

Volume 17

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jeffrey S. White, Judge

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. CR 11-00573 JSW
	)	
WALTER LIEW; ROBERT MAEGERLE;	)	
and USA PERFORMANCE TECHNOLOGY,	)	
INC.,	)	
	)	
Defendants.	)	
	)	

San Francisco, California  
Friday, February 7, 2014

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

For Plaintiff:

MELINDA HAAG  
United States Attorney  
450 Golden Gate Avenue  
San Francisco, California 94102  
**BY: PETE AXELROD**  
**JOHN H. HEMANN**  
**ASSISTANT UNITED STATES ATTORNEYS**

U.S. DEPARTMENT OF JUSTICE  
600 E Street NW  
Washington, D.C. 20044  
**BY: RICHARD S. SCOTT**  
**ASSISTANT U.S. ATTORNEY**

**(APPEARANCES CONTINUED ON FOLLOWING PAGE)**

Reported by: Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR  
Official Reporter

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**APPEARANCES: (CONTINUED)**

For Defendant Walter Liew and USA Performance Technology, Inc.:  
KEKER & VAN NEST LLP  
633 Battery Street  
San Francisco, California 94111

**BY: STUART L. GASNER  
SIMONA A. AGNOLUCCI  
KATHERINE M. LOVETT  
CHRISTINA BLAIS  
ATTORNEYS AT LAW**

For Defendant Robert J. Maegerle:  
MCKENNEY & FROELICH  
1349 West Peachtree Street  
Two Midtown Plaza - Suite 1250  
Atlanta, Georgia 30309

**BY: JEROME J. FROELICH, JR.  
ATTORNEY AT LAW**

1 Friday - February 7, 2014

8:07 a.m.

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

3 ---000---

4 (Proceedings were heard out of the presence of the jury:)

5 **THE COURT:** Good morning. Please be seated.

6 And please call the case.

7 **THE CLERK:** Calling Case Number CR-11-573,  
8 United States versus Walter Liew, United States versus Robert  
9 Maegerle, and United States versus US Performance Technology.

10 Counsel, please step forward to the podiums and state your  
11 appearances.

12 **MR. HEMANN:** Good morning, Your Honor. John Hemann,  
13 Pete Axelrod, and Richard Scott for the United States.

14 **THE COURT:** Good morning.

15 **MS. AGNOLUCCI:** Good morning, Your Honor. Simona  
16 Agnolucci, Katie Lovett, and Stuart Gasner for Walter Liew and  
17 USAPTI; and Mr. Liew is present at counsel table.

18 **THE COURT:** Good morning.

19 **MR. FROELICH:** Your Honor, Jerry Froelich here for  
20 Mr. Maegerle who's standing next to me.

21 **THE COURT:** Good morning.

22 All right. The first thing before we get into the morning  
23 business we talked about, I just wanted to thank the parties  
24 for their briefs. I know these things aren't created by  
25 immaculate conception, that they take a lot of work. The Court

1 was here early in the morning reviewing the materials, the  
2 cases and the like. The Court appreciates the parties helping  
3 the Court to crystallize the issues and make progress toward,  
4 you know, resolving the motions. So thanks to the parties.

5 And I wanted to start by giving the defendants an  
6 opportunity to make their motion formally for the record, and  
7 then I will tell you the way I would like to proceed.

8 **MS. LOVETT:** Thank you, Your Honor.

9 As stated in the brief filed for the Court, Mr. Liew and  
10 USAPTI move for a judgment of acquittal on Counts 1, 2, 3, 4,  
11 5, 6, 7, 8, 9, 10, 11, 13, and 20.

12 **THE COURT:** All right. For the grounds set forth in  
13 Rule 29; is that correct?

14 **MS. LOVETT:** Yes.

15 **THE COURT:** All right. Thank you.

16 Mr. Froelich?

17 **MR. FROELICH:** Yes, Your Honor. I would move for  
18 acquittal on all the counts against my client, and I would make  
19 an oral argument. I didn't have time, quite frankly, being  
20 here in California without my staff to file a written brief;  
21 but I have some oral arguments, not long.

22 **THE COURT:** All right. You also want to make a motion  
23 with -- renew your motion with respect to severance and  
24 mistrial?

25 **MR. FROELICH:** I was going to do that separately,

1 Your Honor.

2 **THE COURT:** Yes.

3 **MR. FROELICH:** I wanted to renew two motions,  
4 Your Honor, a motion for severance, and -- my motion for  
5 severance and also my motions for mistrial.

6 **THE COURT:** All right. Very well. Those will be  
7 taken under advisement.

8 So I assume the Government has no motions.

9 **MR. HEMANN:** We move to go home, Your Honor.

10 **THE COURT:** That's right. Okay. Well, be careful  
11 what you wish for.

12 (Laughter)

13 **MS. LOVETT:** Your Honor, briefly?

14 **THE COURT:** Yes.

15 **MS. LOVETT:** We would also like to renew our motion  
16 for severance.

17 **THE COURT:** Very well. Thank you.

18 Would that be severance of your two clients from  
19 Mr. Maegerle?

20 **MS. LOVETT:** Severance of the financial counts from  
21 the trade secret claims.

22 **THE COURT:** I got you. Okay. Very well. So those  
23 are duly noted.

24 So the way I would like to proceed is to kind of tell you  
25 maybe what I don't want to hear argument on, because I have

1 enough information to make a ruling based upon the briefs and  
2 the Court's own, you know, research and thought; and that is  
3 with respect to the bankruptcy counts, I have enough  
4 information. The issues are well briefed, and I don't really  
5 need argument on the bankruptcy counts.

6 The other thing -- the way I thought I would deal with  
7 this is to give, with one exception where I have a question of  
8 the defendants, at least with respect to -- yeah, all the  
9 defendants, principally Mr. Liew and the corporate defendant, I  
10 would give the defendants the opportunity to reply to what the  
11 Government filed, because they didn't have a chance to reply.  
12 The Government had an opportunity to respond to what the  
13 defendants wrote in writing. And then, of course, I'll give  
14 the Government a chance to respond to any other argument.

15 And one sort of procedural question or one thought I have  
16 is, subject to hearing from, mainly from Mr. Froelich, I would  
17 think that I should hear the arguments with respect to -- by  
18 Mr. Liew and USAPTI, and then give Mr. -- I assume that a lot  
19 of the arguments or some of the arguments that Mr. Maegerle  
20 will make will overlap with those arguments.

21 And, so, what I would suggest is giving you an  
22 opportunity, Mr. Froelich, to go second or after the other  
23 defendants. Is that what you would --

24 **MR. FROELICH:** That's what I expected, Your Honor, and  
25 that's what I've prepared. I have -- some of my arguments

1 overlap and some of them are distinct and separate.

2 **THE COURT:** I understand. Okay. So that's what we'll  
3 do.

4 So the first thing I want to start off with is the  
5 question with respect to the obstruction charge involving  
6 Jian Liu. And the question I have is this, for the defendants  
7 principally, and that is:

8 There is argument about whether there was -- whether there  
9 existed a proceeding that could be potentially obstructed by  
10 the alleged activities of the defendants. And I wanted to know  
11 why the pendency of the civil lawsuit, which had been --  
12 there's no dispute that it had been filed as of the time of the  
13 alleged activities involving Jian Liu, would not qualify as an  
14 official proceeding for purposes of the obstruction statute.

15 **MS. LOVETT:** Yes, Your Honor. I'm happy to address  
16 that concern.

17 Under *Arthur Andersen*, as the Court is probably aware, a  
18 proceeding, an official proceeding, must be foreseeable to the  
19 defendant at the time of the alleged obstructive conduct in  
20 order for there to be obstructive intent. And this alleged  
21 obstructive intent happened -- or conduct happened a week, less  
22 than a week, five days, after the filing of the civil  
23 Complaint.

24 The evidence showed that it was directly related to the  
25 fact that a DuPont private investigator showed up at Jian Liu's

1 house, asked him some questions, shook Jian Liu up; and Walter  
2 Liew was responding to that event, not to any upcoming trial,  
3 upcoming deposition, upcoming anything related to a civil  
4 proceeding.

5 **THE COURT:** But Mr. Liew knew about or a jury could  
6 find that he knew about the lawsuit, and then he is discussing  
7 with Mr. Jian Liu issues about not mentioning consultants'  
8 names, or whatever he was told, you know, not to mention; and  
9 then Mr. Liu, Jian Liu, said he refrained from giving that  
10 information based upon, in part at least, on what Walter Liew  
11 said.

12 So why couldn't a jury find that the civil proceeding was  
13 foreseeable because it actually existed and the papers were  
14 served?

15 You're making a very good jury argument, but my question  
16 is: How can the Court, as a matter of law, rule that there was  
17 no proceeding foreseeable and that that proceeding was the  
18 civil lawsuit?

19 **MS. LOVETT:** Well, I think there are sort of two  
20 distinct communications that we're talking about with regards  
21 to Walter Liew here.

22 There was evidence that Walter Liew told Jian Liu, "Don't  
23 tell anyone about these two consultants." But there was also  
24 evidence that Walter Liew told Jian Liu, "You should talk to an  
25 attorney before you speak to anyone any further."



1 And this speaking to an attorney was directly related to  
2 this civil proceeding. The "don't talk about the two  
3 consultants" was related to this DuPont investigator and was  
4 directly responsive to what happened with the DuPont  
5 investigator. So it's just two distinct interactions there.

6 **THE COURT:** Well, wouldn't it have been reasonable --  
7 could a jury find that the investigator was investigating or  
8 conducting his activities at least in part in connection with  
9 the lawsuit; and to the extent that the instructions or  
10 suggestions that were allegedly made by Walter Liew to Jian Liu  
11 were in some way to affect that proceeding?

12 **MS. LOVETT:** I don't believe that five days after a  
13 civil lawsuit is filed it's foreseeable to a normal, average  
14 person that this case will definitely go to trial, or that it  
15 will even proceed, you know, beyond a few weeks after that.

16 **THE COURT:** But does there have to be a trial or could  
17 it just be a lawsuit? Let's say --

18 **MS. LOVETT:** There has to be some sort of appearance  
19 before the District Court or before some legislative or  
20 judicial body, and that would involve, you know, a deposition,  
21 trial, some official filing; and that was far down the line,  
22 five days into this.

23 **THE COURT:** All right. What's the Government's  
24 response, Mr. Hemann?

25 **MR. HEMANN:** Very briefly, Your Honor.

1           There was an actual -- there was more than a foreseeable  
2 proceeding. There was an actual proceeding. And one had been  
3 filed, and the chronology -- this is a bit from memory,  
4 Your Honor -- was the day that the lawsuit was filed, Walter  
5 Liew called Jian Liu and advised him of the lawsuit while he  
6 was with Christina Liew on the way to the office. It caused a  
7 stir.

8           Over the next several days, there was activity jointly  
9 suggested by Christina Liew to obtain a lawyer and, obviously,  
10 related to the lawsuit.

11           Walter Liew went to Singapore on the 7th of April,  
12 returned on the 11th; and the first thing he did, it appears,  
13 having returned on the 11th, is meet with Jian Liu to talk  
14 about the lawsuit and in the same conversation mentions, "Don't  
15 talk about the old men," referring to Mr. Spitler and  
16 Mr. Maegerle.

17           Jian Liu's recollection is corroborated by Walter Liew's  
18 handwritten notes, which is Exhibit 687, which at the top says,  
19 "Ask Jian Liu what he had told his lawyer," and then  
20 immediately below that refers to "old men."

21           So I don't think they're two separate. I think they're  
22 intertwined. There's an actual proceeding, and I think that is  
23 easily sufficient underneath the statute.

24           Obviously, *Arthur Andersen*, which is really sort of the  
25 seminal and the few cases on this, dealt with a situation where

1 there was not an actual proceeding; and there was a great deal  
2 of debate in that case, as Your Honor will recall, about when a  
3 proceeding or whether a proceeding would ever be instituted  
4 when the shredding that was alleged against Andersen took  
5 place.

6 **THE COURT:** All right. Anything further on that  
7 point, Ms. Lovett?

8 **MS. LOVETT:** Yes, Your Honor, just to say that  
9 revealing or not revealing information to a DuPont investigator  
10 would not be the sort of action that triggers the statute. If,  
11 as the evidence showed, Walter Liew told Jian Liu not to speak  
12 to a DuPont investigator, that would not be obstructive of a  
13 civil case.

14 **THE COURT:** All right. Well, let's move on. I have  
15 the information I need on that count.

16 Let's move on to the other sort of big-ticket issues from  
17 the Government's -- from the Court's perspective that the  
18 Government responded to; and the first big one, because it  
19 permeates a lot of the counts -- and, by the way, I will take  
20 up, I did change the order that I had told you, I will take up  
21 the *Daubert* issue before we break today, because I think it's  
22 important to do that, so I'm going to allow time for that --  
23 has to do with the issue of the foreign instrumentalities or  
24 foreign government because there's two. The statutes have  
25 alternatives.

1 And I did, you know, read the authorities the parties  
2 cited to the Court, especially the *Lan Lee* case which  
3 Judge Ware decided, which relates to this issue, although the  
4 facts were different in that case.

5 So having -- and what I want, Ms. Lovett, you to respond  
6 to really is, not to repeat your arguments or the generalized  
7 arguments, but the Government has given the Court their  
8 examples, at least, of specific evidence in the record that  
9 ties -- both ties Pangang to the Chinese government and also,  
10 from the Government's perspective, argues that on the second --  
11 on the alternative prong, that the conspirators were attempting  
12 to benefit a foreign government or an entity of a foreign  
13 government; i.e., SASAC and the other -- and the Chinese  
14 Communist Party, and the like.

15 And my question to you is: Why don't those exhibits and  
16 that testimony raise issues -- make this a jury question?

17 **MS. LOVETT:** Yes, Your Honor. If I may address those  
18 in reverse order.

19 **THE COURT:** Please do.

20 **MS. LOVETT:** The benefit to a foreign government,  
21 *Lan Lee*, as the Court is aware, stated -- and I should mention  
22 that *Lan Lee* is one of the very few cases that discussed this  
23 issue -- and the Court in *Lan Lee* stated that benefit to a  
24 foreign government is not synonymous with benefit to a foreign  
25 country.

1           So simple benefit to China would not be enough to satisfy  
2 the statute. You need to intend or know that you will benefit  
3 the Chinese government.

4           **THE COURT:** Okay. No, I understand that. But aren't  
5 all these communications and other evidence dealing with -- I  
6 mean, one might make sort of a philosophical argument that  
7 there's really no difference with China because, unlike in this  
8 country, sometimes we don't know who's running the country, who  
9 the Government is, or whether we even have a Government. But  
10 in China, you know, the communications are with these State  
11 entities: SASAC, Communist Party. There's even a  
12 communication from the Premier of China.

13           And, so, I guess, my question is: Yes, I understand that  
14 that's the law, and I agree I think you've made that point, but  
15 why wouldn't the evidence that was adduced by the Government  
16 satisfy that government prong as opposed to country prong?

17           **MS. LOVETT:** Yes, I understand, Your Honor.

18           **THE COURT:** All right.

19           **MS. LOVETT:** The sort of star of the Government's  
20 response to our brief was this letter to Hong Jibi that we  
21 consider puffery, but they presented it; and the letter refers  
22 repeatedly to China, patriotic to China. It does not  
23 explicitly refer to any loyalty to the Communist Party, to the  
24 Chinese government.

25           And the focus here is on Mr. Liew's intent and Mr. Liew's

1 knowledge, not whether, you know, to most people the Chinese  
2 government and China are the same thing.

3       And there hasn't been evidence that Mr. Liew intended and  
4 knew that he would benefit the Communist Party of China. He  
5 knew that his actions would benefit China, the country,  
6 perhaps. That's what the evidence may have shown. But  
7 intending to benefit a country and its people and provide  
8 something that is a benefit to that country is not the same  
9 thing as intending to benefit the Communist Party or the  
10 Democratic Party or any party.

11       You can benefit the people of a country and know you'll  
12 benefit the people of the country without intending to benefit  
13 the government of that country. And the puff letter only shows  
14 an intent to benefit China as a whole.

15       **THE COURT:** All right. Now, please address, before I  
16 hear from the Government, the instrumentality issue. Because  
17 the Government points to evidence, additional evidence, by  
18 Mr. Hu about where he said, you may take issue with it, but he  
19 did testify that the Chinese government appoints directors or  
20 officers, or whatever it was, agents of Pangang group, and  
21 there's evidence of this interplay between the Chinese  
22 government and Pangang that the Government points to.

23       So why wouldn't that evidence be adequate to show, at  
24 least for a jury question, with respect to the foreign  
25 instrumentality?

1           **MS. LOVETT:** That evidence is not sufficient to show  
2 that there was substantial control or domination by the Chinese  
3 government. The main reason that this issue is entirely  
4 insufficiently addressed by the Government's cases, they chose  
5 not to call Professor Feinerman. They chose not to provide any  
6 context about whether it would be substantially controlling to  
7 appoint officers of a company or whether minority ownership of  
8 a company is substantial control.

9           The jury has no context to judge how much control the  
10 Government actually had in the day-to-day operations of these  
11 Pangang entities. And there are many Pangang entities here,  
12 and it's not clear which the Government contends were  
13 State-controlled and which weren't based on the evidence that  
14 was presented.

15           **THE COURT:** But help me with the following sort of  
16 structural issue, which is, from your perspective, the  
17 Government -- and I'm not disparaging what the Government did,  
18 but I'm taking this for the moment from the defendants'  
19 perspective. They threw a lot of stuff in there, and there's a  
20 lot of stuff that, you know, was thrown against the wall about  
21 the interplay of Pangang and the government, and there's the  
22 business cards that came in late in the trial and the like.

23           And the question is: The jury is going to be given, at  
24 least in the Court's proposed instructions, and there will be  
25 an instruction on the definition of "foreign instrumentality,"

1 and why wouldn't it be a jury question about whether the  
2 Government has satisfied the element of proof?

3 They're going to be told -- the jury is going to be given  
4 the definition. They're going to look at all this stuff that  
5 the Government has adduced, and they're going to decide  
6 whether, and both sides would argue to the jury, that either  
7 they have or they haven't proved it. So why wouldn't this be,  
8 at some level, a jury question, factual disputes to be resolved  
9 as to, for example, the relationship between the government and  
10 the Pangang and the other entities?

11 **MS. LOVETT:** Your Honor, since the statute requires  
12 that the jury find that there's substantial control,  
13 substantial ownership, substantial dominion, something along  
14 those lines, they need a context in which to judge whether that  
15 control was substantial and, given how acontextual this is,  
16 whether it was substantial, minimal. This just isn't a jury  
17 question. There legally is not enough evidence that there was  
18 substantial control.

19 **THE COURT:** All right. Mr. Hemann?

20 **MR. HEMANN:** Just a couple of points, Your Honor.

21 First of all, *Lan Lee*, of course, did go to the jury and  
22 was not -- he was acquitted. The case did go to the jury on  
23 the standard that Judge Ware articulated.

24 And the second legal point is that the Government may  
25 prove this element by proving either intent to benefit the



1 Chinese government -- and we agree with the Defense's statement  
2 that it doesn't have to be a government benefit but also  
3 acknowledge that the government country thing with China, as  
4 the Court observed, is a little bit more difficult to parse  
5 than it is here in the United States -- but we can satisfy it  
6 with either proof of intent to benefit the government, or --  
7 and/or proof of intent to a government instrumentality.

8 There's proof of both, and I'm only going to refer to two  
9 documents, one for each. And the question is Mr. Liew's  
10 understanding. I think Ms. Lovett's correct about that.

11 In this regard, the Hong Jibi letter is not so important  
12 as the Nora Lam email, which is Exhibit 374, in which Mr. Liew  
13 states he got into this because of the request from the  
14 State Council.

15 This is a direct link to not a country but a particular  
16 government entity; and it, again, happens to be the government  
17 entity that is the chief executive organ of the Chinese  
18 government.

19 I think that is corroborated by the Hong Jibi letter and  
20 significant other pieces of evidence that show this connection  
21 and an ongoing connection.

22 **THE COURT:** Was the Hong Jibi letter, though, a letter  
23 to a government or to a country?

24 **MR. HEMANN:** I think that the Hong Jibi letter refers  
25 to a request from a government entity. Again, it's the, "We

1 met with this group of Government officials; and, as a result,  
2 I received a list." That's not a list from a country. That's  
3 not a request from a country. That is a request from four  
4 named government officials, at least two of whom Mr. Liew  
5 maintains a relationship with over many years; and, in  
6 particular, Minister Tan and this fellow from the Foreign  
7 Economic -- Foreign Expert Agency with whom he corresponds over  
8 the years.

9 So I think that from a sufficiency perspective, him  
10 writing in 2005 that he got into this at the request of the  
11 State Council is sufficient to go to the jury on the intent to  
12 benefit the Government's prong as corroborated by the other  
13 evidence.

14 As to the control by the State's -- the foreign  
15 instrumentality prong of this, I do think that there is  
16 sufficient evidence from Mr. Hu and Mr. Olson as to the State  
17 ownership of the Pangang Group. I think that -- and that's one  
18 way we could prove it.

19 We could also prove control. Again, it's different. It's  
20 in the disjunctive. And there's an exhibit, Exhibit 291, in  
21 which Mr. Liew writes of a meeting: (reading)

22 "Fan Zhengwei hosted a luncheon for us and told me  
23 that Secretary Lee of the SASAC asked Fan to meet with us  
24 per the instruction of a Senior Minister."

25 I think that that probably, Your Honor, proves both the

1 government part of this but also the control of Pangang Group  
2 by SASAC and a Senior Minister as acknowledged by Mr. Liew in  
3 his own hand.

4 So I think that, Your Honor, those pieces of evidence are  
5 certainly sufficient to go to the jury with.

6 **THE COURT:** Ms. Lovett?

7 **MS. LOVETT:** Your Honor, first to just briefly clarify  
8 what I said earlier. Intent and knowledge is the focus here;  
9 but I believe, under the statute, that the Government must  
10 prove that what -- Pangang or any of these other entities were  
11 actually foreign instrumentalities.

12 Mr. Liew's subjective belief that they were foreign  
13 instrumentalities is not enough to satisfy the statute. And,  
14 so, they must show some evidence that there was actual  
15 substantial control, actual substantial ownership, and that  
16 standard has not been met here.

17 **THE COURT:** All right. What's your -- and that's an  
18 interesting point because the defendants may have believed  
19 anything they wanted to believe. They may believe, for example  
20 that, you know -- well, whatever they want -- whatever anyone  
21 wants to believe about our Government, but it may be totally  
22 irrational and may be not factually true.

23 So is there any evidence in the record from which a jury  
24 could find that, indeed, on the instrumentality point, that  
25 there actually was this relationship that the statute requires

1 between the government and -- you know, this relationship of  
2 control over Pangang Group by the government?

3 **MR. HEMANN:** So I guess I have two responses. Number  
4 one is, it raises -- there's an interesting legal question in  
5 the argument that Ms. Lovett just made as to whether the  
6 Government does need to prove the actual nature of the  
7 ownership or control; and it goes to the line of cases that we  
8 discussed in connection with the Bill of Particulars and the  
9 line that began with the *Shiu* (phonetic) case in the  
10 Third Circuit with which the Court is familiar, which is that  
11 both conspiracy and intent are crimes of the mind.

12 And there could be -- this could be an FBI sting case  
13 where there is no foreign government at all; and there are such  
14 cases in both the -- in the economic espionage arena, in the  
15 FCPA arena, where there's not a foreign government and there's  
16 not an instrumentality that is of the foreign government. It's  
17 the creation of the agents who are investigating and create the  
18 situation that the defendant believes there's one.

19 So I don't agree with the premise that where there is  
20 evidence that the defendant reasonably believed and acted on  
21 those reasonable beliefs under the intent and conspiracy  
22 statutes such proof is required.

23 I don't think we need to hash that out at this point  
24 because we still have the testimony of both Mr. Hu and  
25 Mr. Olson, which is sufficient to go to the jury with, because

1 both of them had personal knowledge based on their own  
2 activities in China of what was transpiring.

3 And, again, I certainly would say that the Court need not  
4 resolve this because of the information available with regard  
5 to the intent to benefit the Chinese government.

6 **THE COURT:** All right. Do you want to respond to that  
7 at all?

8 **MS. LOVETT:** Only to say, Your Honor, that I'm not  
9 aware of any case where it has been held that the foreign  
10 instrumentality or foreign government can be completely made up  
11 or, you know, the government of Freedonia could be seeking  
12 certain information, and a person could be found guilty of  
13 selling trade secrets.

14 **THE COURT:** All right. The other issue that I want to  
15 hear the defendants' response on is particularly on Trade  
16 Secret Number 1. Because in reviewing the arguments of the  
17 parties, reviewing the testimony, the evidence, and the  
18 Indictment, the Government does not charge that the entire  
19 process we're talking about here was a trade secret or that the  
20 defendants misappropriated that trade secret. It's a part of  
21 it. And there was testimony from Diemer, Dr. Diemer, Gibney,  
22 and Dayton about that.

23 So what's the defendants' best argument with respect to  
24 the proof -- the existence of a trade secret as it relates to  
25 Trade Secret 1?

1           **MS. LOVETT:** Yes, Your Honor. As the jury  
2 instructions that will probably be read to the jury, based on  
3 the instructions the Court filed last night --

4           **THE COURT:** Well, you can talk me out of it, though,  
5 if you disagree. I'm going to hear from you.

6           **MS. LOVETT:** On the basis of those instructions and  
7 the instructions both parties proposed, the jury will hear that  
8 Trade Secret 1 is the entire DuPont chloride-route process  
9 which includes subparts, ways and means, Trade Secrets 2  
10 through 5; but the jury will hear the phrase "entire DuPont  
11 chloride-route process," and that is the focus of what Trade  
12 Secret 1 encompasses.

13           And there has been overwhelming plentiful evidence from  
14 the Government's witnesses that the entire process is not a  
15 trade secret, that Mr. Liew did not believe that the entire  
16 process was a trade secret; and that's the real focus of what  
17 the jury is going to be deciding on.

18           **THE COURT:** So you're saying if the jury were to find  
19 that elements of the DuPont chloride-route process to  
20 manufacture TiO<sub>2</sub>, that the jury, a reasonable jury, could not  
21 find that that constituted Trade Secret Number 1?

22           **MS. LOVETT:** No, Your Honor.

23           **THE COURT:** Because it says, "Trade Secret 1  
24 includes." I'm reading from the Indictment, paragraph 14A:  
25 (reading)

1           "The DuPont Chloride-Route Process to Manufacture  
2           TiO<sub>2</sub>. Trade Secret 1 includes ways and means in which  
3           proprietary and nonproprietary components were compiled  
4           and combined by DuPont to form substantial portions of the  
5           TiO<sub>2</sub> manufacturing process and Trade Secrets 2 through 5  
6           set forth below."

7           So doesn't that, even by its plain terms, talk about -- I  
8           mean, I know in patent cases "includes" means everything; but  
9           the real world, fortunately, doesn't function on the language  
10          of patents. Why isn't it a partial -- and that's sort of the  
11          way the case was tried.

12           **MS. LOVETT:** Your Honor, the Government should be  
13          limited by the language in the Indictment, and the Indictment  
14          charges the entire chloride-route process followed by a number  
15          of things that that may or may not include, and that is how  
16          both parties have approached this case.

17          And the Government shouldn't be allowed to just throw in  
18          any particular thing that they can flag as a trade secret and  
19          call that Trade Secret 1 at this point in the case.

20           **THE COURT:** Do you want to confer on this, Mr. Gasner?

21           **MR. GASNER:** Your Honor, if I may --

22           **THE COURT:** Please do. Absolutely.

23           **MR. GASNER:** -- address the Court directly, I would  
24          appreciate it.

25           **THE COURT:** Yes, please do.

1           **MR. GASNER:** As the Court knows from civil practice  
2 with trade secrets and patents, it is possible to allege a  
3 trade secret that is a combination of things; but if one  
4 element of that is missing, there's no infringement in the  
5 civil context.

6           **THE COURT:** Right.

7           **MR. GASNER:** So what the Government did here was to  
8 allege a combination of proprietary and nonproprietary  
9 elements. That was part of our vagueness and indefiniteness  
10 motion on the face of the Indictment. We've renewed that as  
11 applied as well.

12           And that's exactly the problem, is that they alleged this  
13 combination trade secret that is kind of the entirety of  
14 everything that DuPont does in combination. There was no  
15 evidence of exactly what DuPont does, what the combination was.  
16 They had no technical expert, other than Mr. Gibney, who  
17 testified in a vague way as to Trade Secrets 2, 3, 4, and 5  
18 being valuable to Tronox or Kerr-McGee.

19           The Government chose to try this case without getting into  
20 any technicalities. So what we're concerned about is that they  
21 alleged in the Indictment, and we'll argue that the entirety of  
22 the chloride-route process, including this kind of unique  
23 combination of proprietary and nonproprietary, is the secret.

24           And there was lots of evidence about emulating the DuPont  
25 process or the DuPont type of process; and I think it would be



1 unfair and unjustified by the evidence for the Government to  
2 say, you know, the whole process is a trade secret when they  
3 didn't prove that, when the evidence shows lots of  
4 commonalities with other chloride-route manufacturers, and that  
5 there are many of them in the world.

6 So that's our concern, is that they didn't really prove a  
7 unique combination in the way you would in a civil trade secret  
8 case and that there's simply a complete failure of proof.

9 In fact, as Ms. Lovett said, overwhelming evidence to the  
10 contrary. There are many, many commonalities between the  
11 chloride-route manufacturers.

12 So that's our problem, is they alleged the big trade  
13 secret; and then the evidence showed, well, that's just not  
14 true.

15 **THE COURT:** Okay. Mr. Axelrod?

16 **MR. AXELROD:** Yes. First, Your Honor, just in  
17 discussing Trade Secret 1, it's important to focus on it's a  
18 charge in a conspiracy and attempt, and the issue is what  
19 Mr. Liew reasonably believed about the DuPont process; and his  
20 own words, and I'm not going -- the Court has the record about  
21 his belief and his representations about the secrecy of that  
22 process and his possession of the complete process.

23 I think what the other point here is the Defense seems to  
24 be sort of misreading what was indicted and what was tried,  
25 which was not that the entire DuPont -- everything that DuPont

1 does in its chloride-route process is a secret. It's a  
2 combination of things.

3 And actually there was evidence presented of that when  
4 there was the testimony of Mr. Dayton and Mr. Diemer --  
5 Dr. Diemer about, you know -- and particularly in the Basic  
6 Data Document. Some information is secret, some information is  
7 public; but it's these unique compilations of things that are  
8 protected, and that's the theory we've had throughout. That's  
9 been -- that's what's alleged in the Indictment, and there's  
10 been no failure of proof there. So there's ample evidence to  
11 support that.

12 **THE COURT:** All right. Ms. Lovett?

13 **MS. LOVETT:** Yes, Your Honor.

14 Only to raise the fact that the undisputed evidence shows  
15 that Ashtabula was a plant modeled entirely on the Antioch  
16 plant; that the Antioch plant had the, quote/unquote, entire  
17 chloride-route process because it could make titanium dioxide  
18 by the chloride route; and that DuPont knew, in Exhibit 847,  
19 DuPont knew that one of their competitors had the full Antioch  
20 technology through Ashtabula.

21 And the evidence showed that Cristal Global, SCM,  
22 Millennium, all of these competitors had owned Ashtabula at one  
23 point or another, and they had the full DuPont chloride-route  
24 process and understood all the parts of that process.

25 **THE COURT:** All right.

1           **MR. AXELROD:** Well, first of all, I think that that  
2 overstates the evidence because, remember, the Ashtabula  
3 technology -- first of all, SCM, Millennium, and  
4 Cristal Global, that's one company. They just -- it had  
5 different iterations.

6           But, most importantly, this case isn't about the Ashtabula  
7 technology. There was technology built and provided to SCM in  
8 the early '70s. It has nothing to do with the Edgemoor  
9 drawings from the '90s, or the Basic Data Document from 1985,  
10 or the Diemer Correlation in the '90s. And there's this almost  
11 a willful blindness about the state of the technology.

12           And I think that there's -- the fact that DuPont licensed  
13 a particular component, I actually believe there's  
14 technology -- they didn't give them everything, they gave them  
15 whatever they gave them from one facility, that doesn't speak  
16 to all the other technology that is out there.

17           And there's certainly no evidence in the record right now  
18 that the Ashtabula technology was public. And, in fact, we  
19 cited in our pleading sort of the state of the record with  
20 respect to Ashtabula. So that argument is a red herring.

21           **THE COURT:** All right. Do you want to respond to  
22 that?

23           **MS. LOVETT:** Yes, Your Honor, just to say that the  
24 Government continues to point to specific evidence that they've  
25 adduced about Trade Secrets 2 through 5, but that doesn't

1 necessarily show the entire DuPont chloride-route process.

2           **MR. AXELROD:** I'm confused by this use of the word  
3 "entire." It's not in our Indictment. It's not what we have  
4 said to the jury. It's not in the way we presented the  
5 evidence. And they keep saying, "It's the entire this. The  
6 entire that." Where is it? Where are they coming from with  
7 that?

8           **MS. LOVETT:** Your Honor, the Indictment reads, "The  
9 DuPont chloride-route process."

10           **THE COURT:** But then it goes on to say it includes  
11 ways and means in which proprietary and nonproprietary  
12 components were compiled and combined by DuPont to form  
13 substantial portions of the process.

14           So I think, although you certainly litigated, you know,  
15 whether that's adequate and the Court ruled on that, and there  
16 may someday be disagreement by a higher authority, but that's  
17 the state of -- you know, the law of the case, if you will, and  
18 the Court's view of the Indictment.

19           It is pretty broad, but I think it's adequate; and I think  
20 with the Bill of Particulars, you know, the defendants had  
21 adequate notice.

22           And the way the case was tried by both sides, I know the  
23 defendants tried to parse specific portions of what the  
24 Government claims is the TiO<sub>2</sub> process and say, "Well, isn't  
25 this public? Isn't that public? Aren't there patents on this

1 and that?"

2 But as the instruction and the law says, it can be -- a  
3 trade secret can be a compilation of different items; some  
4 public, some not public. That's the definition of "trade  
5 secret" in the statute.

6 So I'm not sure that -- I think the argument that the  
7 defendants are making, it may be very persuasive to the jury,  
8 it may be a winning argument, but it seems to the Court that  
9 the Court can't find, as a matter of law, that the  
10 Government -- that no reasonable jury could find the existence  
11 of a trade secret.

12 I think it's hotly disputed, and there's facts on both  
13 sides; but that's the stuff that jury verdicts are made out of.  
14 I don't think this is a question of law at this point, but I'll  
15 think about it some more.

16 What I'd like to do now, by the way, is, I'd like to give  
17 Mr. Froelich a chance to argue because I don't -- I will tell  
18 you specifically what I'm not hearing argument about, because I  
19 think I have enough in the record on which to make a judgment.

20 For example, and this is only with respect to Walter Liew  
21 and USAPTI because I haven't heard from Mr. Froelich yet, but I  
22 think I have enough information on the issue of knowledge and  
23 intent by Mr. Liew and USAPTI to resolve the issue on the  
24 papers. I don't need to hear further argument on that. I have  
25 the exhibits that both sides -- and the testimony that both

1 sides rely on, but I'd like to hear now from Mr. Froelich on  
2 Mr. Maegerle's position.

3 **MR. FROELICH:** Yes, Your Honor.

4 Your Honor, there is overwhelming amount of evidence in  
5 the record noncontradicted that Mr. Maegerle believed that what  
6 he produced had been revealed. There's dozens of emails.

7 But I want to go -- what I really want to concentrate on,  
8 Your Honor -- and you're almost going to think I'm arguing for  
9 Mr. Liew, but I'm not; I'm arguing for my client -- is the  
10 conspiracy counts. Because what you have to say, there was an  
11 agreement to violate the law, basically.

12 And if you look at all the evidence, there's no evidence  
13 that Mr. Liew and Mr. Maegerle agreed or conspired to violate  
14 the law. In fact, the evidence is to the opposite.

15 The evidence is that Mr. Maegerle consistently told  
16 Mr. Liew that he believed that the information that he had and  
17 provided was proper; and that he believed that he was only  
18 bound by a five-year statute -- five-year agreement, the same  
19 as the consultants, the outside contractors that DuPont hired.

20 That he also believed that because the Ashtabula was the  
21 basis of all of DuPont's technology, TiO2 technology, and that  
22 was sold and then allowed, and that Sherwin-Williams then had  
23 the ability to do what it want with it and did what it want  
24 with it; that it had sold it to SCM, and then SCM had spun it  
25 off to some other company, and then it became Millennium, and

1 then it spun it off to Cristal. And, so, that it had been  
2 spread.

3 And those are consistent throughout the emails. There  
4 is -- for example, Agent Ho put in -- was put in Exhibit 1008  
5 where Mr. Liew is repeating what he had heard from not only  
6 Mr. -- my client, Mr. Maegerle, but what he heard from McIntosh  
7 and what he heard from Spitler, that there was five years and  
8 that they were permitted to do it.

9 So the essence of a conspiracy is an agreement that both  
10 people have to believe violate the law. I think that the  
11 evidence is overwhelming what my client's belief was, and  
12 there's nothing to the contrary that he was doing it with a  
13 wink and a nod.

14 But, more importantly, in a conspiracy, if he's not  
15 conspiring with Mr. Liew, he's not guilty. And, so, he's  
16 consistently telling Mr. Liew, "What I'm giving you is legal,"  
17 and what it is. And that, therefore, Your Honor, as far as the  
18 conspiracy, the conspiracy fails. My client is not guilty  
19 because he didn't agree with Mr. Liew.

20 And whether they have a conspiracy with Mr. Liew doing  
21 things with other people, Mr. Spitler or other -- or other  
22 individuals, they do not have the conspiracy with my client.

23 And, so, that's my argument on that. If you have any  
24 questions, Your Honor --

25 **THE COURT:** No. Go ahead.

1           **MR. FROELICH:** As to the obstruction of justice, as to  
2 the counts dealing with the theft of trade secrets, one of the  
3 things I do think, there is a problem here in the trade secret;  
4 and we've made the objection as to, you know, it's overly  
5 broad.

6           It's like what has come in is if I had -- I'm Ford and I  
7 build a -- and I build a car; and I have a V8 in it, and I  
8 happen to have a supercharger that changes it from everybody  
9 else, and they say it contains everything. And my client gives  
10 them everything -- my client's an engineer for Ford, and my  
11 client gives them everything but the supercharger. He hasn't  
12 sold or hasn't gotten rid of a trade secret because everybody  
13 can take a V8 apart.

14           And, also, when Ford sells that automobile and sells it  
15 with the V8 in it and the supercharger in it, then if I buy the  
16 automobile, I have a right to break it down and find out  
17 exactly what Ford did.

18           So those are my arguments as to the conspiracy and as to  
19 trade secrets. I believe that the evidence is clear. There  
20 must be 15 -- and I gave you 1008, but there must be -- for  
21 example, Your Honor, this flowing over into the obstruction of  
22 justice charge, which I think is totally unsupported because  
23 they lock that in with the Answer that was filed; and the  
24 Answer that was filed in this case, all they do is -- excuse  
25 me, Your Honor, it's 626 I believe it is -- all they do is deny



1 the -- what they say is they deny that they have proprietary --  
2 they improperly got proprietary information.

3 So the evidence is that my client believed what he was  
4 doing, and also that he consistently told Mr. Liew that, "I  
5 believe I have the authority to do this. Not only do I believe  
6 I have the authority to do this, but that DuPont has given me  
7 permission to do it."

8 And there's a letter in evidence, which the Government put  
9 in evidence, of Mr. Liew writing to Mr. Dakin and saying, "This  
10 is what I'm going to do." And the evidence is that  
11 Mr. Dakin -- the evidence which is undisputed in the record is  
12 that Mr. Dakin responded and said that, "We're not going to put  
13 it in writing, but you have permission." And that is in --  
14 that is in several documents, including the 1008.

15 And, so, that's what's -- that's the issue -- that's  
16 what's in the record. There is nothing in this record that  
17 disputes my client's statements that are throughout the record  
18 that he got permission from DuPont.

19 And, so, there's no one that came in and said my client  
20 never got permission, and that Mr. Dakin didn't give him  
21 permission and the Legal Department.

22 And the document itself, the very document that the  
23 Government got in and put into evidence says -- my client  
24 writes to him and he says, "In the various emails that I wrote  
25 to DuPont, I got permission. They didn't put it in writing,

1 but they gave me permission."

2 And, again, as to the obstruction, falling into the  
3 obstruction of justice, they rely, I believe, on 690 -- and I  
4 don't want to speak too much for the Government, I no longer do  
5 that -- but 690, 678, 679, 680. Those are -- there's a series  
6 there of my client responding in how to answer the Complaint.

7 And he goes through the same thing. He says, "Ashtabula,  
8 five years they sold it, and everything else, and we don't have  
9 proprietary information." And that's what they say in the  
10 Answer. They don't say, "We don't have -- we don't have  
11 anything at all." They say, "We don't have proprietary  
12 information."

13 **THE COURT:** All right. Thank you very much.

14 **MR. HEMANN:** Just very briefly, Your Honor.

15 The central premise of Mr. Froelich's argument, I believe,  
16 is that -- there's evidence that Mr. Maegerle thought he was  
17 free to provide any information that he wanted to to Mr. Liew.  
18 There's nowhere in this record that there is that information.

19 The evidence is that there's some evidence, and very  
20 little, that Mr. Maegerle took the position that after five  
21 years, he was free to work for Mr. Liew. That is undisputed.

22 **THE COURT:** But wasn't there also a letter or a note  
23 that Mr. Maegerle sent to DuPont saying, "Hey, I'm going to  
24 work for this other consultant. You know, do I have any  
25 problem?" And they said, "As long as you don't disclose..."

1           **MR. HEMANN:** I'm getting exactly to that point,  
2 Your Honor.

3           Yes, he wrote to -- and I'm looking for it right now. It  
4 was a letter that I believe was written in the late '90s or  
5 mid-'90s to a company in Georgia called Kimera, in which this  
6 is a letter from Mr. Maegerle to DuPont, and it was located in  
7 Mr. Maegerle's home. It was addressed to Mr. Dakin who is, I  
8 can proffer to the Court, has passed away, which is why he's  
9 not a witness in this case.

10           And the letter asks for permission to -- the letter asks  
11 for permission to work for this other company, and the  
12 permission is -- there's no word back from DuPont as far as was  
13 located in Mr. Maegerle's home or in the files of DuPont.

14           Importantly, Mr. Maegerle in that letter shows his  
15 understanding of two things. Number one, that he had to ask  
16 permission to work for this company.

17           Number two, that he understood that he was not permitted  
18 to share DuPont confidential information, and that's the point  
19 of this case. He's not charged with working for Mr. Liew.  
20 He's charged with providing Mr. Liew with confidential  
21 information. And, so, it's that distinction that I think is  
22 the important distinction as the Court resolves this issue of  
23 intent.

24           He, of course, can work for Mr. Liew. He equally, of  
25 course, cannot provide confidential information of the type

1 that is in the Basic Data Document, and the evidence is  
2 undisputed that he understood that distinction as he was going  
3 forward.

4 There's no evidence in the record that Mr. Dakin ever  
5 responded to this letter in the affirmative or otherwise. The  
6 only evidence that he responded, or that somebody from DuPont  
7 responded, is in Exhibit 701, which is in only for Walter  
8 Liew's state of mind; and it suggests that Bob, Mr. Maegerle,  
9 has written a letter to DuPont and followed up with a phone  
10 call and got a verbal okay. Bob said DuPont wouldn't put  
11 anything in writing on this kind of issue; and it's an okay to  
12 work but not an okay to provide information, assuming it  
13 happened.

14 I'd also like to say that this "DuPont won't put anything  
15 in writing on this kind of issue" is belied by Mr. Maegerle's  
16 employment agreement and the practices described by  
17 Mr. McLaughlin, the HR witness, which is that the only way  
18 DuPont will approve of any of this is in writing.  
19 Mr. Maegerle, who is a long-time DuPont employee and worked on  
20 information secrecy issues understood this from his work on  
21 protecting information.

22 The only way you get permission from DuPont, or any other  
23 company, to share their information is to get it in writing.  
24 Mr. Maegerle never got anything in writing from DuPont.  
25 There's not a stitch of evidence that he did. There's not a

1 stitch of evidence he ever got any kind of permission or asked  
2 for permission to share information with Mr. Liew.

3 So I think that that's a -- the Ashtabula issues, I think,  
4 as the Court has previously observed, there's argument on both  
5 sides of that, but that's really a jury argument.

6 And, finally, as to Mr. Maegerle's state of mind, I think  
7 one of the more important pieces of evidence is in  
8 Mr. Maegerle's response to the civil Complaint when he was  
9 corresponding with Mr. Liew. And in that civil Complaint -- in  
10 that response, which is Exhibit 682, Mr. Maegerle says, "Please  
11 call me your Ashtabula consultant." And this is on the heels  
12 of all of these communications regarding the Kuan Yin Basic  
13 Data Document.

14 And that really shows that both -- certainly that  
15 Mr. Maegerle is concerned about being thought of as a Kuan Yin  
16 consultant, and it shows his state of mind, his guilty state of  
17 mind, with regard to Kuan Yin.

18 Just for the Court's reference, the letter to Mr. Dakin  
19 that was located in Mr. Maegerle's files is Exhibit 54.

20 **THE COURT:** All right. Yes?

21 **MR. FROELICH:** Your Honor, first of all, that letter  
22 is about Kimera, and it's totally different. But what I'm  
23 saying is: One, it is a letter that shows that there was a  
24 writing.

25 But, importantly, there's the five years is mentioned in

1 that, and it's coming up to five years. So that's part of his  
2 understanding. He even says, "I can't believe it's not five  
3 years," basically in the letter. So that supports him.

4 But there's numerous documents. They cited 710. I quoted  
5 1008. It says, "Maegerle" -- and they're talking now, this is  
6 about -- this is about Jinzhou, and he's talking and he says,  
7 "Maegerle checked with DuPont, wrote a letter, followed up with  
8 a telephone call, and got a verbal okay."

9 What -- there's nothing that -- there's nothing that  
10 contradicts that in this record. That is -- it's said two or  
11 three times, and there's no --

12 **THE COURT:** Verbal okay to do what?

13 **MR. FROELICH:** To consult on Jinzhou. That's what --

14 **THE COURT:** Well, to consult. So does that mean --  
15 sure, using your theory, he can consult using his skills that  
16 he has and he remembers, he can consult on nontrade secret  
17 matters; but that's like "consult" meaning, "Go to work for  
18 them. That's fine."

19 **MR. FROELICH:** That's fine. But what I'm saying to  
20 Your Honor is, that shows a lack of conspiracy, what he's  
21 telling people. That's my point. Do you understand what I'm  
22 saying?

23 **THE COURT:** I understand the point.

24 **MR. FROELICH:** My point is, it's a lack of a  
25 conspiracy. It's a lack of an agreement. That's what's

1 consistently told. I believe it also goes to his belief.

2 The other thing we have is they say through this letter,  
3 "Call me Ashtabula." How is that an obstruction of justice?  
4 If you read everything he says, "Identify me as an expert."  
5 That's what he's saying. That's what he tells them in response  
6 to when Liew sends him the Complaint. He says, "Identify me as  
7 an expert. Identify me as an Ashtabula expert."

8 And he goes through, "Because I'm going to tell them that  
9 Ashtabula was sold." And that's what -- and that's what's put  
10 in the Complaint. Ashtabula was sold and -- I mean, in the  
11 Answer. It's Ashtabula was sold and, therefore, DuPont gave up  
12 all its TiO2 secrets.

13 **THE COURT:** All right.

14 **MR. FROELICH:** That's consistent what he says. How is  
15 that an obstruction of justice? There is nothing in this that  
16 says, "We didn't get anything from Kuan Yin or the Basic Data  
17 Book." It says, "We did not get any proprietary information,"  
18 and that's consistent with what he believed.

19 **THE COURT:** All right. I want to take a short break,  
20 and then I'll hear -- I may have some additional questions.

21 (Recess taken at 9:02 a.m.)

22 (Proceedings resumed at 9:04 a.m.)

23 (Proceedings were heard out of the presence of the jury:)

24 **THE COURT:** I was going through my notes. That's why  
25 I took a break because I didn't want to be rude when you were

1 arguing and look at my notes, but I did have a question for  
2 either Ms. Lovett or Mr. Gasner about the obstruction charge as  
3 it relates to the whole safety-deposit box issue.

4 **MS. LOVETT:** Uh-huh.

5 **THE COURT:** And, so, this is not -- the Government, to  
6 some extent, you know, backed off on arguing proceeding, in  
7 their brief at least, and talked about a law enforcement agent  
8 or a judge; but my question, based upon the record as I  
9 understand it, the search took place in July. The civil suit  
10 was filed in around April.

11 **MS. LOVETT:** That's correct.

12 **THE COURT:** So the defendants argue that there was no  
13 proceeding because there was only a criminal investigation; but  
14 at the time of the house search, the civil case was on file.  
15 So why can't the jury find that Mr. Liew, together with  
16 Mrs. Liew, were attempting to obstruct the civil case? Because  
17 the evidence in the safety-deposit box, some of it from the --  
18 now we'll talk about from DuPont's perspective and maybe the  
19 Court's perspective, would have been relevant to the civil  
20 proceeding.

21 **MS. LOVETT:** Your Honor, I don't think there's any  
22 evidence in the record that Mr. Liew or Mrs. Liew acted with  
23 intent to obstruct the civil proceeding with respect to the  
24 safety-deposit box. The evidence, as it came out at the start  
25 of trial, indicated that Mr. Liew made statements during the



1 search and after the search. Mrs. Liew took actions. That's  
2 directly related to the FBI search, and any conduct related to  
3 that FBI search just doesn't bear any relation to the civil  
4 suit.

5 **THE COURT:** All right. Do you want to say anything in  
6 response?

7 **MR. HEMANN:** Your Honor, I don't.

8 **THE COURT:** Are you adopting that argument or are you  
9 not adopting the argument?

10 **MR. HEMANN:** I am not doing either yet, Your Honor. I  
11 want to think about it a little bit more. We did not --  
12 candidly, we weren't thinking about that. I was just looking  
13 over Mr. Axelrod's shoulder at the language of the statute, and  
14 it might fit.

15 We didn't address it. It was getting a little closer to  
16 1:30 than I had liked it last night when we got to the end of  
17 the brief.

18 But I think that on the official-proceeding prong, what  
19 the statute says is, "Intended to impair the availability of  
20 records or documents for use in an official proceeding."

21 I think it's fair to say that when you've got a dozen or  
22 so FBI agents standing in your, house searching your house for  
23 evidence related to trade secrets as to which there's a pending  
24 civil proceeding, it is reasonably foreseeable that in the  
25 future, there will be a criminal proceeding. That's what

1 happens after FBI agents conduct searches.

2           **THE COURT:** But doesn't that fly in the face of the  
3 *Andersen* decision about the existence of a criminal  
4 investigation?

5           **MR. HEMANN:** I think that it's different with the  
6 *Andersen* decision because when the *Andersen* conduct took place,  
7 the shredding took place before *Andersen* -- before there was,  
8 in fact, a criminal investigation at all.

9           What happened was, through Enron's internal investigation,  
10 *Andersen* had learned that there was the possibility of a  
11 problem, and set about to shred before a criminal investigation  
12 began; and the argument was: Well, when there's not even an  
13 investigation, the foreseeability of a criminal case is a  
14 bridge too far, although the courts said with regard to that,  
15 that there still are circumstances under which -- even before a  
16 criminal investigation begins, that a criminal case is  
17 reasonably foreseeable.

18           Here we're one step closer to that where you've got FBI  
19 agents searching a house for records related to an allegation  
20 that the defendants knew about of trade secret theft. I think  
21 it was reasonably foreseeable from the *Liew's* perspective,  
22 particularly given their conduct, that the evidence in the  
23 safe-deposit box could be used in a future criminal proceeding.

24           So I think it meets that. We focused on the earlier one  
25 primarily because of the late hour.

1           **THE COURT:** Do you want to say anything further on  
2 that point, Mrs. Lovett?

3           **MS. LOVETT:** Your Honor, I think it's just important  
4 to note that the normal way of getting evidence for a civil  
5 proceeding isn't through FBI agent seizure, so I don't think  
6 the civil proceeding is linked here.

7           In terms of a future criminal proceeding, the cases like  
8 *Arthur Andersen* and, forgive my pronunciation, but the *Ermoian*  
9 case that we cite, deal with the fact that when you're at the  
10 stage of an FBI investigation, you're quite far out from  
11 actually being arrested and prosecuted; and we believe that at  
12 that point, that was not foreseeable.

13           **THE COURT:** All right. I'll read that case.

14           All right. I've exhausted my questions. I'm not going to  
15 allow closing argument. If there's a point of order that  
16 somebody has that directly relates to what we've been  
17 discussing, I'll hear it; but I want to get to the *Daubert*  
18 issue.

19           Go ahead.

20           **MR. GASNER:** Thank you, Your Honor.

21           I just want to supplement our Rule 29 motion with respect  
22 to the bankruptcy charges. I know it was the last day of  
23 testimony. Ms. Lovett was back at the office writing the  
24 brief. She did address the executory contract.

25           **THE COURT:** You didn't have a cast of thousands back

1 there?

2 **MR. GASNER:** Cast of one. A very capable one.

3 **THE COURT:** Just as good it appears.

4 **MR. GASNER:** Yes. Ms. Lovett is worth a thousand.

5 **THE COURT:** Yes. Yes.

6 **MR. GASNER:** But with respect to -- as the Court  
7 knows, the evidence was, basically, the form that was submitted  
8 as part of the bankruptcy, and then what was said at the  
9 hearing. That was really the thrust of the evidence.

10 And if the Court looks at Count 21, it talks about many  
11 other things that we think there's just a failure of proof  
12 because it was kind of the stub end of the case.

13 And, for example, in Count 21, sub (b), the focus is  
14 question 10, which requested that the debtor list all other  
15 property other than property transferred in the ordinary course  
16 of business or financial affairs of the debtor, et cetera. And  
17 then Mr. Liew checked "None" in response to that. There was no  
18 evidence that that isn't true.

19 Secondly, the next question, 11, it basically faults  
20 Mr. Liew for failing to disclose the existence of letters of  
21 guarantee; and there was no evidence, I believe, that he  
22 thought that that wasn't the case.

23 The evidence really showed that a form was submitted that  
24 could have had precheckmarks on it, and the Indictment is very  
25 specific as to certain things.

1           **THE COURT:** All right. Well, I'll look at those  
2 paragraphs.

3           **MR. GASNER:** Okay. Thank you, Your Honor.

4           And then the same issue we'd like to go on as to Count 22  
5 where there are a variety of assertions that were asked on the  
6 record that I believe on their face the evidence is equally  
7 consistent with those statements and answers being true.

8           And, so, we believe that there's been a failure of proof  
9 on those specific questions.

10           So, for example, in Count 22, item (b), the Indictment  
11 alleges: (reading)

12            "In response to the question from the presiding  
13 trustee, 'How long had Performance Group, Inc., been  
14 closed down,' Liew responded, 'Since the beginning of  
15 November 2008.'"

16           Well, there's no evidence at all about, you know, what  
17 "closed down" means or when exactly it closed down or why that  
18 would be untrue. So I think if the Court takes a careful look  
19 at the Indictment and the questions and answers and compares it  
20 to the fairly cursory proof that was presented, you know,  
21 yesterday, that the Court will find there's been a failure of  
22 proof on several of these specifics.

23           **THE COURT:** All right. Anything you want to say on  
24 that?

25           **MR. AXELROD:** Well, Your Honor, I actually think that

1 Mr. Gasner's reading the fulsome record relating to the  
2 activities of the business. For example, this notion that it  
3 was true that the business was closed down since the beginning  
4 of November, the Court may recall the testimony of Mr. Amerine  
5 who was working there that December and got a call that he was  
6 being let go, you know, right around the holidays. The  
7 business was operating. There's lots of evidence to show that  
8 Performance Group and the contracts of Performance Group --

9 **THE COURT:** I don't really need to hear that. I'm  
10 familiar with it.

11 **MR. AXELROD:** Understood.

12 **THE COURT:** The matter is submitted.

13 Let's talk about any *Daubert* issues. Have you all --  
14 Ms. Agnolucci, have you been talking to the Government about,  
15 possibly, how to crystallize the issue here?

16 **MS. AGNOLUCCI:** Well, Your Honor, there have been some  
17 developments on our end since we all last spoke about it.

18 **THE COURT:** Yes. Yes.

19 **MS. AGNOLUCCI:** And we've continued to persevere in  
20 trying to obtain additional evidence that would satisfy  
21 Your Honor as to the partnership agreement that we have offered  
22 and that we think both should be admitted and that Mr. Klein  
23 should be entitled to rely on under Rule 703.

24 So I'd like to make an offer of proof --

25 **THE COURT:** Go ahead.

1           **MS. AGNOLUCCI:** -- as to what has developed since we  
2 last spoke.

3           We arranged for a conference call last night and the  
4 participants in that call were Mr. Klein and ourselves; and  
5 Mr. Ning Qiao, the signatory to the joint venture agreement.  
6 Walter and Christina Liew were also present at the time of the  
7 call.

8           We called the telephone number of Mr. Qiao's home that was  
9 on documents that were produced to us in discovery in this  
10 case, and Christina Liew identified his voice on the telephone.  
11 And we arranged a conversation so that Mr. Klein could gather  
12 additional information regarding the agreement, all of which we  
13 think he is entitled to rely on under Rule 703. And to make  
14 the offer of proof to Your Honor, I'd like to talk about what  
15 was said during that conversation.

16           First of all, Mr. Ning identified his handwriting on  
17 Exhibit 3497. All of us had copies of Exhibit 3497 with the  
18 exhibit tag on it in front of us. We faxed it to him prior to  
19 the call just to make sure that we were all looking at the  
20 document with the same exhibit tag.

21           And --

22           **THE COURT:** Where was Mr. Ning located?

23           **MS. AGNOLUCCI:** In Shengyang, China.

24           **THE COURT:** Okay.

25           **MS. AGNOLUCCI:** We went through the exhibit page by

1 page. The first page he identified as the cover page to the  
2 exhibit, and confirmed that it was his handwriting on that  
3 cover page.

4 The second page he confirmed was a declaration that was  
5 signed by him in his attorney's office on the date indicated on  
6 the document.

7 He stated that the law license on the third page was a  
8 copy of his attorney's law license, and that that was in fact  
9 the individual who represented him.

10 And he stated that the fourth page is a true and correct  
11 copy of a contract that he signed with Walter Liew in August of  
12 2004.

13 He said that Party A to the contract was investment  
14 partners represented by him. He was the main investor and then  
15 there were other partners that were Party A to the contract.  
16 And Party B to the contract was Walter Liew.

17 And he confirmed that this contract was signed in 2004,  
18 and that it related to the 30K titanium dioxide project at  
19 Jinzhou.

20 He confirmed that he and his investment group under the  
21 contract would get 60 percent of the contract proceeds, and  
22 that Party B would get 40 percent. And he said that the spirit  
23 of the contract was as friends and collaborators; and that they  
24 understood that Mr. Liew's company was small, and that  
25 shortcomings may have to be eaten, and that the money would



1 even itself out in the end, but the expectation was that that  
2 would be at least initially the division of that contract.

3 He then stated that when later, around 2009, Mr. Liew  
4 obtained the 100K Pangang contract, he went to look for  
5 additional investors. "He" being Ning Qiao. He felt,  
6 Ning Qiao again, felt that it had a lot of potential, and he  
7 established additional companies for the purpose of sharing the  
8 profits of that project.

9 The understanding was that Mr. Liew and Ning Qiao and the  
10 group of investors would work out the details of the proceeds  
11 of the 100K contract later; but that there definitely was an  
12 agreement to share the profits of that contract, and for those  
13 profits to be sent to companies set up by Mr. Ning Qiao and his  
14 investors. And that the arrangement was similar with the 100K  
15 project to the 30K project arrangement.

16 And, again, Party B was Walter Liew as president of  
17 Performance Group.

18 Mr. Qiao stated that he was the main investor but there  
19 were other investors, including family members; and that --

20 **THE COURT:** Whose family members?

21 **MS. AGNOLUCCI:** Including his family members.

22 Mr. Qiao's family members.

23 **THE COURT:** Okay.

24 **MS. AGNOLUCCI:** And, again, that those companies were  
25 intended to share the proceeds of those contracts.

1 After speaking with Mr. Qiao, we had a separate  
2 conversation with Mr. Klein who said that he felt comfortable  
3 with the information that he had received, that he felt that it  
4 was the type of information that an expert, such as himself,  
5 would rely on in opining on a partnership and a partnership  
6 agreement.

7 And we believe, Your Honor, that under Rule 703, this  
8 information that we have received absolutely passes muster.  
9 You know, although we haven't briefed the issue, I believe  
10 there are cases out there that say that experts can rely on  
11 statements. And certainly in the context of a partnership  
12 where an agreement between and/or among partners can be oral as  
13 well, it's absolutely commonplace for an expert such as  
14 Mr. Klein to rely on oral statements.

15 Finally, I would say that Mr. Qiao stated that his lawyer  
16 had advised him at the time that he signed the declaration on  
17 page 2 of that exhibit, that that was all he had to do to  
18 comply with Chinese law; and that he understood that signing  
19 that declaration was sufficient to authenticate his agreement.  
20 He declined, however, to participate in a deposition.

21 **THE COURT:** All right.

22 **MR. HEMANN:** Just preliminarily, Your Honor, I wonder  
23 if the Court would inquire as to what language this  
24 conversation took place in.

25 **THE COURT:** Oh, yes.

1           **MS. AGNOLUCCI:** Yes, Your Honor. We had a certified  
2 interpreter on the line with us. Mr. Qiao spoke in Chinese,  
3 and we spoke in English.

4           **THE COURT:** All right.

5           **MR. HEMANN:** I think it would be hard to contemplate a  
6 circumstance under which this was less reliable. Mr. and  
7 Mrs. Liew were present during the conversation. The  
8 conversation took place in Chinese.

9           This goes to Mr. Qiao Ning's subjective interpretation of  
10 a contract that is entirely vague on its face. There is  
11 information that Ms. Agnolucci is relying on that goes well  
12 beyond even the written contract and goes to these sort of  
13 vague understandings that may or may not have existed between  
14 individuals.

15           I think one thing that's very important is just to tie it  
16 back to what we're looking at here. We're talking about an  
17 analysis of the gross receipts of a company, Mr. Liew's  
18 company. Nothing Mr. Ning said suggested that he would be  
19 doing any work, that he would be earning the money, that he  
20 would be receiving the money. All of the work that took place  
21 took place in the United States.

22           This is an investment apparently. It appears to be merely  
23 an investment by Mr. Ning, if true. At best, it's an  
24 investment by Mr. Ning in Mr. Liew's company.

25           That has nothing to do whatsoever with the receipt of

1 money by Mr. Liew's company for things that Mr. Liew did.  
2 Whether earned properly or earned illegitimately, the money was  
3 taken in by Mr. Liew. It was not taken in by Mr. Ning.  
4 There's not a stitch of evidence, nor did Mr. Ning say, that he  
5 was doing any work in order to earn the money. The money  
6 wasn't sent to him. None of the contracts with Panzhihua or  
7 Jinzhou mention, acknowledge, contemplate, hypothesize Mr. Ning  
8 or his investment partnership.

9 The money split, it was entirely unrelated to the evidence  
10 before the Court on how Mr. Liew handled the money.

11 So both as to the substance and its utter lack of relation  
12 to the allegations in the Indictment, and as to the  
13 unreliability of these statements, both under the circumstance  
14 in which they were tied -- the circumstances under which they  
15 were obtained, and their lack of relation to the charges, this  
16 is not something that should be mentioned.

17 It's also not the kind of information that either a lawyer  
18 or a businessperson, which is what Mr. Klein appears to be --  
19 or I don't know whether he's being offered as a professor --  
20 but the testimony goes to some very practical issues about law  
21 and accounting.

22 Lawyers and accountants never, ever would rely on this  
23 kind of information to make a decision about gross receipts.  
24 It is so far afield from what a tax lawyer or an accountant  
25 would rely on that it's not worth talking about.

1           **MS. AGNOLUCCI:** May I respond briefly, Your Honor --

2           **THE COURT:** Please.

3           **MS. AGNOLUCCI:** -- just to add to the additional  
4 details of the offer of proof.

5           The document itself says the early stage expenses of the  
6 project are high; and that after the project is secured,  
7 Party B would first pay back those early-stage expenses.

8           And Mr. Qiao confirmed with us on the telephone that he,  
9 indeed, made various efforts to secure the project in China;  
10 and that those efforts cost him a lot, and that that's what  
11 this provision of the contract was about.

12           You know, as to whether this information is reliable and  
13 as for whether this information is the type of information that  
14 Mr. Klein should rely on, I think that Mr. Klein should be the  
15 one who, you know, sort of makes that statement to the Court.

16           And, so, what we'd like to offer is for him to be  
17 voir dired by the Court at some point early next week, either  
18 Monday, he said he could appear by videoconference, or Tuesday  
19 morning in person. And after speaking with him, and he's a  
20 professor at the UCLA Business School and also an attorney, and  
21 I think his expert statement makes very clear what his opinions  
22 are in case there's any doubt; but he would then be in the  
23 position to inform the Court about whether this is the type of  
24 information that somebody in his field would rely on.

25           **THE COURT:** All right. I'm going to need to take this

1 under advisement, obviously, and check the authorities on what  
2 is proper for an expert to rely on.

3 I will only observe that there's absolutely no dispute  
4 that this information -- a couple of things. Number one, just  
5 even assuming hypothetically that the Court would allow  
6 Mr. Klein, the expert, to testify as an expert, Rule 702 would  
7 not mandate the substance anyway. He would simply say, "One of  
8 the things I took into account was X conversation I had on the  
9 phone"; but the Court has the discretion to exclude the  
10 substance of it. And, in fact, that's the better,  
11 jurisprudentially, the better thing to do.

12 But putting that aside, this is clearly based upon -- just  
13 sort of structurally looking at this, he is relying on hearsay.  
14 It's hearsay because it's an out-of-court statement  
15 quintessentially offered for the truth of the matter, so it's  
16 hearsay.

17 And then the question is, the Court has to make a  
18 determination under 702/703 whether, as a matter of law, this  
19 information is something that an expert appropriately relies  
20 on, which may be more of an objective standard than what some  
21 expert says is the case.

22 The Court has to be -- we're talking -- we're in *Daubert*  
23 land now. We're talking about gatekeeper function here and,  
24 so, the Court is not bound by what the expert says. I'm just  
25 thinking out loud with you.

1 But I want to know, are there any other -- was this the  
2 only -- not that this is a small issue, but any other *Daubert*  
3 issues that we need to resolve before -- and I will resolve  
4 this one today, but I need to think about it and consult some  
5 authorities. But are there any other *Daubert* issues? I mean,  
6 any -- I should ask the Government really.

7 **MR. HEMANN:** So, Your Honor, yeah. I mean, it's a  
8 related issue. I think both Mr. Klein and Mr. Cox throughout  
9 their written disclosures refer to these kind of -- some  
10 hypothetical agreements or agreements that might exist. The  
11 joint venture is one of them.

12 They both talk about, you know, money received in a  
13 representative capacity, a party acting on behalf of another  
14 party, directing or controlling funds on behalf of other  
15 people. That all -- the concrete example of that is this joint  
16 venture agreement.

17 The reality is that there simply is no evidence of any  
18 third-party agreements other than the argument that  
19 Ms. Agnolucci's making about the joint venture.

20 So both Professor Klein and Mr. Cox, as part of their  
21 opinions, are going to say, "Well, if there was some other  
22 arrangement that I don't know about, then I would have this  
23 opinion." That, under Rule 702, that's exactly what Rule 702  
24 says is inadmissible because it is an opinion not based on  
25 sufficient facts or data, and that's Rule 702(b).

1           And as the Court knows, coming in with an expert opinion  
2           that is based on nothing other than a hypothetical situation is  
3           not a proper expert opinion. And, so, I understand that  
4           Mr. Cox would come in and talk about the QuickBooks  
5           reconciliation that flows from Mr. Guan's work. I think that's  
6           an appropriate topic. I don't know that it's -- I don't know  
7           that I believe that it's relevant. I don't know that it's so  
8           irrelevant that it shouldn't be admitted if the defendants want  
9           to, but that's appropriate.

10           He can talk about his understanding of how the money came  
11           into Mega Bank and was split, some of it going into the  
12           accounts of USAPTI and some of it going somewhere.

13           But once you get to the somewhere, Mr. Cox doesn't know  
14           anything, and he certainly doesn't know anything about any sort  
15           of agreements that existed with regard to where the money was  
16           going.

17           Mr. Klein's entire opinion is based on the idea that  
18           there's these other agreements with other parties that affect  
19           the nature of the receipts. That's all entirely hypothetical.  
20           It is not supported by any facts or data.

21           And I'd add for the Court that these are -- this is over  
22           \$20 million, and there is not a single record in the  
23           United States of any sort of contract or agreement, any sort of  
24           accounting. There's not a journal. There's not journal  
25           entries. There's not data. There's nothing that shows any



1 evidence of these agreements other than this late-received  
2 contract from Qiao Ning from 2004.

3       So to have two experts, let alone one, come in and say --  
4 one expert, let alone two, come in and say, "Well, I think  
5 there might be some other agreement. This looks like there  
6 might be some other agreement," that's highly prejudicial and  
7 it's just sort of the -- and I'm not meaning to be pejorative  
8 here, but it's kind of the junk opinion that *Daubert* and that  
9 line of cases was designed to address where you cloak somebody  
10 as an expert. You bring them in. The jury is going to think,  
11 "Well, this guy's pretty smart. He must know something or he  
12 wouldn't be getting up and saying this," but they don't know  
13 anything.

14       **THE COURT:** All right. I understand your argument.  
15 Do you want to respond to that briefly? Because I do have  
16 another matter.

17       **MS. AGNOLUCCI:** Yes, Your Honor.

18       I would just say there's ample evidence in the record that  
19 corroborates the agreement and the conversation that Mr. Klein  
20 had with Ning Qiao, most notably the fact that that is how the  
21 money ended up being distributed.

22       **THE COURT:** Well, no, we have to separate out, because  
23 it's a separate issue, the conversation that you had last  
24 night. And the question is: Is there any other evidence --

25       **MS. AGNOLUCCI:** Sure.

1           **THE COURT:** -- that would allow these witnesses to  
2 opine on?

3           **MS. AGNOLUCCI:** And aside from that conversation,  
4 there's also the fact of the transfers and how it happened,  
5 which is consistent with a joint venture or partnership.

6           **THE COURT:** Well, if he wants to say, "I looked at  
7 these transfers and these," as you call it, what the Defense  
8 calls pass-throughs, and on that -- it may very well -- I can  
9 infer that there's some sort of a relationship there or there  
10 may be, that's one thing.

11           But if he says, you know, there must have been some kind  
12 of an agreement pursuant to which this \$28 million was, you  
13 know, sent around the world, that is junk -- that's not even  
14 science, much less junk science. That's just pulling things  
15 out of the air.

16           **MS. AGNOLUCCI:** What I'm trying to speak to,  
17 Your Honor, is the Government's assertion that there's no other  
18 evidence of this arrangement.

19           **THE COURT:** Well, here's what I think we need to do:  
20 I think what we need to do is, I need, maybe outside the  
21 presence of the jury, to hear -- again, I'm putting aside the  
22 conversation last night, that's separate and distinct -- and I  
23 would want to hear, this is central enough, unlike the issue  
24 with some of the Government's experts -- or not the Government,  
25 with Mr. Diemer, for example, about what the basis -- in

1 summary form what's his opinions. I've read the reports. I  
2 understand what his opinions are. And what are the bases.

3 And if he says, "Well, I assumed certain things," I'm  
4 going to want to know chapter and verse, specifically line by  
5 line, where in the record it's supported. And if it's  
6 conjecture or inference of some sort, it must have been or it  
7 could have been or if it were, then this is the proper tax  
8 treatment, that's not going to come before this jury.

9 And I do have one question for you, Ms. Agnolucci. Why  
10 wasn't this guy Ning -- is that his name, Ning? -- contacted  
11 earlier than last night?

12 **MS. AGNOLUCCI:** We attempted to contact him earlier.  
13 We were told that he did not -- he was represented by counsel,  
14 and that we should talk to his lawyer. And we made every  
15 effort, Your Honor, to contact him. We were -- we have been  
16 trying for two years to contact this individual.

17 **THE COURT:** But isn't this fundamentally -- although  
18 the Government doesn't have a right to appeal, the Court has to  
19 consider, you know, as a neutral judge here, both sides, and  
20 isn't this fundamentally unfair to the Government? They get no  
21 chance to cross-examine this guy, no chance to do some  
22 background check so that they can possibly attack the  
23 credibility of the out-of-court declarant, all the things that  
24 they would -- if they had been put on notice of this.

25 And I'm not faulting you, but it's a fact that the

1 Government has no chance to meet this evidence at all. Isn't  
2 that something the Court should consider?

3 **MS. AGNOLUCCI:** Your Honor, the Government has been on  
4 notice that this is our theory of the case for quite some time.  
5 They also have Mr. Qiao's phone number. It's in the discovery.  
6 They certainly were free to call him, do their own  
7 investigation. They have his lawyer's phone number. You know,  
8 so the idea that this is something -- this is a theory that's  
9 coming up at the last minute is simply not accurate.

10 Second of all, that's exactly what Rule 703 is for, is --  
11 you know, it allows experts to rely on otherwise inadmissible  
12 evidence, such as hearsay.

13 **THE COURT:** All right. Do you have anything further  
14 on that?

15 **MR. HEMANN:** Very briefly, Your Honor.

16 We're not actually allowed to call Mr. Ning in China.  
17 It's against our law and their law for us to do that.

18 **THE COURT:** Why is that?

19 **MR. HEMANN:** It violates Chinese sovereign immunity  
20 for a representative of the United States, law enforcement in  
21 particular, to reach into China without going through the  
22 Mutual Legal Assistance Agreement; and, so, we actually are not  
23 in a position to do it.

24 We've known about Qiao Ning, his existence, for two years.  
25 We found out last November of the existence of this agreement,

1 which does not on its face relate to TiO<sub>2</sub>, and we found out ten  
2 minutes ago about this proffer. So we're not in a position to  
3 meet the evidence.

4 But more to the point, this is the defendant's  
5 brother-in-law and Mrs. Liew's brother. He's not somebody  
6 who's available to the Government. If he can't come in and  
7 testify about these assertions, he ought not be able to  
8 testify.

9 **THE COURT:** All right. I'm going to do some research  
10 on this, and I really need to break. Do you have anything last  
11 minute?

12 **MR. GASNER:** Yes. This just relates to the scheduling  
13 and how it hinges on the Court's ruling. We'll look forward to  
14 the Court's ruling later today. If it would allow Klein and  
15 Cox to testify, then they will probably be our witnesses on  
16 Monday.

17 If the Court declines to allow them to testify or Mr. Cox  
18 is very limited by virtue of the Court's ruling, we would  
19 probably call our technical expert, Mr. Cooper. We disclosed  
20 him yesterday as potential, or possibly even the day before, as  
21 a potential Monday witness. There are a lot of documents that  
22 we disclosed. We need the cross-documents from the Government.

23 And I appreciate the problems, but most of our exhibits  
24 were from his report and what he relied upon. They've had the  
25 report for many months now. I've heard rumor that they are

1 subpoenaing a prior employer of Mr. Cooper, and I do think  
2 we're entitled to notice.

3 **THE COURT:** I understand.

4 Are you going to give them the cross stuff?

5 **MR. HEMANN:** We will, Your Honor. We have a practical  
6 problem right now, which is that we have -- right now on  
7 schedule for Monday are four expert witnesses and other  
8 witnesses that have been noticed by the Defense. We've got to  
9 triage a little bit. I don't want to --

10 **THE COURT:** Well, here's what I'm going to do: I'm  
11 going to issue an order today on this discrete issue. I  
12 can't -- the Defense is going to have to decide, based upon the  
13 Court's ruling, whether it wants to even call these folks. And  
14 if they don't, for example, I'm not saying what I'm going to do  
15 if they don't, and, therefore, we're up to the technical  
16 expert, at that point the Government needs to disclose,  
17 pursuant to the Court's standing order, the cross-examination  
18 evidence because that would potentially -- then you'd need to  
19 have a conversation. And it may very well be that the amount  
20 of material and the amount of testimony for Cox and Klein are  
21 limited.

22 **MR. HEMANN:** We have disclosed -- the Defense don't  
23 like our disclosure as to the cross-evidence, but I have a good  
24 faith basis for doing it -- as to Cox and Klein.

25 We have not yet done so for the other experts because we

1 don't know when they'll be testifying. We've got -- I mean --

2 **THE COURT:** You're going to know that in a few hours.

3 **MR. HEMANN:** Yes, Your Honor, and we'll get right to  
4 it.

5 **THE COURT:** Okay.

6 **MR. HEMANN:** We will.

7 **THE COURT:** Thank you very much, everybody.

8 **MR. FROELICH:** Your Honor, I can do it Monday morning,  
9 but I just have a brief argument on severance and the mistrial,  
10 but I can do it Monday morning.

11 **THE COURT:** Let's do it Monday morning before the jury  
12 comes in. Thank you.

13 **MR. FROELICH:** Yes. I didn't want the record to think  
14 I forgot about it.

15 **THE COURT:** My apologies to counsel on the other  
16 matter. I'll be out shortly.

17 **MR. HEMANN:** Thank you very much, Your Honor.

18 **THE CLERK:** So 7:30 on Monday?

19 **THE COURT:** 7:30 on Monday, yes. Thank you very much.

20 (Proceedings adjourned at 9:39 a.m.)

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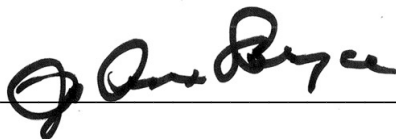
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Friday, February 7, 2014

A handwritten signature in black ink, appearing to read "Jo Ann Bryce", is written over a horizontal line.

Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR  
U.S. Court Reporter