UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CREDE CG III, LTD,

Plaintiff,

v. 16 CV 3103(KPF)

22ND CENTURY GROUP, INC.,

Defendant.

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June 14, 2016

10:04 a.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

OLSHAN FROME WOLOSKY, LLP
Attorneys for Plaintiff
BY: THOMAS J. FLEMING
BRIAN ANDREW KATZ

FOLEY & LARDNER LLP
Attorneys for Defendant
BY: JOHN A. TUCKER
JONATHAN H. FRIEDMAN

(Case called)

MR. FLEMING: Good morning, your Honor. Thomas Fleming for the plaintiff, Crede CG III. With me is my colleague, Brian Katz, from Olshan Frome Wolosky, and Mr. Terren Peizer, who is the CEO of Crede.

THE COURT: Good morning to all of you. Thank you.

MR. TUCKER: Good morning, Judge. John Tucker on behalf of the defendant 22nd Century. With me to my left is Jonathan Friedman, who is also counsel, and Henry Sicignano, who is the president and CEO of 22nd Century, and Tom James, who is the vice president and general counsel with the company.

THE COURT: Okay. Welcome to all of you. Thank you.

We're here on a motion for a preliminary injunction. Mr. Fleming, how is the motion going to proceed this morning?

MR. FLEMING: Well, your Honor, we're at your disposal. I am prepared to deliver an oral argument.

We understand the court rules contemplate that witnesses must be available for cross-examination, with the affidavits serving as a direct. So Mr. Peizer is here. And I will do whatever the Court thinks best.

If you'd like to hear some presentation, I would be more than happy to give you one. If you want to hear testimony, we can do that, too.

THE COURT: First of all, I appreciate your solicitude of me. Thank you.

I have been looking at the papers and the documents. I do have some questions. If you would prefer to begin by orienting me to what you think is appropriate --

MR. FLEMING: Why don't I do that.

THE COURT: I will hear from each side. Then I can just ask questions.

Mr. Tucker, do you have different thoughts about the way this should progress this morning?

MR. TUCKER: Your Honor, only that we believe that the venue issue is a threshold issue that needs to be determined first. In other words, as we pled in our various responses and in our letter motion, that until it's determined whether this Court has venue, the preliminary injunction shouldn't be held. So our thought is that that is the issue that needs to be addressed first.

THE COURT: Well, then why don't we do this: Why don't I have discussion with each of you on the issue of venue. I'll decide venue. And then, depending on what I decide, we'll either go further or we'll not go further.

So can we do that?

MR. FLEMING: Fine with me, your Honor.

THE COURT: This may come in several parts, but that's all right.

Mr. Fleming, let me hear from you with a focus to the issue of venue, sir. And if you want to talk to me about why

you believe that *Atlantic Marine Construction* applies or does not apply, I would be happy to hear from you.

MR. FLEMING: Yes, your Honor.

The issue of venue is framed by the specific counts in the complaint that we're here to enforce. And there are three counts in the complaint that arise from a breach of a specific warrant agreement, the Tranche 1A warrant. There are other counts in the complaint that touch on this, but this morning it's those three counts.

And the Tranche 1A warrant has a very specific forum clause that consents to personal jurisdiction and to venue in this court. And it may be that you have multiple forum clauses. And courts oftentimes confront cases where there are multiple forum clauses, arbitration and trial forum clauses requiring a case to be brought in one country versus another, forum clauses that apply to some claims but not all.

But where the forum clause applies to specific claims, which is what we have here, there is absolutely no precedent for the Court to decline to accept jurisdiction over those claims. And that's the essence of what I think *Atlantic Marine* has to say. *Atlantic Marine* says the Court must enforce forum clauses absent extraordinary circumstances.

THE COURT: Well, doesn't it also say, sir, that they must enforce forum clauses to the extent that the clauses are themselves valid?

Here's the thing for me about *Atlantic Marine*. *Atlantic Marine*, I hesitate to say it's not worthy of a Supreme Court decision, but I might argue it's not worthy of a Supreme Court decision, inasmuch as what it's really saying is if you agree that forum is a certain place, you can't thereafter say, no, I didn't really mean that.

But I think there's a preliminary question -- and I think that's what's being identified by your adversary -- and that is, the *Atlantic Marine* case presupposed that the two clauses -- the forum selection clause, excuse me, would be fine because one company was in Texas and one company was not in Texas. Was it Virginia is the other company? And so in those cases, there really wasn't the antecedent issue of whether venue would be appropriate in either forum.

Here what they're saying is, yes, yes, we have this forum selection clause. However, comma, it's not, in fact, the case that venue is appropriate in New York.

Can you speak to that issue, sir?

MR. FLEMING: Yes, your Honor, because the forum selection clause simply could not be any clearer. It says, each of the holder and the company irrevocably submits to the exclusive jurisdiction of the state and federal court sitting in the City of New York, borough of Manhattan, for adjudication of any dispute hereunder. And that's exactly what we are here today on.

We have a dispute under this Tranche 1A warrant, the exchange right in particular. It goes on from there that says, in connection therewith or any transaction contemplated hereby or discussed herein, and hereby irrevocably waives and agrees not to assert in any suit, action or proceeding if a claim that it is not personally subject to the jurisdiction of any such court --

THE COURT: I'm going to ask you to slow down a bit for the court reporter and for me. Thank you.

MR. FLEMING: That it is not personally subject to the jurisdiction of any such court, that such suit, action or proceeding is brought in an inconvenient forum, or that the venue of such suit, action or proceeding is improper.

So they've consented to personal jurisdiction here, and that's sufficient to consent to venue. So venue is proper here on these counts by the expressed language of the governing law clause in the contract.

THE COURT: Just so that I'm clear, I was focused on -- and Mr. Tucker will speak to me about the irrevocable waiver that's contained in the provision that you've just mentioned. But it's not merely that they've consented to personal jurisdiction. A few words later it says, they are waiving the right -- or maybe I'm misunderstanding this -- they're waiving a forum non conveniens argument and they're waiving a venue argument. Is that your argument to me?

MR. FLEMING: That's precisely what I'm saying. They've done more than consent. They've actually waived. I think it's functionally the same.

But this is a classic forum selection clause that transactional attorneys put in contracts so that everybody knows where to go when a dispute arises. And it's written as broadly as possible to eliminate controversies over venue, not to create them. And there's really no clearer way that you could express a consent to jurisdiction, venue and waive forum non than what's written here.

THE COURT: Sir, does *Atlantic Marine* by its terms speak to the propriety of the waiver of venue and the waiver of personal jurisdiction that is contained in this particular provision that you're citing to me?

MR. FLEMING: I'm not sure *Atlantic Marine* does, your Honor. But there are multiple courts that say parties can consent to jurisdiction. They can consent to venue. And the real standard is whether or not those consents violate due process, where they're essentially depriving somebody of a fair hearing or fair trial. Certainly that's not the case here.

THE COURT: So you wish not to bring this case in the Western District of New York?

MR. FLEMING: I do not wish to bring this case in the Western District of New York.

THE COURT: Are there other arguments you wish to make

to me with respect to venue, sir?

MR. FLEMING: No, your Honor.

THE COURT: Thank you. I'll hear from Mr. Tucker.

Sir, good morning.

MR. TUCKER: Good morning, Judge. I think you are spot on in your analysis of the *Atlantic Marine* case. The *Atlantic Marine* case specifically rebuts or rejects the argument made by plaintiff's counsel. If you look at the decision, what it says is when venue is challenged -- and this isn't a case in which there was a forum selection clause.

So they had a forum selection clause that said it's in this court. And the court said, when venue is challenged -- and I'm reading from page 577 -- when venue is challenged, the court must determine whether the case falls within one of the three categories set out in 1391(b). If it does, venue is proper. If it does not, venue is improper, and the case must be dismissed or transferred under 1406(a).

Then it goes on to say -- which is the specific issue before this Court today -- whether the parties entered into a contract containing a forum selection clause has no bearing on whether the case falls into one of the categories listed in 1391(b).

So what the Supreme Court was saying is the United States federal statutes determine whether venue is proper. And it has to be proper in the first instance. And if it is not

proper in the first instance, without regard to a forum selection clause, then it cannot proceed. And it then goes on to say what the procedure is. And the procedure would be for this Court to transfer it to the Western District of New York, at which point, because of the forum selection clause, the proper mechanism is for them to file then a motion for forum non conveniens to transfer it back under 1404.

THE COURT: Well, let me understand that for a moment. So you're saying I lack venue.

MR. TUCKER: Correct.

THE COURT: Okay.

MR. TUCKER: Nothing personal, Judge.

THE COURT: I take no offense, sir. That's fine. If I didn't have this case, I'd have another case. So it's absolutely fine.

So if this case were to go to the Western District of New York, it would not surprise you if your adversary were to move to transfer back here?

MR. TUCKER: Right.

THE COURT: And then what would be -- if I may get the spoiler alert, sir, what would be your response to that?

MR. TUCKER: Our response to that would be this, Judge: There are seven counts in this complaint.

THE COURT: Yes.

MR. TUCKER: If you look at it, a large number of

them, the claims basically involve this China joint venture.

THE COURT: Yes, sir.

MR. TUCKER: The China joint venture is governed by what's called a shareholders agreement. The shareholders agreement has an exclusive forum selection clause of the Western District of New York. Their argument that, "wait a minute, you can't sever this out, you can't send part of it to New York, part of it, keep part of it here," that same argument would apply once we get over there. But the proper court to determine that -- because the forum selection clauses come into play in respect to a 1404(a), which is a forum non conveniens argument.

At that point the court, that court in the Western District, would be looking at the arguments about, should it be sent back here or not? Should we sever it? That's when they should -- and I would recognize what this court says. What the *Atlantic Marine* court said is forum selection clauses are to be given great weight. We have a case that has two forum selection clauses. One says the western. One says the northern. They're all combined in one case.

What the court -- we believe the proper reading of *Atlantic Marine* is that this Court, because it doesn't have venue to begin with -- and there's no issue about that -- that the Court has to transfer it or dismiss it over to the Western District. At that point if they want to file their motion,

they will file their motion for forum non conveniens under 1404(a). The Court will convene a hearing and will look at the various aspects. Should the forum selection clause as it relates to the tranche warrant agreement, should that be enforced, or should the case stay? Because it's not a given. It's a presumption that it's likely to occur.

But we would suggest, Judge, if you get into the facts -- and these are arguments that we would make to the judge in the Western District -- that we are going to be in the Western District on the China issues. And if you look at the issues that are raised in the preliminary injunction with regard to the warrant agreement and whether or not they could exchange the warrants for stock, all of the activity restriction violations, all of the things that he is doing with regard to saying that the chairman should step down, the board should be replaced, those are all driven by his argument that you guys aren't doing what you should do with regard to the China venture.

So we believe that there is a very compelling argument, along the lines that they're saying you can't sever these things; that once it is in the correct jurisdiction, the correct venue, which is the Western District where it should begin, then the court over there will have to determine, okay, I've got one that stays here, and I've got one that they're trying to move out, move back. And that is what the court over

there is going to have to decide.

But the *Atlantic Marine* court is fairly straightforward and clear that when the court is addressing the venue issue, it's looking at the statute. It's not looking at the contract.

And we also cited the Texas case, which I think you were referring to earlier, which is one of the cases that -- and it's virtually on all fours, Judge. In this case they sued in Texas. And the defendant came in and said, wait a minute, there's no venue in Texas.

And they said, what, we agreed to that. All the arguments Mr. Fleming is making. Look at our forum selection clause. They said, read the *Atlantic Marine* provisions that I just read to the Court, which is, we don't look at that in the first instance. In the first instance we look at 1391. Does it fit or doesn't it fit?

The court said it doesn't fit. It's being transferred. You can then go argue that question later in the other court.

And, Judge, look, I am mindful of the fact that this may be in some -- if we only had this one case, if we only had the one claim under the warrant agreement, if we only had that, I might -- I'm not unmindful of the fact, does this seem a little bit of form over substance, right? Are we just going to rebound and be back here? There's two responses to that.

That's not our case because we have a whole other agreement that says that all ought to be over there, and that is what we think the court implies the dispute is about anyway. And the warrant agreement just kind of follows from that.

The second is whether it is form over substance, it's form over substance that's been directed by the United States Supreme Court. And they said, look, this is how we do it. And so in that respect, Judge -- and I would say, as we've said in our declaration, there's nothing about the Southern District that relates to this. My client is not there. The activities weren't there. Nothing. Or when I say "nothing," I don't want Mr. Fleming -- we have a part-time employee who happens to reside here who covers the northeast region. We do have less than one-half of a percent of our sales that are made to some distributors here. Those are not sufficient to create general jurisdiction over my client. There's nothing about these activities that would create specific jurisdiction.

So for these reasons, Judge, we believe that *Atlantic Marine* -- we're happy to tee this up and argue the merits of this case once we're in the right forum. And the *Atlantic Marine* could not be clearer on point saying, it doesn't matter what the parties agree to. You've got to have it in the first instance. And that's not to say that we couldn't have said, sure, we're okay with it, we won't raise the point, and we'd stay here.

THE COURT: Let me follow what you've just said. So I think I just heard you to say that the theoretical possibility exists that your client could waive a challenge to venue. That is something that can be waived, correct, sir?

MR. TUCKER: At this point, your Honor, I could stand up at this point and say, I waive it.

THE COURT: You're not, I understand?

MR. TUCKER: We're not.

THE COURT: But it is a thing, to use the colloquialism? You have the ability; your client has the ability, when hailed into a court that may not be a court where there is venue properly held, you have the ability to waive it, yes?

MR. TUCKER: Yes.

THE COURT: Okay. Now, *Atlantic Marine* by its terms I don't think addressed the ability or the viability of waivers of venue. That wasn't at issue in the case, correct, sir?

MR. TUCKER: I think it is implicitly an issue, your Honor, when they say we agree to this. A waiver is nothing more than an agreement to a certain position.

THE COURT: Of course. Let me be more precise, then, sir. I have seen choice of forum provisions that say any dispute will be resolved either in the Southern District of New York or sometimes in the state or federal courts of New York, because obviously those are the provisions that are

making their way to cases before me. In my prior life I saw other provisions and other jurisdictions.

I guess the question is: I don't know -- and maybe I need to look at the specific language of the provision in *Atlantic Marine*. I do not know whether it contained what I will call the irrevocable waiver language of the provision in this case and whether, if it did not, there is any significance to the inclusion of that language in the agreement in this case.

MR. TUCKER: I'll answer that for your Honor. I think in the *Atlantic Marine* case, it does not have a forum selection clause that's similar to the one here. I mean, it's similar in the sense -- the one that we have has got more language to it.

THE COURT: More bells, more whistles.

MR. TUCKER: It does. It does. And I don't argue that.

But the point of the matter is whether you say I waive it or whether you say I agree to it, it's getting to the same proposition. And that is, the proposition that the Supreme Court is addressing is: Can the parties establish by contract that to lay jurisdiction in a court where it doesn't exist under the statute, "the statute" being 1391?

And the Supreme Court said, you can't. We're not looking at a forum selection clause. Whether the forum selection clause says the exclusive jurisdiction of venue shall

be in the Southern District or whether it adds another sentence and says, we also waive and won't argue this. That's all part of the same forum selection clause, the same contract that the Supreme Court in the *Atlantic Marine* case is saying you can't -- that is not -- you look at that in the second instance. You don't look at that in the first instance.

THE COURT: Do I understand you, sir, to be saying, therefore, you can never contract ex ante to establish venue in a particular jurisdiction that you would not otherwise have venue under 1391?

MR. TUCKER: I'm saying that what the Supreme Court says is that that is -- that venue is determined in the first instance by compliance with Section 1391. And so if you do that, if you try to do a contractual provision like you said under the *Atlantic Marine* holding, the issue would be whether or not that forum selection clause would be enforceable under 1404(a), which is the forum non conveniens argument. And they say in most instances it should and would.

But it's pretty clear that there's a two-step analysis. And in the first step, it's just looking at, what are the typical venue requirements, and what is the statutory requirements? Do they mesh? If they don't mesh -- like they didn't mesh in the Texas case, like they didn't mesh in the *Atlantic Marine* case -- it goes to the other court.

The *Atlantic Marine* case then says, what's to happen

now? Are we just supposed to ignore the forum selection clause? They said, no, don't ignore it. In fact, it should be given great weight. But the other court, in this instance the Western District, should be looking at that issue in deciding whether it should be transferred back to therefore give effect to what the parties agreed to. That is the procedure that I think is very clear by the *Atlantic Marine* decision and very clear by the Texas.

And again, we also have a very different case than those cases, where there was only one claim, one contract that the claims were about that fall within -- that fell within the forum selection clause. In this instance we also have the shareholders agreement, which I remind the Court says the exclusive venue is in the Western District. And in our letter motion, Judge, we said that if the case is not dismissed for purposes of 1406 for lack of venue, then we would have our 1404 motion to transfer for that portion of it. But we're not there yet, because we're still on the letter portion of it.

THE COURT: Of course.

MR. TUCKER: So our point is it may not -- like you said, it's maybe not worthy of the Supreme Court, but it's an area where the Supreme Court has spoken and has spoken fairly clearly. And that clear direction was, when a case is filed against a defendant and there is a forum selection clause -- and they didn't say a forum selection clause with only these

bells and whistles to it; they say forum selection clause that says that the parties have agreed to litigate this in the same location, certain location; that you don't look at that first if the defendant raises the issue. You look at 1391. Does it comply? If it doesn't comply, as the Supreme Court says, when venue is challenged, the Court must determine whether the case falls within one of the three categories set out in 1391(b).

THE COURT: I'm going to ask you to slow down also for the court reporter and for the judge. Thank you.

MR. TUCKER: They don't usually ask people from Florida to slow down, Judge, when we're in New York.

I will.

MR. FLEMING: May I be heard briefly?

THE COURT: Well, as soon as he finishes, yes.

MR. FLEMING: I'm sorry. I thought he was through.

MR. TUCKER: Anyway, I'll end with just simply what I think were the compelling controlling lines of the decision, which, again, is when venue is challenged, the Court must determine whether the case falls within one of the three categories set out in 1391(b). If it does, venue is proper. If it does not, venue is improper and the case must be dismissed or transferred under 1406(a). Whether the parties entered into a contract -- entered into a contract, not entered into a forum selection clause that only says these things. Where they entered into a contract containing a forum selection

clause has no bearing on whether a case falls into one of the categories of 1391(b).

So the Court is saying, don't even show it to me. It's not relevant to the analysis. It becomes relevant to the analysis only when we're over in the Western District, at which point the Western District district judge will have to listen to the argument about whether it should be returned back here, this portion of it, the one with the exclusive forum here; or whether it should stay with the other part that needs to be over there, because that's where the exclusive jurisdiction provision says.

THE COURT: And, sir, just so I'm clear, your position is if I were to disagree with you, then very shortly thereafter, at least after resolution of this motion, you would be moving for transfer based on forum non conveniens under 1404(a) or something along those lines?

MR. TUCKER: Yes.

THE COURT: Okay.

MR. TUCKER: And the only thing that I would say, Judge, is we're not running from the preliminary injunction hearing.

THE COURT: No one is suggesting that, sir.

MR. TUCKER: We're prepared. As soon as they transfer this over there, it's all briefed up. We're ready to tee it up in the proper venue. And so we're prepared to go. And this

is -- there is nothing about this. This is all that my clients -- that's where our principal place of business, all the activities, all the people are there, as opposed to here in New York. There's nothing about New York, other than those lines in the document. And so that's why we think it's a real motion and it's real under the law.

Thank you.

THE COURT: I didn't think it wasn't a real motion, sir. That's fine.

All right. Mr. Fleming, please.

MR. FLEMING: Yes, your Honor.

Let me just shed some light about what the actual facts were in *Atlantic Marine*, because it's been, I think, badly mischaracterized. *Atlantic Marine* was a case brought in federal court in Texas. The forum selection clause at issue required venue in Virginia. That's what was going on. So it was not a case where somebody picked the correct forum, the forum selection clause. They picked the incorrect forum. And the issue that the Court addressed was the interplay of 1404, of Title 28, and 1406. And it said that it would be in effect error -- the Court could dismiss under 1406, if there were no venue, but under 1404 could transfer.

And that's specifically what the Court said should have happened. It said it should have transferred. And it did not say that a forum selection clause was not enforceable.

Quite the opposite. It said a forum selection clause should be enforced.

THE COURT: Slow down, sir.

MR. FLEMING: It does not say it was unenforceable. Quite the opposite. It said it should be enforced and was dealing with the mechanism for enforcing it. And it did not say that if the parties have selected a venue in their contract, that when you go into court in that venue, you first have to check for 1391. It says nothing like that. That's not what it says. It dealt with someone who chose venue not in the contract, and then the Court had to look at 1391 versus a transfer under 1404.

In this case I would also point out that there are, contrary to what 22nd Century would have the Court believe, there are multiple contacts with this forum. It is a corporation based here in New York. All you need to show is that they have sufficient contacts with this district to establish personal jurisdiction, which we certainly have.

The securities purchase agreement that's the heart of this, where Crede invested 10 million, closed in New York City. It says in the text that it closed at the offices of Mintz Levin on Third Avenue. So they took Crede's $10 million here in New York City. The rest of these transactions followed a few weeks later. Mr. Peizer, he's here. He'll tell you that he met with them multiple times in New York. There are plenty

of contacts here in New York City between 22nd Century and Crede and this transaction.

And, in fact, all of the warrant agreements -- there were four issued -- all require litigation here in New York. The consulting agreement, which accompanies them, requires consents generally to jurisdiction in New York without picking a particular venue. And the securities purchase agreement, which closed here in New York, also requires litigation here in New York.

The outlier in this is the JV agreement out in China. And it may be, your Honor, that -- and it happens all the time. It drives lawyers crazy. But if the parties have agreed for different claims to go to different places, they may have to go to different places. That may be where we're at. But I think that can be briefed on a larger motion on venue, if they want to move the other counts.

But this count is clearly belongs in this district. The Court has jurisdiction under 1391 for the purposes of this transaction by their consent, by their doing business here, taking Crede's money here in New York City just a few weeks before they issued this warrant. And for those reasons, your Honor, I would ask the Court accept jurisdiction and we can move forward with the hearing.

THE COURT: All right. Let me please take a moment and just look. I have notes in several places. You can tell

I'm looking at my computer and my papers. So let me just take a moment, because I actually want to give you a coherent response to the motion, which has traction. It is, as you said, a real motion.

(Pause)

THE COURT: I should begin by noting that while I may have maligned the *Atlantic Marine* decision as being not worthy of the Supreme Court, the fact is it is a Supreme Court decision. I'm not going to not follow it, but I have wrestled over the past couple of days with the scope of the decision. And what was interesting to me is in that decision it did appear that the forum selection clause implicated a jurisdiction for which venue would have been appropriate. And so that's what I understood the Supreme Court to be focusing on.

The thing that I did not understand the Supreme Court to be focusing on was what would happen in those situations where venue was not proper and yet the parties addressed it specifically, which is how I interpreted the provision in this case.

So stepping backwards a moment, it's not clear to me, despite Mr. Fleming's very fine arguments, that venue is proper in the Southern District of New York, strictly speaking. But I don't understand *Atlantic Marine* to be reducing or minimizing the ability of the parties to a transaction to waive arguments

based on venue. And I'm taking my guidance here from 26, U.S.C., 1406(b). Here, I read the provision that was cited to me by Mr. Fleming not merely as a forum selection clause, but as an affirmative waiver of challenges to personal jurisdiction and to venue and to the possibility of a forum non conveniens motion being brought later on. And given that, I think it is materially different from what was happening in *Atlantic Marine*.

And I don't at this time read *Atlantic Marine* to suggest that you can never ex ante contract for venue. To the contrary, that decision suggests -- and I'm just going to quote from it at page 581 of the decision -- the enforcement of valid forum selection clauses bargained for by the parties protects their legitimate expectations and furthers vital interests of the justice system.

Here, this is more than a selection of proper forum; it is a waiver of challenges based on venue, which both parties to the transaction had the ability to do. I do not think that *Atlantic Marine* vitiates the possibility of ex ante contracting as to -- actually, not contracting as to where venue is proper as much as to ex ante contracting to waive any challenges to venue.

So for this reason, at least with respect to the agreement that was called to my attention, I am going to find that venue -- that I may hear the preliminary injunction motion

in this case because challenges to venue have been waived by the contractual provision.

So at the moment I'm not going to transfer the case to the Western District. We are here for emergent relief; namely, your request for a preliminary injunction. And for that reason I want to hear from the parties on it. I recognize that when this issue is resolved, there may very shortly thereafter be a motion to transfer coming to me. And I'll address it as soon as I get it. But in the first instance, I'm not going to say, well, now that I've decided this issue, I'm going to stop, because the request is for emergent relief.

So with that in mind, let me hear from you, Mr. Fleming, about why it is I should be granting emergent relief and what in particular you seek. I'll take you first in sort of a summation format, and then I'll ask you some questions about it, sir.

MR. FLEMING: Thank you, your Honor.

Good morning, your Honor.

In support of our motion for emergent relief, we're offering the Court Mr. Peizer's declaration and the exhibits that are part of it, as well as the public record documents that are annexed to my declaration.

The specific relief that we're seeking is an order compelling the defendant to issue 2,077,555 shares of stock which would be sold at Crede's discretion. And the proceeds

would be placed in escrow to pending further order of the Court.

We're also asking for declaratory or preliminary declaratory relief, because the exchange right that Crede has here entitles it to in effect $2.8 million worth of stock and its exercise for approximately half of that. And the way these warrants and investments are structured is it's what's called a conversion cap. So Crede can't ever own more than 9.9 percent. And its intent in exercising was to go to that cap. And the request for preliminary declaratory relief is to make Crede to sell down, and then over the course of the case exercise again and receive more shares until the exchange right is exhausted.

And what we're really asking for is the bargain that the parties struck. There's no question as to what the exchange right says. There's no question that Crede properly delivered notices. And what we're really dealing with here is one defense, and the defense is that there's a provision in the warrant called activity restrictions. And it is Crede's position and sole defense to those shares that the activities restrictions were violated sometime in February, March of 2015. And as a result, Crede forfeited the exchange right. That's its position.

THE COURT: Can you back up a moment. Did you say it's Crede's position?

MR. FLEMING: It's 22nd Century's position. Thank

you. I apologize.

I'll review the clause in a second, but I think as a threshold matter, if you just look at the six e-mails, that's what we're talking about. None of them come remotely close to meeting the criteria of the activities restrictions clause. The language in that clause is paraphrased from the disclosure requirements for a 13D holder, someone who has on file position disclosing a 5 percent ownership. And under the SEC rules there are nine or ten specific items that must be disclosed if you have plans or proposals in them. And the activities restrictions paraphrase that.

Crede, of course, never filed a 13D. No one ever asked it to file a 13D. No one ever suggested it should. There was, in fact, no complaint about activities restriction contemporaneous with any of these e-mails. The e-mails went on for several months without anybody from 22nd Century complaining, saying, hey, this is a violation of an activities restriction. Now --

THE COURT: But let me stop you, sir. Was there an obligation that they do so? Was there sort of a fair warning that needed to be given before they could muzzle your client?

MR. FLEMING: No. I agree, your Honor, there was no obligation. But one would expect that if you bargained for restrictions and you were receiving e-mails that you were unhappy with, that you would invoke those restrictions.

THE COURT: I see.

MR. FLEMING: And it's my position, I think it's a fair inference, that the failure to invoke them meant that the company in consultation with its advisers concluded that there was no violation.

And, in fact, there was no violation, because the e-mails, the six e-mails don't offer any plan or proposal of any sort to the company to do anything other than to follow the business plan that Crede signed on to when it invested its $10 million and for which Mr. Peizer was retained as a consultant. And when the warrants were issued, he became a consultant to the company, the 22nd Century, with respect to the China venture.

And the e-mails are all about the China venture. It's his commentary to the company saying, the venture is not going well. You're not doing your job. We got to make the venture a success. He's saying that sometimes in an acerbic fashion, sometimes in an annoying and unflattering fashion, but there's no plan or proposal to do any of the nine things that are listed in the activities restrictions.

Now, if you look at some of the things he says, he says things such as -- in one e-mail early on he says, this is a farce that will come to an end. Again, that's not a plan or a proposal. Another e-mail sent in February he says, in effect -- his words were, change will necessarily come about.

But, again, he doesn't put in any plans or proposals of any sort. And, in fact, what's replete through these e-mails is that he has no plan or proposal. The closest -- and this is the closest he comes to, is he at one point suggests that Mr. Sicignano should step aside. Then he later says, step down --

THE COURT: How is that not a plan?

MR. FLEMING: I'll tell you why it's not: Because the plan of proposals have to relate to a change in the board or the management. Mr. Sicignano became the chairman during the course of this relationship. It's a $10,000-a-year job being chairman. He would still be on the board. It's not a change in the board. He remains on the board, even if he's not the chairman. He didn't suggest he step down from the board.

And the commentary was issued all in connection with advice to try and make the China deal happen. If you read the e-mails, Mr. Peizer is saying in order to impress China National Tobacco, which is the state-run operation over in China, it would be better if you were not the face of the company. That's what he's saying. You can still be on the board. That's all he's saying. And he's still the CEO, mind you. That's not a plan or proposal to change the board or the management of the type that falls within these activity restrictions. It just isn't, your Honor. And I think that's the most they have.

And when you look at that miniscule change, it's a suggestion and, again, not followed up on. It's important to focus here on what didn't happen. Mr. Peizer never ran a proxy campaign. He never nominated anyone to the board. And some of his e-mails he told them several times, I don't want to be on the board. He never did anything beyond these six e-mails. And e-mails are replete, again, with the company following its plan, the business plan, to develop China, which ultimately the company terminated in June. And you don't see any e-mails after that in their travel.

So based on the plain text of the e-mails and what they say and don't say, I respectfully submit that there can be no finding that any of these activity restrictions were violated. Based on the external factors they reinforce that. Mr. Peizer was a consultant at the time, so he had a contract with the company. He was in a position and contracted for a position to give advice. The Court needs to read these two together. It can't be that they contract for him to give advice and then he forfeits a $2.8 million right. If he wanted to become an active proxy participant, yes, that would be a violation of the activity restriction. But simply giving advice by e-mail was consistent with his role as a consultant.

I previously mentioned --

THE COURT: As consultant he should be suggesting changes to management in the manner that he did?

MR. FLEMING: He suggested -- for example, the one bill with Mr. Sicignano, if you read the text, he's saying, China National Tobacco is not impressed by you. And it would be better if you were not the chairman of the company in order to move the deal with China National Tobacco. That's all he said. Maybe not -- maybe with some more flattering words.

THE COURT: I have a different recollection of the substance than you. It sounded a lot nastier when I was reading it.

MR. FLEMING: I'm not repeating. Obviously there is an element of sometimes ad hominem remarks; not even ad hominem, but there's a sense of frustration that comes through with Mr. Peizer's e-mail. But that's common to the e-mail world, unfortunately. And I don't think any of that makes something a plan or proposal that leads to a major forfeiture, which is --

THE COURT: No, but doesn't it transcend his job as consultant? I would have thought he'd be a little bit more circumspect as a consultant than making attacks at these times. I'm saying, let me look at these and figure out when he's speaking qua shareholder and when he's speaking qua consultant.

MR. FLEMING: He was a consultant, obviously, but he was also a representative of the larger shareholders of the company. And his entity had a 25 percent interest in the China venture. So he was also a direct investor in the China JV. So

he was a consultant on the China JV. And he obviously had a significant financial interest in that as well. And I don't think you need to divine the two. The fact that he was a consultant meant it was appropriate for him to be communicating with the company on these matters, because that's what they hired him to do, and that's what he did.

And most important, the words plan and proposal are specific words. They're not ideas, concepts, suggestions. They're plans or proposals. They're things that are concrete that would merit disclosure to the investing public so the investing public would understand what a person who owns more than 5 percent was actually going to do with the company.

And if you read these e-mails, he's not doing anything other than saying, please effect your business plan that I invested based on and which has been disclosed to the public. That's what he's saying. And he has no plan or proposal to be on the board, to put somebody else on the board. He doesn't put anybody's name in. He doesn't offer anybody else to be CEO. And there's a whole long list of other things that are in there that obviously don't apply, like a sale or a merger. He has nothing that he's proposing hostile to the company.

The other aspect of this that I'd like to ask the Court to focus on is how the activity restrictions work inside the contract, because the contract has in the activities restrictions a sentence which I think is unambiguous; that

whatever the activity restrictions are, they don't affect Crede's right to exchange or exercise the warrant. And the last sentence in the activities restrictions clause says, quote, the restrictions contained in this paragraph H shall not limit holders' rights to enforce its rights or exercise its rights as to the securities or under this warrant.

THE COURT: And your adversary says that does not pertain to the exchange right but only to the exercise right.

MR. FLEMING: I read that, your Honor. And first of all, that's not what it says, because it says to enforce its rights or exercise its rights as to the securities or under this warrant. So it's enforcing its rights under the warrant.

And what's also important is that the word "securities" appears there. And under the contract, the warrant, there is the warrant, then there is something called the warrant shares. And then there are the shares you get on the exchange. If you look at the opening definitions in the warrant, the warrant shares or the shares are what you get when you exercise by paying cash. So when they write the securities, they're including something more than the warrant shares. And the only and best reading of that is it includes all securities that are issuable under this agreement, whether on exercise or exchange. And, in fact, that's totally consistent with the holders' rights to enforce its rights under this warrant.

So I think the Court under standard provisions of New York contract law has to give force to that clause. That's what the parties bargained for.

There is another clause which has been the subject of a lot of ink.

THE COURT: Section 5?

MR. FLEMING: Pardon?

THE COURT: Section 5?

MR. FLEMING: Section 5, the phrase and subject to the limitations set forth in Section 1(h)(ii) hereof.

THE COURT: Yes.

MR. FLEMING: And the fairest and, I would argue, only way to read that clause is that if you get the exchange shares, those shares remain subject to Section 1(h)(ii), not single (i) and triple (iii), which are two -- but they're subject to a part of the activity restrictions.

And the reason why I say that, your Honor, is that if you look at the activity restrictions, they're in place only so long as Crede holds the warrant or the warrant shares. So in other words, if it exercised the warrant in full and sold the shares, the activity restrictions are gone. That's what the contract says. And the opening sentence is in paragraph 1(h), for so long as holder or any of its affiliates holds any warrants or warrant shares. Again, both defined terms.

So if you exercise your warrant, you don't hold a

warrant anymore. Warrant shares are just the shares you get on cash.

So without that "subject to" language, Crede could exchange the warrant in full, get exchange shares, which are not warrant shares, and the activity restrictions would not apply. And I respectfully submit that what the parties intended here is they wanted to make sure that if Crede did an exchange, that those shares would also be subject to the activity restrictions.

So as long as Crede had those shares, just like on an exercise, it would be bound by the activity restrictions. And that's the bargain the parties struck. It doesn't make any sense that that clause is a show stopper or a Get Out of Jail Free card so that the company can say, you violated the activity restrictions clause a year ago. I know we didn't mention it to you, but we've concluded now it seems likely you'll be exercising because these exchange rights will expire in a few months. But you're out of luck. I don't think it was ever intended to do that. It doesn't make any sense that it would do that.

The forfeiture is totally out of proportion to any aspect of harm or loss. And again, New York law classically abhors a forfeiture. And that's essentially what they're asking for here. And there's no claim of any injury or loss. It's essentially you have a foot fault and you lose

$2.8 million. That's essentially the claim here.

So for all of those reasons, your Honor, I respectfully submit that the plaintiff here, Crede, has established a likelihood of success on the merits; that its exchange right was readily exercised; and there was no violation of the activities restrictions, or if there was -- I don't think there was -- the remedy lies elsewhere.

And granted, these restrictions are akin to standstills and the like that parties sign all the time in the city. The activist proxy people are always agreeing to restrain themselves from doing things. A Court could easily enforce any of these restrictions by injunctive relief. If Crede did decide to run a slate for the board, a court could preside and enforce that restriction without any difficulty. So there's no reason for it to suffer a forfeiture, and certainly there wasn't any here.

THE COURT: Let me back up, sir, because I think you're going to turn soon to irreparable harm. Before you do that, I'd like to make sure I understand whether you agree with the position of the defendant that this is a mandatory injunction, because the last peaceful status between the parties is one where these warrants were not exercised.

MR. FLEMING: That's a close question, your Honor. And I don't think it really makes any difference to the Court's analysis.

We've presented the Court with seven other decisions from this district that looked at the same facts and did not treat these as a mandatory injunctions. And I don't think they are, because it's a little different here in that we exercised -- we should have gotten the shares. It's not a mandatory injunction where I'm telling you to go out and do something you might not otherwise have agreed to do. The only way I can get my remedy is to make you do what you've agreed to do. Is enforcing a noncompete a mandatory injunction? We've agreed not to compete, and now I say, you can't go compete. It's of that flavor.

But again, your Honor, I don't think it determines the outcome here at all. I don't think whether you call it mandatory or not affects the analysis because the right to relief is clear.

THE COURT: Then getting back to these contractual provisions on what you've just spent some time, is it your view, sir, that there is no ambiguity in these contractual provisions and their interplay? And I'm asking that because -- well, for many reasons. Both of you have written to me extensive briefing with what I will call thoughtful arguments that are, if you'll excuse the colloquialism, not crazy with respect to how to interpret these provisions.

Should I intuit from the fact that two thoughtful firms are making two totally different arguments about the

provisions that the provisions are ambiguous? And if so, should I accept some sort of extrinsic evidence on how best to interpret them and how the parties meant them to relate when they enacted these or executed these agreements?

MR. FLEMING: Well, your Honor, of course it's basic to New York contract law if the parties -- just because counsel have different views as to what language doesn't make it ambiguous.

THE COURT: I'm understanding that, yes.

MR. FLEMING: And then the Court's job is to harmonize the language in the contract and to do so in a fashion that's consistent with the intent and understanding that's expressed in the contract.

And here, the language and the activity restrictions is not susceptible of any other reading besides, if you violate the activity restrictions, that can't hang you up on getting shares. You really have to put your hand over it and rewrite it in order to get to a different conclusion, because it says that it can't -- a violation can't prevent you from enforcing your right to the securities or under this warrant. It's comprehensive. Enforce or exercise, securities are under this warrant. The parties are being comprehensive. That clause would be in effect written out of the contract if you read the "subject to" language as a, if you will, show stopper, get out of jail card.

So I submit that you have to harmonize the two. And when one is clear and you have another one that's standing alone, if you put blinders on, oh, maybe it means this, maybe it means that. But when you look at the two together, it's clear what the parties meant. And the clincher here is the fact that the restrictions would not apply otherwise without the "subject to" language.

So on the exchange here on the exchange shares, they wouldn't apply without the "subject to" language. So it's a fair reading harmonizing all of the aspects of the contract to say the "subject to" language carries over the activity restrictions as opposed to creating a forfeiture.

THE COURT: Okay. Thank you.

MR. FLEMING: And if you want to look at extrinsic evidence, I've gone into the extrinsic evidence, and I won't repeat myself. But I think the extrinsic evidence is compelling.

THE COURT: Then let's please talk about irreparable harm.

MR. FLEMING: Thank you, your Honor.

On the irreparable harm, we've provided the Court with seven separate cases, all decided in the Southern District, which I'm sure the Court's had an opportunity to review. Each of them has a fact pattern that I respectfully submit is presented here.

You have a contractual right to receive shares, whether through warrants, convertible notes, some similar instrument, for sale on the public markets. So you have a contractual right to get shares of stock that would be sold on the public markets. That's what the plaintiffs in that case bargained for. And you have a corporate issuer with limited financial means.

And in those cases what the courts do is once they conclude that the right to the shares is clear and the corporate issuer has limited financial means, the Court grants preliminary injunctive relief to enforce the essence of the parties' bargains so that the plaintiff is not left remediless.

And here there's an additional factor which is present in some of those cases -- one or two, but certainly not all of them -- which is that Crede bargained in its contract in these warrants for a maximum right to injunctive relief. There's a clause in the Tranche 1A warrant that says the company acknowledges that breach by it of its obligations hereunder will cause irreparable harm to the holder and that the remedy at law for any such breach may be inadequate. That's in Section 15 of the warrant. That's the Second Circuit case law which we've cited the *Haber* and *Ticor* case.

Haber says it's tantamount to an admission. I agree, it's not dispositive, and the Court isn't bound by that. I agree the parties can't stipulate to equitable jurisdiction and

get something. But it's an important factor to be weighed. And it's particularly important here, when you have an investor that is making an investment and providing capital to a thinly capitalized start-up business. And that's a clause that a person in that position bargains for because they recognize that their real remedy here is to get the shares and then have to wait a year or two years. These type of companies aren't the same. They have a success rate. When it's successful, everybody's happy. Most of them aren't successful. And if you wait a year or two, you really don't have anything. And this protects the essential bargain that the parties struck here.

THE COURT: So let me ask you, I want to orient you. As you talk to me about irreparable harm, my visceral reaction, which is not necessarily my judicial reaction, to the claim -- and again, don't ascribe too much significance to this; this is just my gut feeling when I read things -- was that you're telling me that the 22nd Century is basically a patient who is bleeding, and you're suggesting as a result -- so let me come in and cut off the head. Because what you're asking is to take a company that is not doing especially well and increase your investment in that company that's not doing very well.

And I don't quite understand -- I am concerned that in citing irreparable harm, you're actually going to be asking me to cause irreparable harm. I'm not saying you will, but that's why I'm asking you to help me out of that particular problem.

MR. FLEMING: I'd be glad to, your Honor, because essentially the bargain that the parties struck here when it came to the exchange right was that Crede could over the course of two years, under certain conditions, all of which have been met, obtain $2.8 million worth of stock. It had the right to sell those shares.

Now, it's totally unclear if selling those shares will cause dilution to the company. Generally if you have 100 shares and you issue ten more and things don't improve, the share price goes down. That's generally what happens. But that's what everybody agreed to. So other investors have seen what these exchange rights are. They're all publicly disclosed, so people have been buying knowing all these risks.

And what's important here, your Honor, is that Crede is the largest shareholder in the company today. It has five, six million shares of stock. It's got a very large position of its own, and it hasn't sold those shares. And so if it does sell, it has every incentive to try and do so in a way that causes the least amount of loss, because it will be feeling more pain than anybody else.

So, again, the parties agreed to this. The company can't not issue shares saying, hey, it would be dilutive. We don't want to do that now. That's what they agreed to do. If a company could say, issuing shares pursuant to our agreements would be harmful to other shareholders, then no one would ever

subscribe for stock, because you'd ultimately be left to their mercy. So that's essentially their argument; that if I give you shares, you could sell them and the share price would go down. Again, anything's possible, but if the company did better, the share price could go up. They're also telling you the share price has got to go to $9. So I don't know how they can reconcile the two.

But this is really all about enforcing the parties' rights, the rights of investors over the public policy points of this that I will put before the Court are this is something that's important to people who are in the markets, who are investing capital; when someone like Crede puts $10 million into a company and bargains for these rights, to have the company say, gee, if we don't issue the shares -- you know, if we issue these shares, the price may go down, so we're not going to do it. I mean, that's just totally contrary to the investment bargain that was struck. And it would deter any investor from putting money into a company, if the company could just come in and argue that issuing the shares now would be dilutive.

And, if anything, this is probably the optimum case for issuing shares, because Crede, as I said, is the larger shareholder. So how do they make money by selling shares and driving the rest of the value of their position down? They don't. They would be hurting themselves. So they're going to,

to the extent possible, sell shares in a manner that has the least impact on the market.

So I hope that answers the Court's question.

THE COURT: It does. Thank you.

Please proceed to your arguments.

MR. FLEMING: The other point I'd like to make is that the company's financials, there are a couple of points in them that I think bear no value. We've offered the company -- the Court commentary in our briefs. But the company has revenue. But if you look at the 2015 revenue figures, I mean, you look at what's called cost of goods sold, which is the actual cost to make the product they're selling, the cost of goods sold exceeds the remedy. So every time they sell something, they lose money out of the gig. And first quarter of 2016 is essentially the same.

So basically the revenue doesn't produce anything to the bottom line. It's a company that depends upon raising capital to fund its R and D, to fund sales and overhead, pay Mr. Sicignano's salary and do all these other things. It's been successful in raising capital, but this is exactly the type of company that was before the courts in the other seven cases: A capital intensive venture that has no ability on its own to generate a profit or anything for the bottom line, at least at this stage in its operations.

And so the money judgment remedy is essentially a hope

and a prayer. That's essentially what we have here. And Crede -- maybe the company will take off. We wish them the best of luck. And Crede has a very large position, and it will do well if that happens.

But for these shares, Crede would like to get them and then sell them. And the alternative of being left with a money judgment remedy just doesn't make Crede whole, because it's wholly uncertain and wholly unpredictable whether the company can raise capital. And their financials at the end of 2015 said that they had enough cash on hand to keep their business operating through October of this year. Now, they raised 5 million in February, and the first quarter financials said the exact same thing. So they have enough cash to stay in business until October 2016. And after that they count on other investors coming in. And that's essentially a company that can't pay a money judgment without getting help from other people.

And this is the fact pattern that all of the other cases had that we provided the Court in the Southern District. And that's why it's appropriate to give an injunction, Crede to get its shares now. The stock is -- it's at an all-time low still. It's worth something. It's trading at 75 cents or thereabouts. So shares can be sold. Cash can be put aside, and it can await further order of the Court, when the Court determines, you know, what happened here and if there was a

violation. If you need to hear extrinsic evidence at a trial, we can do that.

THE COURT: And what is your response, sir, to your adversary's contention that irrespective of the revenues of the company, there are still sufficient assets on the books of the company such that there would be something, a judgment would actually result in your client getting something?

MR. FLEMING: I mean, it's difficult for me, your Honor, to evaluate all -- the value of these assets. He's got a lot of patents. 22nd Century has a lot of patents. Who knows what they're worth? Who knows what anybody could get for them? They haven't been able to monetize them to date. So if you want to look at how valuable the patents are, they've been at this for years. Their success in monetizing these things is borne out in the financials. And it shows that they've had roughly $50 million or $40 million in losses over the last three years.

So patents are only as good as the money they can generate. And they have been trying for three years, and they haven't gotten there. So to tell me that they're worth a lot of money, that hasn't been proven in the marketplace to date. And there's no reason for me to or my client to sit here and say, okay, we'll wait another year or two and see if you can succeed.

The bargain we struck, I think -- Crede struck -- and

I keep going to that phrase, because it is the heart of this. It was a deal. And like the deal on venue, they don't like the deal on a lot of this stuff. The consent to irreparable harm they don't like anymore either. But they did strike a deal, and the deal was to get shares, not to get a money judgment. And the best and fairest way to resolve this current impasse between the parties is to make the company honor that deal, give Crede the shares, give them an opportunity to liquidate them and put the money aside.

THE COURT: Thank you.

There are other issues. We've talked a little bit about the public policy concerns. Do you want to talk about the other issues remaining, the balance of equities?

MR. FLEMING: Well, yes, your Honor, I can.

I think the balance of equities, I think, is very simple on this. Crede is essentially asking 22nd Century to honor its contract. And when that's what's at stake, and the Court concludes that's what's at stake, that determines the balance of equities; that the hardship that 22nd Century is claiming here in issuing shares is something that they agreed to do. So if, independent of the activity restrictions, they would be issuing these shares.

So I don't think there's any hardship at all in honoring a party's contract, and nor is there any claim that any activity restrictions are being violated now. There's no

claim that Crede is going to take these shares or run a proxy campaign, if that were even possible. The company has a staggered board. We've just given the Court the 8K they filed. They just had their annual meeting. They can't have another meeting for another year. There's a nomination process that's detailed, complicated. Crede has no ability to do anything with these shares. And if they did, there's injunctive relief available.

So there's no real hardship for the company in honoring the agreement that it committed to.

THE COURT: All right. Anything else, sir?

MR. FLEMING: No. Thank you, your Honor. Your Honor, if there's any questions, I'd be glad to answer them.

THE COURT: I've asked you several of them. Let me hear from Mr. Tucker, and I may have more from you then.

Thank you.

MR. TUCKER: Your Honor, first, I just want to make clear that I'm taking this as equivalent to an opening statement. We have indicated that we want to ask questions, have this as an evidentiary hearing. And we want to ask questions of Mr. Peizer.

We also have our CEO, president and CEO, who can explain a lot of -- they want to say this is a failing company. We think it's a company that has a bright horizon. It's got cash flow, liquidity concerns. It's had those when he -- we're

going to go through the 2013 10K that had the very same risk disclosures when he invested $10 million. We're going to show that those same risk disclosures have been in there for the last three years. This isn't a company that's not been around for a long time. This is basically in the last three years they've been building a patent portfolio. And it's on a company with an upward trajectory.

And you're going to hear from our CEO who says that the reason we haven't gone out and accepted more financing earlier is we're trying to be protective of our shareholders and only do it when we need to. If we have other things ahead that create revenue for us and we don't need to dilute the shares by selling more shares, that's what we're going to do.

So in the past three years they have raised every dollar that this needed, $39 million, including 10 million from Mr. Peizer, who stands over there and says, Rome is burning, I need to have these 2 million shares so I can liquidate them when I'm not going to be -- otherwise, I'm not going to be able to get my money, when he's sitting on five or six million shares that he's not selling. We say in our brief and today, actions speak louder than words. If you really think this is a failing company, why are you sitting on five or six million shares?

So let me get to some of the arguments in this case, Judge. But as I said here --

THE COURT: Let me speak to your preliminary point, sir, which is Mr. Fleming and I have already sort of begun a process that I think I'm going to be continuing with you just because I know me. And that is, I did want him to have an opening, but then I couldn't restrain myself from asking questions. And I'm going to do the same with you, because why treat you any differently?

Certainly if the parties want to put on evidence, that's fine. But if nothing else, my questions will orient you to the issues that are giving me or causing me interest.

MR. TUCKER: I have several friends that are judges. And I say I love a judge who asks questions, because it lets me understand what their thought processes are and address them.

Start out with what you asked Mr. Fleming at the beginning. And is this a mandatory injunction? Absolutely, yes. The cases that he's cited that relate to irreparable harm, these types of cases -- to the extent that they address the issue, they say it's a mandatory injunction. There is no question about that.

The importance of that is it raises a very high standard to a standard that's high to begin with. A preliminary injunction is as defined by the courts as an extraordinary and drastic remedy. That's just when you have a prohibitive injunction. Where you have a mandatory injunction, they say the standard is even higher; that you have to show a

clear likelihood or a substantial likelihood that you're going to win. That sets the bar very high.

The other things they have to show is irreparable harm and that the injunction is in the public interest. And we're going to address all those, because they can't meet those.

First, substantial likelihood of success on the merits. Okay. That really I think, your Honor, we tried to point out in our brief -- and I think it's important that the Court look at the Tranche 1A warrant and the language. It has two provisions for use of the warrants, two provisions. Section 1 is entitled exercise of warrants, exercise. The exercise is where you walk in and say, I'm willing to pay the exercise price of $3.36 and I get the stock. That's one way to do it.

The other is in Section 5. Section 5 is a wholly different way to use the warrants. It starts off, it's entitled exchange rights. It says, in addition to the rights of the holder under Section 1 hereof, the warrants shall be exchangeable. And then it goes on to say the "subject to" the limitations.

So what we have is two different ways to use these warrants. One is to exercise. One is to exchange them. The key provision is the exercise is -- it's subject to certain -- it has the language in here, subject to the limitations set forth in Section 1(h). And I will tell you that there are four

warrant agreements between the parties. The other three shall -- this was a bargain position. The Section 5 is only in this first warrant agreement. The other ones don't have a Section 5. They all are potentially omitted.

This was a point of negotiation. My client gave on one, but with the agreement that it would be subject to the limitations in Section 1(h)(i), which is the activity restrictions.

The activity restrictions are not only about plans or proposals. You heard Mr. Fleming stand up here and say, there's no plans or proposals, plans or proposals, plans or proposals. If you look at the activities restrictions, it's much broader than plans or proposals. We think what he did -- or we fall within that definition anyway, but if you look at page six and subpart 1(h)(ii), it says that the holder will not engage or participate in any action, plans or proposals. So action, plans or proposals. And then it goes on to say, which relate to or would result in pretty broad language. And then it goes on to say, D, any change in the present board of directors or management of the company. Any change in the present board of directors or management of the company. It then goes on, and F says, any other material change in the company's business. G is -- J at the end is a catchall that says any action, intention, plan or arrangement. I mean, trying to get even broader.

THE COURT: What is an intention? I mean, it seems a little bit like thought police. How is it that an --

MR. TUCKER: Well, it could be thought police, but -- unless you disclose what your intentions are. And here, he has. He has either in his e-mails or in his discussions with my client.

And it's pretty clear, there are e-mails that we're going to go through, your Honor, where he says specifically to Mr. -- to the chairman of the board, you need to step down. The only way we're going to do this in China is if the people in China think I'm in control.

He also says your board is not competent. They don't have microcap experience. They don't have public stock experience. They don't have this -- we need to change it. He does more than that. He says, if you don't make these changes and he gives dates by which they have to do this, make these changes. Then he threatens to speak with my lawyer, and we'll be starting more public activist actions.

THE COURT: But, sir, what concerns me about this section of the plaintiff's motion is these statements persisted over a period of time. There wasn't just a bad day when they were engaged in rather inflammatory conversation. This was going on for a period of time. And there's something about it that suggests that your client could be perceived to have been keeping these intemperate statements. And some of them are on

a little bit of the intemperate side in his possibility for back use, should plaintiff ever seek to exercise or invoke his right to exchange under the warrants. That's what concerns me. I'm not saying necessarily that it amounts to waiver, but I am saying that I find it difficult to believe that they didn't at some point try and stop him or remonstrate with him or do something with him before saying months and months later, oh, sorry, you cannot actually do what you seek to do because you have violated this provision.

MR. TUCKER: Mr. Sicignano will testify to that.

Also, there is a e-mail that -- most of these e-mails were in the March/April period.

THE COURT: Yes, sir.

MR. TUCKER: 2015. There is an e-mail April 22, 2015, which we'll offer today, from Mr. Cornell, the chairman. He goes through all the complaints about the business operations. And he says at the end, in specific response to your two requests, I do not choose to resign as the board member or as chairman. And 22nd Century will decline your proposal for you to become a member of the board of directors at this time.

We also remind you of the restrictions contained in Section 5 of each warrant agreement you agreed to at the time of your investment. He specifically told us contemporaneously with all of this going on, you'll hear Mr. Sicignano say, in addition to us having to do damage control with the people he's

talking to about all this, that there were conversations with Mr. Peizer saying, you can't do this. And as you noted earlier, your Honor, there's no notice provision. If he walks -- you know, if he commits these violations and he loses those rights, you know, his exchange rights, that is our remedy that's bargained for. We don't have to tell him along the way, although we did, that he can't do these things.

So the fact of the matter is -- and you'll hear testimony from Mr. Sicignano that, look, he continued to do this. He just went a little bit underground after we wrote this letter. There were continuing conversations about that. And then the letter was written in April -- in March 10th of 2016 saying, you voided your exchange rights because he understood that there was a potential short story coming out, a shorting of the stock which he believed Mr. Peizer may have something to do with. And they wanted him to be aware of the fact that you're not going to be benefiting by our stock going down. So let's let him know that he's already lost his exchange rights. And again, your Honor, the reason for that is that the exchange rights -- he would get more shares, depending upon the lower the price goes.

So you've got something that's very curious here. You've got a plaintiff who says, I think this company's failing, you know, and I'm going to do things -- as you say, cut the head off of a bleeding -- we're going to drive the

price lower. What does that do? It gets him more stock. If it's really bleeding, if it's really a company that's dying, why is he keeping five to six million other shares in his pocket?

We think the plain implication of all that is there's something more. You'll hear Mr. Sicignano say that on many occasions Mr. Peizer told him, I can do with the price of your stock whatever I want to do. It's not a largely traded company. The market cap is not that big. I can do whatever I want to with it, and I can buy control of the company.

All that suggests to me, your Honor, that this is all part of a process of, let's get the price down. I'm going to keep my shares. I can then go out and buy up control, if I need to, if I want to. But, again, we go to the proof is in the pudding. If Rome is really burning, you get out of Rome. He's staying in in more dollars than he's asking this Court to give in the way of a preliminary injunction.

There is no question but that the activities restrictions have been violated. You haven't heard them come up and say, that wasn't my e-mail. Again, we'll go through the e-mails where it said, you need to step down.

THE COURT: He's not disputing the e-mails, sir. He's just disputing whether they amount to a violation.

MR. TUCKER: Right. And --

THE COURT: I would not have expected them to

acknowledge the violation of the provision. But go on.

MR. TUCKER: Okay. I think it's fairly clear -- and then let's go to some of their arguments, though. They say that the "subject to" language doesn't mean that compliance with the activities restriction is a condition for the exchange rights to be used. That's not the case. The "subject to" is important that the company did not want Mr. Peizer to be able to take actions like this that are harmful to the company and have a correlated harm to the stock price and benefit by it.

So while they say -- if you go look at the last sentence of Section 1(h)(ii), it says, this doesn't prevent the holder from enforcing his rights or exercising his rights. It doesn't say it doesn't prevent him -- it's not a carve-out for the exchange. They have used in this document, in Section 1, the term exercise. They've used in this document in Section 5 the term exchange.

THE COURT: But I thought your adversary says that if I read the term securities as I should read the term securities, it would necessarily be implicated by it.

MR. TUCKER: If you read the term securities -- I think what he's saying, Judge, is that the "subject to" should only apply to make this subject to the warrant shares, as he calls them. If you look at the warrant shares, the definition of warrant shares, it's on the first page of the agreement. And it says -- it talks about 1,250,000 shares subject to

adjustments provided herein, fully paid, nonassessable shares of common stock as defined below the warrant shares. The plain definition of that is any shares that are obtained under this warrant agreement. When they say fully paid and nonassessable shares, that means there's nothing more owed on them. They are paid in this instance in one of two ways: Either under Section 1, they walk in and get cash, or they walk in and use their warrant. Exchange their warrant. I have a warrant for 50 shares. Here's my exchange. They are fully paid. That's what a warrant share is.

And if you don't interpret it this way, and Mr. Fleming is about, let's harmonize, let's give meaning to everything -- the activities restrictions, if you don't make this subject to it, then there's really no purpose to the "subject to" language. It's already been addressed.

The last sentence of Section 1(h), which we talked about earlier, if you read it, it says the restrictions contained in this paragraph H shall not limit holders' rights. And then it goes to enforce its rights or exercise its rights as to the securities or under this warrant. To enforce means there are other rights in this document. For example, if there is a stock split, then the warrants need to be adjusted to, you know, more or less to account for that. That's what you say to enforce these rights. That's what's meant by that.

To exercise is the exercise under Section 1 using the

exercise rights. It doesn't say exchange. If you say in Section 5 that the exchange rights are subject to 1(h), and then you go over there and you have this language that says, but this doesn't prevent anything, the "subject to" language has no meaning whatsoever.

THE COURT: I thought the argument he made was that there was a temporal limitation on the "subject to" language, that what it spoke to is the situation when shares were being held by Crede before selling it on the market.

MR. TUCKER: Right. But the Section 1(h) already has language to address that. If you look at the beginning of 1(h), it said, for so long as holder --

THE COURT: Even from Florida, you have to slow down.

MR. TUCKER: Sorry. The introductory language to 1(h) provides that for so long as holder or any of its affiliates holds any warrants or any warrant shares, that the holder will comply with the activities restrictions.

So it's already got that language in there. In other words, the "subject to" language tracks you over to 1(h). And 1(h) says, as long as you're holding this warrant or holding warrant shares, then you're subject to these restrictions. So the "subject to" isn't a temporal restriction; it's referring -- that's already covered in 1(h). Okay?

THE COURT: Okay.

MR. TUCKER: It would not have been -- and we're not

saying, Judge, by this that if he violates his activities restrictions, he can't exercise his warrants. We're not saying that. We're not saying he can't enforce some of his other rights.

But what we're saying is by the "subject to" limitations, that's the only meaning it can have; that when it says -- as it says in 5, in addition to the holder under Section 1, this warrant shall be exchangeable on a cash basis, as further set below, and subject to the limitations of 1(h)(i), meaning you have to comply with those limitations. He argues that there's supposed to have some temporal application, meaning that it can only bar my exchange rights if I'm in the process of breaching. In other words, I can breach for three days or a month or two months, stop and say, fellows, time out. I'm stopping and now I can exercise -- I mean, I can exchange, use my exchange rights. There's nothing in this agreement that says that. It's a ludicrous argument.

The argument about forfeiture. Yes, there is New York law that says that they generally try to avoid forfeiture. But there is another whole big, large body of law that says the parties -- their contracts are to be enforced. Where you have a provision like this that says, look, you've got to comply with this requirement, these requirements or you don't get it, it's not for the Court whether it's -- he loses rights or not to rewrite it.

This is not an equitable issue. This is an issue about enforcing the rights of the parties. And it's clear that we believe that the activity restrictions -- that he's violated them, because there are actions relating to the change in the board and the management that fall squarely within those restrictions. And if he has lost exchange rights as a result of that, that is a remedy that was bargained for and that we are entitled to receive.

Certainly by all this, if you take this and overlay the substantial likelihood of -- the clear likelihood of success, he doesn't meet that standard. We don't think he meets the standard period, but certainly if you put the high up, he doesn't meet it.

He's made the argument with regard to Section 13D. This is the -- 13G is what he files. That says that if I've got at least 5 percent but I'm going to be a passive investor, a passive investor, if I'm going to change and do things, I'm going to have to report it. That's independent of this contract.

We're not here as the SEC trying to enforce things. The language is similar but it's not the same. Ours is broader. Ours talks about actions. It doesn't talk about just plans or proposals. The fact of the matter is upon this evidence, Mr. Peizer should have filed a 13D. That's not our argument. That's somebody else's argument. But the fact is

two wrongs don't make a right. He shouldn't be able to come in here and say, well, I didn't file a 13D. I probably should have. And that means that I couldn't have been violating 13D or I couldn't have been violating these activities restrictions. The focus has to be on the evidence of the contract, what were the restrictions, and did he violate those?

And when he says, any actions to change the board or to change the board in the company management, and you're asking and demanding and given dates certain when the action has to be taken, that the chairman either step down and he be made the chairman and a board member or he threatens I'm then going to do more public activist action, how can that not be a violation?

Turning to irreparable harm, the plaintiffs acknowledge that this is a claim for money damages. What they want is, I want to get the stock, I want to liquidate it, and let's put them in proceeds for the sole reason that what I'm after in this is money, and I won't be able to get it because they say the company's going to be broke and not able to pay it later.

So it's clear by their own pleadings that this is a case about money damages. The case law is also clear that claims for money damages will not support a preliminary injunction or injunction period, because they say that simply is not the irreparable harm. They make only one argument

against that. That argument is citing these various cases where they're saying, well, if you can't collect -- I don't think you can collect the money in the end -- then that would be irreparable harm.

Their argument is wrong, both legally and factually. Legally, the case law that they cite are all unreported decisions.

THE COURT: They may still be persuasive.

MR. TUCKER: They may still be persuasive, your Honor. And they're all based on the *Brenntag* decision, the *Brenntag* decision out of the Second Circuit.

The *Brenntag* decision was decided before the Supreme Court decided the *Grupo Mexicano* case. The *Grupo Mexicano* case also came out of the Second Circuit to the Supreme Court. And the Second Circuit in the lower case, in *Grupo Mexicano*, had given similar relief.

In other words, they said, look, we think in a situation where a plaintiff has a claim for money damages and we believe that there's evidence that they may not be able to collect it, that there can be prejudgment relief in the form of this preliminary injunction. The Supreme Court looked at that and said no. Where the claim is for money damages, the district court doesn't have that authority. And they cite and refer to the long-held principle in American law that, look, we're not getting prejudgment relief like that until after you

get your judgment for money damages. So under the *Grupo* decision by the Supreme Court -- and none of these cases that they cite refer to the *Grupo* case. They don't. It wasn't raised.

It has been raised in the Des Verres (phonetic) case, which we cited out of the Eastern District of New York, which went through it and said, yes, in a situation where someone is seeking money damages, that they don't get preliminary injunctive relief. And they also distinguish *Castle Creek*, which is one of the cases they cite as saying that -- they didn't even mention *Grupo*. They didn't address *Grupo*.

This is a legal claim for money damages. *Grupo* has said that they're not entitled to injunctive relief because it's not irreparable harm. Let's turn to the facts. Even if you get past the law, the cases that they cite typically involve a client that gets into court in the first instance because they defaulted on a financial obligation. For example, *Castle Creek*, it was a default on a convertible debenture, a debt note instrument, where someone is already not meeting their financial obligations.

They also are cases in which the company challenged very little -- you know, challenged not much, if at all, their alleged insolvency, or there was overwhelming evidence. That's not the case here. 22nd Century is a fairly young company. And like many that are -- have assets based as its company

operations to develop important intellectual property patents, there is a large upfront expense associated with that. Once that has been built, then they hope to turn that into money.

And that is shown in their financials. The book value in their basing all of their arguments about the company's finances by looking at the reports in the 10K, you look at that book value of the IP portfolio is about $3-and-a-half million; total asset value, $20 million; the debt on the company, 600-something thousand dollars. Revenue growth in 2014, it was around $500,000; 2015, 8-and-a-half million. 2016 is projected to be 12 million. This isn't a company heading down. This is a company heading up.

It also has additional expenses. You'll hear from Mr. Sicignano that in the last year they bought a subsidiary company that will help manufacture some of these tobacco products. They are having -- they are expending more money now than they are bringing in, but that is part and has been a part of the company's plan from the beginning. And it remains this.

They continue to have the ability to raise capital. They have raised over the last three years -- when, again, if you look at their risk disclosures, which were the same, saying that there is a -- you know, there is no guarantee that we can raise capital, where we disclosed that we're spending more cash than we're bringing in, when all of those disclosures were in there, they have been able to raise $39 million, every penny

that they've needed. These are the same, quote, size of demise of this company that existed when Mr. Peizer brought his $10 million in and said, can I buy?

You'll hear testimony from Mr. Sicignano that in February of 2016, after these horrible financials came out, the 10K, that they raised $5.5 million in a capital offering. You'll hear that not only did they do that, but Mr. Sicignano will tell you that Mr. Peizer wrote an e-mail saying, why didn't you offer it to me? This is the same person who comes in here and says, I got to get my money out of this. I got to get this stock and sell it. It's not what the facts are.

You'll also hear that -- Mr. Sicignano will tell you why they go about raising their funds like they do and what their other sources of money are. And I will point out that the claim for preliminary injunction has to be that we're insolvent or we're near insolvent, reasonable likelihood that we are. They've admitted that we've got cash sufficient, without anything else happening, to go through the end of October.

There are a lot of things that this company is exploring. Mr. Sicignano will speak to you about, between now and then, where they will generate money, that either generates money. They don't have to go to capital. If they don't, then do what their track record has proven for the last three years: That they can go get it. In fact, he'll tell you he's already

been offered money, if people want to do that.

He also -- they've got $20 million worth of assets. They can borrow money. All these are reasons why Mr. Peizer is not selling his five or six million shares. He's hanging in there because he knows where this is ultimately going.

And where this is ultimately going, Judge, is -- what you need to understand is this company has a very unique niche. This company is developing products that they can regulate genetically tobacco products that will reduce nicotine. Whether smoking is a bad thing or not, people are going to continue to smoke. This is a product that you'll hear him say that they've got in front of the FDA right now to allow them to market a lower nicotine cigarette product. They have licenses to the British American tobacco company that are in place. They are working with others to develop a smoking cessation product.

If some of these things happen, Judge, this company, with its patents that by law exclude others from getting into this area, it is a potential tremendous investment company. And that is why Mr. Peizer is saying, I'm keeping my five or six million dollars in shares -- five or six million shares.

The agreement, let me talk a little bit about his irreparable harm. The whole basis of this is brink of insolvency, all based on the 10Ks. We are going to walk through with you and give you the pages where it's part of

what's called a risk disclosure. There are literally 10 to 20 pages of risk identified, that have been identified consistently from 2013 to today. They haven't dissuaded Mr. Peizer or anybody else from investing any money. Do we think that those are likely to occur? No, they haven't to date, and we don't think that they will. But we have to identify them.

The statements also have at least -- these 10Ks also have reports of operations that you'll hear from Mr. Sicignano, he'll tell you the successes that the companies had. It will also give what they call forward-looking statements that will identify, this is what our plan is; where you can see, this is not like these other companies in the cases that they're -- in their cases that they're citing where the companies were just flat on their back, dead. This is a very different company.

What they're asking you to do essentially is to say that any company -- it could largely be a start-up company -- any company that has a need or expresses a need that, look, we may need to do some more capital offerings in the future, that that would be sufficient to say that they're insolvent or nearly insolvent and, therefore, any instance you would have a right to claim irreparable harm and get this preliminary relief. Virtually every company that's starting has no guarantee that we're going to make it, that we're going to have -- generate sufficient revenues to cover expenses. They

all are involved in capital offerings.

He's asking you to take from those two risk disclosures and say that from that we can take -- ignore all the other things, ignore all the -- ignore our asset base, ignore what type of assets we have, ignore our successes, ignore what we think is on our horizon and ignore our track record, ignore all those things. Look at those two risk disclosures that have existed for three years, have not occurred, take that and say, let's give the drastic and extraordinary remedy. You take that and you add on to it their high burden to not only prove that that's going to happen, but that it's clear and reasonably likely it's going to happen. They simply haven't made their proof, satisfied their burden.

Again, we would go back to, if it is so critical, if Crede is going to suffer irreparable harm if I can't liquidate that stock, why hasn't he not liquidated this other stock? The proof is in the pudding. If you think you're going to lose money by your stock, you're out of it. If you don't think you're going to lose money by your stock, you're in it.

The preliminary injunction requires a bond, if you are inclined to enter one, enter a preliminary injunction. There is a provision in the contract -- but the case law is fairly clear that the Court has an independent duty to look and determine whether a bond is appropriate regardless.

THE COURT: Well, here I'm understanding your

adversary to offer to escrow the funds --

MR. TUCKER: Right. And that's not sufficient for a number of reasons.

THE COURT: Okay.

MR. TUCKER: I think that the reason they offer to escrow that is one of the judges did that and they think, okay, this is more precedent. We can follow that track.

The argument is not sufficient because -- for a lot of reasons. Once the stock is issued, it can't be unissued, right? Once it's out, it's out. And it will dilute the shareholders, the current shareholders. What you will hear from Mr. Sicignano is one of the reasons they didn't earlier go out and say, let's raise $20 million or $50 million, is because we want to be judicious with when we go to the market to raise stock, because the current stockholders -- the more we issue, the less their value in the company is. So when you issue these shares for him and he sells them and sells them at the bottom of the market -- you know, it's pretty low right now -- what you're doing is diluting those shareholders and that stock is gone.

It also -- I thought what you were getting at earlier, Judge, when you were saying that someone is bleeding and you're going to cut off their head, if he goes and sells two million shares on the market -- and this stock trades at about 500,000 shares or more a day, you know, thereabouts -- if he goes and

has to get rid of two million shares, I think the obvious implication is it's not going to have a good effect on the stock price.

At the same time, one of our financing opportunities or one of our options is that we would go to the capital markets to raise money. So at the same time he's saying, wait a minute, I'm going to have irreparable harm because I'm not going to be able to get paid this money, one of the reasons -- one of the ways that we would have to raise money would be go to the capital markets. And he's making it work against us. In other words, if you have somebody that says, maybe I want to invest in this company, we would hope that we could have them invest in a capital offering that had a high -- as high a stock price as we could. And if he's over there dumping shares, driving the price down, it's not going to be helpful, to say the least.

We have -- just from a point of pure economics, it's not enough. This is supposed to protect us in the event that he's wrong. He's talking about selling two million shares or so at somewhere 70 cents a share, something like that. He would escrow -- then let's just say I escrowed one-and-a-half million dollars, something like that. I'm not doing the math right now. But there is an analyst who is also our investment banker, but they work on separate sides of the house. There are Chinese walls, so to speak, about that that has this

company -- it's the only one that's really following it. It has this company as a buy recommendation and targets a price of $4.50. That equates to, these 2 million shares, about $9.4 million.

So what Mr. Peizer is suggesting is, let me sell this at 70 cents a share, put that there. Now, if the stock rises from there, any bid, any -- let's say it rises a nickel or dime, much less to the 4.50. I'll say this: This stock has traded between a low of 50 to a high of $6 or so in its history. So it's certainly got that range.

And I mention this in the fact that right now the company has -- is waiting for a response back from the FDA for approval to sell certain of these lower nicotine cigarettes. It doesn't take a brain surgeon to understand if we are to get that, the only company to get that, that that is going to be a good thing and have a good impact on the stock price. If he liquidates it at say 70 cents, and we have that right, there is no proceeds there to pay us that. We're talking if it went, like the analyst says, 4.50, we're talking about 9-and-a-half million, 9.4 million dollars that he would need to pay us back for the stock value that he liquidated.

There's also damages. You'll hear that it's going to hurt our capital offering. There's also legal fees and costs associated with proving that are also subject to the bond. That's why on a conservative basis we've asked for a

$10 million bond. For them to argue -- again, this is where proof is in your actions, not in your words. If they really believe that this company is near insolvent and is going to fail, what's the problem with putting up this bond? It's never going to be called. This is trying to make it easy for them. Look, let me just sell it, put it there, and I have no -- I have no risk. The only harm really is to the company.

An alternative for that, Judge, an alternative is if you want to put 2 million -- whatever shares we get, you liquidate. Put certificated shares in escrow. And then if those stock goes up or down, we get it. We don't believe an injunction should issue at all, but certainly it should be a 10 million or some combination of a bond like that. And I hesitate to suggest that, Judge, because I don't want you to think that we're in favor of it. The fact that the stock --

THE COURT: You've made clear that you're not, sir.

MR. TUCKER: The fact that the stock is issued is a problem for us, okay? The public interest, the balancing of equities, if there is really an issue of insolvency or near insolvency, that's an issue for the bankruptcy court. It's not an issue for the courts beforehand to start favoring one creditor who's coming in or not. They say, the balance of equities is to enforce their rights under the contract. Amen. Enforce the rights under the contract. Section 5 says, subject to your compliance with subsection 1(h)(ii), your exchange

rights. You didn't. I think that there is no question that there has been actions trying to change the board and the management. Enforce the contract.

The last point I will make, Judge, is there is just a question about how many shares he could get anyway. Under Section 1(f), 1(f), there is a cap on the number of shares that he can have. And that impacts what he can -- his right to exercise or use his exchange rights. It says that he can never have more than 9.9 percent of the shares. That means that he can't -- if he can't exchange, use his exchange rights to get more shares, if he would go above the 9.9 percent -- in other words, he has a limit to how many shares he could exchange for. Currently, there are about -- there are 76,025,273 total outstanding shares. 76,025,273 shares, 9.9 percent equates to 7,526,502.

We believe, and we want to ask Mr. Peizer, that Crede owns 5,884,330 shares. They said between 5 and 6 million. He's asking to exchange 2,077,555, which is above the 9. Under our math, the most that he could exchange is 1,642,000 shares, 1,642,172. Again, I hesitate to give you that. I don't want you to think that we are thinking that he's entitled to any, but I want to make sure that if it is going that way, it still has to be subject to those limitations as well.

So the bottom line, Judge, is we would like to put on Mr. Sicignano and Mr. Peizer and fill out some of this

information, some of the things that I've told you about. I think it's important for you to hear from Mr. Sicignano and hear some things from Mr. Peizer.

THE COURT: All right. Let's take a five-minute break and then we'll come back and put on testimony. Thank you.

(Recess)

THE COURT: Mr. Tucker, you wished to call someone as a business?

MR. FLEMING: Your Honor, I guess it's my case.

THE COURT: Would you like to call --

MR. FLEMING: No, I don't. I've called Mr. Peizer's direct, so his affidavit is a direct. So he's subject to cross-examination.

THE COURT: Yes, sir. Thank you for the clarification.

MR. FLEMING: With that, I will rest.

THE COURT: Thank you, sir. All right.

MR. TUCKER: I would like to call Mr. Sicignano.

THE COURT: Do you not want to have cross-examination?

MR. TUCKER: I would like to have -- I would like to call him. If you want me to cross him now, I will.

MR. FLEMING: Your Honor, maybe we can save a little time.

I object to Mr. Sicignano's testimony on direct. He submitted his affidavit on direct. He's gotten his direct into

evidence. And there's no rule of evidence that gives you two direct testimonies. And for them to call him now and offer another direct testimony is just not permitted.

THE COURT: Let me hear from Mr. Tucker on that point.

MR. TUCKER: I'm happy to rest on his direct. I think what we're doing is -- I could sit here, your Honor, and say he can't put in his affidavit because it's an evidentiary hearing and he's here to testify. I think we're here trying to do things --

THE COURT: Well, I have a rule of practice, sir, that permits testimony by affidavit in precisely these circumstances. So I don't think that's the strongest argument for you.

I mean, let me be clear to both of you. What I want to do is to decide this motion correctly. If either of you has tripped up on my individual rules of practice and feels that you do not have before me the information you want to have before me, let me not be the reason for that deficiency in your record.

So, Mr. Fleming, if there's anything else you want anybody to say, you are allowed to do that, sir.

MR. FLEMING: No, your Honor. We put in Mr. Peizer's direct, and we had a chance to submit reply affidavits and the like. We chose not to, because we feel his direct was complete. And we received a couple of days ago a notice that

he would be subject to cross-examination, which your rules contemplate. And we served one also for Mr. Sicignano. So I think both counsel have understood that the affidavits are the direct, and if someone wants to cross, they can cross.

THE COURT: Okay. You've just now told me that you understood that. Let me just confirm with Mr. Tucker.

Mr. Tucker, did you have a different understanding, sir?

MR. TUCKER: From the very first time we've had conversations, we've said that we believe that this is an evidentiary hearing and Mr. Peizer needs to be here. I have no problem with them offering his affidavit and then just letting me cross-examine him, and we'll move along that way. I just have questions to ask him about what's stated in his affidavit or otherwise.

THE COURT: That's fine. Now let's talk about the converse of that, sir, which is having your client's testimony.

Did you get forward everything that you wanted to put before me?

MR. TUCKER: No.

THE COURT: Why not?

MR. TUCKER: Why not? Because, as you recall, they filed their motion. We were told to just respond to it. When we responded, they got a reply memorandum where they raised things that I think I discussed earlier in my argument that

Mr. Sicignano needs to explain what's going on with the company and where they can raise money. I mean, those things weren't all addressed. There's more to be said.

THE COURT: All right. I will permit it, but I am going to ask you to focus it, sir, and to not duplicate what is in the affidavit.

MR. TUCKER: I understand that.

THE COURT: Let us hear then from Mr. Peizer, please.

TERREN PEIZER,

called as a witness by the Defendant,

having been duly sworn, testified as follows:

THE COURT: Counsel, you may proceed.

MR. TUCKER: Your Honor, may I approach the witness and give him -- this is Mr. Sicignano's affidavit with the various exhibits attached to it that I may want to refer him to.

THE COURT: I presume that's only because of the affidavits, not because you want him looking at --

MR. TUCKER: I want him to be looking at the --

THE COURT: That is fine. Thank you.

MR. FLEMING: Do you want to give him his affidavit also? It has some other exhibits also in it that aren't in the Sicignano affidavit.

MR. TUCKER: Pardon?

MR. FLEMING: It has other exhibits that may not be in

Sicignano.

THE COURT: I have Mr. Peizer's affidavit.

MR. TUCKER: If I'm going to refer to other ones, I'll give him those as well.

THE COURT: Thank you.

CROSS EXAMINATION

BY MR. TUCKER:

Q. Mr. Peizer, would you look at the Sicignano Exhibits 11 through 16. I want to ask you just a couple of questions.

The first question would be: Do you admit that you sent these e-mails?

THE COURT: Let me just ask something of plaintiff's counsel. Is there going to be an objection to the introduction of any of these exhibits? I assume not, inasmuch as they were exhibits to a declaration.

MR. FLEMING: I have no objection to the introduction of the exhibits. They're not being offered for the truth of their contents; they're being offered for the fact that they were sent, which I think they were.

THE COURT: All right. Well, I don't know about that last part.

Let me ask the question differently. What I was trying to do was to short-circuit the need for either counsel in cross-examining a witness or directing the witness to have to ask foundational questions before the introduction of the

exhibits.

MR. FLEMING: We have no objection to any of these exhibits coming in.

THE COURT: Okay. Then I'm going to assume that they're all in, unless someone objects to them. Thank you.

MR. TUCKER: Thank you, Judge.

BY MR. TUCKER:

Q. Then let me ask you a different question, sir: In these e-mails, 11 through 16, you sent them and copied at various times board members, shareholders, investment bankers, industry analysts for the company, didn't you, sir?

A. Yes, I did.

Q. And in those e-mails you were taking action to cause a change in the company management, including the chairman of the board of this company, weren't you, sir?

A. No.

Q. Sir, wasn't it your demand that the chairman of the board, Mr. Jim Cornell, step down?

A. Step down as chairman but not change the composition of the board, which is -- a chairman has the same vote as any board member.

Q. So you agree that you were demanding that he step down?

A. As chairman, because CNTC wanted someone else to deal with.

Q. Isn't the chairman the top manager of the company?

A. No.

Q. You also wanted to be put on the board, didn't you, sir?
A. No.
Q. Didn't you also think that the only way that you could move forward with the China venture was if you -- if they understood that you were in control of the company?
A. I offered a suggestion. I repeatedly, in a lot of e-mails, said I had no desire to serve on the board. And, in fact, Crede as an investor never serves on boards. And we've done 20 similar type transactions, never asked for a board seat. And we say we're a passive investor and don't take board representation.

THE COURT: Sir, let me talk to you about that, please. Obviously I'm not an investor, so this is a little bit beyond my ken. But tell me what you mean by saying that you are a passive investor.

THE WITNESS: Meaning that we make an investment and we -- when we enter into the investment, we do it on what we believe are the merits at the time. We feel we're also investing in management. Until they prove us wrong, we are in favor of management and their business plan. So we don't seek board representation. We don't seek to -- I'm a very busy person with a lot of companies. I have no time to serve on boards of companies we invest in as a passive investment.

THE COURT: Okay. But, again, just so that I'm clear, to you, being a passive investor does not foreclose your

ability or your perceived obligation to speak to management when you think either that they're departing from their business plan or that their business plan is proving to not be as successful as one might have thought?

THE WITNESS: Correct. I am the largest shareholder of the company. And there's a very frustrating situation, as I lost seven-and-a-half million very quickly. And I'd be more than happy to speak to those questions.

THE COURT: That's fine to me, sir. Passive investor is, candidly, what I am. I have a couple of shares of stock in a company. I get a little proxy every year. I don't do anything with it because -- well, because I'm not the largest shareholder in any company.

THE WITNESS: In this case I was the one who invested the most capital in the company's history, still to this date.

THE COURT: Okay.

THE WITNESS: As a role of the largest shareholder, and also my role as a consultant, I make suggestions -- I always interact with management giving them suggestions. Frankly, they're always constructive. Every e-mail was in the construct of, let's get back on track. Let's get the China JV going, because that's why I invested in the company.

THE COURT: Okay. Thank you for the clarification. And thank you for the indulgence.

Counsel, you may proceed.

BY MR. TUCKER:

Q. You also were critical of the company's board of directors, weren't you, sir, in your e-mails?

A. Critical of anything that causes substantial loss in the value of my asset.

THE COURT: Is that a yes, sir?

THE WITNESS: I'm sorry. Yes.

Q. And you wanted the board to change its composition to have people with microcap experience, public companies, didn't you?

A. Correct.

Q. And that's what you were saying in your e-mails?

A. No. What I was suggesting is to stem the losses in the stock to encourage people to purchase the stock. These were changes that I suggested in the construct of being the largest shareholder and the consultant to the company.

Q. And you actually made demands that these changes occur by certain dates, didn't you, sir?

A. I may have.

Q. And if they didn't occur, you threatened more alternative publicly disclosed courses of action?

A. Threats are worth the paper or e-mail they're written on.

Q. The actions would be what, sir?

A. I don't -- I didn't have a plan or an action or proposal in mind. So obviously, if I had one, I would have -- after being rejected on all my suggestions, I would have set forth some

activity, if that was the route I was planning to go on.

THE COURT: Excuse me, sir. Were you, in fact, rejected on your suggestion?

THE WITNESS: Every one.

THE COURT: Okay. So weren't you sort of being asked to put your money where your mouth was at that point?

THE WITNESS: Right. But I was making suggestions. That's the whole point. I didn't go that route.

THE COURT: I see. So I want to make sure I understand this: You're saying I should discern from the fact that there were no -- nothing done after you were --

THE WITNESS: That's correct. I sent a letter, e-mail. And as they were acerbic, if you will, it was to try to get them to focus on the issues and not abdicate their fiduciary responsibility. And I could say it. I could threaten it. I could do it. They reject it, I did nothing.

THE COURT: Okay. Thank you.

BY MR. TUCKER:

Q. What do you understand an action that would relate to the change of the company board or a change in the company management to include?

A. I'm sorry. Can you repeat the question?

Q. What do you contend would be an action that would relate to the change in the company board or the company management?

A. It's --

Q. Would it include --
A. It's a defined proxy acquisition and the like. It's defined.
Q. Defined where? It's not defined in this agreement, sir?
A. How you change a board isn't by suggesting a change in the board. How you change a board is by entering a proxy fight.
Q. So does this warrant agreement in the activities restrictions, does it talk about -- does it mention proxy fight? Does it mention formal hostile takeover?
A. That was the intention of the paragraph.
Q. But the language that was used is any action that would relate to a change in the board or a change in management, correct?
A. I'd have to reread it again, but I assume that's -- I don't know. I'm not interpreting what the paragraph says. I know what my understanding was.
Q. Your demands that the board composition change would be an action trying to effect change in the board, wouldn't it, sir?
A. I wish an e-mail could do that but it can't.
Q. But your sending the e-mail was an action to demand that, wasn't it, sir?
A. It's an e-mail.
Q. Your demand that Mr. -- that the chairman step down was an action to change the board and the management of the company?
A. No. No. It was to change a figure head that -- CNTC

suggested that they were very frustrated with 22nd Century. And it was an attempt to get the joint venture moving.

Q. Sir, would you agree with me that if the proper interpretation of this, "these activity restrictions" is any action would include the sending of e-mails demanding that the board members be changed or that the chairman step down, that you violated that --

MR. FLEMING: Objection, your Honor.

A. Not at all.

THE COURT: Couple of things. Number one, one of you at a time.

MR. FLEMING: I have an objection.

THE COURT: I understand, sir.

MR. FLEMING: I mean, the question essentially assumes a set of facts, if you -- and then asks him to agree that that would be a breach. I think it's inherently unfair.

THE COURT: Yeah, but he also said he didn't agree, so I'm not sure how you're harmed. But, okay. That's fine.

MR. TUCKER: I think we're there.

THE COURT: I think we're there. And maybe a little less summing up in your questions. But thank you.

MR. TUCKER: Sure.

BY MR. TUCKER:

Q. The "subject to" language, if you turn to that, it's in Exhibit 7. That's in the warrant agreement.

A. Exhibit 7, did you say? Does Exhibit 7 --

THE COURT: What page, sir?

MR. TUCKER: Page 8, which is Section 5.

THE COURT: Oh, which is actually page 9 on the ECF filing. Thank you.

Q. Are you there, sir?

A. I don't know. I'm not sure.

THE COURT: Here. Here.

THE WITNESS: You said page eight?

THE COURT: It's actually page eight on top.

THE WITNESS: This one.

THE COURT: You're right there. But I think that's the wrong -- is that the correct --

THE WITNESS: I don't know.

THE COURT: May I see it, please.

MR. TUCKER: Section 5.

THE COURT: I think this is a different document.

MR. FLEMING: I think, your Honor, it might be that the Tranche 1A warrant are exhibits to a consulting agreement in Mr. Sicignano's affidavit.

MR. TUCKER: Exhibit 7 to Mr. Sicignano's should be the Tranche 1A warrant.

MR. FLEMING: You're right. Correct. It's on page 9 of 22.

THE COURT: Strangely enough, it's page 8 on mine.

Counsel, you may proceed.

BY MR. TUCKER:

Q. I want to focus you on Section 5. Section 5 identifies the exchange rights, does it, sir?

A. It says exchange rights, yes.

Q. And that's different from the exercise rights that are in Section 1?

A. I'm not sure what you're wanting me to focus on here.

Q. I want you to focus on my question, sir, which is: The Section 5 exchange rights are in addition to the exercise rights covered in Section 1, correct?

A. If you say so.

THE COURT: No, I don't want to do that.

THE WITNESS: I don't know how -- I'm reading it. I'm not -- I can't interpret it legally.

THE COURT: Okay. Well, let me ask you this: It says exchange rights, yes, sir?

THE WITNESS: Yes.

THE COURT: Is there another section of the agreement that deals with what are called exercise rights? Is there another section to the agreement to which you'd like to direct his attention earlier?

MR. TUCKER: The one I did earlier, which is Section 1.

THE COURT: I want you to look at Section 1, sir.

THE WITNESS: I'm not a lawyer.

THE COURT: I understand that, and -- all right. He's going to try a different way, and we'll see if we need to go back to this.

Go ahead counsel.

BY MR. TUCKER:

Q. Look at Section 5.

A. Okay.

Q. Does the first sentence say, in addition to the rights of the holder under Section 1 hereof?

THE COURT: Yes or no?

A. Yes.

Q. "Section 1 hereof" refers to the exercise rights, doesn't it, sir?

THE COURT: Let's go back to Section 1.

A. I assume so, yes.

Q. So you agree with me that there are two ways that these warrants can be used: One is to exercise; one is to exchange?

A. That's correct.

Q. And in the exchange rights section, Section 5, if you continue on and to the second line, it says, this warrant shall be exchangeable by the holder on a cashless basis, as further set forth below and subject to the limitations set forth in Section 1(h)(ii).

Do you see that, sir?

A. Yes, sir.
Q. And that means that the right to exchange, the warrant shall be exchangeable is subject to those limitations, correct?
A. I assume so, yes.
Q. You understand that to mean that if the limitations in Section 1(h)(ii) are not met, that the warrant should not be exchangeable, correct?
A. That was not my understanding.
Q. That's what it says, though, isn't it, sir?
A. I don't know. I don't think I'm qualified to answer that.
Q. That's what it says?
A. But I -- okay.
THE COURT: So the document says what it says. Thank you. Please move on.
Q. 22nd Century in response to your e-mails, there were communications with you asking you to stop such conduct, wasn't there, sir? You had conversations with Mr. Sicignano saying, you can't be doing this, or words to that effect, correct?
A. I don't understand the question.
Q. After you wrote these e-mails demanding that the chairman step down, demanding that there be changes in the board, you had conversations with Mr. Sicignano, didn't you?
A. I might have, probably had conversations with Henry, but I don't know what you're asking.
Q. Did Mr. Sicignano in those conversations to you tell you

that you can't be engaged in these activities?
A. No. Absolutely to the contrary.
Q. Pardon?
A. Oh, contrary. We always talked about getting the China JV on trend.
Q. That's not what I'm asking you about, sir. In the conversations with --
A. No. He never -- I said, no, he never told me anything --
Q. I just want to make sure we're clear on this. Is it your testimony that while you were writing these e-mails and having these communications demanding the changes in the board and the chairman step down, it's your testimony under oath that you didn't have conversations with Mr. Sicignano telling you, you can't be doing this?
A. That's correct.
Q. You do admit though, sir, didn't you, that you received an e-mail from the chairman telling you not to do this, sir, didn't you?
A. Do you mind specifically showing me?
Q. I can.
MR. TUCKER: Judge, may I approach?
THE COURT: You may.
MR. TUCKER: This is one that is not in the notebooks.
THE COURT: Is there a reason why it was kept out, sir?

MR. TUCKER: Because we didn't -- this was an issue that was raised in his reply brief in which he said, nobody ever said anything to me about it.

THE COURT: Okay.

MR. FLEMING: I think that was --

THE COURT: Is there an exhibit number for this, sir?

MR. TUCKER: Yes, your Honor. I don't know, I'll need some help as to exactly how you want to mark it, since we've got the -- maybe we call it Hearing Exhibit 1.

THE COURT: That's fine.

MR. TUCKER: Thank you.

MR. FLEMING: How about Defendant's Exhibit 1?

THE COURT: Okay. Defendant's Hearing Exhibit 1, on the theory there may be plaintiff's hearing objections.

Mr. Fleming, do you have an objection to its introduction?

MR. FLEMING: Could I just look at it for a second?

THE COURT: Of course. (Pause)

MR. FLEMING: No objection, your Honor.

THE COURT: All right. It is admitted into evidence. Thank you, counsel.

(Defendant's Hearing Exhibit 1 received in evidence)

BY MR. TUCKER:

Q. You received this e-mail?

A. It looks that way.

Q. Could I just ask the witness to --

MR. FLEMING: Could I just ask the witness to take a moment and read the e-mail.

A. It's a long e-mail.

THE COURT: I understand that, sir, but it is directed to you, is it not?

THE WITNESS: Yes.

THE COURT: While I would not expect you to remember every single e-mail you ever received, do you recall generally receiving this e-mail? There may be something in there that might jog your recollection.

THE WITNESS: Yes, I do remember.

THE COURT: Thank you, sir.

MR. TUCKER: Thank you, Judge.

BY MR. TUCKER:

Q. I'm not going to go through all of this. The first couple of pages are Mr. Cornell's response to your complaints regarding how the company's approaching the China venture, generally speaking, is that right?

A. I'm sorry?

Q. Is that right? Did I characterize the first couple of pages?

THE COURT: Let me -- if I may, counsel.

MR. TUCKER: Please.

THE COURT: You can read as much or as little of this

as you want. The question from counsel is: Is it fair of him to summarize the first couple of pages of this e-mail by saying that what Mr. Cornell is doing is responding to inquiries you've made of him or to other members of the board?

THE WITNESS: I assume so.

THE COURT: I don't want you to assume, please, because that doesn't help me any. If you think -- if it says something else --

THE WITNESS: Does it have a copy of my e-mail? If he's replying to my e-mail, I'd need to see my e-mail.

THE COURT: Of course. I'm looking at the first sentence, which says, I am writing in response to your recent e-mails.

THE WITNESS: It says --

THE COURT: But I don't know whether he did or didn't, because I don't have the e-mails. I imagine it's the ones 11 through 16.

You know, counsel.

MR. TUCKER: I'm not trying to get bogged down in this.

THE COURT: Let's move on.

MR. TUCKER: Let me just focus him on something that's a little simpler.

THE COURT: Thank you.

BY MR. TUCKER:

Q. In the second to the last paragraph on the last page, does Mr. Cornell say in specific response to your two requests, I do not choose to resign as a board member or as a chairman in 22nd, will decline your proposal for you to become a member of the board of directors? Did he tell you that?
A. That's what it says.
Q. And that was responding to your demand that these things happened. He was declining that demand, correct?
A. Demand or a suggestion. It was a suggestion.
Q. It was a suggestion that you at times gave time deadlines that they needed to comply with your suggestion, correct?
A. I was hoping that they would believe that.
Q. And these were suggestions, as you call it, that you threatened legal action if they didn't comply with your suggestions, sir, is that correct?
A. I don't know what I specifically threatened. I threatened a lot of things in an e-mail that then, when rejected, I took no action. The context is I lost seven-and-a-half million dollars.
Q. Does the Defendant's Exhibit 1 continue in that paragraph that we were talking about to say, we also remind you of the restrictions contained in Section 5 of each warrant agreement you agreed to at the time of your investment in 22nd?
A. Yes, I see that.
Q. And in response to this you didn't stop your actions, did

you, sir? You continued to talk with other shareholders and others about changes in the board, changes in the management, didn't you, sir?

A. Actually, shareholders would contact me daily, wanting me to take control of the company, which I would have.

Q. That's not what I asked you, sir. My question is --

A. But you mischaracterized what happened.

Q. My question to you after you've read this letter, you continued to talk with shareholders and investment bankers and others about wanting the board and the chairman to change, isn't that correct?

A. No, that's not correct.

Q. Did you have discussions with them about that?

A. Again, everyone would -- I'm the largest shareholder in the company. I am the one that was brought in as a consultant to make sure and advise and get executed the China JV, for which I based my $10 million investment on. So people called me daily wanting to know what's the status, why isn't it getting done, etc. and so on.

Q. And in those conversations that you said you had daily, you continued to suggest that the board chairman needed to step down and that the board composition needed to change, didn't you, sir?

A. CNTC made it quite clear that they were not --

THE COURT: Sorry. Excuse me. Yes or no to his --

THE WITNESS: I'm sorry. Please repeat it again.

MR. TUCKER: Would you read it back, please. If it's easier for me to ask, I'll ask it. Whichever.

(Record read)

THE WITNESS: No.

BY MR. TUCKER:

Q. Did you have discussions with them about those topics at all?

A. As I said, I got daily inquiries from the shareholders of the company because I was the point person, as far as the largest shareholder and the point person on the China JV.

Q. We understand that, sir.

The question is: When you're having these daily communications as the largest shareholder, did the subject of changes in the board or the chairman stepping down, did those subjects come up in conversation?

A. Not volunteered by me.

Q. That's not what I asked. I asked: Did those subjects come up --

A. Okay, maybe. I don't know. I don't have a recording of the conversations, so I can't answer.

THE COURT: Well, let me ask this. Do you have a recollection of any of the conversations?

THE WITNESS: I know --

THE COURT: You said people were coming to you.

THE WITNESS: Correct.

THE COURT: Presumably if they're coming to you, they want you to do something.

THE WITNESS: They did.

THE COURT: Is the something they wanted you to do to perhaps be a more active investor?

THE WITNESS: Correct.

THE COURT: And thereby effect change, either at the management structure of the company --

THE WITNESS: Correct. I wasn't the only shareholder that was using 75 percent of their investment.

THE COURT: Nor am I suggesting that, sir. Really, the question is -- he was asking questions about whether you were the -- you were on the front line making these suggestions?

THE WITNESS: No.

THE COURT: And I think what I understand you to be saying is after this e-mail, you continued to receive solicitations or requests from other investors --

THE WITNESS: Correct.

THE COURT: -- that you so become involved.

THE WITNESS: Correct.

THE COURT: Okay.

BY MR. TUCKER:

Q. And who were these people that were suggesting this as

opposed to you suggesting it?
A. Well, anyone that I copied on the e-mail, I copied them because they were the ones always calling me, wanting to know, why is the stock losing all its value? Why isn't the China JV going forward? Why -- are you going to just stand here and watch it lose 75 percent of your value in a few months?
Q. Can you identify any single person that raised with you the topic of changing the board composition or the chairman stepping down? Can you identify any person?
A. I think everyone on that e-mail suggested that.
Q. Suggested it?
A. Yeah.
Q. Did any of those people ever send any e-mails suggesting it?
A. I don't know. I have 89,000 unanswered e-mails on my cell phone.
Q. Let's talk, if we can, about the allegation of irreparable harm. The purpose in this preliminary injunction is to get the exchange the warrants, get stock and liquidate it and put $2.8 million, or whatever the number may be, in escrow, correct?
A. Correct.
Q. So your claim is I want to be able to get my $2.8 million, is that right?
A. Correct.

Q. That's money, isn't it, sir?
A. Yes.
Q. And do you agree that if this stock is issued, it can't be unissued, can it, sir?
A. Well --
Q. Once it's issued and you're sold --
A. That's partially true, but there's a remedy for that.
Q. Okay. Once the stock is issued, the shareholders, the existing shareholders, will be diluted, won't they, sir?
A. The pure issuance of a share by definition is dilutive, but it doesn't necessarily follow that it stays dilutive.
Q. So the answer to my question is, yes, once these shares are issued, it will have a dilutive effect on the --
A. By definition.
Q. Yes. Yes is the answer?
A. Correct.
Q. And you would agree with me that if 2,077,000 shares are sold on the market, it will have a -- it will likely have an effect of decreasing the share price?
A. I can't agree to that.
Q. How many shares does this stock trade on an average basis?
A. A lot, 500,000 to a million shares a day. It wouldn't impact the stock price much at all.
Q. You don't think so?
A. No, I don't.

Q. Okay. Do you agree with me that your liquidating the stock would have any potential impact on the company's future capital stock offerings?
A. Only to the extent that the market saw me as the largest shareholder being a seller of stock. But after we made an investment, the stock traded up quite significantly on the heels of me making the investment and the supposition that we were investing 10 million -- the China JV required 10 million, and we were investing 10 million for the China JV.
Q. Let me ask you to refer to Exhibit 15 in the Sicignano declaration. And I want to focus you on the second page, the last paragraph of your e-mail there, sir.
A. Sorry. Which paragraph?
Q. The last paragraph of your e-mail.
A. The e-mail that begins on page two?
Q. The beginning e-mail. It's from you. The others are, I think, just copied and forwarded on.
A. Wait. No, that's not mine.
THE COURT: Is this the one that says, I don't care for lawsuits, sir?
MR. TUCKER: It's the one that ends, keep up, great work.
THE COURT: Oh. Thank you. Top of page three. So --
THE WITNESS: Is this --
THE COURT: Right there.

THE WITNESS: So just this paragraph he's talking about?

THE COURT: Yes.

BY MR. TUCKER:

Q. And do you not say in there, sir, "you have until April 24th to convince me that things will change and supported by actions, not words. Given your collective inexperience in corporate governance, microcapital feel and knowing what you're dealing with in Crede capital, you are soon to learn a very harsh lesson. I have no doubt that Crede will continue to thrive and make the most of our initial investment in 22nd, but you and your other shareholders will pay a very costly price"?

A. Yes.

Q. How are the other shareholders to suffer a very costly price, except for actions that would result in a decrease in their shareholder stock price?

A. Because of their inaction and -- factually speaking, the stock continues to lose value every day. Because of that, all shareholders are going to obviously lose as a result.

Crede's going to thrive no matter what. This is one investment. I'm not sure what you're asking.

Q. The way the other shareholders are going to be hurt is by actions that will decrease the price of the stock, correct?

A. What are those actions, sir?

Q. I'm just asking.

A. I don't agree. That's why I'm asking you.
Q. Have you taken any action to decrease the price of the stock?
A. I'm sorry?
Q. Have you taken -- and I say "you" globally; your company, you individually, any of your affiliate companies. Have you taken any action to decrease the price of the stock?
A. Absolutely not.
MR. FLEMING: I'm objecting, your Honor, because the question is so hopelessly vague, I don't know what it means to take --
THE COURT: Oh, there's one extra adverb in there, but I think both of you are getting a little bit floored here.
I'm having difficulty, sir, and -- with the anywhere, any company, any action.
MR. TUCKER: I'm trying to be purposely broad, just so we don't have an instance where he says, no, I didn't do it, but maybe his company did or maybe his affiliates. So let me see if I can help a little bit.
THE COURT: Thank you, sir.
BY MR. TUCKER:
Q. Do you know what the concept of shorting a stock is?
A. Absolutely.
Q. When I say "you," I mean you or any of your companies or any of your affiliates. Have you been involved in any way in

shorting the 22nd Century stock?
A. Absolutely not.
Q. Have you pledged or loaned any of your 22nd Century stock to any other person for any purpose?
A. Absolutely not.
Q. Have you had discussions with other shareholders or investment advisers that they should get out of a stock because it was going down?
A. That's self-evident.
Q. Right?
A. It was going down.
THE COURT: No. No. Have you told anybody that?
THE WITNESS: As long as -- as I told even management, fundamentally the value of the company would go -- if they didn't do the China JV, the stock would go to 50 cents. In fact, it did go down to like 60 cents.
Q. That's not my question.
A. But it is your question.
Q. My question is: Have you told any other investor or analyst that the stock was going down and they needed to get out?
A. I don't think I ever said they need to get out to anyone. I just said, I believe that if they don't do the China JV, the stock is going to 50 cents. I said that when it was at $2.
Q. Have you suggested to other shareholders that they need to

liquidate their positions to avoid losses?
A. No. That's up to them. I don't manage other people's money.
Q. Just so we're clear, under oath, you've never made any statements along those lines, suggesting to other shareholders --
A. Little --
THE COURT: Let him ask his question.
Q. Just so we're clear, in the last six months or so you have not made any statements to any other shareholders, investment advisers, investment bankers that the stock should be -- people should get out of the stock because the prices were going down, yes or no?
A. I don't recall.
Q. Now you don't recall?
A. No, because the context is -- the price was going down. Now, I believe that in my opinion, I have no problem saying to people that I thought the company lacked integrity and I thought the company was dishonest. I have no problem saying that. And as a result, if someone owned few enough shares where it wouldn't impact the price of their position, when a company lies and is dishonest and doesn't follow through on their promises, yeah, I think someone -- the stock is going to go down. It just does.
Q. And you think if someone lies on their promises, they

shouldn't be still on the board or chairman, don't you?
A. I believe anyone that lies, is dishonest, shouldn't be serving anything.
Q. So the answer would be yes?
A. No, not specifically that. I'm just saying it's -- has nothing to do it.
Q. Do you agree with me that if the stock was issued to you under these -- under this warrant exchange, and it was liquidated and placed in escrow, if the stock price went back up, that the escrow proceeds wouldn't be sufficient to reimburse the company for that value?
MR. FLEMING: Objection.
THE COURT: If you know.
A. If? I don't know what that means.
Q. You don't understand the question?
A. No, I don't.
Q. If you liquidated this stock and placed the money in escrow, what do you think you're going to get, 70, 80 cents a share, something like that?
A. Wherever it's trading right now.
Q. So about there?
A. Okay. I don't know where it is, but, yeah.
Q. If the stock goes up from there, there's not going to be sufficient money in the escrow to reimburse the company for that stock --

A. And whatever the stock goes down, they get to buy more shares and buy back more shares than they would have issued for me.
Q. Just answer my question.
A. It's just illogical.
Q. It's illogical that if the stock price goes up, that the proceeds wouldn't be sufficient --
A. No, that's --
THE COURT: I think --
A. That's fact, yes.
THE COURT: But I do want you to let him ask his questions first. I know this isn't what you do daily, but you do have to -- I want the record to be clear, so I want you to listen to his questions.
THE WITNESS: I apologize.
THE COURT: Thank you.
Q. If you liquidate the proceeds and escrow the proceeds -- strike that.
If you liquidate the stock and escrow the proceeds and the stock price then goes up, the proceeds aren't going to be sufficient to reimburse the company for the value of the stock?
A. If the stock goes up and stays there, that would be correct.
Q. Thank you.
How many shares of stock do you -- and I say "you"

collectively, your company -- own in 22nd Century now?
A. The same as my last 13G filing.
Q. And you don't know what the exact number is?
A. I --
Q. Is that the number that would be in the exhibit that was filed here, I think it was about 5.8 million shares?
A. That's about right.
Q. So whatever was in that last filing -- when was that last filing?
A. I forget, January or February.
Q. Of 2016?
A. Correct.
Q. And since then you haven't sold any stock?
A. Not one share.
Q. But yet you think that the company -- your allegations in this complaint, in this lawsuit, is that the company's near insolvent?
A. That's correct.
Q. There's a market for you to sell your shares now, isn't there, sir?
A. That's correct.
Q. There's no restrictions on you selling your shares now, is there, sir?
A. No, there is not.
Q. If you really believed that the company was going to fail

so that you needed to get your warrant shares and liquidate them, you could do the same thing with your investment shares, couldn't you, sir?

A. I could, but I wouldn't.

Q. And the reason that you're not doing that is you want to hold them for continued investment purposes, don't you, sir?

A. Absolutely not.

Q. What is the reason for holding it, sir?

A. Let me explain, because I think I know a little bit about the exchange. The exchange entitles the holder, me, to exchange for $2.84 million in stock or value, right? So I'm down 7-and-a-half right now. The exchange is like a note. I'm entitled to -- where my corpus -- the warrants only represented $2.84 million of a $10 million investment. We've done 20 of these. If the stock goes down, I'm out 7-and-a-half million dollars, which I own. The only thing that doesn't lose value is the exchange value, which is 2.84 million. I want that value because I bargained for it. I want the $2.84 million to decrease my loss.

Now, once I realize the 2.84 million, I don't want to take a tax loss on the corpus. I want to sell. But I want the value of what I bargained for.

Q. Is it your plan to sell the 5.8 million shares?

A. As soon as I'm out of my exchange shares, correct. I want to preserve the 2.84 million. It's a note. It's the same as a

note. That value doesn't change. I want that value immediately. I don't want to take the exchange shares and then hammer down the stock. I lose the value of -- the little value of -- 2.84 million.

Q. In fact, if you dump on 5.8 million shares, it would reduce the price of the stock --

A. I would take a tax loss, but I personally --

Q. Let me just --

THE COURT: Let him ask the question.

Q. If you dump 5.8 million shares now, it would reduce the stock price, correct?

A. Perhaps.

Q. And that would mean that you would get more exchange shares, wouldn't it, sir?

A. Only up to a certain point.

Q. If you --

A. I think it has a floor of, or a ceiling of shares, floor of 58 cents.

Q. But if you dump the shares, your investment shares, it reduces the price, means you get more exchange shares, correct?

A. Up to 58 cents.

Q. And you could be liquidating your investment in what you think is an insolvent company in the process, correct?

A. Factually speaking, it is insolvent in -- they say by October. So, frankly, in the biggest bull market in history,

when a stock is trading at its all-time low, and they're going to keep on trying to raise capital -- if tomorrow -- forget about the liquidity crisis. If we just have a bear market, they have no access to capital.

Q. Go back to my question, sir. If you were to sell your 5.8 million shares, you would be able to liquidate and get the value of that in which you think is an insolvent company, correct?

A. I can't -- I explained this already. You're asking the same question.

Q. Is that a yes or no, sir? You could liquidate your 5.8 million shares --

A. But that's not my strategy.

Q. You could do that, sir?

A. Yeah, and I could also go on the market and buy stock. I haven't bought one share with the stock at its all-time low.

Q. And if the company becomes insolvent, as you say it would, what are those shares going to be worth, zero?

A. Which would be fine. I'd take a tax loss on $10 million. I get my 2.84 million back. I'm almost whole.

Q. You can take a tax loss if you sell the 5.8 million shares now, can't you, sir; because you'll take a loss on them, won't you?

A. So the exchange -- we already exercised the exchange for a set amount of shares. If the value were to go down from that

point forward, we don't get the full note value of $2.84 million.

Q. You get more shares?

A. That become increasingly worthless. I don't understand the problem.

Q. Let me see if I can bring this to conclusion.

You're saying that you could potentially get a tax loss for your sale of the 5.8 million shares, correct?

A. I will get a tax loss.

Q. That will happen whether you sell them now or whether you wait until it goes into insolvency, correct?

A. No. The tax loss could change.

Q. The tax loss is what's going to be the difference between --

A. I'm not making myself clear apparently. Sorry.

Q. The difference between what you paid for the shares and what value you get at the end, correct?

A. Yes, correct.

Q. You're going to be able to recognize that tax loss whether you sell the stock now or whether you wait until the -- you can't sell it or it would be zero?

A. Correct.

Q. And the only difference between selling it now or waiting later is if you did it now, you would get something for that, those shares, right?

A. I get --
Q. You get some money for it?
A. Again, I would lessen the value of something that cannot change. The exchange value cannot change. It's a note. $2.84 million. If the stock goes down, I'm not only going to increase my tax loss -- not realized, but I'm going to lose the value of what I bargained for.
Q. Let me ask you the question again and ask if you can just answer my question.

If you sold 5.8 million shares now at, say, 70 cents, you're going to get about 3-and-a-half million dollars in cash, aren't you?
A. I presume that's the calculation.
Q. Roughly. And you still would be able to get a tax loss, right?
A. Correct.
Q. And if the price of the stock goes down because you've sold 5.8 million shares, that means under the warrant exchange rights, you're able to get more shares, correct?
A. Not necessarily true.
Q. All right. Let me move on. Talk about the financial condition of the company.

All of your information regarding the company's financial position is taken from the 10K and the 10Qs, these publicly filed documents, correct?

A. Correct.
Q. You don't have any personal knowledge with regard to the company's finances, right?
A. I --
Q. Other than what you've read?
A. Correct.
Q. And do you disagree with me that the company has on its financial statements $20 million worth of assets?
A. That's book value.
Q. You have no reason to disagree, do you, sir?
A. I'm sorry.
Q. You don't have any basis, knowledge, basis to disagree with that valuation, do you, sir?
A. I don't have any reason to believe it or disbelieve it.
Q. The portfolio is valued at 3-and-a-half million dollars. Again, you don't have any basis to believe it or disbelieve it, correct?
A. Correct.
Q. The long-term debt or the debt on the company of about 5 or 600,000, you don't have any reason to believe or not believe that, correct?
A. Correct.
Q. You agree with me that over the last three years the company's been able to raise $39 million?
A. In the biggest bull market in history.

THE COURT: Is that a yes?

THE WITNESS: Yes. I'm sorry.

Q. Are you aware of any instance in which the company went to the capital markets to try to raise money and they weren't successful?

A. That's a matter of opinion.

Q. You're not --

THE COURT: I'm sorry. Can I -- I thought the question was --

Q. Are you aware of any instance in which the company in the last three years has gone to the market to raise capital with a capital offering and was unsuccessful?

A. I can't -- I don't know what they attempted to do. I only know what they've done.

Q. You're not aware of it then, sir, are you?

A. Correct.

Q. And, in fact, your argument about the company's on the brink of insolvency is based in part on the 10K that was filed in -- for the year 2015, right?

A. In part, yes.

Q. And in that it was the risk disclosures that indicated that there's no guarantee of financing in the future, and that the company's -- you know, may have cash flow that it needs to address?

A. Factually correct.

Q. And yet the company in February of 2016 had a successful $5.5 million stock offering, didn't it, sir?
A. I'm sorry. When?
Q. In February of 2016 after these disclosures, the company had a successful $5.5 million stock offering?
THE COURT: If you know, sir.
A. Successful? Okay.
Q. And, in fact, your response to that was to communicate to the company a complaint that, why didn't they offer that stock for you to buy, isn't that correct?
A. I think you're referencing the summer before.
Q. Is it your testimony that in February of 2016, after this other stock -- this most recent --
A. Oh, yes. I'm sorry. Yes. I know the context, too.
Q. So, yes, in February of 2016, after these disclosures of the what you think is pending insolvency, the company was able to do a stock offering of $5.5 million, correct?
A. Correct.
Q. And after that was done, you complained, why didn't you let me, my company, Crede buy that stock?
A. That's not a fair context.
Q. Did you or didn't --
A. I might have said that, yes, but it's not in context.
Q. You may have said that. Okay.
Let me show you what we'll mark as Exhibit 2,

Defendant's Hearing Exhibit 2.

MR. TUCKER: If I can approach, your Honor?

THE COURT: You may. And let me hear from Mr. Fleming, if he has an objection to it.

A. Yes.

Q. This is your e-mail --

MR. FLEMING: Could I just see this?

THE COURT: I'm sorry, sir.

Mr. Tucker, I'll just ask that we see whether Mr. Fleming has an objection to it. Thank you, sir.

MR. TUCKER: Sorry.

THE COURT: And, sir, can I have a sense of the length of your cross?

MR. TUCKER: I'm getting pretty much there, Judge.

THE COURT: I'm hopeful, yes.

MR. FLEMING: No objection, your Honor.

THE COURT: Then it is admitted. Thank you.

(Defendant's Hearing Exhibit 2 received in evidence)

THE COURT: Mr. Tucker, you may continue.

BY MR. TUCKER:

Q. You sent this e-mail, correct?

A. Correct.

Q. And don't you say in the first line, first two lines, congrats on your financing? That's the $5.5 million financing we've been talking about?

A. Correct.

Q. And then you go on to say, obviously I'm bothered you did a financing with someone who sold their entire position from the last financing, thereby stripping warrants for little risk, but I do like my --

THE COURT: Slow down. Thank you.

Also, we can read, so I don't know that you need to read it in its totality to me.

Q. Let me see if I can paraphrase. Do you then say in the second sentence you're bothered that you did a financing with someone else without offering a deal to me?

A. Correct.

Q. Thank you. Let me just -- if we can turn to the 10Ks. And if you would look --

THE COURT: Where are they, sir?

MR. TUCKER: Mr. Fleming's exhibit or declaration. It's Exhibit A to it.

THE COURT: All right. I have a set of them here. I can hand them to the witness.

MR. FLEMING: That's Exhibit A to my affidavit. I have an extra copy I can give the witness.

THE COURT: Counsel, may I hand him my copy?

MR. TUCKER: Sure.

BY MR. TUCKER:

Q. I'm directing you, if you would, to the Fleming declaration

Exhibit A, which is the 2015 10K.

A. Mm-mm.

Q. And if you would turn to the -- there's a risk factor disclosure on I think it says page 18 of 85.

MR. TUCKER: Judge, if I can approach. And I'll give you another copy so you can follow along.

THE COURT: That's fine. Thank you.

Q. Do you see that, sir? Page 18 of the 10K?

A. Yes.

Q. The first two disclosures are the disclosures about the history of losses and the potential for not sustaining positive cash flow, is that correct?

A. Correct.

Q. There is also, what, 10 or more pages of risk disclosures in there, aren't there, sir?

A. Correct. I see, yeah.

Q. Look if you would at the Sicignano declaration, Exhibit 3, which is the 2014 --

THE COURT: Where is that, sir?

MR. TUCKER: Sicignano declaration Exhibit 3. It's the big one.

A. I'm sorry, sir. Exhibit 3?

Q. Exhibit 3. And this is the 2014 10K, isn't it, sir?

A. Okay. Yes.

Q. If you'll turn to what is page 24 of 101 on that, where the

risk factors start again.
A. I'm sorry. Page?
Q. I think it's 24 of 101, or it may say 25 of 102.
A. 24 of 101?
Q. 101. Do you see that where it says risk factors?
A. Correct.
Q. And there are -- the first two risk factors are the same risk factors that were identified in the 2015 10Q, correct?
A. I assume so.
Q. Look, if you would, at Exhibit 2 to the Sicignano declaration. This is the 2013 10K. Look, if you would, at page 40 of 130.
A. I'm sorry.
Q. Page 40 of --
A. What document, I'm sorry?
THE COURT: It's Exhibit 2. So go one back, and then it is page 40 of 130 in the uppermost right-hand corner.
THE WITNESS: Okay.
THE COURT: If we're lucky, it says risk factors.
THE WITNESS: It does.
Q. And does this 2013 10K have the same first two risk disclosures?
THE COURT: As which ones, sir?
MR. TUCKER: As in the 2014 and as the 2015 10Q.
A. I assume so, yes.

THE COURT: Don't assume. I'm asking you to look.

THE WITNESS: Does it have to be word for word?

THE COURT: It's up to you.

Counsel, I'm capable of drawing that distinction.

Q. So would you agree with me, sir, that for the last three years the company's been identifying as risk disclosures in its 10K its history of losses, the potential for not sustaining profitability? It's been doing that, hasn't it, sir?

A. Yes.

Q. And it hasn't gone insolvent during those three years, has it, sir?

A. Well, it's lost 75 percent of its value. That's getting close.

Q. The company's been able to keep the doors open and increase revenues, increase --

A. Historically, yes.

Q. And, in fact, after the 2013 risk disclosures that you say now portend insolvency, you invested $10 million, didn't you, sir?

A. Yes, and I invested it for the China JV.

Q. And --

A. Which would have changed everything.

Q. And they had two additional investors come in after you in 2014, 2015, and as late as 2016, continued to invest?

A. No. They sold their stock after the first investment,

stripped out the warrants, and yet the company came back to them the second time, which was actually when you sell -- ethically and morally, when you sell stock at 2.58 to an investor, you give them the right to participate at lower levels. And they never did. And I was just pointing out that, once again, they just --

Q. My question --

A. -- operate without integrity.

Q. My question is: Notwithstanding these risk disclosures that I say means Rome is burning, that they've been able to go out and raise $39 million consistently over the last three years, isn't that correct?

A. In a bull market -- that's correct. But in a bull market, when a management is not performing and the stock loses 75 percent of the value, frankly, I don't think they make it.

Q. Last -- two last questions.

The exchange rights were negotiated by an employee of yours, a guy named Michael Waks, is that right?

A. He's a consultant.

Q. He works for you, doesn't he?

A. No.

Q. You haven't described him as your right-hand man?

A. No.

Q. But he was involved in this -- these dealings and explaining the exchange rights, correct?

A. Correct.
Q. Mr. Waks has pled guilty to bank fraud, hasn't he, sir?
A. Okay.
Q. Mr. Waks --
THE COURT: I'm sorry.
MR. FLEMING: Object. I'm going to object, your Honor. This has nothing to do with anything. Mr. Waks's past history has nothing to do with anything. It's completely irrelevant.
THE COURT: He gets one more question on the issue, but counsel told me there were two questions remaining, and I feel like we've asked more than two questions.
MR. TUCKER: I apologize. I'll try to bring it to conclusion.
Q. Your "okay" is a yes?
THE COURT: If you know, sir. If you don't, that's fine.
A. Repeat the question. I'm sorry.
Q. Mr. Waks has pled guilty to bank fraud, hasn't he, sir?
A. I believe 30 years ago or something. I don't know, some -- long time ago, yes.
Q. Mr. Waks is barred from practicing in the securities industry, isn't he, sir?
MR. FLEMING: I'm going to object, your Honor.
A. He has the largest --

THE COURT: Hold on, please.

MR. FLEMING: I'm going to object. Mr. Waks has not been offered for testimony, so there's no credibility to impeach. This is simply trying to drag somebody's name through the mud in a courtroom, which is not relevant.

THE COURT: On the one hand, I'm not a jury and I am less prejudiced by such things. On the other hand, Mr. Tucker has spent his last question on this issue, which I might not have done.

MR. TUCKER: I have one more question.

THE COURT: No, you don't, sir.

Thank you. All right.

A. In defense of Mr. Waks --

THE COURT: I didn't want to hear about Mr. Waks in the first instance, so that's fine.

Thank you.

MR. FLEMING: Could I ask a few questions?

THE COURT: You may, sir.

MR. FLEMING: Very few. I'll just stand here because I don't have that much to ask.

REDIRECT EXAMINATION

BY MR. FLEMING:

Q. Do you have the Hearing Exhibit 1 before you, Mr. Peizer? That's the e-mail dated April 22, 2015.

A. Yes.

Q. You were shown that a moment ago. That's an e-mail that Mr. Cornell sent you on April 22, 2015?

A. Correct.

Q. And I'd like to ask you to take a look at the exhibit binder or the exhibits to Mr. Sicignano's affidavit, and in particular Exhibit 16.

Do you have that in front of you, Mr. Peizer?

A. Page what of what?

Q. No. My question for you is simple: Is the e-mail that you sent here that's marked as Exhibit 16 an e-mail in response to Hearing Exhibit 1, the April 22 e-mail?

A. Yes.

Q. Thank you.

I want to ask you about Hearing Exhibit 2.

THE COURT: That's the one-page document, sir.

THE WITNESS: This one?

THE COURT: The one in your hand.

THE WITNESS: Okay. Yes.

Q. The e-mail in the second sentence makes a reference to the financing happening, quote, without offering the deal to me you paid 2.58 a share, closed quote.

Why did you make that remark?

A. Because, again, it's practice, moral and ethical practice, on Wall Street that if you sell stock, particularly the largest sale you've ever made in the company's history, at 2.58, you

give someone an opportunity to participate at a lower level.
Q. And if the offer had been made to you, would you have participated?
A. In retrospect, no.
THE COURT: No. No.
A. If they -- I -- I've had every opportunity -- no. I have every opportunity to buy the stock at lower levels, and I still don't buy it. The reason is --
THE COURT: That's okay.
Q. When was the last time Crede purchased a share of stock of 22nd Century group?
A. I don't know the specific answer.
Q. In the last six months?
A. No.
Q. In the last year have there been --
A. No.
MR. FLEMING: No further questions, your Honor.
THE COURT: Thank you very much, sir. You may step down.
(Witness excused)
MR. TUCKER: I call Mr. Sicignano.
THE COURT: Yes, please. And I know you're going to be targeted with your direct of him.
MR. TUCKER: Yes, your Honor.
While he's going up there, I'm trying to do it as

quickly as we can. We understood we had until 2:30 from a call about a week or ten days ago.

(Discussion held off the record)

HENRY SICIGNANO,

called as a witness by the Defendant,

having been duly sworn, testified as follows:

THE COURT: Just a moment please.

(Discussion held off the record)

DIRECT EXAMINATION

BY MR. TUCKER:

Q. For the record, what's your address?

A. 4750 Spalding Drive, Clarence, New York.

Q. What's your position with 22nd Century?

A. I'm president, CEO and director.

Q. And how long have you held that position?

A. I've been president since spring of 2010 and CEO for the last year and a half.

Q. Briefly, can you describe your education and work experience before you came to 22nd Century.

A. I went to Harvard College, Harvard Business School, worked at a consumer products company in Connecticut and then went to a tobacco company in Santa Fe, New Mexico. I grew that company from a little less than $20 million in sales to $145 million in sales. And then we sold the company to RJ Reynolds for $356 million. Then I returned to Buffalo, New York, and five

years later made an investment and joined 22nd Century.
Q. When you said you made an investment -- you're a shareholder also in this company?
A. I am.
Q. What number of shares roughly?
A. I own directly three-and-a-half million and indirectly approximately five million.
Q. We've been talking about the company, but I don't think anybody's actually described what the company does. Could you give us a brief description of what the company does.
A. Sure. In a nutshell, we're a plant biotechnology company with a monopoly really on the genes in the tobacco plant responsible for nicotine production. We have over 200 patents in 96 countries around the world and an additional 50 pending applications. All of these patents are dealing with -- well, with raising and lowering nicotine levels in the tobacco plant, which gives us the ability to grow tobacco plants with 95 percent less nicotine than any other conventional tobacco plant, or about three times the nicotine content of a traditional plant. And all of this technology, the applications are actually to make a smoking cessation cigarette which phase two and phase three clinical trials have shown will likely be the most effective smoking cessation aid in the world.
On the other side of things, for people who do not

wish to quit, both our high nicotine cigarettes and low nicotine cigarettes, we believe, will qualify --

THE COURT: Finish the sentence. I want to --

MR. FLEMING: I have an objection, your Honor. We were told that this was going to respond to issues raised in reply. And so far we've heard the man's background, what he did in Santa Fe, how much stock he owns, all things he could have raised in his direct. And in some of these things he did cover, because it's all disclosed in the 10K. And we haven't gotten to what he's here to testify to.

So my objection is he's taking two directs, which was what we were told we weren't going to have.

THE COURT: And that's a very fair point. And I wasn't really focusing on his background. It's wonderful, his educational history, but I do care to understand a little bit about what this company does.

Thank you.

A. So, again, on one side of things, we have a smoking cessation cigarette going through the FDA drug approval process as a smoking cessation aid.

On the other side of things, for the 22 million American smokers who do not wish to quit, we have two potentially reduced-risk cigarettes. And FDA has a new category of products called modified risk tobacco products. No other company in the world has been authorized to label or

market their products as modified risk. We submitted an application last December with much encouragement from FDA. And we believe that we will be, before January 1st of this year, the first company in the world --

THE COURT: This coming year?

THE WITNESS: The end of December this year or January 1, 2017. We believe we'll be the first company in the world authorized by FDA to actually market our cigarettes as a modified-risk tobacco product.

Q. Is the company also involved in the cannabis area?

A. Yes. One of the inventors of some of our most important transcription factor technology for the tobacco plant also spent the last year -- 12 years mapping the cannabis genome. And he has a company based in British Columbia, Vancouver. We purchased 25 percent of his company and gained exclusive US rights to the technology in the cannabis plant that allows us to upregulate or downregulate cannabinoids, which potentially will enable us to produce a cannabis plant with very high levels of the cannabinoids that are very helpful to epilepsy patients, autoimmune disorder patients, cancer patients, while at the same time minimizing THC or completely eliminating THC, which could be a truly revolutionary product in the cannabis industry.

Q. Monopoly in these areas, sir?

A. We have exclusive US rights to that cannabis technology and

coexclusive rights worldwide outside of Canada. And in terms of the tobacco field, we have -- those patents are good in 96 countries around the world. No other tobacco company has those patents.

British American tobacco has licensed for research purposes 28 of our 200 patents and actually paid us $7 million up front for the right to conduct research on the higher nicotine tobacco primarily, but also on the lower nicotine. We have a research license with British American tobacco that extends through October 2017. Anytime before October 2017, BAT could pay us an additional $7 million based on the research they're conducting on three continents right now. When they do that, or even if they don't do that, they could choose to commercialize at any time between now and October 2017, which is when a commercial license would begin with BAT, which initially after a rampup period of paying us only a couple million dollars a year, they will pay us up to $25 million a year for the right to commercialize the product in 180 countries around the world.

Q. There's been some discussion about the financial statements in the book value, 20 million, patent value of 3.5 million. How does the book value compare to your understanding of the real value?

MR. FLEMING: Objection, your Honor. These were all issues raised directly in the moving papers as to what the

value of the assets were.

THE COURT: I'll allow it.

A. We believe the patents are worth more than $200 million.

THE COURT: 200 million?

THE WITNESS: $200 million.

THE COURT: That's an awful lot. Why are you operating at a loss for all these years?

MR. TUCKER: That's a good question.

BY MR. TUCKER:

Q. Why are you, why have you, and why have you done your capital raises in the way that you've done it?

A. The key thing is we have a prescription combustible cigarette that helps people quit smoking. So a logical licensing partner there is a big pharma company. And we're in due diligence now, and I've stated publicly that we're talking with big pharma companies. And I'm not going to go into nonpublic information, but we are in a due diligence phase of discussions with four pharma companies now exploring the rights to -- well, to essentially fund our phase three clinical trial and to make it a prescription drug. That product alone -- let me sketch out what a deal might look like. I don't have a signed term sheet.

THE COURT: That's okay. I mean, I don't want to have too much of this because I do feel like we are simultaneously wandering far afield from the nature of this particular

hearing. And you're doing things that I really could have heard in an affidavit form.

Q. Let me see if I can ask you this way. We can address it.

There has been testimony that the money will run out at the end of October 2016. What alternatives do you have to get the money to continue beyond October of 2016?

A. There are several. One, going on the pharmaceutical proposals, we're asking for $30 million. Approximately 24-and-a-half million would be for the phase three trials. About 5-and-a-half million would be for GNA expenses. So if we were to sign a deal in the next three months, that precludes a financing. BAT could pay us that $7 million at any point. It could be this week, this month, next month, anytime in the next between now and October 2017.

THE COURT: And you're expecting that at some point between today and October of 2017 they will?

THE WITNESS: Yes.

And I can also state that I'll be in India two weeks from now meeting with four different very large tobacco companies in India who have interest in purchasing our raw tobacco. Such a purchase would involve a substantial, if not eight-figure upfront payment, at least a seven-figure upfront payment for our raw tobacco leaf.

Q. Have people offered to buy more of your stock in a capital offering?

A. In the last two weeks, we've -- well, I was at the LD microconference in California last week. Six out of the eight investors that I met with during the day offered to participate in a private placement, if we were to do one. I said we had no current plans to do one, but all but six out of eight said that they would be very interested in participating if we were to choose to do one.

I also turned down an offer from another shareholder approximately two weeks ago for $3 million. Specifically, because -- why am I turning things down? Because our share price is so low. Our goal has been to achieve business milestones and to have the share price go up and raise substantial moneys, if we needed to, at a much higher share price. So while our share price has been depressed, we've raised little amounts of money so as not to dilute shareholders more than necessary.

THE COURT: Thank you.

Q. Is there also a possibility of just simply borrowing money?

THE COURT: Are we going to lead a little less, counsel?

MR. TUCKER: Sure.

THE COURT: Go on.

A. We could certainly borrow money. It's not my preference. We've tried to manage the company as conservatively as possible. We own all the machinery in our factory outright.

And because we don't want to get in a situation of having toxic debt or obligations that we couldn't meet, we've been very careful about that.

Q. Is there a date by which you feel like you've got to do an offering or make some decision prior to October of 2016?

A. Sure.

MR. FLEMING: Objection, your Honor. Leading. And again, this is all stuff he could have put in his direct.

MR. TUCKER: I'm trying to just direct him to an area, Judge, and trying to do it also in the interest of speed.

THE COURT: I will allow it.

A. If we didn't hit one of these milestones by say mid-September, it would make a lot of sense for us to go to the capital markets and do an overnight and raise three or five or seven million dollars in mid-September.

Q. So the plaintiffs in this case say that the company is insolvent or near insolvent. Do you agree with that?

A. No. We've never failed at raising money at the capital markets. And there was some mistaken testimony made. Our stock has traded as low as 16 cents. So in the greatest bull market in history, you know, I guess we're up to 80 cents now. But I've purchased our stock on the open market as low as 16 cents, so that's a fact.

Q. Is the company in default on any of its financial obligations?

A. None.
Q. You understood Mr. Peizer's testimony was based on the 10Ks that have been filed by the company?
A. Yes.
Q. The risk disclosures, is that a requirement of the 10Ks?
A. They are.
Q. How many risk disclosures are there in your 10Ks? Just give me -- number of pages.
A. Twenty pages.
Q. The risk disclosures that we addressed relating to lack of profitability and potential sustainability, those first two, have those been consistently in your 10Ks?
A. Every year I believe since we went public.
Q. How much money have you raised through capital offerings while this language is in the 10Ks?
MR. FLEMING: Objection, your Honor. This is in the public documents, all this stuff.
THE COURT: I think we can move to another category.
Q. When was your most recent capital offering?
A. February.
Q. After three years of those disclosures?
A. Yes. And, frankly, we could have raised three times the money. We raised 5-and-a-half million dollars, and we had offers for over 15 million.
Q. And again, why didn't you go ahead and get the 15 million

then?
A. Because the stock price was at a level that didn't make it strategic to raise that kind of money at that point.
Q. Did you have communications with Mr. Peizer after the $5.5 million raise in February of 2016?
A. No.
Q. He sent you an e-mail?
A. Well, he sent me an e-mail. I didn't respond.
Q. And what was your understanding of his thought with regard to offering this stock again?
MR. FLEMING: Objection.
THE COURT: No. I'm going to ask you not to answer the question. I'm not really interested in your view as to what you think he might have been doing. I've got the e-mail. Thanks.
Q. Has Mr. Peizer ever made any statements to you regarding what he could do with the price of company stock?
MR. FLEMING: Objection.
THE COURT: I'll allow.
MR. FLEMING: This was in the affidavit, your Honor. It's in his --
A. It's actually worse than that. I said to Terren, you know -- Terren, we had a meeting, and he was with his associate from China. And I said -- this was here in the states. I said, you know, Terren, the problem is you and I and you and

22nd Century have very different goals. My goal, and the other shareholders' goals, are for the shares to appreciate. And you have incredibly high, strong incentives to push the share price down very, very low.

And he laughed. And he said, well -- he said it several times, that he could trade our stock at any price that he saw fit. He's very sophisticated. He says he's got dozens of investments in microcap companies, and he's got 25 or 30 years' experience. I have very little experience in those things. But what I do understand is that I have five million shares. And I want the price to go up. And I'm doing everything I can and the company is doing everything I can to enhance the value of those shares. Terren, on the other hand, has 5.8 million shares. And if the price goes down, he gets 5 million shares free. So that says it, in a nutshell.

All of these e-mails and all of these documents and all of these things, it's not what's said in the e-mails that's the worst thing. The worst thing is who he copies on those e-mails. Some of those people that he copies are my personal friends that certainly didn't go to him and say that they wanted a change in the board or in management. Those people call me and say, what does it mean that the largest shareholder in the company is trying to shake up the board, is threatening to sue the company, is threatening to go public, is threatening proxy ballots? What does that mean, that the largest

shareholder in the company is doing that?

Those people weren't going to Terren. They're people that I know. Our accountant, Mark Cane, certainly didn't call Terren Peizer. Dennis Chewg, my friend from 40 years, certainly didn't call Terren Peizer. Bonnie Herzog, the most important tobacco analyst in the United States who works for Wells Fargo, Terren copied those people on those e-mails to damage the company. That's why he did it. To be very clear, there's no other reason; to embarrass the company, to damage the company, and to push the share price down, so he gets five million free shares.

THE COURT: I need you to calm down, first of all.

Second of all, I need you to actually answer a question that was posed by your counsel and not to go off on a narrative.

THE WITNESS: I apologize.

MR. FLEMING: Your Honor, I move to strike. None of this was responsive. It was a -- I don't know what, a tirade of some sort.

THE COURT: I understand that, sir. And yet again, I'm not a jury, so I'm less susceptible to the concerns that you have.

Counsel.

BY MR. TUCKER:

Q. In response to Mr. Peizer's communications, e-mail stuff,

did you have communications with him about stopping?
A. Yes, I did.
Q. Essentially what did you tell him?
A. He said he'll do whatever's necessary to protect his investment or to shake up the board, to do what's best. In his view he sees his dollars as his children. And he's going to take very good care of his children. And if that means getting rid of Jim Cornell or changing the whole board, then that's exactly what he's going to do. And he'll do so by any means necessary.
Q. And in March 10th of 2016 counsel for your company sent him a letter advising him that because of his violations of the activity restrictions, he no longer had exchange rights. Why did it happen then? Why did the letter go in March of 2016?
A. Because Terren started to tell investors that he heard that there was going to be a short article coming out and shares were going to be crashing and everybody should liquidate their investments right away and get out of the stock and buy his other company, Catasys. Buy Catasys, get out of 22nd Century, get out while you can.

And so we thought, well, you know what, it makes sense. We better formally notify Terren that he has breached these -- the exchange rights activity restrictions, and that there's no incentive for him to drive the price down or to change the board or to do whatever he's trying to do, because

those exchange right warrants are null and void. So if he's going to cause a short article to come out, or if he's going to spread rumors that a short article is going to come out, he's going to see no benefit to driving the price down, because those are void.

Q. Did -- you heard -- you remember the letter that -- the e-mail that was sent by the chairman of the company telling him he wasn't going to step down and that he wasn't -- and reminding him of the activities restrictions? Do you remember that? That was April of 2015. Were there continuing issues that you had to face with regard to Mr. Peizer's activities with regard to change of management or the board after that?

A. Certainly.

MR. FLEMING: Objection, your Honor.

A. He did quite a bit of damage --

MR. FLEMING: This was the main issue in his affidavit. He now seems to be coming up with some new ideas that he didn't see fit, after sitting with counsel, to include in his direct testimony, which I find dubious and improper; because this is the direct testimony, not what he's offering now.

THE COURT: I'm going to allow one question on what communications postdated that particular e-mail, but then we do need to finish.

A. There were both phone calls and inperson meetings where I

said to Terren, you've got to stop mocking the board, and you've got to stop these public e-mails copying everybody on there. And he kind of laughed. He laughed. And again, he would repeat often that he was going to do anything necessary for him to exact the kinds of changes that he wanted to make.

Q. So we're clear on the timing, this would have been after Mr. Cornell --

A. After April 15, when Cornell sent the letter, essentially what he did is he stopped doing e-mails. Then he started doing things orally.

THE COURT: In calls to you?

THE WITNESS: We spoke on the telephone, and we also met in person.

Q. Were there calls to others?

A. And there were calls to others as well, which -- yes.

Q. How is it you're informed of calls to others?

A. Shareholders would call or e-mail me and raise the concerns that the largest shareholder was either plotting to overthrow the board or to -- or that there was some mysterious thing coming out that was going to wipe out the value of the stock.

Q. Let me turn to the activities restrictions, see if we can cover that quickly.

First, with the exchange warrants, was that something that you -- that the company wanted to do?

A. Absolutely not.

MR. FLEMING: Again, your Honor, I'm going to object. His desire to sign the contract is irrelevant to the enforcement of the contract. He may not have wanted to sign it, but he did. The company did. And it's irrelevant that he doesn't like it. All these free several times, which is I don't know, maybe his opinion, but it reveals more than perhaps he wants us to see. But it's completely irrelevant.

MR. TUCKER: It relates to the importance of the "subject to" restrictions, Judge.

THE COURT: I'll let you go a little bit with it, sir.

Q. The exchange -- you agreed in the Tranche 1A warrant but not in the others for the exchange, right? Correct?

A. That's correct.

Q. And when you agreed to the exchange rights, Section 5 of the 1A tranche rights, were there limitations?

A. There was a great deal of controversy, discussion and argument about having the exchange rights at all. And so the compromise was -- the intent of the parties that the Court has asked about, the intent of the parties was to create these activity restrictions so that there would not be an incentive or an ability for the investor to advocate changes on the board, to disrupt the company and to harm the company and to force the share price down. Again, if the share price went down, he would get almost 100 percent more shares free from what he currently has today.

Q. So what was your understanding with regard to violation of the activities restrictions and his ability to use his exchange rights?

MR. FLEMING: Objection.

THE COURT: Yeah. No. That's way too leading and calls for him to basically sell out the purpose of this hearing.

Q. The section -- the last sentence of Section 1(h)(ii) that relates to the violations do not prevent the holder to enforce or to exercise its rights, you're familiar with that sentence, sir?

A. Yes.

Q. And how does that relate to the exchange rights?

A. I'm sorry. Repeat that once.

Q. How does that last sentence relate to the "subject to" in the exchange rights?

A. By violating activity restrictions, the exchange rights would be voided. It's very clear.

Q. Is it your understanding that the holder is still entitled to exercise his --

A. Absolutely.

Q. And to enforce his rights?

A. That's right.

Q. And to enforce his rights is basically -- your understanding is what?

A. Well, if there were a special dividend or a stock split or if shares were lost or destroyed, they would be replaced. We don't -- we don't debate any of those rights. And if the stock -- if he wanted to exercise his rights to purchase 1.25 million shares at $3.36 a share, that would be his right to do so.

THE COURT: One moment, please, counsel. When I allowed this questioning, I really did understand it to be things in reply to or almost a surreply to what was said in the reply brief or the reply papers of the plaintiff. Now I feel like this is really stuff that should have been in the original declaration. So I want to stop this area, and I'm assuming we can.

MR. TUCKER: Judge, all I really want to do is cover the bond issue, if I can, have him explain it.

THE COURT: All right.

Q. We've asked for a $10 million bond. Basis for that?

A. That's if -- if he's granted the exchange rates at all, which I don't think he should be.

THE COURT: Okay, sir. I get to make that decision, not you. So why don't we -- so if we assume that I grant it, you've asked for $10 million. Why?

THE WITNESS: Our stock has traded as high as $6.36 in the past. The analyst report -- the most recent analyst report from Chardan capital gives a price target of $4.50 for our

shares. I believe the calculation was $4.50 times 2,077,000 shares, which, again, is -- it's more than he'd even be eligible to receive, because there's a cap on the amount that he could have. So really -- so if the Court, if you were to decide to grant him 2.7 -- 2.077 million shares, that number times $4.50 would be about 9-and-a-half million dollars. And then -- which really doesn't come close to probably defining how much value could be lost on the open market, when we are -- if we are trying to raise additional funds.

But there's an additional half million dollars that was allocated to make up for the damage that we would incur by raising money at lower levels, because there would be the investors selling in the market. And then, of course, legal costs and whatever else. I actually think 10 million is conservative.

MR. TUCKER: Your Honor, I would ask him some questions about the 9.9 percent cap, but I think we've kind of got those numbers covered. It's just math.

THE COURT: I'll have to work on my math abilities, but I think that's okay. Yes. Thank you.

MR. TUCKER: Then I think I have nothing further.

THE COURT: All right. Let me just talk to the parties and to all the parties in the courtroom for a moment.

I know I have folks here for a guilty plea. I will attend to you shortly.

What I'm suggesting, Mr. Fleming, is the following: I'd be happy to hear your cross-examination and redirect. And then I'd like the parties -- I actually want a few moments to think about this when I'm not dealing with a guilty plea. So can I ask the parties to come back at 4:30 today, which is easier than having you come back in another day?

MR. FLEMING: I'd be delighted to, your Honor.

THE COURT: Mr. Tucker, the same?

MR. TUCKER: Yes, your Honor.

THE COURT: Okay.

MR. FLEMING: On the share count, the math issue is really -- I think Mr. Turner doesn't understand how the statute works in computing the 10 percent. And you don't just look at the shares outstanding when you have a warrant. You add the additional shares you're acquiring to the shares outstanding. So it's not just 10 percent of the outstanding shares. You increase the number for the shares received on the warrant, and that's how you get to our number.

But we'd be glad to come back at 4:30.

THE COURT: Terrific. Let me hear the cross-examination, if there is any.

MR. FLEMING: Oh, you want to do the cross-examination now?

THE COURT: Yes.

The parties who are here for the guilty plea will

indulge me for a little while. Thank you.

MR. FLEMING: I don't have much cross-examination.

THE COURT: Then we can finish witness testimony. Then I will have the record I need to make the decision I hope to make this afternoon.

MR. FLEMING: Thank you.

CROSS EXAMINATION

BY MR. FLEMING:

Q. Mr. Sicignano, am I correct that you testified a few minutes ago that you believe the current share price is a depressed price for the company?

A. Yes. I do.

Q. And what is the current share price?

A. Eighty cents.

Q. And what's been the share price since January 1 of this year through today? What's the range?

A. I don't know that.

Q. Do you have any sense of what the highest price it's been in --

A. I know it lasts 12 months. For the last 12 months has been, I believe, 58 cents to a dollar 75.

Q. Today it's at 80 cents, what you consider to be a depressed price?

A. It speaks for itself. It's between 58 cents and a dollar 75.

THE COURT: The question is: Do you think it's worth more than it's showing on the market?

THE WITNESS: Sophisticated large investors have told me that were it not for Terren's interference, we'd be trading at 2 to $3.

THE COURT: That, I'm not going to listen to. That's a yes or no answer. Again, I don't need you to sum up, sir. You've got counsel for that.

Mr. Fleming, I'm going to let you ask.

Q. You gave some testimony on direct about a licensing agreement with BAT. Do you recall that?

A. Yes.

Q. Has that been publicly disclosed to the market?

A. Yes.

Q. And investors are aware of the information you shared here today?

A. Yes.

Q. And you also told us about the value of these patents and all of the ambitious plans that the company has to make use of them. Has that been disclosed to the market also?

A. The hundreds of millions of dollars in patent value has not been publicly disclosed.

Q. But you've disclosed to them that you have these patents, and you're planning to make gains, and you hope to make gains in the cannabis market, correct?

A. Cannabis.
Q. That's been disclosed to the public markets?
A. Yes.
Q. And the share price is today still depressed in your view?
A. Yes.
Q. Would it be fair to say that the markets are making a judgment on the credibility and likelihood of the plans that you've shared with us?
A. No.
Q. Your testimony is that Mr. Peizer told you that he could make the stock trade anywhere he wanted it?
A. Yes.
Q. Is that your testimony?
A. Yes.
Q. Did you ever ask him why he didn't make the share price trade at 2 or $3 a share so he could make some money?
A. As low as he wanted it.
Q. He can only make it go low; he can't make it go up? Is that what he told you?
A. He told me he can make it go as low as he wants and maybe drive it down to 25 cents a share and buy control of the company. That's what he told me.
Q. It's not your testimony he told you he can make the price go anywhere he wants?
A. Anywhere down that he wants, is what he told me.

Q. You talked about Mr. Peizer -- I'm sorry, Crede getting five million shares for free. Do you recall that testimony?
A. I did.
THE COURT: No. The question is: Do you recall speaking --
THE WITNESS: Yes.
THE COURT: -- a few moments ago. Thank you.
Q. Are those the shares available under the exchange right?
A. Potentially.
Q. So the free shares that you're talking about are shares under the exchange right?
A. Potentially.
Q. Why do you say "potentially"?
A. Because they're not available unless the stock goes down to somewhere in the neighborhood of 58 cents and if they're not void.
Q. The free shares -- well, let's talk about the exchange right.
There's a ceiling on the number of shares Mr. Peizer can get under the exchange right, correct?
A. Yes.
Q. So if the share price goes down at some point, he doesn't get the full value of the exchange right?
A. I believe that his value is maximized at around 58 cents.
Q. Right. So if Mr. Peizer or Crede were to drive the price

below 58 cents, they'd be losing money under the exchange right?

A. No. Not if he intended to buy control of the company and then ride the shares up to $10 a share, which is, I believe, his intention.

Q. To answer my question, he would lose money under the exchange?

A. No. You don't lose -- oh, under the exchange?

Q. Correct.

A. No. He wouldn't lose money under the exchange. You maximize at 58 cents or below. And you don't lose any money unless you sell shares.

THE COURT: I think what he's asking, sir, is if he drove the price -- I'm not suggesting he can drive the price, but if the price were to be driven below 58 cents, he's not doing any better at 57 cents or 56 cents than he is at 58 cents.

A. Unless he intends to buy control of the company.

THE COURT: That's not what I'm asking you, sir. I'm asking --

THE WITNESS: That's the motive, but --

THE COURT: Sir, you and your colleague at the other table who has been shuffling throughout this proceeding need to learn to just answer the questions asked. You're both very passionate, I appreciate that. But I'm asking simple

questions. I only want questions answered that I've asked.

THE WITNESS: I apologize.

THE COURT: I'll let counsel continue to ask them.

Q. Is it your testimony that under the -- I'm sorry, under the exchange right, if the share price declines, Mr. -- I'm sorry, Crede will receive more shares on the exchange, correct?

A. Yes.

Q. And the way it operates is if there's a ceiling on the total number of shares they can obtain?

A. Yes.

Q. And that is five million shares?

A. Yes.

Q. So if the price is below 58 cents, they can't get the full five million shares?

A. That's not my understanding. My understanding is --

Q. I'm sorry. To get the 5 million shares, but they're worth 53 cents or 52 cents?

A. That's correct.

Q. So they make less than approximately 2.8 million?

A. If he were to sell them that day.

Q. If the price goes down and Crede obtains new shares -- let's assume it doesn't go below 58 cents. If the price goes down and Crede obtains more shares, aren't those shares worth less?

A. By definition, if the price goes down, they're worth less.

Q. So how does Crede benefit if the price goes down and it gets shares for 60 cents versus 70 cents? It always gets the same dollar amount of shares, doesn't it?
A. It gets more shares.
Q. Right. But it has the variable value at the time of the exchange?
A. The point of there being a variable number is so that you can get more. It's not static.
Q. Right. But isn't the point of the variable number that you'll get the same dollar value when you exercise the exchange?
A. I'm not sure. I don't know if that's the thinking.
Q. Isn't the constant in the exchange -- I'm sorry. Doesn't the exchange work by Crede exercising for a dollar value and receiving a certain number of shares in exchange for that dollar value? Isn't that how it works?
A. It's a complicated formula. All I know is that if he drives the price down to 58 cents a share, he gets 5 million shares. You'll have to ask our CFO for more technical discussion.
Q. Why do you call them free shares?
A. Because he paid for the shares that he got during the $10 million transaction.
THE COURT: But isn't this part of the warrant agreement, sir?

THE WITNESS: It's part of the agreement. I guess when we went public, we went public at a dollar a share and gave a half warrant free, we called it. But I guess there's an economic value to warrants that are associated with the transaction, sure.

Q. He also signed a consulting agreement, correct?

A. In name, that was -- sure.

Q. The warrants were issued under that consulting agreement, weren't they?

A. Performance-based warrants.

Q. Well, weren't the -- wasn't the Tranche 1A warrant, the one we're discussing here today, wasn't that issued pursuant to the consulting agreement?

A. I'd have to refresh myself, but I don't believe so. Well, there was certainly no performance standards associated with the Tranche 1A warrants, no.

Q. You mentioned you bought shares at 16 cents a share. When did that happen?

A. I believe the fall of 2012.

Q. And you mentioned the stock was at $6 a share. When did that happen?

A. I think that was spring of '14 maybe.

Q. Was it your testimony, as I understood it, that the March 10, 2016, letter was sent out because you thought Crede or Mr. Peizer was going to short the stock or begin a short

campaign?
A. Or influence investors to panic.
Q. Have you any evidence that Crede or Mr. Peizer shorted anything?
A. I didn't say short. I said cause a panic.
Q. And how would --
A. Through a short article.
Q. How would Crede or Mr. Peizer --
A. I don't know, but he became very -- what's the word? -- he had a vision that there was going to be a short article published that would drastically drive down the price of our stock. That's a dangerous vision for somebody to randomly have. For the largest shareholder in the company to say, I think there's going to be a short article this week, you should sell your shares but, by the way, I'm not going to sell any of mine, he didn't say that part.
Q. Did he tell you there was going to be a short article sold that week?
A. He told large shareholders and our bankers.
THE COURT: So the answer is no?
THE WITNESS: No.
Q. So everything you know about this is something you heard from somebody else?
A. That's right.
Q. So do you recall that the first exchange Crede exercised

was for approximately 77,000 shares?
A. I don't recall, but I believe you.
Q. Do you recall there's two exchanges here, one for 77,000 shares and one for approximately 2 million shares? And you're not claiming that the initial 77,000 shares would have had a dilutive impact on the markets?
A. I'm not making a prediction one way or another.
Q. And isn't it possible that Crede could sell shares over time at volumes that wouldn't disrupt the markets?
A. He could have done that since the first day he bought his stock. He could have sold stock.
THE COURT: So that's a yes?
THE WITNESS: Yeah.
THE COURT: I just want you to answer the questions yes or no.
Q. You testified that you met with Mr. Peizer at some time in the last five or six months, is that your testimony? When was the last time --
A. I don't think I said last five or six months. I think it was last summer.
Q. Sometime last summer. And where did that meeting take place?
A. One was in Los Angeles and one was in New York, maybe two in New York.
Q. By "New York" you mean New York City?

A. Yes.
Q. And did you have any meetings with Mr. Peizer in New York City before he made his -- or Crede made its investment in 2014?
A. I think I've met with Terren, I don't know, maybe four times, socially at the Core Club or Four Seasons.
Q. And those were -- the Core Club is a private club here in New York City?
A. I guess so.
Q. And the Four Seasons, is that a restaurant here in New York City?
A. I think it's a hotel.
Q. Hotel. Okay.
MR. FLEMING: If I can just confer. (Pause)
Your Honor, those are all the questions I have for Mr. Sicignano.
THE COURT: Thank you.
Brief redirect?
MR. TUCKER: I don't think I have any.
THE COURT: Thank you very much, sir. You're welcome to step down.
(Witness excused)
THE COURT: All right. I thank the parties.
And let me say this before I actually give the decision: I appreciate the work you've put into this. I

appreciate the written submissions. I appreciate your argument today. So now you know that it's not that I'm favoring one of you because of the decision I make.

I will see you, see whoever wishes to be here, at 4:30.

MR. FLEMING: Thank you very much, your Honor.

THE COURT: And I'm going to step off the bench momentarily while the next case sets up. Thank you.

(Recess)

THE COURT: Let me begin, then. I want to, again, commend counsel in this case for the quality of the lawyering. You don't see the range of cases that I see day in, day out. And this is better lawyering than I get on a daily basis. So I'm grateful for that. I'm grateful for the intellectual challenge of this case.

But let me just say this, detracting slightly from that. The parties I don't believe have appeared before me previously. You'll know this for the next time we have a preliminary injunction together. I feel perhaps I misperceived, perhaps I was put in a position of misperceiving, the need for the scope of the direct testimony that was provided this afternoon. Because reviewing my notes of that testimony, it's difficult for me to say that the defendants only knew that this was necessary as a consequence of the reply papers. I think that there was information about the solvency

or not of the defendant in the opening papers. And I think that questions of the violation of the activity restrictions has always been the basis for denying the request to exchange. So I'm not sure why that information was presented in a truncated form in the affidavit. So, again, you'll know this for next time.

Secondly, I have made a determination to, if you will, screen out some of the more passionate statements of the two declarants this afternoon, the folks who testified; I'll call them witnesses. I'm not entirely sure that it matters to me what the believed motives are. It is significant that plaintiff has held his position. It is significant that he has explained to me the strategy that he has. But whether he was planning all along to take over the company or short the stock, again, I'm not entirely sure that it matters.

Let me turn to the issue of what does matter, which is the standard in this case.

To establish or to obtain a preliminary injunction, the plaintiff must establish a likelihood of irreparable harm, a likelihood of success on the merits or sufficiently serious questions as to the merits, plus a balance of hardships that tips decidedly in their favor; a balance of hardships that tips in their favor regardless of the likelihood of success and an injunction that is in the public interest.

The defendant has suggested that what is being sought

here is a mandatory injunction. And I appreciate the discussion I had with Mr. Fleming in this regard. I think that it is probably the case that it is a mandatory injunction, but I actually am going to find the same under either standard. And I am going to deny the request for preliminary injunctive relief, principally because I have not found that plaintiff has demonstrated a likelihood of irreparable harm; and secondarily, because I don't believe that the plaintiff has demonstrated a likelihood of success on the merits or serious questions, plus a balance of the hardships that tips decidedly in its favor.

Let me speak, please, first to the issue of irreparable harm. I have read and considered the cases that plaintiff has cited. And I do think that they are distinguishable on their facts. We'll talk in a moment about the GMD case cited to me by defendants, but the cases that I have considered -- and even were those cases dispositive of the issue, I think unless they were authoritative or required upon me by the Second Circuit, I'm not sure I would agree with them. It seems to me that those cases are more helpful in a situation where there is a demand for money damages and a real genuine issue of collectability. Again, I understand the defense's argument about GMD. I think plaintiff adequately distinguishes that case.

But looking at the defendant in this case, I'm confronted with a company that is largely the same that it was

when the plaintiff made his investment in it. It is a company in the early stages of its existence that has needed large, upfront infusions of cash; that has made rather lengthy risk disclosures in its public filings. And it is not a surprise to me that it continues to gobble up infusions of cash until things happen that allow it to do something with the intellectual property that it has.

It is noteworthy to me that the years of lengthy risk disclosures have not stopped individuals or parties from investing. I accept what defense representative said to me about the surfeit of investors and the company strategy of not diluting the share value and the number of shares. And what is important to me is that the plaintiff has not shown to me that the defendant is likely to close up shop in October. It may be that that is when their current reserves of cash run out, but there are a number of plans in place to obtain money through other sources, be they borrowing or additional trips to the capital markets or other ways of getting money.

So it suggests to me that there are still ways of keeping the company afloat. Even if it turns out that they stop receiving cash in the fall, there are assets. I accept the book value, the $20 million book value. I believe that of that, there's 3.5 million in intellectual property values.

I'm not today going to accept the $200 million figure that was suggested to me by the defense. I'm just not going to

do that. But it is significant to me as well that this is counterbalanced by $600,000 or so in long-term debt. And I was advised today that the company for the most part owns its own equipment. So I don't see that it has unwisely spent the money that it has taken in. And I don't think, therefore, that it's going to close up shop. Everything suggests to me -- well, let me back up, please.

I am accepting what I thought were very, very good questions by Mr. Fleming in cross-examination regarding the degree to which the market has taken into account the upcoming opportunities that the company has, including the British American Tobacco venture, whatever it may be, and other things that have been disclosed.

And certainly we're not asking for the disclosure of material, nonpublic information in this hearing. But the concern I have is I don't see that the company is -- the company is losing money, but I don't see that they're circling the drain, which is of interest to me. And my concern is that allowing the injunctive relief that is sought would actually run the greater risk of irreparable harm. It will dilute the shares, even if only in the short term. It will depress the price.

And there is a suggestion in plaintiff's testimony -- well, let me say the opposite. There was a degree of care that was suggested to me in the opening statements of plaintiff's

counsel that I'm not sure was borne out by Mr. Peizer's testimony. His concern is with the ability, if need be, to obtain a tax loss. I didn't hear him say that he would be circumspect or judicious in his sales in order to ensure that the stock price remains as high as it can naturally be maintained.

I am aware that there is a provision between the parties regarding the irreparable harm. It's a contractual provision. It is significant to me. It's something that I've wrestled with, but I don't find it dispositive here, given the other evidence that I have received.

So, in short, I agree with plaintiff that the inability to recover moneys owed could in certain circumstances suffice. But I don't see that the situation that would amount to that or allow that and allow that type of preliminary injunctive relief has been demonstrated here.

Let me then talk about the likelihood of success on the merits. I think there are a lot of very interesting issues. It's where I've focused the most attention. But I don't think I can say on this record that the plaintiff has demonstrated a likelihood of success on the merits. Rather, I think what I can say is perhaps there is a significant question, maybe a serious question, but not one that is accompanied by a demonstrated balance of hardships favoring plaintiff.

Focusing on the activity restrictions provision, I am not going to use extrinsic evidence for its interpretation because at the moment I think both parties have suggested to me that the provisions are not ambiguous and I should simply interpret them in the way that favors their side. I don't know that they are ambiguous. There is one provision that I'll talk about that might be, but I think I can harmonize that nonetheless.

I think there is a likelihood that the plaintiff violated the activities restrictions that are contained in Section 1(h). Mr. Peizer has been very careful in his testimony today, but to say that something was a suggestion as distinguished from a request, I think of it -- even if I didn't think of it as a plan or proposal, which I think it very much comes close to, I think it's an action. And I think, therefore, it qualifies.

I also think that he is asking too much from me to have me discern from his ultimate unwillingness to push a button and file a lawsuit that I should decide that these weren't really actions, these were merely suggestions, or these statements of someone -- an investor concerned about his investment, which is of course the -- he was the key investor, the primary investor and the biggest investor in the whole company. So I listened very carefully to what Mr. Peizer said, but I can't go where he wants me to go. And I do think that

the statements, in addition to being occasionally intemperate and acerbic, could fairly be construed as actions.

Now, this is on the record I have. And perhaps at a later date I might find something different. But I do find significance in this.

What we're left with, then, is whether that is absolved by other provisions within Section 1(h); namely, the provision that the restrictions contained in this paragraph shall not limit Crede's rights to enforce its rights or exercise its rights as to the securities or under this warrant.

Now, the parties have disputed -- and this is where there may be a bit of ambiguity -- whether that actually means the exercise right to the exclusion of the exchange right or something else entirely; whether the inclusion or definition of securities, with a capital S, should be meant to include both exchange and exercise rights.

I think the better reading is that it has to be read in conjunction with Section 5. And Section 5 has the "subject to" language.

And so then the question becomes -- and I'll try and make this as clear as I'm capable of making it -- where I read Section 5 to encompass only the activity restrictions that are set forth in Section 1(h) or the activity restrictions set forth in 1(h) and the disclaimer on which plaintiffs are relying, which is the "shall not limit" language. And I think

the better reading is that Section 5 renders the plaintiff's exchange right subject to the compliance with the activity restrictions and not the disclaimer. I think including the disclaimer would make this very circular and, therefore, there would be no reason for it.

That said, I do understand the concern that plaintiff has about forfeiture and pretext. And I'll get to those in a minute. But thinking about what this provision is, and recognizing that it exists in only one of the four warrant agreements, it meant something to someone that plaintiff not be permitted or that there be some consequence to plaintiff engaging in actions that would have the effect of reducing the stock price, because there was an incentive on some level for him to reduce the stock price. So I actually think, thinking about all of these provisions and reading them in harmony, I think this particular activity restriction exists and persists and is not read out by the disclaimer language.

So thinking about what plaintiff has argued about the weight that has been undertaken by the defendants, it did give me cause to think that this was pretextual. That said, I don't have a notice requirement in the provision, so I don't think there had to be some fair warning given by the defendants. And in point of fact, notice was given, which means something. It looks like they gave notice when they believed that there was an indication that plaintiff would cash out. But they did, in

fact, tell him that what he was doing was violative.

And then dealing with plaintiff's remaining argument, which is the concern about forfeiture and the fact that New York law, as I think most state laws, abhor a forfeiture, I do understand that. But I also understand, at least I believe I understand, the purpose of the activities restriction. And I am balancing them in finding that plaintiff has not met his burden of proving a likelihood of success on the merits.

Proceeding to the next factor, which is that of the balance of equities, here there are two things at issue. I am very much in favor of parties getting what they bargained for. It just hasn't been proven to me on this record that this is precisely what plaintiff bargained for. The ability to issue the e-mails that he did and to make the statements that he did, and even if I disregarded, as I will, the statements that other people told defendant's representatives, I have the statements that he was told -- I'm sorry, I'm going to get the gentleman's name correct -- say it, sir?

MR. SICIGNANO: Sicignano.

THE COURT: Yeah, that's not how your counsel was pronouncing it, but thank you. Says the woman whose last name is frequently mispronounced.

MR. TUCKER: Thank you for pointing that out, Judge.

THE COURT: No, that's all right. I don't want to do it.

And so, Mr. Sicignano, I accept your testimony about the conversations that you had with Mr. Peizer. I'm not going to -- I don't really want to consider hearsay, so I'm not really going to listen to what other people may have told you, but I am mindful of what you were told. And that, to me, balances, or at least calls into question, what the parties, in fact, bargained for. I think they bargained for what perhaps they may have gotten. And it may be, to be clear, that the plaintiff is entitled to something on some sort of equitable basis or that the plaintiff's breach of the activities restrictions, if that is what is found to have happened, does not foreclose the possibility of equitable relief. But that's not what I'm deciding today.

I am more concerned, as I've hinted at in a prior discussion, that granting the relief sought would actually hasten or bring about a deleterious consequence to the defendant. And I'm not really interested in doing that right now. This company is not today circling the drain, and I don't want to be the judge that puts it in that position.

On the issue of the public interest, I agree with plaintiff that the public has an interest in enforcing contractual agreements. I agree -- perhaps equally, perhaps somewhat less so -- with the defendant's argument, which is that the bankruptcy court should decide and that I should not be basically prioritizing the debtors -- the creditors of the

company at this stage. I don't really know that that's what's going on here. It seems to me that, given the relief requested, the plaintiff is not really asking to get in line ahead of everyone else. It's simply asking for more stock in a business that has been suggested to me it believes is failing. So I think these latter two points are really not dispositive for me.

What has moved me throughout this proceeding is the issue of irreparable harm. Given that, I'm not going to be imposing a bond, because I'm not granting preliminary injunctive relief. But I do want to talk to the parties about what they would like me to do next.

I heard rumblings from the back table about wanting this case moved to the Western District of New York. And I guess if that is the case -- is that the next step, the scheduling of a motion in this regard? So, Mr. Fleming, may I hear from you, and then may I hear from Mr. Tucker.

MR. FLEMING: Sure. There's a letter that's -- by the way, I appreciate the Court's time. Obviously we're disappointed in the decision.

THE COURT: I understand.

MR. FLEMING: But there's a letter request for a motion addressed to various counts in the complaint and venue. And my suggestion was that -- would be that the parties brief the venue portion first. I think we can do that pretty

quickly. I don't need much time to respond to whatever they want to file on venue. And they can specify whether they want it transferred, dismissed, whatever they want.

I just need -- I would ask for a week to respond to whatever they have on venue. And if the Court decides it's going to keep venue, then we can go on to the rest of it. If not, then it can go to the Western District or wherever.

THE COURT: Let me make sure I understand what you're saying, and I'll hear from Mr. Tucker to see if that's what his understanding is as well.

You're saying the motion contemplated by the defense has two parts to it. One is venue proper, and the other is, accepting venue, moving it to the Western District on some other basis?

MR. FLEMING: No. I'm not sure if they want to have it dismissed on account of venue or transferred. I don't view that as too different.

But there's another component, which is failure to state a claim on various counts. That's what I was getting at; not briefing all those and putting them before the court, which would require considerable time and energy in that there's only so many pages one can devote to venue. And I thought we could take that task on and try and do that efficiently.

THE COURT: You'll give me all of those pages, I understand.

Let me ask this question, because I'm a human being more than I'm a judge: Can this relationship not be saved?

MR. FLEMING: I don't know, your Honor.

THE COURT: Okay. Let me ask the question differently: At this stage in the proceedings, is it not fruitful to have discussions with either a magistrate judge or a mediator or me?

MR. FLEMING: I mean, I'd have to talk to my client to find out.

THE COURT: And you are certainly invited.

MR. FLEMING: I can do that right now.

THE COURT: Let me just say -- and I'm sure Mr. Tucker will hear me as I'm saying this. Mr. Tucker is hearing me. Thank you.

If at any point both sides want to discuss any sort of ADR mechanism, you know that -- I won't force it on anybody, but you'll know -- you're grownups. You know to let me know if at any point that is something both sides are interested in.

MR. TUCKER: Sure. Do you use the magistrate judge to do that?

THE COURT: The answer is yes.

Let me just talk to you for a moment -- let me just make sure I know who that is. It is Judge Pitman.

But I also, I have in my lifetime, done settlement conferences. I have I think a 12-and-1 record. Don't make it

two. But the issue is some folks are disinclined to have their conferences before me because of the possibility that I might be presiding over a trial in the case. It may be, sir, that you're more interested in the antecedent question of which district this is going to be taking place in.

MR. TUCKER: Judge, I think at this time, one of the things you noted was there seems to be some passion at times from the witness stand and passion from two people at two different directions. So I think the concept of mediation right now is probably not -- we should not do it at this point.

THE COURT: Okay.

MR. TUCKER: In terms of the -- we have filed the letters. They've responded. I think our thought is that we would brief it all up. I hope you don't say, let's have it at the end of Friday, but --

THE COURT: Heavens, no. But what does "brief it all up" mean? Can't we just focus on the first part of what district this is going to take place in?

MR. TUCKER: We can do that.

THE COURT: I don't want you to brief the merits, only to have me read it and give it to some other judge, because then you'll be sad and I'll be sad.

MR. TUCKER: Can I understand, though, where we are on the venue for purposes of our briefing? Because we addressed that at the beginning, and your Honor said, well, at this point

I'm going to find that there is venue here and I'm going forward.

So there are two aspects of the venue motion. One is venue for all of it should be moved. And the other one is there is -- there are agreements that have the exclusive forum. And I'm trying to understand, are we only on the second part? Are we on the first part and the second part?

THE COURT: Very fair, sir. Because of the preliminary injunction context that I'm in right now, the finding that I needed to make was plaintiff's reasonable probability of success on the venue question. And that is what I found.

If you're telling me now that on a more complete record I would actually find that there was no venue and that my prior discussions about your client's waiver of venue are just wrong, I'll listen to you. And then separately you want to talk to me about the fact that certain counts, there simply may not be venue for. And then I think separately from that, you may say that it would just be more efficient if this whole case were in a district other than the Southern District of New York, because witnesses, documents, everything under I think a 1404 analysis, that everyone is better served by having it up there. Again, I take no offense, but I'm also more up to speed than whoever you will give this to in the Western District of New York.

MR. TUCKER: I just wanted to know, if I spend pages on that --

THE COURT: Spend pages on that, sir. I will not say that it is fruitless, because I was dealing with it under a different standard.

Let's discuss, because you all have been working quite hard to get me these papers, you're allowed to take a breath, decompress from this and then think about your briefing schedule. What amount of time do you need, Mr. Tucker?

MR. TUCKER: Judge, if I said 20 days, is that asking for too much?

THE COURT: Not at all. in fact, I was going to give you -- let me do this: Can I give you, because of my own schedule, to July 11, which is more than 20 days; or am I just --

MR. TUCKER: No. The preliminary injunction was what created all the heat to begin with. And I think we're past that now.

So July 11 would be wonderful. Thank you.

THE COURT: And then, Mr. Fleming, tell me what time you would like, sir.

MR. FLEMING: July 11th is what day of the week?

THE COURT: It is a Monday.

MR. FLEMING: Could I have the Friday after that?

THE COURT: Yes, although that's awfully --

MR. FLEMING: Not the --

THE COURT: The 22nd, you're saying?

MR. FLEMING: 22nd.

THE COURT: Let me give you the 25th. If you wish to wreck your colleagues' weekends, you can have that, too. So the 25th. And then given that some of you are coming from far away states, let me try and do this by phone, rather than having the parties in. Let me look -- do you want to reply? Someone is going to ask for a reply. Yes, he is.

Sir, the 1st of August. All right? And then, assuming we're all available at some point in the month of August, we can get everyone's schedules together, we will get you on the phone. Okay.

Is there anything else we should be discussing this afternoon, Mr. Fleming?

MR. FLEMING: No. Thank you, your Honor.

THE COURT: Thank you.

Mr. Tucker, anything else?

MR. TUCKER: No. Thank you, Judge.

THE COURT: And your colleague gets to talk next time, sir? Mr. Friedman, more than just a signature on the page.

MR. FRIEDMAN: Thank you, your Honor.

THE COURT: That's okay.

MR. TUCKER: Judge, he's the brains, I'm the talker.

THE COURT: I'm not doubting that. Just in my mind,

if you're here and billing, you ought to get to speak. That is the former junior associate in me speaking out. So I won't ascribe that to him. That's all coming from me.

Thank you again. And thank you for returning this afternoon. Thanks.

(Adjourned)

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DEFENDANT HEARING EXHIBITS