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STATE OF SOUTH DAKOTA            )                            IN CIRCUIT COURT  
  ):SS  
COUNTY OF UNION                    )                    FIRST JUDICIAL CIRCUIT

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BEEF PRODUCTS, INC., BPI            )  
TECHNOLOGY, INC., and                )     Case File 63CIV12000292  
FREEZING MACHINES, INC.,            )  
  )  
      Plaintiffs,                        )  
  )     RULING ON MOTIONS  
vs.                                        )     FOR SUMMARY JUDGMENT  
  )     AND SANCTIONS  
AMERICAN BROADCASTING                )  
COMPANIES, INC., ABC NEWS,         )  
INC., DIANE SAWYER, and JIM         )  
AVILA,                                    )  
  )  
      Defendants.                         )

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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.

\* \* \*

Reported by:      Mary Anne Meyer, RDR  
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and Jim Avila.

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

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

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

12 **MR. CONNOLLY:** Erik Connolly on behalf of plaintiffs.

13 **MS. WRIGLEY:** Nicole Wrigley on behalf of plaintiffs.

14 **MS. BAUER:** Julie Bauer.

15 **MS. SAYLER:** Sabrina Sayler.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 particularly adaptable to expose sham claims and defenses.

2 In considering summary judgment, the court also looks  
3 at all pleadings, depositions, answers to interrogatories,  
4 admissions on file, together with affidavits, if any, that  
5 show there's no genuine issue as to any material fact, and  
6 that the moving party is entitled to judgment as a matter  
7 of law. That is the standard set out in SDCL 15-6-56(c).  
8 And as previously stated, I am overruling defendants'  
9 objections to the plaintiffs' statement of facts, in light  
10 of Rule 56(c) and the *Discover Bank vs. Stanley* decision,  
11 2008 S.D. 111.

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

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

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

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

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

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



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

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

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

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

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

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

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

25 As to the statutory disparagement claims of BPI Tech

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

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

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

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

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

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

10 In paragraph 16, the defendants alleged Freezing  
11 Machines is in the business of developing equipment and  
12 processes for the production of meat food products and it  
13 owns the intellectual property for some of the machines  
14 used in the production of LFTB. Plaintiff agrees with this  
15 statement, with the caveat that FMI is involved in other  
16 activities, as explained in plaintiffs' statement of fact  
17 91, 92, and 97.

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

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

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

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

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

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

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

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

12 Then turning to BPI Tech's and FMI's defamation and  
13 common-law disparagement claims, defendants argue that  
14 plaintiffs BPI Tech and FMI cannot bring any claim for  
15 defamation or disparagement because they are not the party  
16 against whom false statements were specifically directed.  
17 Put another way, defendants assert that the -- that BPI  
18 Tech and FMI cannot establish that the allegedly  
19 disparaging or defamatory statements were, quote, "of and  
20 concerning," end quote, those companies or those companies'  
21 products. Assuming for purposes of summary judgment that  
22 the "of and concerning" requirement applies to both the  
23 defamation and disparagement claims, the court adopts and  
24 restates the same standard as set forth in its March 27,  
25 2014, memorandum decision, referencing primarily the

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

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

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

25       Similarly, it is up to the jury to determine whether

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

20 The quote ended with the words "third party."

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

1 before a jury.

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

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

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

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

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

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

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

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

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

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

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

16        As recognized in *Paint Brush Corporation vs. Neu*,  
17 1999 S.D. 120, tortious interference claims may be caused  
18 by defamatory or disparaging statements. In *Paint Brush*,  
19 the court held that a competitor's writing of an allegedly  
20 defamatory and disparaging letter was sufficient to avoid  
21 summary judgment on a tortious interference claim. So as I  
22 review South Dakota law on the issue of improper and  
23 unjustified acts, defamatory or disparaging statements can  
24 be such. Therefore, the court needs to look at the acts of  
25 the defendants.

1       Before looking at the actions of the defendants, I'm  
2 also going to discuss what must be proven as to the  
3 defamation claims. First, I would note that there is no  
4 special privilege granted to news reporters. The South  
5 Dakota Supreme Court declined to adopt the common-law  
6 neutral reporting privilege in *Janklow vs. Viking Press*,  
7 378 N.W.2d 875.

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

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

25       In *Milkovich*, the Supreme Court determined that they



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

4 In the summary judgment pleadings, the defendants have  
5 spent considerable space and time arguing that as to many  
6 of the words or phrases that the plaintiffs contend were  
7 defamatory, that other parties have previously used the  
8 same or similar words. To the extent that this may be  
9 asserting the "incremental harm" doctrine, South Dakota has  
10 never adopted that doctrine. Furthermore, as stated by the  
11 U.S. Supreme Court in *Masson vs. New Yorker Magazine*,  
12 501 U.S. 496, "The 'incremental harm' doctrine does not  
13 implicate the First Amendment and is instead a creature of  
14 state law." That is a quote from *Masson*. So it's not a  
15 First Amendment issue, and South Dakota has never adopted  
16 it, so the court does not find that the "incremental harm"  
17 doctrine applies.

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

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

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

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

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

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

25 I first note that plaintiffs are not public officials,

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

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

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

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

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

7 In defendants' statement of facts paragraphs 93 through  
8 118, the defendants discuss BPI's participation in the  
9 public debate over the benefits of LFTB and BPI's response  
10 to public criticism of its product before March 7, 2012.  
11 The parties agree that there were stories regarding BPI's  
12 processes and equipment published in the years 2003 to 2006  
13 in a trade publication; but I do not find that these  
14 articles nor any advertisements BPI may have had in those  
15 publications involved any matter of public controversy, and  
16 those publications do not make BPI a public figure,  
17 limited-purpose or otherwise.

18 Similarly, allowing various individuals who are doing  
19 stories to come into their plant and to provide information  
20 to them does not make BPI a public figure, nor does putting  
21 information on its own website regarding its product and  
22 processes make BPI a public figure. However, beginning in  
23 2009 with the *New York Times* article, BPI wrote and posted  
24 what they, quote, call an "open letter," end quote.  
25 Furthermore, after the April 2011 episode of *Jamie Oliver's*

1 *Food Revolution*, BPI wrote another open letter, and BPI  
2 acknowledges that its efforts to address media concerns in  
3 2011 included "working with PR firm," "producing  
4 educational short films," "launched consumer friendly  
5 website," and "educated fact-based blog responses." In  
6 addition, a PR firm was hired in April of 2011.

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

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

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

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

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

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

15 As summarized in the *Krueger vs. Austad* decision of the  
16 South Dakota Supreme Court, 1996 S.D. 26, in order to show  
17 reckless disregard, the public-figure plaintiff must prove,  
18 1, libel by clear and convincing evidence; 2, more than a  
19 defendant's failure to investigate; 3, that the defendant  
20 entertained serious doubts as to the truth; 4, that the  
21 defendant had a high degree of awareness of falsity; and 5,  
22 that the defendant had obvious reason to doubt the veracity  
23 of the informant or the accuracy of his reports.

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

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

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

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

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

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



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

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

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

1 imparted by the defendants.

2 That is also supported by the *Bose Corporation* case,  
3 466 U.S. 465, in which not only was the entirety of the  
4 article looked at, but it was also looked at in the context  
5 of what was being addressed. There was testing equipment  
6 for sound, and in that case the court noted the descriptive  
7 challenges associated with describing the sound produced by  
8 the plaintiffs' product.

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

14 ABC Broadcasting acts through employees, so conduct of  
15 all employees mentioned in the summary judgment pleadings  
16 will be considered as to its liability. The court, in  
17 setting forth its analysis, is guided significantly by the  
18 case of *Harte-Hanks Communications*, found at 109 S.Ct.  
19 2678. That is a decision in which all nine U.S. Supreme  
20 Court justices concurred that a jury's libel verdict  
21 against a newspaper should be affirmed; and that included  
22 justices from Chief Justice Rehnquist through Scalia.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 *Times* newspaper article as a basis for his knowledge.

2 Mr. Avila tells him -- tells Mr. Zirnstein that the USDA  
3 undersecretary had worked for the meat industry.

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

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

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

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

1 employment at BPI, even though that was known to ABC.

2 There's no discussion of when Mr. Foshee worked for BPI at  
3 all in the interview.

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

1 the case.

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

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

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

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

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

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

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

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

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

11 In response to defendants' statement of fact paragraph  
12 9, that Ms. Sawyer believed "pink slime" was accurate  
13 because it captured public controversy, plaintiff points to  
14 her deposition testimony, in which she was shown a picture  
15 of LFTB in its finished form, and they also point to the  
16 fact that she knew LFTB was beef and it was safe. However,  
17 again, I do not find this evidence sufficient to establish  
18 that she personally believed her use of "pink slime" was  
19 inaccurate.

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

1 12.

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

7       In response to defendants' statement of fact paragraph  
8 11, that Ms. Sawyer did not discuss the safety of LFTB in  
9 her statements, and in response to defendants' statement of  
10 fact paragraph 12, that Ms. Sawyer did not discuss the  
11 nutritional value of LFTB, and in response to paragraph 13,  
12 that she did not say that LFTB was not meat or beef,  
13 plaintiffs argue that she did use the terms "pink slime"  
14 and "filler." However, as with the direct defamation  
15 claim, I do not find that this is sufficient evidence of  
16 actual malice as to the implied defamation and  
17 disparagement claims.

18       In response to defendants' statement of fact paragraph  
19 14, that Ms. Sawyer did not discuss the approval process,  
20 plaintiffs rely on the use of the term "whistleblower," and  
21 I note that in paragraph 10 of the defendants' statement of  
22 facts they state that Ms. Sawyer believed describing  
23 Mr. Zirnstein as a whistleblower was accurate. Plaintiffs'  
24 response is that Ms. Sawyer conceded that the term  
25 "whistleblower" can not only include her description of a



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

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

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

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

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

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

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

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

1 imply the derogatory implication. In *Saathoff*, 2009 S.D.  
2 17, the South Dakota Supreme Court addressed a claim of  
3 defamation by implication, but the three-member majority  
4 did not discuss how a claim of defamation by implication  
5 differed, if it does, in any way from a nonimplication  
6 defamation claim. Furthermore, the two-member dissent  
7 addressed the implication claim as it would any other  
8 defamation claim.

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

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

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

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

22       Finally, I would note, as I stated in my March 27,  
23 2014, memorandum decision -- and I maintain that ruling --  
24 that the plaintiff can bring both disparagement and  
25 defamation claims, with the understanding that the damages

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

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

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

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

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

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

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

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

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

1 "actual malice" test. Courts, in discussing knowledge of  
2 falsity in the "actual malice" context, agree that it  
3 states a higher amount of culpability than recklessness.  
4 For example, in *Masson vs. New Yorker Magazine*, 501 U.S.  
5 496, knowledge was found when the reporter, quote,  
6 "deliberately," end quote, altered quotations.

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

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

1 when he claims to have formed that belief.

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

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

13 In the case of *State vs. Pickus*, P-i-c-k-u-s, found at  
14 257 N.W. 284, the Supreme Court stated, quote, "Certainly  
15 it was for the jury to say whether or not appellant knew of  
16 the falsity of his representation -- whether or not he  
17 believed in it when he made it. Undoubtedly the evidence  
18 upon that point in every case will of necessity be largely  
19 circumstantial," end quote.

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



1 More recently, in the *State vs. Fischer* decision,  
2 2016 S.D. 1, in a case involving the knowing possession of  
3 methamphetamine, the court noted that it is the combination  
4 of facts that can give rise to a reasonable inference of  
5 knowledge. In that case, the defendant denied knowing that  
6 there was methamphetamine in the vehicle. However, the  
7 court pointed out that he was in control of the vehicle, he  
8 produced the vehicle's registration, he had a different  
9 illegal substance and paraphernalia in his pocket, and when  
10 asked to submit to chemical testing, he refused.

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

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

25 This is also consistent with First Amendment law as

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 elements of a claim of tortious interference. To the  
2 extent there is a question of fact as to whether defendants  
3 Avila and ABC have made defamatory or disparaging comments,  
4 that is an intentional and unjustified act of interference.  
5 However, as all defamation and disparagement counts have  
6 been dismissed against Ms. Sawyer, she has not engaged in  
7 intentional and unjustified acts of interference, and Count  
8 27 is dismissed as to her.

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

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

19 Then turning briefly to plaintiffs' motion for  
20 sanctions against defendant ABC for spoliating evidence,  
21 the court does find that the standard that applies to that  
22 motion is that set forth in *State vs. Engesser*, 2003 S.D.  
23 47, as recognized in *Young vs. Oury*, 2013 S.D. 7.

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



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

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

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

12 Mr. Connolly?

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

18 **THE COURT:** Please.

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

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

4 **THE COURT:** Just stop one moment.

5 **MR. CONNOLLY:** I apologize.

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

7 **MR. CONNOLLY:** April 10 --

8 **THE COURT:** Thank you.

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

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

15 **THE COURT:** I'm just going to tell you one thing. The  
16 practice in South Dakota, motions in limine typically are  
17 two paragraphs if -- I mean, if they're standard. I  
18 realize if they're not standard -- But, for example, just  
19 the very common ones. Sequestration, for example, two  
20 sentences. So when you're saying 15 pages, most of the  
21 time when I have a case the entirety of all of the motions  
22 in limine are encompassed in 15 pages. So what I  
23 understood you to say is for each motion in limine you want  
24 15 pages. So if you each have 30 of those, I take that  
25 times 15. Is that what I'm understanding?

1       **MR. CONNOLLY:** That would be a terrible situation.

2       **THE COURT:** Okay.

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

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

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

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

22       **MR. CONNOLLY:** Yes.

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

1       **MR. CONNOLLY:** Yes, Your Honor. Sorry.

2       **THE COURT:** Thank you.

3       Let me address that issue, Mr. Baine.

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

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

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

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

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

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

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

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

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

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

25           **THE COURT:** Okay.

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

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

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

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

25       **THE COURT:** It's now three.

1       **MR. CONNOLLY:** It's now three.

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

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

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

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

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



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

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

15 So because of that, I am going to adopt the schedule  
16 proposed by the defendants, and while I'm going to  
17 generally impose a 25-page limit for *Daubert* briefs and a  
18 15-page limit for motions in limine, that I will allow both  
19 sides to go beyond that limitation only as necessary. I'm  
20 not going to impose a number, but I would state it shall  
21 not exceed twice that limit. So 50 and 30 pages at most,  
22 but again, used judiciously and not simply using the space  
23 because it's available.

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

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

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

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

17 **THE COURT:** Yes.

18 **MR. BAINE:** Thank you.

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

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

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

3 **MR. CONNOLLY:** Okay.

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

10 **MR. BAINE:** Can I turn this on?

11 **MR. CONNOLLY:** Can we turn on our phones?

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

16 We're off the record, Mary Anne.

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

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

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

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

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

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

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

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

1 proposal that -- start picking the jury on Wednesday, the  
2 31st, and try to get the jury picked, you know, in two or  
3 three days, if possible, so that when we start this trial  
4 on June 5th, we start with a free running ground to get  
5 this trial over and have the jury pretty much in the can or  
6 selected before the 5th, so that we don't run into the risk  
7 of later we're coming back saying we're having trouble with  
8 that August 1 deadline, which I know is not acceptable to  
9 you. But this case -- well, you've seen it. You've been  
10 through this. There's a lot of ins and outs of this case.  
11 It's a proposal or thought to try to do it.

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

17 **MR. WEBB:** That's fine.

18 **THE COURT:** And also I think it potentially could take  
19 three days just to call them in to do the questionnaires.  
20 Currently we have 350 people on the call-in list, and so I  
21 can only practically, in this room or even downstairs, have  
22 70 to 100 people at a time, and some will take longer. So  
23 maybe it can be down to a day and a half, but then I also  
24 have to have another day available for those people who  
25 couldn't come in those two days because they had a

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

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

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

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

21 What is the defense response to that proposal?

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

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

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

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

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

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



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

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

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

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

10 **MR. CONNOLLY:** 10th doesn't work.

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

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

20 **MR. BAINE:** Flexible. Whatever is best.

21 **MR. WEBB:** Whatever is best for Your Honor.

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

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

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

9 **MR. CONNOLLY:** Two tables.

10 **MR. WEBB:** Huh?

11 **MR. CONNOLLY:** Two tables.

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

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

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

17 **THE COURT:** No, there can't.

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

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

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

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

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

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

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

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

1 that long.

2 **MR. CONNOLLY:** After the pretrial.

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

4 **THE COURT:** Okay.

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

10 **MR. CONNOLLY:** 20th.

11 **MR. WEBB:** -- of the 20th?

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

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

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

21 **MR. CONNOLLY:** Give me one second.

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

24 **MS. WRIGLEY:** Yeah. Yes.

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

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

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

10 **MS. WRIGLEY:** Telephonic.

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

14 **MR. BAINE:** That's true.

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

16 **THE COURT:** Do you have concerns with that?

17 **MR. CONNOLLY:** I have some concerns.

18 **THE COURT:** So how about the 24th?

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

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

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

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

1 reply briefs, and I think --

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

4 **MR. WEBB:** March 13th?

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

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

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

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

12 **MR. CONNOLLY:** Sorry. March 13th.

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

18 **MR. CONNOLLY:** March 13 would work.

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

21 **THE COURT:** Mr. Baine, is that --

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

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

1       **MS. SAYLER:** Just procedural stuff.

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

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

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

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

12       **MR. WEBB:** That's fine with us.

13       **THE COURT:** Does that work, Mr. Baine?

14       **MR. BAINE:** Yes, Your Honor.

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

17       And, Mr. Baine, the jury questionnaire proposal?

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

22       **MR. WEBB:** That's fine. Good.

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

1 disputes.

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

12       So, Mr. Webb, your response to that?

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

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

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

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

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

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

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

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

6 **MR. CONNOLLY:** April 10 would be preferable.

7 **THE COURT:** Mr. Baine?

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

11 **THE COURT:** Correct.

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

14 **THE COURT:** Right.

15 **MR. BAINÉ:** April 10 is fine.

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

23 **MR. CONNOLLY:** Your Honor --

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

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

4 **THE COURT:** Right.

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

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

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

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

3 **MR. WEBB:** Great.

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

6 **MR. BAINE:** No, Your Honor.

7 **MR. WEBB:** No, Your Honor.

8 **MS. SAYLER:** Just briefly, Your Honor.

9 **THE COURT:** Yes.

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

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

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

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

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

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

23 Thank you, Ms. Sayler.

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



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

5 \* \* \*

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

7 \* \* \*

8 STATE OF SOUTH DAKOTA )  
 :SS  
9 COUNTY OF CLAY )

10 CERTIFICATE OF REPORTER

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

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

19 /s/ Mary Anne Meyer

20 \_\_\_\_\_  
21 MARY ANNE MEYER, RDR  
22 Official Court Reporter  
23 410 Walnut, Suite 201  
24 Yankton, South Dakota 57078  
25 (605) 668-3092

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<p><b>MR. BAINE:</b> [26] 4/15 68/3 70/22 70/25 72/10 74/12 74/17 75/9 79/21 81/8 81/19 84/18 85/13 86/4 86/21 87/5 87/13 87/17 88/1 94/7 94/11 94/14 94/23 95/4 96/5 96/18</p> <p><b>MR. CONNOLLY:</b> [35] 4/11 65/12 65/18 66/4 66/6 66/8 66/25 67/2 67/21 67/25 71/6 71/25 72/3 74/10 74/18 75/2 75/10 81/9 82/8 82/10 84/1 84/9 84/17 84/20 84/24 85/14 85/16 85/18 85/24 86/8 86/11 86/17 87/7 94/5 94/22</p> <p><b>MR. METZGAR:</b> [1] 4/17</p> <p><b>MR. PARSONS:</b> [1] 4/19</p> <p><b>MR. WEBB:</b> [28] 4/9 75/23 78/16 79/10 81/3 81/10 81/20 81/23 82/9 82/11 82/15 82/17 83/11 83/20 84/2 84/4 84/10 85/22 86/3 86/18 86/23 87/11 87/21 92/12 96/2 96/6 96/17 96/19</p> <p><b>MS. BAUER:</b> [1] 4/13</p> <p><b>MS. SAYLER:</b> [4] 4/14 86/25 96/7 96/9</p> <p><b>MS. 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52/16</p> <p><b>1980</b> [1] 44/4</p> <p><b>199</b> [1] 27/19</p> <p><b>1990</b> [1] 37/21</p> <p><b>1996 S.D</b> [2] 27/3 30/16</p> <p><b>1999</b> [3] 16/15 19/2 63/25</p> <p><b>1999 S.D</b> [1] 23/17</p> <p><b>19th</b> [1] 75/20</p>	<p><b>20005</b> [1] 2/13</p> <p><b>2002</b> [2] 22/5 38/16</p> <p><b>2002 S.D</b> [2] 8/11 21/2</p> <p><b>2003</b> [1] 28/12</p> <p><b>2003 S.D</b> [1] 64/22</p> <p><b>2006</b> [1] 28/12</p> <p><b>2008 S.D</b> [1] 7/11</p> <p><b>2009</b> [2] 28/23 38/25</p> <p><b>2009 S.D</b> [4] 8/14 22/4 23/9 51/1</p> <p><b>201</b> [2] 1/22 97/21</p> <p><b>2010 S.D</b> [2] 21/24 22/18</p> <p><b>2011</b> [6] 28/25 29/3 29/6 29/7 29/10 29/10</p> <p><b>2012</b> [6] 11/15 28/10 29/12 36/16 42/20 60/10</p> <p><b>2012 S.D</b> [2] 9/16 9/17</p> <p><b>2013 S.D</b> [1] 64/23</p> <p><b>2014</b> [5] 10/21 11/2 14/25 27/19 52/23</p> <p><b>2016</b> [1] 57/2</p> <p><b>2017</b> [3] 1/15 4/3 97/18</p> <p><b>202</b> [1] 2/13</p> <p><b>204</b> [1] 68/12</p> <p><b>209</b> [1] 1/14</p> 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<p><b>37</b> [1] 15/11</p> <p><b>378</b> [1] 24/7</p> <p><b>38</b> [2] 22/4 23/9</p> <p><b>390</b> [1] 31/11</p> <p><b>3rd</b> [3] 71/2 84/22 85/1</p> <p><b>4</b></p> <p><b>4 o'clock</b> [2] 87/10 87/15</p> <p><b>40</b> [1] 72/18</p> <p><b>407</b> [1] 68/11</p> <p><b>410</b> [2] 1/22 97/21</p> <p><b>415</b> [1] 31/20</p> <p><b>416</b> [1] 44/4</p> <p><b>418 U.S</b> [1] 27/6</p> <p><b>4304</b> [1] 2/16</p> <p><b>434-5000</b> [1] 2/13</p> <p><b>438</b> [1] 6/3</p> <p><b>441</b> [1] 58/2</p> <p><b>443</b> [1] 29/24</p> <p><b>4561</b> [1] 2/9</p> <p><b>459</b> [1] 31/20</p> <p><b>462</b> [1] 9/21</p> <p><b>465</b> [1] 34/3</p> <p><b>466</b> [1] 34/3</p> <p><b>47</b> [1] 64/23</p> <p><b>491</b> [1] 31/12</p> <p><b>492</b> [1] 43/19</p> <p><b>493</b> [1] 9/21</p> <p><b>496</b> [2] 25/12 55/5</p> <p><b>499</b> [2] 15/3 25/25</p> <p><b>5</b></p> <p><b>50</b> [2] 6/4 73/21</p> <p><b>5000</b> [1] 2/13</p> <p><b>501</b> [1] 55/4</p> <p><b>501 U.S</b> [1] 25/12</p> <p><b>51102</b> [1] 2/8</p> <p><b>538</b> [1] 43/14</p> <p><b>557</b> [1] 44/4</p> <p><b>558-5600</b> [1] 2/5</p> <p><b>56</b> [4] 7/7 7/10 9/17 62/25</p> <p><b>5600</b> [1] 2/5</p> <p><b>562</b> [1] 29/24</p> <p><b>57025</b> [1] 1/14</p> <p><b>57078</b> [2] 1/22 97/22</p> <p><b>57104</b> [1] 2/16</p> <p><b>5th</b> [4] 77/16 78/4 78/6 79/16</p> <p><b>6</b></p> <p><b>605</b> [3] 1/23 2/16 97/22</p> <p><b>60601-9703</b> [1] 2/5</p> <p><b>63CIV12000292</b> [1] 1/4</p> <p><b>64</b> [2] 21/24 22/18</p> <p><b>657</b> [1] 31/12</p> <p><b>668-3092</b> [2] 1/23 97/22</p> <p><b>674</b> [1] 31/14</p> <p><b>678</b> [1] 58/14</p> <p><b>683</b> [1] 61/19</p> <p><b>684</b> [1] 61/19</p> <p><b>685</b> [2] 58/14 61/20</p> <p><b>6:56 a.m</b> [1] 36/16</p>	<p><b>8</b></p> <p><b>82</b> [2] 15/5 51/23</p> <p><b>83</b> [1] 31/14</p> <p><b>830</b> [1] 51/17</p> <p><b>858</b> [1] 62/8</p> <p><b>86</b> [1] 16/23</p> <p><b>875</b> [1] 24/7</p> <p><b>881</b> [1] 51/17</p> <p><b>9</b></p> <p><b>91</b> [3] 12/17 13/2 13/4</p> <p><b>911</b> [1] 25/25</p> <p><b>92</b> [3] 12/17 13/2 13/7</p> <p><b>93</b> [1] 28/7</p> <p><b>97</b> [3] 12/17 13/2 13/14</p> <p><b>9703</b> [1] 2/5</p> <p><b>9th</b> [1] 97/17</p> <p>:</p> <p><b>:SS</b> [2] 1/2 97/8</p> <p><b>A</b></p> <p><b>a-d-u-m-a-n</b> [1] 44/3</p> <p><b>a.m</b> [7] 1/16 3/3 4/1 4/3 36/16 81/19 81/22</p> <p><b>ABC</b> [62] 1/8 2/18 3/11 15/6 16/2 16/4 17/5 18/2 18/6 31/16 33/7 34/14 36/13 36/24 37/6 37/9 37/13 39/5 39/14 40/1 40/16 40/17 41/14 41/19 41/23 41/25 42/1 42/3 42/5 42/20 43/7 43/18 46/16 49/7 49/24 53/2 53/21 54/6 54/12 59/17 59/22 59/24 60/13 60/14 61/10 61/22 62/1 62/2 63/2 63/6 63/19 64/3 64/12 64/20 65/20 67/5 67/9 67/9 67/15 72/10 77/20 85/5</p> <p><b>ABC's</b> [1] 76/17</p> <p><b>Abdallah</b> [1] 2/15</p> <p><b>Abdel</b> [1] 43/18</p> <p><b>Abdel-Hafiz</b> [1] 43/18</p> <p><b>ability</b> [1] 13/21</p> <p><b>able</b> [10] 11/24 41/5 69/7 69/10 70/12 71/8 71/10 72/21 74/7 86/15</p> <p><b>about</b> [50] 15/7 15/22 18/2 18/14 29/8 35/3 36/17 37/19 37/19 38/2 39/22 40/4 40/5 42/22 43/12 43/24 45/23 46/22 56/7 58/11 60/9 61/9 68/24 70/7 72/2 75/25 77/5 77/8 80/3 80/6 80/10 80/11 80/19 81/25 82/1 85/18 86/2 86/24 87/19 88/8 90/9 90/15 90/22 91/5 92/24 93/1 93/3 93/10 93/24 96/16</p> <p><b>above</b> [3] 24/16 52/10 54/17</p> <p><b>absence</b> [1] 45/8</p> <p><b>absent</b> [1] 45/9</p> <p><b>accept</b> [1] 21/14</p> <p><b>acceptable</b> [1] 78/8</p> <p><b>access</b> [1] 28/5</p> <p><b>accessing</b> [1] 13/22</p> <p><b>accordance</b> [1] 89/5</p> <p><b>accuracy</b> [4] 30/23 35/17 44/23 47/10</p> <p><b>accurate</b> [4] 47/2 47/12</p>
<p>'clear' [1] 8/21</p> <p>'grossly' [1] 45/11</p> <p>'guilty' [1] 44/22</p> <p>'identifiable' [2] 20/7 20/8</p> <p>'important' [1] 24/21</p> <p>'incremental' [1] 25/12</p> <p>'knowledge' [1] 52/7</p> <p>'never' [1] 17/3</p> <p>'nexus' [1] 20/15</p> <p>'reasonably' [1] 20/12</p> <p>'triangle' [1] 19/15</p>	<p><b>2</b></p> <p><b>2-8-17</b> [4] 3/3 3/23 4/1 97/6</p> <p><b>20</b> [1] 88/25</p> <p><b>20-10A</b> [4] 10/20 10/23 11/1 11/10</p> <p><b>20-10A-1</b> [1] 53/8</p> <p><b>20-11-5</b> [1] 25/20</p> <p><b>200</b> [1] 2/8</p> <p><b>2000 S.D</b> [1] 62/25</p>	<p><b>3</b></p> <p><b>30</b> [3] 66/24 71/16 73/21</p> <p><b>3092</b> [2] 1/23 97/22</p> <p><b>312</b> [1] 2/5</p> <p><b>31st</b> [1] 78/2</p> <p><b>323</b> [1] 27/6</p> <p><b>329</b> [1] 2/8</p> <p><b>338-4304</b> [1] 2/16</p> <p><b>343</b> [1] 15/2</p> <p><b>35</b> [2] 2/4 68/24</p> <p><b>350</b> [4] 68/11 68/24 69/1</p>	<p><b>7</b></p> <p><b>70</b> [1] 78/22</p> <p><b>712</b> [1] 2/9</p> <p><b>716</b> [1] 51/23</p> <p><b>725</b> [1] 2/12</p> <p><b>727</b> [1] 31/11</p> <p><b>73</b> [2] 15/2 15/5</p> <p><b>767</b> [2] 21/25 22/7</p> <p><b>780</b> [1] 43/15</p>	<p><b>8</b></p> <p><b>82</b> [2] 15/5 51/23</p> <p><b>83</b> [1] 31/14</p> <p><b>830</b> [1] 51/17</p> <p><b>858</b> [1] 62/8</p> <p><b>86</b> [1] 16/23</p> <p><b>875</b> [1] 24/7</p> <p><b>881</b> [1] 51/17</p> <p><b>9</b></p> <p><b>91</b> [3] 12/17 13/2 13/4</p> <p><b>911</b> [1] 25/25</p> <p><b>92</b> [3] 12/17 13/2 13/7</p> <p><b>93</b> [1] 28/7</p> <p><b>97</b> [3] 12/17 13/2 13/14</p> <p><b>9703</b> [1] 2/5</p> <p><b>9th</b> [1] 97/17</p> <p>:</p> <p><b>:SS</b> [2] 1/2 97/8</p> <p><b>A</b></p> <p><b>a-d-u-m-a-n</b> [1] 44/3</p> <p><b>a.m</b> [7] 1/16 3/3 4/1 4/3 36/16 81/19 81/22</p> <p><b>ABC</b> [62] 1/8 2/18 3/11 15/6 16/2 16/4 17/5 18/2 18/6 31/16 33/7 34/14 36/13 36/24 37/6 37/9 37/13 39/5 39/14 40/1 40/16 40/17 41/14 41/19 41/23 41/25 42/1 42/3 42/5 42/20 43/7 43/18 46/16 49/7 49/24 53/2 53/21 54/6 54/12 59/17 59/22 59/24 60/13 60/14 61/10 61/22 62/1 62/2 63/2 63/6 63/19 64/3 64/12 64/20 65/20 67/5 67/9 67/9 67/15 72/10 77/20 85/5</p> <p><b>ABC's</b> [1] 76/17</p> <p><b>Abdallah</b> [1] 2/15</p> <p><b>Abdel</b> [1] 43/18</p> <p><b>Abdel-Hafiz</b> [1] 43/18</p> <p><b>ability</b> [1] 13/21</p> <p><b>able</b> [10] 11/24 41/5 69/7 69/10 70/12 71/8 71/10 72/21 74/7 86/15</p> <p><b>about</b> [50] 15/7 15/22 18/2 18/14 29/8 35/3 36/17 37/19 37/19 38/2 39/22 40/4 40/5 42/22 43/12 43/24 45/23 46/22 56/7 58/11 60/9 61/9 68/24 70/7 72/2 75/25 77/5 77/8 80/3 80/6 80/10 80/11 80/19 81/25 82/1 85/18 86/2 86/24 87/19 88/8 90/9 90/15 90/22 91/5 92/24 93/1 93/3 93/10 93/24 96/16</p> <p><b>above</b> [3] 24/16 52/10 54/17</p> <p><b>absence</b> [1] 45/8</p> <p><b>absent</b> [1] 45/9</p> <p><b>accept</b> [1] 21/14</p> <p><b>acceptable</b> [1] 78/8</p> <p><b>access</b> [1] 28/5</p> <p><b>accessing</b> [1] 13/22</p> <p><b>accordance</b> [1] 89/5</p> <p><b>accuracy</b> [4] 30/23 35/17 44/23 47/10</p> <p><b>accurate</b> [4] 47/2 47/12</p>
<p><b>10</b> [11] 48/21 66/7 67/4 71/2 71/14 94/2 94/3 94/5 94/6 94/8 94/15</p> <p><b>10 a.m</b> [1] 81/19</p> <p><b>10 o'clock</b> [1] 4/2</p>	<p><b>100</b> [2] 2/15 78/22</p> <p><b>100 percent</b> [1] 59/25</p> <p><b>1009</b> [1] 58/23</p> <p><b>101</b> [1] 2/15</p> <p><b>1016</b> [1] 58/24</p> <p><b>102</b> [2] 8/11 22/5</p> <p><b>104</b> [1] 32/8</p> <p><b>105</b> [1] 21/2</p> <p><b>109</b> [3] 7/24 34/18 58/23</p> <p><b>10:00</b> [3] 1/16 3/3 4/1</p> <p><b>10A</b> [4] 10/20 10/23 11/1 11/10</p> <p><b>10th</b> [10] 65/23 66/2 67/13 68/6 81/7 81/9 81/10 81/11 84/20 85/4 <b>11</b> [4] 42/20 48/8 61/8 62/8</p> <p><b>111</b> [1] 7/11</p> <p><b>118</b> [1] 28/8</p> <p><b>12</b> [5] 3/8 46/21 48/1 48/10 71/16</p> <p><b>12-292</b> [1] 4/4</p> <p><b>120</b> [1] 23/17</p> <p><b>12:37</b> [3] 1/16 3/23 97/6</p> <p><b>13</b> [4] 48/11 86/18 86/19 87/16</p> <p><b>138</b> [1] 15/14</p> <p><b>13th</b> [11] 86/2 86/3 86/4 86/12 86/22 87/6 87/8 87/9 87/11 96/16 97/3</p> <p><b>14</b> [1] 48/19</p> <p><b>14-day</b> [1] 71/13</p> <p><b>144</b> [1] 68/11</p> <p><b>147</b> [1] 15/16</p> <p><b>148</b> [1] 15/16</p> <p><b>15</b> [8] 66/12 66/20 66/22 66/24 66/25 67/3 71/14 76/18</p> <p><b>15-6-56</b> [1] 7/7</p> <p><b>15-page</b> [2] 70/22 73/18</p> <p><b>150</b> [1] 40/17</p> <p><b>153</b> [1] 58/2</p> <p><b>154</b> [2] 17/10 18/5</p> <p><b>15th</b> [1] 79/10</p> <p><b>16</b> [2] 12/9 12/10</p> <p><b>165</b> [2] 17/11 18/6</p> <p><b>17</b> [12] 3/3 3/23 4/1 8/14 12/9 12/18 19/3 51/2 61/11 81/13 85/2 97/6</p> <p><b>17th</b> [14] 67/11 81/7 81/9 81/12 81/12 81/13 84/7 84/8 84/15 84/22 85/12 85/15 87/6 87/15</p> <p><b>18</b> [2] 12/9 12/21</p> <p><b>18th</b> [1] 75/20</p> <p><b>19</b> [3] 3/9 49/18 52/16</p> <p><b>1980</b> [1] 44/4</p> <p><b>199</b> [1] 27/19</p> <p><b>1990</b> [1] 37/21</p> <p><b>1996 S.D</b> [2] 27/3 30/16</p> <p><b>1999</b> [3] 16/15 19/2 63/25</p> <p><b>1999 S.D</b> [1] 23/17</p> <p><b>19th</b> [1] 75/20</p>	<p><b>20005</b> [1] 2/13</p> <p><b>2002</b> [2] 22/5 38/16</p> <p><b>2002 S.D</b> [2] 8/11 21/2</p> <p><b>2003</b> [1] 28/12</p> <p><b>2003 S.D</b> [1] 64/22</p> <p><b>2006</b> [1] 28/12</p> <p><b>2008 S.D</b> [1] 7/11</p> <p><b>2009</b> [2] 28/23 38/25</p> <p><b>2009 S.D</b> [4] 8/14 22/4 23/9 51/1</p> <p><b>201</b> [2] 1/22 97/21</p> <p><b>2010 S.D</b> [2] 21/24 22/18</p> <p><b>2011</b> [6] 28/25 29/3 29/6 29/7 29/10 29/10</p> <p><b>2012</b> [6] 11/15 28/10 29/12 36/16 42/20 60/10</p> <p><b>2012 S.D</b> [2] 9/16 9/17</p> <p><b>2013 S.D</b> [1] 64/23</p> <p><b>2014</b> [5] 10/21 11/2 14/25 27/19 52/23</p> <p><b>2016</b> [1] 57/2</p> <p><b>2017</b> [3] 1/15 4/3 97/18</p> <p><b>202</b> [1] 2/13</p> <p><b>204</b> [1] 68/12</p> <p><b>209</b> [1] 1</p>		

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