

2 SUPREME COURT OF THE STATE OF NEW YORK
3 COUNTY OF NEW YORK: CIVIL TERM : PART 48

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4 PHOEBE JONAS,

5 Plaintiff,

6 -against- Index No. 155925/2018

7 BAYER CORPORATION AND BAYER U.S. LLC,
8 D/B/A PHILLIPS',

9 Defendants.

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10 Transcript of Motion Proceedings
11 New York Supreme Court
12 60 Centre Street
13 New York, New York 10007
14 October 30, 2018

15 B E F O R E:

16 HON. ANDREA MASLEY, Justice of the Supreme Court

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* * * * *

25 LAURA L. LUDOVICO
26 Senior Court Reporter
60 Centre Street - Room 420
New York, New York 10007

1 Proceedings

2 THE COURT: Okay. So in the matter of Phoebe
3 Jonas against Bayer Corporation.

4 I see Mr. Quill is here.

5 MR. QUILL: Yes, Your Honor.

6 THE COURT: Is that right, you are Mr. Quill?

7 MR. QUILL: Yes.

8 THE COURT: Okay. And Mr. Mintz?

9 MR. MINTZ: Yes, Judge.

10 THE COURT: Okay. And then I see for the
11 defendant Mr. Llewellyn.

12 MR. LLEWELLYN: Yes, Your Honor. Good afternoon.

13 THE COURT: And you are hereby about to be
14 admitted. Off the record.

15 (WHEREUPON, a discussion was held off the
16 record.)

17 THE COURT: Okay. So I have a motion to dismiss.
18 What an interesting case. I cannot say I've ever had a
19 case with a bobblehead before, or the Civil Rights Law, I
20 haven't had this in years, so I just love this case. So
21 thank you very much.

22 And I have to start with the defendants. You
23 know, it's 4:00, we don't have a lot of time, we have to
24 finish by 4:30. So let me just get straight to, you know,
25 my understanding is that the plaintiff is alleging a
26 violation of the Civil Rights Law for taking her identity

Laura L. Ludovico, SCR

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Proceedings

and using it as a bobblehead for Bayer Corporation, and my understanding is that the defendants are moving to dismiss.

Well, tell me why you are moving to dismiss.

MR. LLEWELLYN: Thank you, Your Honor. Sure.

As you know, the complaint alleges that the --

THE COURT: I read it. Thank you.

MR. LLEWELLYN: Okay. The issue here is whether the bobblehead at issue is a picture or portrait of the plaintiff.

THE COURT: How is this not an issue of fact that we need to have discovery about?

MR. LLEWELLYN: Well, we submitted images of the plaintiff and the bobblehead.

THE COURT: And you want me to make the determination. That's totally inappropriate for a motion to dismiss.

MR. LLEWELLYN: Your Honor, I want you to do exactly what the Court of Appeals did in the Lohan case. In that very recent decision in Lohan, the Court of Appeals looked at a complaint with allegations that were very similar to what we have here; conclusory allegations that the defendant's avatar in the video game was a lookalike of the plaintiff and it was intended to evoke her image. And the Court of Appeals explained that it's for the Court to decide if an accused image is, quote, capable of being

Laura L. Ludovico, SCR

1 Proceedings

2 identified from the advertisement alone as plaintiff.

3 In applying the standard, on appeal for a denial
4 of motion to dismiss, which was reversed by the Appellate
5 Division, the Court of Appeals affirmed the dismissal of
6 the case by looking at the images at issue and saying that
7 the avatar, as a matter of law, wasn't capable of being
8 identified as the plaintiff. The character there merely
9 had some generic features; female, white, blonde hair that
10 were similar to Lindsay Lohan. Ironically, the character
11 in the video game, by the way, was named Jonas, the last
12 name of the character.

13 THE COURT: That's ironic.

14 MR. LLEWELLYN: Yes, I think it's a sign, but,
15 you know, there was some generic features that were similar
16 and the Court said that wasn't enough as a matter of law;
17 there were no distinguishing features that made the avatar
18 capable of being identified as Lohan, they were just these
19 generic similarities.

20 And to be clear, this wasn't -- not an issue of
21 the images being these grainy video game pictures where you
22 couldn't even make out features. We pulled the affidavits
23 in the Lohan case, and I'm happy to give a copy to you and
24 counsel if I can find what I did with them. This was
25 supposed to be my dramatic moment.

26 THE COURT: Sorry. You can use the table behind

Laura L. Ludovico, SCR

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Proceedings

you, they actually moved.

MR. LLEWELLYN: Here we go. We pulled -- here,
I'll give this to my adversary --

(Document was handed to counsel.)

MR. LLEWELLYN: -- and if Your Honor wants to
take one.

This is one of the images in the Lohan case that
was specifically referenced. We're not talking about
grainy pictures where you can't even see what's going on.
They looked at this on a motion to dismiss and they said
that these were just generic similarities and that there
wasn't anything that made this identifiable as the
plaintiff here.

The only difference between this case and the
Lohan case is here we have a three-dimensional bobblehead
instead of a two-dimensional avatar.

THE COURT: This is like that mannequin case I
think.

MR. LLEWELLYN: Well, I don't remember the
mannequin case and maybe --

THE COURT: The mannequin, it can be a picture,
it can be --

MR. LLEWELLYN: Oh, there's no doubt that a
sculpture can count, just like the Court of Appeals held
that a video game image can count as a portrait or picture,

Laura L. Ludovico, SCR

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Proceedings

but, you know, they look -- just as in the Lohan case, here I think you're empowered on this motion and it's sort of a sanity check to see, is this really identifiable as the plaintiff? Here, we have no distinguishing features that are shared by the two. We showed in detail the many differences between the two and, you know, that's in our briefs.

THE COURT: Yes, that chart was helpful.

MR. LLEWELLYN: And the plaintiffs, they don't dispute this catalog of differences. Neither the complaint, nor the opposition brief identifies a single common feature between the two. They have yet to point to any distinguishing features, as Lohan requires. Instead, they say a factual record needs to be developed. There's nothing that's needed here. No discovery is needed to determine whether Ms. Jonas is capable of being identified from the bobblehead alone, as Lohan says.

And Lohan says you have to look at the ad, you can't look at extrinsic stuff, you have to look right at the ad and see if looking at that ad and not a costume, not a character of mannerisms, are they identifiable?

What did the plaintiff say about Lohan? They say that there's an exception for video games. In fact, the Court of Appeals expressly rejected an invitation to rule on First Amendment grounds and said an avatar can be a

Laura L. Ludovico, SCR

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Proceedings

portrait and clearly applied standard Civil Rights Law here.

They also argue that there's some sort of nexus requirement that Lohan decreed, and there's no such thing in the case if you read it. Lohan merely noted that the video game at issue did not use Ms. Jonas' name or photograph. We have the same thing here; the plaintiff's image is not used in the bobblehead ad, there's a bobblehead that doesn't look like her.

I mean, if the defendant is right, Your Honor, if they can come in and say in conclusory terms, they're the same, it's identical or even to point to generic similarities; it's another white female with dark hair, what that effectively means is that the defendants couldn't run their Phillips'® lady ads with a different actor who was a Caucasian woman with dark hair without facing the risk in the burden of litigation and discovery, and that can't be right because, in fact, the case law is clear that the right of publicity statute here only protects the actual physical appearance of the person, not mannerisms, not character, not costume and so forth. And if that's not enough, if you look at the agreements we submitted, which are undisputed, the plaintiff's own agreements for the ads she did do clearly say she doesn't own the character.

So what they're trying to do is an end run around

Laura L. Ludovico, SCR

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Proceedings

that. They're trying to claim that she can't be -- you know, she can be the only Phillips'® lady and we can't get somebody else that has -- bears -- has any general resemblance to her, another human being who's female and white with dark hair, without having to go through this.

And I don't think that's right. I think if you look at the Lohan case, I think you're absolutely empowered to find that there's no distinguishing features that make this bobblehead recognizable as the plaintiff, and I think you're well within your rights to dismiss this case without dragging this through discovery.

THE COURT: All right. Thank you.

Yes, sir.

MR. QUILL: Thank you, Your Honor. I would first note that the photo that defendants have submitted is not in the record. It interesting they are submitting it now, but it was -- but when they submitted a photo --

THE COURT: Well, I'm going to take it because it's helpful, but if you want to submit something in response to it --

MR. QUILL: Thank you, Your Honor.

THE COURT: -- you can do that.

MR. QUILL: Your Honor brought up the key point in your first question to defendants, and defendants have acknowledged the key point here, which is in Lohan the

Laura L. Ludovico, SCR

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Proceedings

Court stated that it's a legal question, a question of law on a motion to dismiss, whether or not a trier of fact is capable of comparing two images; the image of the avatar in Lohan and Ms. Lohan, in this case, the image of plaintiff Ms. Jonas, the bobblehead, and Ms. Jonas.

THE COURT: Going back to the affidavit from the Lohan case, I mean, it's on ECF, so I can take judicial notice of it. Again, I'm happy if you want to put something in, an affidavit or something or objecting, but -- or objecting to it, not for going in because I can take judicial notice of it.

MR. QUILL: Okay. Thank you, Your Honor. We'll take it under advisement.

THE COURT: Sorry. Go ahead.

MR. QUILL: Thank you.

As to the capability question, there's a distinction between the threshold legal question about whether a portrait has sufficient identifiable characteristics and features for a fact finder to make a comparison, the legal question and the factual question of actually making the comparison. The latter is a question for the jury, it's not a question for the Court on a motion to dismiss.

THE COURT: Well, then why did they do it in Lohan?

Laura L. Ludovico, SCR

1 Proceedings

2 MR. QUILL: Your Honor, in Lohan, as we read the
3 case, what they specifically focused on was that the avatar
4 did not have distinct features. I don't see anywhere in
5 the Court of Appeals decision in Lohan, nor in the First
6 Department's decision in which they compared the thickness
7 of eyebrows of the avatar and Ms. Lohan. Once you start
8 getting into questions like that, you are by nature into a
9 factual question that is the province of the jury and not
10 the Court. It's not appropriate on a motion to dismiss.

11 THE COURT: What about her contract?

12 MR. QUILL: I'm sorry, Your Honor?

13 THE COURT: What about her contract?

14 MR. QUILL: Your Honor, we don't believe the
15 contract is even relevant here. Defendants present the
16 contract as documentary evidence, but we're not disputing
17 that Ms. Jonas does not have a right to the character.
18 There's no question that Ms. Jonas does not have a right to
19 the -- excuse me -- to the Phillips'® lady character. She
20 has a right to her own image.

21 If, in fact, if a different -- if defendants had
22 hired a different actress to play the Phillips'® lady in
23 their commercial, Ms. Jonas would have no claim because she
24 doesn't have a right --

25 THE COURT: Well, in fact, they did. They had
26 somebody for a few years who passed away; isn't that true?

Laura L. Ludovico, SCR

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Proceedings

MR. QUILL: That's correct, Your Honor, they did.

THE COURT: Now they hired this other person to be the model, Ms. Haydee, H-A-Y-D-E-E, Shea.

MR. QUILL: Well, Your Honor, with respect to supposed documentary evidence of Ms. Shea's release, that doesn't constitute documentary evidence in this case because Ms. Shea may have released her image to Bayer's outside advertising agency, but there's no evidence in the record suggesting that the outside advertising agency actually used Ms. Shea as the model for the bobblehead.

In fact, the factual question about whether the bobblehead looks more like Ms. Jonas, the plaintiff, or some other random person, like the employee of the defendant's advertising agency, should be left to the jury. It is a different question.

I would also like to raise another distinction between our case and Lohan, Your Honor, and that is in Lohan, despite defendant's argument, the Court went out of its way to point out that there was no prior connection between Ms. Lohan and the video game. In the instant case there is a significant prior connection between Ms. Jonas and the defendants.

Ms. Jonas, as Your Honor noted, appeared in defendant's commercials for two years, and not only that, but on defendant's website for almost a week in April of

Laura L. Ludovico, SCR

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Proceedings

this year, they had a photo of Ms. Jonas from those commercials, which they transitioned into the commercial featuring the bobblehead. So not only did they violate Section 51, but they did so egregiously at that time when they seamlessly transitioned from the photo of Ms. Jonas into the bobblehead.

We also don't argue, Your Honor, that there's an exception for video games. That's a false interpretation of our argument. When we are distinguishing Lohan, we're pointing out that Lohan acknowledges the typical rule is that is a question for the trier of fact, whether or not a purported portrait and the plaintiff are comparable and look alike. That's typically a question of fact. Lohan was an exception, again, because of the ambiguous nature of the avatar in that case.

Here, as defendant's acknowledge, they submitted a list of 15 specific characteristics that are identifiable in the bobblehead. Now, whether or not those characteristics are comparable is a question of fact for the jury, but the mere fact that they submitted that list establishes that the bobblehead here is unlike the avatar in the Lohan case.

Your Honor, with respect to the documentary evidence issue, as I noted, defendants have relied on affidavits, which, as Your Honor knows, are generally not

Laura L. Ludovico, SCR

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Proceedings

acceptable as documentary evidence. Documentary evidence under 3211(a)(1) must utterly refute and conclusively establish the defendant's have a defense as a matter of law. Affidavits don't do that, and certainly, a photograph which requires a comparison between the thickness or thinness of eyebrows, the pointiness of a nose, those are not questions that are --

THE COURT: But I think that's precisely what the Court of Appeals invites one to do.

MR. QUILL: Your Honor, as we --

THE COURT: And I think you're right, it's an initial view. I mean, if you came in with, you know, a picture of me versus a picture of the court officer, as a matter of law, right, I could say dismiss the case, right?

MR. QUILL: Under --

THE COURT: Just a facial -- you know, an initial look.

MR. QUILL: Your Honor, we don't believe Lohan establishes that. We do believe the Court in Lohan, which was adopting language from a prior Court of Appeals case back in Cohen v. Herbal Concepts, where the Court again focused on whether or not the characteristics of the portrait were distinguishable and identifiable. Once you pass that threshold, then it's a question for the trier of fact whether or not two images are comparable.

Laura L. Ludovico, SCR

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Proceedings

THE COURT: So you're saying just that the bobblehead was so generic?

MR. QUILL: The avatar in Lohan was so generic, and the Court used language, as I mentioned, Your Honor --

THE COURT: And defendant is saying that it's so generic.

MR. QUILL: -- that a trier of fact could not possibly engage in the comparison in the factual analysis.

THE COURT: And this back picture on Lohan is the one they said was so generic?

MR. LLEWELLYN: That's one of the specific images that the Court of Appeals' decision references, Your Honor. If you look at the decision, they actually list a few of the images that you see in here. There's this one, there's the bikini clad one. They talked about both of those.

(brief pause in the record.)

MR. QUILL: Your Honor, if I may.

THE COURT: Yes.

MR. QUILL: If the Court were to grant a motion to dismiss here, effectively you would be turning this into a summary judgment motion, which neither parties have effectively briefed or submitted factual evidence on. The entire reason that plaintiff was aware of the bobblehead commercial in this case was because someone called her and informed her that they saw the bobblehead and recognized

Laura L. Ludovico, SCR

1 Proceedings

2 the bobblehead as Ms. Jonas.

3 Now, we, of course, haven't submitted an
4 affidavit to that fact in this matter because we are here
5 on a motion to dismiss, but to the extent the Court wants
6 to convert this to a summary judgment motion, we would
7 certainly be -- we would certainly seek the opportunity to
8 submit evidence to that effect.

9 THE COURT: Well, are there any cases -- I
10 understand this is the case in New York, the Lohan case,
11 where it's so generic. Are there cases anywhere else
12 outside of New York where they have this generic, you know,
13 up or down, is it generic or not?

14 MR. QUILL: I haven't engaged an analysis of
15 courts outside of New York on this issue, Your Honor, as it
16 is section 50/51, the New York statute. I could certainly
17 undertake that research to see.

18 THE COURT: No, it's okay, just asking.

19 Okay. Yes, sir.

20 MR. LLEWELLYN: Thank you, Your Honor. Just to
21 respond to a few things that my adversary said. In the
22 Lohan case, if you read the Lohan case, Your Honor, as I'm
23 sure you already did and probably you will again, I think
24 what the Court of Appeals did there and what they said
25 there bears little resemblance to what we're hearing here.

26 What we heard was that Lohan said there was no

Laura L. Ludovico, SCR

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Proceedings

prior connection with Ms. Lohan, while here, the plaintiff appeared in earlier ads. That's not in Lohan. What Lohan says is that Ms. Lohan's name and picture are not used in the video game. They're not saying they were never used in prior video games. They don't go into that at all. Here, it's argued that the plaintiff appeared in some prior TV commercials, but then on the other hand, they say they're not claiming rights in the character. So I don't understand what it is.

The Court of Appeals decision is very clear that you have to look only at the ad itself, you don't look at what happened in the past. I mean, sure, somebody might have saw the bobblehead with a shirt that said Phillips'® on it, the same color shirt that the plaintiff wore in her ads, part of her character, part of her costume. None of that's protectable. You can't bootstrap her prior appearances and suddenly say she owns the character or she can be the only Phillips'® lady and so forth.

As for the stills that were mentioned, it's alleged in the complaint that for a period of six days or so there were -- maybe it was more than that, but it's alleged that for a short period of time there was a placeholder image where the bobblehead ad appeared, and the placeholder image was an image of the old TV ad with the plaintiff on in, but the complaint also goes on to allege

Laura L. Ludovico, SCR

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Proceedings

that that issue is resolved. They resolved that issue and they admit they resolved that issue. And in any event, it's not part of the ad, the ad is the bobblehead.

So, you know, what we come back to is that there really are no distinguishing similarities between these two, and I'm hard pressed to look at this image from the Lohan case and understand how our case is any different than this. To be sure, I also point out that Haydee Shea, who signed a release with the defendants, looks a lot more like the bobblehead, but I don't even need that. I think that, just as in Lohan, there's no distinguishing similarities and we win. We just happen to have a better case because not only does the bobblehead not look like plaintiff here, she actually looks --

THE COURT: Where's the line in Lohan? Like, where's the line, when does it become a court issue to review? I'm concerned that under your theory you're reading Lohan as forget it, Plaintiffs, you can never, ever bring such a case again.

MR. LLEWELLYN: I don't think so, Your Honor. I think here we have a situation where the plaintiff has done nothing but allege boilerplate. They didn't even manage to allege the words from the statute, they allege likeness. Fine. All they've done is alleged it looks like her and we've come in and said it doesn't really look like her at

Laura L. Ludovico, SCR

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Proceedings

all, it looks like somebody else, there's only generic similarities.

They have yet, even after argument, to point to a single distinguishing characteristic that the bobblehead shares with plaintiff that would cause people, apart from the fact that she's playing the character that my clients own, apart from that fact, a single physical characteristic that distinguishes the bobblehead and makes the plaintiff identifiable as the bobblehead.

I think that at minimum that a plaintiff has to explain that when they're confronted with the evidence that we'll come forth with and the arguments that we'll come forth with.

THE COURT: That's the thing, "confronted with the evidence." It's a motion to dismiss.

MR. LLEWELLYN: It's very clear, Your Honor, the law is very well settled that the Court can take into account on a motion to dismiss material that's inherently essential to the complaint or that's alleged in the complaint. They allege the images, they allege that the images look like the plaintiff. It's perfectly within Your Honor's power to look at these images, just like the Court of Appeals did. I mean, we put the images in just like they did in an affidavit in that case. They did the exact same thing.

Laura L. Ludovico, SCR

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Proceedings

And this idea that you're only allowed to read the complaint and nothing else on a motion to dismiss, we all know that that's not true. In Lohan itself, the complaint alleged that the video game used Lindsay Lohan's voice. The defendant put in an affidavit in that said we didn't use her voice, and the Court says in footnote three that in light of those facts in that affidavit, they're going to ignore the allegation in the complaint and they're going to find the voice isn't used. Your Honor is perfectly empowered to do that in this case.

MR. QUILL: Your Honor, defendants continue to rely on documentary evidence, but they're turning documentary evidence under 3211(a)(1) on its head. A photograph -- two photographs that need to be compared are not documentary evidence, and an affidavit is not documentary evidence.

THE COURT: Well, then what did the Court of Appeals do?

MR. QUILL: Your Honor, the Court of Appeals identified that there was -- identified the threshold legal question. They looked at this photograph and they said this does not -- this is an ambiguous depiction of a twenty-something year old woman. They said it did not have sufficient distinct facial characteristics or features and therefore, they were able to dismiss the case.

Laura L. Ludovico, SCR

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Proceedings

And defendant's continued reliance on this argument about character is neither here, nor there. This case is distinguishable from the main case, which they rely on, *Burke v. Mars, Inc.* because in that case the M&M® dressed up like the Naked Cowboy and the Court said no reasonable juror could look at the M&M® and believe that the creators of that advertisement intended the viewers to think the M&M® was the Naked Cowboy.

Here, we have a very --

THE COURT: They were making fun of it. I mean, it was commentary.

MR. QUILL: That's right because it was preposterous that a Section 51 claim would be brought on that basis, but the Court did allow the Lanham Act to continue because in that case the plaintiff had trademarked the Naked Cowboy. Here, as I mentioned before, had defendants hired a different actress to play the Phillips'® lady, plaintiff would have no claim here, but in this context they didn't; they created a bobblehead, they modeled it after the plaintiff, they misappropriated her likeness and now, to add insult to injury, they're trying to move to dismiss based upon documentary evidence, which does not utterly refute the claim and based upon a comparison that's a factual question that's not proper on a motion to dismiss.

Laura L. Ludovico, SCR

1 Proceedings

2 THE COURT: Okay.

3 MR. QUILL: Your Honor, this is precisely the
4 type of case that Section 51 was enacted to prohibit.

5 THE COURT: Okay. So it's 4:27, was there
6 anything else? I think you've made an excellent argument.
7 I don't really need to hear anything else.

8 MR. LLEWELLYN: Oh, I'm done, Your Honor.

9 THE COURT: If you want to -- you want to -- I'm
10 on trial right now and, frankly, I'm on vacation next week,
11 if you want two weeks to do something, I'm not going to do
12 anything until then.

13 MR. QUILL: Sure. Okay. Yes, if we could have
14 two weeks, Your Honor, that would be great.

15 THE COURT: Okay. So also, you're going to get
16 the transcript for me.

17 MR. LLEWELLYN: Yes, Your Honor.

18 THE COURT: Because I won't remember this.

19 MR. LLEWELLYN: And could I have a chance to
20 submit something in response?

21 THE COURT: No, you submitted this.

22 MR. LLEWELLYN: Very good.

23 THE COURT: Although you didn't write this, so,
24 yes, you can have a week.

25 MR. LLEWELLYN: Thank you, Your Honor.

26 THE COURT: So plus two weeks, plus one week,

Laura L. Ludovico, SCR

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Proceedings

plus you're getting the transcript, and so that brings us to -- we're just going to adjourn it for 30 days. Don't come in. You'll see it on the calendar, but we should have everything; yours, yours and the transcript by then.

MR. QUILL: Okay.

THE COURT: So whatever day Mr. Hanson picks, you'll see it on the calendar, just don't come in.

MR. LLEWELLYN: Do you need us to submit a package of the two after everything or are you just -- do you need us to submit a combined package of the two after the parties have submitted --

MR. QUILL: Or would courtesy copies be sufficient?

THE COURT: Just send -- are you talking about Room 130?

MR. LLEWELLYN: I'm talking about your rule that requires us to give you courtesy copies of everything after a motion is fully briefed.

THE COURT: I think you're reading the rule wrong. Just submit whatever you want; an affidavit, just give it to Mr. Hanson.

MR. LLEWELLYN: Very good.

THE COURT: Courtesy copies are when you're filing in Room 130.

MR. LLEWELLYN: All right. I understand the

Laura L. Ludovico, SCR

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Proceedings

distinction.

THE COURT: If you're giving it to me directly, I don't need an extra copy.

MR. LLEWELLYN: I didn't realize we were providing it to you directly.

THE COURT: Straight to me.

MR. LLEWELLYN: Thank you for explaining.

THE COURT: Yes. Okay. Thank you very much. Have a lovely evening. Okay, plus 30 days.

MR. QUILL: Thank you, Your Honor. Happy Halloween.

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I, Laura L. Ludovico, a senior court reporter for the State of New York, do hereby certify that the foregoing is a true and accurate transcription of my original stenographic notes.



Laura L. Ludovico
Senior Court Reporter