STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
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COUNTY OF UNION)	FIRST JUDICIAL CIRCUIT
BEEF PRODUCTS, INC., BPI TECHNOLOGY, INC., and FREEZING MACHINES, INC.,)	Case File 63CIV12000292
Plaintiffs,)	
vs.)	RULING ON MOTIONS FOR SUMMARY JUDGMENT AND SANCTIONS
AMERICAN BROADCASTING COMPANIES, INC., ABC NEWS, INC., DIANE SAWYER, and JIM AVILA,)	
Defendants.)	

Before: Hon. Cheryle Gering
Circuit Court Judge

Location: Union County Courthouse
209 East Main Street
Elk Point, South Dakota 57025

Calendar: February 8, 2017
10:00 a.m. to 12:37 p.m.

* * *

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(In open court at 10:00 a.m., 2-8-17:)

THE COURT: Let the record show that it is 10 o'clock a.m. on Wednesday, February 8, 2017. This is the time and place set for hearing in Union County Civil File 12-292, entitled *Beef Products, Inc., BPI Technology, Inc., and Freezing Machines, Inc., plaintiffs, vs. American Broadcasting Companies, Inc., Diane Sawyer, and Jim Avila, defendants.* I would ask counsel to note their appearances, starting with plaintiffs' counsel, please.

MR. WEBB: Your Honor, Dan Webb on behalf of plaintiffs.

MR. CONNOLLY: Erik Connolly on behalf of plaintiffs.

MS. WRIGLEY: Nicole Wrigley on behalf of plaintiffs.

MS. BAUER: Julie Bauer.

MS. SAYLER: Sabrina Sayler.

MR. BAINE: Good morning, Your Honor. Kevin Baine on behalf of the defendants.

MR. METZGAR: Good morning, Your Honor. Carl Metz on behalf of the defendants.

MR. PARSONS: And Ron Parsons on behalf of the defendants.

THE COURT: Thank you. And I'll just remind everyone that I expect all electronics to be turned off. And no one has requested recording of this proceeding, so the only recording is the official reporter.

The court has before it primarily the defendants' motions for summary judgment, but also plaintiffs' motion for sanctions. And I'm going to now give my ruling.

When I was reflecting on giving my ruling, I've sat in front of many judges when I was a practicing attorney, and sometimes they just said "Motion granted" or "Denied." And in some respects that can be helpful to get straight to the point. On the other hand, I often wondered, what was the judge thinking when he or she did that?

In this case, I'm going to give a lengthy decision because I believe it's important not only to any appellate review, but as we go forward with the trial, as to those claims that will remain.

I closed the hearing last time saying that I wasn't granting summary judgment as to the entire case, and that's true, but I am granting some of the summary judgment requests. So I will now proceed with my decision, first discussing summary judgment generally, to make it clear that I am following all of the directives I understand that apply in reviewing summary judgment.

As the court has previously stated, I am considering all affidavits and documents submitted by the parties both in support of and in response to and in reply to the summary judgment motions, as well as those documents and materials submitted in addition or by correction.

The South Dakota Supreme Court has, on numerous occasions, delineated the standard that applies to summary judgment. The *Theunissen vs. Brisky* case, 438 N.W.2d 221, recites those that have been in place for the last 50 years. They are as follows: Number 1, evidence must be viewed most favorable to the nonmoving party.

Number 2, the burden of proof is on the movement -- excuse me -- the movant to show clearly that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law.

Number 3, summary judgment is not a substitute for a court trial or for a trial by jury where any genuine issue of material fact exists.

Number 4, surmise that a party will not prevail upon trial is not sufficient basis to grant summary judgment on issues which are not known -- or shown, excuse me, to be sham, frivolous, or so unsubstantial that it is obvious that it would be futile to try them.

Number 5, summary judgment is an extreme remedy which should be awarded only when the truth is clear and reasonable doubts touching the existence of a genuine issue as to material fact should be resolved against the movement -- excuse me -- movant.

Finally, number 6, when no genuine issue of fact exists, summary judgment is looked upon with favor and is

particularly adaptable to expose sham claims and defenses.

In considering summary judgment, the court also looks at all pleadings, depositions, answers to interrogatories, admissions on file, together with affidavits, if any, that show there's no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. That is the standard set out in SDCL 15-6-56(c). And as previously stated, I am overruling defendants' objections to the plaintiffs' statement of facts, in light of Rule 56(c) and the *Discover Bank vs. Stanley* decision, 2008 S.D. 111.

The court does agree that even though defendants have not submitted a detailed response to those statement of facts, the defendants have not admitted those facts. However, for purposes of summary judgment, I am assuming that the plaintiff could prove those facts as set forth in the separate statement.

The court does, in reviewing summary judgment, review and consider both direct and circumstantial evidence. Particularly when looking at the issues of recklessness and knowledge, I would expect that there's unlikely to be direct evidence, and there would be more of a reliance by the plaintiffs on circumstantial evidence. And in the *Harte-Hanks Communications* case, 109 S.Ct. 2678, the U.S. Supreme Court stated, quote, "To make the required showing,

a plaintiff is entitled to prove a defendant's state of mind through means of both direct as well as circumstantial evidence," end quote.

I will discuss circumstantial evidence more later in my decision, but there are also important limitations on circumstantial evidence and inferences. In regard to summary judgment, the South Dakota Supreme Court has stated in numerous cases that it is only reasonable inferences drawn from facts that are to be viewed in favor of the nonmoving party. The cases that reference that include *St. Onge Livestock Company vs. Curtis*, 2002 S.D. 102, and other decisions.

Put another way, the cautionary language in *Saathoff vs. Kuhlman*, 2009 S.D. 17, a defamation case, must also be kept in mind. As stated in that case, quote, "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted," end quote.

This is a case that includes defamation claims, and the *Saathoff* decision brings another factor that the court must keep in mind. As stated in *Saathoff*, quote, "Where the *New York Times* 'clear and convincing evidence' requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or

the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not."

I would also note that to the extent that there are any claims in which actual malice would not be required to be shown, the burden would be "preponderance of the evidence." Also, the court notes, for summary judgment purposes generally, that a disputed fact is material, quote, "if it would affect the outcome of the suit under the governing substantive law in that a reasonable jury could return a verdict for the nonmoving party," end quote. That's from *Robinson vs. Ewalt*, 2012 S.D. 1, also cited in *Stern Oil Company vs. Brown*, 2012 S.D. 56.

Finally, in discussing summary judgment generally and the issue of affidavits versus deposition testimony, I note that the Supreme Court in *Taggart vs. Ford Motor Credit Company*, 462 N.W.2d 493, pointed out the well-known rule that one cannot claim a better version of the facts than in the person's deposition testimony. They noted there in *Taggart* that it is permissible to submit contradictory affidavits if they provide, quote, "an explanation for the

change in testimony or a showing that the answers were ambiguous and the affidavit clarified them," end quote.

In this particular case, there's nothing said in the affidavits to provide any such explanation or showing, but I would say that I've also considered the depositions and the affidavits both in making my ruling, because I don't find them to be necessarily contradictory, because I think the affidavits speak to more the direct evidence of what was being believed versus the deposition testimony as then set forth in the statement of facts. It goes to circumstantial evidence, so that's why I'm considering both.

Now turning to the various claims that have been made in summary judgment, I'm not going to be taking the motions piece by piece. I am going to be intermixing them. As I was doing my decision, it seemed to have a logical flow. Hopefully you will see that logic as I go forward.

As to the issue of whether or not any additional common-law disparagement claims are displaced or preempted by SDCL Chapter 20-10A, for all of the reasons I stated in my March 27, 2014, memorandum decision, I'm maintaining my ruling that it is only those common-law disparagement claims that were preempted by Chapter 20-10A as stated in that decision that are dismissed, and no others.

As to the statutory disparagement claims of BPI Tech

and FMI, pursuant to SDCL 20-10A, as alleged in Count 26, for the reasons I stated in my March 27, 2014, memorandum decision, the court maintains its ruling that parties that can make claims under this chapter for agricultural product disparagement are those parties who are engaged in the business of producing agricultural products, which includes the parties who produce, make, and/or sell the product.

Here, LFTB is the agricultural product at issue; thus, those parties who can bring a claim under SDCL Chapter 20-10A -- it is those parties who are engaged in the business of producing, making, and/or selling LFTB. There's no issue raised as to whether or not BPI is a proper party, so that's why I am focusing on only BPI Tech and FMI.

In looking first at BPI Tech, in 2012, BPI Tech provided technical support, marketing services, and administrative services in connection with the sale of LFTB. Dozens of BPI Tech employees are involved in the day-to-day manufacture of LFTB. Based upon those facts and the others submitted by plaintiffs, and with these facts viewed in the light favorable to plaintiffs as required under South Dakota law, a jury could find that BPI Tech is a producer of LFTB.

While the defendants will be able to point to facts, including the separate corporate structures and agreements

between the parties, that may lead a jury to find that BPI Tech is not a producer of LFTB, it is not an issue that can be resolved on summary judgment.

As to FMI, I'm going to look at the facts in more detail. Most of the facts as to FMI that are alleged by defendants are disputed by plaintiffs. There are only three material statements of facts which are not significantly disputed, and that is defendants' statement of facts 16, 17, and 18.

In paragraph 16, the defendants alleged Freezing Machines is in the business of developing equipment and processes for the production of meat food products and it owns the intellectual property for some of the machines used in the production of LFTB. Plaintiff agrees with this statement, with the caveat that FMI is involved in other activities, as explained in plaintiffs' statement of fact 91, 92, and 97.

In paragraph 17, defendants allege that Freezing Machines has only two employees, Eldon Roth and Regina Roth; and plaintiff agrees.

As to paragraph 18 of defendants' statement of facts, it is alleged that Freezing Machines' primary business activities consist of holding intellectual property and designing, modifying, monitoring, and selling equipment and technology. Plaintiff agrees with this statement except as

to the use of the word "primary," pointing again to statement of facts 91, 92, and 97 as alleged by the plaintiffs.

In looking at these three paragraphs, in paragraph 91, the plaintiff alleges that, "Moreover, FMI monitors and updates the machinery it has developed, with the aim of continuously improving LFTB production." In paragraph 92, plaintiff states, "Eldon Roth acts in his role as an FMI employee when he designs production equipment and when he engages in equipment-related activities, including his constant monitoring and tweaking the equipment and processes involved in the production and manufacture of LFTB."

And finally, in paragraph 97, with the citations omitted, plaintiffs allege, "BPI cannot deliver LFTB without the operations center's involvement. The operations center directs and controls the manufacturing process. It starts and stops the manufacturing process at the facilities. The changes implemented by Tech and FMI employees affect production in real time. Some Tech employees and FMI employee Eldon Roth also have the ability to control production in real time by remotely accessing the control system."

Cited in support of these statement of facts by the plaintiff is the deposition testimony that Eldon Roth

performs daily evaluations of the equipment and monitors the operation of the equipment in the facilities; and as stated in Mr. Jochum's affidavit, Mr. Roth is involved in the remote operation of BPI's production facilities. As plaintiffs contend, without both FMI and BPI Tech, LFTB could not be made.

Looking at these paragraphs, as well as having reviewed the entirety of the summary judgment pleadings submitted by both parties, there is sufficient evidence for the jury to be presented with FMI's statutory disparagement claim as well.

Then turning to BPI Tech's and FMI's defamation and common-law disparagement claims, defendants argue that plaintiffs BPI Tech and FMI cannot bring any claim for defamation or disparagement because they are not the party against whom false statements were specifically directed. Put another way, defendants assert that the -- that BPI Tech and FMI cannot establish that the allegedly disparaging or defamatory statements were, quote, "of and concerning," end quote, those companies or those companies' products. Assuming for purposes of summary judgment that the "of and concerning" requirement applies to both the defamation and disparagement claims, the court adopts and restates the same standard as set forth in its March 27, 2014, memorandum decision, referencing primarily the

Brodsky vs. Journal Publication Company decision of the South Dakota Supreme Court, 73 S.D. 343, but also the *Ramharter vs. Olson* decision at 26 S.D. 499.

In looking at defendants' statement of facts, it appears that paragraphs 73 through 82 are directed to the issue of whether persons understood the ABC statements were about BPI Tech and FMI. Plaintiffs do not dispute that the defendants can cite to the testimony of grocery retailers and ground beef producers who were unaware of these two companies' existence or their role as to LFTB. However, in response, plaintiffs state in paragraph 37 that there are ground beef producers who did testify that they understood that Tech and FMI were producers of LFTB, and the same holds true in paragraph 138 as to quick-service restaurants.

In paragraph 147 as well as 148 of their statement of facts, they assert that members of the beef industry and retailers would understand that these three companies were interrelated and one company. With this evidence, as with the statutory disparagement claim, it is up to the jury to determine whether persons understood that any comments or statements were being made about BPI Tech and FMI, or whether LFTB is a product of not only BPI but also BPI Tech and FMI.

Similarly, it is up to the jury to determine whether

BPI Tech and FMI were sufficiently identified by reference to facts in the ABC stories from which others may understand that BPI Tech and FMI, along with BPI, were being referred to by ABC.

Turning then to the tortious interference claims of BPI Tech and FMI, as to FMI, plaintiffs have agreed to dismiss that claim as asserted in Count 27 of the complaint, and so the summary judgment will be granted as to Count 27 as to FMI.

As to BPI Tech, as to any "of and concerning" requirement imposed by the First Amendment as to the tortious interference claim of BPI Tech, the court adopts its analysis as previously stated. However, that does not end the analysis.

As stated in *Hayes*, 1999 S.D. 28, there are five elements to a claim of tortious interference, and the defendants assert that one of those elements, among others that they assert is missing, is the defendants' lack of knowledge of any relationships allegedly interfered with between BPI Tech and identifiable other parties.

In looking at this, the defendants have primarily cited one statute -- excuse me -- one statement of fact, and that is in paragraph 86, where they say, quote, "Brian Hartman encountered the name BPI Technology while investigating Beef Products and LFTB. However, he had no awareness of

what BPI Technology was or did or that it was anything other than a different name for Beef Products itself. It 'never occurred to him that there was more than one company,'" end quote, end quote.

Thus, the defendants assert that ABC, acting through and relying upon Mr. Hartman's work, could not have knowingly interfered with any relationship between BPI Tech and anyone, because he did not know that BPI Tech was a different company than BPI.

Plaintiffs respond by referencing paragraphs 154 through 165 of their statement of facts. In essence, the plaintiff agrees that Hartman did not understand there was a difference between BPI and BPI Tech, and plaintiffs attempt to spin this lack of knowledge on the part of Hartman to be evidence that he intended to interfere not only with any relationships or expectancies of BPI but also of BPI Tech.

The court disagrees. The mistaken belief that two company names identify a single company is not sufficient to establish that Mr. Hartman knew that he was interfering with any relationship between BPI Tech and another party. And later in my decision, when I'm discussing the statutory disparagement claim, I'll be discussing more what it means to "know," what that term means under South Dakota law, and so I would adopt that discussion here as well.

The court notes that in their statement of facts, the defendants do not talk about other employees of ABC, beyond Mr. Hartman, having knowledge of a business relationship or expectancy between BPI Tech and any other party. However, in their responsive statement of facts, paragraphs 154 through 165, plaintiffs assert that ABC generally has knowledge of BPI Tech.

Plaintiffs first rely primarily on Mr. Hartman's activities; and then other than Mr. Hartman, plaintiffs point to a comment by Mr. Avila that BPI Tech may be a supplier to BPI. They point to the research department having address information that listed all three companies, and an email in which someone in graphics asks Mr. Hartman about using the BPI Tech logo.

None of these facts establish that any of the defendants had knowledge of a business relationship or expectancy between BPI Tech and any other party. Therefore, summary judgment is also granted as to BPI Tech's tortious interference claims in Count 27, and I'm not reviewing any of the other elements of that claim as to BPI Tech in light of my granting summary judgment on that basis.

Then turning to BPI's claim of tortious interference and the issue of whether or not there is the necessary business relationship or expectancy that BPI can assert,

the court looks at the case of *Hayes vs. Northern Hills General Hospital*, 1999 S.D. 28. Without including the cited cases, at paragraph 17 in that decision the South Dakota Supreme Court stated, quote, "This cause of action is the recognition that valid business relationships and expectancies are entitled to protection from unjustified interference." For this tort to occur -- Excuse me. "The tort also protects a party's interest in stable economic relationships. For this tort to occur, the business relationship, if in existence, need not be cemented by written or verbal contract and, whether or not it is in existence, it need not be intended that there be a contract," end quote.

In the *Hayes* decision, at paragraph 22, there is the following language, quote, "There must be a 'triangle' -- a plaintiff, an identifiable third party who wished to deal with the plaintiff, and the defendant who interfered with the plaintiff and the third party." The principal issue is what is meant by "identifiable."

The quote ended with the words "third party."

My reference, then, is I believe that language indicates that the principal issue is what is meant by "identifiable" and whether Hayes provided enough evidence of identifiable third parties to present a genuine issue of material fact that would allow him to take his tort claim

before a jury.

The defendants stressed the word "triangle" used in *Hayes*. However, I do not believe it is the word "triangle" but the word "identifiable" that is the key part of that Supreme Court ruling. As the Supreme Court also stated in *Hayes*, at paragraph 29, quote, "If the parties or class are 'identifiable' then the plaintiff has met his burden on that element. The standard of proof for 'identifiable' parties at the subsequent trial stage is using these identifiable parties or class to create a nexus between those third parties and the defendants' acts. This nexus must be that it is 'reasonably probable that prospective economic advantage would have been realized but for the defendants' conduct.'" Leaving out the citations, the court concludes, "Such a 'nexus' depends upon the totality of the circumstances," end quote.

In this case, grocery stores are clearly identifiable and were identified by defendants. The beef containing LFTB came from an identifiable source, ground beef processors. The ground beef processors purchased the LFTB from BPI. All of these parties are sufficiently identifiable such that a jury could find that it is reasonably probable that a business relationship existed with BPI or a prospective economic advantage would have been realized by BPI but for the defendants' conduct.

Furthermore, I read *Table Steaks vs. First Premier Bank*, found at 2002 S.D. 105, differently than defendants. The presence of a triangle is not mentioned in that case. In fact, the word "triangle" does not even appear in that decision. Instead, it is the nexus between the plaintiff and identifiable third parties that is examined.

In that case, defendant Mastercard had sent a letter to defendant First Premier Bank which resulted in First Premier Bank ending its relationship with the plaintiff restaurant and putting the plaintiff restaurant in the Combined Terminated Merchant File, which resulted in plaintiff restaurant being unable to obtain a credit card processing agreement with other banks and which then resulted in the plaintiff restaurant being unable to accept credit cards from its customers.

In this case, I find that there is sufficient nexus alleged between BPI and identifiable parties, so I do not find that there would be a basis to grant summary judgment on this argument.

Turning then to the issue under tortious interference as to BPI, whether there has been proof of an intentional and unjustified act, that is the third element as stated by the South Dakota Supreme Court. In the case of *Selle vs. Tozser*, found at 2010 S.D. 64, quoting prior cases which cited to the Second *Restatement of Torts*, § 767, there are

seven factors listed that discuss the propriety of interference. These factors are not exhaustive nor determinative of the issue of improper interference, as stated in the *Dykstra* case, 2009 S.D. 38, and the *St. Onge Livestock* case, 2002 S.D. 102.

The court also is aware that in the *Restatement (Second) of Torts* § 767, which has been cited by the court, in comment L, the *Restatement* discusses what is the function of the court and the jury. And in comment L it states, quote, "The jury determines whether the defendant's interference with the plaintiff's advantageous relation was intentional or not. But the cases fail to indicate clearly whether the judge or the jury makes the decision of whether the conduct was improper, or whether the function varies, depending on the circumstances," end quote.

There are cases in which the South Dakota Supreme Court has determined as a matter of law that certain actions were justified. For example, in *Selle vs. Tozser*, 2010 S.D. 64, the court held that advice of an attorney, if followed, would not be improper conduct. However, in that case, there was evidence that the defendant did not follow his attorney's advice and he did things that had not been addressed with the attorney, so therefore the jury could find as to those matters that the defendant had engaged in improper conduct.

In this case, the defendants are not relying upon advice of counsel, and if they were, they would likely be deemed, under South Dakota law, to waive any attorney-client privilege as to communications with counsel regarding the statements at issue in this case. Therefore, *Selle* does not provide any basis for the court in this case not to -- or to find as a matter of law that it's not improper conduct.

In *Dykstra vs. Page Holding Company*, 2009 S.D. 38, the Supreme Court held that a bank did not breach the terms of its contract with the plaintiff or any banking laws, and in fact, the bank had a legal right to do what it did. Therefore, the court ruled as a matter of law that the actions were not unjustified. But again, that's not what is presented to the court in this case.

As recognized in *Paint Brush Corporation vs. Neu*, 1999 S.D. 120, tortious interference claims may be caused by defamatory or disparaging statements. In *Paint Brush*, the court held that a competitor's writing of an allegedly defamatory and disparaging letter was sufficient to avoid summary judgment on a tortious interference claim. So as I review South Dakota law on the issue of improper and unjustified acts, defamatory or disparaging statements can be such. Therefore, the court needs to look at the acts of the defendants.

Before looking at the actions of the defendants, I'm also going to discuss what must be proven as to the defamation claims. First, I would note that there is no special privilege granted to news reporters. The South Dakota Supreme Court declined to adopt the common-law neutral reporting privilege in *Janklow vs. Viking Press*, 378 N.W.2d 875.

That there is no special privilege granting news reporters immunity from defamation claims is recognized also by the United States Supreme Court. I am going to quote at length from the *Milkovich* decision of the U.S. Supreme Court because I do understand the careful balance required by the First Amendment, and it is clearly articulated there in that decision.

Quoting from *Milkovich*, quote, "The numerous decisions discussed above establishing First Amendment protection for defendants in defamation actions surely demonstrate the court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation. We have regularly acknowledged the 'important social values which underlie the law of defamation,' and recognized that society has a pervasive and strong interest in preventing and redressing attacks upon reputation," end quote.

In *Milkovich*, the Supreme Court determined that they

reached the appropriate balance between those, some may say, competing values. I in this case believe that I also am holding that balance true.

In the summary judgment pleadings, the defendants have spent considerable space and time arguing that as to many of the words or phrases that the plaintiffs contend were defamatory, that other parties have previously used the same or similar words. To the extent that this may be asserting the "incremental harm" doctrine, South Dakota has never adopted that doctrine. Furthermore, as stated by the U.S. Supreme Court in *Masson vs. New Yorker Magazine*, 501 U.S. 496, "The 'incremental harm' doctrine does not implicate the First Amendment and is instead a creature of state law." That is a quote from *Masson*. So it's not a First Amendment issue, and South Dakota has never adopted it, so the court does not find that the "incremental harm" doctrine applies.

Also, South Dakota has never adopted the "libel-proof plaintiff" doctrine. However, defendants argue that the common-interest privilege of SDCL 20-11-5(3) applies. As defendants point out, there have been three South Dakota Supreme Court decisions in which the court has applied this common-interest privilege to matters disclosed to the public, with the most recent being *Peterson vs. City of Mitchell*, found at 499 N.W.2d 911, in which a press release

was issued by the police department regarding crimes, and the Supreme Court held that the citizens of Mitchell, i.e., the public, were interested persons in regard to the solving of crimes.

In this case, the public are interested persons in regard to issues raised by defendants, whether it is called food safety, food labeling, or simply knowing what is in the food you buy. As to defamation claims, therefore, plaintiffs must prove actual malice regardless of whether plaintiffs are private or public figures.

However, I am also going to address whether plaintiffs are private or public figures, because it is important to the defamation analysis under First Amendment law.

BPI has conceded for purposes of summary judgment argument that actual malice must be shown; but even with that concession to the appropriate analysis for summary judgment, I believe it is appropriate and necessary for the court to determine whether plaintiffs are public figures, as it is a -- the first step identified in constitutional analysis and will be important for the trial.

Also, the court is going forward with the understanding that plaintiffs agree that BPI Tech and FMI should be subject to the same analysis as BPI. With that in mind, I make the following "public figure" analysis.

I first note that plaintiffs are not public officials,

and so the issue is whether or not they are public figures, and that is a question of law for the trial court. That was recognized in the *Krueger* decision, 1996 S.D. 26.

The issue of public figure vs. private is one pointed out by the U.S. Supreme Court in the *Gertz* decision, found at 418 U.S. 323. There they said, in determining whether or not an individual is a public figure, you should look, quote, "to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation," end quote. This was recognized in the *Krueger* decision; and in *Krueger*, the South Dakota Supreme Court held that the same analysis applies to a corporation as it does to an individual.

I would note that I do believe it is the conduct of the corporation prior to the alleged defamatory statements at issue in the case that determine whether or not the plaintiff is a public figure, not the conduct of the corporation after. I find support for that from the *Skakel vs. Grace* decision, 5 F.Supp.3d 199, a 2014 decision of the district court in Connecticut. In fact, I find all the factors stated by the court to be helpful.

In *Skakel* the court set forth four factors: Number 1, whether the plaintiff has successfully invited public attention to his views in an effort to influence others prior to the incident that is subject of litigation; 2,

whether the plaintiff has voluntarily injected himself into a public controversy related to the subject of litigation; number 3, whether the plaintiff has assumed a position of prominence in the public controversy; and number 4, whether the plaintiff has maintained regular and continuing access to the media.

In defendants' statement of facts paragraphs 93 through 118, the defendants discuss BPI's participation in the public debate over the benefits of LFTB and BPI's response to public criticism of its product before March 7, 2012. The parties agree that there were stories regarding BPI's processes and equipment published in the years 2003 to 2006 in a trade publication; but I do not find that these articles nor any advertisements BPI may have had in those publications involved any matter of public controversy, and those publications do not make BPI a public figure, limited-purpose or otherwise.

Similarly, allowing various individuals who are doing stories to come into their plant and to provide information to them does not make BPI a public figure, nor does putting information on its own website regarding its product and processes make BPI a public figure. However, beginning in 2009 with the *New York Times* article, BPI wrote and posted what they, quote, call an "open letter," end quote. Furthermore, after the April 2011 episode of *Jamie Oliver's*

Food Revolution, BPI wrote another open letter, and BPI acknowledges that its efforts to address media concerns in 2011 included "working with PR firm," "producing educational short films," "launched consumer friendly website," and "educated fact-based blog responses." In addition, a PR firm was hired in April of 2011.

Then, beginning in July of 2011, BPI issued press releases and organized a press conference to talk about testing of LFTB. An entry was made on Wikipedia for "pink slime" in July of 2011. In November of 2011 BPI posted videos on YouTube, and another letter to customers was posted in February of 2012.

With these actions, and having reviewed those letters and videos, as well as the matters to which they were responding -- in other words, the *New York Times* article, the Jamie Oliver presentation -- the court does find that plaintiffs are limited-purpose public figures for purposes of the public controversy that had arisen regarding the process of making LFTB and the inclusion of LFTB in ground beef.

But that does not end the analysis. The court must also determine whether or not this issue is one of public concern. And as stated by the U.S. Supreme Court in the *Snyder vs. Phelps* decision, 562 U.S. 443, "Deciding whether speech is of public or private concern requires us to

examine the content, form, and context of that speech as revealed by the whole record." That is a quote.

The court finds in this case that issues related to food safety, food labeling, and what is in the food consumed by the public are matters of public concern, so therefore, with that determination, as to the defamation claims and the disparagement claims, there must be a showing of actual malice by clear and convincing evidence.

Actual malice is shown by evidence that the defendants knew the defamatory or disparaging statements were false or acted with reckless disregard for the truth in publishing those statements. For purposes of my "actual malice" discussion, I'm going to be focusing my decision on reckless disregard, that prong of actual malice.

As summarized in the *Krueger vs. Austad* decision of the South Dakota Supreme Court, 1996 S.D. 26, in order to show reckless disregard, the public-figure plaintiff must prove, 1, libel by clear and convincing evidence; 2, more than a defendant's failure to investigate; 3, that the defendant entertained serious doubts as to the truth; 4, that the defendant had a high degree of awareness of falsity; and 5, that the defendant had obvious reason to doubt the veracity of the informant or the accuracy of his reports.

The first guideline, meaning libel by clear and convincing evidence, is mandatory; but what the Supreme

Court then stated in *Krueger* is the other four factors are closely related to each other and will often be used in conjunction with one another. In *Krueger*, the court went on to state that "The plaintiff may also enter evidence which is probative of the defendant's state of mind."

As noted by *Krueger*, negligence is not enough. In other words, what a reasonably prudent person would have done, either by not publishing or what additional matters they may have investigated before publishing, is not recklessness. This is recognized in the *St. Amant* decision, 390 U.S. 727, as well as the *Harte-Hanks Communications* decision, 491 U.S. 657. The South Dakota Supreme Court also recognized it in the *Hackworth vs. Larson* decision at 83 S.D. 674.

In making the necessary analysis of the record, I am not considering that ABC was looking for increased ratings, which in turn would lead to more advertising revenue, at least as a significant factor, in light of profit motive not being evidence of malice. That was recognized by *Janklow vs. Viking Press*, 459 N.W.2d 415, citing the *Harte-Hanks* U.S. Supreme Court decision; and more expressly in *Harte-Hanks* it says, quote, "A newspaper's motive in publishing a story -- whether to promote an opponent's candidacy or to increase its circulation -- cannot provide a sufficient basis for finding actual malice," end quote.

The court in this case notes that four affidavits have been submitted by defendants which focused on the beliefs of those four individuals. In reliance on these affidavits, defendants' statements of fact also assert what the individual defendants believed. However, those stated beliefs are not determinative. Citing to *St. Amant*, the South Dakota Supreme Court stated in *Wollman vs. Graff*, found at 287 N.W.2d 104, quote, "The defendant in a defamation action brought by a public official cannot, however, automatically ensure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation," end quote.

In *Wollman vs. Graff*, the defendant who wrote and circulated a pamphlet containing allegedly defamatory statements subjectively believed the statements were true, including the statement that the plaintiff had been fired from previous law enforcement positions. In fact, the plaintiff had not been previously fired, and for his belief the defendant was relying primarily upon statements made to him by a county auditor. That auditor testified at trial,

however, that she had simply told him that she had heard rumors that he had been fired, and she denied even telling him any specific towns, because she did not personally know of any.

What are rumors? They are hearsay. In this case, as one example, one of the statements used in the reports by ABC is an alleged quote or attribution to the undersecretary of the USDA, Jo Ann Smith, the statement, "It's pink, therefore it's meat." Custer doesn't say that he heard that from Ms. Smith. Rather, he says, "My supervisor says the undersecretary said it." But it's quoted as fact. In fact, the person who allegedly said it, Ms. Smith, denies in her deposition she ever made that statement. This is just one example of why statements of subjective belief by the defendants is not sufficient to grant summary judgment. I will have further discussion of the use of circumstantial evidence to rebut defendants' proffered statements of belief later as well.

In addressing defamation and disparagement claims, I would also note that one word, such as "slime" or "filler" is enough to be considered defamatory, such as in the *Ramharter* case, but I am looking at the entirety of the broadcasts. I'm not focusing on just individual words, because as recognized in *Milkovich*, the court needs to look at the entirety of the article in determining what was

imparted by the defendants.

That is also supported by the *Bose Corporation* case, 466 U.S. 465, in which not only was the entirety of the article looked at, but it was also looked at in the context of what was being addressed. There was testing equipment for sound, and in that case the court noted the descriptive challenges associated with describing the sound produced by the plaintiffs' product.

For purposes of summary judgment, I'm also applying the "actual malice" standard to the common-law product disparagement claims. So now I'm going to be looking at the conduct of the defendants and determining whether or not there is actual malice.

ABC Broadcasting acts through employees, so conduct of all employees mentioned in the summary judgment pleadings will be considered as to its liability. The court, in setting forth its analysis, is guided significantly by the case of *Harte-Hanks Communications*, found at 109 S.Ct. 2678. That is a decision in which all nine U.S. Supreme Court justices concurred that a jury's libel verdict against a newspaper should be affirmed; and that included justices from Chief Justice Rehnquist through Scalia.

In reaching that decision, the justices looked closely at the interviews. In fact, they listened to the interviews. They note in their decision, for example,

quote, "The hesitant, inaudible, and sometimes unresponsive and improbable tone of source's answers to various leading questions raise obvious doubts about her veracity," end quote. They looked closely at the questions asked, whether they were leading or not. They looked to see whether there was evidence that directly contradicted the source. They noted that interviews were not conducted of key -- of a key person. They noted that the defendants had not listened to available audiotapes. They noted that an editorial published prior to the article that was alleged to be defamatory would indicate that the defendants had decided to publish the allegation regardless of how the evidence developed and regardless of whether or not the source's story was credible.

The Supreme Court justices noted that there were obvious reasons to doubt the veracity of the informant and the accuracy of the informant's reports. The Supreme Court did note that some matters were accurately reported, but they still concluded that the jury properly found and could find that the failure to conduct a complete investigation involved a deliberate effort to avoid the truth.

In sum, although they held that failure to investigate will not alone support a finding of actual malice, quote, "the purposeful avoidance of the truth is in a different category," end quote.

I would also note that in *Harte-Hanks* the Supreme Court was reviewing a jury verdict, whereas here at the summary judgment stage I must view the evidence in a light most favorable to the plaintiffs as to the nonmoving parties in determining whether a jury could determine actual malice; and as pointed out by Justice Scalia in his concurring decision -- whereas other justices limited it to actual findings by the jury, Justice Scalia said the entire record should be examined at summary judgment. That's exactly what I need to do, review the entire record.

In this case, I do find that the plaintiffs could present to the jury clear and convincing evidence of actual malice on the part of ABC Broadcasting and Jim Avila, but not Diane Sawyer, and so the reasons for my decisions as to the parties are as follows.

At 6:56 a.m. on March 6, 2012, Ms. Brinberg emails a story idea about pink slime. She points out there's no rush on the story. It's not breaking news. But 25 minutes later Mr. Avila suggests a story on pink slime, and two hours later, he continues to pursue that with a note regarding "slime," quote, "Slime meat in school --" Excuse me. Quote, "Pink slime meat in school lunches -- what is really in there and is it safe?" end quote.

A jury could find from these comments that ABC was pursuing a negative spin on its story from the beginning

before any research was done and then took steps in its investigation only to hear and report what fit within that negative image.

In listening to and watching the interviews of Custer, Zirnstein, and Foshee, the primary sources for the stories by ABC, numerous softball questions are asked of these individuals. Now, I recognize that the interviews that are recorded that I'm reviewing are those that are on tape and that there were prior conversations that ABC had with these individuals. But it is still clear and convincing evidence, the court finds, that a jury could believe that the -- neither -- or none of these three individuals were pushed by those at ABC asking them questions.

Also, there are questions regarding credibility and what these three individuals actually said. In listening to Custer's interview, he repeatedly references double hearsay from an unidentified supervisor who said, "The undersecretary says it's pink, therefore it's meat." Instead of talking about his own sources, he talks about the *New York Times* editors deciding to call it "pink slime." He brings up looking at the product in 1990 as a microbiologist. He says it's safe based upon the information he saw back then. He notes that others were discussing that it had connective tissue. That wasn't his role as a microbiologist. It was others'. He stated he

doesn't know how prevalent it is now in ground beef or hamburger, and he talks about comments he's heard in the press regarding what fast-food restaurants have said.

He said it's not nutritionally complete, even though earlier he said that was not his area as a microbiologist. As a microbiologist he says it's safe. He says it does not have tendons. Custer says the undersecretary was on the board of BPI, which is wrong and an untrue statement; and throughout the interview, Mr. Avila uses the term "pink slime."

As to Mr. Zirnstein's interview, he does a long, rambling statement, and in fact at some point says he has lost his train of thought. Mr. Avila jumps in at that point, saying, "Well, yesterday when I talked to you, you were pretty irate. Why does LFT bother you?" And he references being in the plant in 2002, ten years before. And he admits things may be different now, such as how much LFTB can be in a product. He admits he was not involved in the initial approval of the product, admits he was not allowed to work on baseline project, and claims that other, less-qualified people worked on that product -- project, excuse me.

He admitted he did not speak to Smith, the undersecretary, regarding approval. He admitted he did not follow the product for years. He quotes the 2009 *New York*

Times newspaper article as a basis for his knowledge. Mr. Avila tells him -- tells Mr. Zirnstein that the USDA undersecretary had worked for the meat industry.

Furthermore, later, there are emails that are sent by Mr. Zirnstein to ABC that indicate some extreme accusations or concerns being expressed by Mr. Zirnstein, including, quote, "Last month he believed the pink slime forces were coming to kill him, and he was arming up and threatening to shoot anyone who approached his house," end quote.

While these -- this particular email was received after the articles at issue, the court believes that it may be that, particularly as that email referenced that this was not the first unusual email received from Mr. Zirnstein, that there were some indications at ABC that Mr. Zirnstein may have some credibility concerns.

As to Mr. Foshee, the first question asked of him is, "Why is it so hard to get a picture?" And then Mr. Avila brings up an interview with someone he calls a BPI, quote, "defender," end quote, and when Mr. Foshee confirms Mr. Avila's version, Mr. Avila says, "That's what I told him, but he did not want to believe it," end quote.

Mr. Foshee talks about Mr. Clean, equating the ammonium hydroxide with that, and there's no evidence that that is anything more than a complete exaggeration. There's no questions regarding why Mr. Foshee was terminated from his

employment at BPI, even though that was known to ABC. There's no discussion of when Mr. Foshee worked for BPI at all in the interview.

Mr. Foshee talks about nutrition, but he's not a nutritionist. Mr. Avila talks about the LFTB being a, quote, "bit of a scandal that this is on the market," end quote, and Mr. Foshee responds that he is a, quote, "advocate," end quote. He also claims that BPI has falsified information, including test results, to the USDA to get approved; and the court has not seen in the summary judgment documents that at that time Mr. Foshee had any evidence of that.

The court has also considered other evidence in this case; for example, the interview with Dr. Ayoob. While there may be legitimate reasons why Dr. Ayoob was not a nutritionist that ABC would use in this particular case, they had used him more than 150 times. And ABC did not contact the persons identified by the USDA or BPI as persons with knowledge of the subject of nutrition.

Turning to the interview with Ms. Riley conducted by Mr. Avila, Mr. Avila was rude, agitated, and hostile. The first question he asked of Ms. Riley, "Do you have a picture?" The second, quote, "Why -- if it is just another additive, a way to put leaner beef in the burgers at a cheaper price, if it is no problem, if it's safe, all those

things, why not just label it? Why not just put it on the package?" end quote. It's a direct contrast to the questions asked by (sic) Foshee, Zirnstein, and Custer.

And again, while I recognize that the defendants will be able to present evidence as to why an investigative reporter is going to push some witnesses and be friendlier with other witnesses because of the nature of the story, the court believes, again, in looking at the evidence in a light most favorable to the plaintiff, that there is evidence here that a jury could rely upon.

The court notes that the hostility of Mr. Avila is also reported as to his discussions with Dr. Theno and with Kim Essex of Ketchum.

As additional evidence, ABC makes a direct decision, when talking with persons in grocery stores, to use the term "pink slime" even though they knew that was not the real name of the product; and when a person from a school district was interviewed and that person was not willing to use the term "pink slime," ABC commented on it and decided not to use the video clip if the words "pink slime" were not used by that individual.

The court also notes that there were repeated issues regarding pictures, and one person from ABC went out and got meat at a local store that said it, quote, "looked too nice," end quote. And when ABC did get pictures or videos,

it was often expressed by persons at ABC that they had found, quote, "gross," end quote, videos or pictures.

Not only did ABC not contact individuals that were suggested that they contact -- for example, from the USDA or from BPI -- Avila tells others at ABC not to interview persons associated with the meat industry. In fact, later, Mr. Avila would say, quote, "Unless we find someone who gets it, don't interview. Very important," end quote.

A jury could find that Mr. Avila had an agenda, an "us vs. them" mentality. He uses phrases such as, quote, "partial pink slime victory," end quote, when the USDA takes action. He says he is in, quote, "enemy territory," end quote, when he is at the BPI press conference in late March. In an email, he says, quote, "Seems BPI effort to convince public their product is wholesome, safe, and nutritious has not resonated. Instead of arguing with us, they would be better served labeling it and selling it as lean edible beef. Probably too late," end quote.

An Iowa television executive points out to an executive at ABC News in a March 11, 2012, email that in his opinion Avila, quote, "did not balance the complaints of other former USDA officials about the product itself that were included in the story with the view of BPI and/or industry leaders who contend that the use of the product is safe," end quote. Also in this email he mentions that a

particular person that he had talked to in the fast-food industry mentioned to him that that restaurant was not using LFTB based entirely on PR considerations and not safety ones.

Looking at the evidence in a light most favorable to the plaintiffs, a jury could determine that there is clear and convincing evidence that ABC Broadcasting and Mr. Avila were reckless, that defendants had obvious reason to doubt the veracity of informants, and that they engaged in purposeful avoidance of the truth.

As to Ms. Sawyer, I looked for decisions and I'd asked counsel about what decisions were present discussing news anchors. I'm aware of the *Hopewell vs. MidContinent* decision of the South Dakota Supreme Court, found at 538 N.W.2d 780, which involved a news anchor as one of the main defendants; but that South Dakota Supreme Court decision did not separate out the main parties and discuss them. In one case cited by defendants, the *Abdel-Hafiz vs. ABC* case, found at 240 S.W.3d 492, there is reference to a news anchor, but in that case the evidence was that the news anchor did nothing but read what others had written for him, and so without evidence that the persons who wrote the script communicated their belief it was untrue or there's serious doubts about it to the anchor, the anchor was determined to have no actual malice and was dismissed from

the case.

I have found a New York decision to be informative on this issue, *Karaduman*, spelled K-a-r-a-d-u-m-a-n, *vs. Newsday*, found at 416 N.E.2d 557, a 1980 decision of New York's highest court. Now, in that case the court was not looking at the "actual malice" standard but actually a lower standard of where the defendants must be shown to have acted in a grossly irresponsible manner, without due consideration of the standards of responsible parties engaged in news gathering and dissemination; and they were applying that lower standard because it was not a "public figure" case.

But even with that lower standard, they were looking specifically at the role of an editor in a newspaper and whether or not that editor would have some liability. And quoting from part of that decision, quote, "Moreover, we decline to hold that the present existence of triable questions concerning the integrity of the reporters is, without more, sufficient to give rise to an interference of culpability on the part of their editor and to oppose --" excuse me -- "to impose upon the editor the burden of demonstrating his own freedom from 'guilty knowledge' concerning the accuracy of the statements alleged to be libelous by proving that he took independent steps to verify the statements. Newspapers, like any other

organization, must operate through the delegation of responsibilities and chores to workers at the appropriate level of the organizational hierarchy. If a newspaper is to function with a modicum of efficiency and perform its important task of carrying information to its readers, its editors must feel reasonably free to rely upon the trustworthiness and integrity of their reporters, at least in the absence of any indication the reporters in question are not to be trusted. A rule which, absent proof to the contrary, would permit an inference upon an editor drawn upon a simple showing that his reporters had been 'grossly irresponsible' on a single occasion would indirectly impose upon editors the burden of duplicating their reporters' work and rechecking with specificity all of their sources in order to establish a defense to libel claims arising from the potential misconduct of the reporters. Such a result would be completely unacceptable, since it would require a far higher degree of care than has been previously required in our case law," I'm omitting the citation, "and would, more seriously, operate to dampen the free exercise of the rights guaranteed by the First Amendment."

They go on in the decision to talk about circumstances in which an editor might be held liable; for example, proof that he knew his reporter or the reporter's sources were

unreliable, if the general procedures used by the newspaper in checking its stories were slipshod or careless. But in that case there was no evidence of that.

And similarly here, I don't see evidence of that. It is true that in this case Ms. Sawyer did more than simply rely upon the scripts prepared by others. Therefore, it is necessary to look at her conduct, because she did write introductions which were approved and reviewed by others. She also participated in conversations around the Rim, discussing the stories to be presented. She reviewed and commented on scripts, and, as Mr. Avila pointed out, she helped with the tone of the stories. She also participated in the investigation to the extent that she spoke to Agriculture Secretary Vilsack.

If a jury would find the statements made by Diane Sawyer to be defamatory and/or disparaging, then ABC Broadcasting can be liable for what Diane Sawyer has said. However, the question is whether Diane Sawyer can be held personally liable. I note that not all the claims in the complaint are brought against Ms. Sawyer personally.

First, in Counts 1, 3, and 12, plaintiffs complain about Diane Sawyer's use of the words "filler" and "pink slime" in her introductions, and allege that that subjects her to personal liability for defamation and common-law product disparagement. In response to the defendants'

statement of fact, paragraph 8, that Ms. Sawyer believed her use of the word "filler" was accurate, plaintiffs point to two pages of her deposition, one in which she said it was processed beef, another in which they claim she said she knew that the USDA had approved LFTB as ground beef. I don't believe that's what she said at that latter part of her deposition, but even if it was, the evidence cited by plaintiffs is not sufficient to establish that Ms. Sawyer personally believed her use of the word "filler" was false or that she entertained serious doubts as to its accuracy.

In response to defendants' statement of fact paragraph 9, that Ms. Sawyer believed "pink slime" was accurate because it captured public controversy, plaintiff points to her deposition testimony, in which she was shown a picture of LFTB in its finished form, and they also point to the fact that she knew LFTB was beef and it was safe. However, again, I do not find this evidence sufficient to establish that she personally believed her use of "pink slime" was inaccurate.

These comments by Ms. Sawyer and her actions as anchor, which limits her involvement in doing research, are not sufficient to show reckless disregard or knowledge that was untrue. Reliance upon others to do the research is different than purposeful avoidance of truth. Therefore, I grant summary judgment to Ms. Sawyer as to Counts 1, 3, and

12.

Turning to the implication counts, actual malice must also be shown, but I would first note that the defendants' statement of facts repeatedly reference Ms. Sawyer's intent. Intent to imply is not the issue. It's reckless disregard and knowledge.

In response to defendants' statement of fact paragraph 11, that Ms. Sawyer did not discuss the safety of LFTB in her statements, and in response to defendants' statement of fact paragraph 12, that Ms. Sawyer did not discuss the nutritional value of LFTB, and in response to paragraph 13, that she did not say that LFTB was not meat or beef, plaintiffs argue that she did use the terms "pink slime" and "filler." However, as with the direct defamation claim, I do not find that this is sufficient evidence of actual malice as to the implied defamation and disparagement claims.

In response to defendants' statement of fact paragraph 14, that Ms. Sawyer did not discuss the approval process, plaintiffs rely on the use of the term "whistleblower," and I note that in paragraph 10 of the defendants' statement of facts they state that Ms. Sawyer believed describing Mr. Zirnstein as a whistleblower was accurate. Plaintiffs' response is that Ms. Sawyer conceded that the term "whistleblower" can not only include her description of a

whistleblower, but it can also include someone who exposes some sort of wrongdoing or misconduct. But Ms. Sawyer's acknowledgment that the term "whistleblower" can have more than one meaning without more, even though one of those meanings is negative, is not evidence of actual malice.

In addition, Ms. Sawyer's use of the term "investigation," even with the ABC News policy guidelines identifying investigative reports as involving, quote, "illegal activities, violations of public trust and confidence, and other possible wrongdoing," end quote, does not evidence actual malice on the part of Ms. Sawyer personally.

From reviewing the record, others had a role in approving of that term, and even if Ms. Sawyer was the one who initially chose that term, that is not sufficient in and of itself to show actual malice by Ms. Sawyer. Therefore, I'm also granting summary judgment to Ms. Sawyer as to Counts 19 through 23 and 25.

As to Ms. Sawyer, that leaves the claims of statutory product disparagement and tortious interference, which I will be discussing later as to all of the defendants.

So I'm going to continue the analysis as to claims of defamation and common-law disparagement against Mr. Avila and ABC Broadcasting. Defendants contend that various statements which they have made are true and therefore no

cause of action for defamation or disparagement can be asserted against them for those statements. The court has examined each of the phrases and statements alleged to be defamatory, and the court has also necessarily looked at the statements in the context they were made and the news reports as a whole. As previously held by the court, that alleged defamatory statements are said among words that are not alleged to be defamatory or disparaging does not insulate those statements from potential liability.

In *Paint Brush*, the entirety of the letter was not alleged to be defamatory, but yet the alleged defamatory and disparaging statements included in the letter were sufficient to find that summary judgment was not appropriate. The court also has looked at the statute -- excuse me -- at the statement of facts submitted by the parties on the truth/lack of implication issues. There is not a single one of defendants' statement of facts contending truth or lack of implication that plaintiffs do not dispute and provide evidence showing there is a genuine issue of material fact. Therefore, on the issue of truth or falsity and statements not having defamatory or disparaging meaning, the court finds that summary judgment cannot be granted.

The court next addresses the issue raised by defendants that plaintiffs must prove that the defendants intended to

imply the derogatory implication. In *Saathoff*, 2009 S.D. 17, the South Dakota Supreme Court addressed a claim of defamation by implication, but the three-member majority did not discuss how a claim of defamation by implication differed, if it does, in any way from a nonimplication defamation claim. Furthermore, the two-member dissent addressed the implication claim as it would any other defamation claim.

In reviewing that case and other defamation or disparagement cases from South Dakota, I do not believe the South Dakota Supreme Court has yet addressed this issue. In looking at cases across the country, as stated by the defendants there are numerous cases in which intent is required to be shown. There are other states which appear to actually apply the negligence standard. An example of that is the *Manzari* decision from the Ninth Circuit, found at 830 F.3d 881, in which they say to state a claim for implied defamation, the public statement must, quote, "reasonably be understood as implying the alleged defamatory content," end quote.

Other courts require something in between; for example, *Kendall vs. Daily News Publishing*, the Third Circuit decision found at 716 F.3d 82. In discussing claims of defamation by implication and United States Supreme Court First Amendment precedent, the Third Circuit Court of

Appeals found as follows, quote, "As we have explained, to show actual malice for defamation by implication, [the plaintiff] must show by clear and convincing evidence both (1) that the defendants either intended the defamatory meaning or knew of the defamatory meaning and were reckless in regard to it, and (2) that the defendants made the statement with 'knowledge that the statement was false or with reckless disregard of whether it was false or not.'"

The Third Circuit disagreed that intent only must be shown, and found the above standard consistent with First Amendment precedent from the U.S. Supreme Court. The court finds the rationale of *Kendall* to be the most persuasive and consistent with South Dakota and U.S. Supreme Court precedent. Therefore, it is not necessary to prove that the defendants intended the implications set forth in Counts 19 through 22, 23, or 25. If the court instead applies the standard set forth in *Kendall* to the facts, again considering them in the light most favorable to the plaintiffs, there is sufficient evidence from which a jury could find that the *Kendall* requirements have been shown by clear and convincing evidence.

Finally, I would note, as I stated in my March 27, 2014, memorandum decision -- and I maintain that ruling -- that the plaintiff can bring both disparagement and defamation claims, with the understanding that the damages

sought are different. For all of those reasons, I am therefore denying ABC Broadcasting and Jim Avila's motion for summary judgment as to the claims of defamation and common-law disparagement that have not been previously dismissed by the court.

That leaves, finally, Count 26 as asserted by all plaintiffs and Count 27 as asserted by BPI. Count 26 is the statutory disparagement claim under SDCL 20-10A-1. As stated in the definition of "disparagement," it is a, quote, "dissemination in any manner to the public of any information that the disseminator knows to be false, and that states or implies that an agricultural food product is not safe for consumption by the public," end quote.

Plaintiffs have alleged in Count 26, as to LFTB, that the defendants disseminated information the defendants knew to be false and that states or implies that LFTB, which is an agricultural food product, is not safe for consumption by the public.

For the reasons that the court has previously stated in this decision, the court finds that there is sufficient evidence to present to the jury that ABC Broadcasting and Mr. Avila implied that LFTB was not safe for consumption.

I would note that the crux of the issue is whether the defendants knew their statements to be false. That is the word used in the statute. It's actually the version

"knows," but -- did the defendants know the information they were disseminating to be false. There is no requirement under the statute that the defendants intended that their statements implied LFTB was not safe for public consumption.

Through the comments from the public received by ABC and as stated by the court in regard to the common-law implication claims previously stated, there is evidence on which a jury could determine that the statements made by defendants implied, among other things, that LFTB was not safe for public consumption. Therefore, for example, defendants' statement of fact paragraph 260, that ABC did not intend to imply in its report that LFTB is not safe to eat, does not address the key issue under the statute.

The key issue is whether the defendants knew the statements they were making were false. In making the findings above as to actual malice, the court was looking primarily at the "reckless" standard. Under South Dakota -- South Dakota's agricultural disparagement statute, however, recklessness is not enough. Therefore, the court must determine what is meant by, quote, "knows to be false," end quote. There is no South Dakota case law discussing this statute.

The court therefore looked elsewhere. As noted previously, knowledge of falsity is one prong of the

"actual malice" test. Courts, in discussing knowledge of falsity in the "actual malice" context, agree that it states a higher amount of culpability than recklessness. For example, in *Masson vs. New Yorker Magazine*, 501 U.S. 496, knowledge was found when the reporter, quote, "deliberately," end quote, altered quotations.

However, knowledge is not simply evidenced by such direct evidence. Knowledge can also be inferred. The question is, did defendants have knowledge of the facts that make the statements they made false? If so, the defendants' knowledge of the falsity may be inferred by the jury.

Defendants want to simply rely upon statements in affidavits and depositions that they believed everything they said was true and accurate. That's stated in general terms in Mr. Hartman's and Mr. Kerley's affidavits and also more specifically Mr. Avila's. If the statements from the defendants were all that were considered, claims of product disparagement under the statute would be exceedingly rare, and limited to those cases in which the defendant expressly admitted knowledge of falsehood. Instead, both the South Dakota and United States Supreme Court have pointed out that knowledge can be shown both by such direct evidence -- in other words, what the defendant says he believed -- but also by circumstantial evidence of what the defendant knew

when he claims to have formed that belief.

When there is both direct and circumstantial evidence that is in conflict, as it is here, the jury will have to determine whether the defendants' stated belief is credible.

As there was no South Dakota case law discussing the agricultural disparagement statute, I was thinking about other cases in which such knowledge is required. The cases that came to mind are criminal cases, such as the knowing possession of stolen goods, false pretenses, or knowing possession of drugs; and in that context, the South Dakota Supreme Court has addressed this issue.

In the case of *State vs. Pickus*, P-i-c-k-u-s, found at 257 N.W. 284, the Supreme Court stated, quote, "Certainly it was for the jury to say whether or not appellant knew of the falsity of his representation -- whether or not he believed in it when he made it. Undoubtedly the evidence upon that point in every case will of necessity be largely circumstantial," end quote.

They then discuss a case from another jurisdiction, involving an alleged receiver of stolen goods. They point out that gross negligence is not enough. And then they go on to state that the knowledge of the utterer may, quote, "be proven by circumstances, including the opportunities which the accused had to ascertain the facts," end quote.

More recently, in the *State vs. Fischer* decision, 2016 S.D. 1, in a case involving the knowing possession of methamphetamine, the court noted that it is the combination of facts that can give rise to a reasonable inference of knowledge. In that case, the defendant denied knowing that there was methamphetamine in the vehicle. However, the court pointed out that he was in control of the vehicle, he produced the vehicle's registration, he had a different illegal substance and paraphernalia in his pocket, and when asked to submit to chemical testing, he refused.

They state, quote, "Although this body of evidence is not overwhelming, it is not so scant as to prevent even a single rational trier of fact from finding beyond a reasonable doubt that Fischer knew there was methamphetamine in the vehicle he was operating. Therefore, the record contains sufficient evidence to sustain a conviction for knowing possession of methamphetamine," end quote.

In this case, the standard is not beyond a reasonable doubt, but by clear and convincing evidence; and so if it's sufficient to rely upon such evidence in the criminal context, with a higher burden, the court also believes it's appropriate to do so here, where the burden in the civil case is less.

This is also consistent with First Amendment law as

explained by the United States Supreme Court in *Herbert vs. Lando*, 441 U.S. 153. The Supreme Court in that case and in others has specifically noted that circumstantial evidence is appropriate to prove the state of mind of the defendant, and they state, quote, "Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant" and necessary in that case to defeat a conditional privilege or enhance damages. So my quote ends with "mind of the defendant."

Therefore, I need to look at what the defendants knew about the statements they were making that were alleged to be false and in which the plaintiffs say the implication of LFTB being unsafe for public consumption arose.

Looking at the complaint, in paragraph 678 to 685, plaintiffs assert that the following statements imply that LFTB was not safe for consumption.

The use of "pink slime." Both Mr. Kerley and Mr. Avila state that they believed that this term accurately described the color and texture of the product. The plaintiffs say, in response, these individuals, as well as others, admitted that they knew LFTB was safe when they were making that comment. They also point out, in statement of facts 109 through 1 -- excuse me -- 1009 through 1016, that these individuals, when they began using that term, never -- had never seen the product, that the

one picture that had been seen in the *New York Times* article they acknowledge does not look like slime; that a picture that was sent on March 9 with the product in frozen form does not look like slime; and that no one in the industry, meaning BPI, the beef industry, American Meat Institute, or supermarkets, used the term; and that it was pointed out in both a letter from AMI and from BPI in early March that it was an inappropriate term.

As to the allegations that the use of the terms "fraud" or "economic fraud" were false, again, it's stated by Mr. Avila that he says that this term used by Mr. Zirnstein and then repeated by Mr. Avila -- that he believed that the factual basis for Mr. Zirnstein's assessment was true. I previously pointed out where Mr. Zirnstein's recorded interview falls short and could be -- I should say could be construed by a jury to fall short. In addition, the plaintiffs point out that no one at ABC can identify any participants in a fraud; therefore, without participants, there can be no fraud.

As to the statements made by the defendants that LFTB was made with inferior and contaminated beef trimmings, the plaintiffs point out that ABC knew that the protein did not come -- that was in LFTB did not come mostly from connective tissue, that ABC knew it was safe and nutritious, that they knew it was made from 100 percent

beef trimmings, that it was made from edible beef trimmings that had been used in food products consumed by humans, and knew that LFTB's raw material could be used in ground beef without any treatment or processing. There are also general allegations that LFTB was implied as being unsafe.

In response, the plaintiffs point out Mr. Custer's interview on March 6 when he says it was microbiologically safe, the interview with Mr. Zirnstein in which he talks about extensive testing being done by BPI to ensure product safety; a March 6, 2012, email from Mr. Avila in which he acknowledges that both Mr. Custer and Mr. Zirnstein say it's not dangerous to eat; that there are others telling ABC, from the USDA and BPI, that the product was safe; that ABC was reviewing information such as BPI videos in responding that says, for example, in the email from Mr. Hartman on March 7, quote, "very clean and industrial-looking. Food safety experts lauding the company for saving lives by taking on *E. coli*," end quote.

Neutral people, such as grocery store representatives, were saying it was a safe product, yet on March 8 Mr. Hartman is saying, "We need to determine whether this stuff is harmful." When Mr. Avila speaks to Mr. -- to Mr. Theno on March 8, Mr. Avila says, "I hear it's only fit for animal food," and then, when Mr. Theno disagrees, says he was a, quote, "shill," end quote, with no integrity or

credibility and hangs up on him; and when Mr. Theno calls Mr. Avila back, with a swear word Mr. Avila hangs up again.

On March 8, Ms. Sawyer acknowledges that the response to the report of March 7 is that people want to know if their beef is safe. The second question by Mr. Avila, as I previously stated, to Ms. Riley is whether or not it's safe, why not just label it. I've already also referenced the March 11 email from Mr. Cole in which he expresses concerns about whether there is balance in the earlier piece of Mr. Avila that was on the ABC News.

On March 17, Mr. Avila tweets, quote, "As I asked Meat Institute and BPI, if pink slime is good for you and safe, why not market it as such?" end quote. Later, on April 25th, Mr. Avila equates the use of ammonium hydroxide to "cyanide," end quote. On May 7, as I've previously noted, Mr. Avila points out, quote, "Seems BPI effort to convince public their product is wholesome, safe, and nutritious has not resonated," end quote. These comments also go to the other allegations in paragraphs 683, 684, and 685 of the plaintiffs' complaint.

There are facts from which a jury could find that Mr. Avila and ABC had knowledge of the fact that their statements were false. That their words were implying LFTB is not safe is seen in the public's response, as evidenced by Ms. Sawyer's Facebook acknowledgment on March 8.

Knowing that the public was perceiving from the ABC reports that safety was a concern, ABC continued to use the same terminology, with the same reaction being received from the public.

The only reported decision of which the court is aware that involved a similar agricultural disparagement statute is *Texas Beef Group vs. Winfrey*. Looking at the district court decision there, found at 11 F.Supp.2d 858, the court does note that in that case the court held that the disparagement statute did not apply to live cattle. They did go on to say that even if it did, there was no evidence, based upon the facts stipulated by the parties, that any of the defendants had said anything knowingly false. However, the court's analysis as to knowledge was terse, and that issue was not appealed. Therefore, that case does not provide any helpful guidance.

In light of my preceding analysis, the court does note that Mr. Avila's apparent personal bias against LFTB, which he actually acknowledges in his affidavit -- that it's insufficient by itself, that personal bias, to warrant a finding of actual malice or of knowledge. The Supreme Court has stated that the First Amendment protects speech even if biased or improperly motivated. That was recognized by the South Dakota Supreme Court in the case of *State vs. Springer-Ertl*, 2000 S.D. 56.

However, the court finds that there is sufficient evidence to prove that ABC and Mr. Avila knew the statements being made were false in light of the information in their possession. For these reasons, summary judgment is denied on Count 26 as to Mr. Avila and ABC.

I do need to, however, look more closely at Ms. Sawyer. Unlike Mr. Hartman and Mr. Avila and others, she did not have knowledge of the facts. She did speak to Vilsack, Secretary Vilsack, but that conversation was not recorded, and the recalled statements that he made regarding safety were somewhat ambiguous. In fact, she reports to Mr. Avila that Mr. Vilsack implied that slimed meat is safer than unslimed.

As noted in regard to actual malice, this conversation between Secretary Vilsack and Ms. Sawyer is not sufficient to find that she acted with knowledge of falsity nor any other of the actions of Ms. Sawyer; and so again, while her actions can be attributable to ABC, I do not find that they support any personal liability on the part of Ms. Sawyer, and so summary judgment is granted on Count 26 as to Ms. Sawyer.

Finally, the court reviews the tortious interference claim of business relationships in Count 27 as to BPI. As stated in the *Hayes* decision, 1999 S.D. 28, there are five

elements of a claim of tortious interference. To the extent there is a question of fact as to whether defendants Avila and ABC have made defamatory or disparaging comments, that is an intentional and unjustified act of interference. However, as all defamation and disparagement counts have been dismissed against Ms. Sawyer, she has not engaged in intentional and unjustified acts of interference, and Count 27 is dismissed as to her.

In sum, summary judgment is granted as to Ms. Sawyer and she is dismissed from the case with prejudice. She shall have no personal liability, although her actions can be presented as evidence in regard to ABC Broadcasting. Diane Sawyer is dismissed from the case, and her name shall be removed from the caption.

Summary judgment is also granted as to BPI Technology, Incorporated's and Freezing Machines' claims in Count 27. In all other respects, defendants' motions for summary judgment are denied.

Then turning briefly to plaintiffs' motion for sanctions against defendant ABC for spoliating evidence, the court does find that the standard that applies to that motion is that set forth in *State vs. Engesser*, 2003 S.D. 47, as recognized in *Young vs. Oury*, 2013 S.D. 7.

The court, however, need not rule on whether substantial evidence has been presented to meet that

standard, as the defect in plaintiffs' motion is more fundamental. Plaintiffs have not identified what adverse inference they would want drawn. Plaintiffs filed their motion more than a year ago and have had more than enough time to determine that. Plaintiffs' motion therefore is denied.

The court will be entering a written order setting forth my decision in the form of the summary that I've just stated.

Counsel for the plaintiffs, are there any questions or any other matters that we need to address today?

Mr. Connolly?

MR. CONNOLLY: Your Honor, I think there's a couple. One issue has to do with the schedule for the *Daubert* motions and the motions in limine, and the other has to do with the jury questionnaire. I can address the schedule briefly, and then Mr. Webb can address the other issue.

THE COURT: Please.

MR. CONNOLLY: So on the schedule, we have been in dialogue with ABC, trying to come up with a compromise. We have two competing schedules to propose, so I'll just tell you what the two schedules are without any narrative. BPI is proposing that on March 10th the parties will submit their *Daubert* motions. On March 24th, the parties file their oppositions to the *Daubert* motions. On March 27th,

the parties will submit their motions in limine. On April 10th, the parties would submit their oppositions to the motions in limine. BPI --

THE COURT: Just stop one moment.

MR. CONNOLLY: I apologize.

THE COURT: March 27, and then what was the next date?

MR. CONNOLLY: April 10 --

THE COURT: Thank you.

MR. CONNOLLY: -- for the oppositions. Under BPI's schedule there would be no reply briefs.

BPI is also proposing that we have page limits of 25 pages for *Daubert* and 15 for motions in limine. Those page limits would apply both to the opening briefs and the oppositions.

THE COURT: I'm just going to tell you one thing. The practice in South Dakota, motions in limine typically are two paragraphs if -- I mean, if they're standard. I realize if they're not standard -- But, for example, just the very common ones. Sequestration, for example, two sentences. So when you're saying 15 pages, most of the time when I have a case the entirety of all of the motions in limine are encompassed in 15 pages. So what I understood you to say is for each motion in limine you want 15 pages. So if you each have 30 of those, I take that times 15. Is that what I'm understanding?

MR. CONNOLLY: That would be a terrible situation.

THE COURT: Okay.

MR. CONNOLLY: I think 15 is the unquestionable outer limit. I would be happy to go with 10 pages for a limit, and I also think, based on conversations with ABC -- and I don't want to get into narrative -- we're both going to have most of our motions in limine be much, much shorter than that.

So ABC has a -- proposed a different schedule. ABC has proposed March 3rd for *Daubert* and larger motions in limine; March 17th for the oppositions; March 24th for the reply briefs; March 27th, then, for the filing of other motions in limine; April 10th for the oppositions; and there would be no reply briefs on that second set of motions. ABC has objected to page limits on any of them.

So those are two competing schedules. I think we both will just defer to your decision on however you want to proceed with them, but --

THE COURT: But you are proposing, just so I'm clear -- and actually, in criminal law in South Dakota, typically motions in limine are filed as individual documents.

MR. CONNOLLY: Yes.

THE COURT: So that's how you're intending, that each motion on a discrete issue would be filed as a separate document?

MR. CONNOLLY: Yes, Your Honor. Sorry.

THE COURT: Thank you.

Let me address that issue, Mr. Baine.

MR. BAINE: Yes, Your Honor. There are a couple of issues. Both of us have schedules that essentially have all the briefing on these motions completed by April 10th. The differences are threefold. First, the plaintiffs maintain there should be no reply briefs on any *Daubert* motions and that there should be strict page limits on those motions. Their expert reports that we need to challenge on *Daubert* motions are 350 pages, 407 pages, 144 pages, 204 pages. I think on a couple of these *Daubert* motions we need more than 25 pages. I think for most of them we can live with 25 pages.

And I'll tell you one thing, Your Honor. In this case I'm painfully aware of the fact that you don't help yourself by excessively briefing issues and loading the court down with pages, and I hope we have persuaded the court over the period of a couple of years that we don't do that, we try to be as succinct as we can be, and we will be as succinct as we can be.

But when we are filing a *Daubert* motion, for example, attacking the economic experts' evidence in this case, which combined is about 350 pages, we might need 35 pages rather than 25 pages. When we're attacking Mr. Kivetz, who

has 350 pages on surveys that he's conducted, there are significant substantial arguments we need to make attacking those surveys. We'll keep as close to 25 as we can, but we might need to go a little bit over. So I would -- I would prefer not to have a strict page limit.

And, perhaps even more importantly, on motions of this importance and magnitude, we need to be able to reply. If plaintiffs file an opposition that we think is inaccurate or mischaracterizes things or omits a fact or casts the argument wrongly, we need to be able to reply on motions that are as important as these *Daubert* motions. So we would like the opportunity to reply on *Daubert* motions. We don't need replies on in limine motions, and we are happy with the idea that both sides can file their in limine motions and file their oppositions and that's it. We can argue to the court, but I agree, on those we don't need replies.

But we would like some leeway on a couple of our *Daubert* motions. And I think we sent an email this morning, and I hope it went out -- I was here -- indicating that we do believe we can live with the 25-page limit on most *Daubert* motions, but there are a couple that we'll need more on. And so I would ask the court to give us the leave, on the ones where we think it's really important, to exceed 25 pages.

And the third thing is this, Your Honor. There may be a small number of non-*Daubert* motions that are truly significant and more than simple in limine motions to exclude one piece of testimony, but there are one or two significant in limine motions that, quite frankly, we would like to give to Your Honor earlier and not wait until -- I guess it's -- March 27th to give you, about three weeks before the pretrial. We would like to give them to you with the first wave of motions.

Now, the plaintiffs want to limit the first wave to motions that are classified as *Daubert* motions. We would like to be able to give you a couple, one or two, substantial motions that are not technically *Daubert* motions, but that do go to the admissibility of certain kinds of evidence that we want to get to the court early, and we want to have the opportunity to reply on them because they're so significant.

THE COURT: So between the motions in limine that you classify as significant and the expert *Daubert* motions that you believe involve more issues, do you believe that there's more than a total of five of those things that would exceed the 25-page limit or the 15-page limit?

MR. BAINE: No, I don't think there are more than five. No, Your Honor.

THE COURT: Okay.

MR. BAINE: No. So our schedule basically has us filing on March 3rd rather than March 10, to build in one week for replies on those first wave of significant motions. That's the difference in the schedule. Thank you.

THE COURT: Any other response on that, Mr. Connolly?

MR. CONNOLLY: Yeah, I'll just make a couple quick comments. We've been able to deal with page limits and summary judgment briefing with Tech and FMI, as well as Sawyer. We were under page limits, and we were able to adequately brief those issues. So I think page limits make a lot of sense here. Second, it is part of the reason for the page-limit desires that we only have the 14-day window. And if I have 15 *Daubert* motions or if I have 10 *Daubert* motions plus whatever these big motions in limine are, then I have 12 big motions that could be 30 pages long, and that's just not enough time for me to get them all responded to. So that's part of the reason that I think a page limit would make some sense.

On the reply briefs, I don't think the current schedule had a reply brief for any *Daubert* or motions in limine, so this would be something that we're adding to it, so I think because the court has oral arguments slated for two days, we can do --

THE COURT: It's now three.

MR. CONNOLLY: It's now three.

THE COURT: I wanted to talk with you about that, because we're not going to get it done in two.

MR. CONNOLLY: So now that we have three days of oral argument at the pretrial, I think that is more than enough time to give what we would have otherwise put into the reply briefs for you, and we don't need to throw more paper at the court to get those points out. And I'll do my best not to make any blatantly misleading statements on my brief that ABC is going to have to respond to.

MR. BAINE: Your Honor, in answer to your question, I think that -- I don't want to commit myself, but I think we have five or six *Daubert* motions and one or two of the non-*Daubert* motion that are substantial. That's my current thinking. It could change a little bit, but that will give a sense, Your Honor.

And I would only say, Your Honor, the plaintiffs have routinely filed briefs well in excess of 40 pages on minor discovery motions. These motions have a tremendous impact on the course of the trial, and I think the court would again benefit from our being able to argue them and brief them fully.

THE COURT: The court -- I would tell you that generally I don't see *Daubert* as a paper process. When a true *Daubert* motion is made, typically the court would hear

the testimony of the individual. But here I recognize that already, if I'm looking at extending the pretrial from two days to three, it's not practical to think that. So I do think in this case that it's going to be the paper the court needs to make an initial determination, and if I find that I can't make it on the paper and I need to hear in person from the expert, you know, that's why that pretrial is scheduled early enough, that I could still do that.

So I do find in this case that it's going to be the briefing that gives me much of that background information, which will also help me direct the questions at the time of oral argument to get to that point of whether I can rule based upon the information that's been presented or whether I am going to have to take that next step.

So because of that, I am going to adopt the schedule proposed by the defendants, and while I'm going to generally impose a 25-page limit for *Daubert* briefs and a 15-page limit for motions in limine, that I will allow both sides to go beyond that limitation only as necessary. I'm not going to impose a number, but I would state it shall not exceed twice that limit. So 50 and 30 pages at most, but again, used judiciously and not simply using the space because it's available.

But I have found from both sides that both sides have been good in providing me with necessary information.

I would also note that I believe this is important because generally *Daubert* -- it's not a legal issue, because the court knows the *Daubert* standard -- obviously there could be cases in which that particular subject matter or that particular expert was involved that may be cited, but otherwise it is a heavily factual determination, and so for the parties to set out and be able to summarize for the court these lengthy expert opinions would be of benefit. And so that's why also the reply will be beneficial as well.

MR. CONNOLLY: Your Honor, can I ask one question on that?

MR. BAINE: Your Honor, may we have -- may we have those one or two motions that are technically *Daubert* that are more substantial at the earlier date, with the 25 pages?

THE COURT: Yes.

MR. BAINE: Thank you.

MR. CONNOLLY: I think we had a protocol when we were getting the materials for the summary judgment, in terms of how we were delivering it to you and getting it into your chambers. Should we do that with *Daubert*s and motions in limine? I think it would make sense.

THE COURT: Yes. It's very difficult. The file is so large electronically it's very hard to get the information,

especially cohesively, so submitting it to me with one paper copy and two flash drives is preferable.

MR. CONNOLLY: Okay.

THE COURT: And, counsel, I brought up the third day. I want to make sure you are all available then. I mean, we can either start it a day early or extend it a day. And so let's look at that and see. Obviously, if we can't, we might have to find some other days to do it, but I'm just concerned that we're going --

MR. BAINE: Can I turn this on?

MR. CONNOLLY: Can we turn on our phones?

THE COURT: Yes. You all may turn on your phones to make that determination. And if for some reason you can't today, you can be in contact with my court reporter. So let me look here.

We're off the record, Mary Anne.

(An off-the-record discussion was held.)

THE COURT: So back on the record. In talking with counsel, we are going to extend the current pretrial conference on the 18th and 19th to the 20th. And of course, counsel, if we're done, we'll end when we're done, but that will just give us the flexibility that I think we may need. Okay.

MR. WEBB: I just have one other issue to raise and return to an issue we talked about the last time we were

here, which is the jury questionnaire and the jury selections. So some thoughts from our end, and we can talk. So you told us to get that questionnaire narrowed down eight pages, you told us, and so we are doing that. We have followed your direction. We're working with -- by Monday morning I'm going to distribute to Mr. Baine an eight-page questionnaire that will be whittled down to eight pages. My thought is that we would spend a week where we go through it together, figure it out so that the following Monday the goal would be to file with you that following Monday an eight-page questionnaire that hopefully has resolved any dispute on all questions.

If there are some questions, maybe -- I don't know -- two or three that we just can't agree on, that -- when we file that questionnaire with you, that following Monday, we will present to you one document which will be a joint brief. Part A will be our position, part B will be ABC's position on, say, questions 2, 7, and 15, and you can decide; in other words, you'll have it right there in front of you there as one brief, hopefully narrowed and possibly all questions agreed upon. So that -- that's point one of my proposal.

Point two is more food for thought, which is that I think we all agreed -- and Your Honor had pointed out a case here in South Dakota -- providing that questionnaire

too early to these jurors poses risk of Internet searches, and who knows what could happen. So I think we've all -- at least I think Mr. Baine and I had agreed, and I thought Your Honor had. We explained -- we thought we presented to you -- we just -- about a week before you pick the jury, bring them in and have them fill out the questionnaire while they're here.

And so I started thinking about, you know, we've got this cutoff date of August 1, which is a date that we have to be done with this trial. And so I don't know how long it's going to take to pick this jury, but I started thinking, based on your schedule, would the following be possible? That we have this questionnaire ready to go. I looked at the calendar. What if we hypothetically, based on your schedule -- we bring them in on May 26. That's the Friday before, you know, we start the trial June 5th. If we brought them in on May 26, they fill out the questionnaire with all the admonitions and security of being physically in court, and that we then -- at least I would propose to Your Honor and to ABC -- I don't -- there's -- We're bringing in a lot of jurors, and there's -- I don't know what's going to happen with hardships with this trial, but trying -- Both sides have enormous amounts of witnesses. I wonder if we can start picking -- pick the jury starting that Wednesday, just as a

proposal that -- start picking the jury on Wednesday, the 31st, and try to get the jury picked, you know, in two or three days, if possible, so that when we start this trial on June 5th, we start with a free running ground to get this trial over and have the jury pretty much in the can or selected before the 5th, so that we don't run into the risk of later we're coming back saying we're having trouble with that August 1 deadline, which I know is not acceptable to you. But this case -- well, you've seen it. You've been through this. There's a lot of ins and outs of this case. It's a proposal or thought to try to do it.

THE COURT: And the only comment that I'll make is it won't be on the 26th, because that's the Friday before Memorial Day and most of the jurors are probably going to have plans, and so we would have to do it either the week before or, at a minimum, earlier in that week.

MR. WEBB: That's fine.

THE COURT: And also I think it potentially could take three days just to call them in to do the questionnaires. Currently we have 350 people on the call-in list, and so I can only practically, in this room or even downstairs, have 70 to 100 people at a time, and some will take longer. So maybe it can be down to a day and a half, but then I also have to have another day available for those people who couldn't come in those two days because they had a

legitimate reason, and then a backup date for them to come in and fill theirs out. So that means that potentially up to three days are going to have to be set aside for that process to occur.

So that's just a reason why I think it needs to be earlier. And then the clerk's office, to scan and make those available, that itself, even with multiple people working, could take a day, just to scan in that many questionnaires. So I think it would need to be the week of the 15th if we're going to do it close in time. So --

MR. WEBB: That's -- that's fine with us. We're trying to -- Whatever Your Honor thinks. I wasn't sure how long it would take to get the questionnaires filled out, once you have them, then starting jury selection itself and going through the voir dire and trying to get as much of that done before the 5th, if that's possible based on your schedule.

THE COURT: Right. And obviously, you know, it's something I'd have to move things around, but -- and get others to cover, but I can look at that.

What is the defense response to that proposal?

MR. BAINE: Well, Your Honor, we're certainly flexible, and we can, if necessary, come out early to start on jury selection. I should mention that Dane Butswinkas, who has been unable to be in this hearing because he's had other

trials, will be involved heavily and will probably be lead trial counsel, so I would want Dane to be -- and Dane and Dan have spoken a lot about a lot of these issues, so I would want to talk to him as well. But we're amenable to anything that would get the jury selected promptly.

We are concerned about the length of the trial. You know, we have, in the past, used time clocks for parties, said, "You have X numbers of hours for your case. Use it as you wish." I think we're going to have some conversations about how to keep this trial on track, and so I think these are things we could talk about.

THE COURT: Yes, and that's -- you know, obviously I think we don't want to necessarily wait until April, but -- so I appreciate you bringing it up now, Mr. Webb, because, for example, time clocks are going to be used. I'm not sure that they're going to be visible to the jury, necessarily, although I'm not sure it hurts anything, but I think that's the only way to keep the matter on track.

And as I previously mentioned, we'll be talking about how the day's going to be structured, too. That obviously will impact your witnesses and your scheduling the witnesses and how you present your case. So we need to address those things as well.

So why don't we -- I'm thinking maybe we should schedule for sometime in March a telephone conference call

where we can discuss some of these what I would call more procedural -- trial procedural issues, see where we have agreements, see what direction we're going.

MR. WEBB: We're fine with that. Whenever -- what -- is there some date you have in mind, looking at your schedule for March?

THE COURT: The 10th or the 17th would work the best, which are both Fridays.

MR. BAINE: 10th doesn't work for me. 17th does.

MR. CONNOLLY: 10th doesn't work.

MR. WEBB: And I can't do the 10th. I can't do court -- The 17th -- We also agree on the 17th.

THE COURT: Okay. So on the 17th we'll -- March 17 we'll do a telephone conference call and I'll let you know -- I'll probably come here to this courthouse, but if for some reason I'm not, I'll tell you where I'll be so that if you wanted to be here in person, you could. but we'll plan it to be a conference call. And what time do you want to start that? 9 or 10 a.m.?

MR. BAINE: Flexible. Whatever is best.

MR. WEBB: Whatever is best for Your Honor.

THE COURT: Okay. Let's say 9 a.m. That gives us more time.

MR. WEBB: Just one other logistical issue which we've had some discussions about. Was the -- You raised the

issue about the logistics of the courtroom that's being constructed and designed for us. The two issues that we're a little unclear on on our table is that looking at where the tables are, I think there will eventually need to be one table, small table, but where our exhibit operators sit at, because they're kind of making that show move forward. And so we don't know exactly where that might be, and then we started talking among ourselves --

MR. CONNOLLY: Two tables.

MR. WEBB: Huh?

MR. CONNOLLY: Two tables.

MR. WEBB: Two tables. And then we -- none of us saw where a big -- what I -- In most of these trials there's one big screen.

THE COURT: There is not going to be in this trial.

MR. WEBB: And that can't happen here, I take it?

THE COURT: No, there can't.

MR. WEBB: So I didn't know whether there should be a day set aside where we all come in and look at this to look at where the TV screens are going to be, but maybe that should be later, but --

THE COURT: Right. Because the only thing -- I mean, the only thing I could envision which would be somewhat like it would be here, it would be between the bench and the witness, but it would not be really viewable by the

witness very well. It's not going to be viewable by the jury very well. So that's why I am thinking it just doesn't pay -- I mean, you could bring in -- I don't have any objection if you want to bring in a portable screen and you could figure out where it would go and just see if it's going to be practical, but I honestly don't think it's going to be practical in that setting.

So that's why I would -- I have understood that it's going to be, you know, shared monitors being brought in for the jurors that will -- and obviously everyone else who needs to see having an individual monitor.

MR. WEBB: That -- I was hoping we could figure out some ingenious way to find a place to put a screen, but it may not be so. At some point -- as far as how big the screens will be and where they'll go, I didn't know whether at some point we need a logistics date and work -- I think both sides have to be there and your staff has to be there, right, to work together?

THE COURT: Yes. How much lead time is necessary for that?

MR. WEBB: I -- I would guess a month before the trial, roughly, that you would want to test that out and look at it.

THE COURT: Could we use one of those days, part of the day for the pretrial? Because I don't think it will take

that long.

MR. CONNOLLY: After the pretrial.

MR. WEBB: Why don't -- the answer is yes.

THE COURT: Okay.

MR. WEBB: And we could consult among ourselves. And maybe I should ask Your Honor, as far as the court, would we want to shoot for, let's say, the afternoon of the 17th, which is the -- or not the 17th, but the afternoon -- afternoon of the --

MR. CONNOLLY: 20th.

MR. WEBB: -- of the 20th?

THE COURT: Yeah, I think that's the time to look at it, with the understanding that you're done early. But I think that's unlikely. So I think we can plan on that, but that does remind me, just to make sure on the 17th, we're clear that's also one of the deadlines, isn't it, for the responses to the motions filed?

MR. CONNOLLY: I don't think we're going to --

MR. BAINE: No, Your Honor, I think the last deadline is the 10th? Isn't that right?

MR. CONNOLLY: Give me one second.

THE COURT: Because I have March 3rd, March 17th, March 24th.

MS. WRIGLEY: Yeah. Yes.

MR. CONNOLLY: So just for clarification, it's going to

be March 3rd for the *Daubert* and the large motions in limine, March 17 for the oppositions to those, March 24th for the replies, March 27th for the other motions in limine, April 10th for the oppositions, and I believe BPI and ABC agree we're not going to need reply briefs on that latter set.

THE COURT: Correct. But now we've -- I just wanted to bring that to your attention. We have now set this what I would call --

MS. WRIGLEY: Telephonic.

THE COURT: It's a general discussion of general procedural matters, but it's still set on the 17th, when the briefs are due.

MR. BAINE: That's true.

MR. CONNOLLY: Oh, that's March 17th.

THE COURT: Do you have concerns with that?

MR. CONNOLLY: I have some concerns.

THE COURT: So how about the 24th?

MR. CONNOLLY: The 24th is the day the reply briefs are due.

THE COURT: That's true too. Okay. would it help to look earlier in the week?

MR. WEBB: That week is a -- We can't do it that week. I can't do it earlier that week. The 24th is out?

MR. CONNOLLY: Yeah. 24th is the day we have for the

reply briefs, and I think --

THE COURT: What about the week of the 13th, earlier that week? March 13th?

MR. WEBB: March 13th?

MR. BAINE: Your Honor, it does seem to me that we can do two things at once. We can have a telephone call the same day some briefs are due.

THE COURT: Right. I just want to make sure --

MR. CONNOLLY: I do not want to do that, Mr. Baine.

THE COURT: I just want to make sure, because like I said --

MR. CONNOLLY: Sorry. March 13th.

THE COURT: -- I don't consider the conference call to have critical decisions being made. It's more of a discussion opportunity, but yet I want everyone to be able to participate who wishes to and not be distracted by briefing.

MR. CONNOLLY: March 13 would work.

MR. WEBB: March 13 would work for us for that telephone call on jury selection/jury questionnaire issues.

THE COURT: Mr. Baine, is that --

MR. BAINE: Well, March 13th, that's -- that's before the in limine motions are filed.

MR. WEBB: This is just to talk about jury selection, right? Jury matters.

MS. SAYLER: Just procedural stuff.

THE COURT: Yes, just procedural things in regard to that process. Or again, I was potentially thinking time clocks, with the day's schedule, how the day would look. So, important but not legal issues.

MR. BAINE: Your Honor, March 13th or March 17th are both fine with us, or anytime that week.

MR. CONNOLLY: Yeah, let's do the 13th.

THE COURT: And the 13th I would -- I'm going to have to move some things around, so I could do it at 4 o'clock on the 13th.

MR. WEBB: That's fine with us.

THE COURT: Does that work, Mr. Baine?

MR. BAINE: Yes, Your Honor.

THE COURT: Okay. So 4 o'clock. Instead of March 17th at 9, it's March 13 at 4 p.m. Okay.

And, Mr. Baine, the jury questionnaire proposal?

MR. BAINE: Yes, Your Honor. I can beat Mr. Webb by about three, four days. We have also reduced it to eight pages, and we'll submit our competing eight-page questionnaires in the next couple days.

MR. WEBB: That's fine. Good.

THE COURT: I'm comfortable with counsel. You've worked well together and you'll get something, as you did previously, to me, and it's understandable if there are any

disputes.

MR. BAINE: Your Honor, may I raise one point of clarification? And I'm not asking for the court to respond. It's just I want to make an observation. The court did not specifically address in its oral explanation our suggestion that there are really four claims in this case, not fifteen claims or whatever. And the way the case is structured now, there are probably about -- oh, I don't know -- twelve, thirteen, fourteen claims, often two claims per word. So we have two claims for the word "filler," two claims for the word "substitute," and the like.

And we had argued in our motion that we understand the plaintiffs' theory to be that all of those words are, in their view, untrue and contribute to these four overall meanings which are the things that really caused them the harm, and we had suggested in the brief that as a matter of law those counts must be dismissed for various reasons, but also that as a practical matter they were essentially duplicative.

And what I want to raise for the court, and not for the court to necessarily respond at this moment: It does seem to me that the case -- we need to find ways to streamline this case for the jury's consideration, and one way that strikes me as appropriate, if not required, is to not give the jury 20 counts to go through on a checklist -- separate

count for "filler," separate count for "scraps," separate counts for those things -- but rather, to give them the four overall meanings.

In fact, I would maintain that strictly speaking, the complaint is not organized properly in accordance with what is a claim. There is, technically speaking, a claim based upon the March 7 broadcast, whatever that is. There's a claim based on the March 8 broadcast, whatever that is. Each time there's a publication, that can be a claim.

What the plaintiffs have done in their complaint, they've taken words from nine different broadcasts, and instead of breaking the case down by broadcast, they broke it down by words, so that they'll have a substantive count that cuts across all broadcasts. And it does seem to me that the way it's organized now is very complicated and unduly burdensome for the court, for the jury.

I think there are four claims in this case, and I think that they can refer to all of these words in support of those four claims, so I would suggest that ultimately the efficient way to present this case to a jury is to say, in effect, "The plaintiff claims that its product has been disparaged and it has been defamed in four respects, and they rely upon eight broadcasts and a number of different words, all of which you may consider in determining whether the plaintiffs prevail on either the claim that they've

falsely disparaged this product as unsafe, falsely disparaged it as not meat," etc.

But that is a way to try to wrap our arms around the case and make it manageable, and it's also a way that I think is more consistent with what the law defines as a cause of action.

Now, it's just something I wanted to raise now, and perhaps we can discuss at a later time when we're talking about trial management, but I wanted to plant that thought.

THE COURT: And the plaintiffs don't need to respond because, first of all, I think I'd probably just have a very brief statement that stated that I believe that the multiple claims can proceed as they have, from a legal perspective.

I will tell you this, and I'm thinking about adding it to our schedule. I was reading one of then Judge Ginsburg's, now Justice Ginsburg's, concurring decisions, in which she pointed out that especially in a defamation case, when you have issues of actual malice and knowledge and you have all those things and reckless, which are common terms for the jury to deal with and they're very distinct terms that they need to follow -- she talks about instructing the jury at the beginning, in the middle, at the end, and really making it clear to them what they need to do.

And so I think I need to have jury instructions early on from all of you, at least the preliminary jury instructions, which I would tell you, I can even send you my set of preliminary, which are typically -- Under South Dakota patterns, typically what is said about the claims of the parties is very brief. There's two sentences. You know, "The plaintiff claims disparagement, defamation, tortious interference. The defendant denies all the allegations." It's intended, often, just to be that general.

But in this case, I do think it's going to be necessary to give the jury a little bit more guidance than that that is typically given in a case. And so that may get to the practical issue that you raised, Mr. Baine, because obviously it's going to -- I'm going to be settling jury instructions early on, then, to give the jury some guidance as to how the case would proceed.

I would say generally, as I see this case, the facts are -- as to the claims are somewhat the same, you know. There's some differences, again, because of the elements, but that's typical in most cases. The jurors don't know what the law is. They just -- they hear this body of law -- or excuse me -- this body of facts, and in the end they're told, "This is the law that you apply to that," and it's at the end when that structure is provided to them.

And so the parties don't need to do that and the court doesn't need to do that until the end.

Again, however, I think Justice Ginsburg makes a good point, that we need to do that probably earlier than later. So I think to address that concern, Mr. Baine, that if I set a deadline for the parties to submit proposed preliminary jury instructions, that that may help. May not resolve it entirely, but it may help greatly in doing so, and the what I think is a very necessary providing of information to the jury as to what they need to be considering.

So, Mr. Webb, your response to that?

MR. WEBB: Yes. Well, I'll just add to your comments. First of all -- I'll add to all the comments. I agree with the principle. First of all, we will -- we will work with you to get you early instructions so the jury is well instructed. Number two, the question that Mr. Baine raises, which is that because of the way -- the complaint, which is properly drafted, may be streamlined in a way to make things smoother at trial -- that's really a jury verdict form issue; in other words, how the jury verdict form gets constructed.

I have had internal discussions on my side of the fence here about trying to put together a draft verdict form. We would then discuss with the other side, so that when you're

talking about trying to have these preliminary jury instructions, we may also have a preliminary verdict form which will force the lawyers on both sides to think about how to streamline the case.

And while this is a thought in formation -- but it ties in to what Your Honor is raising, which is -- I agree the jury should be properly instructed. I agree with Justice Ginsburg, and I also agree with Mr. Baine there's probably ways to streamline this case. And so those are my thoughts about doing that.

THE COURT: Okay. Well, what I would like to do, then, is I would like to use that April date to also -- even if not resolve, to be discussing those preliminary instructions. And I agree, Mr. Webb, that often it's better to look at the big picture, which is the verdict form, and then go back to say, okay, what -- how is this case going to be presented, because ultimately this is what the jury is going to answer. So I think that verdict form would be helpful as well.

I don't expect, however, to have a full set of jury instructions of all of the law that you would intend to submit, but preliminarily; and then a draft, at least, special verdict form I think would be helpful.

So let's talk about when that can be presented so I have that in advance of the April pretrial date. Do you

want to use the other motion-in-limine deadlines of March 27 and April 10? So March 27 to present and then April 10 if you have any -- I wouldn't expect a response, but if you had any significant response -- or do you just want to use April 10? A single deadline.

MR. CONNOLLY: April 10 would be preferable.

THE COURT: Mr. Baine?

MR. BAINE: That would be April 10 for our proposed jury instructions and verdict form? Maybe we would have discussed it in advance, but --

THE COURT: Correct.

MR. BAINE: -- we're probably more likely to agree on the form than the instructions, but, yeah.

THE COURT: Right.

MR. BAINE: April 10 is fine.

THE COURT: Okay. So let's do that, then. And again, I would like a full set of preliminary instructions and the special verdict form. I -- If you can give me other instructions that you would do as final instructions or, as Justice Ginsburg pointed out, some interim, I'm fine with that. You can give me more, but at a minimum preliminary and proposed verdict forms.

MR. CONNOLLY: Your Honor --

MR. BAINE: And just so I understand what you're saying, I think what I understood you to say -- with which

I agree -- is that in a case like this it's really important not to instruct the jury at the end but tell them at the beginning what they should be listening for.

THE COURT: Right.

MR. BAINE: We should give you some preliminary instructions as well as final instructions.

THE COURT: Right. And I will send you by email, again, my standard ones, which are based on South Dakota law, and you'll see them. I'm sure your local counsel have provided you with the -- There are no standard instructions in South Dakota for defamation or disparagement, but there are ones generally that say don't do research and "You're the finders of fact, and here's what you consider for credibility of witnesses," you know, those types of things. And I'll send you, again, the standard set, which is typically only eight or so -- eight or nine long that I would typically use in a case, and you can take from there what you would add.

I will tell you this: I usually don't change pattern instructions much, so don't anticipate that you can take those and change wording. There's a few wordings -- I mean, they still refer to Myspace, for example, and I'm not sure that many people use Myspace anymore or even know what it is, so there are certain things like that that, you know, maybe I would tweak in it, but generally I follow

those pretty closely. So I will get those to you later this week.

MR. WEBB: Great.

THE COURT: Is there anything else, then, that we need to discuss?

MR. BAINE: No, Your Honor.

MR. WEBB: No, Your Honor.

MS. SAYLER: Just briefly, Your Honor.

THE COURT: Yes.

MS. SAYLER: I think the proposal was to submit, like, a joint questionnaire by February 20th. I don't know if you adopted that date, or at least I didn't hear it, and I wanted to make sure that I noted it. I think it was February 20th. Is that correct?

THE COURT: I would like to make sure that we can talk about it by that March 13th date, so whether it's February 20th or if you want a little bit more time --

MR. WEBB: We can, I think, within --

MR. BAINE: We can do it by the 20th.

MR. WEBB: I think we can both agree on the 20th and get it done by the 20th.

THE COURT: Okay. Then it will be the 20th.

Thank you, Ms. Sayler.

Okay. I will do a written order both with my summary judgment ruling and with these deadlines so that it's in

written form so that you have it, and then with that, I will expect to just hear from you as to the conference calling information for March 13th. So that's when I will next see you or talk to you. We are adjourned.

* * *

END OF PROCEEDINGS AT 12:37 P.M., 2-8-17.

* * *

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF CLAY)

CERTIFICATE OF REPORTER

I, Mary Anne Meyer, Registered Diplomate Reporter, Notary Public in and for the State of South Dakota, hereby certify that I was present for and reported the proceedings as described on page 1 herein, and that this transcript contains a true and correct record of the proceedings so had.

To all of which I have hereunto set my hand this 9th day of February, 2017.

/s/ Mary Anne Meyer
_____
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