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2 (Call to Order)

3 **THE CLERK:** All rise.

4 **THE COURT:** Good afternoon. Ladies -- well,  
5 gentlemen, please be seated -- oh, lady, I see the young lady  
6 back there. My apologies. Let me call our matter. Just give  
7 me one second and we will see where we are.

8 Ms. Mendez, I didn't see you either but you were  
9 shrouded by the taller gentleman to your left.

10 Okay. All right, these are our 2:00 o'clock matters.  
11 Let me take the first matter on the Docket. There's the main  
12 case and then the adversary, Case Number 09-11507, *Crescent*  
13 *Resources, LLC*. This is a motion for entry of proposed  
14 protective order.

15 **MR. BROTHERS:** Good afternoon, your Honor, Doug  
16 Brothers for the Crescent Resources Litigation Trust.

17 **THE COURT:** Thank you.

18 **MR. PECHT:** Your Honor, Gerry Pecht for the Duke  
19 Energy Defendants.

20 **THE COURT:** Is this matter opposed?

21 **MR. BROTHERS:** It is.

22 **THE COURT:** All right. How long do you think this  
23 one will take?

24 **MR. BROTHERS:** Twenty to 30 minutes.

25 **THE COURT:** Okay.

1           **MR. UNIDENTIFIED:** I think about that.

2           **THE COURT:** All right, thank you. And then the  
3 second matter on the Court's Docket is Adversary Number  
4 10-01111, *Crescent Resources Litigation Trust versus Duke*  
5 *Energy Corporation*. There are two matters on the Court's  
6 Docket, the motion to file proposed amended complaint under  
7 seal and the motion for leave to file amended complaint. For  
8 the record?

9           **MR. BROTHERS:** Doug Brothers for the Crescent  
10 Resources Litigation Trust.

11           **MR. PECHT:** Gerry Pecht for the Duke Energy  
12 Defendants.

13           **THE COURT:** Are both matters opposed?

14           **MR. UNIDENTIFIED:** No.

15           **MR. BROTHERS:** No. I think this might take five to  
16 ten minutes to announce an agreement and also to explain to the  
17 Court some scheduling ramifications as a result of it.

18           **THE COURT:** Certainly, gentlemen. Can we take -- and  
19 I'm not foreclosing anyone else that wishes to enter an  
20 appearance. Does anyone else want to wish -- enter an  
21 appearance or -- Mr. Autry?

22           **MR. AUTRY:** Your Honor, I will not be speaking but  
23 for the record, Pat Autry appearing on behalf of Defendant  
24 Arthur Fields.

25           **THE COURT:** Thank you. Does anyone else wish to

1 enter an appearance? All right, very good then. Let's take  
2 the shorter matters up first, gentlemen, if we may. Okay? And  
3 that's in the adversary proceeding. Who would like to speak  
4 first?

5 **MR. BROTHERS:** May I proceed?

6 **THE COURT:** Yes, sir. You'll get your turn,  
7 Mr. Pecht. I won't keep you from talking but since I heard  
8 five to ten minutes, my -- I was so thrilled to hear that that  
9 I thought we'd jump to that first.

10 **MR. BROTHERS:** With respect, your Honor, to the  
11 motion to seal, the Court may recall that we have filed a  
12 proposed amended complaint with a motion to seal that complaint  
13 per Duke's designations which we don't agree with. We don't  
14 think it's necessary because we don't think those documents --

15 **THE COURT:** Wait, let's back up. When you say, "per  
16 Duke's designations which we don't agree with," why don't you  
17 be a little bit more specific?

18 **MR. BROTHERS:** I will, your Honor.

19 **THE COURT:** Thank you.

20 **MR. BROTHERS:** Duke has designated a number of  
21 documents as confidential.

22 **THE COURT:** Okay.

23 **MR. BROTHERS:** The import of those designations and  
24 the significance of them is something we'll talk about with  
25 respect to the protective order momentarily --

1           **THE COURT:** Right.

2           **MR. BROTHERS:** -- but we had agreed in the interim  
3 not to utilize those matters designated as confidential in a  
4 public fashion pending further order of the Court.

5           **THE COURT:** All right.

6           **MR. BROTHERS:** And so as a result, we filed one  
7 version of the complaint under seal that referred to certain of  
8 the documents that had been marked as confidential. What I  
9 would like to do at this point, your Honor, is very briefly  
10 explain to the Court what pages those are and what exhibits  
11 those refer to and ask the Court to look at those and determine  
12 whether, in fact, those are confidential documents because we  
13 do not believe that they are.

14           **THE COURT:** All right.

15           **MR. BROTHERS:** And so we find ourselves in the  
16 unusual posture of filing a motion to seal but believing in  
17 essence that the amended complaint should not be sealed.

18           **THE COURT:** Now, I'm not in any way being silly. Do  
19 I need to seal the record at this point based upon your  
20 discussion?

21           **MR. BROTHERS:** I think in -- as an abundance of  
22 caution, I don't believe there's anybody in the courtroom who  
23 needs to be excluded because of who they are but I think yes.  
24 I think -- why don't you seal the record at this point so I can  
25 talk about these matters?

1           **THE COURT:** Mr. Pecht?

2           **MR. PECHT:** Your Honor --

3           **THE COURT:** Yes, sir.

4           **MR. PECHT:** -- the issue here is whether or not --

5           **THE COURT:** Come to the podium, please, so we may  
6 hear you.

7           **MR. PECHT:** The issue here is a motion to seal --

8           **THE COURT:** Yes.

9           **MR. PECHT:** -- and we do not oppose the motion to  
10 seal.

11           **THE COURT:** All right.

12           **MR. PECHT:** So the Court could grant the motion to  
13 seal but what Mr. Brothers is now talking about is outside of  
14 the motion. What's he now talking about is having the Court  
15 look at each of the documents and determining whether they're  
16 confidential or not confidential. That process is governed by  
17 -- should be governed by the protective order and there's a  
18 procedure that is normally followed when you're contesting  
19 documents that are confidential.

20           **THE COURT:** Does that relate to the other matter that  
21 I'm going to consider today?

22           **MR. PECHT:** That's going to the protective order that  
23 the Court enters and if the Court enters that protective order  
24 and follows the usual procedures with regard to  
25 confidentiality, then they file a brief. They challenge the

1 confidentiality. We get to brief them in response and the  
2 Court makes -- it can have oral argument and the Court makes a  
3 decision about it but it's not proper to just come into court  
4 and say, I'm going to challenge these documents, never file a  
5 motion about them and then start arguing about it.

6 **THE COURT:** All right. Mr. Brothers?

7 **MR. BROTHERS:** Our motion to seal is quite clear that  
8 we do not believe the matter should be filed under seal --

9 **THE COURT:** I understand that.

10 **MR. BROTHERS:** -- and we filed the motion merely  
11 because of the designation of those materials as confidential.  
12 I have no problem returning to the substance of these after we  
13 argue the protective order if that's -- if that helps the  
14 Court.

15 **THE COURT:** Well, I think we -- you're sort of in  
16 agreement but your approach is different. Is that -- would  
17 that be fairly accurate, Mr. Pecht?

18 **MR. PECHT:** I think we're in -- well, I don't know.  
19 I mean, I think from our perspective, the Court should -- we're  
20 not opposed to the motion to seal. The Court should enter the  
21 motion to -- the order on the sealing.

22 **THE COURT:** All right. So I'll simply do that and to  
23 the extent you want to make some other arguments, can we deal  
24 with that in the context of the motion for entry of protective  
25 order?

1           **MR. UNIDENTIFIED:** Absolutely, your Honor.

2           **THE COURT:** All right. Let's do it that way then.  
3 For purposes of the record, Docket Entry Number 45 in the  
4 adversary proceeding is approved. All right. Let's deal with  
5 the motion for leave to file amended complaint.

6           **MR. BROTHERS:** Your Honor, my understanding -- this  
7 is a proposed amendment that was filed contemporaneously --  
8 essentially contemporaneously with our response to the motion  
9 to dismiss. My understanding from Duke's papers is that  
10 there's no substantive opposition to the motion but there was  
11 pushed back with respect to what schedule that ought to  
12 trigger.

13           **THE COURT:** That's my understanding as well. Would  
14 you agree, Mr. Pecht?

15           **MR. PECHT:** Yes, your Honor.

16           **THE COURT:** Thank you. Go ahead, Mr. Brothers.

17           **MR. BROTHERS:** Our position is the suit was filed  
18 some seven and a half months ago. There's been no discovery.  
19 For a variety of reasons, the case has essentially been frozen.  
20 The amended -- proposed amended pleading was filed and served  
21 on March 22nd. To the extent that the Duke Defendants would  
22 have a right to supplement or file a new motion to dismiss with  
23 respect to the new pleading, Rule 12(g) limits that as to new  
24 matters raised in the new pleading and there is only one new  
25 count -- there are many new facts pled but there's only one new

1 legal count in the amended complaint which I believe to be  
2 Count 7 which has to do with direct breaches of fiduciary  
3 duties. So any -- to the extent that they would have a right  
4 to file an additional motion to dismiss, it would be limited as  
5 to that claim.

6           Seeing as how they've had the amended pleading  
7 already for a month, it seems to me appropriate especially in  
8 light of the fact that this Court has under advisement their  
9 global motion to dismiss anyway. It seems appropriate for them  
10 to have a short period of time, perhaps 15 days or thereabouts,  
11 us a brief reply should we decide that we need to and then the  
12 Court could rule on the motion both with respect to the  
13 original complaint and the amended complaint as is customary  
14 granting or denying based on the totality of the pleadings  
15 including the amended pleading. There's no point under 12(g)  
16 in re-triggering the deadlines and retriggering a brand new  
17 motion to dismiss practice in toto.

18           In addition, your Honor, we believe that a discovery  
19 order needs to go ahead and be put into place so that the case  
20 is not basically stopped in its tracks while these challenges  
21 to the pleadings take place. Under Local Rule -- I think it's  
22 7026(b) -- discovery generally waits on a scheduling order in  
23 an adversary but there's an important caveat there, unless  
24 otherwise authorized and we think it's appropriate and we sort  
25 of previewed this issue some months ago to the Court --

1 Mr. Spears and Mr. McCarthy and I in an informal setting saying  
2 that we think it's appropriate at this point for the Court to  
3 authorize document discovery to begin in the case both as to  
4 the Duke parties and as to third parties.

5           So whatever timetable the Court imposes with respect  
6 to, you know -- I assume the leave to amend will be granted and  
7 then there will be some sort of period of time in which Duke  
8 can make its additional which we believe should be limited  
9 challenge, that the Court should also otherwise document  
10 exchange discovery to occur and we think it should be limited  
11 to that because until we get sort of a final resolution of the  
12 privilege issues and the rights to the RBH documents, it would  
13 seem to me premature to begin any other type of discovery in  
14 the case other than exchange of documents.

15           **THE COURT:** All right, thank you.

16           **MR. PECHT:** Your Honor, Gerry Pecht here for the Duke  
17 Defendants. The Trust filed an amended complaint after we  
18 moved to dismiss and what they're trying to do is to replace  
19 their old complaint with a brand new complaint. They've added  
20 24 pages and 83 paragraphs to that complaint thereby  
21 acknowledging that their original complaint was in effect  
22 deficient.

23           We don't oppose the filing of the amended complaint  
24 but we're asking for 45 days within which to file our motion to  
25 dismiss. This issue regarding 12(g) I will note is not in

1 Mr. Brothers' papers. He doesn't reference 12(g) at all in his  
2 motion. He never -- this is the first time I've heard of any  
3 issue regarding 12(g). If I had heard about it before this, I  
4 would have fully briefed it. What happens when you file an  
5 amended complaint, a new amended complaint is that the old  
6 complaint is thrown out. It's no longer the operative pleading  
7 but if the Court enters this motion for leave to grant the  
8 amended complaint, we've got a new pleading.

9 **THE COURT:** So we effectively, if I may, restart the  
10 clock?

11 **MR. PECHT:** We restart the clock and we file now a  
12 motion to dismiss with regard to the amended pleading and the  
13 new allegations and we're not limited in any way because they  
14 added 83 paragraphs and 24 pages. So we can file a full motion  
15 to dismiss and we do have a very good motion to dismiss, in our  
16 view.

17 **THE COURT:** If I may, would you or would you not  
18 agree that notwithstanding Mr. Brothers' citing of 12(g),  
19 really the time for me to decide that is after I grant leave to  
20 file the amended complaint and you file your motion to dismiss  
21 and they think you've acted inappropriately as it relates or  
22 not with relevance to 12(g), they can file the requisite reply?

23 **MR. PECHT:** Exactly, your Honor. If they think  
24 there's some issue with regard to 12(g) that we -- that they  
25 want to raise, they could raise it and they can raise it

1 appropriately in a motion which we -- both parties can brief  
2 and the Court can hear.

3 **THE COURT:** All right, go ahead, sir.

4 **MR. PECHT:** We had a meet-and-confer about this.  
5 They agreed that we could have 45 days to file an answer but  
6 their position is you're not going to -- we're not going to  
7 allow you to file a motion to dismiss. We're not going to give  
8 you the additional time to file the motion to dismiss. I will  
9 note that the Court has been abundantly generous to the trust  
10 in giving them time. The Court gave the trust a hundred and  
11 four days to file a response to our motion to dismiss. We are  
12 asking only for 45 days. I will also note that with regard to  
13 the original complaint, the parties agreed and the Court so  
14 ordered that we have 60 days to file our motion to dismiss.  
15 We're not asking for 60 days here. We're asking for 45 days  
16 within -- in which to file a motion to dismiss.

17 With regard to the discovery orders that Mr. Brothers  
18 raised, that also is a matter that hasn't been briefed, hasn't  
19 been properly presented to the Court and it was just addressed  
20 here off the cuff for the first time without any papers being  
21 presented to the Court with our opportunity to brief the issue.  
22 We think that there are fundamental preliminary issues that the  
23 Court must decide before this matter proceeds.

24 **THE COURT:** All right. So you oppose Mr. Brothers'  
25 suggestion that there should be some allowance for exchange of

1 documents?

2 **MR. PECHT:** Yes, your Honor, we do.

3 **THE COURT:** All right, thank you. Mr. Brothers?

4 **MR. BROTHERS:** Your Honor, I think 12(g) speaks --  
5 12(g), sub 2 speaks specifically to this circumstance. I don't  
6 want to reiterate my earlier argument but I stand by it and I  
7 would say with respect to our meet-and-confer, I'm not going to  
8 get into a he-said-she-said. I think there's a little bit of  
9 disagreement as to what was said in the conference but in any  
10 event, it seems to me that a much shorter period of time allows  
11 Duke to exercise whatever rights it may have under 12(g)(2) and  
12 moves the case along.

13 **THE COURT:** Well, I mean, 12(g)(2) -- well, let me  
14 get up closer to the microphone -- says, "Except as provided in  
15 Rule 12(h)(2) or (3), a party that makes a motion  
16 under this rule must not make another motion under  
17 this rule raising a defense or objection that was  
18 available to the party but omitted from its earlier  
19 motion." I mean, that's what the rule says. I won't  
20 know that until, A, I've allowed the motion for leave which of  
21 course I'm going to do because there's really no disagreement  
22 on it and, B, to the extent that Duke files a motion to  
23 dismiss, then I think 12(g)(2) is implicated at that point.  
24 There may be a valid argument that they've raised -- made  
25 arguments that are otherwise available in the original motion

1 but I don't think we're there yet.

2           So I'm just going to cut through this and what I'm  
3 going to do -- and I had a feeling you were cite to me,  
4 Mr. Pecht, the Court's generosity as you term it -- his words,  
5 not mine, Mr. Brothers -- about the allowance. It occurred to  
6 me when I read these motions that I think balancing the  
7 equities -- 45 days is appropriate under the circumstance in  
8 which to respond. I am not going to preclude you and limit you  
9 to an answer. To the extent that the Trust thinks that you  
10 have violated the rules in that regard, the Trust will tell me  
11 and I'll decide it at that point. So the motion for leave to  
12 file amended complaint is granted. Duke will be given 45 days  
13 in which to respond whether it be an answer or a motion to  
14 dismiss.

15           And then I'm not also -- I'm sorry. The one other  
16 thing is I'm not going to require exchange of documents at this  
17 point. I -- trust me. I understand we're moving at a snail's  
18 pace on the discovery on this. I'm not pleased about that but  
19 I'm not going to alter anything at this point until I've ruled  
20 on the 542 motion. So for purposes of the record, one, the  
21 motion for leave to file the amended complaint is granted.  
22 Two, Duke will have 45 days in which to either file an answer  
23 or otherwise plead under Rule 12 and, three, I'm not going to  
24 allow at this point any exchange of discovery.

25           **MR. AUTRY:** Your Honor, may I ask for a

1 clarification?

2 **THE COURT:** Yes, sir.

3 **MR. AUTRY:** I assume the Court's ruling extends to  
4 Defendant Fields as well?

5 **THE COURT:** Yes, it does.

6 **THE COURT:** All right. So can I get an order from  
7 you, Mr. Pecht?

8 **MR. PECHT:** Yes, your Honor.

9 **THE COURT:** All right, thank you.

10 **MR. BROTHERS:** One additional clarification, your  
11 Honor. We need to schedule a timeframe for us to respond to  
12 the motion to dismiss.

13 **THE COURT:** How much time would you like?

14 **MR. BROTHERS:** Thirty days and I hope not to use it  
15 all.

16 **MR. PECHT:** No objection, your Honor.

17 **THE COURT:** Is 30 days all you need?

18 **MR. BROTHERS:** Yes, sir.

19 **THE COURT:** All right. I would have given you more  
20 but --

21 **MR. BROTHERS:** I understand, but I'm serious about  
22 trying to --

23 **THE COURT:** I know you are. I know you are. So, 30  
24 days it is. Can you recite that in your order, as well,  
25 please, Mr. Pecht?

1           **MR. PECHT:** Sure, your Honor.

2           **THE COURT:** All right. Thank you. All right. So,  
3 with that in mind, now we need to proceed to the motion for  
4 entry of proposed protective order. Are we ready to proceed on  
5 that, gentlemen?

6           **MR. BROTHERS:** Yes, your Honor.

7           **MR. PECHT:** Yes, your Honor.

8           **THE COURT:** All right. Go ahead, Mr. Brothers.

9           **MR. BROTHERS:** Your Honor, I want to spend just a  
10 little bit of time on background on this because --

11           **THE COURT:** Sure.

12           **MR. BROTHERS:** -- this, even though in other contexts  
13 often this is a rather routine process, it is not in this case  
14 for a number of reasons.

15           Let me be clear at the outset, having read Duke's  
16 submission, that the trust is not a proponent of the need for a  
17 protective order. The trust received documents unilaterally  
18 designated by Duke as confidential and as privileged and was  
19 put in a position of needing to honor a limitation on use of  
20 that pending the Court's clarification and further order of the  
21 Court.

22           **THE COURT:** Before we go any further, do I need to  
23 put this under seal?

24           **MR. BROTHERS:** I don't believe so. I don't intend to  
25 refer to anything that would require it to be under seal.

1           **THE COURT:** Because if we do, that's certainly not a  
2 problem, but we would have to take a brief recess to  
3 accommodate that.

4           **MR. BROTHERS:** Now, having said that, when we get to  
5 the implications of this on the motion for leave to amend, I  
6 will advise the Court -- I'm sorry, on the motion to seal --

7           **THE COURT:** Thank you.

8           **MR. BROTHERS:** -- I will advise the Court at that  
9 point and we can deal with the sealing issue, if that's  
10 acceptable.

11           **THE COURT:** Does that work for you, Mr. Pecht?

12           **MR. PECHT:** Yes, your Honor.

13           **THE COURT:** All right. Thank you. Go ahead, Mr.  
14 Brothers.

15           **MR. BROTHERS:** So, the trust was not a proponent of  
16 there being a protective order as such, but felt that there  
17 needed to be clarification as to what use the trust could make  
18 of materials that were designated as confidential. We sent our  
19 version roughly three weeks before we filed it. We didn't hear  
20 back, although we asked several times. And then, finally we  
21 did have a conference with Duke after two different competing  
22 versions were circulated amongst counsel and because there are  
23 fundamental and irreconcilable differences, we've had to move  
24 forward.

25           Essentially, there are two major areas in which

1 Duke's proposal runs afoul of proper standards. One is that it  
2 seeks to avoid in numerous respects certain requirements of the  
3 rules. And I'll go through that in detail.

4 And secondly, it would effectuate an end run around  
5 this Court's deliberate and considered determination of the  
6 privilege and joint privilege issues, some of which -- many of  
7 which -- are already before this Court.

8 Let me give some background on the context of the  
9 protective order discussion here. Typically in litigation such  
10 as this, the discussion about a protective order would be to  
11 protect bona fide proprietary documents and if there are bona  
12 fide proprietary documents in the case that meet the standards  
13 of Rule 26, they're indeed entitled to protection of a  
14 protective order. No question about that.

15 The Court may be aware of several other circumstances  
16 in which the trust has been involved in protective order  
17 discussions. We were involved with Mr. Autry's client in  
18 another adversary matter regarding a tax situation and we  
19 agreed to a protective order that protected sensitive  
20 employment information. We've also worked with some of the  
21 accounting firms to agree to limit certain information. But  
22 we've done so in the context of there being a definition of  
23 what those materials are and our determination that there's a  
24 bona fide and legitimate interest to protect with respect to  
25 those materials.

1           The unusual aspect of where we find ourselves today  
2 is that to date the entire body of documents that we are  
3 talking about that Duke would seek to have governed by this  
4 protective order are not Duke documents. They're Crescent  
5 documents maintained primarily by Crescent's lawyers.

6           And so, it's not a situation where -- at least yet;  
7 although this protective order or whatever's entered will  
8 govern future production, presumably -- it's not the customary  
9 situation where a party seeks to protect its proprietary  
10 interest as reflected in its confidential documents that had  
11 been maintained as confidential; rather, it's Duke's desire to  
12 assert a restriction on the use of documents maintained by  
13 Crescent's lawyers who have sworn under oath that they were  
14 representing Crescent in connection with these matters.

15           To this, we have the overlay of what we believe has  
16 been an indiscriminate claw back, based on privilege claims.  
17 Obviously, that's not before the Court today in terms of the  
18 merits of that. But we've seen what we believe to be abusive  
19 conduct there and we've seen those claw backs to have occurred  
20 much later than the 14 days in which Mr. Spears originally  
21 asked this Court to impose attorneys eyes only protection so  
22 that claw backs could be done.

23           So, the problem that we find ourselves facing in  
24 trying to deal on the terms of a protective order is that  
25 simply by designating documents as confidential, Duke

1 effectuates control over our documents, our ability to use  
2 them, and handcuff the trust in the implementation of its  
3 responsibilities. That's one area we're dealing with.

4 Another area that we're dealing with is that the  
5 privilege matters, separate and apart from the confidentiality  
6 matters, are not properly the subject of protective order  
7 discussion. Customarily, those matters are dealt with under  
8 Rule 26 and Rule 502 of the Rules of Evidence, which I'll talk  
9 about in just a second. And we believe it's particularly  
10 inappropriate here where the Court is considering complicated  
11 issues of joint privilege, what rights that gives the parties  
12 if there is a joint privilege, what rights of waiver there are,  
13 what costs are associated with that. That will all be briefed  
14 and argued in due course. That should not be, in essence,  
15 trumped by a proposed protective order.

16 So, where we come in this discussion is from the  
17 position of yes, if there's a bona fide proprietary interest  
18 under the rules, Duke, like any other litigant, if they can  
19 meet their burden, is entitled to a protective order. But  
20 we've got to be particularly cautious and vigilant here to make  
21 sure that there's not an overbroad request that would encourage  
22 or facilitate some kind of misuse or abuse.

23 So, having said that, let me talk briefly about the  
24 impact of Rule 26 and Rule 502 of the Federal Rules of Evidence  
25 and associated case law. Privileged matters, as I said, as a

1 general rule are not the subject of a protective order.  
2 They're generally governed by two provisions in the Federal  
3 Rules. It's Rule 26(b)(5)(B). Rule 26(b)(5)(B) is the  
4 production of privilege documents provisions of Rule 26. And  
5 it provides what the lawyers have used in this case and others  
6 as the shorthand of the claw back remedies. It has a  
7 definition. It has formulation for the return, sequester or  
8 destruction of documents and stands on its own and is binding  
9 on all of the parties without a protective order.

10 In addition, Rule 502 of the Federal Rules of  
11 Evidence talks specifically about the admissibility of  
12 privilege documents and provides that if a disclosure of  
13 something that's privileged is inadvertent, if reasonable steps  
14 are taken to protect it and reasonable steps are taken to  
15 rectify the inadvertent disclosure, that the materials can, in  
16 essence, be clawed back or snapped back.

17 That's binding on all the parties, too, and provides  
18 together those two provisions to provide adequate protection to  
19 Duke with respect to privilege matters. And we've consistently  
20 taken the position in this case that we will honor those  
21 provisions. They're binding on everybody. And what we don't  
22 need are a series of provisions in a protective order that  
23 alter those rules. And I'll show the Court why these do in  
24 just a minute.

25 So, the next question then under Rule 26 is what are

1 confidential matters and what is the rule for protection of  
2 confidential matters or proprietary matters? Rule 26(c) speaks  
3 to that. And it defines them as trade secrets or other  
4 confidential research, development or commercial information.  
5 What we're dealing with here, of course, your Honor, is a  
6 transaction -- primarily it's a transaction that closed back in  
7 2006. It's not new technology. It's not highly proprietary  
8 business information. So, we're not dealing with a situation  
9 in which there is an intuitive need to protect this.

10           The general rule is that the public has access to  
11 litigation documents and materials unless the party opposing  
12 disclosure shows good cause why a protective order is  
13 necessary. So, general rule, open disclosure of matters that  
14 are litigated unless the party opposing shows good cause.

15           The burden is on the party -- under 26(c) -- is on  
16 the party seeking the protective order and they must show a  
17 particular need for protection. Broad allegations  
18 unsubstantiated by specific examples or articulated reasons do  
19 not satisfy and we've got -- there's a number of cases that can  
20 be found in the annotations simply under the Rule that hold  
21 that. Good cause must be shown by specific prejudice or harm  
22 that will result.

23           The Manual for Complex Litigation speaks to this and  
24 advises us that the Court should enter a protective order only  
25 when the movant makes that particularized showing of good cause

1 by affidavit or testimony of a witness with personal knowledge  
2 of specific harm that would result from disclosure or loss of  
3 confidentiality; none of which has occurred in this case.  
4 There's been no such showing by Duke. And Duke, frankly, needs  
5 to show that with respect to each particular document that it  
6 seeks to protect.

7           So, from that now, let me move from those general  
8 principles, let me move forward and talk about the two  
9 different forms that have been submitted. And I think I should  
10 speak really about three different forms, your Honor. One is  
11 the form we submitted. One is the standard Western District  
12 protective order form. And the third is their form.

13           Our form was derived from the Western District form  
14 and is quite similar. We've made several changes and let me  
15 explain to the Court why we have done so. The first is, we've  
16 abandoned the provision in the Western District's standard form  
17 that sets forth a category of documents as attorneys' eyes  
18 only, which is sort of a super confidential designation. And  
19 the reason we've done that is because this is not a trade  
20 secrets type case. We have a litigation trustee on the other  
21 side. It's not a case involving business competitors where  
22 only attorneys should be able to look at materials. The  
23 litigation trust has no business other than liquidating the  
24 claims involved that have been assigned to it.

25           And secondly, because Mr. Benson himself has

1 particularized knowledge, experience and training that would be  
2 most helpful to counsel. And, of course, he remains subject to  
3 the Court's jurisdiction in terms of enforcement of the order.

4 My understanding is that Duke's proposed order  
5 doesn't require an attorneys' eyes only format, as well. So,  
6 it may be that that variation from the standard form of the  
7 Western District is not controversial.

8 **THE COURT:** Okay.

9 **MR. BROTHERS:** The other thing that we've done that  
10 we know Duke opposes is the standard Western District form says  
11 that materials designated as confidential may be used only in  
12 the subject litigation. We have broadened that to include  
13 their use in all litigation brought by the trustee. And the  
14 reason we've done that is twofold. First, these are the  
15 trustee's documents and for them to be designated as  
16 confidential -- as least to the existing production of the  
17 trustee's documents -- and for them to be designated as  
18 confidential by our adversary, thus limiting our ability to use  
19 them in preference actions and other adversary actions is  
20 untenable, frankly, for us.

21 Now, we would certainly agree that whatever  
22 restrictions the Court wishes to impose on their use in this  
23 litigation would be applied equally to other adversaries.  
24 We're not talking about expanding them for other uses outside  
25 of the litigation trust -- litigation activities. But it is

1 important to us that documents -- even documents designated as  
2 confidential -- because they derive from Crescent's own records  
3 -- be allowed to be used in other trustee litigation.

4 Our proposed form of order contains the standard  
5 definition of qualified persons, that you can mark depositions  
6 after the fact and those sort of other uncontroversial  
7 provisions that are also in the Western District form. So,  
8 what we have, in essence, proposed, your Honor, is the Western  
9 District form with those two primary substantive changes.

10 We then visited with Duke and Duke proposed a form  
11 that was radically different and far more elaborate and we  
12 reached agreement on two points, relatively minor, but  
13 additional modifications that we would make. One is, of  
14 course, that the protective order that Mr. Fields through his  
15 counsel be party to the protective order. That's fine with us.

16 Secondly, a request that qualified persons include  
17 vendors, particularly vendors with respect to storage and  
18 maintenance of electronically stored information. That's fine  
19 with us, as well; obviously with an understanding those vendors  
20 would be advised of the confidentiality.

21 But then, we have a myriad of disagreements with  
22 Duke's order. And let me go through those. I'm not certain  
23 that they're comprehensive, but they're certainly in my mind  
24 numerous and any one of them, frankly, sufficient to suggest  
25 that Duke's order ought not be entered.

1           First, Duke's order applies throughout to privileged  
2 information, as well as to confidential information, and we  
3 oppose that because that's not the proper subject of a  
4 protective order. The preamble to Duke's proposed protective  
5 order purports to protect "otherwise commercially sensitive  
6 information." Rule 26(c) does not contemplate the protection  
7 of "commercially sensitive information." It doesn't rise to  
8 the sufficient standard.

9           **THE COURT:** What do you think that means?

10          **MR. BROTHERS:** What I think we should do, your Honor,  
11 is simply take the definition from Rule 26 and we've actually  
12 largely agreed on what that definition is elsewhere in the two  
13 protective orders.

14          **THE COURT:** Then, if you can explain it to me, why  
15 does it need this definition, for lack of a better word?  
16 What's your understanding?

17          **MR. BROTHERS:** My understanding is it creates a  
18 looser definition than that which is required.

19          **THE COURT:** Right.

20          **MR. BROTHERS:** And that's why we oppose it.

21          **THE COURT:** I understand your objection.

22          **MR. BROTHERS:** The definition -- it's in definition A  
23 of their proposed order, and it's a definition of confidential  
24 information. They say in their papers it's the same as ours.  
25 It's really not quite, because they have other language in

1 paragraph three D that would need to be put back into the  
2 definition, but the bottom line, your Honor, is the definition  
3 in our proposed order has the entirety of the definition all in  
4 one place, which is where it belongs.

5           Their definition G talks about -- defines what  
6 privileged documents are and defines them as sole or joint  
7 privileged; again, getting into and we think, frankly, running  
8 an end run around this Court's determination of what is sole  
9 and what is joint privileged and what the implications of that  
10 are, which needs to happen in due course.

11           We oppose definition "I sub (4)" in which their form  
12 of protective order purports to require us to obtain the  
13 agreement of third-party witnesses to be bound by the  
14 protective order. That's not in the standard form anywhere,  
15 your Honor, and in other forms that I've seen, the most  
16 restrictive is simply that you're not going to use confidential  
17 information with witnesses other than those who are an author,  
18 recipient, or whose work is referred to in the document. But  
19 they go well beyond that.

20           Definition I-7 in qualified persons -- and this is  
21 important -- would allow an appellate review process before we  
22 could show a document to a third party. Let me give the Court  
23 an example.

24           **THE COURT:** Please.

25           **MR. BROTHERS:** If we receive a document that is to

1 Moore and Van Allen, a law firm representing Bank of America,  
2 they're not a qualified person under the definition. And if we  
3 said, "We want to show it to that person," and Duke said, "No,  
4 you may not show it to that person," then -- and this Court  
5 looked at the document and said, "Well, you can show it to that  
6 person; this isn't highly sensitive stuff," Duke would have the  
7 right to take that issue on appeal, which I've never heard of a  
8 party being able to appeal a Court's determination as to what  
9 is or is not confidential, and we couldn't use that document  
10 until that appellate process was concluded; so that the  
11 potential mischief associated with that provision is  
12 disturbing. Obviously, it will be up to this Court or a  
13 master, or however the Court decides to proceed, depending on  
14 the volume of these issues, to make determinations, and then,  
15 if a party disagrees with those determinations, this Court may  
16 or may not have the discretion or desire to allow an appeal.  
17 But for a protective order at the outset to state that the  
18 party has the right to an appellate process on matters that  
19 would greatly interfere with the orderly progress of the case  
20 is something we're vehemently opposed to.

21 Paragraph three, for example, recites that third-  
22 party designations are binding. So, for example, if Duke  
23 received materials from another party that claimed they were  
24 confidential and furnished them to us, we'd be bound by those  
25 designations, which we oppose. Those should be subject to the

1 same review process as any other designations.

2           With respect -- I think I talked earlier about the  
3 proposed order from Duke kind of supplanting the rules and  
4 changing the burdens. Paragraphs 3(c) and 4(h), taken  
5 together, 3(c) allows Duke to designate confidential documents  
6 by Bates number. For example, they could send us a CD with  
7 10,000 pages and say they're all confidential, but 4(h) would  
8 require us to object to each document individually and state  
9 the basis for each objection, which entirely flips the burden  
10 of proof under the rules.

11           Paragraph 4(e) we oppose. It pertains to retroactive  
12 designations. The rules require only, if there is a  
13 retroactive designation of something that's confidential, the  
14 rules would require us to take reasonable steps to retrieve the  
15 materials if we've already disseminated them to a third party.  
16 That's what Rule 26 requires. This proposed protective order  
17 would require us to identify to Duke to whom we have furnished  
18 the information and require us to retrieve it, which is, again,  
19 a burden that's beyond that imposed by the rules.

20           Four (g), paragraph 4(g), we oppose. It's very  
21 similar to my earlier argument about qualified persons. It's  
22 another appellate review provision that would allow appellate  
23 review if we wanted to show it to a third party, the Court  
24 permitted it, and Duke opposed that.

25           Paragraphs 4(j) and (k) deal with the sealing

1 process, that is, to sealing proceedings. The Court may recall  
2 when we had our hearing on February 17th on the turnover order  
3 that there were a number of documents that had been designated  
4 as confidential and there was some discussion as to whether we  
5 needed to proceed under seal, and we ended up reaching  
6 agreement that it was not necessary. But to give the Court an  
7 idea of the burden that this put on us, we had documents now  
8 filed and discussed, not under seal, so I can talk about them  
9 here, that are transmittal letters from Robinson Bradshaw to  
10 Jones Day that represented Morgan Stanley, that include closing  
11 binders of documents transmitted to opposing counsel, that  
12 include an opinion of Robinson Bradshaw and Hinson sent to Bank  
13 of America, all of which were designated as confidential, so  
14 all of which under their form of protective order we would be  
15 required affirmatively to obtain a sealing of a process,  
16 irrespective of the bona fide nature of the claim. And, so,  
17 once again, very cumbersome, and it puts the burden squarely on  
18 the trust rather than on the proponent of the claim of  
19 confidentiality.

20 Paragraph 4(1), very important. It talks about the  
21 joint privilege issue again and indicates that access shall be  
22 limited with respect to waiver or dissemination of joint  
23 privileged materials; again, in essence, trumping this Court's  
24 consideration of that issue when we get to briefing what the  
25 appellation of joint privilege will suggest with respect to use

1 of the materials.

2 Paragraph 4(p) we oppose. It's a discussion of what  
3 would constitute a waiver of a right to claim confidentiality  
4 or privilege. And, again, Rule 26 and Rule 502 speak directly  
5 to that, and we don't believe it appropriate to supplant those  
6 provisions.

7 And, then, finally, paragraph five has a clawback  
8 provision. Again, we don't think that's properly the subject  
9 of the protective order.

10 And I could go on a little more, but I think that  
11 indicates to you the nature of the bona fide concerns that we  
12 have with their form of protective order. And, so, what I  
13 would suggest that the Court do in this regard is, if the Court  
14 determines that they have met their burden of needing a  
15 protective order -- which I think under the case law they have  
16 not shown any particularized need -- but if the Court either  
17 determines they have or determines to give them an opportunity  
18 to do that at some point, that we stick as close to the  
19 standard form of the Western District as possible, making, we  
20 believe, the appropriate adjustments that were contained in our  
21 proposal.

22 If their form of protective order were to be entered,  
23 I really do fear that the consequences for the management of  
24 this litigation would be disastrous, and I think the trust's  
25 ability to pursue not only this claim but the other claims that

1 are within its charge would be greatly hampered.

2           And with that I could move on to the motion to seal,  
3 but I presume it makes more sense for Mr. Pecht to respond to  
4 this before I do?

5           **THE COURT:** That's fine.

6           **MR. BROTHERS:** Okay. Thank you.

7           **THE COURT:** Mr. Pecht?

8           **MR. PECHT:** Your Honor, Jerry Pecht for the Duke  
9 defendants.

10           I want to start with the last point first, which is  
11 that Mr. Brothers says that they really don't want a protective  
12 order and don't see the need for a protective order. I will  
13 note that we are here on the trust's motion for entry of  
14 proposed protective order. They filed the motion for the entry  
15 of the protective order. We do believe a protective order  
16 should be entered in this case, and they filed the motion  
17 asking that it be entered.

18           What I have done, your Honor, is I have taken from  
19 their briefs the points of disagreement that I know about  
20 before today. And I've put them in a chart. I have not  
21 included in this chart the issues that were raised for the  
22 first time today by Mr. Brothers that haven't been briefed in  
23 any of the briefs, because I didn't know about them until I sat  
24 here today and listened to Mr. Brothers raise for the first  
25 time a whole host of new problems that he says that he has with

1 our protective order that's not in his motion, that's not on  
2 any brief that's been filed with this Court.

3 So, I will go over with the Court, if the Court  
4 permits me to hand the Court, those issues on which I knew  
5 before I got here today on which we had disagreement and what  
6 their position is and what our position is and what our reasons  
7 are for our position, in a chart form so that the Court can see  
8 our position, their position, and the reasons for the  
9 disagreement.

10 **THE COURT:** That's fine. And you have a copy for  
11 Mr. Brothers?

12 **MR. PECHT:** Yes, your Honor.

13 **THE COURT:** That's great. If you'll tender that to  
14 Ms. Lopez, please.

15 **(Pause)**

16 **THE COURT:** Thank you.

17 **(Pause)**

18 **MR. PECHT:** The other point I'd like to make is  
19 Mr. Brothers has raised today, and he's raised on other  
20 occasions, the fact that there were some documents that were  
21 produced that were designated as confidential that are no  
22 longer designated as confidential, and he says, well, that  
23 demonstrates that our designations were inaccurate or  
24 incomplete in some way.

25 In any production of this magnitude, of this size and

1 this speed, where there's a production which they want to get  
2 out quickly, there's going to be some documents that are over-  
3 designated. When they have come to our attention, we have de-  
4 designated the confidentiality provisions in the documents. I  
5 would say that there is no massive production like this in any  
6 other case where there aren't a few documents -- and he's only  
7 been able to point to a few -- in which there aren't  
8 designations of confidentiality which then turn out to be over-  
9 designated. And we have corrected those when we found them and  
10 continue to do so.

11           The points that I have, your Honor, is -- the first  
12 point is whether or not they should be allowed to use these  
13 documents in other proceedings. And Duke's proposal on this is  
14 that they should be allowed to use the protected information  
15 only in the disputes between the parties. That is in  
16 conformity with the Western District of Texas forum for  
17 protective order, which limits the use of confidential  
18 information solely for the purpose of preparation in trial and  
19 the litigation and for no other purpose whatsoever.

20           What they want to do -- and Mr. Brothers keeps saying  
21 these are Crescent documents. Well, as the Court knows, there  
22 is a dispute about that. And that dispute has not yet been  
23 resolved as to whose documents they are, whether they're joint  
24 privileged, whether they're sole privileged, who has ownership  
25 of the documents. That issue is still outstanding.

1           What we do not want to have happen here is for them  
2 to use our documents willy nilly in other litigation that are  
3 confidential or privileged.

4           **THE COURT:** Particularly, if I find under the 542  
5 motion that the joint privilege restricts -- be clear; I am not  
6 making that finding. I am just saying, for example, if it's  
7 only limited between the parties, the cat's out of the bag.

8           **MR. PECHT:** That's exactly the point of our  
9 protective order. Every provision that Mr. Brothers challenges  
10 is exactly for the point of protecting our interest with regard  
11 to that issue while the Court considers it, so that we have the  
12 protective order covering privileged information, and he says  
13 that's not typical of a protective order. Well, it is not  
14 typical that you have joint privileged documents in litigation.  
15 And we have to have a methodology for protecting that  
16 information until the Court rules on the motion that is  
17 pending.

18           And, so, for example, what we say is that they cannot  
19 use as joint privileged documents in other litigation until the  
20 Court rules. So, we're not taking any other position on it  
21 other than that, and that there's a final determination of that  
22 issue.

23           Same thing with confidential information. What we're  
24 saying is they can't use our confidential information in any  
25 other proceeding; just like every other case. Standard. You

1 use the confidential information only in the case in which the  
2 confidential information is produced. You can't use it in  
3 other cases without having a court rule on whether it's  
4 appropriate to use that confidential information in other  
5 cases. If they have a problem with our designation of  
6 confidential information, there is a usual, typical procedure  
7 for challenging those designations. And they can come forward,  
8 they can file a motion, they can make a challenge. They  
9 haven't done that.

10           So, the first point that we raise is that the order  
11 should apply only to disputes between the parties and not in  
12 any other matters. And it should be so restricted.

13           The second, it should include a procedure for  
14 designating documents as joint privileged. And we've got that  
15 procedure in here, and if the Court looks at it, so that it  
16 will not be used in other litigation until the Court rules on  
17 that matter and we get a final disposition of that issue.

18           And that's also -- by the way, this issue that he's  
19 raised about the appeal? What we're asking for is that there  
20 be a final determination of that issue before they use our  
21 documents in other litigation. I mean, I don't know how the  
22 Court's going to come out on it, and, but, you know, as I  
23 indicated, to protect our interests, we would, you know,  
24 depending on how the Court comes out, we would have to file an  
25 appeal, and what we don't want to have happen is, until there

1 is a final determination of that, for them to be able to use  
2 our documents that are joint privileged in other litigation  
3 until we get a final resolution of that issue.

4           The third point has to do with the clawback  
5 procedures. And, you know, we think there should be a clawback  
6 provision in here. Mr. Brothers was the one who initially came  
7 up with the idea of the clawback provision. He included it in  
8 his initial protective order that he sent to us, which we  
9 signed, which he signed, which we submitted to the Court. We  
10 then had an agreement with regard to the clawback provision,  
11 including that with regard to clawback documents that those  
12 would be submitted to the Court, and there are probably boxes  
13 of documents here with the Court that include the clawback  
14 documents. We believe, if we're going to have a protective  
15 order, that that clawback provision should be incorporated in  
16 the protective order. I didn't think he had any problem with  
17 that, but apparently he does.

18           Now, there's a number of other points that have been  
19 raised in which we had disagreement. The first is we think  
20 that the order should be flexible in the manner in which the  
21 documents are designated. So, for instance, in the past  
22 because we were doing a quick production we would designate  
23 documents. Instead of putting "confidential" on them we would  
24 list the Bates numbers and say these are all confidential. And  
25 that designation, that procedure, should be allowed to stand

1 because that's the way we did it. And the fact that we didn't  
2 put the confidential stamp on them at the time should not bar  
3 us from declaring them confidential. There's no reason why you  
4 have to have a confidential stamp on them if you designated  
5 them as confidential on a list that you provided to the other  
6 side.

7           The same thing with electronic documents. Sometimes  
8 it's not possible to an electronic document to mark them  
9 confidential. So you have another procedure for marking them  
10 confidential and you notify the other side that they are  
11 confidential with regard to those Bates numbers on the -- or  
12 those documents that are in the electronic form so that they  
13 know which ones they are and that you're designating them as  
14 confidential.

15           With regard to the designation of confidential and  
16 what provision applies here in terms of what is confidential,  
17 we're fine with the rules in terms of just the rules apply with  
18 regard to what documents are confidential. We don't think the  
19 rules should be altered and we don't think there should be  
20 anything in this about burden of proof. They have a provision  
21 in their order regarding burden of proof.

22           The burden of proof should be decided by the case law  
23 and not decided in a protective order. You don't normally  
24 include in a protective order language with regard to who has  
25 the burden of proof. That's going to be decided on a document

1 by document basis based upon what the case law is as to who has  
2 the burden of proof and shouldn't be included in a protective  
3 order where the Court decides without briefing, without  
4 argument or anything else about what constitutes or who has the  
5 burden of proof.

6 Another small point, that we thought a small point,  
7 but apparently they object to it, shall provide that the time  
8 for designating deposition testimony as protected runs from the  
9 date of the receipt of the final transcript -- I'm on the  
10 bottom of Page 2 -- rather than the preliminary transcript so  
11 that you get to have the final transcript and then you can  
12 designate it after that.

13 I think we agree that designations shall be within  
14 ten days.

15 And the final point I have on Page 3 is that there  
16 should not be an alteration of the burden of proof, they  
17 shouldn't -- and they have provision with regard to the burden  
18 of proof.

19 Now, as Mr. Brothers was arguing all this I was  
20 trying to figure out how do we present this to you in a way  
21 that makes it sort of easy for you to decide this, because  
22 there's a lot of different issues here.

23 **THE COURT:** I like that idea. How are we going to do  
24 that?

25 **MR. PECHT:** I know. That's the difficult part. I've

1 got a checklist here. I think if the Court advised us on how  
2 it came out on these different points, I would like to say that  
3 maybe Mr. Brothers and I could then come to some agreement as  
4 to what we could put in a protective order if we knew how the  
5 Court came out on these broad issues. That's one thought that  
6 I had as I was sitting here thinking about it.

7 **THE COURT:** Well, at the risk of insulting your  
8 intelligence, that was exactly my thought process as I listened  
9 to it is -- I'll just share with you I don't have a problem  
10 going through and giving you the contours of what I think is or  
11 is not permissible pursuant to the order saying, you know,  
12 yeah, neah on these items. But, frankly, I have no interest in  
13 sitting down in the minutia and working through these issues.  
14 I don't think I should have to do this. You guys are talented;  
15 you all know what you're doing. I think I can defer that  
16 responsibility to you all.

17 So, yes, Mr. Pecht, you read my mind.  
18 Notwithstanding the number of disputes that we have had in this  
19 matter, they are what they are; I think I could -- if I was  
20 provided with a checklist and did a sort of comparative  
21 analysis, I could inform you all on what is and is not  
22 permissible, then delegate to you the responsibility of coming  
23 up with an order.

24 **MR. PECHT:** Yeah. And what I've attempted to do is  
25 provide the Court with that checklist, our position, their

1 position, of the items that I knew about. Because I said there  
2 have been new items raised here today that weren't in the meet  
3 and confer, that weren't raised in any of the briefing, that I  
4 didn't anticipate. But we could add or enhance that checklist  
5 so the Court could see side by side what each party proposes  
6 and the reasons for it, and that might make it easier for the  
7 Court.

8 **THE COURT:** Because, you know, I've taken a lot of --  
9 I've truly taken a lot of notes of what you all have said, and  
10 I understand the relative concerns of the parties. But it's a  
11 little bit difficult off the cuff to work through this. I'll  
12 just be honest with you all --

13 **MR. PECHT:** Yeah.

14 **THE COURT:** -- in terms of -- because there's a  
15 number of issues implicated.

16 Anything else, Mr. Pecht?

17 **MR. PECHT:** No, your Honor.

18 **THE COURT:** All right. Mr. Brothers.

19 **MR. BROTHERS:** A brief response to several of the  
20 points. And, obviously -- I think I indicated this -- we filed  
21 the motion because we have been put unilaterally under  
22 restrictions on use by virtue of conditions associated with the  
23 production of documents marked as confidential.

24 With respect to the suggestion that we're raising new  
25 concerns, I note two things. One, Mr. Spears, not Mr. Pecht,

1 was involved in the conference; and most of these concerns -- I  
2 can't represent to the Court that it was 100 percent of them,  
3 but it was most of them were raised in the conference. And  
4 they didn't file their form of order with the Court until  
5 yesterday. And so --

6           **THE COURT:** Yeah. And actually I have to be honest  
7 with you. One of the things I've been doing while you all have  
8 been arguing to me is -- I can be honest with you. I spend a  
9 lot of time getting ready for hearings. Now, I generally do it  
10 over the weekend in advance because I'm in the courtroom. And  
11 I was a little bit concerned with myself that how did I miss  
12 their proposed form of order. Well, I know how I missed it.  
13 It didn't get filed until yesterday. So thank you. Because  
14 one of the things I've been doing -- I have been listening to  
15 you all -- I was going where in the heck was that on the  
16 docket.

17           **MR. BROTHERS:** It was yesterday afternoon, which gave  
18 me enough time to read through it and develop this checklist.  
19 But it was a short period of time.

20           **THE COURT:** And I'm not trying to point fingers at  
21 anybody. I'm just telling you that I was caught a little  
22 bit -- notwithstanding this helpful aid that Mr. Pecht put  
23 together, about what the relevant issues would be.

24           Go ahead, sir.

25           **MR. BROTHERS:** Let me also suggest to the Court a

1 significant guiding principle if we're going to go through this  
2 checklist proposition for the Court to keep in mind. And that  
3 is whether certain matters do or do not properly belong in a  
4 protective order that will govern moving forward.

5           For example, this question of the joint privilege  
6 designation and Mr. Pecht's suggestion to the Court that all he  
7 wants to do is protect the status quo until there's a ruling.  
8 We have clearly indicated in correspondence that we intend, as  
9 much as we dispute the designation, we intend to honor until  
10 order of the Court. And so there's not an impending peril to  
11 Duke with respect to that issue, but it simply doesn't belong  
12 in a protective order moving forward in the case. The  
13 decisions on that belong in separate order of the Court on  
14 those particular issues.

15           Similarly, with respect to appellate rights. I  
16 understand Duke's position. They've articulated it frequently  
17 that depending on what the order of the Court is they may want  
18 to take matters up on appeal. Well, there's established  
19 procedures for that. And depending on what the matter is, do  
20 they mandamus, do they ask for leave to appeal, do they get a  
21 stay from this Court, do they get a stay from the district  
22 court. All of those are procedures that are in place that  
23 provide protection to litigants that should be invoked rather  
24 than an effort to sidestep them with a preemptive protective  
25 order that establishes the parties' rights in a vacuum as to

1 the dispute.

2           So I think it's an important guiding proposition for  
3 this Court that the protective order needs to be limited. If  
4 there's going to be one entered, it needs to be limited to  
5 issues then existing and the minimal amount of protection under  
6 the case law consistent with Duke showing -- you know, bearing  
7 the burden of showing that they've got matters that are  
8 confidential and not bleeding over into these broader privilege  
9 issues and so forth for which they're already adequately  
10 protected and which will be the subject of future orders from  
11 the Court.

12           **THE COURT:** All right. What about my comment to  
13 Mr. Pecht that what I ought to get, and it really would be  
14 helpful to me, is just a checklist. I'll go through it. I  
15 already can tell you I have some thoughts about what I'm ready  
16 to do at this point. But I'd like to do it all at once. If I  
17 could just get the aid of you all to tell me this is -- I mean  
18 I know what the standing order recites. I understand --

19           **MR. BROTHERS:** And that's what I was going to suggest  
20 is if it's going to be a checklist, let's have three columns.

21           **THE COURT:** Right.

22           **MR. BROTHERS:** That includes the standing order.  
23 Because, in our view, that should be the default because that's  
24 clearly -- you know, clearly has the --

25           **THE COURT:** That might be one of the things I'm also

1 thinking about is we've got a standing order in place by folks  
2 whom I'm sure have thought deeply and thoroughly about this,  
3 and why shouldn't I start from the benefit of that work  
4 product?

5 **MR. BROTHERS:** And to be clear, we would far more  
6 prefer that than their form or even a small variation off their  
7 form. Because there are just so many -- their form is fraught  
8 with all kinds of problems.

9 **THE COURT:** All right. So how do we achieve that?  
10 Can we come back to the -- first of all let me, in the interest  
11 of disclosure, tell you what my dance card looks like. I have  
12 court pretty much all day tomorrow and Friday, and then next  
13 week is a Fifth Circuit conference. And I'll probably be  
14 working while I'm going to the many events they're kindly  
15 providing to us. I actually won't physically be here.

16 I don't want to unnecessarily delay this, but what  
17 I'm saying is what I'd like is just you all to give me that  
18 free list, that list of standard Duke trusts and give me a  
19 little time to sift through it. And then I'll come back and  
20 tell you how it's going to play out and then, as I indicated,  
21 then defer to you all the responsibility of crafting an order.

22 **MR. BROTHERS:** That's fine. I think we could just do  
23 it by submission. I don't think we need any more of your time.

24 **THE COURT:** Okay. But I'll need to set -- what I'd  
25 like to do is then set a hearing but I'm letting you know it's

1 probably not going to be until after I get back which is -- I  
2 hope it's not too long.

3           **MR. BROTHERS:** I have time to work on it. I had a  
4 trial setting next week which was cancelled so that's fine for  
5 me. The following week though I'm out of the country.

6           **THE COURT:** Okay.

7           **MR. BROTHERS:** So I'd ask that it not be the  
8 following week.

9           **THE COURT:** Oh, I can accommodate that schedule so  
10 with that in mind --

11           So let me just be clear, Mr. Brothers, in terms of  
12 your schedule and then I'll ask what Mr. Pecht's availability  
13 is. One moment please.

14           We recognize that I mean it's going to be in May.  
15 And my -- if I heard you correctly, Mr. Brothers, next week is  
16 the Fifth Circuit Conference. The following week you're going  
17 to be out of the country; is that correct?

18           **MR. BROTHERS:** I'm out of the -- I return on Monday,  
19 roughly May 14th.

20           **THE COURT:** Okay.

21           **MR. BROTHERS:** I don't have the -- 15th -- 16th, May  
22 16th so --

23           **THE COURT:** My calendar was wrong.

24           **MR. BROTHERS:** Yeah, no, and so the 17th is the first  
25 day I'll be back doing business.

1           **THE COURT:** All right. So I would need to -- I'll  
2 give you -- with that in mind I'll give you-all some time to do  
3 your submissions and then announce a ruling that week. Now, we  
4 have our Crescent day on the 20th.

5           **MR. BROTHERS:** Yes, sir.

6           **THE COURT:** Can we just do it on that day?

7           **MR. BROTHERS:** Sure.

8           **THE COURT:** Does that unduly prejudice anybody?

9           **MR. BROTHERS:** I think that's fine. I don't think  
10 there's anything pending between now and then where a  
11 determination makes a difference.

12           **THE COURT:** All right.

13 Pre       **THE COURT:** Your Honor, I think that works for us as  
14 well.

15           **THE COURT:** All right, very good then. And I will  
16 rule on that day and tell you what we're going to do.

17           Now, how much time would you like to work through  
18 this? When would you -- in view of the fact that I'm going to  
19 rule on the 20th and I'd like a couple of days to review your  
20 respective work?

21           **MR. BROTHERS:** May I confer with Mr. Pecht real  
22 quickly?

23           **THE COURT:** Yes, you may. Do you want to just go off  
24 the record?

25           **MR. BROTHERS:** Please.

1           **THE COURT:** All right. Do you want me to step away  
2 for a minute?

3           **MR. BROTHERS:** No, that's fine.

4           **THE COURT:** Okay, let's go off the record please, Ms.  
5 Miller.

6           **(Off the record from 3:02:01 to 3:03:44)**

7           All right, thank you.

8           Go ahead, Mr. Brothers.

9           **MR. BROTHERS:** I've visited with Mr. Pecht, your  
10 Honor, and we have agreed to meet and confer on Tuesday, May  
11 3rd?

12 Pre       **THE COURT:** May 3rd, yes.

13           **MR. BROTHERS:** And make a joint submission to the  
14 Court by Friday, May 6th. And when we say "joint submission"  
15 it may be a single document with competing positions ...

16           **THE COURT:** Sure.

17           **MR. BROTHERS:** ... in the document but it'll be a  
18 single place where the Court can look to understand the  
19 controversies that remain between the parties.

20           **THE COURT:** That would really, really help me out,  
21 gentlemen and ladies, if we could do it that way, and then I  
22 could work through it. I had some sense of what I was going to  
23 do on this, notwithstanding the arguments made today, but in  
24 view of what I've heard today and notwithstanding -- it's not  
25 that your presentations hasn't been understandable -- that's

1 not a good word but it's just very hard to merry up the  
2 relative positions of the party.

3           Particularly, I will tell you, the starting point  
4 ought to be the standing order document. I mean, that's why we  
5 have it. Good heavens. And I'm going to follow it as closely  
6 as I can, subject to the relative concerns of the parties.

7           All right.

8           **MR. BROTHERS:** Very good.

9           **THE COURT:** All right. So with that in mind, what  
10 are we going to do about the seal aspect of this? Do we want  
11 to defer until I've ruled on that?

12           **MR. BROTHERS:** May I confer real quickly, your Honor?

13           **THE COURT:** Sure.

14           **(Pause)**

15           **MR. BROTHERS:** Let us confer on that as well and if  
16 we don't reach agreement can we have that put on the omnibus  
17 state on the 20th of May?

18           **MR. PECHT:** I'm not sure what the issue is with  
19 regard to the seal. Maybe I'm missing --

20           **THE COURT:** Well that's -- let's do it this way.  
21 You'll confer on the 3rd. I'm going to rely upon that Mr.  
22 Brothers will explain and articulate his position and then I'll  
23 take it up on the 20th. That gives you 17 days in which to  
24 prepare for whatever his arguments may or may not be and we can  
25 go from there. But yes, that would be my preference, let's get

1 her done on the 20th, if we can.

2 **MR. BROTHERS:** That's fine.

3 **THE COURT:** All right. Anything else that we need to  
4 take up before we adjourn?

5 **MR. BROTHERS:** No, your Honor.

6 **THE COURT:** All right. From your perspective. All  
7 right, thank you-all.

8 I appreciate the fact that you-all are willing to  
9 work together on this. This will help me in terms of coming  
10 up, with fashioning something that I think is adequate for the  
11 parties' needs. Are we --

12 Oh, while I've got Mr. Martinec here, he's quietly  
13 been working away.

14 Mr. Martinec, Ms. Lopez told me you have not been  
15 just sunning yourself the last couple of weeks, that you filed,  
16 was it 25 preference actions?

17 **MR. MARTINEC:** I think 25.

18 **THE COURT:** All right. And if you can tell me and it  
19 doesn't violate any, you know, confidential concerns, how many  
20 more are coming?

21 **MR. MARTINEC:** I would say that those are the  
22 preference matters. There's about 75 more of those and 40 548  
23 actions relating to bonuses paid to present and former  
24 employees of Crescent Resources.

25 **THE COURT:** All right.

1           **MR. MARTINEC:** And we're trying to do them as -- I  
2 refer to them as "traunches" but like every 25, in part,  
3 because just that gives us some ability to really deal with  
4 discreet groups as opposed to filing 140 at one time and having  
5 everything -- for one thing, my phone would never stop ringing  
6 but --

7           **THE COURT:** Okay. And that actually you've informed  
8 me on something that I really didn't focus on. You're kind of  
9 -- is your approach to tier it by -- for lack of a better word  
10 -- "subject category" in terms of the allegations or the bases  
11 for the complaint or --

12           **MR. MARTINEC:** Well -- and of course the preferences  
13 are all -- I mean they're all pretty much the same. Most of  
14 these are 90-day preferences, not insider preferences. Within  
15 the 548 complaints -- I call them "548 complaints" but they  
16 actually have a 547 component because some of the bonuses,  
17 depending on how the plan is interpreted, could represent the  
18 payment of an antecedent debt under some case law and therefore  
19 it might actually be a preference but essentially those are  
20 separate categories that are being handled in something of a  
21 separate way. And I -- of course I'd say there may very well  
22 be more avoidance actions of one kind or another as we approach  
23 the current July -- excuse me -- June 8th deadline but at the  
24 moment all that's in the hopper at the moment are the remaining  
25 roughly 75 preferences and 40 bonus-related 548 actions.

1           **THE COURT:** All right. And we had discussed this  
2 previously on an occasion. It was your thought process that  
3 maybe we might convene sort of a status hearing to get a lay of  
4 the land of all of those which I'm more than happy to do. It  
5 might be that I might suggest to you at that point in time --  
6 and this is why I just want to put you on notice and I would  
7 tell this for the benefit of all the defendants -- that given  
8 the magnitude of them, I might tell the Chief Judge that I need  
9 to allocate some of these cases to maybe some of the other  
10 judges. So just to let you know that some of these actions may  
11 be tried. I might ask Judge Mott to try some of them --

12           **MR. MARTINEC:** Right.

13           **THE COURT:** -- or Judge King or Judge Clark. And I'm  
14 not trying -- because you can understand that I get a hundred  
15 adversary proceeding, I won't be able to carry on my normal  
16 docket.

17           **MR. MARTINEC:** And the ones that we're working on, I  
18 have to say, that those really -- I mean, obviously it never  
19 hurts to have some sense of what else happened in the --

20           **THE COURT:** Right.

21           **MR. MARTINEC:** -- in the case but in many ways, these  
22 kinds of actions are fairly discreet; and therefore, I don't  
23 know that having -- assigning some portion of them to another  
24 court probably is not going to in any way be a less efficient  
25 way of dealing with it because they are pretty discreet

1 matters.

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

3           Anything else?

4           **(No audible response)**

5           All right. We'll see you back on Crescent Day on the  
6 20th, all right? Thank you.

7           **(Proceeding adjourned at 3:10 p.m.)**

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CERTIFICATION

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



April 28, 2011

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TONI HUDSON, TRANSCRIBER

**UNITED STATES BANKRUPTCY COURT**  
**Western District of Texas**

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Bankruptcy Case No.: 09-11507-cag

Chapter No.: 11

Judge: Craig A. Gargotta

IN RE: **Crescent Resources, LLC** , Debtor(s)

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**NOTICE OF FILING OF TRANSCRIPT**  
**AND OF DEADLINES RELATED TO RESTRICTION AND REDACTION**

A transcript of the proceeding held on **4/27/11** was filed on **4/28/11**. The following deadlines apply:

The parties have until **May 5, 2011** to file with the court a *Notice of Intent to Request Redaction* of this transcript. The deadline for filing a *request for redaction* is **May 19, 2011**.

If a request for redaction is filed, the redacted transcript is due **May 31, 2011**.

If no such notice is filed, the transcript may be made available for remote electronic access upon expiration of the restriction period, which is **July 27, 2011** unless extended by court order.

To review the transcript for redaction purposes, you may purchase a copy from the transcriber **Exceptional Reporting Services (361) 949-2988**, or you may view the document at the clerk's office public terminal.

Dated: 5/2/11

George D. Prentice II  
Clerk, U. S. Bankruptcy Court  
BY: Laurie Boyd