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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 MATTHEW CHRISTIANSEN,

4 Plaintiff,

5 v.

15 CV 3440 (KPF)

6 OMNICOM GROUP, INC., ET AL,

7 Defendants.

PREMOTION CONFERENCE

8 -----x  
9 New York, N.Y.  
July 21, 2015  
4:45 p.m.

10 Before:

11 HON. KATHERINE POLK FAILLA,

12 District Judge

13 APPEARANCES

14 LAW OFFICE OF SUSAN CHANA LASK  
15 Attorneys for Plaintiff  
16 BY: SUSAN CHANA LASK

17 DAVIS & GILBERT  
Attorneys for all defendants except Cianciotto  
18 BY: HOWARD J. RUBIN  
DANIEL A. FEINSTEIN  
19 JUDITH KONG

20 LEEDS BROWN LAW  
Attorneys for Defendant Joe Cianciotto  
21 BY: RICK OSTROVE  
22  
23  
24  
25

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1 (Case called)

2 MS. LASK: For plaintiff Susan Chana Lask.

3 I apologize, your Honor. I was ten minutes late. I  
4 went to the wrong building.

5 THE COURT: I'm going to ask you please to stand when  
6 you're speaking to me, only because there are monitors here  
7 that I cannot see you behind. Thank you.

8 Yes. Please come on time next time. Thank you.

9 And folks at the back table, who's here?

10 MR. OSTROVE: I'm Rick Ostrove from Leeds Brown  
11 representing the individual Joe Cianciotto.

12 MR. RUBIN: Howard Rubin from Davis & Gilbert  
13 representing Omnicom, DDB, Mr. Hempel and Mr. Brown.

14 MR. FEINSTEIN: Dan Feinstein also from Davis &  
15 Gilbert representing same defendants.

16 MS. KONG: Judith Kong also from Davis & Gilbert  
17 representing the same defendants.

18 THE COURT: Who from Davis & Gilbert is actually going  
19 to speak today?

20 MR. RUBIN: The plan is that I will; but if I need  
21 some help from Mr. Feinstein, he will speak up.

22 THE COURT: Okay. That's fine. Although Ms. Kong  
23 should be -- if she is here, you should let her talk. But  
24 maybe we'll save that for the next conference, sir.

25 MR. RUBIN: I should say that Ms. Kong is not admitted

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1 in the Southern District yet; her admission is pending, but she  
2 is working on the case and we wanted her to have the experience  
3 of being in court.

4 THE COURT: I'm very happy to have her here. I look  
5 forward to hearing from her when she's been admitted.

6 Thank you.

7 Ms. Lask, I'm going to begin with you.

8 We are here for a promotion conference, but it is also  
9 our first proceeding in this case. So if there's anything  
10 about the case that's not obvious from the complaint or  
11 anything else you'd like to tell me about the case, now is your  
12 chance to do so.

13 MS. LASK: No, your Honor.

14 I think the complaint was -- I made it very specific,  
15 I guess to make it real obvious for everybody what it's about.  
16 There's nothing there that I could add. But I would be glad  
17 to answer any questions from the Court right now.

18 THE COURT: Okay. Let's start with the easy  
19 housekeeping matter.

20 May I now order the caption changed to reflect  
21 Mr. Christiansen's name as the plaintiff rather than  
22 "Anonymous"?

23 MS. LASK: Yes, ma'am.

24 THE COURT: Okay.

25 Also, could you talk to me, please, about the nature

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1 of the EEOC claim that was filed. I don't think I have a copy  
2 of it.

3 My recollection of the form is that there are boxes  
4 that are checked. Did he proceed with an EEOC complaint or  
5 with the State Division of Human Rights complaint?

6 MS. LASK: He filed an EEOC and a state human rights.  
7 Both of them gave him a right-to-sue letter. Although there's,  
8 I guess, a misunderstanding from the defendants where they are  
9 saying that there wasn't a state EEOC letter. I have it.

10 THE COURT: And I understand you to be saying that it  
11 was withdrawn for administrative convenience.

12 MS. LASK: Exactly. And anyways that happens; so by  
13 law it doesn't matter.

14 THE COURT: Right. That is how I understand New York  
15 Executive Law 297(9).

16 My question is a little bit different.

17 Sometimes, at least as I recall these forms, you can  
18 indicate somewhere on the form what particular types of  
19 disability are being alleged.

20 What types of disability did -- I'm sorry, what types  
21 of discrimination, excuse me, did Mr. Christiansen indicate  
22 that he had experienced?

23 MS. LASK: Your Honor, I don't have that in front of  
24 me, I apologize. But I also understood from the research that  
25 I did, I knew their position from a while because we have been

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1 trying to arbitrate this or mediate it.

2 THE COURT: Before coming here.

3 MS. LASK: Before coming here.

4 THE COURT: I'm sorry. When you say "arbitration," I  
5 assume there's an arbitration agreement. I'm waiting for the  
6 motion to compel.

7 No. You're speaking of something more informal.

8 MS. LASK: Yes, a private mediation between us and the  
9 other parties. And my research, as well, shows to me that if  
10 he didn't -- any kind of mistake like that or if it wasn't  
11 checked -- I don't have it in front of me -- it still brings  
12 him to court. He has the right-to-sue letter.

13 THE COURT: I'm not suggesting otherwise.

14 My understanding of the law is if, for example, he  
15 were to indicate that it was simply discrimination based on  
16 sexual orientation without discrimination based on disability,  
17 for example, his ability in federal court to bring claims of  
18 disability discrimination might depend on the narrative that he  
19 provided to the EEOC and whether or not it could be fairly said  
20 from that narrative that his employer would be on notice that  
21 it was not merely sexual orientation discrimination, but  
22 disability or regarded as disabled discrimination. That's my  
23 understanding. So that's why I was trying to figure out what  
24 he actually alleged in the EEOC matter.

25 MS. LASK: Yes. And I do believe he alleged that he

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1 was HIV positive, and they had accused him of having AIDS. So  
2 that issue was brought out. I don't have the specifics in  
3 front of me, again, but I will definitely double-check that.

4 THE COURT: Okay. Now, I suspect and -- oh, I'm  
5 sorry, the gentleman Mr. Rubin is handing up something.

6 MR. RUBIN: We have the EEOC charge if you'd like to  
7 see it.

8 THE COURT: I would like to see it, thank you very  
9 much.

10 Thank you, Mr. Lopez.

11 May I keep this copy?

12 MR. RUBIN: Yes, Judge.

13 THE COURT: Thank you.

14 Strangely enough, nothing has been checked, but okay.

15 MS. LASK: Is that the federal or state?

16 MR. RUBIN: Federal.

17 THE COURT: This is the EEOC one, the federal one.

18 MS. LASK: Title 7, civil rights.

19 THE COURT: Yes, I'm looking towards the bottom third  
20 of the document, circumstances of alleged discrimination.

21 MS. LASK: I would think --

22 THE COURT: Well, I'll have to look at your letter  
23 that accompanies it that is dated October 29th, and we'll see  
24 whether it speaks to all of these issues. Again, I may be  
25 misperceiving the law, but my understanding of it is that where

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1 these boxes are not checked, it really doesn't matter what  
2 notice was given to both the EEOC and the employer; so I think  
3 that is something that is of interest to me.

4 Ms. Lask, there are a couple of points here where  
5 Mr. -- I want to get this right. How do I pronounce your  
6 client's name, sir, Mr. Ostrove?

7 MR. OSTROVE: Yes. Cianciotto.

8 THE COURT: Cianciotto.

9 You'd think with an Italian surname I would do better,  
10 but I should certainly try. Okay. Cianciotto.

11 There are certain things, for example, Title 7, that  
12 he is simply not able to have charges brought against him  
13 because he is an individual and not a corporate entity.

14 You are not disagreeing with that; correct? You are  
15 not disagreeing that there is no liability for Mr. Cianciotto  
16 under Title 7, are you?

17 MS. LASK: No, I don't disagree with that.

18 THE COURT: Okay. That's fine. I just want to make  
19 sure.

20 I'm fairly certain I will not be able to persuade the  
21 four folks behind you not to file a motion to dismiss, I'm just  
22 trying to limit the number of things on which we have to have  
23 some discussion.

24 MS. LASK: Yes.

25 THE COURT: All right, then, let me begin.

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1           Let me talk to Mr. Ostrove first. Thank you.

2           Actually, I'm sorry, Ms. Lask, one more thing before  
3 you sit down.

4           A couple of times what I saw in your responsive letter  
5 is a suggestion that there should be tolling based on mental  
6 disability. I don't know that that's alleged to my liking in  
7 the complaint, but I guess I want to understand your position.  
8 Is it that he was so emotionally distraught by the events that  
9 he could not comply with the deadlines?

10           MS. LASK: Yes, your Honor.

11           And to answer the first part of your sentence, it is  
12 alleged in the complaint. Towards the end of the complaint,  
13 right before the first cause of action, I go into why the  
14 tolling should apply.

15           He was analyzed by a psychologist expert, and it was  
16 determined that he basically had severe depression, PTSD, and  
17 all of the other physical and mental ailments that go along  
18 with being paralyzed to the point that he -- not paralyzed  
19 physically, paralyzed with fear to even bring this out, which  
20 fits in with the case, I think it's *Li*, and I do cite it a  
21 couple of times, and other cases.

22           Again, the first thing you would say is, Well, why  
23 wasn't this filed quicker? And the explanation is in the  
24 complaint that he was paralyzed with fear basically because he  
25 actually was HIV positive, which was a private matter to him.

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1 And all of a sudden Joe Cianciotto was running around telling  
2 everyone he has AIDS. And he's freaking out in his mind  
3 thinking, What do I do? If I do anything, I'm going to have to  
4 expose myself, and everyone is going to have a negative opinion  
5 of me as a man with HIV, plus I'm gay. So the mental and  
6 physical disability was enough to pass the statute of  
7 limitations for us, as the complaint explains.

8 THE COURT: Okay.

9 One more question, please.

10 Can I understand your argument with respect to  
11 constructive discharge. Because I understood -- maybe I'm  
12 mistaken. Is he not still working there?

13 MS. LASK: He's still working there.

14 But after he filed the complaint with the EEOC, they  
15 had asked him to leave for three months' severance. And I had  
16 said, Why should he leave? Joe is the one that, you know, was  
17 the abuser; my guy is the victim. He should be out.

18 They kept asking him to leave. And the constructive  
19 discharge theory, as well, goes with the fact that we had asked  
20 them to take down the offensive picture of him that Joe had  
21 posted on Facebook that we had brought to DDB's attention, as  
22 well. And they just mocked him -- that's our position -- by  
23 ignoring that request and leaving it up and then asking him to  
24 leave on top of it.

25 Putting him under that kind of pressure of realizing

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1 that you're saying I'm gay, you're saying I have AIDS, you're  
2 mocking me and you won't take down that Facebook post thing,  
3 which is against your own handbook policies, it just came up to  
4 a lot of intimidation that they just wanted him out, because  
5 Joe admits that --

6 THE COURT: I'm sorry, this is Mr. Cianciotto?

7 MS. LASK: Cianciotto. Mr. Cianciotto.

8 THE COURT: I don't know him well enough to call him  
9 "Joe." Thank you.

10 MS. LASK: Joe Cianciotto admits that he has a severe  
11 fear of communicable diseases. Well, that includes AIDS, HIV.  
12 And he was running around to not only Matt, the plaintiff --

13 THE COURT: Mr. Christiansen.

14 MS. LASK: Mr. Christiansen. I'm going to use those.

15 THE COURT: Thank you.

16 MS. LASK: -- Mr. Christiansen, as well as other  
17 employees, gay males, and targeting them and saying, Because  
18 you are gay, you have AIDS; because you are gay, you have AIDS.

19 So his extreme fear, we believe, led --

20 THE COURT: Mr. Cianciotto's extreme fear. Whose  
21 extreme fear?

22 MS. LASK: Mr. Cianciotto's extreme fear of  
23 communicable diseases and apparently gay men led them to ask  
24 Mr. Christiansen, the plaintiff, to leave.

25 THE COURT: But he didn't.

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1 MS. LASK: No.

2 THE COURT: And he's still there.

3 MS. LASK: Yes.

4 THE COURT: And the terms and conditions of his  
5 employment have not changed.

6 MS. LASK: Not yet; but they have also threatened that  
7 by October he's out. They claim that it's going to be under a  
8 mass -- they have to let many employees -- I mean throughout  
9 this we've been threatened with libel because of this, we've  
10 been threatened that he has to leave. He stayed and we've made  
11 a point. Ultimately, Mr. Cianciotto apparently was terminated  
12 last month. But the theory on that cause of action is they  
13 keep threatening him to leave. He is there.

14 THE COURT: What you're arguing then is that the  
15 working conditions have been made so intolerable, that a  
16 reasonable person would resign, except your client still has  
17 not.

18 MS. LASK: Yes. It's hard for him to be there, but  
19 we're making a point.

20 THE COURT: All right.

21 I've seen cases on constructive discharge. I won't  
22 say that I have familiarity with the situation where there are  
23 conditions that are, as you describe them, very difficult or  
24 impressive or one might say intolerable and yet the person  
25 stays. So I would have thought that constructive discharge

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1 meant you left, but perhaps there is that -- maybe the case law  
2 is itself sufficiently fluid that it would allow that.

3 Okay. Let me talk then please to Mr. Ostrove.

4 Thank you.

5 Mr. Ostrove, there are a couple of claims in which you  
6 basically -- your client has no horse in the race. These are  
7 the ones that involve individual liability under Title 7,  
8 things of that type. So I don't think you and I need to talk  
9 too much about that.

10 Tell me what you want to tell me about why you think  
11 the claims should be dismissed as to your client.

12 MR. OSTROVE: Well, it's unclear to me exactly whether  
13 or not certain of the claims are being asserted against him in  
14 the first place. My take on it as to the only thing that may  
15 be viable would be as an aider and abettor under the human  
16 rights law and not for constructive discharge.

17 THE COURT: We are talking both state and city human  
18 rights law?

19 MR. OSTROVE: And city. And city also. I apologize  
20 your Honor.

21 THE COURT: Yes. I think that's the understanding we  
22 both have. Let me say it this way: I am still trying to get  
23 my head around noncorporate entity liability under the state  
24 and city human rights laws, because there are some suggestions  
25 that it is the employer or an agent of the employer who can be

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1 directly liable; but more often than not, what I see is aiding  
2 and abetting liability, which, as you are, I'm sure, aware,  
3 results in the very strange circumstance where the company is  
4 directly liable for the actions of the person who has aiding  
5 and abetting liability. But, okay, that I understand.

6 So I assume that's one of the things you want to sort  
7 of tease out in your motion; is that correct?

8 MR. OSTROVE: Yes.

9 THE COURT: Okay. I would never tell you what to do,  
10 sir, but perhaps in speaking with Ms. Lask, prior to filing any  
11 papers, you might come to a better understanding of what it is  
12 she's seeking, and then that might just save you some  
13 arguments.

14 MR. OSTROVE: I will certainly endeavor to do that.  
15 And the only reason I didn't do that is because of the  
16 circumstances where we were retained very quickly and I didn't  
17 really have a chance to look at the complaint before I went on  
18 vacation. And then the order came out pretty quickly and we're  
19 here.

20 But before I make a motion, I will have a conversation  
21 with her. I figured we would sort out some of those issues  
22 here today, like your Honor did right away on the individual  
23 liability under Title 7 in the ADA, which doesn't exist.

24 THE COURT: Okay. Well, then we've gotten something  
25 accomplished today.

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1           Sir, I also understand you to be moving under, I  
2 think, Rule 8 based on -- this is my note, which I don't know  
3 if it's actually your language -- excessive verbosity.

4           You can try, sir, but I actually appreciated the  
5 amount of detail in the complaint, particularly given the  
6 nature of the other claims and the other issues that are being  
7 raised by the other folks at the back table with you. So I  
8 cannot stop you from making that claim, sir, I'm just telling  
9 you now, without prejudging the issue, that you might have a  
10 tough road to hoe with respect to that.

11           MR. OSTROVE: I do also appreciate detail in the  
12 complaint. But the problem from a defense point of view -- and  
13 I think it's a legitimate point -- is how do you answer a  
14 complaint when one paragraph -- which the paragraph is supposed  
15 to be, in and of itself, short and concise so that you can  
16 answer, admit, deny, or acknowledge information, some of these  
17 paragraphs go on for two or three pages and evidence is  
18 seemingly cut and pasted into those paragraphs.

19           I don't have a problem with necessarily the amount of  
20 words that are used, but there's just no distinguishing between  
21 paragraphs, which makes it unduly burdensome, I believe, to  
22 file my answer.

23           THE COURT: Okay. No, I think I have a better  
24 understanding of your argument. It's not merely the amount of  
25 words, but how much those words go to aiding you in

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1 understanding the claims as to your client as opposed to  
2 someone else's clients.

3 MR. OSTROVE: Well, there's that. And separate and  
4 apart from that, the way things are meshed, it's hard to tell  
5 when certain things occurred. And it's really hard to  
6 ascertain what might be within the statute of limitations and  
7 what might not be. I don't know if that was intentional.  
8 Because obviously she knows there's a statute of limitations  
9 issue, which is why we have this whole section about equitable  
10 tolling.

11 THE COURT: Yes. Well, which limitations period are  
12 we talking about, sir, the 300 days one or the one year one of  
13 the slander or something else entirely?

14 MR. OSTROVE: Well, since no federal claims are  
15 against my client, I will leave that to counsel next to me on  
16 those issues.

17 THE COURT: Yes.

18 MR. OSTROVE: I do agree that there are probably  
19 things within three years. And if that's the limitation period  
20 that we are using, I think that there are certain actions that  
21 come in that frame.

22 Regarding the slander, I do think it's outside of a  
23 year, and I don't think it's pled properly either.

24 THE COURT: All right.

25 And you are disagreeing with her tolling argument.

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1 MR. OSTROVE: Yes.

2 THE COURT: Okay. We'll see how that works out at the  
3 motion-to-dismiss stage. You and I will both see how that  
4 works out.

5 Okay. Anything else, sir?

6 MR. OSTROVE: No. I'm sure that counsel -- I mean I  
7 do think that the intentional infliction claim should not  
8 survive based on the case law, even if everything in there is  
9 true. It doesn't rise to the level of what has been found in  
10 the few instances where intentional infliction claims have been  
11 given credence.

12 I'm also not clear -- I guess I'll talk about it with  
13 counsel, about the breach of contract and the labor law claims  
14 that are brought against me or my client. But I guess I'll  
15 sort that out with counsel.

16 THE COURT: I was interested in the breach of  
17 contract. That seems to be very much a supplemental pendent  
18 jurisdiction issue. And I didn't understand the labor law  
19 violation because I guess -- were this a Fair Labor Standards  
20 Act case, there would be an exception for someone of  
21 Mr. Christiansen's compensation level. Also, I think there's  
22 an exception for folks involved in creative endeavors. I don't  
23 know off the top of my head whether there are New York Labor  
24 Law analogues for these exemptions. But I supposed I should  
25 ask Ms. Lask before I turn to Mr. Rubin, what is the nature of

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1 the labor law claim? So I will do that. Thank you.

2 Ms. Lask, what are the nature of your breach of  
3 contract and labor law claims please?

4 MS. LASK: The labor law claim is the one about where  
5 he's not getting -- Mr. Christiansen wasn't getting paid,  
6 correct. That's the labor law.

7 THE COURT: I'm sorry. Let me understand what it is.  
8 Just nonpayment of the wages owed to him? It wasn't an  
9 overtime or a minimum wage issue; it was he was not getting  
10 paid?

11 MS. LASK: There's a case, I'm sorry I don't know it  
12 off the top of my head, but it was two years ago or so. I  
13 think it went to New York's Court of Appeals. It was all about  
14 those labor law violations. And I literally took that cause of  
15 action from the case where it had to do with -- yes, they  
16 weren't getting paid. And it could be an oral contract, by the  
17 way. That's why I put the emails in where he was saying --  
18 Mr. Christiansen was asking them, Where's my payment?

19 If they agreed to give him a raise, which that was  
20 what the labor law violation was going on, which is considered,  
21 according to that case, salary, and they don't pay it, then he  
22 has that labor law violation under that section that I cited in  
23 the complaint.

24 THE COURT: All right.

25 And there are no exemptions for him under the labor

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1 law, given either his status or his salary?

2 MS. LASK: Under that case, there wasn't that I saw.  
3 I will double-check. I wouldn't have put it in unless I --  
4 I'll double-check that, your Honor. Everything I did, I  
5 double-checked as much as I could.

6 It was the same case. They brought a breach of  
7 contract, and the labor law violation case. I will look for if  
8 there are exemptions. I don't believe there are in that case  
9 to the Court of Appeals. That plaintiff I'm pretty sure was in  
10 a management position.

11 THE COURT: Can I also understand before I turn to  
12 Mr. Rubin and his colleagues, what is the basis for bringing  
13 Omnicom into this matter?

14 MS. LASK: Mr. Christiansen, the plaintiff, is  
15 employed by Omnicom. And Omnicom is the parent of DDB. His  
16 salary comes from Omnicom, and Omnicom oversees DDB. His  
17 employee handbook comes from Omnicom.

18 When people make complaints, employees of DDB are  
19 making complaints to such people as Peter Hempel, who's one of  
20 the named defendants, or Chris Brown, you know, management at  
21 DDB, it certainly gets reported to Omnicom's -- to their parent  
22 company.

23 THE COURT: Are you arguing a joint employer or a  
24 single unified employer in this respect?

25 MS. LASK: Yes. Omnicom is his employer, as well as

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1 DDB. Yes.

2 THE COURT: Okay.

3 MS. LASK: And Omnicom pays his wages.

4 THE COURT: Okay. Let me talk to Mr. Rubin then.

5 Mr. Rubin, there are many causes of action here, and  
6 you've objected to a lot of them, sir, suggested motions to  
7 dismiss as to a lot of them.

8 MR. RUBIN: I believe all of them, your Honor.

9 THE COURT: Okay. Well, there are a few I want to see  
10 if we can't resolve a little bit more quickly.

11 MR. RUBIN: Sure.

12 THE COURT: The election of remedies I don't think is  
13 going to work, sir. You have several based on that, because  
14 I'm understanding that the state matter was withdrawn for  
15 administrative convenience.

16 Do you have a different understanding, sir?

17 MR. RUBIN: Yes.

18 THE COURT: It went all the way through to an Article  
19 78 proceeding?

20 MR. RUBIN: No.

21 The latest we have, the latest picture we have is that  
22 in March the state division said that it was considering  
23 closing it for administrative convenience. We have not seen  
24 anything that says it has been closed. If Ms. Lask has such a  
25 thing, that would change our position on that. But we have not

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1 seen anything that indicates that it's actually closed. They  
2 were considering it.

3 THE COURT: You agree with me that if it were  
4 administratively closed prior to the conclusion of an Article  
5 78 proceeding, there would not be an election of remedies  
6 issue.

7 MR. RUBIN: Correct.

8 THE COURT: So it's up to Ms. Lask to give you the  
9 documentation to your satisfaction that it has been  
10 administratively closed.

11 MR. RUBIN: Correct.

12 THE COURT: Great. Because that would be a few fewer  
13 arguments.

14 MR. RUBIN: Yes. That involves state and city claims,  
15 not federal claims. And those claims we would hope would be  
16 litigated in state court.

17 THE COURT: Fair enough.

18 Okay. Well, let's then talk about your other  
19 arguments.

20 Let's begin first, please, with the failure to exhaust  
21 and the statute of limitations, the 300-day statute of  
22 limitations. I see them to be somewhat intertwined, so would  
23 you talk about those first.

24 MR. RUBIN: Yes. Well, to start, there is no EEOC  
25 charge against Omnicom. It's not named in the EEOC charge.

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1 THE COURT: Yes. I see that.

2 But Ms. Lask is going to say that they are a joint  
3 employer based on her allegations in the complaint.

4 MR. RUBIN: She may say that, but the law will be that  
5 if you don't name that joint employer in the EEOC charge, then  
6 they get dismissed.

7 THE COURT: Okay.

8 MR. RUBIN: And there was no EEOC charge against  
9 Mr. Hempel or Mr. Brown. So I think they will be dismissed.  
10 And as your Honor indicated, under Second Circuit law they  
11 can't have a Title 7 claim against individuals anyway.

12 THE COURT: Does it help them at all on the city and  
13 state human rights law claims?

14 MR. RUBIN: They are different issues.

15 THE COURT: You have different issues with us.

16 MR. RUBIN: Right.

17 There's an aiding and abetting issue. And then  
18 Mr. Brown, for example, was not even hired until after the last  
19 act of discrimination in this case. He didn't come to the  
20 company till 2014. We believe that the last act of  
21 discrimination ended in July 2013, when Mr. Cianciotto  
22 apologized for his prior actions and received an email --

23 THE COURT: One moment, please.

24 Ms. Lask, you've got to stop shaking your head. It's  
25 incredibly distracting.

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1 MS. LASK: Oh, I'm sorry. I'm thinking.

2 THE COURT: That's fine.

3 Thank you, Mr. Rubin. Please continue.

4 MR. RUBIN: We believe that the last act of  
5 discrimination took place prior to July 2013, when Mr.  
6 Cianciotto publicly apologized for some of his prior actions  
7 and received an email from the plaintiff thanking him for that  
8 meaningful apology. And that email will eventually come into  
9 the case when appropriate.

10 So we think that creates the date from which the  
11 statute of limitations runs.

12 THE COURT: What about what I've just heard from  
13 Ms. Lask about the more recent conduct regarding the continued  
14 viability of his employment, his eligibility or not for raises?  
15 In the last year or so, have there been discussions between  
16 counsel about this gentleman's employment? Has he been asked  
17 to resign?

18 MR. RUBIN: No. There were settlement negotiations,  
19 part of which -- which is not uncommon in these kinds of  
20 cases -- there is an exchange for severance, you leave the  
21 company. That was a settlement negotiation which we should not  
22 be discussing in front of your Honor.

23 THE COURT: I would have to agree with you. Okay. I  
24 appreciate in understanding that.

25 MR. RUBIN: But it was brought up, so I have to deal

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1 with it. In that context it is quite common to ask the  
2 employee to resign in exchange for money. So that's what that  
3 is all about.

4 THE COURT: Okay.

5 MR. RUBIN: Constructive discharge your Honor  
6 mentioned, you are absolutely right. As long as the person is  
7 still working, there is no constructive discharge case. Cases  
8 will sustain that. That's not even a close question.

9 In our letter, as you indicated, we indicated we were  
10 going to move to dismiss all 12 causes of action. This last  
11 response only discusses three of those causes of action. Nine  
12 are not addressed at all. And maybe, based on conversation  
13 that you had with Mr. Ostrove, we should assume that those --  
14 we can have a conversation, maybe those nine are going away  
15 because, in fact, there was no opposition to them in the  
16 letter.

17 THE COURT: I am doubting that's the case.

18 MR. RUBIN: I am, too.

19 THE COURT: I'll let you have that discussion with  
20 her.

21 Yes. And it's interesting, because once or twice  
22 folks have suggested to me in their formal motion when it is  
23 filed that the failure to address something at the promotion  
24 conference is some sort of waiver. I've not had to decide  
25 that; I hope I won't have to decide that this time.

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1 MR. RUBIN: I wouldn't argue that it was a waiver so  
2 much as we didn't see any opposition; we don't understand what  
3 the basis of opposition would be. We listed each one and that  
4 would be the ground on which we would move to dismiss all of  
5 those.

6 In terms of the failure to exhaust, as you saw in the  
7 complaint, there is no charge to EEOC on disability, so that  
8 has not been done yet, so obviously the statute of limitations  
9 has run on that.

10 THE COURT: Do you agree with me, sir, that if the  
11 narrative provided to the EEOC, if you will, commingled the  
12 sexual orientation claim with the regarded as disabled claim,  
13 that that would be enough even if a box was not formally  
14 checked?

15 MR. RUBIN: I don't agree with you, and I don't  
16 believe that in this case it would be sustained.

17 THE COURT: All right.

18 Let me hear about the 300 days, sir.

19 MR. RUBIN: Well, the 300 days we believe runs from  
20 July 2013 at the latest and, therefore, the charge, which was  
21 filed later than that, was untimely when it was filed. And no  
22 new charges can be filed now because they are clearly untimely.

23 THE COURT: I should have been more precise, sir.

24 It's the tolling argument that Ms. Lask and I were  
25 talking about. I have read the complaint, as have you. You

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1 may have a different view than she does regarding the nature of  
2 claims about sort of an inability to act. But given that we  
3 are at the motion to dismiss stage, and I should be quite  
4 solicitous of plaintiff and his pleading, let me understand,  
5 please, why you think these tolling arguments are not going to  
6 you succeed.

7 MR. RUBIN: I don't even think this is a close  
8 question.

9 THE COURT: I need a little bit more than that, sir.

10 MR. RUBIN: I'm going to give you a little bit more  
11 than that.

12 He came to work everyday. He was completely  
13 functional. We have emails from him. His last mention that he  
14 was afraid to come out, that he didn't want to let people -- he  
15 was openly gay. There are emails from him in which I will  
16 confess, your Honor, as an old man I've learned new expressions  
17 that I'd never learned before that are on emails from him to  
18 Mr. Cianciotto and others in which he is not only openly gay,  
19 but participating in all of the banter that he now claims was  
20 so horrible. That will come out at the appropriate time in  
21 this case. I will tell you, I had to look up some of those  
22 things in the urban dictionary to figure out what they were.

23 THE COURT: You've got younger colleagues; they can  
24 tell you what this stuff means.

25 MR. RUBIN: Well, I try not to chat with some of those

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1 younger colleagues about some of those topics to avoid a case  
2 myself.

3 THE COURT: Fair enough.

4 MR. RUBIN: My understanding of that case law -- I'm  
5 sorry to interrupt.

6 THE COURT: To your point that there is banter, there  
7 is information out there, I don't get to consider that in a  
8 motion to dismiss.

9 MR. RUBIN: I wasn't suggesting that it was coming in  
10 a motion to dismiss. It will come in at the appropriate time  
11 in this case.

12 THE COURT: Okay. Thank you.

13 MR. RUBIN: But the fact that he came to work every  
14 day is enough to show that he was not so mentally disabled.

15 The case law on that, which I'm familiar with,  
16 basically has to be a coma. That's really for people who are  
17 completely dysfunctional, not for people who come and do a  
18 perfectly good job every day.

19 I think it's going to be really hard to sustain, to  
20 find any case law that says if you're healthy enough to come to  
21 work, interact with other people, and do your job, then you're  
22 mentally disabled and unable to file a claim. I don't think  
23 there will be any cases that say that.

24 THE COURT: Once again, sir, how do you get to do that  
25 in a motion to dismiss? Is that somehow fairly implicated by

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1 the allegations in the complaint?

2 MR. RUBIN: Certainly the allegations in the complaint  
3 indicate that he has been working this whole time and he's  
4 still working, as your Honor raised in terms of the  
5 constructive discharge. So I believe that by itself will be  
6 enough.

7 THE COURT: Okay. I understood from one of your  
8 letters -- and I think it may have been yours -- the argument  
9 that sexual orientation discrimination is not actionable under  
10 Title 7, I've seen some recent teachings from the EEOC, I'm  
11 sure you have, as well, because you are now smiling at me.

12 Are you going to continue to maintain that argument?

13 MR. RUBIN: Absolutely. The EEOC is out to lunch.

14 THE COURT: I see. This is going to be a *Skidmore*  
15 deference, and there oughtn't be much deference.

16 MR. RUBIN: This is going to be the Second Circuit and  
17 the Southern District have repeatedly held. All you have to do  
18 is read the newspaper after the same-sex marriage decision to  
19 see the uproar around the country about the fact that  
20 discrimination on sexual orientation is legal throughout the  
21 country. All those people wouldn't be arguing that if Title 7  
22 actually prohibited it. All those people are arguing that the  
23 Congress ought to pass such a law because they know full well  
24 Title 7 doesn't prohibit that. This isn't even close.

25 THE COURT: Could we switch, please, to the Title 7

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1 nondiscrimination claims, such as slander, intentional  
2 infliction of emotional distress, and others.

3 Why don't we start with the slander. Is that really  
4 more Mr. Cianciotto and his counsel's fight to have or do you  
5 want to speak to that or you'll leave that --

6 MR. RUBIN: We're named, so we will fight that.  
7 There's a one-year statute of limitations, that's very clear.

8 THE COURT: It's the same tolling argument you've just  
9 made to me.

10 MR. RUBIN: I don't know that tolling comes into --  
11 I've not seen tolling in the context of a slander case.

12 THE COURT: Okay.

13 MR. RUBIN: I have seen it in the context of a Title 7  
14 case. But even then, it would otherwise be the same way. This  
15 man was perfectly competent. I'm not trying to argue he wasn't  
16 depressed or unhappy, but that is not nearly enough standard to  
17 toll the statute of limitations.

18 THE COURT: Okay. And I presume related to that  
19 you're going to tell me that whatever made him depressed or  
20 unhappy was not sufficient to rise to the level of intentional  
21 infliction of emotional distress.

22 MR. RUBIN: The standard on that is behavior outside  
23 the bounds of civilization. We'll be able to cite lots of  
24 cases far, far, far worse than this that have been dismissed on  
25 the face of the complaint based on the fact that they are not

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1 intentional infliction of emotional distress.

2 THE COURT: Can I understand, please, why the  
3 negligent supervision/negligent retention claim is, you  
4 believe, precluded by the New York workers compensation law?

5 MR. RUBIN: Obviously we have cases that say that.

6 THE COURT: That may have been something -- I didn't  
7 think that was what Mr. Ostrove wrote. I thought that's what  
8 you folks wrote on. But he can speak to it, just as long as  
9 someone can.

10 MR. OSTROVE: I didn't write it, but I do believe that  
11 workers comp does preclude negligence claims against the  
12 employer in general.

13 THE COURT: All right.

14 Then, Mr. Rubin, we'll move on.

15 New York Labor Law, why it applies, why it doesn't  
16 apply. Is there an exemption here? Am I making that up? Is  
17 there an exemption here?

18 MR. RUBIN: I don't think there's an exemption, your  
19 Honor.

20 THE COURT: Okay.

21 MR. RUBIN: I know that because I argued the case in  
22 Court of Appeals in Albany, where we lost on that ground, but  
23 won on other grounds. So we won the case, but ultimately they  
24 held that there was not an exemption.

25 THE COURT: Okay.

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1 MR. RUBIN: I will always remember Judith Kaye leaning  
2 down from the bench and saying, Mr. Rubin, why don't we follow  
3 the statute.

4 THE COURT: Oh, well, then, all right, we have a  
5 firsthand observer at the events in issue.

6 But then is there a violation of New York Labor Law?

7 MR. RUBIN: No, no.

8 In this case, the suggestion is that he was told that  
9 because he got a promotion, he would get a raise.

10 THE COURT: Yes.

11 MR. RUBIN: In the advertising industry, you don't get  
12 a raise the day you are promoted. You get a raise when they  
13 feel like giving you a raise. In fact, most cases they give  
14 you a title instead of a raise.

15 So, yes, he may have been told that he would get a  
16 raise, and eventually he did get a raise; within a year he did  
17 get a raise. That's in the complaint. So that claim is at  
18 maximum \$25,000, which is what he claims the raise would be,  
19 and he did get it a year later. That is less than the  
20 jurisdiction for diversity in this Court.

21 THE COURT: Sure. But I mean if I have any other  
22 federal claims, if I want to, I get to keep that for  
23 supplemental jurisdiction.

24 MR. RUBIN: Yes. But you will not have any other  
25 federal claims. I don't think that's going to be an issue.

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1           The mere promise that you're going to get a raise in  
2 the future, that's going to be a very hard breach of contract  
3 case. And I do not believe that that kind of a claim, of a  
4 promise of a raise in the future, falls under the New York  
5 Labor Law. It's not like a failure to pay an amount that you  
6 actually owe. It's, at most, a breach of an oral agreement to  
7 pay in the future, which would not be covered by the New York  
8 Labor Law. I'm afraid that's a law I know a lot about, having  
9 argued it at the Court of Appeals.

10           THE COURT: Okay. Anything else we should talk about?

11           MR. RUBIN: No.

12           We will obviously consider everything said today and  
13 then confer with Ms. Lask about which causes of action --  
14 although I think, as you suggested, maybe they will all be kept  
15 in the complaint, and we are ready to move ahead with our  
16 motion to dismiss.

17           THE COURT: Okay. Thank you.

18           Ms. Lask, is there anything else you want to say to me  
19 in reply?

20           MS. LASK: Just that the last act was not on July  
21 13th. The complaint makes it clear it goes into January of  
22 2015.

23           THE COURT: What is it in January of 2015 that is part  
24 of this scheme?

25           MS. LASK: The picture that he found in September of

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1 2014 that was on Facebook, that Matthew Christiansen found on  
2 Facebook on Mr. Cianciotto's page that he posted depicting him  
3 as a gay sissy kind of a thing.

4 THE COURT: This is the bathing suit picture?

5 MS. LASK: The bathing suit picture, yes.

6 So he had asked them in October to take it down, and  
7 they refused, they refused, they refused. And we had to file  
8 the EEOC. And that's explained in the EEOC document.

9 So it goes on and on. It goes past the July 2013.

10 THE COURT: Is the picture still up?

11 MS. LASK: No, they took it down in January of 2015;  
12 although they claim they took it down in November of 2014.

13 THE COURT: And had it not been taken down, would you  
14 be arguing that it persisted through today?

15 MS. LASK: Yes. But it was finally taken down. It  
16 was only taken down once we complained to the federal EEOC and  
17 the state, actually. It took two complaints to get that down.  
18 So if we were wrong it wouldn't be down. If we were right, it  
19 would be taken down, which is what ultimately happened. That  
20 picture should have never been up there depicting him in that  
21 position.

22 THE COURT: All right.

23 And this was on Mr. Cianciotto's personal Facebook  
24 page?

25 MS. LASK: Yes, that tagged hundreds of people.

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1 Facebook tags -- you could tag people. It took me a while --  
2 my client had to explain it all to me.

3 And all of his colleagues, the people from the State  
4 Farm account, you know, it's a big joke to have that up there.  
5 And we did, you know, before filing any complaint, ask them  
6 twice and, you know, through my calls and letters to take it  
7 down, and they completely ignored us. So it took complaints to  
8 get that down. It just shows the pervasive ha-ha, mocking, you  
9 know, the employees.

10 THE COURT: Do you dispute what Mr. Rubin has said,  
11 that your client actually engaged in email correspondence or  
12 verbal correspondence that engaged in the banter, the very  
13 banter that is the basis of this lawsuit?

14 MS. LASK: Absolutely, your Honor.

15 THE COURT: Okay.

16 MS. LASK: I don't want to go beyond the parameters of  
17 a motion to dismiss. As you said, we are limited to the four  
18 corners of the complaint. But can I say something, since he  
19 went beyond?

20 THE COURT: Well, the fact of the matter is in  
21 resolving a motion to dismiss, there are other things that can  
22 be considered. For example, there are exhibits or if there are  
23 documents that are referenced in the complaint or if there are  
24 events that are fairly implicated by the allegations in the  
25 complaint. So there are a couple of sort of additional ways in

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1 which information can get in.

2 I will resolve the motion to dismiss based on what I  
3 can resolve the motion to dismiss on. But if you want to tell  
4 me something now, I will listen to you.

5 MS. LASK: Okay.

6 THE COURT: As long as it isn't settlement  
7 discussions, which I don't want to hear about.

8 MS. LASK: Absolutely. I wouldn't do that.

9 The atmosphere there, and it was for quite a while --  
10 this was going on for years that Mr. Cianciotto would target  
11 people, they were gay or female, and control the pictures and  
12 do this and do that. And basically what these are are young  
13 creatives that were being taken advantage and scared to death  
14 to lose their jobs. This was their source of income; it's a  
15 small world there, as with many professions; and they are  
16 scared to death also of being blacklisted.

17 They did complain --

18 THE COURT: Who is "they"?

19 MS. LASK: The employees. Mr. Christiansen was one of  
20 them. The employees would complain to management and human  
21 resources. They were shot down all of the time.

22 Mr. Cianciotto was permitted to continue this  
23 pervasive, hostile work environment against everybody; and the  
24 attitude was just -- I don't want to say to shut him up, but to  
25 keep him quiet. So Mr. Cianciotto would stop. People would

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1 just say, Okay, Joe, that's all right.

2 So now my client wasn't -- Mr. Christiansen was not  
3 engaging in any banter beyond what everyone else was doing  
4 there to keep Mr. Cianciotto quiet. Anything -- and I've seen  
5 the emails -- that they are making a huge issue of is  
6 completely nothing compared to what this Mr. Cianciotto was  
7 doing to Mr. Christiansen and other people, but they are not in  
8 this complaint.

9 But, again, with the hostile work environment, you do  
10 explain, which the complaint does explain, that it was  
11 pervasive, it was going on constantly. And, no, Matthew  
12 Christiansen was not engaging in banter anywhere near the level  
13 of what he was getting back from Mr. Cianciotto.

14 Sometimes when you're bullied, a lot of people come to  
15 the point where you almost become numb and you just say, Okay,  
16 okay, okay, yes, ha, ha, ha. And that's the banter they are  
17 talking about. There's nothing in the urban dictionary.  
18 There's one word he's talking about.

19 THE COURT: I don't need to know it now.

20 MS. LASK: Yes. That's it. That's all I can say.

21 THE COURT: All right. Thank you.

22 As expected, I am not able to persuade the defendants  
23 not to file a motion to dismiss, and that's not surprising.  
24 The issue is just setting a schedule.

25 Let me suggest the following: In light of the fact

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1 that I would like the parties to have some chance to see if  
2 there are things they can resolve among themselves, and in  
3 light of the fact that perhaps someone somewhere wishes to take  
4 some time off in the month of August, I'm going to ask for the  
5 motions to dismiss to be filed by the 2nd of September, which I  
6 think gets you right after -- let me look at that schedule  
7 again. That is the Wednesday -- so it's actually the Wednesday  
8 before -- you know what? Let me change that and make it the  
9 9th of September, because someone is going to tell me they are  
10 going to be out during that week and I'll be sad.

11 MR. RUBIN: Your Honor, if I might.

12 THE COURT: Yes.

13 MR. RUBIN: As the party that will be filing the  
14 motion to dismiss, we would like to file it long before that.  
15 We were literally ready to serve it today. Some issues came up  
16 that we should be thinking about what you said. So we are  
17 ready to go and we want to get on file as soon as possible.

18 THE COURT: But I've got two.

19 Mr. Ostrove, are you as eager to file?

20 MR. OSTROVE: Not over the summer, your Honor. But  
21 I'll stick to whatever schedule they want. I need at least a  
22 week or two.

23 THE COURT: All right.

24 MR. OSTROVE: Or you know what, your Honor, actually,  
25 even better, I can file a week after them.

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1 THE COURT: Well, no, I'd rather -- let it be the same  
2 time.

3 MR. RUBIN: It doesn't necessarily have to be the same  
4 time.

5 THE COURT: August 14th?

6 MR. RUBIN: The sooner the better.

7 THE COURT: I know. But you do have to have a  
8 meaningful conversation with Ms. Lask beforehand.

9 MR. RUBIN: I suspect that won't last long.

10 THE COURT: I understand.

11 August 14th.

12 MS. LASK: Your Honor, I --

13 THE COURT: Yes, Ms. Lask.

14 MS. LASK: -- actually have various obligations and  
15 other things. If it could be the week afterwards, because I'm  
16 going to need time to also oppose.

17 I'm out of state on --

18 THE COURT: When please?

19 MS. LASK: I'm trying to think when I go. The first  
20 week of August, and I have several federal cases that I'm  
21 involved in.

22 MR. RUBIN: We don't object to her having the time she  
23 needs to respond. The sooner we file, the longer she'll have  
24 to respond.

25 THE COURT: September 21st for your response.

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1           And my preference is that it be a single response to  
2 the two motions.

3           MS. LASK: Yes.

4           THE COURT: So if that means you need 30 pages rather  
5 than 25, I'm not going to quibble with that. I don't think  
6 you're going to need 50 pages. I imagine a lot of these  
7 arguments are going to duplicate themselves. But if you need  
8 some small extra pages, we'll do that.

9           And then the 28th, Mr. Rubin and Mr. Ostrove, for a  
10 reply?

11          MR. RUBIN: One week?

12          THE COURT: I'll give you more. I can give you  
13 till --

14          MR. RUBIN: I think also, if I remember correctly,  
15 although I don't have my calendar in front of me, that's  
16 probably when the Jewish holidays are.

17          THE COURT: All right. How about October 5th?

18          MR. RUBIN: Okay.

19          THE COURT: Mr. Ostrove, does that work for you, sir?

20          MR. OSTROVE: Yes, your Honor.

21          THE COURT: Okay. Then we'll issue a scheduling order  
22 to this effect.

23           Is there anything else we should talk about today,  
24 Ms. Lask?

25          MS. LASK: No, your Honor.

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1 THE COURT: Okay. Thank you.

2 Mr. Rubin, anything else?

3 MR. RUBIN: No, your Honor.

4 THE COURT: Okay. Let me just ask the parties please,  
5 before August 14th can you arrange to have a copy of the  
6 transcript of this conference transcribed, share in the cost,  
7 please, so that I have something on file as I'm looking at your  
8 motions. I suspect if you get it for regular delivery, so that  
9 it comes to me in 30 days, that will give me enough time to  
10 look at it while I'm looking at your motions, and that it not  
11 be further expedited, but I leave that to you.

12 Thank you very much for coming in this afternoon.

13 MS. LASK: Your Honor, would I get a copy of that same  
14 transcript that goes to the Court, as well?

15 THE COURT: I'm asking you both to share in obtaining  
16 a copy of it from the court reporters. And when you do that, I  
17 get a copy of it automatically.

18 MS. LASK: Thank you.

19 THE COURT: All right. Thank you.

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