

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Department 4

Hon. Warren L. Ettinger, Judge

DAVID KOHAN, an individual; ODE,)
INC., a California corporation;)
JASON NIDORF MUTCHNICK aka MAX)
MUTCHNICK, an individual; TOO MUTCH)
INK, a California corporation;)
VISION ART MANAGEMENT, a California)
corporation,,)

Plaintiffs and,)
Cross-Defendants,)

vs.)

Case No. BC307563)

NBC STUDIOS, INC., a New York)
corporation; NATIONAL BROADCASTING)
COMPANY, INC., a Delaware)
corporation; and DOES 1 through 20,)
inclusive,)

Defendants and)
Cross-Complainants.)

AND RELATED CROSS-ACTION)
_____)

REPORTER'S DAILY TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

April 26, 2007

Volume 47 of
Pages 7755 to 7819

Ruanne McArthur, CRR, RMR, CSR #2699
Official Reporter

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EXHIBITS

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State of California)
) ss
County of Los Angeles)

I, Ruanne McArthur, CRR, RMR, Official Court Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing pages, 7755 through 7819, inclusive, comprise a full, true, and correct daily transcript of the proceedings held in the above-entitled matter on April 26, 2007.

Dated this 26th day of April, 2007.

Ruanne McArthur, RMR, CRR, CSR No. 2699
Official Court Reporter

1 Los Angeles, California April 26, 2007
2 Case Number: BC307563
3 Case Name: Kohan vs. NBC Studios
4 Department 4 Hon. Warren L. Ettinger, Judge
5 Reporter: Ruanne McArthur, RMR, CSR #2699
6 Time: 9:00 a.m. Session
7 Appearances: (As heretofore noted.)

8 -oOo-

9 THE COURT: Well, fancy meeting you all here
10 again.

11 Let me tell you where we are. We have a
12 jury trial with the jurors arriving momentarily. As soon
13 as your jurors arrive, they are being taken one at a
14 time, if necessary, out of this whole area and into the
15 jury room, just to let them sit there. So they won't
16 have to -- are there any more of them out there?

17 THE COURT LIAISON: I am missing one juror, your
18 Honor.

19 THE COURT: Let's take a look. I do not want
20 that juror brought in while I am talking to the jurors.

21 THE COURT LIAISON: I will take her through the
22 back hall.

23 THE COURT: Would you do that. Thank you.

24 So, I have before me two motions. Let me
25 take the easy one first. The motion by plaintiffs to
26 have defendants bring financial records this afternoon,
27 and that shouldn't be difficult to obtain.

28 What do you want to say about that?

1 MR. SHIELDS: Well, certainly premature, your
2 Honor.

3 THE COURT: Certainly it is premature, but having
4 said that, I don't want to keep these jurors -- I have no
5 idea what it is and we are not ready to open the sealed
6 verdict yet, but my question is: Is there any reason why
7 that information -- and you must have seen a copy of what
8 Mr. Nessim --

9 MR. SHIELDS: I got it this morning, your Honor.

10 THE COURT: All you have to do is flip to page 4
11 or whatever it is when he indicates the two types of
12 financial documents would be -- this would be sufficient
13 so we don't have to call witnesses and just give that to
14 the jury. That's the first -- my first question is:
15 What's the soonest we can get that?

16 MR. SHIELDS: I don't know, your Honor. I will
17 check and I will have an answer shortly.

18 In addition, I don't think that it is
19 appropriate to have simply the documents go to the jury.
20 I think that we will need some live testimony.

21 In addition -- if it ever arises.

22 THE COURT: Sure.

23 MR. SHIELDS: And in addition, your Honor, before
24 that, it seems to me that we have some decisions to make,
25 even before the presentation of any evidence with respect
26 to punitives. Before that happens, there are motions and
27 there are --

28 THE COURT: And I am aware of this and I

1 purposely -- as I said, I took the easy one first because
2 the easy one only has a question. The question is: How
3 quickly can we have those documents?

4 MR. SHIELDS: I will check with Mr. Lichtman. We
5 will have that information for the court shortly.

6 THE COURT: I did not mean to suggest in saying
7 that that you would be precluded from putting on any
8 evidence. I just needed to get that out of the way.

9 MR. SHIELDS: Okay.

10 THE COURT: Now we have the -- a much more
11 complicated issue -- are they all in there?

12 THE COURT LIAISON: They are, your Honor.

13 THE COURT: Okay. And watch out for the -- now
14 we are having another pack of jurors coming in so
15 Mrs. Luna will try to keep them occupied.

16 I know or I assume, Mr. Nessim, that you
17 folks just received the motion that was filed, and so I
18 want to hear from each side as to what course you would
19 like us to follow in terms of dealing with that motion
20 for mistrial.

21 Obviously, there has to be a hearing.
22 Obviously, we cannot rule before there is a hearing, and
23 the format of the hearing will take -- we will talk about
24 a little later on; but I want to know what do we do with
25 the verdict that has been signed, however it is, and
26 sealed, and we have it here?

27 So I would like to hear from both sides.

28 MR. SHIELDS: Your Honor, with respect to that,

1 to the extent that there is discussion and there is a
2 particular ruling on the motion, I think that there is
3 some question about what remedial action need be taken.

4 THE COURT: You have confused me. I'm sorry. I
5 am not following you.

6 MR. SHIELDS: To the extent that the court rules
7 in favor of -- grants the motion, then the question would
8 be what remedial action would be required.

9 And it seems to me --

10 THE COURT: You say your motion.

11 MR. SHIELDS: Yes.

12 THE COURT: Okay.

13 MR. SHIELDS: It seems to me that the remedial
14 action can span all the way from excusing that juror,
15 having the deliberations start anew. We don't think that
16 that necessarily is sufficient, but that certainly is
17 something that is in the mix. It goes all the way from
18 that to declaring a mistrial.

19 THE COURT: Sure.

20 MR. SHIELDS: So that it seems to me that the
21 verdict ought not to be opened until the decision on the
22 motion has been had because one of the possible
23 alternatives is to excuse that juror and have the
24 deliberations go forward with an alternate.

25 THE COURT: Well, let me just be a devil's
26 advocate because I truly haven't thought out what is the
27 most appropriate and I wouldn't make a decision without
28 hearing from the plaintiffs.

1 But let me ask you this: I have no idea
2 and you have no idea and Mr. Nessim has no idea what the
3 verdict is going to be.

4 MR. SHIELDS: That's correct.

5 THE COURT: If it is a defense verdict, then this
6 is all moot. It doesn't really matter, as far as you are
7 concerned. It may matter as far as Mr. Nessim is
8 concerned; but that puts us in a whole different light,
9 and then we don't have to worry about the issue of
10 punitive damages and we don't have to worry about
11 anything.

12 But we don't know what that is.

13 MR. SHIELDS: That is true, your Honor, and I
14 think this is one of those motions that need be decided
15 without regard to the outcome of the verdict.

16 THE COURT: Well, I am not sure you are right.
17 Because if the verdict is in plaintiffs' favor, then you
18 are in a position to show that you have been harmed, and,
19 therefore, the court should consider dealing with the
20 verdict that was against you, hypothetically.

21 Whereas if you are not harmed and the
22 verdict is in your favor, then we are spinning a lot of
23 wheels for no reason.

24 MR. SHIELDS: Doing that, your Honor, you should
25 recognize that that eliminates one of the possibilities.
26 It eliminates the first possibility that I postulated,
27 that is, the notion that perhaps, after a discussion,
28 there would be a decision to excuse that juror and to

1 start the deliberations anew.

2 The --

3 THE COURT: Why would that be?

4 MR. SHIELDS: Because if you have a verdict, it
5 would seem to me that you would then have the verdict and
6 then you would have whatever post-verdict issues that
7 would arise.

8 To the extent that you don't have a
9 verdict, then it seems to me that one of the options that
10 would be open at that point would be to excuse the juror;
11 but after the verdict has been rendered, after the
12 verdict has been heard, it seems to me that that
13 eliminates that option.

14 THE COURT: It does, unless all counsel stipulate
15 that we want to know where we are. We agree that the
16 court can hold a hearing. We can -- the court can then
17 go through any of the litany of suggestions that you have
18 asked, and that it will not inure to the detriment of
19 either side, and I am not suggesting anybody is going to
20 do this.

21 Let me hear from plaintiffs for a moment.
22 I understand what you are saying and it is a problem, in
23 a case that, fortunately, has been fraught with no
24 problems up to now.

25 (Laughter.)

26 MR. SHIELDS: Your Honor, I was just reflecting
27 on that, that there have been no problems here and it
28 arrived on the court's doorstep, having in the past,

1 experienced no problems.

2 THE COURT: Okay. Right. I am somewhat
3 disappointed that I haven't received a motion for
4 mistrial based on misconduct of the judge, but I am sure
5 that will come.

6 (Laughter.)

7 THE COURT: Yes, sir.

8 MR. NESSIM: Your Honor, let me consult for one
9 moment.

10 THE COURT: Absolutely.

11 MR. BOXER: Excuse us, your Honor.

12 May we just have a moment?

13 THE COURT: Yes.

14 (A pause in the proceedings.)

15 (Other court matters were heard.)

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(The following proceedings were held in open court outside the presence of the jury:)

THE COURT: All right. Back to Kohan versus NBC Studios.

Now, you are going to address, if I understand -- if I am just guessing, the motion that has been filed by the defendants for mistrial because of misconduct of a juror.

MR. NESSIM: Correct.

THE COURT: Okay.

MR. NESSIM: All right. As you pointed out, your Honor, we only just received it and only skimmed it; but this appears to be a post-trial motion. The alleged misconduct appears to predate the case. I don't think it's necessarily misconduct at all, though I haven't studied it.

THE COURT: Nor am I asking you to opine on it.

MR. NESSIM: Right. Possibly, as a suggestion, is that -- obviously, there has been a lot of time invested in this jury. We would recommend that if the court believes that there should be a hearing, and I think you indicated that was your belief, that the court question this juror because it appears that the views have nothing do with this case, predate the case, are just general political views. He's a political-type guy,

1 evidently.

2 But our suggestion is that you question
3 this juror to determine if there was bias in this case;
4 and that could occur, I think, either before the verdict
5 is read or after the verdict is read; but in either case,
6 we would have a record of whether there is bias by this
7 juror.

8 THE COURT: You are absolutely right. There has
9 to be a hearing. Let's focus on the second part of your
10 presentation and that is the when of it. Is it before or
11 after the verdict is read?

12 I don't dispute that we have to have some
13 kind of hearing.

14 MR. NESSIM: Right. Right.

15 I think it can be before the verdict is
16 read. I mean, I think that would make more sense, but we
17 would go with the court's preference in either way.

18 THE COURT: Well, I get back to the question that
19 I posed before, and I think Mr. Shields' point is
20 well-taken, once the verdict is read, it is read, unless
21 there is some kind of a stipulation.

22 I find -- let me pretend with you that
23 there was -- there will be a hearing and let us pretend
24 that we conclude that the juror is guilty of misconduct
25 for having failed to reveal certain information.

26 I did not see the questionnaire that you
27 folks posed and I don't need to see it right now, but I
28 am simply saying that we need to show -- and I think you

1 are correct -- one, there was misconduct; and two, if
2 there was, that it somehow or another caused the
3 deliberations to be unpure, if you will.

4 And that is a hearing.

5 On the other hand, as I posed to
6 Mr. Shields, if it turns out that none of this really
7 matters, then we are spinning a lot of wheels.

8 The second part of the problem, I think,
9 is -- going back to one of Mr. Shields' suggestions -- if
10 it turns out that the juror, who happens to be the
11 foreperson, is the one who we excuse for misconduct, I am
12 kind of at a loss to figure out how you can then say,
13 "Okay, the rest of you, you just start deliberating
14 again," because if that juror -- and none of us know what
15 was said in that room -- but if that juror was the
16 guiding force, I don't know how -- to use one of your
17 favorite phrases, how you unring that bell because
18 whatever that person brought to the table in reaching a
19 determination, I don't know how you can say to the other
20 jurors, "Now you all go back and we are going to give you
21 one of the alternates. Start all over again and forget
22 everything that your foreperson said because we have
23 concluded that he demonstrated bias," or whatever we
24 conclude.

25 MR. NESSIM: Right.

26 THE COURT: I don't know how you can do that.

27 MR. NESSIM: One moment.

28 (A pause in the proceedings.)

1 MR. NESSIM: First of all, I mean, we start from
2 the premise that there is no bias, even though --

3 THE COURT: Sure, I understand.

4 MR. NESSIM: But it seems to me that if this
5 court does make a determination that there was bias and
6 he is inappropriately on the jury, I mean, the court is
7 right, you have, I guess, one of two choices.

8 One is to put on an alternate and ask them
9 to deliberate anew. I think that you could question the
10 other jurors, and determine that they have an obligation
11 to begin anew. They have an obligation to disregard
12 anything that happened earlier or particularly what that
13 person said.

14 It seems to me that that is the preferable
15 course, given that this was a three-month trial, or close
16 to it; and all of the resources that went into it, rather
17 than starting anew.

18 I mean, nothing is perfect, if the court
19 makes that determination, but I think that would be a
20 preferable course.

21 The other request that we would make is if
22 the verdict is read, that we think parts of it -- it was
23 a lengthy special verdict, some questions may have been
24 confusing.

25 If the court notes that it is incomplete or
26 things like that, that would be another reason to send it
27 back or at least that is an issue that we should discuss.

28 THE COURT: Sure. If -- once it is open, the

1 methodology would be that the court would look at it and
2 determine whether or not it is complete.

3 Now, if it is incomplete, in a perfect
4 world, and we don't have all these motions, we would
5 simply send it back in and tell the jurors to complete
6 it. And so I agree with that.

7 Or at least we ask the jurors: "Question
8 number 8" -- and I am making this up, obviously -- "is
9 incomplete. Is it because you couldn't reach a verdict?"

10 Answer: "Yes, we left it blank because we
11 couldn't resolve that."

12 Okay. That's like a verdict.

13 MR. NESSIM: And it could be that certain of
14 them, if they were left blank, aren't necessary
15 because --

16 THE COURT: Exactly. Exactly.

17 MR. NESSIM: Of course.

18 THE COURT: So we would have to work that out.

19 MR. NESSIM: Your Honor, I guess our suggestion
20 would be for the court to examine this juror soon, you
21 know, perhaps he should be given an opportunity to look
22 at this so -- in fairness to him, so he could respond to
23 it; but that's only a suggestion.

24 THE COURT: I don't think so. I don't think he
25 is a party and I don't think he is entitled to due
26 process and we are not going to do anything to him.

27 MR. NESSIM: Sure.

28 THE COURT: I think a more interesting question

1 is should the examination be done in camera by the court
2 or should counsel be present during that? In any event,
3 it will be done with the court reporter.

4 MR. BOXER: Why not both, your Honor? Why not do
5 it in camera with counsel so the person is not
6 embarrassed but at least you can have a record?

7 THE COURT: The person -- which person is not
8 embarrassed?

9 MR. BOXER: The juror, because there may be
10 further proceedings and if you -- if it's in open
11 court --

12 THE COURT: I never intended it to be open court.
13 My question was do we do it in camera with just the court
14 or do we do it in camera with the court and counsel?

15 MR. BOXER: I think counsel need to be present
16 but I don't think they need to question, your Honor.

17 THE COURT: They clearly do not need to question.
18 They can question through me.

19 Yes?

20 MR. SHIELDS: Your Honor, I would concur that we
21 have the right to be there, and the parties should be
22 there.

23 THE COURT: Okay.

24 MR. SHIELDS: And we also would suggest that the
25 parties would have the right to give their suggestions to
26 the court as to which questions ought to be put to the
27 juror.

28 THE COURT: I agree with that. I would think

1 that the lawyers on both sides should -- you don't even
2 have to meet and confer on this one -- should prepare for
3 the court a script of those questions that you think go
4 either to the issue that defendants view as serious or
5 plaintiffs view as not as serious, whatever it is you
6 want to ask, that should be written out.

7 MR. NESSIM: My only --

8 MR. SHIELDS: Just one other point, your Honor.

9 We also believe that the question of
10 whether the deliberations were adulterated by the
11 participation of this particular juror is a different
12 question than the one as to whether or not the juror
13 engaged in misconduct such that the juror ought to be
14 excused.

15 It seems to me that that was a question of
16 what the juror said, what the juror did, how the juror
17 answered the questions on the questionnaire, and the
18 court's questions that were posed to him at the time that
19 he was examined and voir dire occurred.

20 So it seems to us that those two questions
21 are really different as to whether or not the juror ought
22 to be excused and whether or not the juror then, by
23 participating in the deliberations, somehow tainted the
24 deliberations.

25 Now, we don't know, and I know that I
26 hesitate, always, to agree with Mr. Nessim, he will tell
27 you that, but it seems to me that what I do agree with
28 Mr. Nessim regarding this issue is that the determination

1 of whether or not the deliberations have been tainted
2 really have to be determined after the issue of the juror
3 misconduct has been determined, and then the question of
4 whether or not there has been a taint.

5 And we are going to reserve judgment on
6 that, and I do believe that there is some desire on the
7 part of both sides, because of the length of this trial,
8 to try to do what is necessary to preserve the
9 deliberations and try to move forward.

10 And so that's why we are reserving our
11 determination as to whether or not there was a taint with
12 respect to the deliberations or not.

13 THE COURT: Well, it becomes an easy resolution
14 if the court concludes that the conduct of the juror is
15 not sufficient to have him excused. Then it is a much
16 easier call. I agree with that.

17 If, however -- it is my opinion that if,
18 however, it is concluded that that juror should not be
19 allowed to continue to deliberate, then, it seems to me,
20 the process of bringing out the jurors individually and
21 asking them, "Well, what do you remember him saying? And
22 did that influence you?"

23 I mean, it seems to me it is either tainted
24 or it is not tainted, and the idea of trying to go
25 through, on a juror-by-juror basis, and have them say,
26 "No, I wasn't paying any attention to him at all," or,
27 "Yeah, I listened to every word he said."

28 I mean that, it seems to me, is a recipe

1 for even more confusion than we have, so I won't do that.

2 MR. SHIELDS: Okay.

3 MR. NESSIM: Your Honor, a few suggestions.

4 First --

5 THE COURT: As long as you don't touch that
6 microphone.

7 MR. NESSIM: I will be very careful.

8 (Laughter.)

9 THE COURT: Okay.

10 MR. NESSIM: I will keep my hands back here.

11 THE COURT: Good.

12 MR. NESSIM: I think that this hearing -- maybe
13 we could take a 20-minute break. We could look at the --
14 read the motion more carefully -- I don't know if the
15 court has read it carefully -- and at that time, give the
16 court possible questions; but I think that the jury is
17 here waiting. They probably expected to get out this
18 morning, that we should do it as quickly as we could.

19 THE COURT: That's right, except that I want to
20 now explore the second avenue and that is read the
21 verdict. Bring them out, read the verdict, and see where
22 we are.

23 MR. NESSIM: Sure.

24 THE COURT: But I will need a stipulation from
25 both sides that Mr. --

26 MR. NESSIM: Hartwell, I think it is.

27 THE COURT: No, no.

28 MR. NESSIM: I'm sorry.

1 THE COURT: That Mr. Shields' motion will not be
2 mooted by the reading of the verdict.

3 MR. NESSIM: Right.

4 THE COURT: I don't think it is.

5 MR. NESSIM: Right. We would so stipulate; and I
6 am not sure that even reading it would preclude, if the
7 court made a determination that this juror had bias,
8 would preclude an alternate even after the reading to go
9 forward.

10 THE COURT: You and I differ. Let me tell you --

11 MR. NESSIM: I said I don't know.

12 THE COURT: Let me tell you what my thinking is,
13 and that may impact your thinking.

14 A, I think we should read the verdict
15 because it may moot this entire process or it may not;
16 but at least we know what we are dealing with, and so we
17 have that.

18 MR. NESSIM: Well, the bias could go both ways.

19 THE COURT: I understand.

20 MR. NESSIM: Of course.

21 THE COURT: Well, it wouldn't matter which way --
22 let me give you -- I don't think it can. If the bias, we
23 must assume, will go to the winner, if it is a
24 plaintiffs' verdict, then I suppose one could argue --
25 and we may find out -- that the rest of the jury panel
26 voted in spite of the foreperson; but if that's the case,
27 then there is really no bias that impacted the verdict.

28 If the verdict goes against the plaintiffs

1 and the jurors all say, or any of them say, "Yeah, we
2 listened to our foreperson and he voted for the defense
3 and so we went for defense."

4 Then the defendants, who have made the
5 motion for mistrial, have no bias. I know that that will
6 be followed close on the heels by a motion for mistrial
7 from the plaintiffs who claim that he polluted the pool.

8 So I understand that is going to happen,
9 but at least we know where we are.

10 What I do not agree with -- and I cannot
11 see -- if we determine -- if we determine that there is
12 no bias -- and incidentally, I think we should have the
13 hearing even after the reading of the verdict -- because
14 if it turns out that there was no misconduct on the part
15 of the foreperson, then the verdict stands.

16 If we determine that there was misconduct,
17 then I don't think you send back this same pool and you
18 say to them, "By the way, we are going to give you one of
19 the alternates. Start all over again."

20 Again, if all counsel stipulate that that
21 is what they want to do, I will certainly consider that,
22 but, I think, for the court to direct that is pretty
23 high-handed because it assumes that these jurors can just
24 erase everything that -- assuming that we make a finding
25 that the foreperson's conduct was improper, then it's
26 pretty hard to ask the jurors or instruct the jurors that
27 you will now begin deliberations again and forget
28 everything he said.

1 MR. NESSIM: You know, your Honor, I would -- you
2 know, I think reading the verdict first is fine. We
3 would certainly be willing to enter into the stipulation
4 you mentioned.

5 But I think that if the court does
6 determine, after questioning this juror, after the
7 reading of the verdict, that there -- that he should not
8 have been on the jury, then I think that it is not -- the
9 jury can be asked: "Can you disregard what he said?"

10 THE COURT: Sure.

11 MR. NESSIM: They are presumed to be able to
12 follow the law, and I am not sure it's that much
13 different of a situation with lots -- I mean the whole --
14 whenever one juror leaves, they begin anew and implicit
15 in that is they forget what was said in the first round,
16 and I think jurors --

17 THE COURT: No, it doesn't. I don't think it is.
18 I think all that we say when we bring in a new juror,
19 because of illness or whatever, is, "You start your
20 deliberations anew"; and that means that they go through
21 and they review the evidence anew.

22 We do not instruct a jury under those
23 circumstances to disregard any discussions that happened.
24 We simply say, "Start with deliberations again."

25 So this is a little different than that.

26 MR. NESSIM: Right.

27 THE COURT: But you are right, we are jumping the
28 gun.

1 MR. NESSIM: Sure.

2 THE COURT: And we need -- in my opinion, we need
3 to know whether or not there was misconduct.

4 MR. NESSIM: Right. So maybe what we should do
5 is what I think you are suggesting is, if the court
6 determines that there was sufficient bias, then we can
7 discuss the next step --

8 THE COURT: Exactly.

9 MR. NESSIM: -- because -- let's --

10 THE COURT: Let's see where we are.

11 Yes?

12 MR. SHIELDS: Your Honor, two points. First of
13 all, it is difficult for us to see the benefit of reading
14 the verdict if the plaintiffs can object. It seems to me
15 that --

16 THE COURT: They said they will stipulate that
17 there will be no impediment or waiver on your part.

18 You can -- let me jump ahead. Let's
19 pretend this didn't happen and the verdict is in favor of
20 the defendants -- stop smiling -- and there is nothing to
21 prevent the plaintiffs from then making a motion for
22 judgment notwithstanding the verdict, for a mistrial, for
23 anything they want.

24 So I am not suggesting that they give up
25 any rights. I don't think I have --

26 MR. SHIELDS: That is the point, your Honor, that
27 the question of the juror misconduct is going to have to
28 be resolved and decided one way or the other.

1 THE COURT: No, it won't. If it is a defense
2 verdict, then the only motion that I have before me is a
3 motion to dis -- for mistrial based upon misconduct of
4 the juror.

5 If it is a defense verdict, then your
6 motion is moot. Other than being a person who wants to
7 uphold the virtue of the courts and justice and the
8 American way, it is not going to happen.

9 MR. SHIELDS: I understand that, your Honor.

10 But the point we were trying to make is if
11 the plaintiffs could object that that objection would be
12 forthcoming probably directly and immediately.

13 THE COURT: No. It would be forthcoming as any
14 post-verdict motion would be.

15 MR. SHIELDS: Well --

16 THE COURT: Nothing wrong with that.

17 MR. SHIELDS: The second point, your Honor, is
18 that I can't stipulate to that without the consulting
19 with my client so if I can go and consult with my
20 client --

21 THE COURT: Go ahead.

22 MR. SHIELDS: -- and we will be back in a few
23 minutes.

24 THE COURT: Tell the client that what you are
25 stipulating to is that in the event that we waive -- that
26 we read the verdict, that you are not waiving your motion
27 for a mistrial. See if he's unwilling to do that. I
28 would be anxious to hear that.

1 MR. SHIELDS: All right. Thank you.

2 MR. NESSIM: And, your Honor --

3 THE COURT: While you are talking to him, ask him
4 how soon he can have his financial information here.

5 (Laughter.)

6 MR. SHIELDS: We will.

7 MR. NESSIM: Your Honor, the procedural --

8 MR. SHIELDS: Those two seem inconsistent.

9 THE COURT: Pardon me?

10 MR. SHIELDS: I said those two seem inconsistent
11 but --

12 THE COURT: Yes.

13 MR. NESSIM: Your Honor, just --

14 THE COURT: Before you leave, Mr. Shields.

15 Yes?

16 MR. NESSIM: Do you want us, before you read the
17 verdict, to give you suggested questions or should we
18 take that up after you read the verdict? I know you are
19 going to question the juror after but I don't know when
20 you want our input.

21 THE COURT: I don't know that I am even going to
22 question the juror after because --

23 MR. NESSIM: True.

24 THE COURT: -- if it is a defense verdict,
25 Mr. Nessim stands up and magnanimously -- excuse me,
26 Mr. Shields stands up and magnanimously says, "Since we
27 won, we will withdraw our motion." Hence, no need to
28 question. And I don't have any motions from you folks,

1 thank God.

2 So your motion will be in the nature -- and
3 you may want to, to preserve something, you may want to
4 have all of us and the foreperson go in to chambers and
5 we may be able to do that.

6 Anyhow, you want to go make your phone
7 call.

8 MR. SHIELDS: I do, your Honor.

9 THE COURT: All right. We will take a 15-minute
10 break.

11 MR. SHIELDS: Can we have until 10:00, your
12 Honor, if it's okay?

13 THE COURT: Sure.

14 MR. SHIELDS: Thank you.

15 THE COURT: Are you going to send a courier?

16 MR. SHIELDS: Your Honor, we are going to send
17 carrier pigeons, your Honor.

18 THE COURT: Folks, before you leave, we are going
19 to let the jurors go to coffee.

20 MR. SHIELDS: Yes.

21 THE COURT: You are obviously instructed, because
22 I will declare my own mistrial, not to communicate with
23 them, not to talk to them, not to have any contact with
24 this panel.

25 And if you take the jurors out, take them
26 out the back way and tell them that they are free for
27 coffee until 10:00, and then come back in through the
28 back way.

1 MR. SHIELDS: Thank you, your Honor.

2 MR. NESSIM: Thank you, your Honor.

3

4 (A recess was taken in the proceedings.)

5

6 (The following proceedings were held in
7 open court outside the presence of the
8 jury:)

9

10 THE COURT: The record will reflect that all
11 counsel in Kohan versus NBC are present, the jury is
12 still not present.

13 And, Mr. Shields, you have the floor.

14 MR. SHIELDS: Okay. Thank you, your Honor.

15 With respect to the stipulation, what we
16 would do is we would stipulate that the court could read
17 the verdict and make a decision as to whether or not the
18 hearing should go forward or when it should go forward,
19 and that the court would make the decision after looking
20 at the verdict; and we could stipulate that the court
21 could look at the verdict, that it would not be read in
22 open court, but the court could do that.

23 THE COURT: And based upon the court's reading,
24 can determine whether or not we need to go forward with
25 these other proceedings.

26 MR. SHIELDS: Yes. Correct.

27 THE COURT: All right.

28 MR. NESSIM: Let me consult for a moment, your

1 Honor.

2 THE COURT: Sure.

3 (A pause in the proceedings.)

4 MR. NESSIM: Your Honor, let me just ask for one
5 clarification, if I could.

6 THE COURT: Sure.

7 MR. NESSIM: Was the proposed stipulation that
8 the court read the verdict and share it with counsel
9 only?

10 THE COURT: No.

11 MR. NESSIM: Or that the court --

12 THE COURT: As I understood it, the court just
13 reads the verdict. If, in reading the verdict, it
14 appears, for example -- I will give you several
15 permutations -- that there are some blanks in it and it
16 needs to be sent back, then I would announce that to
17 counsel.

18 If it is the type of a case where it
19 indicates there are sufficient votes in favor of
20 plaintiff, then we would have a hearing as to that juror
21 to determine whether or not the mistrial should be
22 granted or whether we can excuse him or whatever it may
23 be.

24 And if it is a verdict totally in favor of
25 defendants, then it would become -- their motion would
26 become moot because there is no damage shown, which does
27 not, in the opinion of the court, preclude plaintiff from
28 making a post-verdict motion.

1 And then, if the court believes that the
2 motion should be -- let's take them one at a time.

3 If the defendant prevails, we still bring
4 out the jury and you get to question them individually,
5 "Is that your true vote?"

6 If plaintiff prevails, then we need to
7 examine the one juror before we bring the jurors out, and
8 then we may go through the same process.

9 MR. NESSIM: Well, I guess what we would propose,
10 your Honor, that -- we agree that these decisions should
11 be in the discretion of the court, but I think if the
12 court determines that it is appropriate to question the
13 juror in question, we would also ask the court to at
14 least consider questioning the other jurors to see if
15 they could put -- if the court makes a determination that
16 this person should not have been on the jury, make a --
17 at least question them to see whether they could put it
18 aside or whether --

19 THE COURT: I don't have any problem. I am not
20 sure of the verity of doing that because this jury wants
21 to go home.

22 MR. NESSIM: Of course.

23 THE COURT: And the answers that you are going to
24 get is, "No, we couldn't put that out of our mind. Get
25 another jury. It is not our problem anymore." But I
26 don't have any objection to doing that. I just don't
27 know that I have a lot of faith in it.

28 MR. NESSIM: Okay. Well, why don't we see where

1 we are?

2 MR. BOXER: Excuse me for a minute.

3 THE COURT: Sure.

4 (A pause in the proceedings.)

5 THE COURT: To finish my thought --

6 MR. BOXER: Excuse me.

7 THE COURT: -- I have serious doubt in my mind
8 that you are going to be able to get them to stay for
9 punitives, forget about anything else, but anyhow --

10 MR. NESSIM: Your Honor, the one -- obviously,
11 there are pros and cons with each approach but one
12 advantage I saw in Mr. Shields' proposal is at least we
13 would have opened the possibility of, if the court
14 determined that this juror needed to be excused, of
15 continuing either with 11 or continuing with adding one.

16 But if the court has made a determination
17 that we are not going to go that way, then there is
18 probably no reason not to read the verdict.

19 THE COURT: Well, I just have a personal opinion.
20 I would not preclude -- assuming we decide,
21 hypothetically, that that one juror is to be excused. It
22 seems to me that both sides may very well want to
23 question the remainder of the panel. I will do it first,
24 but I would not preclude the counsel from questioning the
25 jurors to determine whether or not, when all is said and
26 done, you want the 11 or the 11 plus an alternate or what
27 have you, to deliberate.

28 But I do believe that, at a minimum, if it

1 turns out that the one juror is excused, that the jurors
2 should deliberate anew, should deliberate with an
3 alternate, and the question is: To what end? And I
4 leave that really to the lawyers, and they would
5 participate in that voir dire examination.

6 MR. NESSIM: All right. And, your Honor, I
7 should add that we did have the chance in the break to
8 read the motion and just so you know our position --

9 THE COURT: You're opposed to it. I understand
10 your position.

11 MR. NESSIM: I know, but to give you some more
12 particulars, if I may briefly.

13 THE COURT: I don't need them now.

14 MR. NESSIM: Okay.

15 THE COURT: I don't at this point.

16 MR. NESSIM: At the appropriate time, I would
17 like to.

18 THE COURT: Sure. You will get an opportunity to
19 do that, but I don't need them now.

20 May I see the verdict? You don't have it.
21 You have lost it.

22 THE CLERK: Your Honor, I was just looking for
23 Mrs. Luna, who has the key to where it is locked up.

24 THE COURT: The jurors should be back in there.

25 THE CLERK: I knocked on the door. The door is
26 locked. They are off.

27 THE COURT: We need to get them here.

28 Kind of stick your head out the door and

1 see when she gets here.

2 (A pause in the proceedings.)

3 THE COURT: I should let you know, Counsel from
4 both sides, we have attempted to contact Judge Elias to
5 see if there is available a transcript of her voir dire
6 examination. If you have such a thing, I would sure like
7 to see it.

8 MR. SHIELDS: We are attempting to get the entire
9 voir dire transcript, your Honor.

10 THE COURT: Great.

11 MR. SHIELDS: I think we have certainly the vast
12 bulk of it but we are trying to get the entirety of it.

13 THE COURT: Okay. I would like that, and then we
14 are trying to get a copy -- and you may have that -- of
15 his answer to -- answers to the written questionnaire. I
16 don't have that.

17 This is the first time in my life I have
18 ever had a situation where another judge picked the
19 entire panel, went through all the voir dire, and then I
20 end up with the case.

21 MR. SHIELDS: Your Honor, this is the first for
22 me as well.

23 THE COURT: Okay.

24 MR. SHIELDS: It is the first for me personally,
25 and I have never really heard it happen before.

26 THE COURT: Well, and I can understand why. If a
27 judge suddenly disqualifies themselves, you have no
28 option, if they don't have that information right away.

1 I got -- we can go off the record.

2 (A pause in the proceedings.)

3 THE COURT: The record will reflect that the jury
4 is still not in the courtroom. The court has been handed
5 the sealed verdict form.

6 (A pause in the proceedings.)

7 THE COURT: It is the opinion of the court,
8 having looked at the verdict form in a rapid fashion,
9 without parsing out each individual portion, that it is
10 appropriate to interview the foreperson before going any
11 further.

12 MR. SHIELDS: Okay. Your Honor, can we have a
13 specified amount of time to write out questions for the
14 court?

15 THE COURT: Well, that time has come and gone.
16 You need to do it right now.

17 MR. SHIELDS: We had started.

18 THE COURT: Okay.

19 MR. NESSIM: I would like you to finish in the
20 next few minutes because I don't want to keep this jury
21 present.

22 And by the way, let me ask the question
23 that I asked at the outset: Is there any reason why you
24 would not be able to have the financial information of
25 NBC here this afternoon?

26 MR. SHIELDS: We are searching for the person,
27 your Honor, and we will --

28 THE COURT: I don't think this jury really

1 contemplates that they are going to have to come back,
2 and indeed they may.

3 I think what we ought to do -- it is now
4 almost 10:30.

5 Do you have your questions ready,
6 Mr. Nessim?

7 MR. BOXER: Yes, we do.

8 THE COURT: Okay. Let me have those and I would
9 be anxious to hear your suggestions as to what we need to
10 do with reference to the other jurors while we are
11 questioning the foreperson.

12 MR. NESSIM: Your Honor, should I hand it to the
13 clerk or read them?

14 THE COURT: Just hand it to the clerk, assuming I
15 can read your handwriting.

16 MR. NESSIM: Let me know if you can't.

17 THE COURT: Okay. Thank you.

18 (A pause in the proceedings.)

19 THE COURT: Would you show this to Mr. Shields,
20 and we will let you see his as well.

21 MR. NESSIM: Your Honor, my only comment is when
22 you question the juror that he not be presumed to have
23 done anything wrong and that he not be put on the
24 defensive in terms of the form of the question.

25 (A pause in the proceedings.)

26 MR. NESSIM: Your Honor, have you decided whether
27 your examination will be in camera or whether the lawyers
28 will be present?

1 THE COURT: The lawyers will be present and it
2 will be in camera.

3 MR. NESSIM: And will it be before or after the
4 verdict is read?

5 THE COURT: Before.

6 MR. NESSIM: Okay.

7 THE COURT: It will be the next order of
8 business.

9 (A pause in the proceedings.)

10 (The following proceedings were held in
11 chambers :)

12 THE COURT: Mr. Nessim, you want to put something
13 on the record. You have four minutes to do it.

14 MR. NESSIM: Okay.

15 THE COURT: Because we are not going to waste any
16 more time here.

17 MR. NESSIM: Okay. First of all, we did read the
18 materials. This information that was on his website was
19 publicly and readily available. We think it's too late
20 to --

21 THE COURT: You are wasting your time. I am not
22 going to set a precedent that says every lawyer has to
23 Google every possible juror. That is lunacy.

24 MR. NESSIM: Let me continue then.

25 THE COURT: Go to a new topic.

26 MR. NESSIM: I think that what his website
27 writings reflect, all which were written before this case
28 began, were strong political views about the Iraq war,

1 about 9/11, about the Bush administration. It doesn't
2 reveal any bias about the facts of this case or his being
3 a juror on this case. I mean, jurors have all sorts of
4 political views and I don't think that his websites
5 reflect anything other than that.

6 Now -- and I think jurors commonly put
7 aside the views that they have on a variety of cases,
8 criminal cases, civil cases, whatever.

9 Now, in terms of their questions, this is
10 not a repeat voir dire to ask him any question one wants
11 about his political views. The question is whether he
12 was biased in this case, whether his political views or
13 personal views, whatever they were, biased him in this
14 case; and we think that the court's questions should be
15 limited to that. It should not be felt that he's being
16 put on trial or intimidated.

17 Based on the written questionnaire, as you
18 indicated it, I haven't seen anything orally to indicate
19 he made any false statements. These were -- the
20 questions that they have asked were things they could
21 have explored in oral voir dire; and I think almost all
22 of these questions are either irrelevant or don't go to
23 the bias in this case.

24 The only possible exception would be the
25 second to the last about -- you limited to NBC: "Other
26 than articles posted in your website, have you expressed
27 written or oral opinions about NBC?" Perhaps that is an
28 appropriate question about bias, but I don't think it's

1 appropriate to explore all of his, you know, political
2 views and all of that.

3 The question is whether he was biased in
4 this case, and I think the questions should be limited to
5 that.

6 THE COURT: Okay. Bring him in.

7 (A pause in the proceedings.)

8 MR. BOXER: Your Honor, the juror does not know
9 me. Perhaps if you could identify me or allow me to
10 identify myself.

11 THE COURT: You can all identify yourselves.

12 MR. BOXER: Thank you very much, your Honor.

13 (A pause in the proceedings.)

14 THE COURT: Good morning, Mr. Hartwell. Have a
15 seat over here. We need to ask you some questions.

16 It has come to my attention that for some
17 time you have had a website?

18 JUROR HARTWELL: That's correct.

19 THE COURT: And you have written some articles?

20 JUROR HARTWELL: I have.

21 THE COURT: And I would like to ask you some
22 questions about the articles.

23 JUROR HARTWELL: Okay.

24 THE COURT: First of all, did you have any
25 opinions of NBC Studios or GE before you came in here for
26 this trial?

27 JUROR HARTWELL: No.

28 THE COURT: Okay.

1 JUROR HARTWELL: I referred to the mass media on
2 occasions.

3 THE COURT: Yes. And mentioned ABC and NBC by
4 name?

5 JUROR HARTWELL: ABC and NBC by name.

6 THE COURT: Yes. Let me give you a quote, if I
7 may. And I hope this is an accurate quote. This is in
8 an article that you wrote in May of 2005:

9 "How can the corporate media
10 (such as ABC, NBC, CBS, and Fox) miss
11 all these stories and annoy us with
12 phony ones. The Walt Disney Company
13 owns ABC, Viacom owns CBS, General
14 Electric owns NBC. The executives
15 who make decisions on what to air
16 receive huge tax cuts thanks to the
17 Bush administration policies as do
18 the corporations themselves."

19 That is -- it is to that that I referred.

20 JUROR HARTWELL: Okay.

21 THE COURT: And I guess my question is: Other
22 than the writings that appear on your website, have you
23 written any other articles?

24 JUROR HARTWELL: None that I can recall.

25 THE COURT: Okay. Before the trial, did you have
26 a feeling about the relationship between the government
27 and the media other than what you have said in your
28 articles?

1 JUROR HARTWELL: A relationship. A relationship
2 where, on occasions, I believe that parts of the mass
3 media do take direction from members of the government,
4 yes.

5 THE COURT: Okay. Did you have any reason why
6 you didn't reveal that on your questionnaire?

7 JUROR HARTWELL: I can't recall any question that
8 appeared to refer to that.

9 THE COURT: Okay. Let me read two, and you may
10 be right, but let me read two of them.

11 On the questionnaire, the last two
12 questions were:

13 "If you have any ethical,
14 religious, political, or other
15 beliefs that may prevent you from
16 serving as a juror, explain."

17 And you left that blank?

18 JUROR HARTWELL: That's correct.

19 THE COURT: And the next one was:

20 "Is there anything not covered
21 by this questionnaire that would
22 affect your ability to be a fair and
23 an impartial juror?"

24 And you said no?

25 JUROR HARTWELL: That's correct.

26 THE COURT: Okay. Then Judge Elias, in her
27 courtroom, asked these three questions, and apparently
28 she had given you all a description of what this case was

1 about, correct?

2 JUROR HARTWELL: Yes.

3 THE COURT: And she told you who the parties
4 were?

5 JUROR HARTWELL: Yes.

6 THE COURT: Okay. And then she said:

7 "Having heard the description of
8 the case, is there any member of the
9 panel that feels that he or she
10 cannot give either side of the
11 parties a fair trial?"

12 And then she asked:

13 "Does anyone have any feelings
14 about the nature or subject matter of
15 the case that would make it difficult
16 for you to be a fair and impartial
17 juror?"

18 And then she said:

19 "Do any of you have any belief
20 or feelings toward any of the
21 parties, attorneys, or witnesses that
22 might be regarded as prejudice or
23 bias for or against any of them?"

24 JUROR HARTWELL: That's correct.

25 THE COURT: And you did not answer any of those
26 questions?

27 JUROR HARTWELL: That's correct.

28 THE COURT: Why not?

1 JUROR HARTWELL: I believed then and I believe
2 now that I could be a fair and impartial juror. I don't
3 have ill feelings towards NBC nor towards the parties,
4 and I understood the case to be about plaintiffs who had
5 got involved in a contract dispute with NBC and NBC
6 Studios.

7 THE COURT: Did they not mention -- and again, I
8 wasn't there, so you are going to have to help me out.

9 Did no one mention the fact that there were
10 allegations of fraud against NBC?

11 JUROR HARTWELL: This was mentioned, yes.

12 THE COURT: Okay. That is something other than
13 the contract.

14 JUROR HARTWELL: Right. I understood the actions
15 to be in the context of deliberating or deciding upon a
16 contract or about other matters between the plaintiffs
17 and the defendants.

18 THE COURT: The plaintiffs being individuals and
19 the defendant being a corporation?

20 JUROR HARTWELL: That's correct.

21 THE COURT: Okay. And at no time did you feel
22 that it was appropriate for you to tell the lawyers on
23 both sides any of your feelings about -- that you wrote
24 about in your website?

25 JUROR HARTWELL: That's correct.

26 THE COURT: Okay. Now, how about the views, when
27 you were leading the discussion or participating in the
28 discussion, did you tell anything to the jurors about

1 your view of corporations and how they are beholden to
2 the government?

3 JUROR HARTWELL: No.

4 THE COURT: Did you talk about anything
5 concerning the corporations and how they favor the
6 government, specifically the Bush administration?

7 JUROR HARTWELL: No, I did not.

8 THE COURT: I'm sorry?

9 JUROR HARTWELL: No, sir, I did not.

10 THE COURT: You did not.

11 So it is your belief that -- or is it your
12 belief that the views that you expressed on the website
13 did not, in any way, impact on your vote?

14 JUROR HARTWELL: That's correct.

15 THE COURT: And how about what you said to other
16 jurors?

17 JUROR HARTWELL: It had no impact on what I said
18 to other jurors.

19 THE COURT: Okay. Then go back to my question.
20 When Judge Elias read those final three questions, was
21 there a reason why you didn't raise your hand and say, in
22 substance, "You know, I don't think it's going to affect
23 my vote, but the lawyers, in fairness, ought to know that
24 I have written these articles and here is what they say"?

25 Any reason why you didn't tell them that?

26 JUROR HARTWELL: The article in which I made
27 reference to NBC and other big media corporations did not
28 appear to be connected at all to the case that I was

1 being told about.

2 THE COURT: Well, that is not my question, sir.
3 My question is: Didn't you feel that it would be
4 appropriate to say to the lawyers, "You know, you ought
5 to know this about me. I think I can be a fair juror,
6 but I have written some articles that are very critical
7 about big corporations, including NBC"?

8 Did you not think that might be helpful to
9 the lawyers in deciding whether or not you should be kept
10 as a juror?

11 JUROR HARTWELL: No, I did not consider that.

12 THE COURT: You didn't consider it. Okay.

13 Now, Judge Elias, at the time she was
14 giving you the verbal questionnaire, if I may, said to
15 the panel that what we are trying to do is to pick a fair
16 and an impartial jury, didn't she?

17 JUROR HARTWELL: She did.

18 THE COURT: And she said that it is important
19 that the lawyers on both sides get jurors that do not
20 start out ahead or behind one another, correct?

21 JUROR HARTWELL: Correct.

22 THE COURT: I don't have any other questions.

23 Anybody have any single question that you
24 think is significant?

25 MR. SHIELDS: Just whether other jurors knew
26 about the website.

27 THE COURT: Well, all right. Do you know if any
28 of the other jurors knew about your website? We can ask

1 them but it would be easier just to ask you.

2 JUROR HARTWELL: I don't believe they know about
3 the website, no. I did not mention it.

4 THE COURT: So if they found out about it, they
5 found out from somebody other than you?

6 JUROR HARTWELL: That would be correct.

7 THE COURT: Okay. Thank you so much. We
8 appreciate your coming.

9 MR. NESSIM: Thank you.

10 (A pause in the proceedings.)

11 THE COURT: I think he should be disqualified. I
12 don't think there is a chance in the world that he should
13 not have revealed that to the lawyers during Judge Elias'
14 voir dire.

15 MR. NESSIM: Your Honor, may I be heard on that?

16 THE COURT: You sure may.

17 MR. NESSIM: I don't think that there was
18 anything. He made the determination that he was -- it
19 was described that it was a case between a wealthy group
20 of plaintiffs, individuals and corporations, against
21 NBCS, and the case concerned Will & Grace profit
22 participation; and there is nothing in his website views
23 that relate to that sort of dispute.

24 He has political views on 9/11, on the Iraq
25 war, on the Bush administration, and that the media may
26 be carrying the administration line, but I don't think
27 there was any obligation for him -- I don't think there
28 was any question that called for that information, and I

1 don't think -- I think he gave an honest answer when he
2 said that it was a fair -- he didn't think that he had an
3 obligation to volunteer it.

4 If he had a view that related to the facts
5 of this case, I would agree with you completely.

6 THE COURT: I don't think his answer was honest.

7 MR. NESSIM: Well, I actually --

8 THE COURT: Come in.

9 THE COURT LIAISON: They are asking if there is a
10 possibility they can leave for lunch or either order
11 lunch because they are extremely hungry.

12 THE COURT: You didn't feed them when you took
13 them out?

14 THE COURT LIAISON: I didn't have a card, your
15 Honor.

16 THE COURT: Okay.

17 MR. NESSIM: Your Honor, I think that his -- I
18 don't think there is any reason to conclude he is not
19 telling the truth. He acknowledged --

20 THE COURT: Counsel, I do make credibility calls
21 all the time. I like to think I am right. You don't
22 have to agree with me. I am satisfied that he should not
23 be on this panel.

24 Now my question is: What do we do about
25 it? I am going to excuse him.

26 Now, what do we do about it?

27 MR. BOXER: Well, your Honor, it would seem
28 premature, at least, to assume that the jurors cannot

1 follow the law.

2 THE COURT: That is a different issue.

3 MR. BOXER: Which would be to bring an alternate
4 on and proceed, unless the parties were willing to
5 stipulate to an 11-person jury.

6 MR. SHIELDS: No.

7 THE COURT: You have raised an appropriate
8 question. He is going to be off. Now we have 11 jurors,
9 and we have available two alternates.

10 What -- and I am open to either of those
11 suggestions because I don't want to throw away two
12 months' worth of work just with a waive of my hand.

13 We may very well have to question the other
14 jurors, and we may have to question them individually or
15 together; but I don't care -- we won't -- well, I think
16 we have to do that whether we are going to go with 11 or
17 whether we are going to go with 12, bringing in an
18 alternate. I think in either case --

19 MR. BOXER: I am not sure that that is
20 available --

21 MR. SHIELDS: We have already --

22 MR. NESSIM: Before you disqualify --

23 THE COURT: Let's go off record. If you are
24 going to babble, it's not going to be on record.

25 MR. SHIELDS: I understand, your Honor. I'm
26 sorry.

27 THE COURT: You were saying?

28 MR. BOXER: I heard counsel for defendant quietly

1 say they wouldn't agree to 11, so that may not be an
2 option.

3 THE COURT: That's fine. I don't care. We have
4 two alternates.

5 MR. NESSIM: Your Honor, it's obviously your call
6 to make on this.

7 THE COURT: I have made that call. He is gone.
8 Now where do we go is my question?

9 MR. NESSIM: I take it we don't know what the
10 vote was on the --

11 THE COURT: I don't know. I have no idea. Nor
12 knowing, do I care. I think they have got to start their
13 deliberations anew.

14 MR. NESSIM: Then I think the answer is we need
15 to bring in the first alternate.

16 THE COURT: Okay. We will do that.

17 MR. NESSIM: Unless they stipulate to 11.

18 THE COURT: No, they don't want to do that and
19 that's okay.

20 MR. NESSIM: That's fine.

21 THE COURT: My question, however, is: How do we
22 question the remaining 11? And I think we have got to be
23 able to say to the remaining 11 that we have excused the
24 foreperson, and we have excused the foreperson because he
25 failed to respond to questions asked by Judge Elias and,
26 therefore, we want to know whether or not -- I think we
27 need to tell them that he has written some websites
28 critical -- without going into the details -- of major

1 corporations, including NBC, and we need to ask them the
2 question: "If he's not there and you have one of the
3 alternates brought in, are you able to put out of your
4 mind whatever it is he may have said and begin
5 deliberating anew?"

6 MR. BOXER: I don't know why you would need to do
7 that individually.

8 THE COURT: No, I don't either.

9 MR. SHIELDS: Your Honor --

10 THE COURT: I think we need to tell them that.

11 MR. NESSIM: Your Honor, I think we've also --
12 it's certainly our view that his comments, a prolific
13 writer/author, have been taken out of context. I mean, I
14 think a lot of people write things about political issues
15 and I would not agree with the statement that he -- that
16 he made a false statement or that he was obligated -- I
17 mean, it's certainly our view that he --

18 THE COURT: Counsel, you have said that. We are
19 past that. The question I need to know, and I so far
20 have heard from Mr. Boxer and it makes sense, there is no
21 need to bring the jurors out individually. We bring out
22 the 11 of them, and we -- and you have Ms. Mason -- we
23 don't even have the other jurors, do we, the alternates?

24 THE COURT LIAISON: We do, your Honor.

25 THE COURT: The first alternate, have her brought
26 into the courtroom.

27 MR. SHIELDS: Your Honor, may I be heard on the
28 individual thing?

1 THE COURT: Yes.

2 MR. SHIELDS: Because this person was the
3 foreperson, I think, in order to ensure the candor of
4 each of the jurors, I think individual examination is
5 really needed because if they are in a group setting,
6 they are going to be under the gaze of everyone else and
7 I think that they will be far more candid about what it
8 is they did, felt, and saw during the deliberations if
9 they didn't have other jurors --

10 THE COURT: I don't intend to ask them what they
11 did or saw. What I intend to ask them, as a group, I
12 intend to tell them that we have excused the foreperson,
13 that we excused the foreperson because, in the opinion of
14 the court, based upon previous writings that he has
15 engaged in, that his failure to answer the question, "Do
16 you have any belief or feelings toward any of the
17 parties, attorneys, or witnesses that might be regarded
18 as bias or prejudice," and that, in the opinion of the
19 court, disqualified him.

20 I would then ask the jury, as a group: "We
21 are bringing in an additional juror, one of the
22 alternates, and I am going to direct you to go in and
23 re-deliberate, and -- as though you had not done it. Is
24 there anyone on the jury panel who, as a result of
25 anything said by their foreperson, or anything -- of his
26 views, that would make it impossible for you to go and
27 re-deliberate on this case? Show me your hands."

28 If anyone raises their hands, they are

1 gone.

2 MR. SHIELDS: Well, your Honor, I think that the
3 question should be not impossible but difficult.

4 MR. de BODO: It should be affected.

5 MR. SHIELDS: And I think affected by the thing
6 because --

7 THE COURT: I don't mind that. But I am not
8 going to question each individual juror. I just want to
9 know if we bring a new juror in, one of the alternates,
10 can they be fair to both sides.

11 MR. SHIELDS: May I ask this, your Honor? Can I
12 ask you to ask the jurors that if a juror would rather be
13 questioned about this in private, that they send a note
14 or that they indicate that they would rather do it in
15 private?

16 THE COURT: Sure. I don't have any problem with
17 that if that's what they want, but I am not interested in
18 hearing what the views were that were expressed and I
19 certainly would not do that in the presence of the other
20 jurors.

21 MR. SHIELDS: Yeah, and the issue here is that
22 once having been led to the water, so to speak, to drink,
23 are they there and they are going to remain there
24 irrespective of what they do.

25 So I think that what we are concerned about
26 is whether or not the whole process has been so tainted
27 by him in that the process, now going back will not be
28 effective and that is the examination that we would like

1 to have made.

2 And we think that we really have a problem
3 because he was the foreperson. If he would have been
4 somebody other than the foreperson, we think that we are
5 entitled to a real examination of the jury about his role
6 in the process because if his role in the process was
7 significant and his role in the process was to lead them
8 to a decision, then it seems to me that it is going to be
9 difficult for them to come to a different conclusion,
10 even though he is not there; and that is the question
11 that I think needs to be addressed with the jury and that
12 we need to get real comfort about their ability to do
13 that before.

14 THE COURT: I hear what you are saying and it
15 makes sense.

16 What if they say, however, "No, we weren't
17 affected by him one way or the other and we would be more
18 than happy to bring in the alternate juror, and we will
19 go right down it, we can do it in half the time, and we
20 will go forward."

21 MR. BOXER: Your Honor, the problem you have is
22 if you ask the question as broadly as "affected," you are
23 asking a jury to ignore the instruction which is to
24 listen to other people --

25 THE COURT: Right.

26 MR. BOXER: -- and to deliberate.

27 Obviously, if they did their job and they
28 sat together for five days, each person listened to every

1 other person.

2 The issue here is whether or not they can
3 start anew and appropriately. If they ask a question as
4 broadly as Mr. Shields' question, you know the answer and
5 it is going to lead to a mistrial and the jurors are
6 going to say, "Clearly, we listened to him. He asked us
7 to vote. He stated his views." I hope they listened to
8 him.

9 The issue is whether or not what the court
10 now has concluded was an inappropriate disclosure, has
11 anything to do with the deliberations.

12 THE COURT: How do you know that unless you --
13 you know, you have subliminal leadership as well as
14 direct leadership. I don't disagree with what you have
15 said, Mr. Boxer. I am just trying to figure out how, in
16 fairness to both sides, we are not having a knee-jerk
17 reaction, unless we ask questions individually.

18 I think I am becoming persuaded that we at
19 least need to ask the jurors a question, two questions,
20 three questions, to find out whether they could --

21 MR. BOXER: There is no reason to do it
22 individually. I am very concerned that we are going to
23 lose the patience of jury and we only have two
24 alternates. We know that NBCS has made multiple mistrial
25 motions. They don't want this case to be completed at
26 this time.

27 THE COURT: And, indeed, they may have those same
28 motions for mistrial, maybe in the guise of a motion for

1 judgment notwithstanding the verdict, or a motion for a
2 directed verdict, or any number of things, new trial.

3 MR. BOXER: But I don't want to delay any more
4 than necessary --

5 THE COURT: I agree.

6 MR. BOXER: -- the process of completing the jury
7 deliberations, because if we put too many barriers by
8 having them start anew, I can easily see them, if you
9 give them a very easy out, taking it because they are
10 tired of us and this case.

11 THE COURT: I am sure.

12 MR. BOXER: And I think it's only -- there is no
13 reason to believe, based on what we now know, that
14 anything happened there other than this gentleman did not
15 disclose certain information four months ago before
16 deliberations.

17 I think you could ask them generally and
18 afterwards, you can -- they can be questioned again
19 because I can assure you all the resources NBCS will have
20 will interview every one of them afterwards, but let's
21 not put such barriers in front of them that they will
22 just say, "I want to get off this jury now."

23 THE COURT: Well, let me give you the other side
24 of the coin. I think you are right, but the other side
25 of that coin is, "Let's say whatever it is that is going
26 to keep us in here. We have rendered a verdict. We will
27 bring in the other person. We will take 30 minutes, and
28 we will have the -- we will get them to rubber stamp the

1 verdict."

2 I don't know what the number is, but I
3 don't see how I can be in a position where, on one hand,
4 I say that I think that juror had an obligation and
5 failed his obligation to inform the attorneys of his own
6 biases.

7 Now, he is out. So the question is: We
8 put somebody else in.

9 And do you know who?

10 MR. BOXER: I think you would say generally to
11 the jurors or say generally to the jurors, "Is there
12 anything that was said or done by Mr. X that would
13 prevent you from starting your deliberations fresh, in an
14 unbiased fashion?" You can ask that question.

15 THE COURT: I intend to ask that question.

16 MR. BOXER: I think at that point, that's it.
17 Otherwise, you are suggesting the answer you are looking
18 for.

19 THE COURT: No, no, no.

20 MR. NESSIM: Your Honor, I also think that -- I
21 mean, I understand that he -- you may believe he is not
22 telling the truth. He said he did not discuss his
23 website or his political views, whatever they are.

24 I mean I think that if the other jurors
25 indicate that they can start afresh, that they can --
26 that nothing he did or said would influence them, you
27 know, there should be should be a presumption of
28 correctness for the other jurors and not a view that

1 they're not telling the truth or there is some subliminal
2 message.

3 I mean, I think they are presumed to be
4 able to follow the law.

5 THE COURT: Okay. Anything you want to say? You
6 get the last word, then we will bring the panel in.

7 MR. SHIELDS: I think in the Weather case, which
8 is a California Supreme Court case which we cited to you,
9 that was a case in which the foreperson did not reveal
10 information originally and the entire verdict was
11 overturned because that person was a -- was the
12 foreperson and because the inference was and the
13 presumption was that because that person was the
14 foreperson, and because the foreperson has such a
15 significant impact on the course of deliberations, both
16 directly and subliminally, that that fact alone was
17 enough to convince the California Supreme Court that the
18 verdict ought to be reversed.

19 So that in order for that presumption to be
20 reversed, it seems to me that the court really has to be
21 convinced by examining these jurors and that there really
22 has to be a record that would support the notion that
23 they could put this out of their mind.

24 Now, because the presumption is really
25 otherwise, for obvious and common sense reasons, and --

26 THE COURT: I have read Weather and it says as
27 you suggest, and it is a problem.

28 MR. NESSIM: But there is nothing necessarily in

1 their mind that he said. I mean, if he's telling the
2 truth.

3 THE COURT: No, no, no. Weather said that they
4 didn't bother to examine the jurors. They said that the
5 foreperson -- and we have a copy of it up above 5
6 Cal.3d -- and I am going to bring the jurors in. I am
7 going to -- and you can excuse the foreperson. Just tell
8 him he can go home. Turn in his badge.

9 And then I am going to tell them that he
10 has -- we have excused him. I am going to read the
11 question and I am -- that Judge Elias asked, the
12 questions, three of them -- and I am going to say to them
13 that in the opinion of the court, his failure to reveal
14 articles that he wrote that demonstrated a pre-existing
15 bias against NBC and other corporations was enough to
16 disqualify him.

17 I am going to tell them that I am going to
18 bring in an alternate, and that one of the things that we
19 are concerned about -- and tell them that when we have
20 the alternate, they will have to start their
21 deliberations anew.

22 That doesn't mean -- that does mean that
23 they have to share with the other alternate and the other
24 juror their thought processes and what they went through.

25 They have to elect a new foreperson; and
26 starting anew means that they really have to at least
27 take a fresh look at what they have done; and we need to
28 know if they have been -- and I don't know how they are

1 going to answer this except by individual questioning --
2 if they have been influenced by anything that their
3 foreperson has either said or done --

4 MR. BOXER: That is the question I have a problem
5 with, your Honor, because I hope they were influenced by
6 each juror.

7 THE COURT: That's right. But to the extent --
8 to finish -- influenced to the extent that they could not
9 now --

10 MR. NESSIM: Right.

11 THE COURT: -- in his absence, give a fair and
12 impartial hearing to both sides.

13 MR. SHIELDS: And go back and redo without any of
14 the thoughts that they received from him, and any of the
15 considerations --

16 THE COURT: I am not saying I am ruling out
17 asking them individually. Assuming they all say, "Yes,
18 we can do that," then it seems to me at the 1:30 session,
19 we will bring them in one at a time.

20 I will take three questions -- four
21 questions so each side gives me two of them, that you
22 think we should ask those jurors individually, and that's
23 all we are going to ask, either yea or nay, and then they
24 go back in. Okay.

25 MR. BOXER: Thank you, your Honor.

26 MR. SHIELDS: Thank you, your Honor.

27

28 (A recess was taken in the proceedings.)

1 (The following proceedings were held in
2 open court, within the presence of the
3 jury:)

4

5 THE COURT: First, my apologies for
6 inconveniencing you and for keeping you and now I am
7 going to tell you why and what we have been doing.

8 At the time that you were all selected,
9 Judge Elias asked questions of the panel. The questions
10 were essentially this -- and I wasn't there so I am
11 reading what has been given me and I have been assured
12 that these are the correct questions.

13 Because I am sure Judge Elias said to you,
14 as I say to all jurors, that the purpose of a jury is to
15 get a group of people that are fair and unbiased and can
16 be fair to both sides.

17 The three questions that I found
18 significant are these:

19 "Having heard the description of
20 the case" -- and apparently it was
21 all laid out -- "is there any member
22 of the panel that feels that he or
23 she cannot give either side or any of
24 the parties a fair trial?"

25 Number 2 -- and these are not in the order.
26 These are the order that I have them.

27 "Does anyone have any feelings
28 about the nature or subject matter of

1 the case that would make it difficult
2 for you to be a fair and an impartial
3 juror?"

4 And number 3:

5 "Do any of you have any belief
6 or feelings toward any of the
7 parties, attorneys, or witnesses that
8 might be -- that might be regarded as
9 bias or prejudice for or against any
10 of them?"

11 Mr. Hartwell did not respond to any of
12 those, and Mr. Hartwell was aware of the fact that he has
13 a website in which he had published articles that were
14 critical of corporations in general and NBC specifically;
15 and so he has been excused.

16 And he has been replaced by the alternate
17 juror; and this is not an easy thing to do because the
18 rules are as follows: One of your fellow jurors has been
19 excused and an alternate juror has been selected to take
20 his place.

21 The alternate juror must be given the
22 opportunity to participate fully in your deliberations,
23 therefore, you must set aside and disregard all past
24 deliberations and begin your deliberations again.

25 Now, I can't read minds. I wish I could
26 sometimes -- maybe this is not the time I want to be able
27 to do that.

28 (Laughter.)

1 JUROR LOERA: Your Honor, how about expressions?

2 THE COURT: That I can read pretty well.

3 Here is what I need to do and we are not
4 going to do it before lunch but we are going to do it
5 afterwards.

6 I am going to inquire of everyone except
7 the alternate, as to what impact your deliberations had
8 and what, if any, either direct or subliminal
9 instructions you received from Mr. Hartwell, as your
10 foreperson, and whether or not you could be fair and
11 impartial jurors to both sides.

12 Now, the methodology does not require that
13 you go through and bring the alternate up to date by
14 saying every word, but the alternate must have the
15 opportunity to know what your -- what you considered, to
16 make her own mind up, to have a full and free voice in
17 making that decision.

18 And I will inquire of you individually, not
19 for long, maybe about four questions each, in chambers,
20 when we return from the noon break.

21 You think you feel bad, there is another
22 jury out there waiting and saying, "When do we get our
23 chance?" And they are not going to be happy either, and
24 I will tell them to see you about expressions if they
25 want to.

26 So we apologize to you. In my judgment, we
27 have to do this, and so we will.

28 So have a nice lunch. We will see you back

1 at 1:30, and we will meet you back in the courtroom in
2 the jury room.

3 Again, and I know this is a tough order, do
4 not discuss this amongst yourselves or with anyone else.
5 Do not form or express any opinion on the matter. You
6 can express an opinion about the judge, but not about the
7 case.

8 (Laughter.)

9 THE COURT: And let you all come back at 1:30,
10 and I will try to talk to you and see what we can
11 accomplish.

12 Thank you again. And our apologies.

13
14 (The following proceedings were held in
15 open court outside the presence of the
16 jury:)

17
18 THE COURT: The record will reflect the jury has
19 left the courtroom.

20 I have invited the lawyers to give me two
21 questions for each side that they think they would like
22 to have put to the jurors in order for us to determine
23 whether or not the jurors, in their present state of
24 mind, would be able to start anew and be fair to both
25 sides. That's the goal. So I will wait to hear from
26 you.

27 MR. SHIELDS: Okay. Thank you, your Honor.

28 First of all, we do have a great concern

1 regarding whether other jurors know about the website,
2 and that is a particular area of concern for us.

3 We believe they do, and we believe that the
4 jury ought to be questioned about that.

5 And --

6 THE COURT: That is easy. We will do that.

7 MR. SHIELDS: Okay. And we also believe that the
8 questions that relate to whether or not this panel in its
9 entirety ought to be dismissed is in many ways a legal
10 issue that has been decided by the appellate courts with
11 this situation in mind, and we believe that the court,
12 before proceeding, should permit the parties, either
13 later today or tomorrow, to actually submit some
14 authorities that go directly to the question of what the
15 court ought to do in this situation and what California
16 law requires the court to do; and we would like an
17 opportunity to submit those authorities and to have a
18 hearing, perhaps as early as tomorrow morning.

19 We would volunteer to come in tomorrow
20 morning and to submit the authorities so that the court
21 would have the direction from the appellate courts that
22 have faced this particular issue in the past.

23 THE COURT: I have certainly read the California
24 Supreme Court case. You should certainly have the
25 opportunity, and will have the opportunity to submit
26 whatever you choose, and we would ask for it as early as
27 we can get it, but that would not impede and will not
28 impede my questioning of the jurors that we have.

1 It may or may not become necessary,
2 depending upon the answers of the jurors. We will
3 question them individually. We will question them in
4 chambers. We will question them on the record, and each
5 side may have two lawyers, if you wish. I don't see any
6 harm in that, and we will just move along as rapidly as
7 we can.

8 MR. SHIELDS: Okay. Thank you, your Honor.

9 And we will submit authorities by -- we are
10 going to submit them by 7:30 tomorrow morning. We will
11 just toss them over the transom like in the past, but we
12 will submit them to the court. We will have them in your
13 mailbox tomorrow morning by 7:30.

14 THE COURT: My question is: And what time will
15 you have them in the lap of the plaintiffs so that they
16 have an opportunity to respond?

17 MR. SHIELDS: Your Honor, we will try to have
18 them this afternoon, sometime -- sometime this afternoon,
19 early evening. 5:30, 6:00 o'clock, so they would get an
20 opportunity to at least have reviewed them.

21 THE COURT: Okay. Does that sound appropriate,
22 Mr. Nessim?

23 MR. NESSIM: Certainly, further legal briefing is
24 appropriate. My comments would be, one, I think that
25 after the questioning today, unless the court finds cause
26 to let them go, they should begin their deliberations
27 because there is no reason to go on two tracks.

28 THE COURT: Absolutely. I don't have any problem

1 with that.

2 Mr. Nessim, please find something else to
3 play with other than that microphone.

4 MR. NESSIM: I'm sorry.

5 THE COURT: Go ahead.

6 MR. NESSIM: I'm trying to get my other point,
7 your Honor.

8 One moment.

9 THE COURT: Yes.

10 MR. NESSIM: Yes. The jurors obviously know
11 about the website based on your comments to them right
12 now. There's no reason to believe they knew about it
13 before. We have obviously expressed our views on
14 Mr. Hartwell in chambers, but I think that it is
15 important that this new questioning not be a new, and in
16 a sense, voir dire, but the questions should be whether
17 they were infected by anything improper, and it should be
18 limited to that.

19 THE COURT: I intend to ask them if they are
20 aware of the website or had seen it. I think that's a
21 perfectly appropriate question and I will ask that
22 question of each of the individual jurors.

23 MR. NESSIM: Other than your mentioning it just
24 now you mean.

25 THE COURT: Yes.

26 MR. NESSIM: All right.

27 THE COURT: If they have ever read it, if they
28 have seen it.

1 MR. NESSIM: Okay.

2 THE COURT: I suspect the answer will be no, that
3 they have not seen it or did not know of it.

4 MR. NESSIM: All right.

5 THE COURT: But we will see.

6 MR. NESSIM: And again, it's our view that the
7 website has nothing to do with this case and reflects
8 political views that don't relate to the nature of this
9 dispute.

10 THE COURT: You can file that in your papers.

11 I hope you will fashion two questions. If
12 I do not have two questions, then I will not ask
13 questions on behalf of whichever side doesn't turn them
14 in.

15 MR. NESSIM: And you want those at 1:30, your
16 Honor?

17 THE COURT: Yes. Anything else?

18 MR. SHIELDS: Thank you, your Honor.

19 THE COURT: We are in recess until 1:30.

20

21 (The noon recess was taken until
22 1:30 p.m. the same day.)

23

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28

1 Los Angeles, California April 26, 2007
2 Case Number: BC307563
3 Case Name: Kohan vs. NBC Studios
4 Department 4 Hon. Warren L. Ettinger, Judge
5 Reporter: Ruanne McArthur, CRR, CSR #2699
6 Time: 1:30 p.m. Session
7 Appearances: (As heretofore noted.)

8 -oOo-

9 (The following proceedings were held in
10 open court, within the presence of the
11 jury:)

12
13 THE COURT: I am going to release you until
14 9:00 o'clock tomorrow. Obviously -- and this is
15 important, you are obviously more skilled than I am, but
16 you are not to go on the Internet. You are not to look
17 for the website of your former foreman; and when the case
18 is over, you can Google or whatever it is you folks who
19 know computers do, but not until then.

20 And you are also admonished you are not to
21 discuss this case amongst yourselves, with anybody else,
22 your therapist, your bartender, anybody.

23 (Laughter.)

24 THE COURT: Just bear up until tomorrow morning
25 at 9:00 o'clock.

26 Have a pleasant evening.

27 (A pause in the proceedings.)

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(The following proceedings were held in open court outside the presence of the jury:)

THE COURT: The record will reflect that the jurors have gone back into the jury room to pick up their possessions, and I don't know whether Mrs. Luna is going to parade them back out here to take them through the back door.

THE CLERK: Do you want me to have her take them through the back door?

THE COURT: Absolutely. If it's not too late.

All right. The record will reflect the jury is not in the courtroom.

The jurors have been excused until tomorrow morning; and have been admonished not to view the website.

Is there anything -- you wanted to put something on the record?

MR. NESSIM: One moment.

MR. BOXER: Excuse us, your Honor.

(A pause in the proceedings.)

MR. NESSIM: I will wait until tomorrow, your Honor.

THE COURT: Okay. That's fine. You can write the question down so you won't forget it overnight.

(Laughter.)

1 THE COURT: Do you have a question?

2 MR. SHIELDS: No, your Honor. I have had all my
3 questions answered for today. I think that I am saving
4 them up for tomorrow.

5 THE COURT: I am sure you are.

6 We will see you all at 9:00 o'clock
7 tomorrow morning.

8 MR. NESSIM: Thank you, your Honor.

9 MR. BOXER: Thank you, your Honor.

10 MR. SHIELDS: Thank you, your Honor.

11 MR. de BODO: Thank you, your Honor.

12

13 (The matter was continued to Friday,
14 April 27, 2007 at 9:00 a.m. for
15 further proceedings.)

16

17 (The next page number is .)

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