

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF ILLINOIS

U.S. EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION,

Docket No. 16-2222

Plaintiff,

vs.

Urbana, Illinois  
January 22, 2018  
1:45 p.m.

RENT-A-CENTER EAST, INC.,

Defendant.

FINAL PRETRIAL CONFERENCE

BEFORE THE HONORABLE ERIC I. LONG  
UNITED STATES MAGISTRATE JUDGE

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

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Proceedings recorded by digital sound recording;  
proceedings reported by mechanical stenography from said  
recording; transcript produced by computer.

1 (In open court; 1:45 p.m.)

2 THE COURT: Good? All right.

3 Looks like we're, we're -- all right. So now  
4 we're officially back together. 16-2222.

5 We did -- just for purposes of the recording,  
6 just so that everyone understands, we did talk about a  
7 few non-substantive issues, mainly about process and what  
8 we're going to do, while we were trying to get the  
9 recording working.

10 But now that the recordings's working, let's  
11 get the -- let's go ahead and start with the jury  
12 instructions that you submitted. I want to go through  
13 them with you. Obviously, I won't make a final ruling on  
14 any of these until the formal charging conference, but I  
15 want to give you an idea of where I stand on these so  
16 that you can plan accordingly. There may be a few things  
17 that come up that I, I need -- I just need more  
18 information about. I need to know what the evidence is  
19 going to look like before I can make a decision anyway.

20 Your joint proposed jury instructions, are both  
21 of you comfortable -- Mr. Mulaire, you comfortable with  
22 the joint proposed instructions submitted as document 63?

23 MR. MULAIRE: The plaintiff is. Yes.

24 THE COURT: All right. And, Ms. Wasserman,  
25 you're good with those as well?

1 MS. WASSERMAN: As to the joint ones, yes, Your  
2 Honor.

3 THE COURT: Okay. All right. So I'm going to  
4 give all the joint ones --

5 MR. MULAIRE: Your Honor, I think --

6 MS. WASSERMAN: -- Oh.

7 THE COURT: Oh, suddenly there isn't quite  
8 the --

9 MS. WASSERMAN: There is one contested issue.  
10 I apologize. It was a joint issue. There is one  
11 contested issue that it was -- it was identified as  
12 joint, but it's now going to be contested.

13 THE COURT: Okay. Which one?

14 MS. WASSERMAN: And that is the standard, the  
15 legal standard to be applied. We originally discussed  
16 having a mixed-motive instruction; --

17 THE COURT: Okay.

18 MS. WASSERMAN: -- and since I've been involved  
19 in the case, as you know, Your Honor, for a very brief  
20 period of time, in looking at it, we believe that there's  
21 no evidence here to support a mixed-motive instruction.

22 THE COURT: Okay.

23 MS. WASSERMAN: We believe that the proper  
24 standard is "because of," which is the panel instruction.  
25 It is the general panel instruction from this

1 jurisdiction. We believe that that's the appropriate  
2 instruction.

3 And so that will be a contested issue.

4 THE COURT: Okay. What's the EEOC's thought  
5 on --

6 MR. MULAIRE: I mean, the EEOC's position is  
7 that the Joint Jury Instruction Number 7 that we're  
8 discussing, the version that is submitted as the joint  
9 instruction, is still the EEOC's position. From our  
10 point of view, it's not a matter of evidence for purposes  
11 of sex discrimination claims. The causation standard  
12 written into Title VII is "motivating factor."

13 It is true that the pattern instruction, 3.01,  
14 from the Seventh Circuit actually gives two alternative  
15 instructions; and we believe that the one that the  
16 defendant is proposing would be appropriate for cases  
17 like age discrimination or retaliation where the standard  
18 of causation is "but for" causation.

19 But for sex discrimination, that's not the  
20 standard; so we believe "motivating factor" is  
21 appropriate.

22 MS. WASSERMAN: And, Your Honor, from our  
23 perspective, there's -- not only is there no evidence on  
24 the -- to support the motivating factor, the complaint  
25 was written in a, as a "because of." That's how the

1 complaint was written. It was argued in the summary  
2 judgment brief. Counsel argued that it was a "because  
3 of" standard. It is the pattern instruction. It is  
4 3.01, and we believe that that is the standard that  
5 really should apply in this case.

6 THE COURT: All right. I'm going to have to  
7 look at this a little more closely. I don't want to just  
8 rule on it.

9 MS. WASSERMAN: And, Your Honor, if you'd like  
10 further briefing on why we believe the -- we have no  
11 problems submitting further briefing prior to the  
12 charging conference because this, I would assume, would  
13 be something that would be addressed at a charging  
14 conference.

15 THE COURT: It will be. Do you want -- Mr.  
16 Mulaire, do you want, do you want an opportunity to brief  
17 it also?

18 MR. MULAIRE: Yeah. I think that would be  
19 useful.

20 THE COURT: Okay.

21 MR. MULAIRE: Something short.

22 THE COURT: Why don't -- well, let me ask both  
23 of you. Both of you understand the issue. Both of you  
24 understand each other's positions. Why don't you get me  
25 simultaneous submissions on the Friday before we pick the

1 jury, and that way I'll look at it over the weekend and,  
2 and have an idea -- I'd like to, I'd like to give you an  
3 idea -- I'd like you to -- before you make your opening  
4 statement, I want you to have an understanding of where  
5 we're going to go with this; and so I don't want to wait  
6 for the formal charging to rule on it. So if you'll do  
7 that for me, I'll take a look at it over the weekend; and  
8 then as soon as we get the jury picked, we'll talk about  
9 it; or even before then, if we have the time.

10 MS. WASSERMAN: Thank you, Your Honor.

11 THE COURT: Tom, I don't know exactly the date,  
12 so --

13 LAW CLERK DRYSDALE: February 2nd.

14 THE COURT: All right. So, as part of our  
15 order we'll put out, incorporate that for me.

16 LAW CLERK DRYSDALE: I will.

17 (Brief pause in proceedings.)

18 THE COURT: All right. And just so you all  
19 understand, too: What I, what I'm talking today is  
20 preliminary. The final determinations will be at the  
21 formal charging conference. I just want to frame this so  
22 that you've got an idea of where I'm going, so some  
23 things may come up that, that change that slightly.

24 All right. Let's look at Rent-A-Center's  
25 proposed instructions next. The first one is the

1 spoliation instruction. I just don't know enough about  
2 that as far as what the -- as far as what evidence is  
3 going to come in. I think as we start working through  
4 this, we'll determine -- as I hear the evidence about  
5 what happened with those affidavit-- or attachments,  
6 we'll make a decision as to whether there's sufficient  
7 basis for that instruction.

8           The instruction as drafted is exactly what the  
9 Seventh Circuit provides for. So if it's called for by  
10 the evidence, then we'll give it. And if it's not called  
11 for by the evidence, we won't. So, really, that's  
12 simple; but I need to see what the evidence is going to  
13 be before we go down that road.

14           The second Rent-A-Center proposed jury  
15 instruction is transcripts of interview notes. Anything  
16 you want to add to that as far as how are they going  
17 to -- let me ask you a question. How do you intend to  
18 get those notes in?

19           MS. WASSERMAN: Well, that is probably the --  
20 if I could identify the single item that has been taking  
21 the most time of our recent discussions, it is probably  
22 regarding these notes; and it's a bigger issue than  
23 simply the jury instruction. But it's the jury  
24 instruction -- there were transcribed notes as well as  
25 handwritten notes that were created by the person -- this

1 woman by the name of Gloria Mayfield who's a former  
2 employee of the EEOC who is the investigator who  
3 conducted this, this -- the EEOC's investigation.

4 THE COURT: Okay.

5 MS. WASSERMAN: And we've been attempting to  
6 serve Ms. Mayfield with a subpoena. It is apparent,  
7 based upon what our process server has been telling us,  
8 that it appears -- I'm not going to accuse anyone of  
9 anything -- it appears as though she's attempting to  
10 dodge service.

11 Be that as it may, we're attempting to serve  
12 her so that she would be able to introduce these  
13 documents into evidence. It was her investigation, and  
14 they -- it identifies what people told her during the  
15 course of the investigation.

16 We understand that there might be a stipulation  
17 in the offing with regard to the authentication of both  
18 her handwritten notes, as well as the transcribed notes;  
19 but we still believe that Ms. Mayfield is an essential  
20 witness for the purpose of testifying about who said what  
21 to whom.

22 If there would be allowed to be admitted either  
23 the transcribed version or the handwritten version, if we  
24 could just stipulate that they would be admitted into  
25 evidence, that addresses this instruction. That

1 addresses a whole larger issue.

2 So that may be more than Your Honor wanted to  
3 hear, but it sort of puts it in context --

4 THE COURT: No, but it's helpful.

5 MS. WASSERMAN: -- why this is an issue.

6 THE COURT: Mr. Mulaire, anything you want to  
7 add for that?

8 And you all can sit down. Be comfortable.  
9 Just talk into the microphone so it gets picked up. Now,  
10 when the jury's here, that's different. You know, stand  
11 when the jury's present, but you don't need to stand when  
12 we're just here talking about things.

13 Mr. Mulaire, anything?

14 MR. MULAIRE: Yes, Your Honor. So, the --  
15 first of all, Ms. Mayfield is not employed by the EEOC  
16 further, so just in case --

17 MS. WASSERMAN: I said "former."

18 MR. MULAIRE: Oh, okay.

19 MS. WASSERMAN: I did say "former."

20 MR. MULAIRE: Sorry. I missed that. Just, I  
21 just wanted to make sure that was clear for the record.  
22 So, you know, what she's doing or not doing right now, we  
23 can't speak to.

24 THE COURT: Sure.

25 MR. MULAIRE: As to the, the issue that Ms.

1 Wasserman described, I mean, we are willing -- we have  
2 stipulated to -- so we'll start with the transcription.  
3 So there was an effort proposed by defense counsel during  
4 discovery to take the handwritten note which -- suffice  
5 it to say, the handwriting is not easy to read; and so we  
6 all agreed: All right, fine. We'll create a written  
7 transcription of what the notes say. And I believe we've  
8 already reached an agreement that the typed version is an  
9 accurate statement of what the handwritten ones say. I  
10 believe we've already --

11 THE COURT: Okay.

12 MR. MULAIRE: -- so that, that part is already  
13 agreed to. And the agreement may be over emails. We can  
14 formalize it if you'd like. So that step is already  
15 agreed to.

16 Now, the question of whether Ms. Mayfield is,  
17 is needed in order to authenticate the notes, we've also  
18 stipulated to the authenticity of -- I think it was the  
19 handwritten notes that were -- whatever was on your  
20 exhibit list, we've stipulated to the authenticity of.

21 To the extent that defense counsel is asking us  
22 to stipulate to the admissibility, that's, that's a  
23 significant step further. We have hearsay objections to  
24 the contents of the notes, and that's not something that  
25 they would solve by having the witness here in person.

1 That's just a legal objection.

2 So, with respect to the jury instruction, which  
3 is sort of where this all began, you know, I don't -- may  
4 I confer with Mr. Shultz just briefly?

5 THE COURT: Sure.

6 (Brief pause in proceedings.)

7 MR. MULAIRE: We don't, we don't have an  
8 objection to this jury instruction, per se. It's just  
9 that it's not clear yet whether the notes themselves will  
10 actually be admitted into evidence. So at this stage,  
11 that's really what our objection will be to this. We  
12 don't know if they'll come in.

13 THE COURT: Okay.

14 (Brief pause in proceedings.)

15 MR. TRUSEVICH: Your Honor, on that issue, may  
16 I address what [inaudible] --

17 THE COURT: Please.

18 MR. TRUSEVICH: So the issue is -- and, first,  
19 I want to say it's a pleasure to be able to deal with  
20 attorneys on the other side. We have gotten along great,  
21 and hopefully we work stuff out; but it's really a  
22 pleasure to, to work with Justin and Miles. We just  
23 disagree fundamentally on some of the things.

24 And so, for example, on Ms. Mayfield, so if  
25 Your Honor were to say, "You know what? I'm not going to

1 allow those notes in," we need Ms. Mayfield here live.  
2 And my co-counsel may not say that she's dodging service;  
3 but our process server says people are coming out of her  
4 apartment and they say, "Is Ms. Mayfield in there?"

5 And they say, "We don't know."

6 And then they see someone peering out of the  
7 blinds; and they knock on the door, and there's no  
8 answer.

9 And, Your Honor, we really are going to need  
10 some guidance from the Court to get her served.

11 But what's important is: If they are not going  
12 to agree to admissibility -- and that's fine; that's  
13 absolutely their prerogative -- then we want her live  
14 because things that Ms. Kerr says in her deposition, when  
15 you look at Ms. Mayfield's notes -- so it's critical for  
16 our defense to say that, "Well, Ms. Mayfield, did Ms.  
17 Kerr ever bring this up to you? Ever bring this up to  
18 you? Ever bring this up?"

19 And I can guarantee Your Honor as I sit here --  
20 and I've gotten most my trial practice from watching The  
21 People's Court, but I think I'm pretty good, Your  
22 Honor -- she's going to say "no." Ms. Mayfield's going  
23 to say "no."

24 And, Your Honor, that is critical to our  
25 defense to have Ms. Mayfield here, or have the notes

1 admitted, one of the two.

2 And, again, working with Miles and Justin, we  
3 get along. We agree on a lot of things. But on this, I  
4 think it's a little bit hard to say, "Well, we're going  
5 to object to the notes, but we're also going to object  
6 to, you know, Ms. Mayfield coming." And, again, they  
7 have not --

8 THE COURT: Well, I don't think that --

9 MR. TRUSEVICH: And, again, they have nothing  
10 to do with Mayfield dodging service.

11 THE COURT: Yeah.

12 MR. TRUSEVICH: I get that.

13 THE COURT: Right. I took the -- and maybe I  
14 got the wrong opinion; but you're not objecting to Ms.  
15 Mayfield's appearance, right? I mean, it's just -- she's  
16 just not within your control, and you can't force service  
17 on her? Is that the point?

18 MR. MULAIRE: The latter statement is also  
19 correct.

20 But our understanding is that the only reasons  
21 that they would call her would be to elicit what we  
22 consider hearsay. And so if that's correct, I, I don't  
23 think there's anything -- I mean, she has no firsthand  
24 knowledge of anything. I mean, --

25 THE COURT: Right, right, right.

1 MR. MULAIRE: -- so the only things she would  
2 be saying --

3 THE COURT: It would be in order to prove up an  
4 inconsistent statement, basically.

5 MR. MULAIRE: Right. I mean, and just to  
6 address what Mr. Trusevich said, I mean, whether it's  
7 through her notes or through her testimony, her oral  
8 testimony here, it would still be hearsay to say, "Bob  
9 told me X." But, you know, --

10 MR. TRUSEVICH: I'm sorry.

11 THE COURT: Well, Bob -- in this case, though,  
12 is Bob the complainant?

13 MR. TRUSEVICH: Yes, Your Honor.

14 And, more importantly, it is a government  
15 investigation; and Ms. Kerr -- and, again, I, I defer to  
16 my, my professional colleague, Justin -- or Mr. Mulaire.

17 Your Honor, in your court, do you mind if we  
18 refer by --

19 THE COURT: No.

20 In front of the jury, though, you should --

21 MR. TRUSEVICH: Absolutely.

22 THE COURT: -- maintain formality.

23 MR. TRUSEVICH: But Justin on -- you know, if  
24 they want to do that.

25 But I think, Your Honor, it is critical to our

1 defense to be able to say, "Ms. Mayfield, did Ms. Kerr  
2 ever say this, this, this, and this?" Because in her  
3 deposition -- and, again, they may respectfully  
4 disagree -- but in her deposition her story grew like the  
5 loaves and the fishes. And I think for Ms. Mayfield to  
6 go, "No, she never told me that, that, that, and that,"  
7 that's critical for the jury to be able to weigh the  
8 credibility. Are these made-up stories in January '17,  
9 2017, when I took her depo or back in December of 2015  
10 when Investigator Mayfield talked to her on five  
11 different occasions?

12           So that's our -- that's the purpose, Your  
13 Honor.

14           MS. WASSERMAN: And, further, Your Honor,  
15 the -- we would be able to overcome -- specifically, as  
16 to Ms. Kerr's statements to the investigator, we'd be  
17 able to overcome the hearsay objection with the whole  
18 statements against interest, or, or absence of statements  
19 that were against her interests. That would be a  
20 potential exception to the hearsay rule with regard to  
21 any communications between Ms. Kerr and Ms. Mayfield.

22           MR. MULAIRE: Two points. I mean, on that --

23           THE COURT: And, and just, if you all would do  
24 me a favor, just have one of you -- one of you take a  
25 position at a time. That way, Mr. Mulaire's not being

1 double-teamed, and I'm not losing focus as to who's,  
2 who's saying what.

3 MR. TRUSEVICH: Yes, Your Honor.

4 MS. WASSERMAN: Yes, Your Honor.

5 MR. MULAIRE: Oh, and I think you told us we  
6 could sit, so I'm going to take advantage of that.

7 THE COURT: Might as well.

8 MR. MULAIRE: But on the latter point -- I'm  
9 sorry; now I'm trying to remember what the latter point  
10 was.

11 MS. WASSERMAN: Hearsay objection.

12 MR. MULAIRE: The hearsay objection.

13 So I know Ms. Kerr is not -- I mean, while she  
14 is the person who was discrim-- she's the aggrieved  
15 individual, to use the language from the statute, she's  
16 not a party to the case.

17 The EEOC is the plaintiff here. You know, we  
18 are not here simply as her representatives. I mean, the  
19 government has filed suit against Rent-A-Center; and so  
20 the, you know, the statement against interest -- it's the  
21 statement of -- it's an admission of a party opponent  
22 that is the exception to the definition of hearsay.

23 THE COURT: And I'm curious about that, because  
24 I actually asked Tom to do some research for me, because  
25 I've only seen District Court cases where they've all --

1 I wouldn't say "all," but I've seen many District Court  
2 cases where they've allowed statements by the complainant  
3 where EEOC has brought the charge, and they've brought  
4 statements -- or, I mean, the Court's allowed statements  
5 by the complainant as an admission under 801(d)(2).

6 Are you, are you suggesting that's not the law?

7 MR. MULAIRE: It is true. I'm not aware of any  
8 controlling cases by any Seventh Circuit case law.

9 THE COURT: Yeah. I've only seen a few  
10 District Court cases on the issue.

11 MR. MULAIRE: Right. So I've not seen a rule  
12 that we're all obligated to follow from the Seventh  
13 Circuit, and it is true that District Courts go both ways  
14 on that.

15 THE COURT: Yeah. That's what I found.

16 MR. MULAIRE: And we believe the correct  
17 position is, is just the plain language of the rule  
18 refers to "a party-opponent." And, I mean, what is clear  
19 is that she is not a party to this -- there's Supreme  
20 Court case law that says that our claims are not  
21 derivative of her claims. We don't stand in her shoes.

22 And so, you know, we think, we think the  
23 underlying principles, you know, make it such that  
24 that -- exception for a statement of a party-opponent,  
25 just by the plain language of the rule, doesn't apply.

1 I did have a second point, and then I want to  
2 leave that, Your Honor.

3 THE COURT: Yeah. Why don't you hang on to  
4 your second point for a second, and I'll turn back to  
5 you --

6 MR. MULAIRE: Sure.

7 THE COURT: -- because I do want to take this  
8 up because it's something that's bound to come up again  
9 during the course of this --

10 MS. WASSERMAN: Correct.

11 THE COURT: -- trial.

12 MS. WASSERMAN: A couple points. First of all,  
13 at Ms. Kerr's deposition, she was instructed by her  
14 counsel not to respond to questions; there were  
15 instructions.

16 So that being the case, it has clearly been  
17 litigated as though -- even though the case is "EEOC  
18 versus Rent-A-Center," it has clearly been litigated as  
19 though it is "Megan Kerr against Rent-A-Center" is one  
20 point because, otherwise, if that wasn't the case, then  
21 there would have been no need for instructions of people  
22 not to answer questions. And the EEOC functioned there  
23 at the deposition as her counsel. So it clearly would be  
24 her -- we believe that, in and of itself, would be  
25 sufficient to overcome the issue.

1           Furthermore, if the, if the law were such that  
2 anybody could simply say, "Oh, that's -- the EEOC is  
3 litigating on behalf of a person," but that person can  
4 say whatever they want to, to whomever they want to,  
5 whenever they want to, and not be held accountable; yet,  
6 that is the person whose rights are being addressed by  
7 the EEOC, or whoever the agency, it would completely  
8 thwart the Rules of Evidence. It would completely give  
9 an individual who chooses to file a charge with the EEOC  
10 carte blanche to say whatever they want to see -- to say  
11 because it can't be used against them. That's not what  
12 this is all about.

13           I mean, we would love to have taken the  
14 deposition of somebody from the EEOC, and we should have  
15 been allowed to take, possibly, one of counsel or  
16 somebody else from the EEOC, their deposition, if, in  
17 fact, they are the plaintiff in this case. But that's  
18 not how the case has been litigated from the get-go.

19           It's been litigated as though it is "Megan Kerr  
20 against Rent-A-Center," Megan Kerr being represented by  
21 the EEOC. And that's what's going on here. If the jury  
22 is going to award any kind of damages, it's based upon  
23 that it's going to be going to Megan Kerr. It's based  
24 upon Megan Kerr's alleged emotional distress, Megan  
25 Kerr's mitigation -- which is yet another topic to

1 discuss -- Megan Kerr's wage loss.

2 So to basically say that she can say whatever  
3 she wants to and not be held accountable really makes no  
4 sense.

5 THE COURT: Go ahead, Mr. Mulaire.

6 MR. MULAIRE: At a certain level of generality,  
7 this is something that the Seventh Circuit has spoken to.  
8 I mean, there's case law that, that emphasizes that, when  
9 the EEOC files suit in its own name, it does so as a law  
10 enforcement agency. There's even one Seventh Circuit  
11 opinion -- it's on a different topic; it's on Rule 23  
12 certification -- that even goes so far to point out that  
13 it's a mere detail that, you know, the monetary relief  
14 recovered is paid to the victim as opposed to going to  
15 the government treasury. So, I mean, the case law is  
16 clear at that level of generality that, you know, EEOC  
17 enforcement suits are not merely representative  
18 exercises.

19 It's, it's also the case that, you know,  
20 respectfully, counsel has sort of conflated two different  
21 issues. The fact that a witness is receiving legal  
22 advice doesn't mean that she's a party to the case. I  
23 mean, people can receive legal advice, instructions by  
24 their counsel not to answer to protect privilege, and all  
25 kinds of circumstances, where they not be -- where they

1 may not be a party to the case.

2 So I don't think that, you know, demonstrates  
3 that she's within the scope of the party-opponent rule.

4 You know, I do want to -- just because there is  
5 a little bit of case law on this, you know, if this is  
6 something that, --

7 THE COURT: Yeah.

8 MR. MULAIRE: -- you know, the parties might be  
9 able to briefly address in a submission.

10 THE COURT: I would -- I was actually going to  
11 invite that because I think this is something that's  
12 going to repeat throughout the trial, so -- today's  
13 Monday. Is Friday too early for the, for the two of you  
14 to get something to me?

15 MR. MULAIRE: This coming Friday?

16 THE COURT: Yeah. Because I want -- I want  
17 enough time to do my own research after you've given me  
18 your submissions; and, at the same time, I also want to  
19 give you enough lead time so that you can plan  
20 accordingly because if I'm going to find that these are  
21 not party submissions -- I mean party statements, yeah,  
22 that may change the way you approach the case.

23 And, obviously, if I find that they are  
24 admissible as, by a party-opponent, then that may change  
25 things, too. So I want to give you some lead time on it.

1 But is Friday too early?

2 MR. MULAIRE: That's fine for the plaintiff.

3 THE COURT: Okay for Friday?

4 MS. WASSERMAN: That would be, that would -- to  
5 submit a briefing by that time?

6 THE COURT: Yeah. It doesn't have to be  
7 anything extensive. What I'm really looking for is,  
8 is -- is I want you to preserve your objections and your  
9 positions. But I also want -- I want you to give me  
10 whatever case law you have that you think is pertinent to  
11 the decision so that I can, I can read those cases.

12 MS. WASSERMAN: That should be fine; and just  
13 so that we can encapsulate it, the issue is the  
14 admissibility -- basically, the admissibility of these  
15 notes and, in particular, with regard to statements --

16 THE COURT: Yeah.

17 MS. WASSERMAN: -- made by Ms. Kerr --

18 THE COURT: Right.

19 MS. WASSERMAN: -- to the EEOC investigator.

20 THE COURT: That's exactly -- well -- yes.

21 MR. MULAIRE: So, Your Honor, I had something  
22 slightly new in mind. That's fine as well --

23 THE COURT: What I want addressed is the  
24 applicability of 801(d)(2) as it relates to statements by  
25 Ms. Kerr.

1 MR. MULAIRE: Okay.

2 THE COURT: Okay. And that's going to be all,  
3 all statements by Ms. Kerr.

4 MR. MULAIRE: Okay. The, the notes that Ms.  
5 Mayfield took, however, are not simply interview notes of  
6 Ms. Kerr, but --

7 THE COURT: Right.

8 MR. MULAIRE: -- there's a host of other  
9 witnesses who are unambiguously not parties. You know,  
10 there's not even a colorable argument --

11 THE COURT: I'm sure --

12 MR. MULAIRE: -- as well. A few of them --  
13 have you actually interviewed any managers -- but, in any  
14 event, I mean, there are interview notes of witnesses  
15 other than Ms. Kerr, and so there --

16 THE COURT: Right.

17 MR. MULAIRE: -- is that component to this that  
18 is broader than the 801 exception.

19 And I did have a second point, and I could make  
20 that if now is a good time.

21 THE COURT: Please do.

22 MR. MULAIRE: And so that's just going back a  
23 couple of steps. I mean, if it were the case that the  
24 Court determines "no, it's not hearsay because the 801(d)  
25 exception applies," then under that scenario, I mean,

1 that would address our objection whether it would be to  
2 the notes being admissible or Ms. Mayfield's oral  
3 testimony about "what someone so said to me."

4 So, I mean if -- it's sort of -- I think they  
5 both rise and fall with this issue. If it's hearsay,  
6 then neither one is going to be okay, neither the notes  
7 nor her coming in person.

8 However if it is admissible -- and we don't  
9 think it should be; but if it is, then I don't think you  
10 need -- my apologies -- I don't think they need her here  
11 in person because, at this point, that would eliminate  
12 the hearsay objections that we have to notes, and they  
13 could simply move the notes into admission.

14 THE COURT: So --

15 MS. WASSERMAN: That's correct.

16 THE COURT: So let me give you my -- so you  
17 understand my background, I'm a former AUSA. I did it  
18 for 14 years. Okay? So the way I view this evidentiary  
19 question is similar to the way I would view an FBI agent  
20 taking notes during an interview -- all right? -- the  
21 admissibility of those interview notes.

22 Is there any reason that my analysis, using  
23 that as my framework, is incorrect? I mean, it's  
24 basically the same idea; and in, in those contexts, it's  
25 going to depend on the circumstances. I mean, I hate to

1 say that to you, but, but it does depend somewhat.

2 MR. MULAIRE: Yeah. I mean --

3 THE COURT: Go ahead. Go ahead, Mr. Mulaire;  
4 and then I'll turn to you, Ms. Wasserman.

5 MR. MULAIRE: I will correspondingly confess  
6 that I have never been an AUSA or done any criminal work,  
7 so I'm a little hesitant to speak authoritatively; but, I  
8 mean, I think it would depend, on significant part, on  
9 who the interview was of.

10 THE COURT: Correct.

11 MR. MULAIRE: If it was an interview of a  
12 criminal defendant, then that person's a party to the  
13 case.

14 You know, if it was an interview of somebody  
15 else who's not -- I would need to look into it a little  
16 bit more so --

17 THE COURT: And it also goes -- if the  
18 interviewer is on the witness stand, is it their personal  
19 thought? Or is it a summary of what's being said? I  
20 mean, it's going to --

21 MS. WASSERMAN: Right.

22 THE COURT: -- until I know what is in those  
23 notes, it's very hard for me to make just a general  
24 ruling on these.

25 MS. WASSERMAN: I --

1 THE COURT: If you want to submit to me what  
2 you have in mind, I can look at them, and I'll -- I'll be  
3 able to look at them and tell you what and how they would  
4 come in.

5 MS. WASSERMAN: Yes, Your Honor. I mean,  
6 preliminarily, we agree with Your Honor's analysis that  
7 this is a federal agent of the, of the -- the EEOC, but a  
8 federal investigator conducting an investigation. So we  
9 see the analogy.

10 THE COURT: Yeah.

11 MS. WASSERMAN: And it may make sense, as part  
12 of the submissions, to submit the notes in question.

13 THE COURT: Yeah. Whatever you -- I think  
14 whatever you're proposing to put in, why don't you give  
15 those to me so that I can look at them.

16 MR. MULAIRE: We could probably use the typed  
17 notes.

18 MS. WASSERMAN: Yes.

19 THE COURT: I've done some Medicare fraud in my  
20 time, --

21 MR. MULAIRE: Otherwise, he's going to tell us  
22 to submit them anyway.

23 THE COURT: -- so I'd prefer the typed notes if  
24 you --

25 MS. WASSERMAN: Absolutely.

1           And the other piece of that is we agree with,  
2 with Justin that in the event the Court determines that  
3 the notes are -- that authentication is waived and that  
4 they are admissible, there, there likely would be no need  
5 to bring a witness here to bring them in. We would be  
6 able to -- as long as they're admissible, --

7           THE COURT: Okay.

8           MS. WASSERMAN: -- we'd bring them in without a  
9 witness.

10          MR. MULAIRE: Yeah.

11          THE COURT: Okay.

12          MR. MULAIRE: And just to flag it -- I don't  
13 think it bears on this dispute -- the notes, there were a  
14 couple of allegations that Ms. Kerr made in her  
15 administrative charge. Way back when, she made three  
16 different claims. The EEOC is pursuing a claim of  
17 discharge.

18          THE COURT: Yeah. I think that was subject to  
19 a motion in limine.

20          MR. MULAIRE: Yeah. So, I mean, the notes will  
21 include some things to which we will have an entirely  
22 separate relevance objection --

23          THE COURT: Relevance objection.

24          MR. MULAIRE: -- to the extent they go to a  
25 harassment claim that's not at issue in the case.

1           Just so long -- we don't need to  
2           comprehensively articulate every objection we have to --

3           THE COURT: No, no, no, no.

4           MR. MULAIRE: -- the submission?

5           THE COURT: No. All I want you to do is just  
6           the general understanding of whether the notes themselves  
7           are admissible -- or even the statements, obviously.

8           So --

9           MR. MULAIRE: Okay.

10          THE COURT: All right. So we'll take that up  
11          once I see -- so you'll, you'll give me both of those on  
12          Friday; is that right? The 801(d)(2), the position you  
13          have on the 801(d)(2) issue and then also the interview  
14          notes as far as the admissibility? All right.

15          MS. WASSERMAN: Yes, Your Honor.

16          MR. MULAIRE: Yes.

17          THE COURT: So I'm trying to keep a running  
18          tally as well, and I know Tom's doing a better job than I  
19          am.

20          All right. The third instruction is a general  
21          damages instruction that was submitted. EEOC gave a, its  
22          own instruction. Just from having reviewed it, I think  
23          that the EEOC one is the one I'm likely going to give,  
24          unless there's some basis for why you want that first  
25          sentence that isn't included in the pattern instructions.

1 MS. WASSERMAN: Right. That's the one --  
2 that's the one that just brings it all together --

3 THE COURT: Yeah.

4 MS. WASSERMAN: -- and tells the jury what  
5 they're the doing.

6 THE COURT: Yeah, yeah. Which is --

7 MS. WASSERMAN: Yeah. That's --

8 THE COURT: -- separately -- that's separately  
9 covered as part of the compensatory damages instruction.

10 MS. WASSERMAN: That's fine, Your Honor.

11 THE COURT: All right. So we're going to give  
12 the EEOC one, but we'll formalize that during the formal  
13 conference; and if something changes along the way....

14 And then the compensatory damages instruction,  
15 if you can help me understand -- and maybe it's just that  
16 I, I, I misunderstand the issue; but I always took the  
17 "after-acquired evidence" portion to limit back pay and  
18 front pay awards. And so if we're not going to submit  
19 the back pay to the jury, why do we need the  
20 "after-acquired evidence" portion there at the end?

21 MS. WASSERMAN: We're fine with that, Your  
22 Honor.

23 THE COURT: Okay. All right. So what we'll --  
24 we'll likely give EEOC's Number 2 then as well.

25 And the next -- the mitigation of damages,

1    though, that's the last issue and sounds like one the two  
2    of you have talked about; and it's one I, frankly, would  
3    like to hear your thoughts on.  Even though I read your  
4    submissions on the issues, I am interested to hear what  
5    your thoughts are because it does require, obviously --  
6    the mitigation of damages does require some fact-finding,  
7    and so my question to both of you on this is, is, is:  
8    Who do you propose makes those factual determinations?  
9    And is there a way that we submit those factual  
10   determinations?

11           And what I'm talking about is, is the obvious  
12   question regarding the effort to find comparable  
13   employment.  Do we submit that to the jury, and then I  
14   take that as part of the back pay analysis?  Or is this  
15   something that -- or do you all want me to make the  
16   factual finding as to the reasonable efforts and whether  
17   the employment was comparable?

18           All right.  So that's my question.

19           Now, it's your instruction.  I'll let you  
20   start, Ms. Wasserman.

21           MS. WASSERMAN:  Right.  From our perspective,  
22   it -- the jury should be the entity that determines  
23   mitigation of damages because it's not only mitigation of  
24   damages and the fact finding with regard to whether she  
25   was looking for a job, but that information goes to other

1 claims as well. It goes to the emotional distress claim.  
2 If she couldn't find a job because -- and that was  
3 leading to her emotional distress, for example -- the  
4 jury gets to hear everything related to that emotional  
5 distress claim because it is for the jury to decide.

6 THE COURT: Did she give any indication of that  
7 during her deposition, that her unemployment was, was  
8 contributing to the emotional distress?

9 MR. TRUSEVICH: Your Honor, I just don't -- I,  
10 I took it, and it was seven hours. I just don't recall.

11 THE COURT: Okay.

12 MR. TRUSEVICH: I'll have to look.

13 THE COURT: All right.

14 MR. TRUSEVICH: I just don't recall, Your  
15 Honor.

16 MS. WASSERMAN: But, regardless, it is a  
17 preliminary issue that needs to be decided. And we  
18 believe that even though it's for the Court to determine  
19 the amount, the jury has to determine whether or not  
20 there is an amount that's appropriate; and mitigation  
21 goes directly to that.

22 THE COURT: Okay. Mr. Mulaire, --

23 MR. MULAIRE: So --

24 THE COURT: -- what do you think about that  
25 issue?

1 MR. MULAIRE: Yeah. A couple of points. I  
2 mean, it is true that there will be fact finding that's  
3 necessary; but just because there's fact finding doesn't  
4 necessarily mean that it goes to the jury. I mean, even  
5 apart from mitigation, there's fact finding that's  
6 necessary to determine gross back pay even before you  
7 figure out what --

8 THE COURT: Sure.

9 MR. MULAIRE: -- subtractions might be  
10 appropriate. And that's fact finding, but nobody  
11 disputes that that's for the Court to decide.

12 So the simple fact that there's a dispute of  
13 fact doesn't automatically equal "the jury decides it."

14 Under the, the structure of Title VII as we --  
15 you know, I won't repeat everything in our briefs; but,  
16 you know, the structure of Title VII is such that back  
17 pay is an equitable remedy that's decided by the Court;  
18 and to the extent that mitigation of damages -- while  
19 that's the colloquial phrase, "mitigation of damages,"  
20 it's really mitigation of back pay.

21 THE COURT: Right.

22 MR. MULAIRE: The statutory justification for  
23 the mitigation of damages defense to back pay comes from  
24 this section of Title VII that confers that equitable  
25 remedial authority on the Court; and so to the extent

1 that it's a back pay -- it's a defense to that equitable  
2 remedy, it's a subsidiary issue of back pay.

3 There are, indeed, disputes of fact but, you  
4 know, they should be decided by the Court.

5 I can also state that as far as I recall, I  
6 don't believe Ms. Kerr testified about experiencing  
7 emotional distress as a result of her unemployment. I  
8 will also simply represent that we will forgo relying on  
9 any such testimony, even if it is the case that she  
10 experienced some -- that's, that's not evidence that we  
11 will be relying on.

12 So we take issue with this statement that the  
13 mitigation evidence is relevant to other claims. You  
14 know, the specific other claim -- it was mentioned there  
15 was emotional distress; and for the reason I just  
16 mentioned, it won't be relevant to that.

17 I think -- that's what I think on the issue.

18 THE COURT: All right.

19 MS. WASSERMAN: But given the -- but going back  
20 to the, to the comment about it being a fact-finding  
21 mission, it really is a very intricate, detailed fact  
22 analysis. And while we recognize that the amount of back  
23 pay -- and I think that it differs from the issue of the  
24 gross amount of back pay versus the net amount of back  
25 pay. I think it differs from that.

1           This is really a more detailed analysis that  
2 has to be done. And given it is a fact-finding  
3 adventure -- fact-finding venture, it is in the purview  
4 of the jury to make that decision; and that's why we  
5 believe that the issue of mitigation really does need to  
6 go before the jury.

7           THE COURT: Mr. Mulaire, let me ask you: As  
8 far as -- what would the EEOC's position be if the Court  
9 submitted just the two factual questions to whether the  
10 plaintiff took reasonable action to reduce her damages  
11 and whether the plaintiff reasonably might have found  
12 comparable employment if she had taken such action?  
13 Without putting any dollar figures to the jury, what's  
14 your thoughts on that?

15           MR. MULAIRE: I mean, the logistical -- to  
16 start with, the logistical problem with that would be  
17 that --

18           THE COURT: You still have to get into what's  
19 comparable, don't you? And that becomes money and so  
20 forth.

21           MR. MULAIRE: Correct. There's no bright line  
22 between those questions and translating it into dollars.

23           But even more fundamentally, there's another  
24 line-drawing problem that that doesn't account for, which  
25 is that mitigation of damages is not a "yes" or "no" or

1 an all-or-nothing proposition.

2 It could be that, you know, if somebody's  
3 unemployed for -- I think the period of time here for  
4 which we're seeking back pay is a two-year period. It  
5 could well be -- this isn't our position; --

6 THE COURT: I know.

7 MR. MULAIRE: -- it could well be that the  
8 finder of fact decides "she looked reasonably hard for  
9 the first 12 months; but after that, not so much."

10 And so you would need -- I mean, the fact  
11 finder is not simply deciding "yes, you looked," or "no,  
12 you didn't" for that whole two-year period, but is  
13 deciding "did you for the whole two-year period" or "did  
14 you initially but then it tapered off," or -- you know, I  
15 think -- well, anyway, I made the point clearly enough.

16 THE COURT: Yeah. I understand your point.  
17 Yeah.

18 MR. MULAIRE: So that would need to be built  
19 into the analysis; and the jury instruction that they  
20 proposed sort of chops up the question of mitigation,  
21 mitigation of damages into pieces and attempts to give  
22 those "yes" or "no" questions to the jury, purporting to  
23 reserve to the Court to then somehow translate that into  
24 a dollar figure to subtract.

25 And it's entirely unclear how you would get

1 from -- you know, if the jury -- well, first of all, the  
2 question to the jury isn't appropriate because it's an  
3 all-or-nothing thing, and that's not the nature of the  
4 question that needs to be decided.

5           You know, if the jury returned and said, "Yes,  
6 she attempted" -- you know, "she attempted to find work;  
7 she made a reasonable effort," that doesn't tell you:  
8 For the whole period? For a year? For six months? For  
9 18 months?

10           And so, logistically, what they proposed is --  
11 even if one were making the argument that mitigation of  
12 damages is a jury question, I can't think of any logical  
13 reason to try and sort of separate it up into pieces like  
14 this and give part to the jury and reserve part for the  
15 Court. That's not an approach that's recommended by the  
16 civil -- you know, the pattern instructions anticipate  
17 either this issue will go to the jury or won't, not  
18 dividing it up this way.

19           So I'm not aware --

20           THE COURT: Would EEOC object to submitting the  
21 question of back pay and mitigation of damages as an  
22 advisory question to the jury?

23           MR. MULAIRE: Yeah. We would, Your Honor.

24           THE COURT: Okay.

25           MR. MULAIRE: And part of the reason here -- I

1 don't want to go too far in speculating as to why my  
2 colleagues want to do certain things; but, you know, to  
3 lay our cards on the table here, I mean, they -- the  
4 evidence that they characterize as evidence of failure to  
5 mitigate -- and we have some disputes about whether --

6 THE COURT: Sure.

7 MR. MULAIRE: -- there's actually --

8 THE COURT: No, I --

9 MR. MULAIRE: -- evidence of that.

10 THE COURT: -- understand you have different  
11 views of the same piece of paper. I understand that.

12 MR. MULAIRE: You know, what I think they  
13 consider a value generally in terms of -- well, let me  
14 phrase it in terms of what we think.

15 They're prejudicial. I mean, there are things  
16 that they've gone back and found from, you know, as far  
17 as 20 years in her past that they want to say, "Well, you  
18 know, you didn't actually leave the military with that  
19 rank. Isn't it true that, you know, you lied about  
20 that?"

21 And I think the connection of that to  
22 mitigation of damages is exceptionally tenuous to begin  
23 with; but, I mean, that's, you know, the only hook there  
24 really is for bringing that stuff into the case,  
25 certainly to introduce the documents which would

1 otherwise not be relevant to anything directly; and so it  
2 would be extrinsic evidence to the extent any of this  
3 would be permitted as, you know, impeachment or  
4 credibility evidence.

5 And so, you know, the value to them and the  
6 prejudice to us is that this is stuff that, you know, the  
7 jury is not supposed to hear about because it goes to an  
8 issue that's supposed to be decided by the Court; that  
9 is, ultimately, back pay. And mitigation, again, is a  
10 subsidiary issue of that. Sending it to the jury as an  
11 advisory verdict would prejudice us because it's -- you  
12 know, it's likely to be used in a way that casts  
13 aspersions that we think are completely unfair, you know,  
14 on Ms. Kerr. And so to the extent it's not a jury issue,  
15 you know, simply giving it to the jury as an advisory  
16 role would give us all the prejudice; and, you know, we  
17 don't see any benefit to submitting it to the jury for an  
18 advisory verdict.

19 THE COURT: All right. Ms. Wasserman, your  
20 thoughts, and then I will -- go ahead.

21 MS. WASSERMAN: A couple of things. First of  
22 all, I think while there are pattern instructions, there  
23 are ways of modifying things; and an easy way of  
24 modifying the, the verdict form would be to pose the  
25 question of mitigation and then have another question --

1 "If you've determined that she completely failed to  
2 mitigate, your answer is X. If you believe that she  
3 mitigated for a period of time, identify the number of  
4 months that you believe she mitigated for" -- and that  
5 would be a way of getting around the notion of the "all  
6 or nothing," how to get some sort of a resolution from  
7 the jury on when and how long she mitigated. That's one  
8 point.

9 Another point is: The evidence that we're  
10 talking about is, is -- I mean, we're not going to hide  
11 any balls. We're talking about resumes and information  
12 that she utilized to seek other employment. We're, we're  
13 going to address this so there's no need to walk around  
14 it or dance around it. And at Ms. Kerr's deposition, she  
15 testified and was asked significant questions about her  
16 efforts to seek other employment and the resumes that she  
17 submitted in order to seek other employment; and those  
18 resumes had significant inaccuracies that were testified  
19 about in detail at the deposition.

20 So, yes, they do go to credibility because if  
21 she's putting one thing out there to try to get work but  
22 the truth is something else, that is a credibility issue.  
23 It goes directly to the witness's credibility. And being  
24 she's the charging party and she's the individual for  
25 whose benefit this jury is going to be impaneled --

1 because it's not the agency's benefit; they're going to  
2 determine how much money, if any money, to give to Ms.  
3 Kerr -- her credibility is clearly at issue.

4 But it's the mitigation piece -- these resumes  
5 go to the heart of mitigation; and it's something that  
6 the jury should be deciding, whether or not she properly  
7 mitigated. And that's what, that's what we're talking  
8 about.

9 THE COURT: Okay.

10 MS. WASSERMAN: And I think that the issue of  
11 allowing the jury to decide mitigation, and how long, is  
12 appropriate.

13 We also do not believe that there is any--  
14 would be anything wrong with the jury providing the  
15 advisory opinion. This is, this is not an easy issue;  
16 and we believe that, were the jury to hear all the  
17 evidence -- I mean, that's why they're being impaneled;  
18 that's why they're giving their civic duty, is to make  
19 some decisions in this case -- and for them to provide  
20 the advisory opinion, we don't believe that there's  
21 anything inappropriate about that. We don't believe that  
22 there's anything prejudicial because it's based upon the  
23 evidence that's going to be presented at trial.

24 And if the EEOC really wants this to go to  
25 trial and wants there to be a jury trial, then the jury

1 should be allowed to make this decision. I mean, we've  
2 raised the issue with counsel about why don't we just  
3 wrap this in a nice, neat little bow and try our case for  
4 Your Honor and do this as a bench trial since the Court  
5 is going to be determining some of the amounts of damages  
6 anyway, and the offer was declined.

7           So that being the case, we don't believe that  
8 the EEOC should be allowed to have their cake and eat it  
9 too. "Well, we'll give the jury certain things that we  
10 want them to hear; but certain things that we don't want  
11 them to hear, that's okay for the judge to hear. Either  
12 have the judge hear -- Your Honor hear the entire case as  
13 a bench trial, or have the jury hear the entire case and  
14 provide whatever advisory opinion the Court may or may  
15 not elect to take, but let them hear everything that they  
16 need to hear.

17           THE COURT: All right. Mr. Mulaire, I'll give  
18 you the last word, and then --

19           MR. MULAIRE: Yeah, --

20           THE COURT: -- we'll move on.

21           MR. MULAIRE: -- two points. I mean, one -- I  
22 mean, the question of whether something is a jury trial  
23 or not is not an all-or-none exercise. I mean, it's  
24 not -- I mean, the fact that we believe there would be  
25 prejudice in showing things to the jury that aren't

1 relevant to the matters that they're actually deciding --  
2 not issuing an advisory verdict on doesn't mean that --  
3 that's not our reason for asking the Court to consider  
4 back pay.

5           It's because Title VII is designed in a way  
6 that commits back pay to the Court. I mean, that's,  
7 that's a function of the way Congress wrote the statute.  
8 I mean, the way jury trials were appended onto Title VII,  
9 they weren't there in the first place. The Civil Rights  
10 Act of 1991 added them, but it added them not as an  
11 all-or-nothing proposition, but simply for, you know,  
12 the -- for liability, compensatory damages, and punitive  
13 damages.

14           The other things that the Court decides, which  
15 are equitable in nature -- and back pay is; even though  
16 it might not be under other statutory schemes, for  
17 purposes of Title VII, it is an equitable remedy -- it's  
18 the statute that commits that to the Court. It's not our  
19 preference about what the jury does or doesn't hear.

20           An advisory verdict wouldn't relieve the Court  
21 of having to make a fact finding. You know, the Court  
22 would still have an obligation to make its own decision;  
23 and, you know, frankly, the prejudice concerns that we  
24 have would be alleviated by having the Court hear the  
25 mitigation evidence because the risk of confusion of

1 issues is just different when, you know, the Court is  
2 considering certain evidence. You know, we don't have  
3 the same concerns that, you know, evidence shown to the  
4 Court will then lead to, you know, other applications  
5 that aren't intended; whereas, with jurors, that is more  
6 of a risk. That's why, you know, frequently, you know,  
7 pure bench trials, there are sort of fewer rulings on  
8 admissibility and things are taken under, you know,  
9 advisement more frequently.

10 So, our, our position is that it's, you know, a  
11 function of the statute; that it's a jury question, --

12 THE COURT: All right.

13 MR. MULAIRE: -- and it can't be chopped up in  
14 the way that the defendant is proposing.

15 THE COURT: I'm going to look -- there's a case  
16 I want to read again, so I'm going to reread that this  
17 afternoon, and I'll get something out tomorrow or first  
18 thing Wednesday morning.

19 MS. WASSERMAN: May I ask a question, though?

20 THE COURT: Sure.

21 MS. WASSERMAN: It appears as though we're  
22 looking to bifurcate the case. I mean, that sounds like  
23 what we're now hearing, is sort of an attempt at  
24 bifurcating this trial, because that -- there would be  
25 two separate sets of evidence and two separate sets of

1 witnesses: one that would be going, that the jury would  
2 be hearing and one that only the Court would be hearing.

3 Is that what we are now looking at?

4 Because if the mitigat-- if we're talking about  
5 the trial being bifurcated on back wages --

6 THE COURT: No. I think that --

7 MS. WASSERMAN: -- then that's a whole meaty  
8 trial in and of itself.

9 THE COURT: What I understand Mr. Mulaire's  
10 point to be is that the question of liability goes to the  
11 jury. The question of compensatory damages/punitive  
12 damages goes to the jury.

13 The question of back pay and amount of back pay  
14 and whether the, Ms. Kerr mitigated damages as it relates  
15 to back pay and poten-- possible front pay comes to me.

16 I think that's the point you're making, right?

17 MR. MULAIRE: That is the point.

18 THE COURT: That's it.

19 MR. MULAIRE: And --

20 THE COURT: And so I'll take a look at it, and  
21 we'll see where things go.

22 MR. TRUSEVICH: Your Honor, may I ask just one  
23 procedural question? Again, I'm sorry. I'm used to --

24 THE COURT: All right. 3:45 is going to sneak  
25 up on us if we keep going at this rate.

1 MR. TRUSEVICH: Yeah, I know, Your Honor. I  
2 apologize.

3 But how would that work if, if I'm going  
4 through -- or, you know, whether I cross Ms. Kerr or Ms.  
5 Wasserman crosses Ms. Kerr -- and it says on the resumes  
6 a point in the mitigation, is the jury still hearing --  
7 you know, I'm addressing it to you because --

8 THE COURT: If, if --

9 MR. TRUSEVICH: -- but the jury's still hearing  
10 it?

11 THE COURT: So the way I would do it is I'm not  
12 going to have a second mini trial on this thing. The way  
13 we're going to do it is we'll excuse the jury momentarily  
14 while we ask those questions as it relates to that  
15 particular witness, so -- I don't know that we're going  
16 to do it that way. I haven't made a decision yet because  
17 I want -- like I said, there's a case I want to read  
18 again.

19 MR. TRUSEVICH: All right, Your Honor.

20 THE COURT: But as far as procedure goes, we're  
21 not going to bring everybody back three times. I'm not  
22 going to make you all come back three times. We're going  
23 to -- we'll just tell the jury, "There's some things  
24 we've got to do with this witness outside your presence.  
25 Have another doughnut. Drink some more coffee. We'll

1 see you in 45 minutes."

2 MR. MULAIRE: Related to that, Your Honor, I  
3 mean, these -- as far as I know, Ms. Kerr is the only  
4 witness who would be testifying about that. I mean, if  
5 she needs to be available a second time at the end of the  
6 day, you know, that's, that's something that we're fine  
7 with.

8 THE COURT: Yeah.

9 MR. MULAIRE: I mean, it's not the case that --  
10 I mean, we don't have any other witnesses to present in  
11 connection with back pay --

12 THE COURT: As far as it relates to back pay  
13 or --

14 MR. MULAIRE: -- or mitigation.

15 THE COURT: I assumed you might have a witness  
16 or two. I guess I was making an assumption.

17 MR. MULAIRE: I don't think anyone was  
18 disclosed for that purpose.

19 THE COURT: Okay. All right.

20 All right. Well, let me -- like I said, I want  
21 to take a look at -- I want to take a look at something  
22 in particular that I recall reading yesterday, and so I  
23 want to look at that again; and we'll get something out  
24 tomorrow --

25 MR. MULAIRE: Thank you, --

1 THE COURT: -- or first thing Wednesday on the  
2 issue.

3 MR. MULAIRE: -- Your Honor.

4 (Brief pause in proceedings.)

5 THE COURT: All right. Let's get to -- I'm  
6 going to -- verdict forms. I don't think we need to  
7 spend any time on those right now. We'll finalize those  
8 at the charging conference. I may have a few things I  
9 want to address. Let's get that straight now.

10 Let's go -- let's take up the EEOC's motions in  
11 limine now. All right docket entry 65 is the EEOC's  
12 first motion in limine regarding -- I took it to mean,  
13 Mr. Mulaire, the phrase "stolen valors," which you want  
14 barred; it's not the, not any misstatements about  
15 military background or anything like that.

16 MR. MULAIRE: No.

17 THE COURT: You're really looking to exclude  
18 something that's drawn on the heart --

19 MR. MULAIRE: That, that's the focus of this  
20 motion in limine.

21 THE COURT: Yeah.

22 MR. MULAIRE: We're not waiving objections to  
23 other things.

24 THE COURT: I know you're not; but as far as  
25 that motion in limine, you just want to keep that phrase

1 out? Is that right?

2 MR. MULAIRE: Correct.

3 And, Your Honor, while you addressed the  
4 question to me and I answered it, if I may, Mr. Shultz  
5 can address 1 through 5; and I'll address 6 through 10,  
6 if that's all right.

7 THE COURT: Perfect. And no objection to not  
8 using "stolen valors"; is that right?

9 MR. TRUSEVICH: Absolutely.

10 THE COURT: So we're going to allow that  
11 motion.

12 Docket entry 66 is the EEOC's second motion in  
13 limine relating to evidence of, of Ms. Kerr's unrelated  
14 charge allegations of harassment and discrimination. I  
15 just need a little more information about what was said,  
16 by whom, how it's intended to be used. I just -- there  
17 wasn't enough in what was submitted for me to understand  
18 exactly what's at issue.

19 MR. SHULTZ: Sure, Your Honor.

20 THE COURT: Go ahead.

21 MR. SHULTZ: Oh, so the defendant wants to use  
22 the charge of discrimination which, as Mr. Mulaire  
23 indicated, has harassment, --

24 THE COURT: Right. There are three claims,  
25 right?

1 MR. SHULTZ: -- demotion, and discharge. And  
2 the only claim that is at issue in this lawsuit is the  
3 discharge claim. So we, we wouldn't -- we object to  
4 referring to the other two unrelated charge  
5 allegations --

6 THE COURT: Okay.

7 MR. SHULTZ. -- and focusing just on, demo--  
8 just on termination because that's the only relevant  
9 claim in the lawsuit. And discussion about the  
10 harassment or demotion charged in the administrative  
11 charges bear no relevance to whether she was  
12 discriminatorily discharged.

13 THE COURT: All right. From Rent-A-Center's  
14 perspective?

15 MR. TRUSEVICH: Yes, Your Honor. The issue  
16 is -- first of all, the EEOC has actually drafted --  
17 there were multiple iterations that they sent over to us.  
18 They actually drafted the charge; so it's not Ms. Kerr  
19 who hand-wrote out the charge. EEOC drafted the charge,  
20 sent it to her, and included those claims.

21 And I think what happened is at her deposition  
22 all of us -- including Justin and Miles -- for the first  
23 time she said, "Yeah. And, by the way, Russ Kasper was  
24 making discriminatory, humiliating, and embarrassing  
25 remarks two to three times a day from March 2013 when she

1 transitioned to the time he was terminated, nine months."

2 And I said, "You heard all three?"

3 She said, "Not three, but at least two; so you  
4 do the math."

5 And the reason we think that's relevant, Your  
6 Honor, I understand they're only suing us for the  
7 termination because of the statute of limitations; but,  
8 Your Honor, if, if -- I think the jury has to know if  
9 someone is making discriminatory, humiliating, demeaning,  
10 embarrassing comments two to three times a day -- which,  
11 by the way, she's pointing her finger at their other  
12 strong witness, Russ Kasper -- and they want to keep that  
13 out of the firing squad -- she never complained during  
14 that nine months. I think the jury needs to hear that.

15 Is that reasonable? Did someone really make  
16 two to three comments for nine months every day? And  
17 that was her deposition testimony, Your Honor, two to  
18 three embarrassing, humiliating, discriminatory comments  
19 two to three times a day for nine months. And, yet, she  
20 never complained.

21 But what she did tell Investigator Mayfield is  
22 Mr. Kasper would tell a customer, "Oh, she used to be a  
23 man."

24 Ms. Kerr then went to Carnahan, the district  
25 manager. He talked to Kasper. And Ms. Mayfield,

1 Investigator Mayfield, writes in her notes, "Kasper  
2 stopped," and that was her only complaint to Respondent.

3 And, again, so that inconsistent -- I think the  
4 jury has to hear that, or it cuts the legs from under us,  
5 Judge; so that's the relevancy.

6 MR. SHULTZ: Two points regarding the drafting  
7 of the charge. So an individual fills out a  
8 questionnaire, has an intake interview with an intake  
9 officer; so the EEOC's not making any --

10 THE COURT: I know.

11 MR. SHULTZ: -- representations about --

12 THE COURT: Yeah. I know how the process  
13 works.

14 MR. SHULTZ: Yeah. So, you know, Ms. Kerr said  
15 she had, she believes she was discriminated in those  
16 three ways. You know, we investigated and made a  
17 determination that only had a cause finding for the  
18 discharge. There wasn't any sort of finding made  
19 regarding the two other claims. And the claim at issue  
20 here is just discharge; and to bring in evidence  
21 regarding two other adverse actions -- demotion and  
22 harassment -- would just confuse the issue for the jury,  
23 which should just be focused on whether she was  
24 discriminatorily discharged.

25 THE COURT: Are you seeking to bring in her

1 statements about what Kasper was reportedly doing? Is --  
2 you're not trying to get in any EEOC findings as it  
3 relates to those other two charges, are you?

4 MR. TRUSEVICH: No. No, Your Honor. It is  
5 simply the fact that -- and I think it surprised  
6 everybody -- that she said that Kasper was making  
7 these -- and that's their, their witness.

8 And I took his deposition two days after hers,  
9 and I said, "Mr. Kasper, are you aware that two days ago  
10 she said you made these discriminatory statements two to  
11 three times a day for a nine-month period?"

12 And he said, "That never happened."

13 And I think again, Your Honor, a jury has to  
14 hear that. They want to prop her up there and just say,  
15 "Yep. I was terminated on July 20th. I was set up, and  
16 it's all, all because I transgendered."

17 They want Kasper to come up and say, "Yep, the  
18 DM told me for nine months, 'Hey, find a way to fire her  
19 because she's transgendered'" and never hear of  
20 conflicting stories. Somebody is not telling the truth.

21 So, Your Honor, harassment is a form of  
22 discrimination, and so that's one reason. And if it  
23 comes out -- they are, they are literally wanting to take  
24 that out -- then why is Mr. Kasper even coming in as a  
25 witness? He ought to be excluded as a witness because he

1 was fired in December of 2013. Seven months later is  
2 when she was fired. Kasper had already been gone for  
3 seven months. So if they're going to bring him in to  
4 prove that DM discriminatory animus, we have to get this  
5 in, Your Honor.

6 At least, with all due respect from  
7 Rent-A-Center to Your Honor, it is a critical piece of  
8 evidence on, for the jury to determine who's telling the  
9 truth. I think if someone is -- if that much  
10 discrimination was going on and we have all these  
11 open-door reporting procedures, I think the logical thing  
12 the jury would say is: Yes, she would have complained if  
13 it was really happening the way she says. Or is she just  
14 exaggerating or making it up, Judge?

15 But if you, if you knock that out, then  
16 Rent-A-Center's position is then Kasper shouldn't even  
17 testify.

18 THE COURT: All right. It's your motion. I'll  
19 give you the last word.

20 MR. SHULTZ: Again, Your Honor, the EEOC is not  
21 trying to pursue and prove liability regarding harassment  
22 and demotion; and to discuss those two issues, which,  
23 while they are forms of discrimination, they're not  
24 adverse actions for which the Commission has sued  
25 Rent-A-Center. And the jury should just be focused on

1 discharge, and to bring in the two other issues that were  
2 alleged in the charge simply bears no relevance to  
3 whether Rent-A-Center discriminatorily discharged her.

4 THE COURT: All right. I'm going to deny the  
5 motion as it relates to, to the allegations, but I'm not  
6 going to allow any EEOC findings as it relates to those  
7 allegations. So don't -- I'm, I'm taking you at your  
8 word that you're not going to try to bring those in, so  
9 let's, let's not try to create any inferences or anything  
10 else as it relates to that.

11 On that same, there was another -- in that same  
12 motion was a request to bar evidence regarding Ms. Kerr's  
13 prior employment. Again, what's really at issue here?  
14 How's the -- how do you anticipate it's going to be used?

15 MR. SHULTZ: It kind of goes to what we were  
16 discussing earlier about mitigation of damages.

17 THE COURT: Okay.

18 MR. SHULTZ: You know, they got --  
19 Rent-A-Center subpoenaed records for several years prior  
20 to Ms. Kerr even working at Rent-A-Center, and then after  
21 Rent-A-Center; so it's kind of in conjunction with the,  
22 you know, why mitigation and back pay should go to the  
23 Court and not to the jury. Again, it would confuse  
24 issues and because it would be overly prejudicial to the  
25 Commission.

1 THE COURT: What's Rent-A-Center intending to  
2 bring in and that they're trying to bar?

3 MR. TRUSEVICH: I apologize for, that I keep  
4 standing up. I'm just --

5 THE COURT: That's okay; it's not a bad habit,  
6 by any means.

7 MR. TRUSEVICH: Thank you, Your Honor.

8 You know, prior employment and educational  
9 history, again, if, if she didn't testify at her  
10 deposition, saying, "Yep," you know, "here's my  
11 educational background."

12 THE COURT: Will you pull that microphone to  
13 you?

14 MR. TRUSEVICH: I'm, I'm sorry. You --

15 THE COURT: That's okay. We don't have a court  
16 reporter today, so we've got to make sure we pick  
17 everything up.

18 MR. TRUSEVICH: Your Honor, if she hadn't  
19 testified in her deposition that -- and I gave her  
20 several opportunities, saying, "Megan, that's just not  
21 true. Do you want to, to back out of this?"

22 And she'd say, "Absolutely not." You know,  
23 "Here's what my educational rank is. Here's my prior  
24 employment. I was the" -- on her resume, she said, "I  
25 was a small business owner. I was successful at it."

1           And, Your Honor, with all due respect to my  
2 colleagues, it is absolutely just patently false that she  
3 was a franchisee at Enzo's at the Champaign mall at 19  
4 years old; that she was a franchisee owner of Game Stop.  
5 And not that it makes a difference to them, but they  
6 asked me who two witnesses were. The two witnesses are  
7 the owners of the business who I just talked to last week  
8 and said -- and we're not calling them, so it doesn't  
9 matter.

10           But, Your Honor, she testified to this in a  
11 depo, and I asked her that. And I said, "Are you saying  
12 that you were a franchisee of Enzo's Pizza? You weren't  
13 just a store manager?"

14           And in her application, she says --

15           THE COURT: To you?

16           MR. TRUSEVICH: -- totally -- to us -- totally  
17 different than what she said in her depo, and she  
18 double-downed in her deposition.

19           And I said, "Are you as positive about you  
20 being a franchisee, business owner, executive chef of  
21 Enzo's Pizza, of Cox Video, as you are about Jason Morris  
22 handing you the keys and giving you permission? Are you  
23 as positive about that, Megan?"

24           And she looked at all of us straight in the eye  
25 in the camera and said, "Yes, sir, I am."

1           And, Judge, again, it goes to the credibility.  
2 I can tell you -- and I'm -- like number three: I  
3 totally agree; the divorce and child proceedings, we're  
4 not going to get into that at all, and we agree to it.

5           But the prior employment and the educational  
6 history, Judge, again, it is -- they are saying our store  
7 manager gave her the keys on Saturday night; said, "Sure.  
8 Go take the truck on Sunday," set her up, and then came  
9 in on Monday and said, "Did you use the truck, Megan?"

10           "Yeah. You know I did, Boss. You gave me the  
11 keys.

12           "Yeah. I'm gonna have to let you go."

13           Somebody is absolutely telling a lie, Judge;  
14 and I'd prefer you, Your Honor determining that -- but so  
15 be it; it's the jury -- and if the jury doesn't hear that  
16 full story, Judge, all they're going to hear is a  
17 sympathetic person coming up, going, "Yeah. He gave me  
18 the keys, and he told me to go take the truck. I took  
19 the truck, and, and they had this conspiracy that --  
20 well, he must have had a conspiracy because he went up  
21 there and took a picture of it and then fired me on  
22 Monday."

23           It's a fourth of the story, Your Honor. So her  
24 prior employment and educational history -- if we just  
25 went and found that on our own and said, "Oh, you really

1 didn't do this ten years ago." But I can provide  
2 deposition testimony -- page, line after line after  
3 line -- in that seven hours.

4 And I'd go back to it. I said, "Are you still  
5 sticking to what you said an hour ago?"

6 "Yes, sir, I am. I was a franchisee.

7 "Do you have any documents to prove that?"

8 "No."

9 So, Your Honor, it -- I know they say it's  
10 prejudicial. It's the facts, and that's what it is. And  
11 somebody is not telling the truth, Your Honor. It's  
12 credibility.

13 MR. SHULTZ: And to be -- to the extent that he  
14 wants -- that Rent-A-Center wants to impeach Ms. Kerr on  
15 the witness stand -- "Didn't you say X, and that's not  
16 true?" -- that's fine.

17 But to bring in all these records, it's just  
18 extrinsic evidence of a collateral matter. The matter at  
19 hand is what Mr. Trusevich just said about: Did Jason  
20 Morris on Saturday give permission for Megan to use the  
21 truck on Sunday, and was she fired on Monday? The  
22 evidence should be -- the admitted evidence should be  
23 pointed to that event and not to whether, you know,  
24 20 years prior she was actually a pizza franchise owner  
25 in Texas.

1 To -- if they want to use that for, you know,  
2 impeachment orally, that's one thing; but to bring in the  
3 actual evidence to prove that up is barred by the  
4 Extrinsic Evidence Rule. And, you know, the Federal  
5 Rules of Evidence really points to this fact-finding  
6 mission regarding the, the claims at issue in this  
7 lawsuit. And that's just an extrinsic area that's not at  
8 issue in the lawsuit. It's pointed to that Saturday  
9 event, the Saturday and Sunday events.

10 THE COURT: Other than her application, what --  
11 are you intending to bring in other records?

12 MR. TRUSEVICH: So, Your Honor, there are some  
13 other records where she lists different positions; so in  
14 her deposition, she said, "Nope. I was a  
15 franchisee/co-owner.

16 "You were the highest person there?

17 "Yes, I was."

18 There's two different documents where she says  
19 just the opposite, Your Honor; so we are intending to  
20 produce documents that, in her own handwriting, that show  
21 a different story.

22 THE COURT: All right. Are they authenticated?  
23 Or what's the status of those records beyond just the  
24 admissibility as it goes to the relevance?

25 MR. TRUSEVICH: So we have the custodian of

1 records --

2 THE COURT: Okay.

3 MR. TRUSEVICH: -- from, like, let's say, the  
4 military or from us; and it's her own handwriting, Your  
5 Honor, and her signature and date.

6 MR. SHULTZ: And I'd note that our, our ninth  
7 motion in limine deals with extrinsic evidence, so --

8 THE COURT: Yeah. I saw it. Yeah, yeah.

9 (Brief pause in proceedings.)

10 THE COURT: I'm going to look at -- there's one  
11 thing I want to check tonight again as it relates to the  
12 collateral documents, so I want to look at those real  
13 quick before I make a ruling on this; but I'll get --  
14 I'll incorporate that as part of my written order  
15 tomorrow.

16 MR. TRUSEVICH: Yes, sir.

17 THE COURT: Tom, make note that we need to  
18 include this as part of it.

19 (Brief pause in proceedings.)

20 THE COURT: I'm glad you agree that you're not  
21 going to try to get the divorce and custody proceeding,  
22 the fact that she's behind in child support, because I  
23 was, I was going to grant that anyway; so it sounds like  
24 it's by agreement, right?

25 MR. TRUSEVICH: It is, Your Honor.

1 THE COURT: All right.

2 MR. TRUSEVICH: The only thing I just wanted to  
3 make the Court aware is, the -- and, again, you know, we  
4 don't want to hide the ball; and they've never taken a  
5 cheap shot at us, and we wouldn't take a cheap shot at  
6 them or Ms. Kerr.

7 But the, for the mitigation, the Court did  
8 order her -- and we don't have to call it a child  
9 proceeding. We can say "In another matter, didn't the  
10 Court order you to keep a log of all your places to  
11 apply?"

12 We've never received that log. We received a  
13 log right before their interrogatory responses were  
14 served on us on August 18 when we said, "List all the  
15 places for work."

16 She applied -- I want to say, on August 8th,  
17 around ten days before the interrogatories were produced  
18 to us -- she applied to probably -- I don't know, 50 --  
19 50 jobs.

20 But prior to that, I am going to ask her about,  
21 "In another proceeding, were you told to, to keep an  
22 employment log? Do you have that log?"

23 We've never received it to this day. That's  
24 the only thing. I will not say it's a child proceeding.  
25 I will do whatever, refer to it -- if Your Honor allows

1 it in, I will refer to it as any way Your Honor tells me  
2 to refer to it.

3 THE COURT: All right. Mr. Shultz, what are  
4 your thoughts? I mean, I know part of that goes back to  
5 the mitigation of damages question, but setting that  
6 aside for the time being.

7 MR. SHULTZ: Well, to the extent that this is  
8 relevant to mitigation --

9 MR. MULAIRE: Can we have just a moment, Your  
10 Honor?

11 THE COURT: Absolutely. Yep.

12 (Brief pause in proceedings.)

13 THE COURT: While they talk for a second, I  
14 want to ask you a question.

15 What -- what's the, what's the intention as it  
16 relates to: Why are you putting in the evidence that  
17 the, one, she was required to keep the log and, two, she  
18 doesn't have it?

19 I'm -- beyond just asking the question and  
20 saying, "Did you maintain a log? And where all did you  
21 apply?"

22 MR. TRUSEVICH: Exactly, exactly that, "Where  
23 did you all apply?" Because I think what the evidence is  
24 going to show is that she wasn't out there looking for a  
25 job, Your Honor.

1 THE COURT: Yeah.

2 MR. TRUSEVICH: And I think if she was supposed  
3 to keep a log and the log -- I want to say it was a month  
4 before they filed the lawsuit in this case; I believe the  
5 hearing was in June, and they filed the lawsuit, this  
6 lawsuit, in July -- she ought to at least have that.

7 "Where did you apply during all the period  
8 prior to October 2016 when you started the  
9 interrogatories and listed 50 places?"

10 "Where did you apply from July 2014 when you  
11 were fired July 21st -- Monday, July 21, 2014, until that  
12 October? Where did you apply? Can you tell us other  
13 than -- do you recall any places that you applied?" Et  
14 cetera.

15 That's the only reason I was going to get into  
16 that, Judge.

17 THE COURT: All right.

18 MR. SHULTZ: And to the extent that that's  
19 relevant towards mitigation, we wouldn't object if the  
20 basis of that comes from these child court proceedings.

21 THE COURT: Okay.

22 MR. SHULTZ: There might be some other  
23 objection at that time.

24 THE COURT: All right.

25 MR. SHULTZ: We're not going to waive it. But

1 if the basis of that is coming from child support  
2 proceedings, then we wouldn't object to, relative to  
3 mitigation.

4 THE COURT: All right. Well, as far as  
5 document 66 goes, I'm going to allow the motion as it  
6 relates to any reference to the child support payments  
7 being behind and the custody proceedings themselves.  
8 Let's just stay out of that.

9 MR. TRUSEVICH: Sure, Your Honor.

10 THE COURT: There's no need to get into it.

11 The last part that I saw in document 66 was the  
12 motion to bar evidence relating to unemployment  
13 compensation. I don't want you to just -- I don't want  
14 you to reiterate what you had in your motion, or in your  
15 response. Was there anything else you want to add?

16 MR. SHULTZ: No. Just the Collateral Source  
17 Doctrine.

18 THE COURT: Yeah.

19 MR. SHULTZ: It's a collateral source. That  
20 doesn't get taken away from back pay. That doesn't  
21 reduce back pay.

22 MR. TRUSEVICH: And on that issue, I believe  
23 that the law's split on that. But that's not the reason  
24 we want to get into this. We're not going to get into  
25 what she got for unemployment, how much, Your Honor.

1           What this goes to is her application for  
2 unemployment benefits. She's going to tell you and the  
3 jury that, oh, she -- well, she's told four different  
4 versions of what she was doing with the truck, but one of  
5 the versions: She told the, Unemployment that she was  
6 moving homeless people with Goodwill. Now, she may deny  
7 that, but that's what the unemployment records say, so --

8           THE COURT: Is it in her writing, her hand?

9           MR. TRUSEVICH: It is not, Your Honor. It is  
10 not. It's the, the --

11          THE COURT: Is it an electronic submission?

12          MR. TRUSEVICH: There's two documents that are  
13 part of an electronic submission. This part is a  
14 narrative that the unemployment -- which is why we have a  
15 subpoena out to the state agency, unless they agree to  
16 the admissibility on them, to say, "Here's what the  
17 process is." You would call in --

18          THE COURT: Do you have a copy of that with  
19 you?

20          MR. TRUSEVICH: I do, Your Honor. I do.

21          And I asked her about this in her deposition.

22          MR. SHULTZ: I don't -- what did -- I don't  
23 think you had these records for deposition.

24          MR. TRUSEVICH: No. You're right. Maybe I  
25 asked her what she was doing with it, and that's what --

1 that's what it was. And --

2 MR. SHULTZ: But that's the -- not to  
3 interject, but so there are --

4 MR. TRUSEVICH: May I approach, Your Honor?

5 THE COURT: Uh-huh.

6 MR. SHULTZ: There's two written submissions.  
7 The second one is from several years after -- and I'm not  
8 sure where it comes from.

9 But what he's referring to is the -- there's  
10 some sort of interview, and there's interview notes in  
11 there. And we have no -- we don't know who the person  
12 who typed those up are or anything about the, the notes  
13 or the veracity of them.

14 Andy, what exhibit is that?

15 THE COURT: All right. So you're still working  
16 on foundation and authenticating? Is that what the issue  
17 is?

18 MR. TRUSEVICH: So the Assistant Attorney  
19 General, Andrew Dryjanski -- who actually did the proving  
20 up of the documents, the -- I asked him; I said,  
21 "Mr. Dryjanski, if the EEOC's going to object to the  
22 records, we'll have to subpoena you." He's supposed to  
23 get back with me in one week. He's trying to find  
24 someone in the, you know, Champaign area that can come in  
25 and say the process.

1 I mean, Your Honor, when it says, "I did this,"  
2 if they didn't get that information from, from Ms. Kerr,  
3 then who? And, I mean, we were hoping that EEOC would  
4 just agree to it.

5 THE COURT: All right.

6 MR. TRUSEVICH: But if not --

7 THE COURT: I want to, I want to understand --  
8 yeah, please. You don't have to ask, as long as you're  
9 not going to jump across the bench at me.

10 MR. TRUSEVICH: But, Your Honor, you see the,  
11 the quandary we have with --

12 THE COURT: Yeah. I want -- so, I'll, I'll  
13 rule on that once I have a better -- I want to know how  
14 it's submitted, how that document was prepared. And, you  
15 know, give me the foundation so that I can make an  
16 educated decision on that --

17 MR. TRUSEVICH: Okay.

18 THE COURT: -- and how reliable it really is.

19 And then, Mr. Shultz, I'll give you -- preserve  
20 your objection on it --

21 MR. SHULTZ: Okay.

22 THE COURT: -- and then I'll look at it as it's  
23 presented and how it might be presented.

24 MR. SHULTZ: Okay. Thank you, Your Honor.

25 THE COURT: All right. Document 67 -- for what

1 it's worth though, as far as 66 goes, stay out of the  
2 compensation itself. Like, I don't want to know how much  
3 money she got from Unemployment. That doesn't need to go  
4 to the jury.

5 MR. TRUSEVICH: Yes, Your Honor.

6 THE COURT: So, so I am going to grant that  
7 aspect of the motion; but as it relates to the statements  
8 in the application and during the interview, once I've  
9 got a better feel for the, the foundation and, and where  
10 that document comes from, I'll make a decision then.

11 MR. TRUSEVICH: Okay, Your Honor.

12 THE COURT: All right.

13 67 is a request to bar testimony from Richard  
14 Thompson and Albert Bennett. I didn't see in your  
15 response any, any objection to the motion as related to  
16 Bennett, so I'm assuming you're not intending to call  
17 Albert Bennett?

18 MS. WASSERMAN: Your Honor, both of these  
19 witnesses are potential impeachment witnesses, and it  
20 really depends upon how the evidence comes in at trial.  
21 That's really what they're both there for.

22 THE COURT: All right.

23 MS. WASSERMAN: There was testimony by  
24 Mr. Kasper that, for example, he was a deacon in the  
25 church. And if that is elicited for the purpose of

1 trying to get the jury to somehow believe that this  
2 person who is a recent deacon of the church then, Albert  
3 Bennett -- who is Pastor Albert Bennett -- would be here  
4 to testify, "Yeah. No, he was never a deacon in the  
5 church."

6 THE COURT: All right. Where are these two --

7 MS. WASSERMAN: Well, he was 20 years ago, but  
8 he's not --

9 THE COURT: All right. Where are the two  
10 witnesses --

11 MS. WASSERMAN: They're local, --

12 THE COURT: -- physically located?

13 MS. WASSERMAN: -- both.

14 THE COURT: Both local?

15 MS. WASSERMAN: Yes.

16 THE COURT: All right. Let's take it up  
17 after -- let's take this motion up after the testimony  
18 that you think is relevant. All right?

19 MS. WASSERMAN: As to both of the witnesses?

20 THE COURT: Yeah. Both, both -- unless --

21 MS. WASSERMAN: Well, Richard Thompson is  
22 completely different. Richard Thompson -- and it also is  
23 going to be to present impeachment testimony. There was  
24 testimony that has been deduced that the event -- one of  
25 the versions of what occurred on that date, that Sunday,

1 was that this was an event with the Masons, the  
2 Freemasons, who -- the Freemasons were working with this  
3 individual who needed to be moving, and they paid her,  
4 her furniture and all of that.

5 Richard Thompson is the individual who, at that  
6 point in time, was leading the Masons in this area; and  
7 he will testify that there was never such a Mason event  
8 on the date. His testimony is essential for that  
9 purpose, to basically refute the testimony of Ms. Kerr,  
10 Ms. Shumate, that this was not a Mason's event, which  
11 they both testified to at their depositions.

12 THE COURT: So you're relatively certain that's  
13 coming in?

14 MS. WASSERMAN: I'm sorry?

15 THE COURT: You're relatively certain the  
16 information related to the Masons is coming out?

17 MS. WASSERMAN: As a practical matter, if it  
18 doesn't come in, then I don't know why we're here.

19 But if the, if the theory is changed yet again  
20 as to what occurred on that date, then maybe we wouldn't  
21 need him; but we're pretty certain, based upon the  
22 testimony that's coming in this case thus far, that we're  
23 going to need him to refute --

24 THE COURT: Well, I'm going to wait -- I'm  
25 going to wait on document 67 until I hear what's at

1 issue. Obviously, one of the points the EEOC made is,  
2 you know, Thompson doesn't have personal knowledge of  
3 certain things -- and you're, you're aware of the hearsay  
4 rules -- and so if he's going to say, "Bob told me that,  
5 that he didn't help her that day," well, that's not  
6 coming in, but --

7 MS. WASSERMAN: Oh, no. He's going to say that  
8 in his role, --

9 THE COURT: Yeah.

10 MS. WASSERMAN: -- in his capacity, --

11 THE COURT: So if we can get --

12 MS. WASSERMAN: -- he would know.

13 THE COURT: Yeah. He'll be limited to personal  
14 knowledge, but I want to hear --

15 MS. WASSERMAN: That's fine.

16 THE COURT: -- I want to hear it as it comes  
17 in. I don't think this is the sort of -- I don't think  
18 this is the sort of thing I can rule on generally on  
19 either of those. So we're going to reserve -- we're just  
20 going to reserve on 67 until I hear the evidence on those  
21 issues.

22 68 is a motion to exclude "false on one thing,  
23 false on everything."

24 MR. TRUSEVICH: Judge, I agree with this. I  
25 just want a little clarification. That's the reason I

1 asked about that is -- you know, I understand that -- I  
2 mean, cross is cross-examination. I mean, as long as  
3 it's professional, it is cross-examination. And I may  
4 ask Ms. Kerr -- or if Ms. Wasserman is taking Ms. Kerr --  
5 "Ms. Kerr, you're saying" X, Y, and Z; "that isn't  
6 correct, is it?", and let her decide what she wants to  
7 do. I have never said or meant to imply there's any  
8 requirement the jury automatically disregard all  
9 testimony from a witness based on an inconsistency; and  
10 if I said that, I apologize to both of you because I, I  
11 don't recall ever saying that in my depo.

12 I would ask her, "Ms. Kerr, have you ever heard  
13 the statement, 'If someone's lying about this, they're  
14 lying about that?' Have you ever heard that old adage?"

15 "Yes."

16 And then I'd ask her a question about something  
17 that she was doing.

18 So, Your Honor, I don't want to do something  
19 that gets me in trouble with the Court; but, Your Honor,  
20 my style on cross-examination is: It is  
21 cross-examination. And if you tell me that that is an  
22 improper question -- but I have never, and I certainly  
23 didn't mean to imply that, you know, I somehow get to  
24 tell the jury, "Hey, if she's lying about one thing," in  
25 closing argument -- in fact, I think it's the charge --

1 what -- that that's there. But that wasn't my intent.

2 But I, I just want to make sure I have the  
3 right to ask her, "Megan, that's just not correct, is  
4 it?" without getting in trouble with the Court. And if  
5 the Court tells me "No, you can't ask her that," then,  
6 then I certainly will know ahead of time.

7 MR. SHULTZ: We're just concerned with this  
8 line of questioning that, you know, for the examining  
9 attorney, or the cross-examining attorney to comment on  
10 the veracity of a witness's testimony or asking a witness  
11 to comment on the veracity of another witness's testimony  
12 is improper.

13 And even that question -- "Are you aware of  
14 that old saying that 'If you're lying over here, you're  
15 lying over there?'" -- isn't designed to elicit any  
16 information from the witness that's relevant to any issue  
17 with the case.

18 THE COURT: Yeah.

19 MR. SHULTZ: It's to forecast Rent-A-Center's  
20 position on what sort of credibility and why the jury  
21 should make certain credibility decisions about what a  
22 witness is testifying to; so that's the scope, the  
23 purpose of both this and --

24 THE COURT: And number 7, yeah.

25 MR. TRUSEVICH: And, Judge, I will certainly

1 agree to, to the, you know, "If they're lying about this,  
2 lying about that" --

3 THE COURT: Yeah. That's out. I wasn't going  
4 to allow the motion anyway, so I'm glad you're going to  
5 agree to it.

6 MR. TRUSEVICH: But, Judge, what I was going to  
7 ask you, though, is: I just want to make sure, though,  
8 if, if -- that I'm not handcuffed in that, this motion  
9 that, "Well, Ms. Kerr, Ms. Shumate says" X, Y, and Z,  
10 which is inconsistent with what I think Ms. Kerr is going  
11 to say.

12 If, if Ms. Shumate is saying that, is that  
13 incon-- do you agree or disagree with that --

14 THE COURT: That's fine.

15 MR. TRUSEVICH: Perfect.

16 THE COURT: You're not going to get into "Is  
17 she lying?"

18 MR. TRUSEVICH: No.

19 THE COURT: All right. We're not going to go  
20 down that road --

21 MR. TRUSEVICH: I will not.

22 THE COURT: -- because I don't want you asking  
23 witnesses about the veracity and the character of  
24 somebody else.

25 But as far as, you know, "Factually, is that

1 true or not true?" --

2 MR. TRUSEVICH: Yes, Your Honor.

3 THE COURT: -- that's perfectly fine.

4 MR. TRUSEVICH: Thank you very much for  
5 clarifying it.

6 THE COURT: So, so I am going to allow 68 as it  
7 relates to the, what we just talked about on that one  
8 question.

9 And then jumping forward, then, to what is the  
10 motion in limine number 7 -- what's the number? What's  
11 the document entry on 7?

12 MR. MULAIRE: Is that motion in limine 5?

13 THE COURT: The one I just had was 4; and then  
14 7 is the one for asking -- 72. So 72 I'm going to allow  
15 as well. All right. So 68 and 72 are both allowed.

16 And then number 5 is 69, and then 6 is 71. All  
17 right.

18 So number 5, then, document 69, is a motion by  
19 the EEOC to exclude all argumentative questions and  
20 remarks challenging a witness's conclusions.

21 I'm going to, I'm going to deny the motion  
22 just -- let's take it up on a question by question. If,  
23 if it's an argumentative question, pose your objection  
24 then. It's just -- I can't say, "Don't ask an  
25 argumentative question." The Rules of Evidence already

1 say that.

2 MR. SHULTZ: Great. Thank you, Your Honor.

3 THE COURT: All right. So we're going to deny  
4 69.

5 71 is, is a motion for prohibiting attorney  
6 vouching as well as personal experiences. I am going to  
7 allow that. We're not going to -- no vouching. I also  
8 don't want lawyers bringing out their own experiences.  
9 So let's keep it to the witness and the facts of the  
10 case, and so we're going to allow 71.

11 Now, as I mentioned before, we're going to  
12 allow 72.

13 Number 8 is 73, and that's regarding the Call  
14 Center records.

15 Mr. Shultz, go ahead.

16 MR. MULAIRE: I think this one is me.

17 THE COURT: Oh, okay. We're past number 5,  
18 aren't we?

19 MR. MULAIRE: We're past number 5, so --

20 THE COURT: Yep.

21 MR. MULAIRE: Your Honor, I will say I don't  
22 think I have anything off the top of my head to add --

23 THE COURT: Okay.

24 MR. MULAIRE: -- beyond what we've said, stated  
25 in our motion, so --

1 THE COURT: Okay. Let me ask you, though: You  
2 did note in -- I think it was in your reply about an  
3 additional 54 pages that were just produced; you hadn't  
4 had a chance when you filed your reply to look at those.  
5 What, what did it end up being?

6 MR. MULAIRE: I will confess: There have been  
7 a few things going on over at the federal government in  
8 the last week or two, so I have not carefully looked at  
9 those. I mean, I believe there were --

10 THE COURT: Yeah. Speaking of which, I was  
11 surprised to see you today.

12 MR. MULAIRE: We were granted permission to  
13 attend today, notwithstanding the --

14 THE COURT: So, over the weekend, you became  
15 essential. Congratulations.

16 MR. MULAIRE: It's an honor.

17 And if -- you know, I have not been checking  
18 the news in the last hour and half.

19 THE COURT: Good point, good point.

20 MR. MULAIRE: My understanding is: We might  
21 have a budget by the time we're done here today, so  
22 hopefully we are past --

23 THE COURT: We do. Congratulations.

24 MR. MULAIRE: We're getting paid.

25 THE COURT: You're getting paid.

1 MR. MULAIRE: So, I mean, in the 54 pages,  
2 there were two items that appear to simply have been  
3 Bates-labeled versions of things that were previously  
4 exchanged.

5 THE COURT: That you'd already seen.

6 MR. MULAIRE: The majority of pages, though, do  
7 not fall into that category. There's a few that,  
8 honestly, I just don't know what they are.

9 THE COURT: Okay.

10 MR. MULAIRE: I've looked at them. You know, I  
11 mean, they were disclosed after the deadline for motions  
12 in limine; and, so, honestly, I wasn't prepared to, you  
13 know, make any kind of motion --

14 THE COURT: Sure.

15 MR. MULAIRE: -- or argue about them today.  
16 We'll make a Rule 37 objection if they attempt to use  
17 them at trial and they weren't disclosed timely.

18 THE COURT: All right. I'm going to -- I'm  
19 going to deny the motion as it relates to the Call Center  
20 records, although you're welcome to preserve -- you can  
21 object as the records come out. Now, if there's  
22 something new that I learn during the course of the  
23 testimony, I may change my opinion; but I'm going to deny  
24 the motion, number 8, document 73.

25 MR. TRUSEVICH: Your Honor, may I just add one

1 point, just for the record, on that?

2 THE COURT: Okay. I did rule in your favor,  
3 though. You do know that?

4 MR. TRUSEVICH: Thank you, Your Honor. And I  
5 just -- but I just -- because you, the 54 pages -- and I  
6 apologize for that; but, you know, my co-counsel, her  
7 parents -- her mother just passed away two weeks ago; her  
8 father was terminally ill. So I was trying to still keep  
9 my day job, get those over to you; and that's the reason  
10 it's late.

11 I just don't want Your Honor to go, you know,  
12 "That's pretty crappy of the in-house lawyer to have just  
13 done that," and I just wanted -- for the record,  
14 Stephanie's going through a lot; and I really appreciate  
15 Ms. Wasserman stepping in that short before trial.

16 THE COURT: All right.

17 MR. TRUSEVICH: I just -- I wanted to note that  
18 for the record. Thank you, Your Honor.

19 THE COURT: Number 74, motion number 9 to  
20 exclude impeachment using collateral material. Again, I  
21 just need to see the documents. It's, it just -- it's  
22 too hard for me to enter a general order. While I  
23 certainly understand the position you're taking, as well  
24 as the, as the doctrine itself, I need to see the  
25 documents. So I'm going to deny the motion generally,

1 but still object issue by issue, document by document;  
2 and I'll take a look at those documents as they, as they  
3 are presented.

4 And if there are things where you've got a  
5 witness where you've got some that you think may fall  
6 into that questionable area, let's take it up before you  
7 call a witness; and we'll give the jury a little break,  
8 and that way we're not doing a sidebar over here while  
9 the jury's standing there.

10 MS. WASSERMAN: Thank you, Your Honor.

11 THE COURT: All right. Number 10 is exclude --  
12 I'm gonna, like I mentioned before, I'm going to take  
13 this up on the back pay/mitigation issue. So we'll get  
14 the -- once I see your submissions, you're going to get  
15 me -- I'm going to get you something here in the next day  
16 or two, so you're not giving me anything on that issue;  
17 but we'll get that, we'll get that resolved here in a  
18 day, next -- by the close of business Wednesday at the  
19 latest.

20 All right. Let's move on to Rent-A-Center's  
21 motions. The first one is a motion to bar testimony  
22 relating to the 2002 lawsuit. I think this is  
23 uncontested. Is that -- is that right?

24 MR. MULAIRE: That's correct, Your Honor.

25 THE COURT: All right. So we're going to go

1 ahead and allow that motion; no mention or reference to  
2 the 2002 lawsuit or settlement by the party.

3 Number 2 is a motion to bar any evidence or  
4 testimony relating to allegations relating to Russell  
5 Kasper being wrongfully terminated. The question isn't  
6 whether he was terminated or left; it's whether he was  
7 wrongfully terminated. Is that right?

8 MS. WASSERMAN: That's correct, Your Honor. I  
9 mean, and this goes to the whole issue that Russell  
10 Kasper was terminated long before, from our perspective;  
11 and one of the theories that Plaintiff intends to present  
12 at, at trial is this whole issue of he was terminated  
13 because of the fact that he didn't fire Megan Kerr.

14 We have lots of documentation reflecting that  
15 he was disciplined and counseled and written up, so we  
16 intend to present all of that to show that that wasn't  
17 the reason.

18 Now, again, we come back to the fact that we  
19 don't know why Russell Kasper belongs in this lawsuit to  
20 begin with. But be that as it may, we don't want anyone  
21 arguing that his termination was wrongful in any way. We  
22 can put in the facts about the termination; and he can  
23 put in his theory, albeit unsupported, and we'll have the  
24 documents which do support the reasons, but there should  
25 just be no reference made to whether the termination was

1 wrongful, or anything along those lines, because then  
2 we're left with the jury having to decide this person's  
3 wrongful termination case that he never brought.

4 MR. MULAIRE: So to clarify, I mean, this is a  
5 motion that, you know, we did include some words here  
6 just to clarify, you know, what precisely the motion  
7 seemed to be asking for but that we agreed with.

8 So, I mean, to the extent that the motion  
9 sought to exclude, you know, evidence about, you know,  
10 why Russell Kasper was fired, or whether that was right  
11 or wrong, we agree. We're not going to try to present  
12 that.

13 It should cut both ways, though. I mean, we're  
14 not going to be raising the issue of whether it was wrong  
15 to fire him, but they shouldn't be putting in evidence  
16 justifying why he was fired. I mean, he was fired.  
17 That's the fact that will be put in by us because it's  
18 sort of part of the chronology of all this.

19 THE COURT: So is he, on direct, going to say  
20 he believes he was testifying -- or I'm sorry, discharged  
21 for not firing Ms. Kerr?

22 MR. MULAIRE: I don't plan to elicit that from  
23 him. No.

24 THE COURT: All right. I think what I'll do  
25 with this one is I'm going to -- did you want to say

1 something?

2 MS. WASSERMAN: Yes, Your Honor. I mean, we  
3 believe that it's important why he was terminated,  
4 because it goes to one of the theories of our defense,  
5 why he was terminated.

6 THE COURT: All right. Well, I'm going to  
7 listen to the -- I'm going to listen to his direct;  
8 and --

9 MS. WASSERMAN: Okay.

10 THE COURT: -- if it's not relevant, it's not  
11 going to come in; but if it's relevant, then we'll let  
12 it -- but we'll, we'll -- I want to hear it, and I'll  
13 hear what -- I don't think -- if, if he testifies that he  
14 was fired for not getting rid of Ms. Kerr, then you have  
15 wide range to go after him for the reasons he was  
16 terminated.

17 If he just says, "I was terminated; and this,  
18 this, and this happened," it's a different analysis.

19 So I, I want to hear what's at issue, and we'll  
20 make a decision then, so --

21 MS. WASSERMAN: We actually would like to -- if  
22 Your Honor would indulge me, there are reasons, I mean,  
23 he was terminated; but the documents that he signed and  
24 the documents he was provided show that he was terminated  
25 for a lack of sales and for sales being bad in the store.

1 Ms. Kerr was also involved with sales at the store, and  
2 she was the assistant manager responsible for sales in  
3 that store. So it's very important that it's determined  
4 that sales are the reason why he was terminated but not  
5 her because one of the arguments they made is that there  
6 was testimony that somebody believed that somehow sales  
7 went down in the store because of her, but that's really  
8 not the case.

9 And if anything regarding sales in that store  
10 is presented, we're entitled to bring in this information  
11 about sales in the store.

12 THE COURT: Yeah. I think I -- I think I need  
13 to put this one in context before I --

14 MS. WASSERMAN: Okay.

15 THE COURT: We're not going to get into any --  
16 regardless of what happens, though, we're not going to  
17 get into whether he was discriminated against. We're not  
18 going to create a mini trial about his termination,  
19 but that doesn't mean one or two questions aren't going  
20 to be allowed to get into that.

21 I want to hear -- frankly, I, I think I'll know  
22 the answer once I hear each of your opening statements  
23 because that will frame things.

24 Because I've seen through the pleadings where a  
25 lot of positions have shifted, both Ms. Kerr's and,

1 according to EEOC, Rent-A-Center's. And so I want to  
2 hear it, and we'll go from there.

3 MR. MULAIRE: Could I ask a question, Your  
4 Honor?

5 THE COURT: Yeah, yeah. Go right ahead.

6 MR. MULAIRE: I just want to clarify: So we  
7 don't intend to elicit that on direct; that is, you know,  
8 "Mr. Kasper, why were you fired?"

9 But I assume the same applies to the defendant.  
10 They can't elicit it on cross just for the purpose of  
11 then starting a debate about it. I mean, if it doesn't  
12 make a difference in the direct --

13 THE COURT: We're not going to get into any  
14 discriminatory motives as it relates to his  
15 determination, regardless.

16 Now, if his termination due to lack of sales in  
17 the store is relevant after I've heard things, then we  
18 may -- I might allow you to go down that road, but I'm  
19 not going to let you get into any discrimination  
20 anywhere --

21 MR. MULAIRE: Okay.

22 THE COURT: -- as it relates to him.

23 MR. MULAIRE: Thank you.

24 THE COURT: It is what it is, and that's what  
25 we're going to do.

1           So as it relates to, to the second motion in  
2     limine as part of docket entry 60, what I'm going to do  
3     is I'm going to allow the motion in part, deny the motion  
4     in part. Nothing about whether Kasper was wrongfully  
5     terminated in the sense of discriminatory termination,  
6     but I'm going to reserve as it relates to getting into  
7     the broader question of why he was terminated, if it was  
8     indeed sales and whether that's relevant or not after  
9     I've heard it.

10           Make sense?

11           MS. WASSERMAN: Yes, Your Honor.

12           THE COURT: Sufficiently muddy that neither of  
13     you have any idea what I just said?

14           MS. WASSERMAN: I'm trying to work through my  
15     opening statement in light of it.

16           THE COURT: All right.

17           MR. MULAIRE: I mean, I, I guess I would just  
18     state: Our position is that if, why he, you know, the  
19     motive for firing him comes in, it should come in for  
20     both sides and --

21           THE COURT: Yeah. No, no, no, no.

22           MR. MULAIRE: -- for all of the evidence and  
23     not --

24           THE COURT: No, no. I'm not one of those -- if  
25     it comes in, I'll give you some -- we'll be able to get

1 into it; but we'll deal with it when I know more about  
2 this case. Right now all I've got is what you submitted  
3 and what I read in the motion for summary judgment and  
4 the order.

5 Number 3 is a motion to bar evidence relating  
6 to alleged mistreatment of Amber Shumate by RAC's private  
7 investigator.

8 Let me ask: Who's the investigator? What's  
9 the relationship to RAC? Is the investigator going to  
10 testify?

11 MR. TRUSEVICH: No, Your Honor. The law firm  
12 hired -- I mean, obviously, we're a small, in-house  
13 department; so we hired a private investigator to go,  
14 just like they have Ms. Mayfield, to go interview. And  
15 he interviewed several people, interviewed another one of  
16 the witnesses that they're calling, Ms. McCallister;  
17 another one, Mary Ann Kelly; and they all say she was  
18 nice.

19 And then when I took Ms. Shumate's deposition,  
20 I was surprised to hear her say --

21 THE COURT: Is, is the investigator going to  
22 testify?

23 MR. TRUSEVICH: No, Your Honor.

24 THE COURT: All right.

25 MR. TRUSEVICH: Now, if --

1 THE COURT: And what's, what's Ms. Shumate  
2 going to say happened?

3 MR. TRUSEVICH: Ms. Shumate said in her  
4 deposition that he came in, went into her house, sat at  
5 her kitchen table, scared her kids, wouldn't leave.

6 And then I said -- I said, "Really?" And her  
7 husband's a volunteer fireman. In fact, he was just  
8 leaving the house as our private investigator got there.  
9 And I said, "What was the number, the police report  
10 number?"

11 She goes, "What number?"

12 I said, "Well, the police report. Certainly  
13 you called the police on this man who scared your  
14 children, kept you" -- you know, kidnapped, et cetera?

15 And she said, "No. Once he left, I didn't do  
16 it. But I called the EEOC."

17 And then she also testified that the EEOC  
18 investigator, Ms. Mayfield, was rude to her; and she  
19 either hung up on her or didn't hang up on her, but Ms.  
20 Mayfield, the federal investigator, called her a liar and  
21 she was mad at that, too.

22 THE COURT: All right. Mr. Mulaire, what are  
23 your thoughts on this?

24 MR. MULAIRE: Yeah. So I, I mean, there are a  
25 few instances today where opposing counsel's recollection

1 of what exactly was said at a deposition is, is different  
2 from ours. And I'm trying not to --

3 THE COURT: We all remember things differently,  
4 but --

5 MR. MULAIRE: -- focus on each one of those,  
6 but I'm -- Ms. Shumate never testified that anybody was  
7 kidnapped, so there's some misstatements occurring.

8 But, no, I mean, the Seventh Circuit case law  
9 that we cited, I think, is clear. I mean, Ms. Shumate  
10 will testify in addition to what, the other things that  
11 Mr. Trusevich mentioned, that, you know, it was clear  
12 that this investigator was attempting to persuade her to  
13 change her story. And we think that the controlling case  
14 law makes clear that that's, that's relevant. This was  
15 an agent of Rent-A-Center.

16 The other thing that I would add is that, you  
17 know, we, I mean, do object to Defendant being able to  
18 rely on the information that it just provided to Your  
19 Honor because in discovery we asked for information --  
20 the same information about this investigator -- "who is  
21 this?" -- and they refused to provide that. They  
22 wouldn't even tell us the name of the investigator. And  
23 so we don't think they should be able to oppose our  
24 motion by now providing information about the  
25 investigator or the nature of his relationship.

1 I mean, the automatic exclusion under Rule 37  
2 is such that they shouldn't be permitted to rely on  
3 information that they refused to provide earlier when  
4 asked.

5 So --

6 THE COURT: What's the -- what's Ms. Shumate  
7 going to say about the evidence and attempting to  
8 persuade or not to testify or to change her testimony?

9 MR. MULAIRE: Well, when she was asked -- I  
10 mean, the investigator asked her about -- Ms. Shumate is  
11 the customer who received --

12 THE COURT: Sure.

13 MR. MULAIRE: -- the delivery of furniture on  
14 that Sunday, and she'll testify to that.

15 And the investigator asked her about that.  
16 And, you know, I will confess: I, I don't know every  
17 last thing the investigator asked her about; but, you  
18 know, that is the, you know, core of her testimony. And  
19 the investigator, according to her, kept repeatedly  
20 pressing her on things that she already answered in a way  
21 that she thought made it clear that he was trying to get  
22 her to change her answer, and he was conducting himself  
23 in a way that was sort of loud and domineering. He  
24 refused to leave her home when she asked, and we think  
25 that that's -- you know, by itself would that be a case

1 for trial? No. But, I mean, that's a little piece of  
2 the puzzle that the jury is allowed to consider. You  
3 know, if a defendant is going to rely on an investigator  
4 to do those things, as the Seventh Circuit said, that's,  
5 that's evidence of, you know, consciousness of guilt.  
6 That is --

7 MR. TRUSEVICH: And, Your Honor, number one, if  
8 Ms. Shumate's going to be allowed to say that, we ought  
9 to be allowed to call our PI as a rebuttal witness and  
10 let the jury see what, what he says. That, that just  
11 never happened. It's the same private investigator that  
12 talked to their other witnesses, and not one of them had  
13 complaint about her.

14 Plus, she ended up giving her deposition. She  
15 testified, according to her, truthfully. So nobody did  
16 change her testimony. It's rank hearsay; and under 403,  
17 we think it should come out. I mean, I shouldn't say  
18 "out." We just don't think it relevant under 401, and we  
19 think it's prejudicial under 403.

20 THE COURT: All right. I'm going to go back  
21 and reread that Ty Inc. Case. So I'll, I'll include that  
22 as part of the order tomorrow. I just want to reread  
23 that case.

24 All right. Number 4 is a motion to bar  
25 evidence relating to RA-- Rent-A-Center's position

1 statement to the EEOC. I need to see the proposed  
2 redacted exhibit. So once, once I see that, then I can  
3 make -- I mean, there seems to be some agreement that  
4 parts of it should come out.

5 MR. MULAIRE: I have a copy right now, if you'd  
6 like to see it.

7 THE COURT: Of the proposed, all-redacted  
8 exhibit?

9 MR. MULAIRE: Yeah.

10 MS. WASSERMAN: We have, Your Honor -- we've  
11 got some concerns about the redacted version. Parts are  
12 redacted. Parts are not redacted.

13 MR. MULAIRE: Right. We redacted the --

14 THE COURT: That's, that's precisely why I want  
15 to look at it.

16 MS. WASSERMAN: Right. But, Your Honor, from,  
17 from our perspective, this is, this is purely hearsay.  
18 This is a letter -- this is a position statement that was  
19 written by my, somebody in my law firm.

20 THE COURT: Uh-huh.

21 MS. WASSERMAN: It's not as though it was a  
22 human resources person within the organization. It is a  
23 lawyer letter that was done based upon a lawyer's  
24 investigation that occurred years ago, years before  
25 formal investigations, formal discovery, all of that was,

1 transpired. It was simply a lawyer's letter based upon  
2 hearsay upon hearsay of what that person was told to go  
3 into in this letter that was then submitted.

4 So we don't believe that any of it should come  
5 in because I don't know if anybody plans on calling  
6 Mr. Wilder from our Chicago office as a witness to  
7 basically talk about what he did to create what was in  
8 this letter. So we have serious problems about that, and  
9 anything he would testify to would be hearsay upon  
10 hearsay.

11 That said, if the Court is inclined to admit  
12 the document, which we believe shouldn't be admitted,  
13 then the entirety should come in. The, the EEOC should  
14 not be just picking and choosing which portions of the  
15 facts they want to allow in and which portions of the  
16 evidence that's presented they don't want to put in. So  
17 either we believe it all should come in -- should not be  
18 excluded, or all should be admitted.

19 THE COURT: All right. Why don't -- Tom, you  
20 want to get a copy of that, and let's look at it closely.

21 MR. MULAIRE: Should we provide the unredacted  
22 copy as well?

23 THE COURT: I've got the unredacted copy.

24 MR. MULAIRE: Oh.

25 MS. WASSERMAN: Right.

1 THE COURT: It was attached as an exhibit.

2 MS. WASSERMAN: And one of the things to point  
3 out just about the redaction is that there's a reference  
4 that's to a footnote. The reference to the footnote is  
5 still in there, but the footnote itself was redacted.  
6 So, again, that's -- goes to our argument that if it  
7 comes in, it comes in. We don't believe it's appropriate  
8 for any of it to come in. But if either of it comes in,  
9 all of it should come in, --

10 THE COURT: Yeah.

11 MS. WASSERMAN: -- not the bits and pieces that  
12 the EEOC wants to come in.

13 THE COURT: I want to look at the exhibit and,  
14 and see what -- I'll take a look at it.

15 What's -- where do you -- what do you intend to  
16 use it for, just demonstrating inconsistencies?

17 MR. MULAIRE: There's a, there's a section that  
18 says "relevant facts," and it's not quotations of  
19 interviews that were done. It's just, you know, a screen  
20 of narrative sentences about, "This is what happened."

21 THE COURT: No. I read it. But what, what are  
22 you going to use it for?

23 MR. MULAIRE: Oh. To show the changing -- it  
24 goes to pretext because the story has changed that Jason  
25 Morris knew that Ms. Kerr had been evicted and that she

1 admitted that she had been evicted. But now, you know,  
2 Rent-A-Center doesn't want to talk about the eviction,  
3 which is the next motion in limine that they have. So it  
4 goes to the revolving story that Rent-A-Center has sort  
5 of surrounding the relevant facts of the case. It goes  
6 to pretext.

7 THE COURT: Okay. I'll give you a second, but  
8 we're fast approaching 3:45.

9 MS. WASSERMAN: And it can just as easily go to  
10 somebody misstating themselves in the course of the  
11 preliminary investigation --

12 THE COURT: Sure.

13 MS. WASSERMAN: -- that was done.

14 THE COURT: No. I just, I -- I need to see  
15 what's being proposed, and then I'll -- it will not be  
16 difficult once I get a chance to read it.

17 MR. MULAIRE: I'll just briefly note the  
18 section we read in our response regarding 801(d)(2)(C)  
19 and how this is not hearsay.

20 THE COURT: Say that again.

21 MR. MULAIRE: How this is a statement made by a  
22 person who Rent-A-Center authorized to make the statement  
23 under 801(d)(2)(C).

24 THE COURT: Oh, I gotcha, okay. Yeah, yeah.

25 (Brief pause in proceedings.)

1 THE COURT: All right. I'll look at it  
2 afterwards so we can get through the rest of this stuff.

3 Number 5 is evidence relating to Ms. Kerr's  
4 eviction from her apartment. You want to keep that out?  
5 Is that --

6 MS. WASSERMAN: Yeah. We believe there's  
7 absolutely no relevance as to whether it was an eviction  
8 or simply departing.

9 THE COURT: Is -- wasn't there a Jason Morris,  
10 or somebody that I read, that includes that in an  
11 affidavit?

12 MS. WASSERMAN: It was. But, again, we believe  
13 that --

14 THE COURT: Is Mr. Morris going to testify?

15 MR. MULAIRE: Yes.

16 MS. WASSERMAN: He is going to testify.

17 THE COURT: All right. How are we going to try  
18 this case without, without touching upon that?

19 MS. WASSERMAN: He -- the testimony would be,  
20 "Are you aware of the fact that she left her apartment?"

21 "Yes."

22 "Eviction" has got a very different -- I mean,  
23 "eviction" means being forced to leave. "Leaving" means  
24 giving up your --

25 THE COURT: Oh, you're concerned -- you're not

1 concerned with her leaving an apartment; --

2 MS. WASSERMAN: No.

3 THE COURT: -- you're concerned with the  
4 word --

5 MS. WASSERMAN: Eviction.

6 THE COURT: -- "eviction"?

7 MS. WASSERMAN: That's correct.

8 THE COURT: Oh, I got you. I misunderstood  
9 your motion then.

10 MR. MULAIRE: Well, part of Jason Morris's, one  
11 of the presentations of the story from this -- one of the  
12 reasons why Jason Morris was in Rantoul, 30 miles away  
13 from his home, on a day off, on a Sunday, was because he  
14 knew that she was having troubles with her landlord and  
15 that she was in the process of getting evicted and that  
16 when he confronted her on Monday, that she admitted that  
17 she had been evicted and was using the truck.

18 THE COURT: Yeah. I'm going to deny the  
19 motion.

20 Number 6 --

21 MS. WASSERMAN: I'm sorry? I apologize; I  
22 didn't hear.

23 THE COURT: Deny.

24 MS. WASSERMAN: Deny.

25 THE COURT: Yeah. Number 5 is denied.

1           Number 6, bar Evidence/testimony relating to  
2 Russell Kasper's alleged secrecy/nondisclosure agreement.  
3 I think we're all, all in agreement that stays out; is  
4 that right?

5           MS. WASSERMAN: Yes.

6           MR. MULAIRE: Correct, Your Honor.

7           THE COURT: Okay. So that's granted as well.

8           Number 7 is a motion to bar evidence/testimony  
9 relating to the alleged contents of notes and calendar  
10 entries made by Kasper.

11          Fire away.

12          MS. WASSERMAN: Certainly. Russell Kasper  
13 testified to all of these various things that occurred  
14 and all these alleged conversations with, with Jason  
15 Carnahan and all of his alleged communications, and he  
16 supposedly kept it in a nice, neat, little book.

17          THE COURT: Okay.

18          MS. WASSERMAN: The book is nowhere to be  
19 found. He claims that, oh, when he left, when he was  
20 fired, he was allowed to take his coffee pot. But he  
21 couldn't take this notebook that had all this important  
22 evidence with him. We think that's a, a crock.

23          And we think that for him to basically be able  
24 to tell this jury "Oh, yes. I had all these notes" gives  
25 it somehow the, the appearance that there's some real

1 importance here.

2           The fact of the matter is: Those notes don't  
3 exist. We have never seen them. They've never been  
4 produced. We don't believe that Mr. Kasper was able to  
5 take his coffee pot but not some papers that he had; so  
6 we believe that he shouldn't even be allowed to talk  
7 about having this notebook.

8           THE COURT: Who's -- so, from -- when did  
9 Mr. -- help me understand the timeline. When did, when  
10 did Mr. Kasper get terminated?

11           MS. WASSERMAN: In December, in December of the  
12 year before, --

13           MR. MULAIRE: 2013.

14           MS. WASSERMAN: -- of 2013.

15           THE COURT: All right. And who terminated his  
16 employment? Carnahan?

17           MS. WASSERMAN: Yes.

18           THE COURT: All right. Is Carnahan going to  
19 testify for you?

20           MS. WASSERMAN: Yes.

21           THE COURT: What's the EEOC's position on this?

22           MR. MULAIRE: Well, one, regarding his  
23 credibility, that's a question for the jury.

24           And, two, he'll testify that he had a file  
25 cabinet where he kept all these notes and that he, you

1 know, documented these things that Carnahan was saying to  
2 him, put them in a file cabinet; and when he left, he  
3 wasn't allowed to take any of these files with him, and  
4 he only was able to take this coffee pot.

5 THE COURT: All right.

6 MS. WASSERMAN: But just that he had the  
7 notebook that this was all contained in --

8 MR. MULAIRE: He called them -- go ahead. I'm  
9 sorry.

10 MS. WASSERMAN: I believe he testified that he  
11 had a notebook that all these documents were in, and he  
12 was not allowed to take his personal notebook with him.

13 Again, I think that that's made up of whole  
14 cloth --

15 THE COURT: Sure.

16 MS. WASSERMAN: -- and so -- but I don't want  
17 the jury to hear that he had a notebook --

18 THE COURT: All right.

19 MS. WASSERMAN: -- to begin with. It's not --

20 THE COURT: And you all believe him and think  
21 that the notebook existed and that somebody at  
22 Rent-A-Center --

23 MR. MULAIRE: Yes.

24 THE COURT: -- got rid of it?

25 MR. MULAIRE: Yes. And, I mean, it's a

1 credibility issue.

2 THE COURT: We're going to let that -- the jury  
3 figure that one out.

4 MR. MULAIRE: Thank you, Your Honor.

5 THE COURT: Motion's denied.

6 Number 8 is a motion to bar evidence/testimony  
7 relating to other illegal acts allegedly committed by  
8 Rent-A-Center. I'm going to turn to EEOC on this one. I  
9 want to hear what your thoughts are on that.

10 MR. MULAIRE: So, at his deposition, Kasper  
11 said that Carnahan had asked him to peddle merchandise --  
12 which is to, I guess, to sell door to door --

13 THE COURT: Uh-huh.

14 MR. MULAIRE: -- to increase sales at the, at  
15 the store and that he had done that in the past and was  
16 stopped by the Rantoul Police and said that that was  
17 illegal; and that when Carnahan asked him to do it this  
18 time, Carnahan said that we -- or Kasper said, "We can't  
19 do that because that's illegal," and, you know, Carnahan  
20 reiterated that, "Well, it's not illegal because they're  
21 former customers," and to go ahead and do it.

22 So, we believe it's character evidence under  
23 608.

24 THE COURT: Of who?

25 MR. MULAIRE: Of Carnahan.

1 THE COURT: All right. I'm going to, I'm going  
2 to allow the motion. So we're going to bar evidence of,  
3 and testimony relating to Mr. Carnahan telling people to  
4 peddle merchandise door to door. We're not going to get  
5 into that. So we'll grant that motion.

6 MS. WASSERMAN: Thank you, Your Honor.

7 THE COURT: All right. So that's all the  
8 motions in limine. There are a few things I need to, to  
9 finish up. Tom's got a good list of those. We'll get  
10 those out. There's a few things we'll get out tomorrow  
11 or Wednesday.

12 You're going to get me submissions on the, on  
13 the mixed-motive versus motivating factor instruction,  
14 and then that's going to be two weeks. All right?  
15 Motivating factor instruction.

16 And then Friday you're going to get me  
17 submission on the scope of 801(d)(2), as well as the  
18 interview notes, admissibility of those.

19 And then I'll take care of the mitigation of  
20 damages issue tonight or tomorrow, as well as a couple of  
21 those other issues that we held off on, until I can get a  
22 chance to read. Like, this letter, I want to see the  
23 redacted version.

24 So those are the motions in limine.

25 Other than what we've gone through, is there

1 anything in particular about any piece of evidence that,  
2 that is going to be problematic as far as a presentation  
3 perspective goes?

4 MS. WASSERMAN: I think, frankly, we've  
5 discussed them here.

6 THE COURT: Okay.

7 MS. WASSERMAN: I think that they're all being  
8 addressed.

9 THE COURT: Okay.

10 MS. WASSERMAN: Some are the mitigation  
11 documents, and some are the notes --

12 THE COURT: Okay.

13 MS. WASSERMAN: -- and all that I think --

14 THE COURT: Now, we've got -- Shannon will make  
15 sure that whoever comes in with you is able to get hooked  
16 up to the system so that you can present things  
17 electronically if you want to.

18 Alternatively, we'll have the ELMO available  
19 for you to present. I don't like -- I don't want stuff  
20 handed out to the jury, though. I don't like that  
21 passing around because it distracts from the testimony.  
22 But we'll work with you to make sure that stuff gets,  
23 gets published as needed.

24 Witnesses. Anybody invoking Rule 615?

25 MR. MULAIRE: No. But I have a question --

1 THE COURT: Oh, on what, what --

2 MR. TRUSEVICH: Judge, again -- and I don't  
3 want to beat a dead horse -- we're running out of time --

4 THE COURT: That's all right.

5 MR. TRUSEVICH: -- but as far as Ms. Mayfield,  
6 so we've also -- in addition, she's got -- she's retired  
7 from the EEOC, and she has a federal lawsuit against the  
8 EEOC for discrimination.

9 We have served her lawyer today, and I'm just  
10 going to come to the Court at some time and say, "Your  
11 Honor, is there anything the Court can do in order to let  
12 Ms. Mayfield know: "The Court needs you down there. You  
13 need to show up. If you don't want to testify, you can  
14 tell His Honor all the reasons why you don't want to  
15 testify."

16 But we are literally spending thousands of  
17 dollars to have our service processor around the clock  
18 waiting for her, and she's just dodging service. We're  
19 going to continue to do it. But it's just needless  
20 expense and money; and for her to be a former federal  
21 investigator -- and, again, I, I totally -- Justin and  
22 Miles, they would help me out if they could; they can't  
23 control it. I understand that.

24 But I've been practicing for 26 years. I've  
25 just not seen anything like this.

1 THE COURT: Where's, where's she located?

2 MR. TRUSEVICH: She's a little bit south of  
3 Chicago, and we served her lawyer today.

4 THE COURT: Is she in our neighborhood?

5 MR. TRUSEVICH: She's not; but under the  
6 rules, --

7 THE COURT: I know.

8 MR. TRUSEVICH: -- Judge, as long as it's at my  
9 expense.

10 THE COURT: I know.

11 MR. TRUSEVICH: I've called her lawyer. We  
12 will pay for her to fly if she wants to fly from Chicago  
13 to here. We'll pay for her. We'll pay for her hotel.  
14 "Whatever you want, Ms. Willis, you let me know."

15 And Ms. Willis said, "I don't have anything to  
16 do with it. Call Mr. Shultz," and I think -- Mr. Shultz  
17 didn't have anything to do it.

18 THE COURT: It's out of his, it's out of his --

19 MR. MULAIRE: I wonder -- I mean, it's been a  
20 little bit of a long year, but I wonder, in light of our  
21 earlier discussion, if the hearsay objection -- depending  
22 on which way --

23 THE COURT: Yeah.

24 MR. MULAIRE: -- the hearsay objections go --  
25 you know, if we lose that, you know, as I mentioned

1 before, I think then the notes themselves would be  
2 admissible. I don't -- I mean, obviously, it's up to you  
3 whether you want to continue to try to serve her.

4 MR. TRUSEVICH: No, no, no. We wouldn't.  
5 Thank you for that.

6 MR. MULAIRE: So, I mean, I don't -- I think  
7 that might address the issue.

8 MR. TRUSEVICH: It would. Thank you for that.

9 THE COURT: Okay. All right. All right.

10 MR. MULAIRE: Your Honor, we --

11 THE COURT: Mayfield, though, is the name.

12 MR. MULAIRE: -- we would like to exclude  
13 witnesses under Rule 615.

14 THE COURT: All right. So that's what we'll do  
15 then, so we'll keep -- we'll sequester witnesses. We'll  
16 have -- across the hall, each of you will be assigned an  
17 attorney-witness room that you can keep your witnesses.

18 Our CSOs are here for mine and the jury and the  
19 Court staff, so you'll have to get your own witnesses  
20 when it's time. Don't expect our CSOs to go get them for  
21 you.

22 MR. TRUSEVICH: Judge, I'm assuming we'll have  
23 one corporate rep --

24 THE COURT: Yeah. You'll have the corporate  
25 rep.

1           What are you -- are you planning to have Ms.  
2 Kerr, or is it just you?

3           MR. MULAIRE: We actually haven't discussed  
4 that. Is there any chance we could --

5           THE COURT: Yeah. Defer the question?

6           MR. MULAIRE: Yeah.

7           THE COURT: You can punt. You can get back to  
8 us, and we'll take it up in the morning.

9           If you all have an objection to her presence,  
10 we'll let you bring it up that morning if it becomes an  
11 issue.

12           All right. So let's get to -- I do want to  
13 see -- I need to get your witness lists from you as part  
14 of that pretrial order, as well as exhibit lists.

15           I like -- my own personal preference is to have  
16 things on PDF that I can put on the computer, and then I  
17 just pull up right here and follow along with the witness  
18 on my own. So that way, if there is an objection --  
19 because I don't want you publishing things until they're  
20 admitted -- and so I can have everything right here and  
21 handy. So if you can get me PDF copies of your  
22 exhibits, --

23           MR. MULAIRE: Okay.

24           THE COURT: -- it makes things easier for me.

25           MR. MULAIRE: Should we email those to the

1 chambers email address or --

2 THE COURT: You can either email or bring them  
3 on a thumb drive. Well, Sean might not like the idea of  
4 a thumb drive. You can -- okay. Yeah, you can bring  
5 them on a thumb drive, either one, whichever works for  
6 you. I'll just give them to our IT guy, and he'll scan  
7 to make sure you're not trying to corrupt our system  
8 before he loads them.

9 MR. TRUSEVICH: I think --

10 MR. MULAIRE: I think we do have a thumb drive.

11 MR. TRUSEVICH: If we agreed -- Miles, Justin,  
12 and I agreed on certain exhibits to be --

13 THE COURT: I still want them -- I still want  
14 them; but if you're all in agreement as to the  
15 admissibility, we'll, we'll admit them right at the  
16 outset. And if you want to reference them from beginning  
17 to end, you can.

18 MR. TRUSEVICH: Guys, if you have time, why  
19 don't we, the four of us, maybe, maybe do that?

20 THE COURT: Okay. Because that, that frees up  
21 the presentation. That way, you're not going through the  
22 mechanics --

23 MR. TRUSEVICH: Yes, sir.

24 THE COURT: -- of "Have you ever seen this  
25 before?" type of stuff. We don't need to get into that

1 if we can avoid it.

2 Let's see, do you have any -- are you going to  
3 present any, any witnesses by deposition?

4 MS. WASSERMAN: Yes.

5 MR. MULAIRE: Yes, Your Honor.

6 THE COURT: Okay. Read or video?

7 MS. WASSERMAN: Some of both -- some of each.

8 THE COURT: Some of each, okay.

9 Do this for me: Tee up the objections ahead of  
10 time so that we can -- if you have objections that you  
11 haven't agreed to, let's get those resolved outside the  
12 presence of the jury. Let's not get halfway through the  
13 reading and then -- I don't want to read the objections  
14 in. Okay? I want to read the testimony.

15 And so let's get those objections teed up at  
16 the outset, and we can take those up and have the, the  
17 transcripts redacted as necessary and, and get everything  
18 ruled on before the jury.

19 MS. WASSERMAN: And the video will be shown on  
20 this screen?

21 THE COURT: Yeah. It will be shown on --  
22 actually, it will go on that screen. And that screen  
23 will be rolled around and presented -- and it will also  
24 be on your screen on your T-- yep. You'll get it on the  
25 tables. I'll get it up here. The jury will get it on

1 each one of those little monitors in front of them and  
2 then also on the big screen.

3 MR. TRUSEVICH: Judge, this is better than  
4 Dallas; I'll tell you that. It really is.

5 THE COURT: Well, --

6 MR. MULAIRE: Your Honor, may I suggest the  
7 parties --

8 THE COURT: And I want to get -- let me finish  
9 my thought, and then I'll turn to you, Mr. Mulaire.

10 As far as the objections in the video, let's  
11 get those resolved so we can have those dubbed out. I  
12 don't want to stop and fast-forward and those sorts of  
13 things.

14 MR. MULAIRE: I suspect partly in order to, you  
15 know, edit the videos in light of objection rulings,  
16 that's something that would need to happen a little bit  
17 before trial.

18 THE COURT: Unless you agree on them. I'm  
19 just --

20 MR. MULAIRE: Yeah. We'll have some  
21 disagreements.

22 THE COURT: Yeah. Whatever disagreements there  
23 are, let's get them teed up and get them done.

24 MR. MULAIRE: In terms of a timeline, we had  
25 all these wonderful plans of having exchanged objections

1 to each other by now, and I think each --

2 THE COURT: Yeah.

3 MR. MULAIRE: -- side has gotten a little bit  
4 behind, but that is something I think we are planning on  
5 having really soon.

6 THE COURT: The beauty of trial prep.

7 MR. MULAIRE: I'm sorry?

8 THE COURT: I said: The beauty of trial prep.  
9 Good luck keeping up.

10 MR. MULAIRE: I wonder if it would make sense  
11 to pick a date now for submitting those to the Court as  
12 opposed to, your know, just bringing them on the first  
13 day of trial. You won't have any way of having enough  
14 time, and there'd be no way to edit --

15 THE COURT: If you bring them to me the first  
16 day of trial, we'll pick the jury, and we'll start  
17 evidence; and I'll look at them when the jury goes home,  
18 and you'll have to get them dubbed when I get them to you  
19 by 9:00.

20 MR. MULAIRE: If we do that -- to be -- if we  
21 were to get those to you by the end of the week, does  
22 that give Your Honor enough time to rule, or --

23 THE COURT: That's plenty of time for me.

24 MR. MULAIRE: -- do you need them sooner?

25 THE COURT: If you get them to me by Friday,

1 objections, I will get you -- I will get you rulings on  
2 the objections by Tuesday or Wednesday; and then that  
3 gives you a few days to dub your videos and resolve  
4 the --

5 MR. TRUSEVICH: Can we count on a conference  
6 call, like, on Wednesday? Does that work for the two of  
7 you, Kevin?

8 MR. LITTLE: Yeah.

9 MR. TRUSEVICH: That would be great; and if we  
10 can do that, we can, we can work it out.

11 THE COURT: Okay. Just get me all the, get me  
12 all the outstanding objections by Friday, with the  
13 transcripts. You don't need to give me the videos. Just  
14 give me the transcripts; and then I'll, I'll -- I'll rule  
15 on the objections and then --

16 MS. WASSERMAN: So -- so the highlighted  
17 transcripts reflecting what the designations are and the  
18 objections --

19 THE COURT: Yes.

20 MS. WASSERMAN: -- to Your Honor by Friday?

21 THE COURT: Yep, yep. And then I'll rule on  
22 the objections, and that way you can either redact or, or  
23 dub videos.

24 MR. TRUSEVICH: You do want them  
25 electronically, correct?

1 THE COURT: Makes -- yeah, yeah. File them,  
2 file them through the system.

3 MR. MULAIRE: So I'm, what we've been doing so  
4 far is basically highlighting in different colors on the  
5 deposition transcript --

6 THE COURT: That's fine. Just tell me what  
7 you're doing.

8 MR. MULAIRE: Can we -- hopefully, your ECF  
9 system can accept that.

10 THE COURT: If you tell me what your system is,  
11 you don't have to change your system for me.

12 MR. MULAIRE: Okay.

13 THE COURT: I can adapt with the best of them.

14 MS. WASSERMAN: The only question is: When we  
15 image it for filing, will it show the different colors?

16 MR. MULAIRE: Yeah. I mean, if worse comes to  
17 worse, we can email those PDFs to the chambers address  
18 instead, --

19 THE COURT: Either way is fine, just so long as  
20 you tee it up on the record.

21 MR. MULAIRE: -- we or can mail paper copies if  
22 that's better.

23 THE COURT: No. Won't be needed.

24 MR. MULAIRE: Okay.

25 THE COURT: Just make sure your objections are

1 on the record so that --

2 MR. MULAIRE: Okay.

3 THE COURT: -- everything that's considered has  
4 to be out in the open.

5 MR. MULAIRE: A, a question that will impact  
6 mostly the video dubbing: So we've, we've agreed on a  
7 schedule that's already come and gone for doing  
8 designations and counter-designations; and so there are a  
9 couple of depositions where, including video depositions,  
10 where, you know, the other side has counter-designated --

11 THE COURT: Sure.

12 MR. MULAIRE: -- some items. I've seen it done  
13 both ways, that either all the testimony designations and  
14 counter-designations is just played in the order in which  
15 it appears. I've also seen it where the  
16 counter-designations are all done at the end, sort of in  
17 the nature of cross-examination, even though it's not  
18 quite that.

19 Does the Court have a rule about that? Is it  
20 something we should discuss first?

21 THE COURT: I don't have a rule, but my  
22 practice has always been the former, which is: Once  
23 you've designated and counter-designated, we're going to  
24 play it as it appeared during the video --

25 MR. MULAIRE: And likewise --

1 THE COURT: -- because otherwise -- I mean,  
2 it's the -- if we do it the other way, it's the  
3 equivalent of recalling the witness, which I don't see  
4 any reason to do that because then you're messing around  
5 trying to figure out where the cross-examination is, and  
6 that becomes a [inaudible].

7 MS. WASSERMAN: And --

8 MR. MULAIRE: And, like--

9 MS. WASSERMAN: I'm sorry.

10 MR. MULAIRE: And, likewise, there are some  
11 depositions that will be done through a reading. I guess  
12 it's slightly more awkward where, you know, the counsel  
13 for Defendant is going to ask the questions that are our  
14 counter-designations; but if it's all being presented in  
15 one, you know, steady stream, I guess is that how that  
16 would happen?

17 MS. WASSERMAN: Well, well -- Your Honor,  
18 actually, I see reading as somewhat differently. One  
19 question -- and I'll get back to my comments on that one  
20 in a moment -- does Your Honor have any objection to  
21 several of the individuals that are identified as our  
22 witnesses are going to be called in the EEOC's case in  
23 chief. We intend to put our case on through them as  
24 opposed to recalling them as a witness.

25 Are we in agreement about doing that?

1 MR. MULAIRE: No. I mean, we would prefer to  
2 present our case during our case, and these are corp--  
3 these are managers of the corporation. I mean, they can  
4 testify again two days later.

5 MS. WASSERMAN: Your Honor, we find that that  
6 is going to be much more confusing for the jury. These  
7 are managers who are out of -- some of whom are out of  
8 the area, out of state possibly; and it's more confusion  
9 for the jury.

10 We believe that -- and what I've, historically  
11 have done, all my trials -- I've never actually had a  
12 counsel object to it -- for the ease of the jury, when  
13 the witness is on the stand, you put them on so they hear  
14 everything the witness has to say while they're on the  
15 witness stand as opposed to finishing and then bringing  
16 them back again.

17 THE COURT: Yeah.

18 MS. WASSERMAN: We find that that's more  
19 confusing for the jury.

20 THE COURT: Sure.

21 What's the objection, Mr. Mulaire? You just  
22 want a clean presentation of your evidence? Is that  
23 what --

24 MR. MULAIRE: That's correct.

25 THE COURT: Yeah. I'm going to allow them to,

1 to handle it that way. That's the way I've always  
2 handled it. I think it's easier for both the jury and  
3 for the witness.

4 MR. MULAIRE: And so then --

5 MS. WASSERMAN: And then on the same, on the  
6 same note, going to the, to the -- however, as far as the  
7 designations, I think that makes sense that if the, if  
8 you guys have a person reading -- so you're reading back  
9 and forth a portion that you want to designate, we would  
10 then do our reading after you're done, maybe not doing it  
11 in order so we don't have you reading our portions and us  
12 reading yours.

13 THE COURT: So what, what I've done is I  
14 usually volunteer one of my staff to just sit up there on  
15 the witness stand and do the reading. You all ask the  
16 questions you want asked; flag down the page of the  
17 transcript where it is; my clerk or somebody else will  
18 read along; and when you've finished your questions, then  
19 you all would stand up and turn to page whatever and  
20 start the reading from your end and then --

21 MS. WASSERMAN: Right.

22 THE COURT: So that, that's the way I've done  
23 it historically where -- but if you all want to bring  
24 your own reader, you know, you're welcome to.

25 MR. TRUSEVICH: We were just going to split it,

1 Judge, so if it's a female, you know, --

2 THE COURT: Yeah. That's what I've got. I've  
3 got a male clerk and a female clerk. And that's what  
4 I've always done, is if it's a male witness, I've asked  
5 Tom to do it. If it's a female witness, Marcy sits up  
6 there. And so -- unless the two of you wanted to bring  
7 your own. I, I've always found it, as a lawyer,  
8 uncomfortable to have a co-counsel sitting on the witness  
9 stand reading the other end of a transcript. I, I  
10 just --

11 MR. TRUSEVICH: Judge, she's in LA, and she's a  
12 trained actress. I want her up there.

13 THE COURT: That's right. Are you going to cry  
14 at any point during the deposition?

15 MR. MULAIRE: I mean, Your Honor, I think --

16 THE COURT: What are your thoughts, Mr.  
17 Mulaire?

18 MR. MULAIRE: I mean, I don't think we have a  
19 problem with any-- we were planning on having a paralegal  
20 here during the trial who --

21 THE COURT: That's fine. Yeah.

22 MR. MULAIRE: -- might do some reading if  
23 there's no objection to that.

24 THE COURT: No. Absolutely.

25 MR. MULAIRE: But since we will only have one

1 of her, if there's other readers available, that's  
2 helpful.

3 THE COURT: Yeah. We'll, we'll help. We'll  
4 accommodate.

5 MR. MULAIRE: The -- just getting back to the  
6 deposition designations, you know, I could anticipate --  
7 and maybe we should just talk about them case by case on  
8 our own time first; but, you know, there may be some  
9 instances where, you know, there's a designation. It  
10 skips a bit, and then it continues again; and we've  
11 counter-designated the piece in the middle, sort of for  
12 completeness, and so simply reading --

13 THE COURT: Yeah. You all need to work that  
14 out. I mean, there may be times where somebody --  
15 because it's not unusual; this happens all the time --  
16 where you want one question, and then you want the fourth  
17 question and Defense says, "Well, if you're going to ask  
18 1 and 4, I want 2 and 3."

19 MR. MULAIRE: Right.

20 THE COURT: Well, it just doesn't make sense to  
21 ask 1, then 4, and then come back and ask 2 and 3. You  
22 all just work together to make sure it makes sense.

23 MR. MULAIRE: And then just to clarify with  
24 the, taking their -- I guess they would be conducting the  
25 direct during our case, for their, the management

1 witnesses. They then won't be permitted to recall those  
2 witnesses during their case in chief, correct?

3 THE COURT: No. Once, once we release them --

4 MR. MULAIRE: Okay.

5 THE COURT: -- and send them home, they're  
6 going home.

7 MS. WASSERMAN: Unless there will be some need  
8 for rebuttal at some point, but I don't envision that  
9 because we're putting our case on in the case in chief.

10 THE COURT: Right.

11 MR. MULAIRE: Right. And, actually, that gets  
12 to another question I have. I mean, the -- I was going  
13 to ask whether, you know, if we have a short rebuttal  
14 case -- I don't anticipate anything at this point -- you  
15 know, if Your Honor has any rules about that.

16 THE COURT: No, I don't.

17 MR. MULAIRE: But then I'm -- Rent-A-Center is  
18 the defendant, so I'm not sure what they mean by  
19 rebuttal.

20 THE COURT: Yeah.

21 MS. WASSERMAN: It would depend upon if you do  
22 a rebuttal and we do a surrebuttal, if it gets that into  
23 the weeds.

24 MR. MULAIRE: Got it.

25 MS. WASSERMAN: Again, I don't envision that

1 happening but --

2 THE COURT: Demonstratives? Have you  
3 exchanged -- if you plan to use them, do you -- have you  
4 exchanged them yet?

5 MR. MULAIRE: I don't think --

6 MS. WASSERMAN: None have been exchanged.

7 MR. MULAIRE: No.

8 MS. WASSERMAN: At this point, we might end  
9 up having some demonstratives that we would use in  
10 closing, --

11 THE COURT: Okay.

12 MS. WASSERMAN: -- but we don't know what they  
13 are yet because it's -- we'll see what evidence --

14 THE COURT: They're still fluid.

15 MS. WASSERMAN: -- comes in.

16 THE COURT: Yeah.

17 MR. MULAIRE: Likewise, we haven't made any  
18 decisions yet; but if we did want to use any slides  
19 during our opening, show them to opposing counsel first?

20 THE COURT: Yeah, yeah. I just want to make  
21 sure that no objections come up during the arguments.  
22 That's really what my worry is. I want a clean  
23 presentation; and so if there is an objection, let's take  
24 it up before we start. So give each other enough time.

25 MS. WASSERMAN: Right.

1 THE COURT: Use a sense of professionalism.  
2 Give each other enough time to actually look at those  
3 demonstratives to make a decision whether an objection --  
4 because if you don't give each other enough time, then  
5 the, the gut instinct is to object.

6 "Why are you objecting?"

7 "Well, I don't know. I haven't looked at it  
8 yet."

9 All right? So let's, let's not get into that.

10 MR. MULAIRE: We did have one other matter to  
11 raise.

12 THE COURT: Uh-huh. Yeah. No. I've got --  
13 I've got a few things I want to get into.

14 MR. MULAIRE: Oh, sorry.

15 THE COURT: I want to tell you how I handle  
16 jury selection. I want to go into a few things -- you  
17 got to go? Have a safe trip.

18 MS. WASSERMAN: You know, I can probably  
19 push -- how long will it take to get from here to the  
20 airport, the Champaign airport?

21 THE COURT: 20 minutes.

22 MS. WASSERMAN: Okay. Then I probably have  
23 about another 12 minutes, or 8 minutes.

24 THE COURT: They won't wait for you though.

25 MS. WASSERMAN: What?

1 THE COURT: They won't wait for you.

2 MS. WASSERMAN: Then, then I wouldn't mind if  
3 we could reorder things so I could understand a little  
4 bit more about the judge, how the judge conducts jury  
5 selection --

6 THE COURT: Okay.

7 MS. WASSERMAN: -- before I depart.

8 THE COURT: All right. Is that all right, Mr.  
9 Mulaire?

10 MR. MULAIRE: Sure.

11 THE COURT: All right. Let's, let's -- so  
12 here's what we'll do. I'm going to seat -- so we'll call  
13 in -- I think we'll have at least 25 people. That's our  
14 normal -- what do we call in? Do you know? 20? No.  
15 We'll do 22 or 24, something like that. So somewhere  
16 between 20 and 24 we'll have here.

17 I'll seat 14 in there randomly. Then I'll ask  
18 all the questions; and then I'll call you up, and we'll  
19 take challenges here at the bench. If I allow any  
20 challenges then we'll dismiss that person; reseal into  
21 those spots. I'll question them specifically. Then I'll  
22 call you back up on just those. If there's any motions  
23 for challenge on those, we'll take it up.

24 And then once we've got 14 without challenges,  
25 then we'll start peremptories; and then once we've

1 started peremptories, if you pass, you're done. Okay?  
2 So you can't, can't hold back. Either, either exercise  
3 or don't exercise.

4 And when we finish, we'll have eight or nine or  
5 ten or whatever it is, and they'll all deliberate; no  
6 alternates.

7 MR. TRUSEVICH: Each side gets three, Your  
8 Honor?

9 THE COURT: Each side gets three. Yep, yep.

10 So that's what -- the way we do it. That way  
11 we've got -- I don't like -- I used to do, I used to do  
12 six and have the two alternates, but then I found that  
13 the two people that found out they were alternates at the  
14 end left mad. So I don't want to do that anymore; so if  
15 you're here and you listen, you get to deliberate. So  
16 that way we'll have everything.

17 Any questions about it?

18 I'll do the voir dire. There were some  
19 questions that came up as far as the objections. You  
20 know, I'll, I'll clean up some of that language. I don't  
21 want any argumentative questions. If you want to take  
22 those up right now, we can do those real quick before you  
23 leave or, or we can, we can take it up after. It  
24 doesn't --

25 MS. WASSERMAN: Well, then, I, I apologize to

1 the Court and to counsel.

2 THE COURT: No need. I'm surprised we're still  
3 going, so --

4 MS. WASSERMAN: Okay.

5 THE COURT: -- that's all right.

6 (Brief pause in proceedings; Ms. Wasserman  
7 presumably exiting the courtroom.)

8 THE COURT: All right. Mr. Mulaire, you had a  
9 question or two?

10 MR. MULAIRE: Well, a matter to raise.

11 So a subpoena was issued, or delivered to the  
12 EEOC as an entity to attend trial and bring the  
13 investigative file; and, procedurally, we're not quite  
14 sure what that means.

15 THE COURT: Are you, are you planning to be  
16 here?

17 MR. MULAIRE: We are planning on being here. I  
18 mean, it seems like it's sort of in the nature of a  
19 30(b)(6) subpoena; but that's a discovery device, not a  
20 trial device. I mean, the procedures are -- or the  
21 subpoena's procedurally improper.

22 To the extent there were documents in the  
23 investigative file that weren't privileged, they were all  
24 disclosed in discovery. We've stipulated to their  
25 authenticity, you know, to the extent they showed up on

1 the witness -- excuse me, the exhibit list that the  
2 defendant gave to us.

3 And so, you know, we'd like that subpoena to be  
4 quashed or withdrawn.

5 We attempted to talk about a few things before  
6 we came in here today, but --

7 THE COURT: That was one of them you hadn't  
8 gotten a chance to get to yet?

9 Do you know what's, what's -- what's going on?

10 MR. TRUSEVICH: Yeah. May I approach?

11 THE COURT: Yeah. Sure. Why don't you just  
12 hand them to Shannon. That way we can get in the  
13 practice of --

14 MR. TRUSEVICH: So what I've handed was the  
15 verification pages Mr. Shultz did to the EEOC discovery  
16 reply.

17 THE COURT: Okay.

18 MR. TRUSEVICH: So, Your Honor, again, and with  
19 all due respect to my colleagues, I've just not seen that  
20 in 26 years of practice. So Mr. Shultz verifies it; but  
21 then says, "But if our," you know, "if the deposition  
22 testimony is different, then that's incorporated."

23 You know, I, I couldn't verify interrogatories.  
24 We had Carnahan, and we expect Mr. Mulaire and Mr. Shultz  
25 to, to talk to him about those responses; but we need

1 someone to go over those discovery responses. Again, in  
2 my humble opinion, they are plain wrong.

3 And when I tried to ask Ms. Kerr, they  
4 instructed her saying, "Based on attorney-client  
5 privilege, don't answer that." So I couldn't ask her  
6 about it.

7 I can't call Mr. Shultz, unless I can, which  
8 would be fine if he wants to talk about the discovery  
9 responses; but he verified them, Your Honor, both sets.  
10 And I need to be able to talk to somebody from the EEOC  
11 and say -- just like they want the position statement to  
12 show the --

13 THE COURT: Sure.

14 MR. TRUSEVICH: -- ever changing --

15 THE COURT: Yeah. I understand your point.

16 MR. TRUSEVICH: We want the same thing.

17 May I approach, Your Honor?

18 THE COURT: Yeah. You don't have -- once --

19 MR. TRUSEVICH: I'm sorry.

20 THE COURT: So just for -- this is another  
21 thing: With witnesses, once you've asked to approach the  
22 witness the first time and it's allowed, just keep, keep  
23 on going back and forth --

24 MR. TRUSEVICH: Your Honor, if I violate that,  
25 I apologize, too. In Dallas, you have to ask each time,

1 and I apologize about that.

2 THE COURT: That's fine.

3 MR. TRUSEVICH: But that's my one concern,  
4 Judge. If they're not going to let me ask her about it  
5 and instruct her not to answer on attorney-client  
6 privilege -- I can't get Mr. Shultz because he's an  
7 attorney -- I need someone from the EEOC to be able to go  
8 over these.

9 THE COURT: How do we, how do we deal with  
10 that, Mr. Mulaire?

11 MR. MULAIRE: Well, I mean, first of all, we  
12 never instructed Ms. Kerr not to answer questions or  
13 interrogatories on the basis of attorney-client  
14 privilege.

15 The, the rule -- Rule 33 -- expressly permits a  
16 corporate or government entity to have any individual  
17 verify where there's a private -- you know, where they're  
18 a party who's a natural person, then that person has to  
19 verify the discovery responses.

20 I'm, what we've done is directly provided for  
21 by the Federal Rules of Civil Procedure.

22 I also don't know -- I mean, again, the  
23 subpoena's procedurally improper. I mean, there's no way  
24 to subpoena an entity to trial. If they had wanted to  
25 preserve an entity's testimony, the way to do that would

1 have been to conduct a 30(b)(6) deposition.

2 But I also don't see even why it's -- you know,  
3 what purpose it would serve. I mean, if they need  
4 somebody to authenticate, "Yes, this is a true and  
5 accurate copy of the EEOC's interrogatory response to  
6 thus and such," we have already said that we will  
7 stipulate to that. We are not making authenticity  
8 objections. You know, the objections that we would make  
9 are, you know, if the interrogatory covers two topics and  
10 one of them is irrelevant and we think it's prejudicial,  
11 we might object to that, you know. But, I mean, we don't  
12 have any objections -- we're not going to put them to the  
13 test of authenticating discovery responses. We, you  
14 know, checked the box for waiving authenticity on the  
15 exhibit list for almost all of their exhibits and  
16 everything that would be covered by this.

17 So, you know, when he says he needs to talk to  
18 somebody from the EEOC, I, I don't fully understand what  
19 that means; and I don't agree that there's any need for  
20 that, that I can think of.

21 And, also, I, you know --

22 THE COURT: Well, are you -- I mean, it's sort  
23 of inconsequen-- you're going to be here, right?

24 MR. MULAIRE: Correct.

25 THE COURT: And you're going to have your file

1 with you, aren't you?

2 MR. MULAIRE: I mean, we'll have the  
3 exhibits -- I mean, at this -- the file was disclosed  
4 long ago. So anything that either party wanted to use  
5 from it is now on the exhibit list.

6 MR. TRUSEVICH: Or parts of the file were  
7 produced.

8 MR. MULAIRE: Right. I mean, the file --

9 THE COURT: How big? What are we talking  
10 about? Are we talking about 200 pages?

11 MR. MULAIRE: Something like that.

12 THE COURT: Are we talking, like,  
13 200,000 pages?

14 MR. MULAIRE: No. More like a couple hundred.

15 MR. TRUSEVICH: Couple hundred.

16 THE COURT: Just throw it in a trial -- throw  
17 it in your suitcase and bring it so that it's here. If  
18 it becomes an issue, we'll deal with it; but let's just  
19 withdraw the subpoena for now, or I'll quash it,  
20 whichever one you want to do.

21 MR. TRUSEVICH: Your Honor, we'll, we'll  
22 withdraw it.

23 THE COURT: Good idea.

24 MR. MULAIRE: Thank you.

25 THE COURT: So we'll do that. And we'll take

1 up -- you know, if there's a question on there in the  
2 interrogatories that you want to question Ms. Kerr about  
3 and there's an objection to, to why she should be able to  
4 answer the question, we'll take it up on a question by  
5 question --

6 MR. MULAIRE: Okay. Fair enough, Your Honor.

7 MR. TRUSEVICH: Thank you.

8 THE COURT: But let's make sure we have  
9 everything here so if there is an issue we can get it  
10 resolved instead of having to call back to D.C. and have  
11 stuff emailed or faxed. I want to avoid that.

12 MR. MULAIRE: Yeah. I guess I would just ask  
13 if there's anything they anticipate using that it would  
14 appear on their exhibit list. I mean, we're happy to  
15 also have --

16 THE COURT: Well, that's -- I mean, if it's --  
17 yeah, unless it's in rebuttal to something.

18 MR. MULAIRE: Thank you.

19 THE COURT: We'll deal with it.

20 All right. Anything else on that issue?

21 MR. MULAIRE: No, nothing else.

22 THE COURT: All right. So let's go through,  
23 real quick -- so I, I generally adopt Judge Bruce's  
24 courtroom rules, just so you know. If you want them,  
25 just pull them off Judge Bruce's list on the website.

1 I don't, I don't think I've got my own, do I,  
2 Shannon? I don't think I ever did. I think I've just  
3 always said, "See Judge Bruce's rules," is what I've  
4 done.

5 There's a few things on there, though, I do  
6 want to note, though. Judge Bruce notes that we'll  
7 convene at 9:30 and end at 4:30. I'm going to -- our  
8 start time and end time is going to depend completely on  
9 the geographic makeup of our jury. So we have, at times,  
10 members of the jury that are two hours from here.

11 MR. TRUSEVICH: Wow.

12 THE COURT: And if they're two hours from here,  
13 we'll start at 9:30. But if we don't have anybody that's  
14 driving that far, we'll start at 9:00, and we'll end at  
15 5:00.

16 But we -- we just have to see who's on the jury  
17 before we make that decision one way or the other.

18 So, Judge Bruce has a no food or drink in the,  
19 in the courtroom. Shannon will always have for you  
20 water. So there will be water on there; and, you know,  
21 if you want mints or Lifesavers or something like that so  
22 you don't choke, you know, --

23 MR. TRUSEVICH: That's what I was going to ask,  
24 whether we can have cough drops, Your Honor.

25 THE COURT: Yeah. Those are all fine. Those

1 are all fine.

2 Just don't do anything to make the jury  
3 jealous -- all right? -- because we're not going to let  
4 them -- they'll have a bottle of water with them; but  
5 other than that, you know, they won't be allowed to bring  
6 stuff out.

7 MR. TRUSEVICH: You have to watch; Clint has a  
8 beer in the courtroom.

9 THE COURT: All right. Yeah. So don't sit  
10 over there eating Snickers or anything like that.

11 I, I am very careful with the jury's time. I  
12 don't want them to come in and then sit in the back room  
13 for two hours or three hours. So if there's anything  
14 that you anticipate coming up in the next day, let me  
15 know so that we can either do it at the end of the day  
16 after we've dismissed them; or we can do it at the  
17 beginning of the day before they arrive, and we can let  
18 them come in a half hour later. All right? I would --  
19 they'd much rather stay home and have a cup of coffee  
20 with their husband or wife rather than drive in here.  
21 Okay? So let's, let's get those things teed up ahead of  
22 time so that we're not wasting the jury's time.

23 Like I mentioned, as far as the formalities,  
24 you know, when it's just us, I don't -- just sit -- just  
25 be comfortable, and let's talk about the issues and deal

1 with it.

2           When the jury's present, though, try to be a  
3 little more formal. I think that it's meaningful to them  
4 when we stand and are respectful, especially toward each  
5 other. And with that said, be, be sure to direct  
6 comments toward me. Try not to talk at each other. That  
7 becomes disruptive.

8           You'll see there's a couple other things in  
9 here that I want to note. Like I mentioned before, only  
10 one witness -- or, I mean, one attorney per witness. So  
11 if it's your witness, it's your objections. Okay? So I  
12 don't want Mr. Shultz jumping up to object during Mr.  
13 Mulaire's witness. Okay? You know, you can elbow each  
14 other and slide notes to each other all you want. Just  
15 only one person talk. If it's your witness, you talk.  
16 If it's not your witness, you scribble notes.

17           MR. MULAIRE: Only one party, one record.

18           THE COURT: That's right. You got it.

19           Like I said before, too, ask to approach each  
20 witness. But then once you've got it, you're free to  
21 walk back and forth.

22           As far as the presentation of documents, if  
23 everybody agrees they're admissible, let's just get them  
24 admitted; and that way you can talk about them without  
25 having to go through the mechanics of laying foundation.

1 I know it makes sense to lay foundation because sometimes  
2 you -- you know, it's meaningful to what the document is.  
3 You know, so I'm not telling you not to do that; but I'm  
4 telling you: If it doesn't matter, don't -- you don't  
5 have to waste your time on my account. Okay? That's the  
6 point.

7 Be short on your objections. Just state your  
8 grounds without getting into a long argument about it.  
9 I've tried enough cases that I usually know why it's  
10 objectionable, if it's objectionable.

11 I don't need a response from the person asking  
12 the questions, although there may be times where, if I  
13 think it's close, I'll give you -- I'll turn to you and  
14 ask you if you have any thoughts.

15 But if I -- most of the time, after I hear the  
16 objection, I'll either rule on it without giving you that  
17 chance. It just is the reality of things. I, I -- and  
18 sometimes I'll stop and go back and read the question  
19 over just to make sure I didn't miss something; and, but,  
20 let's avoid argument during the, the objections. Let's  
21 just, you know, state the grounds: relevance,  
22 argumentative, whatever it is. Just get to it.

23 And if you want to make a record, if there's  
24 something that you think you need to make a record on,  
25 let's do it up here so that we're not trying to influence

1 the -- I want to avoid any attempts or even unintended  
2 influence on the jury just from the arguments. So if  
3 there's something you want to make a record on, we'll do  
4 it over here, and we'll take it up there.

5 Be careful, too, once the objection's made.  
6 Like I said, sometimes I'll stop to read because I  
7 have to -- I'll go back and reread the question.

8 Unless you're going to withdraw the question,  
9 don't, don't ask another question until I've had a chance  
10 to look at it; and I may stop the witness and have the  
11 witness wait for me to look, too.

12 Now, if you're going to withdraw the question,  
13 that's fine. Just say, "I'll withdraw the question," and  
14 ask the next one; and then I won't, I won't rule on it.

15 I think we've touched on everything else.

16 Once, once the exhibits are offered, once  
17 they're tendered, then Shannon takes charge. Okay? So  
18 even if it's tendered and, and I deny it, its  
19 admissibility, she's still going to keep it. Okay?

20 If you need it, just let her know. She's --  
21 you know, she'll, she'll hunt you down to find it, and  
22 she'll chase you to the hotel if she has to. But just  
23 understand that once, once it's been tendered, it becomes  
24 hers; and if you need it back, let us know. But I'm sure  
25 you'll have plenty of copies. Okay?

1 I think that's everything I've got.

2 As far as the voir dire goes, the questions --  
3 there were a couple of objections that were raised.

4 Before we get to that, any, any questions about  
5 just general conduct as far as how we're going to handle  
6 things?

7 MR. TRUSEVICH: None from our side.

8 MR. MULAIRE: Just generally in terms of time  
9 limits, the parties, you know, previously agreed and  
10 we've discussed with the Court that this will be a  
11 five-day trial.

12 THE COURT: Yeah.

13 MR. MULAIRE: And while I mentioned it on the  
14 status conference where the trial date was picked, I just  
15 want to reiterate that I'm unavailable the following  
16 week.

17 THE COURT: Yeah.

18 MR. MULAIRE: That's why we picked  
19 February 5th. So, you know, obviously we can only  
20 control our own case.

21 THE COURT: I'll, I'll ask you at the end of --  
22 I'll ask you at the end of every day how we're  
23 progressing.

24 MR. MULAIRE: Okay.

25 THE COURT: And if we get to a point where we

1 fall behind, I may start prodding you to move it.

2 MR. MULAIRE: Okay.

3 THE COURT: Okay.

4 MR. MULAIRE: Likewise, for openings, any time  
5 limits --

6 THE COURT: No.

7 MR. MULAIRE: -- or just, we're left to our own  
8 devices?

9 THE COURT: You're up to your own discretion;  
10 and if you want to bore the heck out of them, that's your  
11 decision.

12 MR. MULAIRE: Got it.

13 THE COURT: All right?

14 Now, as far as the voir dire questions, let's  
15 just -- I just -- all I'm going to do is run through the  
16 ones that there were objections filed. I'm not going to  
17 get into the others because I may, I may -- just so you  
18 all know: Just because you proposed it and I haven't  
19 addressed it today doesn't mean I'm going to ask it. All  
20 right? I'm going to go back through, and I'll do my own  
21 questions. But there are certain ones that there were  
22 objections made, and I want to get those objections  
23 addressed because I don't want to ask a question to which  
24 there's an objection without dealing with it.

25 So, number 15 was objected. Rent-A-Center

1 proposed, "Is there anyone on the jury panel who has had  
2 a family member or friend" -- it will be "close friend";  
3 it's not going to be any friend; it will be a close  
4 friend -- "who has filed a claim against a current or  
5 past employer with the EEOC, Department of Labor, or the  
6 National Labor" -- I'm going to strike "National Labor  
7 Relations Board." I am going to leave in "Department of  
8 Labor" because there's just this common misunderstanding  
9 that "labor" and "employment" are the same thing. And so  
10 I'm going to leave that out there because, you know, my  
11 neighbor may have filed an employment law case that I  
12 thought got filed with the Department of Labor. It was  
13 really EEOC. I want to get it -- I want to set that out.

14           There's objection to number 9, "Do you feel an  
15 employee has an obligation to be aware of, and to abide  
16 by, company policy and rules? Do you feel it's important  
17 to follow your employer's rules?" I'm not going to ask  
18 that one. Just so you know, I'm just not going to ask  
19 it.

20           There's questions about -- number 25 and 31 are  
21 very similar -- "Do any of you believe that somebody who  
22 sues a large company is automatically entitled to recover  
23 some money just because they brought the lawsuit?" And  
24 then there's the, "Under our system of justice, the EEOC  
25 bears the burden. . . , and Rent-A-Center is not required

1 to disprove. . . . If the EEOC fails to convince . . . "

2 -- so what I'm going to do with those two is -- I

3 scribbled this this after-- this morning, so it may be

4 slightly different from this; but the gist of what I'm

5 going to ask is: "One party to this litigation is a

6 large corporation. Does anyone have a problem with large

7 corporations? One party is a governmental entity. Does

8 anyone have a problem with a governmental entity? The

9 parties are to be treated equally. Is there anyone who

10 will treat either party more or less favorably because of

11 who they are as a corporate entity or either as a

12 governmental entity?"

13 So we'll get into both -- we'll get into both

14 of those, so we'll, we'll try to see if anybody has a

15 bias against the government or a bias against large

16 corporations. So we'll try to draw that out, and I'll

17 finagle the language a little bit about how that's asked.

18 So number 28 and 29, "Does anyone feel if

19 someone is falsely accused of discrimination that they

20 should not defend themselves?" And then, "Do you have

21 any problem with the concept that, in the eyes of the

22 law, the individual plaintiff and corporate employer are

23 the same?"

24 Obviously, I dealt with 29 somewhat already.

25 But as far as 21 -- 28 goes, I'm going to ask: "Does

1 anyone disagree with -- that a plaintiff has a right to  
2 come to this Court and seek damages?" and "Does anyone  
3 disagree with, that a defendant has a right to defend  
4 claims brought against it?"

5 And so we'll get into both of those. We'll ask  
6 both of those questions.

7 But that's how I'll deal with those objections.

8 And I'm going to look -- I'll look a little  
9 more closely at everything that was proposed and try to  
10 keep it -- I'll try to draw out -- I can generally  
11 determine what it is you're trying to get at through your  
12 questions, and I'll try to draw that out -- maybe not ask  
13 it precisely the way that you do, but in a way that I  
14 think will draw out that perceived bias or, or not.

15 Okay?

16 MR. MULAIRE: Okay.

17 THE COURT: That's everything on my agenda. Do  
18 you all have anything else you want to take up today?

19 (Brief pause in proceedings.)

20 MR. MULAIRE: No, Your Honor.

21 THE COURT: All right.

22 MR. TRUSEVICH: Nothing from Rent-A-Center.

23 Thank you, Your Honor, --

24 THE COURT: All right. Hold on.

25 MR. TRUSEVICH: -- for accommodating us -- and

1 your staff.

2 THE COURT: All right. Hold on.

3 (Brief pause in proceedings.)

4 THE COURT: All right. And then one of the  
5 things we've talked about is you're trying to finalize  
6 the final pretrial order as well. Any reason you can't  
7 get that done by Friday? Because we need to have the  
8 witness list, the exhibit list, and everything so that  
9 Shannon can have everything ready to go.

10 MR. MULAIRE: Yeah. I mean, we brought a copy  
11 with us. We had -- I mean, Ms. Wasserman said there were  
12 still things we needed to discuss; so I take that at face  
13 value, but I think it's pretty close to done.

14 THE COURT: All right. So you all -- you're  
15 going to have a conference call Wednesday?

16 MR. MULAIRE: Correct.

17 THE COURT: So why don't you put that at the  
18 top of your agenda and then get that to me Friday as  
19 well, and then that way we can -- we'll have it, and  
20 we'll have -- I'll at least have a copy of the exhibit  
21 list and witness list, which is what I need at my end.

22 Do you make a copy for them generally to  
23 maintain? No? They're on their own? All right.

24 MR. MULAIRE: Actually, I'm sorry. I --

25 THE COURT: That's all right.

1 MR. MULAIRE: -- did think of one question.

2 THE COURT: Uh-huh.

3 MR. MULAIRE: So for the exhibits themselves,  
4 when Your Honor was commenting that you prefer PDF, does  
5 that extend to the exhibits? You want all the exhibits  
6 in PDF or --

7 THE COURT: No. Exhibits need to be paper --

8 MR. MULAIRE: So submit them --

9 THE COURT: -- because Shannon will maintain a  
10 physical file that will be kept in our doc-- evidence  
11 vault.

12 MR. MULAIRE: Should we provide a binder of  
13 courtesy copies of exhibits in addition to the labeled  
14 ones?

15 THE COURT: No. If you give me the PDF, I'll  
16 use that as the courtesy copy.

17 MR. MULAIRE: Okay.

18 THE COURT: And then I'll just pull it up --  
19 because it's easier for me just to hit a couple of clicks  
20 here than to pop around through a binder and make a bunch  
21 of noise because I've got this microphone right  
22 underneath me.

23 (Brief pause in proceedings; counsel  
24 talking amongst themselves.)

25 THE COURT: Okay.

1 MR. TRUSEVICH: What about as far as -- for the  
2 black binders, Judge, we normally will have one for the  
3 witness, --

4 THE COURT: Uh-huh.

5 MR. TRUSEVICH: -- one for the court clerk.

6 THE COURT: Uh-huh.

7 MR. TRUSEVICH: And is that the way you want  
8 it? We did have one for you, but we'll cancel it.

9 THE COURT: Yeah. I don't need it. Well, you  
10 can give it to me, but it will sit on the floor.

11 MR. TRUSEVICH: All right, Your Honor. Paper  
12 weight.

13 THE COURT: Yeah. That's exactly what it will  
14 be.

15 All right. Any chance you all are going to get  
16 this settled in the next two weeks?

17 MR. TRUSEVICH: No, Your Honor. We will not.

18 THE COURT: Okay. That's fair enough.

19 MR. MULAIRE: I think that answer must go for  
20 both of us.

21 THE COURT: Yeah.

22 MR. MULAIRE: Just, my experiences in the past,  
23 walking out of a final pretrial conference and then  
24 thinking of the one other question I should have asked.

25 THE COURT: Yeah. As soon as you sit in a

1 different chair, it --

2 MR. MULAIRE: Is -- you know, we'll contact  
3 opposing counsel first, but is there a particular member  
4 of your staff who we could call if we thought of a  
5 procedural question --

6 THE COURT: Just ask Tom. Call Tom.

7 MR. MULAIRE: Okay.

8 THE COURT: Tom Drysdale is his last name.  
9 Just call him in general on my line. He actually is  
10 usually the one responsible for picking up the phone  
11 anyway.

12 MR. MULAIRE: Thank you.

13 THE COURT: All right? All right. Well, thank  
14 you all; looking forward to it.

15 MR. TRUSEVICH: Thank you, Your Honor.

16 THE COURT: I'm sure we'll enjoy ourselves, our  
17 week together, and get things done. We'll stand in  
18 recess until then. Let me know if you need anything  
19 though.

20 MR. MULAIRE: Thank you, Your Honor.

21 MR. TRUSEVICH: Thank you.

22 (Hearing concluded, 4:07 p.m.)

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REPORTER'S CERTIFICATE

I, LISA KNIGHT COSIMINI, RMR-CRR, hereby certify that the foregoing, to the best of my ability, is a correct transcript from the proceedings digitally recorded before the magistrate judge in the above-entitled matter. I was not personally present for said proceedings.

Dated this 4th day of May, 2018.

\_\_\_\_\_  
s/Lisa Knight Cosimini

Lisa Knight Cosimini, RMR-CRR  
Illinois License # 084-002998