

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

FIRECLEAN, LLC,	.	Civil Action No. 1:16cv293
	.	
vs.	.	Alexandria, Virginia
	.	September 23, 2016
GEORGE FENNEL; STEEL SHIELD	.	10:18 a.m.
TECHNOLOGIES, INC.; and	.	
ISM WEAPONS SYSTEMS, INC.,	.	
	.	
Defendants.	.	
	.	
.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JOHN F. ANDERSON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFF:	BERNARD J. DiMURO, ESQ. STACEY ROSE HARRIS, ESQ. DiMuroGinsberg, P.C. 1101 King Street, Suite 610 Alexandria, VA 22314-2956
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FOR THE DEFENDANTS:	HELEN D. NEIGHBORS, ESQ. Franklin & Prokopik, P.C. 2325 Dulles Corner Boulevard Suite 1150 Herndon, VA 20171
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(Proceedings recorded by electronic sound recording, transcript produced by computerized transcription.)

1 P R O C E E D I N G S

2 THE CLERK: FireClean, LLC v. George Fennell, et al.,
3 Civil Action No. 1:16cv293.

4 THE COURT: All right. Okay. Everybody note their
5 appearance for us. Thank you.

6 MS. HARRIS: Good morning, Your Honor. Stacey Rose
7 Harris for plaintiff, FireClean.

8 THE COURT: Okay.

9 MR. DiMURO: Ben DiMuro for plaintiff, FireClean.

10 MS. NEIGHBORS: Helen Neighbors on behalf of Steel
11 Shield Technologies.

12 THE COURT: Okay. Thank you.

13 I just warn you that I'm -- there's another matter
14 that I have on my docket that they had a case in front of Judge
15 Lee. When they are finished and come down here, I'm going to
16 take a break. I'm not going to make them sit through all of
17 this, to be honest with you, to go through. So I may, assuming
18 they get down here before we're done, just take a brief pause
19 in our case and in these motions to deal with that issue.

20 I'm going to take up the motion for reconsideration
21 first. Okay. Well, you know, there was some indication in
22 your papers that you thought you didn't have a full and fair
23 opportunity to argue whether this is a trade secret or not.
24 Let me know what you believe you have that would support an
25 argument that the formula itself, the specific formula is not a

1 trade secret.

2 MS. NEIGHBORS: Your Honor, we were looking at the
3 case of -- it was mentioned in my previous brief, that
4 indicates that something that is before the U.S. Patent and
5 Trademark Office, that is not a trade secret.

6 THE COURT: Okay. And --

7 MS. NEIGHBORS: And our position -- yes, sir.

8 THE COURT: Their formula, you have all the
9 information that is in the USPTO, and the USPTO says that
10 anything that falls within that patent has to be a blend of at
11 least three different oils, right?

12 MS. NEIGHBORS: Yes, sir.

13 THE COURT: It doesn't say -- and they have various
14 different claims.

15 MS. NEIGHBORS: Yes, sir.

16 THE COURT: The first is that the three have to be at
17 least 25 percent, and then there's another variation of 50 and
18 75 and up to 100, and, you know, it has to be this type of oil,
19 that type of oil.

20 Help me understand why you think the specific
21 formula, that is, what the oils are, what the composition --
22 what types of oils and the percentages of those oils, is not a
23 trade secret based on the patent application.

24 MS. NEIGHBORS: We believe that based on the
25 information that they provided as part of the trade secret --

1 trade secret -- as part of the patent application would reflect
2 that certain ones or certain of the oils have been disclosed to
3 the Patent and Trademark Office. I'm talking about canola oil.
4 I'm talking about canola-soybean oil blends. That information
5 is contained within.

6 Our position is that by disclosing that information
7 to the Patent and Trademark Office and that those items are,
8 are part of this product, that --

9 THE COURT: Are possible components of a patentable
10 article. And, you know, there are a lot of different, you
11 know, they could be selling six, seven, ten, many different
12 variations. They could all fall within the claims of this
13 patent. They list at least eight or nine different types of
14 oils --

15 MS. NEIGHBORS: Yes, sir.

16 THE COURT: -- as potential oils.

17 They list various different percentages of those
18 oils, and they say one has to be a high something or another
19 oil, or one should be a high this or that, but the idea that
20 there are -- there's a, various dependent claims that follow an
21 independent claim --

22 MS. NEIGHBORS: Yes, sir.

23 THE COURT: -- so, like, one is the independent
24 claim, and then you've got, you know, the ones that depend on
25 that, you know, I don't understand how you can argue that the

1 patent itself precludes there being a trade secret as to a
2 specific formula that may be contained within a broad parameter
3 of a patent.

4 MS. NEIGHBORS: Specifically what we were referring
5 to is there's the case that does say that if it's a patented
6 item, then it is not a trade secret, and it cannot be a trade
7 secret, because the purpose of the patent itself is to give
8 them exclusive rights for -- to the product for a certain
9 period of time to use and to have exclusive rights to that
10 product.

11 That's what we're relying on because once you get --
12 the patent is what gives you -- or takes you out of the realm
13 of a trade secret is because you've been granted a patent for
14 the exclusive use of those particular items.

15 THE COURT: All right.

16 MS. NEIGHBORS: Nobody can do anything with that
17 formula until your time has expired unless certain other
18 factors occur, but ultimately, that's where it ends up is they
19 get exclusive rights to use that formula and that formulation
20 of the product --

21 THE COURT: Well, it's not that formula. It's that
22 concept. I mean --

23 MS. NEIGHBORS: Okay.

24 THE COURT: -- the, the difference that -- and I
25 think this is a significant one -- is the patent has given them

1 certain rights to have, and if someone did a blend of two oils,
2 they wouldn't fall within the terms of that patent, and then
3 they could go out and sell as much as they wanted and not be
4 covered under that patent.

5 If it's three or more, then they very well may be
6 covered under the terms of the patent, but if they blended two
7 types of, you know, a canola oil and a, whatever other kind of
8 oil, sunflower oil together and they sold that, then, you know,
9 it wouldn't be covered by the patent.

10 The problem -- and I'm just having a conceptual
11 problem -- is that there are many, many different variations of
12 a formula that could fall within the coverage of the patent.

13 MS. NEIGHBORS: Yes, sir.

14 THE COURT: And the mere fact that there is a patent
15 I don't think precludes one from saying, I've got a very
16 special formula even though it falls under the coverage of the
17 patent, and I have not disclosed it to anybody else. I mean, I
18 think everything else, you know, falls into place, that it's
19 been kept, you know, only two people in the world know it and,
20 you know, they haven't disclosed it to anybody else, and, you
21 know, those kinds of protections for trade secret exist, but I,
22 I don't know -- I still don't really understand how you can say
23 that these specific formula -- and if it's a machine, that is,
24 you know, this machine is covered by that patent and it, you
25 know, it has specific specifications as to what it is, you

1 know, you're right, you know, you can take a machine, you can,
2 you know, re-engineer it, you can do those kinds of things, but
3 it is a, a known machine, but the blends, the components of the
4 blends, given that there are many, many different variations,
5 it still could be covered by the patent, I think, can be
6 protected as a trade secret.

7 MS. NEIGHBORS: Our position is that when you have a
8 patent, you're patenting the fact that you're blending
9 products. If John Q. Public -- part of the patent process
10 before you put a product out on the market that you want to get
11 a patent on is you've got to be able to go in and see and say,
12 okay, I've got this, and this is something that I've put
13 together and I'm going to put out on the market, Product A. I
14 get a patent on it, or I'm going through the patent process to
15 get a patent on that.

16 The product itself and the argument in this case is
17 this product hasn't changed. The formulation of this product
18 hasn't changed, but the bottom line is there's no way to tell
19 what that product is because what they're patenting is, is the
20 product. It's a blend of oils.

21 Well, if I come up as --

22 THE COURT: It's at least three or more oils.

23 MS. NEIGHBORS: At least three or more oils, but if I
24 come up as John Q. Public and I've invented Product B, Product
25 B is a blend of three or more oils, there's no way for me to

1 tell if they're allowed to keep the trade secret status that my
2 three oils and what I'm patenting or trying to patent myself is
3 patentable --

4 THE COURT: Well --

5 MS. NEIGHBORS: -- because they've gotten the
6 spectrum.

7 They've named pretty much --

8 THE COURT: The Patent Office has granted them the
9 right to practice three or more blends of at least 25 percent
10 going forward for those purposes, for bikes and guns and
11 whatever else that's recited in the patent application, for the
12 life of the patent.

13 If the patent expires, let's say, in 30 years from
14 now and someone by chance -- and the odds of this would, I
15 suspect would be very high -- would come up with the exact same
16 blend that they have after the patent has expired and they use
17 the same percentages and the same amount and the same number of
18 oils and they came up with it on their own, they could sell it.
19 There would be no, you know, there's no patent protection to
20 keep them from selling that. They didn't steal this trade
21 secret.

22 They haven't gotten any other protection other than
23 we're keeping it secret, so, you know, you could do that, but
24 the odds of, you know, which of the -- which oils, how many,
25 and the amounts, you know, I still see is protectable as a

1 trade secret.

2 MS. NEIGHBORS: Okay, understood. And at the 30-year
3 mark or whenever the patent expires, I agree with you
4 wholeheartedly. If someone else comes up and engineers a
5 product that's the same as the one that was patented and the
6 patent's expired for, yes, they could.

7 We're talking what is the time frame in between, and
8 that is our understanding of the patent law is supposed to give
9 you exclusive rights to it so that if anybody else tries to,
10 to -- does come up with a product, blended three oils in those
11 percentages --

12 THE COURT: See, that doesn't make any sense, and
13 I'll tell you why.

14 MS. NEIGHBORS: Okay.

15 THE COURT: I have a product that is my own blend of
16 something, okay? I never told anybody about it. I have a
17 patent that covers many different kinds of products, but I have
18 this special one that I know about. It's covered by the
19 patent.

20 You're saying that if I get a patent, then I don't
21 have the right to protect that special blend any longer than
22 what the Patent Office says.

23 MS. NEIGHBORS: The question is you're saying that
24 the patent -- I'm trying to make sure that I understand
25 correctly --

1 THE COURT: Right.

2 MS. NEIGHBORS: You're saying that that patent that
3 you've obtained covers that special blend.

4 THE COURT: Covers that plus many more blends.

5 MS. NEIGHBORS: Many more.

6 THE COURT: Right.

7 MS. NEIGHBORS: The problem is I as a public or
8 somebody that has -- I come up with the same formula that you
9 came up with.

10 THE COURT: Okay.

11 MS. NEIGHBORS: I, I engineered it all on my own. I
12 didn't have -- I didn't have any inside information on it.

13 THE COURT: Right.

14 MS. NEIGHBORS: I, I come up with that patent. You
15 can preclude me from using -- not the patent but the formula,
16 you can preclude me based on that patent from using that.

17 I have no way of knowing that you've already got the
18 corner on the market for that for whatever the length of, of
19 the patent is.

20 THE COURT: Sure. You've got notice of the patent.

21 MS. NEIGHBORS: The patent says --

22 THE COURT: If it's covered -- if it's covered by the
23 patent and there are three -- if there are three or more
24 variations of oils and your product is three or more variations
25 of oils and meets the other requirements of the patent, you

1 know, you're deemed to have notice because it's out there, the
2 patent is known to the public and published, and you should
3 know that you shouldn't be trying to market that kind of a
4 product, and if you do, you would be subject to patent
5 infringement claim.

6 MS. NEIGHBORS: Understood. I just -- understood.

7 THE COURT: All right. Well, having given you
8 opportunity to make the argument on the trade secret, I'm
9 reaffirming my earlier ruling that I don't think in this case
10 that a -- that the issued patent would require any inventor to
11 then disclose the specific formula for anything that is
12 included in the patent.

13 MS. NEIGHBORS: Okay.

14 THE COURT: And, you know, if they licensed it to
15 someone else to use, so say they licensed it to, you know,
16 FrogGlue (sic) or whatever and they came up with their own
17 formula, you know, it doesn't necessarily mean that that
18 FrogGlue would have to disclose their formula. They're just
19 getting the right to use a patent, and that would have been,
20 you know, using three blends of oils together and so-and-so.

21 So I don't -- you know, I don't believe -- well, I'll
22 reconsider but reaffirm my earlier ruling that the specific
23 formula in this case is a trade secret.

24 All right. Now, your -- and I think we've taken care
25 of the clarification that we know that --

1 MS. NEIGHBORS: Yes.

2 THE COURT: -- the local rule provides that unless
3 there's another time period for responding, it's 11 days from
4 the day the order gets entered.

5 I understand your argument for reconsideration to be
6 based on the fact that you believe that the correspondence with
7 the FBI shows that there have been changes in the formula. Is
8 that --

9 MS. NEIGHBORS: Yes, sir.

10 THE COURT: Okay. You've seen their opposition --

11 MS. NEIGHBORS: Yes, sir.

12 THE COURT: -- that says, you know -- and this isn't
13 just counsel representing. This is the, Mr. Sugg saying under
14 oath that there haven't been changes. If I was required to
15 disclose a formula, there would only be one formula. It's been
16 the same percentage of oils and things like that.

17 So help me understand now that you have seen that,
18 how the basis for your motion for reconsideration based on
19 there being more than one formula stands up.

20 MS. NEIGHBORS: Okay. Couple of things. Let's talk
21 first about Mr. Sugg's declaration.

22 THE COURT: Okay.

23 MS. NEIGHBORS: He says that -- in his declaration,
24 he talks about making up formulas, experimental blends that are
25 supposed to replace FireClean. We're supposed to -- we're

1 trying to build a better mousetrap. I've got a product. I'm
2 putting out sample bottles of product that is supposed to
3 replace FireClean. That in and of itself indicates that, those
4 formulation issues going on.

5 The other thing that I would like to point out is at
6 the last hearing, the representation was made is, oh, they put
7 an additive into the product in 2015, October -- September-
8 October 2015. They added an additive to the product.

9 That's a change to the formula. That's not the same
10 formula that was out on the market in 2012 up through that
11 September -- September-October time frame, because they've
12 added something to that formula. The affidavit says, well, if
13 we made any changes, we'd tout it, probably tout it as new and
14 improved.

15 Well, they did change the formula. They put another
16 additive in, and they said nothing to the public. So there is
17 a change to this formula. The formula has been changed.

18 The other thing that we were looking at is documents
19 that have been provided to us --

20 THE COURT: Well --

21 MS. NEIGHBORS: I'm sorry, I'm looking at my notes.
22 There's no change to the labeling. There's no change to the,
23 to the bottle.

24 He talks about the fact that there's -- he talks
25 about the fact that -- he talks about blends, blends samples,

1 plural. Then he talks about sample blend, singular. So which
2 is it? Is it plural, there are multiple blends out there that
3 he's working with? Those are formulas and formulations of a
4 product.

5 I understand his position that, oh, well, it's not
6 based on for FireClean, and that's what I think he's trying to
7 imply and infer to the Court. Our position is but you're
8 saying you're trying to improve on your product that's already
9 on the market.

10 THE COURT: Well, okay. So what does that have to do
11 with anything in this lawsuit, that one is trying to improve on
12 the product that is currently available in the marketplace
13 would be the formula that your guy got and tested? What -- you
14 know, people are always trying to build a better mousetrap,
15 improve their products, see if they can't do certain things.

16 MS. NEIGHBORS: I understand.

17 THE COURT: That, you know, if it hasn't been sold in
18 the marketplace, if it hasn't been availed to anyone who's, you
19 know, blogging about this stuff, if it, you know, isn't the
20 formula that your client tested, then I don't know what
21 relevance it has to the lawsuit.

22 MS. NEIGHBORS: There's two things going on.

23 THE COURT: Okay.

24 MS. NEIGHBORS: One of them is the fact that there is
25 an admission already that there have been changes to the

1 formula.

2 THE COURT: Then --

3 MS. NEIGHBORS: And tell me that, you know, you make
4 the representation in your affidavit that if I have to give a
5 formula, I'm only going to give one formula. Well, right now
6 as it stands, the formula from 2012 up through whenever they
7 made that change is not the same formula, so actually, it would
8 be two formulas, because the first formula would have to give
9 us all the ingredients for the first iteration. The second one
10 would have to include the newer additive that they had just
11 placed in the formula.

12 THE COURT: What difference does he -- the issue in
13 this case -- and it's really not that difficult,
14 Ms. Neighbors -- is they have sworn and it is clear that their
15 products contains at least three oils in the same amount from
16 the beginning to now, okay?

17 MS. NEIGHBORS: Yes, sir.

18 THE COURT: And the affidavit is clear, it says, you
19 know, that 99 percent of the -- since the inception of -- since
20 the inception of FireClean's sale of its products, the
21 selection of the oil, so that is, which oils are used, for 99
22 percent of the product and the proportions in which they appear
23 in the product have remained the same.

24 The problem in your case, and it's a problem that
25 we've talked about many, many times, is the fact that there are

1 three different types of oils blended together to form their
2 product, there is no doubt that isn't Crisco Vegetable Oil.

3 MS. NEIGHBORS: Yes, sir.

4 THE COURT: And, you know, no matter what additive
5 there may be, no matter what those oils are, because there are
6 three different types of oils, and they're put together in a
7 product, and that isn't Crisco Vegetable Oil, right?

8 MS. NEIGHBORS: Your Honor, that is one of several
9 claims that we are defending. We are defending Crisco. We're
10 defending Crisco oils. We're defending Crisco oil. We're
11 defending Wesson. We're defending PAM. Those are all
12 allegations that are made.

13 Crisco has a blend that includes canola, soybean, and
14 another. I've put it in our brief.

15 THE COURT: Right.

16 MS. NEIGHBORS: So --

17 THE COURT: But, you know --

18 MS. NEIGHBORS: We are not --

19 THE COURT: -- the product that your guy has sitting
20 up here showing off on his YouTube is Crisco Vegetable Oil, and
21 when he talks about FrogGlue, he talks about canola oil. When
22 he talks about this product, he talks about Crisco oil.

23 He -- you know, the idea that, you know, he's only
24 talking about some sort of type oil without some product name
25 is difficult to, to fathom when he's FrogGlue, Frog something,

1 he just talked about a generic type of oil, and when he
2 compares that to this product, he talks about Crisco.

3 MS. NEIGHBORS: Okay. First of all, in the
4 demonstration video, there is no oil bottle. The only bottle
5 that's in the demonstration video is the FireClean bottle and
6 the Weapon Shield bottle. Those are the only two.

7 In the demonstration video, the reference is to
8 Wesson and PAM, not to Crisco.

9 Next, when the reference is made to FrogLube, it's
10 not to canola oil. FrogLube is absolutely not canola oil.
11 FrogLube is soybean oil.

12 THE COURT: All right, sorry. Maybe --

13 MS. NEIGHBORS: And he, he -- open parens, soybean
14 oil, close parens.

15 When he's -- so the question becomes and what we have
16 to prove, one of the things we have to prove is Crisco
17 Vegetable Oil, but it's not the only thing we have to prove.
18 We also have to prove the other Criscos that are in there, the
19 Wesson that's in there.

20 Wesson also has a blend that's more than one oil. He
21 references Wesson. He doesn't specifically say "Wesson
22 Vegetable Oil"; he says "Wesson." So they've got blends that
23 include soybean, canola, and something else.

24 So what I'm saying is the vegetable oil-soybean oil
25 comparison is one of the --

1 THE COURT: But Wesson is only soybean and canola
2 oil, according to Exhibit 12 to your --

3 MS. NEIGHBORS: Yes, sir.

4 THE COURT: So clearly, that isn't going to be here
5 because they've got three oils, right? So, you know, it's not
6 going to be that because that's only two, and they have at
7 least three.

8 MS. NEIGHBORS: Crisco blend is three.

9 THE COURT: All right. So Crisco blend is three.
10 None of the Wessons have more than two blends. There's only
11 one, that's Crisco blend's oil that is canola, sunflower, and
12 soybean.

13 MS. NEIGHBORS: Yes, sir.

14 THE COURT: Is that right?

15 But the vegetable oil is solely soybean oil, right?

16 MS. NEIGHBORS: Yes, sir. That's what the product
17 says.

18 THE COURT: So your argument is now going to be
19 because he says Crisco, he really means Crisco blends oil and
20 that that could have up to three different blends in it?

21 MS. NEIGHBORS: That is one of the arguments.
22 There's other arguments that apply to the Lanham Act case.

23 THE COURT: Okay.

24 MS. NEIGHBORS: The other thing that I'd like to
25 point out is we looked at the GC, gas chromatography, graph

1 that we were provided with late yesterday in this case to
2 support their position that Crisco Vegetable Oil and FireClean
3 were not the same except for the fact that if you look at the
4 two graphs and superimpose them on each other, they're exactly
5 the same. That's No. 1.

6 No. 2, the graphs and the, and the information that
7 was provided don't match.

8 So our position is that that goes to show that there
9 is, there is a question here, and that it is a question, and
10 what we need to do is we need the formula and --

11 THE COURT: Why? The formula is only going to show
12 that it's not the same formula. I mean, that, that is -- you
13 can't really believe that if you got the formula in this case,
14 that you would then be able to look at that formula and any
15 product by Crisco or any product by Wesson and say they are the
16 same formula.

17 MS. NEIGHBORS: What we would be able to say is we
18 would be able to take the formula, which would include the
19 additives and the suspensions, and factor those out of --

20 THE COURT: Crisco doesn't have those additives or
21 suspensions in it. I --

22 MS. NEIGHBORS: My understanding is yeah, they do
23 have additives. The FDA doesn't require them to label them on
24 the label of the bottle, but there are, there are additives and
25 suspensions to keep it from going rancid.

1 THE COURT: Okay. All right. What else?

2 MS. NEIGHBORS: So our position is with respect to
3 the declarations, they're not 100 percent on point with what is
4 said. Generally, we get what they say. There are
5 inconsistencies between the declarations that have been
6 provided.

7 THE COURT: What, what -- help me understand what you
8 think are inconsistent.

9 MS. NEIGHBORS: The inconsistency is Mr. Sugg says he
10 personally provided -- he provided the product to Mr. Butler
11 for Mr. Butler to test and give him feedback, Mr. Butler being
12 a federal agent of the FBI. Mr. Butler's affidavit says he
13 provided the product to the FBI for the FBI to use.

14 Now, there's a lot of other statutory issues that I
15 will not go into right now, but the bottom line is there's an
16 impropriety there is a fundamental issue, but on top of that,
17 it's the fact that Butler says: Oh, I was given a bottle, and
18 this, you know, the bottle in question wasn't labeled as
19 FireClean.

20 The question becomes were any of the other bottles of
21 product, experimental products that he was given labeled as
22 FireClean, and there's, there's no way to tell that based on
23 that affidavit.

24 The -- he doesn't -- Mr. Butler doesn't respond to
25 Boland being present when he was provided with the experimental

1 sample, although Mr. Sugg says he was. The sample was provided
2 to the FBI, not to Mr. Butler. The experimental sample was not
3 labeled in the same manner as partially available FireClean.
4 We understand that, but there was a label on the bottle. They
5 implied and inferred from that statement there's a label on the
6 bottle.

7 What did, what did the label say? Did it have a
8 formula?

9 THE COURT: Well, he said -- Boland said that he
10 doesn't know what the formula is, right?

11 MS. NEIGHBORS: He says he doesn't know what the
12 formula is but --

13 THE COURT: Well, if there's a label on the bottle,
14 you would know what the formula -- if there was a label that
15 said this contains X, X, X, and X, then you would know what the
16 formula is, right?

17 MS. NEIGHBORS: If he paid -- if he paid attention to
18 it. All he knows is he got handed a bottle of product.

19 He's unable to tell when Mr. Sugg told him that the
20 experimental blend was intended to have different
21 characteristics from, from FireClean. There's no indication
22 that Mr. Butler is the contracting officer or the contracting
23 representative for the FBI, which is who would receive any kind
24 of product that is being --

25 THE COURT: That was officially sanctioned for

1 testing by the FBI.

2 MS. NEIGHBORS: Yes.

3 THE COURT: Okay. But that's not the issue that's in
4 front of me. The issue that's in front of me is whether there
5 were multiple blends -- multiple formulations of FireClean put
6 in the marketplace, not whether he was shopping around, trying
7 to, you know, improve his product, letting people test it
8 either officially or unofficially to see whether this is better
9 or worse.

10 MS. NEIGHBORS: Right. The question becomes and the
11 question still is we don't know that because they -- although
12 he says, oh, if we had changed the formula, we would have
13 altered the label, Mr. Sugg says that, he did change the
14 formula but didn't -- he didn't alter the label. There is no
15 change to the label as a result of the additive that he put in
16 2012-2015, October -- excuse me, 2000 -- September-October
17 2012-2015, I'm sorry.

18 We don't even reference the fact that FireClean is
19 coming in and asking to swap out a gallon bottle, which was
20 referenced in my brief.

21 THE COURT: Right.

22 MS. NEIGHBORS: They talk about swapping out a bottle
23 of product. So are you swapping it for a new, a new version of
24 this? Nobody's addressed that. That's never been addressed
25 and never been discussed. So that's with respect to him.

1 Mr. Boland doesn't really verify that, the date on
2 which he was there. He says, oh, I was there a few times when
3 he was handing out product. There's no specificity to say that
4 it was that date.

5 Then it says this particular sample was not in a
6 bottle labeled as FireClean, inference being there were other
7 bottles of sample that were labeled -- potentially labeled as
8 FireClean of experimental formula.

9 The -- now, let's -- I would like to move on to the
10 issue of the additional information that we obtained when they
11 finally provided us with discovery. They provided us with some
12 documents which show --

13 THE COURT: Well, let's just go back.

14 MS. NEIGHBORS: Yes, sir.

15 THE COURT: As a practical matter, you have the sworn
16 declaration of one of two people in this world who know the
17 formula --

18 MS. NEIGHBORS: Yes, sir.

19 THE COURT: -- saying: If I was required to disclose
20 the blends of the three, three or more oils that are put
21 together, it would be one set of blend -- I mean, it would be
22 one formula.

23 Help me understand how all of this other stuff that
24 you've got -- I mean, if I was to order him to provide the
25 formula, you're going to get the same blends, the same

1 components of the oils, okay? I mean, you understand that,
2 right?

3 MS. NEIGHBORS: Yes, sir. It's -- but the formula --
4 your formula is not just your blend of oils. Your formula
5 is --

6 THE COURT: Well, that's all, that's all you need for
7 this case.

8 MS. NEIGHBORS: The formula also includes your
9 additives and your suspensions, because they do affect the
10 result of any testing that gets done. That's why we're saying
11 give us the formula that provides the baseline that we can work
12 from to figure out what the results mean and what the, the
13 various peaks on GC mass spec or peaks on ESI mass spec mean.

14 Is that an issue where we've got an additive
15 interfering with the oil or masking the oil, or is that -- you
16 know, these are things that you can rule out.

17 THE COURT: Okay. Well, if, if your expert can come
18 up with a reliable test in a reliable manner that shows that
19 results of Crisco Vegetable Oil are exactly the same as this
20 FireClean product, then you're good to go, aren't you?

21 MS. NEIGHBORS: Yes, sir, but the problem that we're
22 having with it is being able to come up with that reliable test
23 because we're in the blind. All it says -- because we don't
24 have enough information --

25 THE COURT: You're in the blind with Crisco oil, too.

1 I mean, Crisco's not going to tell you each and every additive
2 that they have in their product.

3 MS. NEIGHBORS: No, but they tell us the main
4 ingredients so we can pull it out from there.

5 THE COURT: Well, the blend, they don't tell you what
6 percentage the blends are, and the Crisco blend as opposed to
7 the Crisco Vegetable Oil that you know then would be 100
8 percent of a certain type of oil. I mean, that --

9 MS. NEIGHBORS: We know what the -- if you're talking
10 about the blends, we know the three oils that we're dealing
11 with.

12 THE COURT: Right.

13 MS. NEIGHBORS: So there's extrapolation that you can
14 do with the three oils. I know exactly what I'm dealing with
15 with the three oils. Can I extrapolate from that and the, the
16 data that we obtain through testing what the percentages are?
17 Yes.

18 Here I'm flying blind. We know it's three oils, but
19 it could be any of three oils that are part of the list of
20 approximately 15 oils.

21 THE COURT: Or it could be 15 oils.

22 MS. NEIGHBORS: It could be 15 oils, although they
23 seem to be indicating that it's three. The magic number is
24 three.

25 THE COURT: Well, it has to be at least three.

1 MS. NEIGHBORS: Yes, sir.

2 THE COURT: I'm not sure there's anything that would
3 be specific to say that there are only three. I mean, I think
4 there -- it's comprised of at least three non-synthetic oils
5 derived from a plant, vegetable, or fruit. Okay.

6 MS. NEIGHBORS: Now, when we looked at -- we looked
7 at the GC, gas chromatography information that was provided to
8 us, the 2012 and the 2015 blends. There -- between 2012, there
9 are peaks there that are not present in 2015 at all.

10 Then when we compared the 2012 GC results to the 2015
11 and the 2016, 2016 is vastly different than 2015 and 2012.

12 THE COURT: And vastly different, who says?

13 MS. NEIGHBORS: If you, if you put all three --

14 THE COURT: But who -- I mean, you know, who says
15 that just because a graph is different, that means it's vastly
16 different in a significant way relating to this case? I mean,
17 that, that's the other issue that I don't quite understand, you
18 know.

19 And they mention in their first affidavit in that,
20 you know, I guess paragraph 9 of Sugg's declaration says there
21 are going to be minor chemical variations between lots. This
22 is typical and expected when using biologically based
23 ingredients. I would expect to see some variation in Crisco
24 Vegetable Oil as well.

25 MS. NEIGHBORS: That's the original argument that we

1 made, which we were told was invalid. Now they're making the
2 same argument that we made originally, which is one of the
3 reasons we need the formula, because you've got variations
4 between the oils themselves because it's a biological product.

5 Again, the formula provides the baseline. The
6 formula provides the level playing field so we know what oils
7 we're dealing with, so we can then turn around and do the
8 experiments and do the testing that needs to be done to be able
9 to get to a point where we can say yes/no. Yes, it is; no, it
10 isn't; or there's a problem here between these two oils that
11 they are so remarkably similar, that the question becomes
12 whether they are, in fact, the same.

13 THE COURT: Anything else?

14 MS. NEIGHBORS: With respect to paragraph 8 of the
15 affidavit --

16 THE COURT: Which affidavit?

17 MS. NEIGHBORS: Mr. Sugg's.

18 THE COURT: Okay.

19 MS. NEIGHBORS: It says if compelled to produce all
20 versions of the formulation, the plaintiff would still only be
21 producing a single formulation because the fact is there's only
22 ever been one, and that formulation does not resemble Crisco
23 Vegetable Oil, which is 100 percent soybean oil.

24 The issue here is this: That's not actually a
25 factual statement because they have added additives in 2015.

1 So that means there's not one formula; there's two. The
2 question is were there any other additives added between 2012
3 and 2015. That question's never been addressed.

4 All we're saying is give us a level playing field.
5 We will take --

6 THE COURT: Level in what way?

7 MS. NEIGHBORS: Level --

8 THE COURT: You have the same formula of Crisco
9 Vegetable Oil, and so you want to level the playing field by
10 now I want the exact formula for FireClean?

11 MS. NEIGHBORS: No, sir. What I'm saying is in
12 Crisco, I know what the vegetable oil is. I can identify that
13 vegetable oil.

14 Here I can't identify the vegetable oil. It could be
15 one of a number. We can't identify the vegetable oils.

16 So in order, in order for us to do an
17 apples-to-apples comparison, we need to know what we're dealing
18 with. All we're saying is give us an opportunity to see what
19 we're dealing with, see if this is, in fact, true.

20 THE COURT: Well, why --

21 MS. NEIGHBORS: In order to --

22 THE COURT: Help me understand why you need to
23 know -- I mean, if, in fact, you're going to take the position
24 that FireClean in the use in which it is put is the same as
25 Crisco or Crisco Vegetable Oil, so you would look at, I don't

1 know, lubricating factors; you would look at, you know,
2 viscosity; you would look at flash points, those kinds of
3 things that you would be testing product versus product. Why
4 isn't that all you really need to know?

5 MS. NEIGHBORS: To interpret those results, you need
6 to understand the interplay between the ingredients. So in
7 order to --

8 THE COURT: I mean, viscosity is the viscosity. It's
9 either going to pour or it's not going to pour. You don't need
10 to know, you know, if you do it at different degrees, you know,
11 you measure the viscosity, it's not going to be different if
12 it's three oils or six oils. It's still going to pour or not
13 going to pour.

14 It's going to, you know, catch fire at whatever time
15 it's going to catch fire, flash point or whatever, you know, no
16 matter how many oils are in it, so that, that is a data point
17 that is done by the blends both for Crisco and for FireClean.

18 MS. NEIGHBORS: And when we look at the information
19 that we have and the information that they've done the testing
20 on, there is such a huge similarity between them that that's
21 part of the problem. They're not all that different. These
22 oils are not all that different.

23 THE COURT: Well, that's -- that can be your argument
24 that you make, but, you know, if the oils are not all that
25 different, then knowing whether it's soybean, canola, and

1 sunflower, or whether it's avocado and pine nut oil isn't going
2 to make that much difference, is it?

3 MS. NEIGHBORS: It does make a difference from the
4 standpoint of being able to run the appropriate tests, being
5 able to compare them correctly, and being able to factor out
6 the additives and the suspensions so that we know that we're
7 dealing with the actual oil product, as opposed to dealing with
8 masking that's occurring because of the additives they put in
9 it.

10 THE COURT: Well, that -- that's -- the product is
11 the combination of all of those things, so when your client
12 represents that, you know, it's the same as Crisco, it's -- the
13 entire product is the same as Crisco, not the oils are the same
14 blend of oils but they've added something else that makes -- he
15 says the product is Crisco or Crisco Vegetable Oil or PAM or
16 Wesson.

17 He doesn't say anything that the, you know,
18 percentage of oils or the oil base is the same. He says it's
19 the product, and it doesn't perform as well or Crisco does just
20 as well or save your money and go buy Crisco.

21 You know, that's why I don't -- I'm still having a
22 hard time understanding why the specific formula, that is,
23 blends of oil, however many, and additives play such a
24 significant role, and, you know, your expert doesn't really say
25 that she can't perform these -- can't perform valid tests

1 without knowing the exact amounts of everything in the product.

2 MS. NEIGHBORS: Which -- okay. Taking that argument,
3 give us the ingredients. We don't need to know the
4 percentages. Give us the ingredients. We've also asked for
5 that.

6 We're just not asking for the formula. If there's --
7 the concern is that we're going to narrow the magic formulation
8 or the magic mixture of the ingredients, then the, the other
9 alternative -- the other thing that we were asking for were the
10 ingredients. Give us a list of ingredients, additives and
11 suspensions. Give us those three things, and we can work from
12 there.

13 THE COURT: All right.

14 MS. NEIGHBORS: And we did ask for that.

15 I understand the Court's position on this particular
16 issue and where you're coming from. It's a question of we've
17 asked for information that our expert is telling us this makes,
18 this makes it so that I can do what I need to do to be able to
19 evaluate these products and evaluate the claims that were made,
20 and I need to know because I can tell you what -- I can tell
21 you what Crisco, the blends are, Wesson, the blends are, the
22 rest of these, PAM, the blends are. I can tell you what those
23 are, because that information is available to me.

24 What's not available to me is the ingredients that
25 are in this product, and is -- was some of the ingredients in

1 this product a derivative of any of the other ingredients that
2 we're working with.

3 Now, something that -- they talk about the high oleic
4 acid content. You -- there are genetically engineered versions
5 of canola oil that bring the oleic acid level up to above 80.
6 I can't say that with certainty as to soybean oil because I
7 haven't found that information at this point, but I can tell
8 you that these, these oils can be genetically engineered to, to
9 have certain characteristics and properties.

10 THE COURT: Well, the patent -- to fall under a claim
11 of a patent, you wouldn't have to have that type of oil being
12 part of the blends. The only thing you have to have is three
13 vegetable oils being distinct from each other and each having a
14 smoke point above 200 degrees Fahrenheit, and the combined
15 volume of those three oils has to be at least 25 percent of the
16 product that you're selling. So you could do three oils, 75
17 percent water, and each of the three oils have to have a smoke
18 point over 200 degrees Fahrenheit.

19 MS. NEIGHBORS: Okay. Except for the fact that they
20 filed -- the patent was rejected, they filed an amendment --

21 THE COURT: I'm just looking at claim 1 of the issued
22 patent.

23 MS. NEIGHBORS: Right. But what I'm saying is claim
24 1 was modified.

25 THE COURT: Huh?

1 MS. NEIGHBORS: Claim 1 was modified. We gave it in
2 our original, where they talked about one of the oils, the
3 oleic content was going to be 85, 85 or higher. Amendment and
4 response under 37 CFR -- it's Exhibit 1 to our reply brief in
5 further support of its first motion to compel. That was an
6 amendment to it and --

7 THE COURT: Well, is the claim that's attached to the
8 patent that's attached to the complaint not the actual issued
9 patent?

10 MS. NEIGHBORS: It's not been issued. This patent's
11 not been issued yet. They're still in the patent process.
12 They've got an international, a U.S. patent that hasn't -- they
13 haven't issued it yet. They're still in the investigative
14 process.

15 THE COURT: So no patent has been issued, and this is
16 just the application that was published?

17 MS. NEIGHBORS: Yes, sir. Because they had an
18 international and a U.S. patent concurrently, so under the
19 rules, after 18 months, both -- the patent application gets
20 published because of the fact that you got the international.

21 And actually, the Patent Office challenges that
22 there's already a patent out there that does this, and they're
23 just in the argument process of distinguishing this patent from
24 the other one that exists.

25 THE COURT: Okay. All right. So, so what does that

1 get you?

2 MS. NEIGHBORS: I still think we're in the same place
3 that we -- just we need the formula to be provided to us, or in
4 the alternative, we'll take the ingredient list, an ingredient
5 list of everything, additives and suspensions, which will allow
6 our expert to proceed forward and do the testing that she needs
7 to do to be able to defend this case.

8 THE COURT: All right, let me hear from the
9 plaintiff.

10 Let me -- the trade secret issue I don't need to hear
11 from you-all on. I've made my ruling on that, that I do find
12 it to be a trade secret.

13 Looking through the information that was obtained
14 from the FBI, let me just make sure I have an understanding of
15 the history of -- and, you know, the e-mails are not
16 necessarily in chronological order, so I tried to get a sense.

17 It appears that in December 2012, there was a meeting
18 and an agreement where the FBI at that point decided to put
19 FireClean into service, so there was some provision of product
20 of FireClean, of FireClean to the FBI in December 2012. The
21 e-mails talk about, you know, ordered, payment January 2013,
22 the order, the payment, the delivery of that. There was the
23 e-mails in late 2012 about putting it into service and why they
24 were doing that.

25 In March of 2013, that's when you start getting the,

1 the e-mail about the tackiness issue, right?

2 MS. HARRIS: I believe there was one at that time.

3 THE COURT: Okay. And that e-mail had to do with the
4 product that was provided in December or January of 2013, the
5 actual FireClean product that was provided.

6 MS. HARRIS: That was all in regard to actual
7 FireClean product, Your Honor.

8 THE COURT: Okay. All right, so you've got that.
9 And then in July of 2013, there's the gallon of FireClean that
10 we delivered a couple months ago issue, and is this the one in
11 which they indicate -- let me, let me make sure I've got this
12 right, because -- at one point, there is talking about
13 switching out the bottles -- or switching out the container
14 that we provided to you earlier, and I, I don't think that has
15 been addressed as to what that really refers to.

16 MS. HARRIS: I would be happy to explain that.
17 FireClean has always been sold in 2-ounce bottles, and in this
18 one instance, the FBI requested FireClean to provide it in
19 gallons. FireClean had never done that before. They were
20 hesitant to do so, but because they valued the customer, they
21 did so, and for whatever reason, the large container was not
22 amenable to the FireClean product, and there were problems, we
23 believe, because we put it in these gallon bottles.

24 I don't know what caused the problem, whether it was
25 a bottling issue or a chemical issue, but that was what we were

1 eager to replace, and since then, we have not provided it in
2 gallon bottles, because we were very surprised to hear about
3 the problem and, and knew that it was because of the way in
4 which the product was packaged in that unique instance.

5 So that was all referring to actual FireClean.

6 THE COURT: So when you're switching out the
7 container, you're not talking about switching out the actual
8 formula of the FireClean product but only the manner in which
9 it was packaged?

10 MS. HARRIS: Yes.

11 THE COURT: Is that --

12 MS. HARRIS: Absolutely.

13 THE COURT: And then I know there's the
14 back-and-forth about the e-mail having to do with the, I guess,
15 experimental or blend that -- and I've gotten the affidavit
16 that you filed this morning --

17 MS. HARRIS: Thank you.

18 THE COURT: -- or late last night and the other
19 affidavits, and so I, I understand what the issue is there.

20 So you've got that -- that's the August 20 talking
21 about the new blends, the new formula. That was the testing.
22 And then I think from what I can tell, that there was pretty --
23 there's no other e-mails until they order some more product in
24 2015, June of 2015 from, it looks like maybe Brownell is the
25 police store or something like that, but let me ask you this.

1 And this is more of as something to discuss and see if it can't
2 just help in the issue of you being able to put to rest some of
3 the issues here.

4 The blends oil by Crisco contains according to the
5 defendant's exhibit canola, sunflower, and sun beans -- soybean
6 oil. I would suggest that you consider if possible, without
7 any waiving of trade secret rights, if there is, in fact, one
8 or more of those oils that is not contained in the FireClean
9 product, to provide a stipulation of that.

10 There is an issue, and, you know, this blend oil --
11 and I think, you know, obviously, your, your more direct
12 argument are the specific states as to Crisco Vegetable Oil,
13 and there are the pictures of the Crisco Vegetable Oil product,
14 but there are references to Crisco, and there is this Crisco
15 blends that is canola, sunflower, and soybean.

16 If the client is in a position to do that and is
17 willing to do that without waiving any trade secret rights of
18 providing a stipulation that which one or more of those oils
19 would not be contained in any FireClean product, that could put
20 that issue to rest, and at this time, I'm not going to order
21 that the specific formula be produced.

22 You know, honestly, I'm not sure what Judge Ellis may
23 end up requiring you to do at some point in this case. I mean,
24 if it gets to a dispositive motion issue and he sees all that
25 the parties are doing at this stage of dancing around, what's

1 this, what's that, what's the other, he may, in fact, require
2 you to do something and do it immediately, but I'm just putting
3 you at notice of that.

4 MS. HARRIS: May I respond to that, Your Honor?

5 THE COURT: Sure.

6 MS. HARRIS: Our position is not that Mr. Fennell
7 compared it to a Crisco blend, and we're not going to be making
8 that assertion in this case. We are confining our Lanham Act
9 claims to the statements that FireClean is Crisco Vegetable
10 Oil, and there were times when he said Crisco, but our position
11 will be if you look -- that he was referring to Crisco
12 Vegetable Oil because that is what his Facebook page shows.

13 You can view it all at one time. There are numerous
14 pictures of Crisco Vegetable Oil and numerous times when he
15 said that, and the only, the only scientific evidence that we
16 are going to be offering is with respect to Crisco Vegetable
17 Oil, 100 percent soybean oil. We're not even taking on the
18 blends in this case. It's --

19 THE COURT: Well, that's, that's not what your
20 complaint says, and that's part of the issue that we have in
21 this case. Fennell's statements are literally false, are
22 literally false by necessary implication in that they assert
23 that FireClean is Crisco. That's paragraph 89, subparagraph 1.
24 It doesn't say that FireClean is Crisco Vegetable Oil.

25 So your complaint is broader than what you have just

1 indicated, and discovery relates to the issues that are raised
2 in the complaint. So, you know, either you need to withdraw
3 that or specify that -- make it more specific, because, you
4 know, there are times throughout your complaint that you talk
5 about Crisco and not Crisco Vegetable Oil and the statement
6 that he made relating to Crisco and not just Crisco Vegetable
7 Oil.

8 MS. HARRIS: I understand that and -- excuse me for a
9 moment, Your Honor.

10 All right. Your Honor, I -- before we take any other
11 positions, I suppose I would like to consult with my client
12 about the proposal you made.

13 THE COURT: Sure. I -- no. But, I mean, the only
14 reason I'm suggesting that is because if it is a way to just
15 make it clear that the blends there don't include one of the
16 three -- the oils in FireClean don't include one of the three
17 oils in the Crisco blend, it would, I think, make your case a
18 little bit easier and hopefully would keep you from having to
19 possibly deal with Judge Ellis when this issue gets in front of
20 him at some point in this case, and it obviously will at some
21 point, but, you know, at this point in time, I'm -- you know,
22 having heard additional argument, I'm not convinced that there
23 have been any different variations of the product put into the
24 marketplace.

25 So while I understand the argument, and honestly, if

1 I had read what the FBI sent to me, I would have been confused
2 about that as well, and I would have thought that, you know,
3 based on those statements in and of itself, it's a reasonable
4 interpretation that there had been changes made, and when I
5 read them initially when this motion came in, I certainly had
6 this impression.

7 But having heard the explanation, I accept the
8 explanation that he was trying to revise his product, it was
9 provided on an informal basis, not through the commercial
10 marketplace for testing and analysis and discussion.

11 And, you know, we now have a sworn statement under
12 oath subject to the penalty of perjury that, you know, the
13 blends of the oils -- and, you know, I think it was worded
14 appropriately carefully to talk about the blends of the oils
15 that comprise 99 percent of the product -- that the oil types
16 and percentages are the same, have been, and continue to be the
17 same to this point in time.

18 Obviously, the additives, I mean, there is some -- I
19 think there's been some discussion that additives have been --
20 that the other 1 percent or less than 1 percent, there have
21 been some modifications to that over time, and I think you
22 explained that the last time we were here, that at some point
23 in time, there was either more additive or less additive or a
24 new additive or something was done.

25 MS. HARRIS: May I address that briefly?

1 THE COURT: Sure.

2 MS. HARRIS: The data provided in our sur-reply brief
3 where -- our expert actually looked at three different versions
4 of -- four different versions of FireClean, one of them being
5 post-additive modification, and he still concluded that they
6 were -- there are no significant differences between them,
7 lending further support to the notion that any additive changes
8 is not going to affect the being able to scientifically
9 determine whether FireClean is or is not Crisco.

10 THE COURT: All right. Well, at this point in time,
11 I've, you know, reaffirmed my decision on the trade secret. I
12 don't find that there's any new evidence that various versions
13 of the FireClean product were put into the marketplace having
14 to do with changes in the oil factors, so I don't find that
15 that evidence is sufficient enough for me to reconsider my
16 earlier ruling or to change my earlier ruling, that I'm denying
17 the request that the specific formula for the product be
18 disclosed. So I deny the motion for reconsideration. Okay?

19 MS. HARRIS: Your Honor, is that denial with
20 prejudice this time?

21 THE COURT: No. No. I mean, she certainly can --
22 you know, she has the opportunity to appeal my decision to
23 Judge Ellis. This is a pretrial matter that can be presented
24 to Judge Ellis as a ruling that he can see whether I'm clearly
25 erroneous or contrary to law, so, you know, I can't make the

1 final ruling.

2 If other evidence comes up and we find out that
3 Mr. Sugg was less than truthful in his declaration, I certainly
4 would reconsider that and have this, you know, the formula
5 produced if there's other information that may come up, so, you
6 know, I'm not saying that this is -- things can continue to
7 come up. So this is my ruling on this motion today.

8 MS. HARRIS: Okay.

9 THE COURT: Okay?

10 MS. HARRIS: Thank you.

11 THE COURT: All right. And actually, just for the
12 purposes of keeping the record straight, I'm going to deny the
13 motion to file the sur-reply. I don't think, you know, there
14 was any good basis to try and put in a sur-reply in this case,
15 and I didn't need it, didn't look at it, and decided it without
16 taking into consideration the arguments that were contained in
17 the sur-reply.

18 I did understand the statement in Mr. Sugg's
19 declaration that vegetable oils have different, you know,
20 whatever it was in paragraph 9, that, you know, you may get
21 different results from testing based on different batches of
22 vegetable oil or different types of oil.

23 So I'm going to deny the motion to file the
24 sur-reply. I'm going to go ahead and ask that it be removed
25 from the docket, and that will take care of the motion to seal

1 that information as well, so it won't be publicly available,
2 okay?

3 I did look at the declaration from the FBI agent, so
4 I found that to be supplemental based on what you were saying
5 you were going to be filing in your other pleadings.

6 Okay. I don't think the case from Judge Lee is here
7 yet, so we'll, we'll start in on the motion to compel now.

8 MR. DiMURO: Judge, before I get to the motion to
9 compel, the colloquy with Ms. Harris, as I understand where it
10 ended up, that we'll consider the suggestion on the
11 stipulation, and at this juncture, we won't commit to withdraw
12 any claims, but we will reconsider that.

13 THE COURT: Yeah. I think there is that issue, and I
14 think Ms. Neighbors is, you know, given the allegations in the
15 complaint relate to Crisco, not just Crisco Vegetable Oil, and
16 we now know that there is a Crisco product out there that
17 contains three different blends of oils --

18 MR. DiMURO: My point being rather than make a
19 knee-jerk decision this morning --

20 THE COURT: No, no. And I prefaced it by discussion
21 with your client and making sure that, you know, he would be
22 comfortable with doing that under the circumstances, but I
23 think that's -- that could be one way to at least make any
24 further argument you have to make in this case a little bit
25 easier.

1 MR. DiMURO: Yes, sir.

2 THE COURT: Okay?

3 MR. DiMURO: The -- I have a suggestion on the motion
4 to compel --

5 THE COURT: Okay.

6 MR. DiMURO: -- to make it -- to grease the wheels,
7 so to speak, and make it easier.

8 I've really broken it down into four themes, two of
9 which are general and two are a little more specific, and I
10 think if we just did it theme by theme, we would not have to go
11 item by item, if Your Honor please.

12 THE COURT: Okay. Well, I've got, I've got mine down
13 to eight themes, but maybe you've got a little bit better
14 approach than I had.

15 MR. DiMURO: All right. Well, I will address my
16 themes, and hopefully --

17 THE COURT: Okay.

18 MR. DiMURO: -- we'll, we'll overlap at some point.

19 All right, my first theme is just a general concern
20 about objections in answering the discovery, and I'm not prone
21 to be redundant, so I'll -- or go on at length, because these
22 are, I think, rather obvious matters. All the general
23 objections should be stricken, the 12 that remain for document
24 requests, the 15 for interrogatories, for reasons that are
25 historic in this court.

1 No. 2, the suggestion in the objections that they're
2 not going to answer a question because the corporation did not
3 make the statement, Fennell made the statement, and Fennell is
4 not the president, is just in our view obfuscation and
5 silliness because it's a, I think it's a wholly owned company,
6 a one-member-owned LLC. He says he's the president on his
7 Facebook page, they admit he's the president in their answers,
8 and even if he wasn't the president of the company, he is the
9 face of SST, the corporation. So we, you know, that should be
10 precluded as a ground for not answering information.

11 No. 3, there were a number of requests in both the
12 interrogatories and the document requests that when they
13 finally responded, they, they just omitted them. They
14 didn't --

15 THE COURT: Well, this was after a consultation that
16 you-all had and agreement that you were going to be revising
17 those document requests and interrogatories, modifying them or
18 revising them, so that at the time they served these responses,
19 they still were in the process of preparing their responses to
20 the revised requests. Is that it?

21 MR. DiMURO: Part yes, part no. You're correct that
22 the meet-and-confer occurred before the -- occurred over the
23 objections before the date the responses were due, but -- and
24 the responses came out on August 26.

25 On August 17, we sent -- Ms. Harris sent a letter

1 indicating the revisions, and then item No. 3, not every one of
2 the things that were omitted were subject to revision. They
3 were just subject -- they just omitted the answer.

4 So -- but I think my suggestion when I get through
5 this, this first theme will probably conflate all these issues.

6 Our next point is there are no objections left save
7 three or four by stipulation. When we met and conferred over
8 the vast array of objections, Ms. Neighbors said, and we
9 appreciated it, that notwithstanding her objections, she's only
10 going to withhold information or documents if she specifically
11 states in the response, "Standing on the objections."

12 That only occurred in three or four spots. She
13 didn't put that stipulation into the interrogatory answers, so
14 that should be done as well.

15 And then my final point on this general theme, she
16 hasn't identified -- or the defendants have not identified in
17 response to document requests which documents are responsive to
18 what document request.

19 My suggestion on that vast -- that theme is that we
20 presently have responses that have scores of objections,
21 general objections, omitted responses, objections inserted
22 where she said she's not going to withhold any information on
23 objections.

24 My suggestion in a perfect world would be to receive
25 amended answers that cure these problems, withdraw the general

1 objections, don't stand on the fact that George Fennell may not
2 be the president of the corporation, take up the objections
3 where she's not standing on any objections, include the omitted
4 requests, and let's just get a clean, readable set of
5 responses, amended responses.

6 I suspect you'd like to go theme by theme?

7 THE COURT: Yeah, why don't we go ahead and do that.
8 That way we can sort of deal with those issues. All right.

9 MS. NEIGHBORS: Thank you, Your Honor. First of all,
10 last night we provided them with a list wherein we categorized
11 the documents that were produced, we indicated what the Bates
12 numbers were, and we indicated what responses they corresponded
13 to.

14 That included the omitted and -- that included all of
15 the requests. We didn't limit it to just -- so everything
16 we've produced, we've given them an indication of what we
17 believe that document was responsive to or that group of
18 documents was responsive to.

19 THE COURT: Both for interrogatories and document
20 requests? So, like, the Fennell interrogatories, I think
21 you -- or there were some interrogatories that you were saying:
22 Go look at our document -- you know, our documents. You can't
23 do that.

24 MS. NEIGHBORS: Understood. And thinking about that,
25 my thinking was, and I will correct it, is that we gave them

1 categories of documents, and the categories of documents fit
2 within the interrogatory responses. So we need to -- we need
3 to update that, and we need to say these, these categories of
4 documents where they already have --

5 THE COURT: All right.

6 MS. NEIGHBORS: So -- yes.

7 THE COURT: Let's just so I don't miss anything, I'm
8 going to do these in somewhat my order, somewhat Mr. DiMuro's
9 order.

10 MS. NEIGHBORS: Okay.

11 THE COURT: The general objections, we -- and I, you
12 know, that is our standard practice is we don't allow general
13 objections. I think I understand they are often done; but
14 they're really not allowed other -- and privilege and work
15 product are not really objections; they're privileges; and so,
16 you know, they are, you know, when I say I'm striking the
17 general objections, I'm not striking any claims of work product
18 or privilege, you know, those are asserted as privileges and
19 have to be documented appropriately; but, you know, the general
20 objections are out; and I, I have the understanding that you
21 were responding based on your specific objections, not the
22 general objections.

23 MS. NEIGHBORS: Yes, sir.

24 THE COURT: But to the extent that anything has been
25 withheld either in document responses or interrogatory

1 responses based solely on general objections and not specific
2 objections, that information has to be produced, okay?

3 MS. NEIGHBORS: Yes, sir. We've withheld nothing
4 based on general objections. They've all been -- we haven't
5 withheld anything actually. My statement to them at the
6 beginning of the response for requests for production, we came
7 to an agreement that I would put a statement that if I was
8 withholding something pursuant to an objection, I would
9 specifically state it.

10 THE COURT: Okay.

11 MS. NEIGHBORS: That I agreed to do and I did do with
12 the response to request for production of documents. We did
13 not discuss the interrogatories, but the same applies to the
14 interrogatories, but we were happy to put that forward in that
15 particular document.

16 We, we stood on objections as to certain items only,
17 and we told them what we were standing on an objection for.

18 THE COURT: All right. Well, I'm, I'm --

19 MS. NEIGHBORS: Yes, sir.

20 THE COURT: -- just making it clear that --

21 MS. NEIGHBORS: Yeah.

22 THE COURT: -- if there were, you've got to produce
23 it.

24 MS. NEIGHBORS: No. Yes, sir.

25 THE COURT: There aren't so, you know.

1 The issue with, you know, statements and the, you
2 know, documents, the document responses from SST saying: We
3 didn't make these statements, that, that -- when you look at
4 what Mr. Fennell says, you look at the way that he projects
5 himself to others, he is speaking on behalf of the company.

6 Not only does he, you know, say: I do this for
7 FireClean, or, you know, I, I'm doing this for Weapon Shield
8 and the others, but he also says things like, you know: If you
9 buy, you don't like it, we'll give you your money back. You
10 know, that isn't somebody in a personal capacity. That is
11 someone who's speaking on behalf of the business.

12 I don't know if it makes any difference. I suspect
13 any documents that are within the possession, custody, or
14 control of SST would be the same documents that Mr. Fennell has
15 and will be producing, but, you know, to the extent that there
16 are objections that, you know, we didn't make this statement
17 other than maybe, you know, I know they are not a lubricant
18 engineer, but I think that can be interpreted as any documents
19 you have that would support that Mr. Fennell is a lubricant
20 engineer or something like that, you know, obviously, it could
21 have been worded -- it could have been individualized a little
22 bit in the wording of them, but I think that the concept that
23 these statements that were made by Mr. Fennell at this point
24 can't be attributed to SST is not an appropriate approach for
25 discovery purposes, and whether you're able to argue later, but

1 for the purposes of discovery, to the extent SST has any
2 documents relating to this test, that test, support for this
3 statement, support for that statement, you know, those kinds of
4 things, then SST needs to produce them.

5 MS. NEIGHBORS: Yes.

6 THE COURT: Okay?

7 MS. NEIGHBORS: Yes, sir. What we did, and I've
8 already addressed this --

9 THE COURT: Okay.

10 MS. NEIGHBORS: -- is we indicated that SST requests
11 for production of documents, defendant has no documents
12 responsive to these requests; however, it incorporates by
13 reference George Fennell's responses to the corresponding
14 requests.

15 So a lot of the requests were, between the two were
16 the same, so what we're saying is we're just going to
17 incorporate what George gave you.

18 THE COURT: Okay. Well, the problem with that is
19 that SST really probably does have within its possession,
20 custody, or control the documents that Mr. Fennell has.
21 Mr. Fennell is the president of the organization, as you have
22 said in your answer, and the chief technology officer or
23 whatever, an officer of the company.

24 You know, there is -- it's a little bit of a stretch
25 to say that the company doesn't have access to the information

1 of its president and/or chief technology officer, or whatever
2 his other title is.

3 MS. NEIGHBORS: Understood. So I'm -- I want to make
4 sure that I understand what the Court is asking me to do.
5 Rather than go with my reference, go ahead and reproduce all
6 these documents --

7 THE COURT: No, no.

8 MS. NEIGHBORS: Okay.

9 THE COURT: And, you know, I just -- the point --

10 MS. NEIGHBORS: Okay.

11 THE COURT: And I think they, they have a valid point
12 there that, you know, you taking a position that SST doesn't
13 have any documents, it doesn't have any information, we didn't
14 make these statements, they need to protect themselves in
15 making that argument.

16 And I'm not going to require you to produce all these
17 same documents that you've produced for Mr. Fennell, but if, in
18 fact -- you know, I'm not also finding that your objection,
19 that SST doesn't have any of these objections is a valid
20 objection. I'm finding that SST does have in its possession,
21 custody, or control, given the statements as to Mr. Fennell's
22 relationship and the statements and the method in which those
23 statements that he made to the public do seem to be related to
24 the corporate entity, not just in his personal capacity. So,
25 you know, to the extent that there were any documents that SST

1 has that Mr. Fennell didn't have, you need to produce those,
2 okay?

3 MS. NEIGHBORS: Yes, sir. There are none, and this
4 is just for the purposes of discovery.

5 THE COURT: Right. You know --

6 MS. NEIGHBORS: Yes.

7 THE COURT: You know, everything is subject to Judge
8 Ellis --

9 MS. NEIGHBORS: Okay.

10 THE COURT: -- making his own decisions when the case
11 gets in front of him on any type of dispositive motion or
12 trial, okay?

13 MS. NEIGHBORS: Okay.

14 THE COURT: The ones that were not specifically
15 addressed in the responses, that is, the ones that were subject
16 to some modification, which was, you know, a number of the --
17 both sets of document requests and, I think, three of the
18 interrogatories, have you responded to them yet?

19 MS. NEIGHBORS: Yes, sir. When I did the matrix, I
20 included them in the matrix, telling them this responds to
21 that. So I did not do -- I did not do a formal pleading, which
22 I will agree to do.

23 THE COURT: Okay.

24 MS. NEIGHBORS: The interrogatories --

25 THE COURT: You'll need to do that.

1 MS. NEIGHBORS: Yes, sir.

2 THE COURT: Interrogatories 7, 8, and 10?

3 MS. NEIGHBORS: 7 and 10 were amended yesterday
4 because those were the two I had. I'll have to look at 8
5 because I thought we responded to that.

6 THE COURT: I thought 7 -- 7, 8, and 10, you say they
7 were amended yesterday. You filed responses yesterday or --

8 MS. NEIGHBORS: I actually saw 7 and 10. I missed 8.
9 So I will tell you 8 has not been addressed, but 7 and 10 has,
10 and we supplemented request No. 1, the response to request
11 No. 1.

12 THE COURT: Let me just make sure I didn't -- your,
13 your responses that are attached to their motion go from 6 to
14 9, so 7 and 8 are missing, and 9 to 11, so, you know, I don't
15 have what 7, 8, and 10 ask for, I don't think. You know,
16 certainly (inaudible) --

17 MS. NEIGHBORS: Your Honor, we'll agree --

18 THE COURT: -- but --

19 MS. NEIGHBORS: I've already done 7. I've already
20 done 10. I will look at 8, and they will get 8.

21 THE COURT: What, what was 8, in interrogatory 8?

22 MR. DiMURO: I'm sorry, Judge, our exhibit is the
23 actual responses.

24 THE COURT: Right. That's why I was asking you,
25 because I have the exhibit, and I can look at that but --

1 MR. DiMURO: I'm afraid I don't know.

2 THE COURT: Okay. All right. Well, you do need to
3 at least address whatever it is that's in 8 and get them a
4 response.

5 MS. NEIGHBORS: We'll address 8.

6 THE COURT: Okay? You're not withholding anything
7 based on the protective order now; is that correct?

8 MS. NEIGHBORS: No, sir. It's all been produced.

9 THE COURT: Okay. All right. So the Fennell
10 interrogatories, the not subject to objections, your -- my
11 ruling on the general objections applies to the Fennell
12 interrogatories, not just the document requests.

13 You do need to -- to the extent that you're providing
14 additional responses in clarification or answers, those would
15 need to be done in a supplemental answer to the interrogatory
16 and under oath just so everyone's got the protections that
17 they're entitled to have.

18 When you refer to documents, and we've talked about
19 this briefly, rule 33(d)(1) requires you to do that with some
20 specificity. The idea that, you know, go look at our document
21 production really doesn't cut it. You, you need to be specific
22 as to which documents that you say are responsive to those
23 interrogatories.

24 And the same goes with your responses to requests for
25 production of documents. You indicated you've provided them

1 with that information --

2 MS. NEIGHBORS: Yes, sir.

3 THE COURT: -- as to the categories of documents now.

4 Okay. So -- and that, you know, you can't expect
5 them to know which documents you think relate to certain
6 topics. You know, just telling them to go fish doesn't
7 really -- isn't a proper approach. So you have to give them
8 that information.

9 So I think we've gotten through what I have as your
10 first phase 1 and several of my first items to cover. So --

11 MR. DiMURO: Yes, sir. So my suggestion, I hope
12 would be the Court's view, that there'd be filed amended
13 responses to these -- the first set of document requests and
14 the first set of Rogs to Mr. Fennell, because right now, all we
15 have -- what we're going to end up with is a hodgepodge of, of
16 several responses, some that omit interrogatories and requests,
17 some that don't, a matrix that I won't have a written -- I
18 don't presently have a written response to the document
19 requests that is specific.

20 I would ask that Ms. Neighbors agree or Your Honor
21 direct that amended, clean responses be filed, which include
22 removing the objections that she's not --

23 THE COURT: Well, the general objections at least.

24 MR. DiMURO: The general objections, but also, she
25 says, "I'm not, I'm not standing on my objections with the

1 exception of three or four."

2 THE COURT: Okay.

3 MR. DiMURO: Yes, we had that discussion. She was
4 going to put that stipulation in the beginning of the document
5 requests, I thought the interrogatories, too. She did that. I
6 didn't agree that that was acceptable, but you gotta get
7 discovery moving in this case.

8 THE COURT: All right. Well -- and I, I understand
9 your concern to make sure the record is clean, but, you know,
10 the real issue is do you have all the documents that you're
11 going to get in the first place, and I don't want to make --
12 Ms. Neighbors, are you willing to go ahead and just provide a
13 supplemental response?

14 And obviously, to the extent that you're revising
15 answers to interrogatories or those kinds of things, providing
16 the additional information, those are going to have to be
17 verified, but I assume you've got your initial responses on
18 some sort of soft copy of that that you can just revise. Is
19 that something that you can do so the record is --

20 MS. NEIGHBORS: Yes, sir, I understand. We can, we
21 can remove and soft-copy out the general objections, but we did
22 have specific objections to each of where we did have specific
23 objections.

24 THE COURT: Right.

25 MS. NEIGHBORS: What I would ask is that I be allowed

1 to keep the specific objection and then provide whatever the
2 response is.

3 THE COURT: Well, the -- if you've got specific
4 objections and are withholding documents based on those
5 specific objections, they can remain in there.

6 MS. NEIGHBORS: Okay.

7 THE COURT: If you have specific objections and
8 you're not withholding any documents based on those specific
9 objections, then, you know, they shouldn't be in there.

10 MS. NEIGHBORS: My question is this to the Court:
11 We're still looking for documents. We're still trying to see
12 if there's anything else we can find. I don't think there's
13 going to be anything else, but if the situation occurs where I
14 find a document that would have been subject to that objection,
15 I don't want to waive the right to raise that objection if I
16 have to do a supplement and say, I'm withholding the following
17 document --

18 THE COURT: All right.

19 MS. NEIGHBORS: -- and it falls under an exception.

20 THE COURT: What, what it would need to say is at the
21 present time, we are not withholding any documents subject to
22 these specific objections.

23 MS. NEIGHBORS: Okay.

24 THE COURT: If, in fact, we find a document that is
25 being -- that we withhold based on the specific objections, we

1 will notify you.

2 MR. DiMURO: I will agree to that predicate in her
3 amended response, and if we -- and she can take the specific
4 objections out without prejudice so that we have a much --
5 it's, it's been very difficult to figure out what is in and
6 what's out.

7 THE COURT: Well, I mean -- all right.

8 MR. DiMURO: So --

9 THE COURT: The problem is that if there is a request
10 that she thinks she may at some point in time want to assert an
11 objection, if she finds a document that would be subject to it.

12 MR. DiMURO: Very well. I am more interested in
13 amended responses that put in the omitted information, give
14 better answers, are more specific about what's in or out.

15 THE COURT: Understood.

16 MR. DiMURO: All right, fair enough.

17 My second theme, and I think you touched -- sort of
18 began to touch upon it, was Mr. Fennell's interrogatory
19 answers, I had three concerns there. The statement, "Subject
20 to and without waiving the objection," is always an indicator
21 of masking information.

22 THE COURT: All right.

23 MR. DiMURO: The answer that -- most of the answers
24 say, "See all documents." You've already said that that's not
25 acceptable.

1 THE COURT: I've taken care of that.

2 MR. DiMURO: And again, I think Ms. Neighbors agreed
3 when she was at the podium that she won't withhold information
4 notwithstanding an objection unless she specifically states
5 that she's doing so.

6 THE COURT: Doing so.

7 MR. DiMURO: So that's my second theme.

8 THE COURT: Well, I think we've taken care of the
9 second theme.

10 MS. NEIGHBORS: Yes.

11 THE COURT: Okay?

12 All right, I'm going to just -- is everybody here for
13 the boat people case?

14 A VOICE: I think counsel is on his way.

15 THE COURT: All right. We'll take up the third
16 theme, and then we'll hear them.

17 MR. DiMURO: Fine.

18 THE COURT: I mean, I think I dealt with your second
19 area, where he is -- Mr. Fennell is going to provide
20 supplemental responses to the interrogatories that are not
21 subject to the objections. He's going to identify the
22 documents to the extent he hasn't already that are subject to
23 33(d)(1), and we'll sign them under oath or provide a
24 verification for them.

25 MR. DiMURO: Okay. The first and second theme were

1 general issues. Now I'm moving to the specific categories in
2 the first wave of discovery. So -- and there's only a couple,
3 so I'll just do them all at once.

4 Fennell Interrogatory No. 12, identify any person
5 paid to promote Weapon Shield, we just need the --
6 Ms. Neighbors has indicated, I think, in an e-mail or
7 correspondence that there's none. We just need the answer in
8 an interrogatory answer.

9 THE COURT: Yeah. Actually, I dealt with that, I
10 think, when you -- when I indicated that she has been providing
11 some additional information, that that additional information
12 has to be provided (inaudible), so --

13 MR. DiMURO: Right. And the purpose of the
14 interrogatory is just to find out if people who lobby for
15 Weapon Shield have some sort of financial interest in doing so.

16 All right. The next specific one is the same request
17 for production to both SST and Fennell. To SST, it's 17; and
18 to Fennell, it's 21. Mr. Fennell states in the demonstration
19 video that Weapon Shield has no shelf life, and we ask for the
20 documents to support, refute, or contradict that contention.
21 He's obviously making a, a comparison to FireClean, so we'd
22 like the information that backs up that contention.

23 THE COURT: Okay.

24 MR. DiMURO: The next is we request for production 52
25 to the company SST tax returns 2013 to 2015. A Lanham Act

1 defendant's profits can be a form of damages, and in her brief,
2 Ms. Neighbors says that up to 50 percent of the revenue or
3 profits that SST derives is Weapon Shield. We should be able
4 to look at the tax returns and not rely on their specific, you
5 know, they come out and say X dollars are attributable to
6 Weapon Shield.

7 THE COURT: Statements were all made in 2015; is that
8 correct?

9 MR. DiMURO: I'm sorry?

10 THE COURT: The statements that you're complaining of
11 in the complaint were made in 2015?

12 MR. DiMURO: Yes.

13 THE COURT: So why are you looking for tax returns in
14 2013 and 2014?

15 MR. DiMURO: I just to -- as you do in a lost profits
16 case, sometimes it's helpful to see the historical numbers to
17 see if there's been a sudden change in 2015 compared to '13 and
18 '14, a change that might have been artificially created.

19 THE COURT: All right.

20 MS. NEIGHBORS: With respect to the no shelf life,
21 we've provided them with the publicly available information.
22 Weapon Shield's formulation is a trade secret, and it is not at
23 issue in this case. Whether it has a shelf life or not --

24 THE COURT: They're not asking -- well, you have made
25 the issue of it has no shelf life an issue in the case, so to

1 the extent that you have any test results, studies,
2 documentation that addresses the shelf life of Weapon Shield,
3 and if you have to redact specific formula information, but if
4 you have some test, study, report, or whatever that deals with
5 the shelf life, whether the product decays or loses properties,
6 produce it, okay?

7 You can mark it however you want to mark it under the
8 terms of the protective order, but that would need to be
9 produced.

10 MS. NEIGHBORS: Okay.

11 THE COURT: Why wouldn't the 2015 tax return be
12 appropriate?

13 MS. NEIGHBORS: Well, actually, there was an error.
14 I saved something when I was preparing the brief, and it didn't
15 save correctly. The actual number is 24 percent or less. We
16 did provide them -- we actually went so far as to provide them
17 with a summary from 2013, '14, and '15. So we've already
18 provided the information that's on the tax return to them for
19 those three years.

20 THE COURT: What, what information?

21 MS. NEIGHBORS: We provided the sales, the -- all the
22 deductions, what the, what the -- and what the final profit
23 was. For -- and the other thing is they don't get everything.
24 They get what's related to Weapon Shield CLP, not the
25 company -- the company does more than just one product. The

1 company has a whole host of products that have nothing to do
2 with weapons and lubricants for weapons. They have a whole
3 line that's railroad. They have a whole line that's
4 engine-related.

5 So what our position is is they're entitled to the
6 information as it pertains to Weapon Shield. We've already
7 provided that information to them in the form of the sheet that
8 we sent them on --

9 THE COURT: What is that sheet? I mean, where did
10 that information come from?

11 MS. NEIGHBORS: That information came from the CFO of
12 the company, and he's an accountant, and he provided it based
13 on what he had in the tax returns, so it's taken from the tax
14 returns.

15 THE COURT: All right. Mr. DiMuro, widen that --
16 what -- my understanding of what they've done is you've got a
17 company that sells many products. They've provided you with
18 the information for three years based on the product sales of
19 the product at issue; and I think you would agree that the
20 profits of the company isn't what's at stake; it's the profits
21 from the product that would have been a competing product with
22 your client's product. So why isn't that specific information
23 sufficient for you to come up with your damages analysis?

24 MR. DiMURO: This has come in sort of on the eve of
25 the hearing, so I haven't personally looked at it.

1 THE COURT: Okay.

2 MR. DiMURO: But based on what Ms. Neighbors is
3 saying, certainly we would have the -- should have the
4 opportunity to validate or verify the numbers off of the tax
5 returns. The CFO says it's 24 percent, but the tax return may
6 say it's something else.

7 THE COURT: Well, I -- I'll give you an opportunity
8 to depose the CFO if you want to depose the CFO, I mean, to
9 find out about those records or have him certify that the
10 information is true and correct based on his -- if he's an
11 accountant, he's got certain professional obligations and
12 duties.

13 Yeah, I'm going to hold that one in reserve. I mean,
14 I want you to look at the information, if there's something
15 that is specific that you think causes you some real concerns
16 about that information, but from what Ms. Neighbors has
17 indicated, it does appear that, you know, they have provided
18 you with sufficient information at this time to do a damages
19 analysis as to either their increase in profits or not.

20 MR. DiMURO: Yes, sir.

21 THE COURT: Okay?

22 MR. DiMURO: I only have one theme left, or do you
23 want to take the other case, Your Honor?

24 THE COURT: Let me just take the other case, give
25 you-all just a quick breather. It's a pretty big theme. It

1 has to do with the second set of document requests -- rather,
2 the second set of discovery, right? So we've got a little bit
3 to deal with on that.

4 All right, so let's go ahead and call the boat people
5 case.

6 MR. DiMURO: Judge, is it going to be 5/20/30
7 minutes?

8 THE COURT: It's going to be three to five minutes at
9 most, very quick. Thank you.

10 (Recess from 11:57 a.m., until 12:06 p.m.)

11 THE COURT: Okay. So back to the last phase for
12 Mr. DiMuro's argument.

13 MR. DiMURO: Have my phases -- have our phases
14 overlapped?

15 THE COURT: Okay. Well, we'll see.

16 MR. DiMURO: All right. If I just put on the record
17 and make a point about the tax returns, obviously, when you
18 have one company providing a number of services and products,
19 you might choose -- if it suited your purpose, you might choose
20 to allocate an unfair overhead factor to the Weapon Shield
21 products. So we would need to verify that as well.

22 THE COURT: Yeah. And the thing I'm not sure of is
23 whether the -- and I have the sense that we haven't -- you
24 haven't had an opportunity to study the documents they've
25 provided you on the damages expert --

1 MR. DiMURO: Right.

2 THE COURT: -- damages issue yet.

3 I'm not saying I won't order the tax returns at an
4 earlier time if there's a specific need for tax returns. It
5 may be that you may need some type of certification or just the
6 ability to depose the CFO who prepared those documents to make
7 sure that the information is correct, but --

8 MR. DiMURO: Perhaps a short narrative along with the
9 verified chart just identifying the, the method of operation --

10 THE COURT: Yeah. So --

11 MR. DiMURO: -- would be helpful.

12 THE COURT: -- at this point in time, I'm going to
13 deny the tax returns without prejudice for you to re-raise it
14 if necessary, okay?

15 MR. DiMURO: All right. And my last phase, Your
16 Honor, is what I deemed or called the second wave of discovery.
17 That's first Rogs to SST, second Rogs to Mr. Fennell, second
18 set of document requests, and -- yes.

19 So my first point is if you had a chance to look at
20 the, the objections, they are two to three pages per discovery
21 request. We think they are grossly oppressive and harassing,
22 and it would be a waste of time and money, just as I, frankly,
23 believe much of what I've had to do on this motion to compel
24 has been a waste of time and money, and we've asked you to
25 strike -- to strike them. They're just so far over the top.

1 The -- but would you like me to go specific by
2 specific?

3 THE COURT: Well, I mean, I know you're talking about
4 the interrogatories, the objections being too overpowering, I
5 guess I should say, but there's also the objections as to
6 whether the specific information that's being asked for in
7 interrogatories, whether, you know, the personal information --
8 they say that, you know, you have the same access to their
9 "like" people as they do, and what are you going to do with the
10 information even if you got it?

11 MR. DiMURO: Well, Ms. Harris could speak to it a
12 little more directly, but we've tried -- perhaps, frankly, it
13 would be efficient if Ms. Harris could address the issue of the
14 Facebook page --

15 THE COURT: Okay.

16 MR. DiMURO: -- and the YouTube video.

17 It will just be more efficient.

18 MS. HARRIS: Thank you. Your Honor, I know in some
19 instances, it is possible to view the people who like or
20 subscribe to a page. In this case, we weren't able to see who
21 likes -- who, quote-unquote, likes this particular Web site, a
22 Facebook page.

23 I'm happy to work with Ms. Neighbors. If she wants
24 to provide me with a link or show me what to click on, that's
25 fine. I'm usually able to do it, and I wasn't in this case.

1 I think that companies may be able to hide that
2 information at their option. My best guess is that perhaps
3 that was -- that's one of the settings on this page is that the
4 people who like them is not publicly visible. I could be
5 wrong. That's just my speculation because I can't find it
6 myself. And moreover, that -- just because something is
7 publicly available is not a grounds for not producing it.

8 And as for why do we need to know them, there -- many
9 of them are the people to whom these statements were published.
10 We would like the opportunity to at least know who they are.
11 We may want to try to interview them, find some of them, and
12 they may be relevant to aspects of our case, including
13 causation and damages.

14 THE COURT: Why, why do you think they would have the
15 information that you're asking for in interrogatory No. 1 for
16 anybody who clicks on "like" to the company Web site?

17 MS. HARRIS: Because as a company, when you have a
18 Facebook page, you can see everyone who has -- who likes your
19 page.

20 THE COURT: Right, but that doesn't necessarily tell
21 you their phone number, mailing address.

22 MS. HARRIS: If they don't have the information, then
23 they can't provide it, but if they have it -- for example, some
24 people have their address on their Facebook profile. If --
25 we're not saying they're obligated to go out and find it, only

1 if it's contained within the information that they have.

2 We, we would be willing to say that their Facebook
3 user alias is probably sufficient in this case.

4 THE COURT: And why isn't it limited in time? I
5 mean --

6 MS. HARRIS: We just want what it is as of the
7 present day.

8 THE COURT: Well, it says -- okay. Okay. So you've
9 got the Facebook users, you've got the YouTube users as to whom
10 are the same information. You just want who they are at the
11 present time to the information that's available.

12 Is that, is that something that you've looked to see
13 if you have public access to or not?

14 MS. HARRIS: I have, and I can't find that I have
15 public access to that information.

16 THE COURT: And then the communications made or
17 received by Steel Shield that relate -- that refers to content
18 of the demonstration video. Why are you asking them to
19 identify those communications?

20 MS. HARRIS: We would like them -- production of them
21 would be sufficient. Why do we want them at all?

22 THE COURT: Well, no. I mean, I'm trying -- the idea
23 of asking people to identify communications, I'm -- you know,
24 you want them to if they have a letter, say a letter from
25 so-and-so received on such-and-such?

1 MS. HARRIS: That or produce it in lieu, but if there
2 were conversations, for example, after Mr. Fennell posted the
3 video, if, if he spoke about that video with people at his
4 company, we'd like to know if there were conversations about
5 it.

6 THE COURT: Well, how -- and if you were the
7 recipient of that kind of a discovery request, how would you go
8 about responding to that?

9 MS. HARRIS: I would ask any representative of the
10 company as well as Mr. Fennell if they've had oral
11 conversations with anyone.

12 THE COURT: And they would say maybe/yes. Tell me
13 the specific of those, and what are they going to say?

14 MS. HARRIS: They would identify -- they would say:
15 Yes, on one occasion, I recall specifically I spoke with one
16 person, it was on this date, and we know about it, and we can
17 pursue it in deposition.

18 THE COURT: So they're going to recall a specific
19 discussion a year ago, right after you posted this video in
20 June of 2015.

21 MS. HARRIS: Your Honor, my clients remember certain
22 conversations that they have that are prominent. I don't think
23 that strains belief.

24 THE COURT: Okay. All right. So in the second
25 document request, you're asking for documents related to

1 friends, FOIA requests, Facebook messages, and the Weapon
2 Shield coefficient of friction; is that right?

3 MS. HARRIS: Yes. Relating to the coefficient of
4 friction, on one occasion, Mr. Fennell stated that FireClean
5 among other products will cause a host of nightmares, including
6 increased coefficients of friction, so we would like to know on
7 what -- what was his basis for that statement, the implication
8 being that Weapon Shield is superior in that regard.

9 And coefficient, coefficient of friction itself
10 relates to the assertion that FireClean will gum on a weapon or
11 in the bottle.

12 THE COURT: All right, let me hear from Ms. Neighbors
13 on these.

14 Okay. The interrogatories first, that is, who likes
15 you.

16 MS. NEIGHBORS: Your Honor, we have looked at it.
17 With respect to Mr. Fennell's personal page, you can click on
18 the "like," the little thing where it says "like" for any, any
19 communication, and you can see a list of names. That's all it
20 gives you. It doesn't give you any further information other
21 than a list of names. These -- all these people liked you.

22 His --

23 THE COURT: Now, anybody can do that or only
24 Mr. Fennell can do that?

25 MS. NEIGHBORS: No, sir, my understanding is anybody

1 can do that as far as Mr. Fennell's personal page because his
2 settings are set in that manner.

3 The company page, on the other hand, the Steel Shield
4 and the Weapon Shield page, we have gone in and tried to look
5 at the likes. The only thing we get is graphical data. It
6 doesn't tell you who the individuals are. What it gives us is
7 a graph to say this number of people looked at it.

8 It's just very strangely set up because what they
9 do -- and I, I tried to see if there were any other categories
10 that you could change it so that you could actually see who are
11 the likes, and it doesn't let you do that to be able to move in
12 to say who were the individuals who liked this particular page.

13 Now -- so from that particular perspective,
14 Mr. Fennell's are available. You can go to any post you want,
15 look at the specific post. And it's not limited to just the,
16 the page itself. You're not liking the page itself. You're
17 liking individual communications. So someone might say -- this
18 is a way of saying, "I agree with you." So it's a -- and you
19 click on the "like" button, and it will show you a list of
20 names.

21 THE COURT: I'm not a Facebook user, but my
22 understanding is that if, if you like an entity's Facebook
23 page, that automatically gives you some -- or you automatically
24 start getting information from them. Is that right or not
25 right?

1 MS. NEIGHBORS: I'm like you, not a Facebook user.
2 My understanding is that just because you like something
3 doesn't mean that that -- you're going to start getting
4 communication from them, but I'm -- I'd have to look into that.
5 I cannot say that with 100 percent certainty.

6 THE COURT: Well, here's what I'm -- what about the
7 YouTube? Is that different than Facebook?

8 MS. NEIGHBORS: The YouTube -- when I looked at the
9 YouTube, that one is available publicly. That is on the
10 Internet. That is not like Facebook, which is a controlled
11 system wherein you have to be a member of Facebook to be able
12 to even get to George's page.

13 If you try to get to George's page from the regular
14 Internet and type in "George Fennell Facebook," it will bring
15 it up. You can see the page, but you can't do anything on the
16 page. It will bring up a white screen and says you either have
17 to sign in with your information or you have to join to be able
18 to see the page completely and get access to it.

19 The YouTube, it's out there. I'm trying to remember
20 the last time I clicked on a likes, if I could see whether it's
21 individual names, but it only would be names. It wouldn't give
22 me -- or whatever their screen name is or whatever ID they're
23 using on the, on the Web. It does not give you name, address,
24 phone number, or any other information. It just -- it could be
25 "FireClean Dave." It will just say "FireClean Dave," just to

1 use an example of a screen name that you could see. You
2 wouldn't be able to get any other information about that
3 particular individual.

4 THE COURT: Do you know how many subscribers there
5 are to the Weapon Shield YouTube channel?

6 MS. NEIGHBORS: The -- my recollection is somewhere
7 between 6 and 800. I think it's 600-something, 695.

8 THE COURT: That's to the YouTube channel.

9 MS. NEIGHBORS: Yes, sir.

10 THE COURT: I just want to make sure we're --

11 MS. NEIGHBORS: Just the YouTube channel.

12 THE COURT: Channel.

13 MS. NEIGHBORS: And the other thing is with, with
14 respect to the likes and with respect to your friends, just
15 because your friends are your friends doesn't mean that they're
16 going to have read every single communication you do, because
17 people, from my understanding of Facebook, you get these
18 updates. You just, you know, you can read it or you can delete
19 it. You don't have to read it.

20 Just because someone's a friend doesn't mean that
21 they actually saw the post in question or a post in question or
22 a particular post.

23 THE COURT: Okay.

24 MS. NEIGHBORS: Can I --

25 THE COURT: Sure.

1 MS. NEIGHBORS: Can I go down the list that they
2 gave?

3 THE COURT: Thank you.

4 MS. NEIGHBORS: As for the FOIA requests, we've been
5 giving them the FOIA responses as I've -- we've given them the
6 FOIA responses we've received. We're still working on a couple
7 of others, but I've agreed to give them to them. I mean, I
8 don't -- without this document production request, we had
9 already agreed, so I'm not sure what that particular issue is.

10 THE COURT: Well, probably the issue is that in
11 response to their request -- I guess you didn't assert an
12 objection to that so -- okay.

13 So 4 has to do with the Facebook messages that
14 mentioned FireClean.

15 MS. NEIGHBORS: We already produced those in our
16 document production, the Facebook messages. And what I'm
17 talking about Facebook messages, Facebook has different
18 components. You've got the stuff that's on -- that's publicly
19 available. I can go into someone's Facebook page and basically
20 scroll through years' worth of information, and I can see it if
21 I'm a Facebook user. If I've got a Facebook account, I can go
22 into someone's Facebook account if they've made it so that
23 other people can access it and go in and look at all their, all
24 their Facebook posts.

25 Mr. Fennell's Facebook posts, personal -- his

1 personal page has a whole bunch of stuff about shooting
2 matches. He has information about the Second Amendment,
3 politics. He has information about specific shooters, you
4 know, congratulations, so-and-so won this week. Wow, you know,
5 we're really proud of you.

6 There's all sorts of other stuff. This Facebook page
7 is not solely devoted to -- he talks about his dog, Harley. He
8 talks about all sorts of different things that are going on in
9 his life.

10 It's -- it is broader than just Weapon Shield and
11 discussing Weapon Shield. Does Weapon Shield appear on the
12 page? Yes, but it has all sorts of other things that are not
13 related to Weapon Shield. So when you're --

14 THE COURT: Well, No. 4 asks for Facebook messages
15 sent or received on behalf of Weapon Shield that mention
16 FireClean. So they're only ones that would relate to
17 FireClean.

18 MS. NEIGHBORS: We've given them from Fennell's
19 Facebook page all the ones that mention FireClean, all the
20 messages -- we pulled them -- we did what they say -- Facebook
21 tells you to do to pull down the data. We've already produced
22 that.

23 Weapon Shield really doesn't get that many posts.
24 People don't really go to Weapon Shield to look for FireClean
25 or discuss FireClean. So it's not really discussed.

1 I will, you know, we'll agree to look and see if
2 there are any posts, but they would be able to get the posts as
3 well because that page is accessible to the, to the Facebook
4 public.

5 THE COURT: Okay. What about the issue having to do
6 with the coefficient of friction? All documents reflect the
7 testing of Weapon Shield for coefficient of friction.

8 MS. NEIGHBORS: I will have -- these answers aren't
9 due yet. We're trying to get this set of responses due -- done
10 as well. My understanding as far as formal testing with
11 respect to Weapon Shield itself, the stuff that they have from
12 the coefficient of friction is the demonstration videos that
13 they've done, but as far as, you know, doing the math as to
14 specific coefficient of frictions, I'm going to have to say I
15 can't say with 100 percent certainty. I don't believe they do,
16 but I would have to defer to my client and double-check that
17 particular information.

18 THE COURT: All right. Again, let me just hear from
19 the plaintiff. The coefficient of friction -- Weapon Shield's
20 coefficient of friction, why -- what statement is there that --
21 have they ever made a statement that Weapon Shield's
22 coefficient of friction is better or less than FireClean's
23 coefficient of friction?

24 MS. HARRIS: In one of the exhibits to our complaint,
25 they say that FireClean causes a host of -- a host of

1 nightmares.

2 THE COURT: Okay. So FireClean does.

3 MS. HARRIS: Including increased coefficients of
4 friction by Weapon Shield, or something to that effect.

5 The implication is that Weapon Shield has better
6 coefficients of friction. If the answer is none, then they
7 should say that. That's okay. But if they have tested Weapon
8 Shield for coefficient of friction and let's say it didn't test
9 as well as FireClean and they've -- now they've made these
10 statements knowing that they were false.

11 So we'd like to know simply what was the basis for
12 saying that, that FireClean -- if FireClean has problems with
13 its coefficients of friction, implication being Weapon Shield
14 is superior in that property.

15 THE COURT: Well, there are two parts to that. You
16 can say they've got problems, but that doesn't necessarily mean
17 that you don't also have those same problems. So where is it
18 that they say something in comparison that makes their testing
19 of the coefficient of friction relevant?

20 MS. HARRIS: It's Exhibit N. "Until you've had
21 soybean oil (FireLube) or Crisco oil (FireClean) on your gun
22 long enough to experience the nightmares of free radical
23 polymerization, molding, increased frictional coefficients on
24 the metal-to-metal contacts, and a host of other nightmares
25 which are encountered when using another oil or product with

1 them . . . , you'll think they are doing what the manufacturer
2 says they're doing. Being in this industry and in specialty
3 lubricants for nearly 30 years, I can honestly say that
4 vegetable oil lubricants are the absolutely poorest examples of
5 lubrication" If Weapon Shield is not the best product
6 you've ever used or does not live up to every claim, I will
7 immediately refund your purchase price.

8 That's skipping over some of the other language in
9 that post.

10 THE COURT: Okay. So kind of working backwards,
11 Ms. Neighbors, what I'm going to have you do is if there are
12 any, again, tests, reports, studies that deal directly with the
13 coefficient of friction of Weapon Shield, again, if there's
14 need to redact information that relates to formulaic
15 information or something, but if there's a testing and it says
16 the coefficient of friction is X or Y, you'll need to produce
17 that.

18 For the, you know, I guess the Facebook messages to
19 the company, you know, I do think, you know, even though there
20 may not be many, you need to search them and produce them if
21 they relate to FireClean. So if they have some Facebook
22 messages.

23 You've agreed to provide the FOIA information.

24 MS. HARRIS: Your Honor, going back to the Facebook
25 messages, when Ms. Neighbors was talking, she was referring to

1 them as posts, which are different from messages. A Facebook
2 message is what is sent through a user's Facebook in-box or
3 e-mail account and are not publicly visible. A Facebook post
4 is something that appears on your page that is visible.

5 And this request No. 4 Facebook messages seek those
6 messages that are not, not posts, and Ms. Neighbors kept using
7 the word "posts." I want to ensure that it's clear what we are
8 seeking.

9 MS. NEIGHBORS: If I could respond, please?

10 THE COURT: Okay.

11 MS. NEIGHBORS: When we produced the Facebook, we
12 called them Facebook conversation posts. It's like IM'ing,
13 instant messaging or texting.

14 THE COURT: All right.

15 MS. NEIGHBORS: It's that kind of information, but
16 we've gone through and checked. We will check to see. My
17 understanding is that there are none under Weapon Shield.
18 There's nothing under Steel Shield. Neither of them is there
19 any of that kind of communication going on, but we will
20 double-check, and we will say none if there are none.

21 THE COURT: Okay.

22 MR. DiMURO: Using, looking for messages.

23 MS. NEIGHBORS: Yes.

24 MR. DiMURO: Okay.

25 THE COURT: All right.

1 MS. NEIGHBORS: When we're saying that, I mean,
2 probably could have referenced it as IMs or messages, but
3 that's what 13 and 14 are on the matrix. Those are IMs.
4 They're not posts from the Facebook pages. You guys can get
5 that. It's already there and available.

6 THE COURT: The "like" issue, you know, I want
7 you-all to talk about having access to that information and
8 whether you can get it yourself or whether you have to provide
9 it to them, but to the extent that there is information that's
10 available that would give you the subscribers to the YouTube
11 channel through whatever, I don't know if they have a user name
12 or whatever, how you sign up to be a subscriber to a YouTube
13 channel, but, you know, I think that information, they probably
14 are entitled to current subscribers. I don't know if there's a
15 way to do historical. For our intents and purposes, it would
16 be current.

17 The same would go to both the -- having to do with
18 the people who are friends and people who like, I guess two
19 different things. One is to the, to the company, you wanted
20 those who like the Weapon Shield Facebook page, right? So --
21 and to the extent that you have, you know, a Facebook user name
22 or can access that information, either you need to access it,
23 download it, and provide a copy, or tell them how they can
24 access it and get it themselves and make sure that they're
25 available to do that.

1 Okay? I think that wraps -- and the interrogatories,
2 you know, that's -- to the extent you can provide a list with
3 that information, provide a list with the information. I don't
4 think you necessarily have to provide it in the answer to an
5 interrogatory form, but you've got to say, you know, see
6 attached list that contains that information that was
7 presented.

8 Okay. Anything else today?

9 MR. DiMURO: The only thing I saw on my list was
10 communications referring to the content of the demonstration
11 video. I didn't cross that off.

12 THE COURT: Yeah. Yeah. It's relevant information
13 whether you can -- you know, if you've got any documents,
14 produce the documents. If anybody has any recollections of
15 specific conversations having to do with the content, then at
16 least identify the participants and what they can recall the
17 conversation said. Okay?

18 MR. DiMURO: That's everything on my list, Judge.

19 THE COURT: Okay. I know the parties have asked for
20 fees, and everybody is asking for fees for both issues. You
21 know, this is a case in which --

22 MR. DiMURO: If I might, Judge, we had to file the
23 motion. You've seen the paperwork trying to meet and confer
24 and try to get these objections withdrawn, and then we don't
25 get answers until after our motion is filed, and still getting

1 stuff last night. I mean, it's cost a lot of money.

2 THE COURT: Yeah. Well, you brought the case.
3 You're pursuing the case. It's going to be a
4 difficult-litigated case. I think each party has been taking
5 some pretty strident positions in this case, so at this point
6 in time, I'm not going to award costs on any of the various
7 motions that I've heard to date.

8 You know, you-all have got to try to find a way to
9 get to the heart of the issue in this case and not spend a lot
10 of time dealing with peripheral matters and attacks on each
11 other in the pleadings. You know, it's not going to get you
12 anywhere other than continuing that approach further on, and
13 then it's going to just make it impossible for you-all to
14 represent your clients well.

15 And representing your clients well isn't making a big
16 argument and calling the other side names. It's counseling
17 them as to how they should get the case resolved and focusing
18 on the issues, and if you can't resolve them yourselves, then
19 getting them presented to the -- a decision-maker to do that as
20 quickly and as inexpensively as possible so that you can get a
21 resolution and move on.

22 So -- all right. So I'm denying any request for
23 sanctions in this case. I think the parties have to the extent
24 for the most part made -- there has been -- I didn't fully
25 grant the motion to compel. There were some issues that were

