   No.   Eight to ten  
11 weeks.

12                  And, again, Your Honor, you know there  
13 were negotiations with respect to the scope of electronic  
14 discovery, which Mr. Falkenstein, from day one, has always  
15 said, you can do it, it just needs to be reasonably  
16 founded.

17                  You know, the fact that instead of  
18 coming to a negotiated agreement, Telluride filed a motion  
19 to compel that dragged out for several months --

20                  THE COURT:   Counsel, if you could  
21 have solved the problem without the intervention of  
22 Judge Schellhas, and Judge Borg, and this Judge, then we  
23 wouldn't be here.

24                  But now it's been -- it's taken the  
25 time of three judges, and so you will get a decision in

1 two minutes. You have sort of gotten one, but you will get  
2 the summary in a minute.

3 Ms. Norgard, why don't you come up and  
4 say anything else you want to say.

5 Let me put it this way:

6 Is there anything else you want to say  
7 before I rule in your favor?

8 MS. NORGARD: No, Your Honor.

9 THE COURT: I will rule in your  
10 favor.

11 I find that there is no abuse of  
12 discretion, in any aspect of the proposed order that was  
13 issued by Judge Borg.

14 I find that all of the discovery that  
15 is sought in that computer is potentially reasonably  
16 likely to lead to the discovery of admissible evidence.

17 I find that the Protective Order that  
18 has been shaped by Judge Borg is perfectly consistent with  
19 Rule 26, and with the requirements of Minnesota law.

20 And the only question I have is, what  
21 is a reasonable amount of time.

22 And I'm going to ask the plaintiff  
23 that, because this has been going on for months now.

24 What is the reasonable amount of time  
25 that the Court should put in its Order that the evidence

1 should be accessed?

2 Do you have a harddrive in the control  
3 of your expert?

4 MS. NORGDARD: Right.

5 Let me make sure I understand the  
6 question.

7 Are we talking about extending the  
8 discovery schedule, or --

9 THE COURT: No.

10 MS. NORGDARD: Or about accessing the  
11 drive specifically?

12 THE COURT: No.

13 Judge Borg says, Falkenstein shall  
14 produce to plaintiffs outside computers, forensic copies  
15 of his personal computer drives in their entirety.

16 Copies shall be subject to a  
17 Protective Order issued by the Court, and so forth.

18 I'm reading from his draft.

19 Defendants may provide a privilege  
20 log --

21 I'm just paraphrasing.

22 Those particular times are to be  
23 ordered by Judge Borg in his report, the Court adopts in  
24 the form of an Order issued by this Court.

25 What date do you believe is fair,

1 appropriate, and reasonable.

2 MS. NORGARD: I think 10 to 15 days  
3 would be ample time.

4 THE COURT: Mr. Boebel, what is your  
5 position on that, leaving aside your objection, as I know  
6 you have, to the Court's decision?

7 MR. BOEBEL: The reality is that I  
8 don't know I can even begin to give the Court a statement  
9 of how long it would take to log irrelevant information  
10 across seven hard drives.

11 THE COURT: Let's separate the log  
12 from the production of forensic copies of the personal  
13 computer drives.

14 MR. BOEBEL: Well, the forensic  
15 copies are already in the possession of Telluride's  
16 expert.

17 THE COURT: Can he access them now?

18 MR. BOEBEL: Again, this comes back  
19 to the whole issue.

20 The whole point of the log is to  
21 create a set of materials that they cannot access.

22 THE COURT: And to separate them  
23 out.

24 MR. BOEBEL: And I don't think those  
25 two issues can be separated out.

1 THE COURT: Okay.

2 I will give you 30 days.

3 MS. NORGARD: Thank you, Your  
4 Honor.

5 THE COURT: That is my order; 30 days  
6 to have complete compliance with Judge Borg's Order.

7 And when I say that, it's something  
8 that the parties should have certainly been thinking about  
9 for a case that has been pending -- in 30 days it will be  
10 getting close to the one-year anniversary.

11 And the Supreme Court has told us that  
12 97 percent of all civil cases should be resolved in one  
13 year.

14 This is not a class action.

15 This is an individual case, and under  
16 the normal rules, it would be going to trial in March.

17 So, I'm going --

18 I would like a proposed order from  
19 you, Counsel, that incorporates my ruling, and that has 30  
20 days as the deadline, 30 days from today.

21 And in terms of the scheduling, I  
22 think the overall scheduling for this case, again,  
23 normally it would be going to trial in March, of 2008.

24 But I think given the complexity of  
25 the computer issues, and given that there has basically

1 been no discovery on this issue, there has been no  
2 deposition, certainly the hard drive hasn't been accessed,  
3 I think that the eight-month extension, although it's more  
4 than I would like to give, is reasonable.

5 And you're talking about eight-months  
6 extension of all deadlines?

7 MS. NORGARD: Correct, Your Honor.

8 THE COURT: I will extend all  
9 deadlines by eight months, and I would ask you to include  
10 that in the proposed order to the Court.

11 If you have further problems with  
12 discovery, I'm going to manage this case like you wouldn't  
13 believe, okay?

14 And I don't want this case to drag  
15 on.

16 Mr. Falkenstein, if you have a problem  
17 with this Court, talk to your lawyer outside of the  
18 presence of the Court.

19 Okay?

20 Now, I'm a sanctioning Judge, too.

21 I don't do it unduly, but I believe  
22 Rule 37 has a meaning, and I think that it should have  
23 bite.

24 And if people don't have good-faith  
25 justification for complying with Court orders, I

1 sanction. I do. That's what the Rules require.

2 I don't do it unduly.

3 And if I also find that there was not  
4 compliance with the Court Order, if I do get motions  
5 inviting further sanctions, including striking the  
6 pleadings, I will do that in an appropriate case.

7 So, be forewarned that I'm not going  
8 to let this case get away from me, and that this case is  
9 going to follow the rules, and it's going to be handled in  
10 a very timely way, without any undue delay.

11 We will stand in recess.

12 Thank you, very much.

13 MS. NORGDARD: Thank you, Your  
14 Honor.

15 THE COURT: Get that order to me by  
16 the end of the week, and I expect to sign it.

17 MS. NORGDARD: Thank you, Your  
18 Honor.

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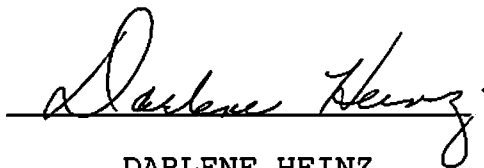
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REPORTER'S CERTIFICATE

I, Darlene Heinz, do hereby certify that the foregoing pages of transcript are a true and accurate transcription of my Stenograph notes, taken at the time and place aforementioned.

DATED: December 17, 2007.

  
A handwritten signature in cursive script, reading "Darlene Heinz", is written over a horizontal line.

DARLENE HEINZ