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Volume: I
Pages: 1-142

IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

----- x
WILLIAM CARR, individually and on
behalf of all others similarly
situated, Case No. 03-L-1271
Plaintiffs, CLASS ACTION
vs.
GATEWAY, INC.,
Defendant.

----- x

VIDEOTAPED DEPOSITION OF ELIZABETH BARTHOLET
Tuesday, September 26, 2006
Boston Law Collaborative, LLC
99 Summer Street
Boston, Massachusetts
9:41 a.m. to 3:04 p.m.
Reporter: Karen A. Morgan, CSR/RPR

□

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2

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19
20 ALSO PRESENT: Jody Urbati, Videographer.
21
22
23
24

□

4

I N D E X		
EXAMINATION OF:		PAGE
ELIZABETH BARTHOLET		
By Mr. Zigler		6, 129, 134
By Mr. Shultz		55, 133, 135
E X H I B I T S		
NO.		PAGE
1	Letter dated 2/8/05	5
2	Order on Motion to Quash Deposition	21
	Subpoena or in the Alternative for	

11	Protective Order	
12	3 Court order	21
13	4 Chronology of Key Events	30
14	5 Award of Arbitrator	30
15	6 Letters dated 4/20/04	30
16	7 E-mail with attachment	30
17	8 E-mail with attachment	30
18	9 E-mail with attachment	30
19	10 Letter dated 3/17/05	30
20	10A Letter dated 3/17/05	126
21	GATEWAY	
22	1 Handwritten document	67
23	2 Handwritten document	67
24	3 Arbitrator and Mediator Agreement	84

□

5

1 PROCEEDINGS
2 (Exhibit No. 1 marked for
3 identification.)
4 THE VIDEOGRAPHER: Good morning. It is
5 9:41 a.m. September 26, 2005 and we are in Boston,
6 Massachusetts at the offices of Boston Law
7 Collaborative, LLC, 99 Summer Street, Suite 1600. My
8 name is Jody Urbati, a videographer contracted by Jones
9 Reporting Company, 2 Oliver Street, Boston. We are
10 here today for the videotaped evidence deposition of
11 Elizabeth Bartholet of 10 Farwell Place, Cambridge,
12 Mass. in the case of Carr, et al versus Gateway, Inc.
13 pending in the Third Judicial Circuit, State of
14 Illinois, Case No. 03-L-1271. This deposition is being

15 taken and videotaped at the insistence of the
16 plaintiffs. This is tape one. The court reporter
17 today is Karen Morgan of Jones Reporting Company.
18 would the reporter please swear in the witness?

19 ELIZABETH BARTHOLET, having duly affirmed
20 that her testimony would be the truth, the whole truth
21 and nothing but the truth, testified as follows in
22 answer to interrogatories by MR. ZIGLER:

23 MR. ZIGLER: Just so the record is clear,
24 this is probably my fault, but I think it's 2006.

□

6

1 THE VIDEOGRAPHER: I read it.

2 MR. ZIGLER: But I think everybody is okay
3 with that.

4 Q. Good morning, Miss Bartholet. My name is
5 Aaron Zigler. I'm an attorney representing the
6 plaintiffs in this matter. I want to thank you first
7 for appearing here today. I have a few sort of initial
8 comments to try to get everybody at ease to start with
9 so I'm going to start with a question. Have you ever
10 been deposed before?

11 MR. SHULTZ: Just, Aaron, while we're on
12 the record, I think we should recite what we agreed to
13 before the deposition began which is that all
14 objections are reserved, except those objections
15 relating to the form the question or the responsive of
16 the answer. Is that agreed?

17 MR. ZIGLER: Yes. That's agreed.

18 MR. SHULTZ: Thank you.

19 Q. I'm sorry. I had a question pending. Have
20 you ever been deposed before?

21 A. No, I have not.

22 Q. Okay. Then there's just some basic
23 guidelines that I'll go through. I'm going to ask you
24 some questions today and you're under oath and you're

□

7

1 supposed to provide answers to those questions unless
2 your attorney instructs you not to answer. My
3 questions and your answers are going to be taken down
4 by the court reporter today. This is all being
5 videotaped. If you need a break, just ask. I'm
6 probably going to want to take lots of breaks today.
7 I'm drinking a lot of coffee and it's early in the
8 morning so nobody is going to be upset about that and
9 I've got a late flight so don't worry about that. If
10 you need to talk to Mr. Hoffman, that's fine. Just say
11 so and we can go ahead and take a break but form is
12 generally if there's a question pending, you should
13 answer that question before speaking with your
14 attorney. If I ask you a question and later you
15 remember something that you want to add to that
16 question, that's fine. You can tell us at that point.
17 By the same token if I have a question pending and you
18 think of a document that would help you answer that
19 question or would help further illustrate the answer to
20 your question, you should mention that and then we'll
21 try to get a hold of that document for you. Maybe I've
22 got it. Maybe your attorney has it. Okay. Now this

23 one is just for form. I have never had it answered in
24 the negative. Is there any reason why you would not be

□

8

1 able to answer my questions fully and truthfully today?

2 A. No.

3 Q. Could you please state and spell your name
4 for me?

5 A. Elizabeth Bartholet. Elizabeth,
6 E-L-I-Z-A-B-E-T-H. Bartholet, B-A-R-T-H-O-L-E-T.

7 Q. Where do you live?

8 A. Cambridge, Massachusetts.

9 Q. Who do you work for?

10 A. Harvard Law School.

11 Q. Do you have any other jobs?

12 A. I work part-time occasionally as a consultant
13 and fairly often as an arbitrator or a mediator. I
14 also have written a couple of books but that's often
15 considered part of one's employment as a faculty
16 member. I'm on the tenured faculty of Harvard Law
17 School.

18 Q. Now when you said consultant, can you tell me
19 a little bit more about that, who you consult for and
20 what the scope of that is?

21 A. I occasionally give advice to various
22 non-profits. I care a lot and most of my professional
23 now I focus on issues having to do with child welfare,
24 adoption, foster care and I give a lot of advice to

□

9

1 non-profits and to individuals in that context. I
2 occasionally have testified about legislation. I also
3 have advised people who are interested in adopting lots
4 of the time for free. Occasionally for a fee.

5 Q. You mentioned that you also arbitrate or
6 mediate occasionally. Is that in association with any
7 particular group?

8 A. Yes, it is. For -- I'd have to probably look
9 at a CV to get the exact dates but for at least a
10 couple of decades I have worked as an arbitrator on
11 panels for the American Arbitration Association. As of
12 now, I'm on a labor and a commercial panel and then I
13 believe an employment panel that is a subpanel of the
14 commercial group. All for the Triple A and I have done
15 a number of arbitrations for them over the years. I
16 also serve on a panel of mediators for something called
17 MREP. Mediation, Research and Educational Project I
18 think it's formally called and is run by somebody
19 called Steve Goldberg out of the Chicago, Illinois area
20 and there I serve on a panel of mediators for cases
21 involving Verizon and its union. With Triple A I
22 served for several years on a regular panel involving
23 the U. S. Postal Service and the union APWU, American
24 Postal Workers Union, so I heard a series of cases on a

□

10

1 pretty regular basis that were expedited arbitration
2 cases for them. I served for a number of years on the
3 JAMS End Dispute panel doing I believe it was entirely

4 arbitration work. I served for a while on a
5 Massachusetts Commission Against Discrimination panel
6 that I'm pretty sure was just for mediation in
7 connection with civil rights cases although I think I
8 was only assigned one or possibly two cases when I was
9 serving on that and I served for a while on the
10 National Arbitration Forum panel of arbitrators.

11 Q. Okay. You sort of glossed over your Harvard
12 Law professorship so why don't we turn back to that.
13 How long have you been a professor at Harvard?

14 A. I came to teach as an assistant professor of
15 law in the summer of 1977 starting to teach in the fall
16 of '77 and I have been there ever since. I became a
17 tenured professor I'm pretty sure it was the year of
18 1983.

19 Q. What do you teach there?

20 A. I teach now employment discrimination. I
21 have taught it pretty much every year almost since I
22 got to Harvard except for sabbatical terms, years. I
23 teach -- this year and last year I have been director
24 of a program that I started called the Child Advocacy

□

11

1 Program. In that connection I teach a law class that
2 is called Child, Family and State this year. I teach a
3 class that last year was called the Policy Workshop and
4 this year is called the Art of Social Change that
5 involves a lot of outside speakers on issues related to
6 child welfare and I teach the Child Advocacy Clinic
7 which involves sending students out to work for a

8 variety of organizations doing child welfare related
9 work and then they come back into the classroom and I
10 teach that class, a portion of it, as well as
11 organizing the whole thing. So right now that's what I
12 teach. In early years I taught Civil Procedure and
13 Advanced Civil Procedure. I have taught family law for
14 probably around a decade and what I'm teaching now,
15 child, Family and State, is a child centered version of
16 the regular family law class. I have taught other
17 clinical courses focused on employment issues over the
18 years but haven't in recent years.

19 Q. I see you brought some documents with you
20 here today.

21 A. Yes.

22 Q. Are those documents that you reviewed in
23 preparation for this deposition?

24 A. Yes, they are and at least one of them is a

□

12

1 document that I prepared. It's a chronology document
2 that I prepared in preparation for the deposition so
3 that as I went over my records to try to be as specific
4 as I could about dates of particular events, I wanted
5 to make sure that I had the chronology straight and
6 could testify to it accurately so I do have a one-page
7 document that represents the chronology of key events
8 that I'm prepared to testify to.

9 Q. Great. It sounds like you did quite a bit to
10 prepare for this deposition. About how much time do
11 you think you spent?

12 A. I spent some time Friday of last week. It
13 might have been a couple of hours, something in that
14 range, and then I came in and met Friday afternoon with
15 my lawyer David Hoffman and I believe that we met for
16 something in the range of an hour or less. I don't
17 think -- I think it was a little less than an hour.

18 Q. I know there has been motion practice in this
19 case already and I know that you have attended a
20 hearing on a motion to quash. If you had to ballpark
21 the total number of hours that you have been involved
22 with this subpoena, could you just give me that?

23 A. I would really have trouble giving you a
24 figure. It is -- you know, the hours including the

□

13

1 hours I just referred to I would guess might amount --
2 including going to court for the hearing, including I
3 think there was a telephone conference call involving
4 the lawyers but not involving the judge that I believe
5 I was part of last summer and was your question
6 ballpark the number of hours I have spent preparing for
7 the deposition or spent related to the subpoena and the
8 objections to the subpoena and the various motions? I
9 think it could be 30 to 40 hours and that's rough.

10 Q. Okay. We got off track of the documents.

11 MR. ZIGLER: Mr. Hoffman, do you think we
12 could get copies of those made so just so there's extra
13 copies to pass around?

14 MR. HOFFMAN: Sure.

15 MR. ZIGLER: Thank you.

16 Q. You mentioned that you at one point performed
17 arbitrations in connection with the National
18 Arbitration Forum?

19 A. Yes.

20 Q. When did you take that position?

21 A. I believe that it was in August of 2001 that
22 I signed an agreement with the NAF to be an arbitrator
23 for them. I did not actually start getting cases as
24 best I know until the beginning of 2003. Now when I

□

14

1 talk about specific cases here, I'm doing it based on
2 the records of cases that I was able to find and also
3 records I have of income that I got from arbitrations
4 that I was assigned to by NAF and so my records of
5 cases decided only includes cases starting in the
6 beginning of 2003.

7 Q. Were you recruited for this position or did
8 you approach them?

9 A. I do not know how it came about. I do not
10 know whether I got something in the mail or by e-mail
11 from NAF or whether I got something that indicated to
12 me that I could/should send something into NAF. I
13 simply don't remember.

14 Q. Do you remember what your duties were to be
15 in connection with this position at the National
16 Arbitration Forum?

17 A. Well, I have reviewed in the last several
18 months the various documents that NAF sent me as well
19 as the agreement that I signed and so I do remember

20 generally the responsibilities that I agreed to and
21 that they told me were the responsibilities of being an
22 arbitrator for NAF.

23 Q. Generally these duties were to arbitrate
24 cases?

□

15

1 A. They were certainly only to arbitrate cases
2 and they were generally to arbitrate cases fairly and
3 generally to uphold the integrity of the arbitration
4 process.

5 Q. Were these for only particular types of cases
6 or for any sort of subject matter?

7 A. I don't remember being told that there would
8 be any general type of cases when I first agreed to
9 arbitrate with NAF. I knew really knowing about NAF
10 except that it was what I think of as an arbitration
11 service provider. That's all I knew. I didn't know
12 the nature of the cases. It quickly became apparent to
13 me that the only cases I was assigned in the beginning
14 and pretty much the only cases I was ever assigned were
15 cases involving a credit card company on the one hand
16 and various alleged creditors, people who were alleged
17 to owe money to that credit card company so that the
18 nature of the disputes that I quickly learned I was
19 involved in as an arbitrator was a credit card company
20 seeking to be paid by people they alleged owed them
21 money as a result of having the credit card.

22 Q. Okay. Now do you still work with the
23 National Arbitration Forum?

24 A. No, I do not.

□

16

1 Q. How did that relationship terminate?

2 A. There were a series of events that led me to
3 believe that NAF was supervising and implementing an
4 arbitration process that was systematically unfair to
5 alleged creditor parties and that made me feel that I
6 should resign so as not to be part of what I saw as an
7 unfair biased process.

8 Q. Okay. Did you send a letter of resignation?

9 A. I did send a letter of resignation.

10 Q. I'm going to hand you what has been
11 previously marked as Bartholet Exhibit 1.

12 (Witness perused document.)

13 A. Yes. I have read the letter.

14 Q. Okay. Is Bartholet Exhibit 1 your
15 resignation letter to the National Arbitration Forum
16 that you were just referencing?

17 A. Yes, it is.

18 Q. Did you personally prepare this letter?

19 A. Yes.

20 Q. Is that your signature at the bottom?

21 A. Yes.

22 Q. Did you mail this letter as it is indicated
23 on the inside address?

24 A. Yes, meaning I put it in the out box at my

□

17

1 Harvard Law School office probably but yes.

2 Q. Would you say that you believed at the time
3 you wrote this that the NAF was biased in some way?

4 MR. SHULTZ: Objection. Leading. Also
5 calls for an opinion which exceeds the scope of the
6 judge's order and also is an improper question. The
7 question of fairness or unfairness lies with the trier
8 of fact, in this instance Judge Mendelsohn.

9 Q. You can answer the question.

10 A. Could you read back the question?

11 (Question was read back by the stenographer.)

12 A. Yes, that is why I wrote the letter. I
13 believed that from my experience what I witnessed the
14 NAF had a system with respect to these kinds of Master
15 Card company creditor cases that was systematically
16 biased in favor of the credit card companies or the
17 credit card company since there was only one at this
18 point with which I had any experience.

19 MR. HOFFMAN: Could we take a break for
20 just a minute?

21 MR. ZIGLER: Sure.

22 THE VIDEOGRAPHER: Off the record

23 10:02 a.m.

24 (A break was taken.)

□

18

1 THE VIDEOGRAPHER: Back on the record

2 10:21 a.m.

3 MR. HOFFMAN: This is David Hoffman. I'm

4 counsel for Professor Bartholet. I just want to note
5 for the record that in her previous answer Professor
6 Bartholet mentioned the name of a company and wishes to
7 correct the record. Am I correct in understanding what
8 you meant was credit card company as opposed to a
9 specific company?

10 A. Yes. That's exactly what I meant.

11 MR. SHULTZ: Just so we're clear, this is
12 in an effort to conform to the judge's ruling as to
13 permissible area of inquiry.

14 MR. HOFFMAN: That is.

15 MR. SHULTZ: It's not as though it's an
16 untruthful answer.

17 MR. HOFFMAN: That's right.

18 MR. SHULTZ: It was just to conform to the
19 court's order.

20 MR. HOFFMAN: That's exactly right and I
21 appreciate counsel's clarification of that.

22 A. Also -- well, I really was using Master Card
23 as the generic. I was intending it as the generic as
24 meaning the same thing as credit card companies.

□

19

1 MR. HOFFMAN: As if one were to use Kleenex
2 for tissue or something.

3 A. Exactly.

4 MR. HOFFMAN: Thank you.

5 Q. Okay. We are going to change gears just to
6 take care of a couple of housekeeping issues while
7 we're back. You have been ordered to appear here

8 today, haven't you?

9 A. Yes.

10 Q. And I want to sort of go through the
11 procedural history that leads you here but I want to do
12 it in a non-leading fashion as much I can so you're
13 going to have to bear with me for just a second. How
14 did you first become aware of this action?

15 A. I received an e-mail from you that I believe
16 notified me that you wanted to subpoena me for a
17 deposition.

18 Q. Did you receive a subpoena?

19 A. And then on a Saturday morning the doorbell
20 rang and there was a man with a subpoena which was
21 probably some number of weeks after the e-mail. I
22 never responded to the e-mail and the next thing I knew
23 somebody was at my door with a subpoena.

24 Q. My apologies for that. Following that

□

20

1 subpoena I understand that there was some motion
2 practice here in Massachusetts. Do you understand if
3 your attorney filed anything in the Massachusetts court
4 with respect to this? with respect to that subpoena?

5 A. Yes. I at a certain point talked to David
6 Hoffman about being my attorney and at a certain point
7 we talked about filing a motion to quash the subpoena.

8 MR. HOFFMAN: Let me just note for the
9 record that I have no objection to Professor Bartholet
10 answering with respect to the general subject matter of
11 communications with counsel but as to any substance, we

12 would of course object.

13 MR. ZIGLER: Of course.

14 A. We did file a motion or he filed on my behalf
15 a motion to quash the subpoena or in the alternative
16 for the court to issue a protective order.

17 Q. Do you know the outcome of that motion?

18 A. Yes. After an argument in court and some
19 briefing, ultimately the judge issued an order denying
20 our motion to quash the subpoena and ordering me to
21 testify but telling me fairly specifically what I could
22 testify to and what I could not testify to.

23 Q. Okay. I'm going to offer what I'll represent
24 to you as Judge Gershengorn's order on the motion to

□

21

1 quash deposition subpoena.

2 MR. ZIGLER: I'm going to offer this as
3 Exhibit 2.

4 (Exhibit No. 2 marked for
5 identification.)

6 MR. ZIGLER: I'm also going to offer
7 another order from the Middlesex Superior Court. This
8 is the Massachusetts state court that's dated August 3,
9 2006. That will be three.

10 (Exhibit No. 3 marked for
11 identification.)

12 Q. Professor Bartholet, is it safe to say that
13 but for these two orders from the Massachusetts state
14 court you wouldn't be here today?

15 A. Yes.

16 Q. Now, in your previous testimony before the
17 break you were talking about your resignation letter,
18 Exhibit 1, and told us that you believe that there was
19 a systematic bias in favor of credit card companies or
20 a particular credit card company. Now, did you limit
21 your answer to credit card companies and that
22 particular credit card company because you have
23 knowledge or experience with other types of respondents
24 with the NAF or did you limit it for some other reason?

□

22

1 If the question is confusing, I'll be happy to
2 rephrase.

3 A. Yes. I don't quite understand what you mean
4 by did I limit my answer.

5 Q. Okay. I'll try to explain some more. In
6 your previous testimony you said that you believed
7 there was a systematic bias and you said you believed
8 that it was in favor of credit card companies or a
9 particular credit card company. What made you think
10 that it was just in favor of this credit card company
11 as opposed to some broader category of people?

12 MR. SHULTZ: I'm going to object to this
13 extent, that to the extent that you have attempted to
14 recharacterize her testimony, it's not a complete
15 characterization. I think the testimony was from my
16 experience from what I had witnessed and then responded
17 on that basis as to the credit card company and what
18 she viewed as being this systematic bias.

19 Q. Can you answer the question or do you need me

20 to rephrase it again?

21 A. The question didn't really make sense to me
22 in terms of what I meant to testify to so I had only
23 had experience with NAF for most of -- let me rephrase
24 that. Almost all the cases I had with NAF, almost all

□

23

1 of them involved one credit card company so -- and my
2 concerns related to the NAF process had to do with what
3 I experienced in connection with a set of cases
4 involving almost always a particular credit card
5 company.

6 Q. Do you have any knowledge, any personal
7 knowledge with respect to that same behavior by the NAF
8 which you're referring to with respect to any other
9 participant before the NAF other than that particular
10 credit card company?

11 A. In my time with NAF as best I could tell from
12 my records, there were two other cases that at one
13 point were assigned to me that involved two other
14 different companies which appeared to me to be credit
15 card companies. So I'm going to call the one with
16 which I had a lot of experience Credit Card Company X.
17 There were a number of cases assigned to me involving
18 Credit Card Company X. At a certain point in time, two
19 other cases were assigned to me that involved companies
20 that from their names as I reviewed my records I took
21 to be credit card companies that were different from
22 Credit Card Company X.

23 Q. My question is really do you have any

24 personal knowledge that would lead you to believe that

□

24

1 the NAF treats the credit card companies that you have
2 personal experience with any differently than any other
3 businesses that come before them?

4 A. I have no knowledge one way or another with
5 respect to other businesses because I simply didn't
6 have experience with other businesses.

7 Q. Okay. Thank you. Let's turn back to your
8 notice of termination Exhibit 1. Did you believe your
9 statement in Exhibit 1 to be true when you wrote it?

10 A. Yes.

11 Q. Can you tell me the facts that led you to
12 believe the statements in Exhibit 1?

13 A. Yes. So I'll just start at the beginning and
14 there's really only a handful of facts. When I started
15 to get NAF cases, which I believe was at the beginning
16 of '03, I got a series of cases all of which seemed to
17 be fairly simple, all of which I was asked to decide
18 simply on the basis of the papers and sometimes there
19 was a little exchange between the parties. Sometimes I
20 ordered some exchange in terms of additional
21 information after the first submission of papers. So
22 between the beginning of '03 and roughly the beginning,
23 I think maybe around February of '04, I decided about
24 19 -- I decided 19 cases that I could find records for

□

25

1 all involving one credit card company, Credit Card
2 Company X I'll call it again, and in 18 of those cases
3 I decided in favor of the claimant credit card company
4 ruling that the alleged creditor should pay various
5 claimed monies to the credit card company. In the 19th
6 of those cases, one out of the total of 19, I dismissed
7 the case on the merits. Again, I only kept the records
8 of the actual decision but I did dismiss the case on
9 the records so -- I'm sorry. On the merits and I don't
10 have a memory of exactly what went on that led me to
11 dismiss it but it was a one-line dismissal in terms of
12 the order that went out.

13 Then I got a case which was the first case
14 in which the alleged debtor asked for a hearing which
15 under the NAF process either side could ask for but
16 this was the one case in which one party did ask for a
17 hearing. It was also the only case in which the
18 respondent, the alleged creditor, made a counterclaim
19 and in that case after the hearing and based on a fair
20 number of papers that in that case had been submitted
21 by the respondent, I ended up ruling on the merits for
22 the respondent both on the claim by the credit card
23 company and on the respondent's counterclaim against
24 the credit card company and ruled that an amount that

□

26

1 was roughly 48,000, it was \$48,000 plus some, should be
2 paid by the credit card company to the respondent.
3 Prior to this time I had never been --

4 MR. SHULTZ: Excuse me. Could I just
 Page 22

5 object? I think it would be easier if we went through
6 a question and answer format. If there's an objection,
7 then I can raise my objection at that time rather than
8 a narrative. Actually, objection. Move to strike.
9 Non-responsive.

10 Q. A couple of follow-ups quickly. You talked
11 about the 19th case in your previous answer. When you
12 were speaking of the 19th case, was that the last of
13 the 19 cases against Credit Card X of which you were
14 speaking or was it earlier chronologically?

15 A. I did not mean by saying in the 19th case
16 that it was the last. I don't remember where it came
17 in succession chronologically but I don't believe it
18 was the last of the total of 19 so all I meant to say
19 was that there was a total of 19 cases prior to the
20 case in which respondent asked for a hearing and out of
21 that 19, in 18 of the 19 I ruled for the credit card
22 company. In one of the 19 I dismissed the credit card
23 company's claim.

24 Q. Okay. I think we probably need a designation

□

27

1 for the case where there was a counterclaim so that we
2 can refer to it easily and I would suggest Case Y.

3 A. Case Y.

4 Q. Okay.

5 MR. ZIGLER: Is that all right?

6 MR. SHULTZ: Yes.

7 Q. So Case Y will be the case that we just
8 mentioned that had a counterclaim. Professor

9 Bartholet, in your previous answer you said that of
10 those 19 cases you had one case where a hearing was
11 asked for; is that correct?

12 MR. SHULTZ: Objection.
13 Mischaracterization. That's 20.

14 A. After the 19 cases, I then got a case in
15 which a hearing was asked for.

16 Q. Okay. So of the 20 cases which you have
17 testified to, only one case in which -- there was only
18 one case in which a hearing was asked for?

19 A. Yes.

20 Q. And that was Case Y?

21 A. Yes.

22 Q. You also testified that in Case Y you ruled
23 for the respondent on both the counterclaim and the
24 claim.

□

28

1 A. Yes.

2 Q. And the respondent in that case was a private
3 person and not a credit card company?

4 A. Yes.

5 Q. And prior to ruling in Case Y you had only
6 once previously found for the respondent; is that
7 correct?

8 A. Yes. Again, I'm testifying based on my best
9 attempt to find all of the records that I had in my
10 office and to go through those records and to find out
11 what I decided but yes. It's also consistent with my
12 memory. I mean my memory wholly apart from going over

13 all the records was that I consistently ruled for the
14 credit card companies in all the cases until Case Y.
15 Then when I went over my records, I found that there
16 was actually one in which I didn't rule for it but
17 dismissed the case.

18 Q. This might be a good time to take a look at
19 your records. Do you have anything in your records
20 that would help your recollection in answering these
21 questions at this point?

22 A. The one-page chronology would help me to be
23 completely accurate about the dates and the number of
24 cases and who was involved in the cases or not who by

□

29

1 name of the party but the nature of the party, yes.

2 Q. So let's back up then. You brought a number
3 of documents here with you today which you reviewed in
4 preparation for this deposition; is that correct?

5 A. Yes.

6 Q. They're in front of you?

7 A. Yes.

8 Q. And you have made copies?

9 A. Yes, and they do include more than the
10 one-page chronology. To the degree they include
11 anything else, we redacted, eliminated the names of any
12 parties.

13 MR. ZIGLER: Can I see those documents or
14 copies at least? Thank you.

15 MR. HOFFMAN: Aaron, would you rather have
16 a copy you can mark up?

17 MR. ZIGLER: Let me get these marked and
18 then we'll pass the copies around.

19 MR. SHULTZ: If I promise not to mark them,
20 can I have my copy now so I can take a look at it?

21 MR. ZIGLER: As long as you don't object to
22 the foundation of you getting those documents. I
23 believe I have got seven documents here. I'm going to
24 have them marked four through 11.

□

30

1 MR. HOFFMAN: I just want to note for the
2 record that we have done our best to redact any
3 identifying information of the parties. If we have
4 goofed in some manner, we would just ask counsel to
5 alert us to that and we'll redact those names as
6 needed.

7 MR. SHULTZ: That's fine.

8 MR. ZIGLER: Agreed.

9 (Exhibit Nos. 4 through 10 marked
10 for identification.)

11 (Discussion off the record.)

12 MR. SHULTZ: I have no problem with the
13 redaction but the redaction is going to be off the
14 exhibit numbers.

15 MR. ZIGLER: Four through ten.

16 A. So this is the marked one.

17 Q. Professor Bartholet, you're on the record.

18 MR. SHULTZ: I was just going to make a
19 record that I have no problem or objection to the
20 redactions but I would like the record to reflect which

21 documents we are making the redactions to since they
22 have already been marked.

23 A. It is actually seven, eight and nine.

24 MR. ZIGLER: Let's go off the record now.

□

31

1 (Discussion off the record.)

2 THE VIDEOGRAPHER: Back on the record

3 11:04 a.m.

4 MR. ZIGLER: Just to clear up the record I
5 want to recant what we have done while we were off the
6 record. We offered some exhibits that wound up
7 improperly redacted so we have gotten rid of those and
8 offered a new set of documents, the same documents that
9 Professor Bartholet gathered together for this
10 deposition now properly redacted and they have been
11 marked Exhibits 4 through 10.

12 Q. Do you have those documents in front of you,
13 Professor Bartholet?

14 A. Yes, I do.

15 Q. Okay. Are these the documents that you
16 brought with you to the deposition today?

17 A. Yes.

18 Q. Let's start with Exhibit 4. Can you explain
19 to me what Exhibit 4 represents?

20 A. This is a chronology that I put together. I
21 believe I typed this up yesterday, yes. It's based on
22 my both memory and review of my records to try to put
23 together for myself the chronology of key events.

24 Q. Okay. Have you looked through the other

1 exhibits, five, six, seven, eight, nine and ten to
2 make --

3 A. Yes, I have. I'm sorry. I didn't mean to
4 cut you off.

5 Q. That's okay. These are the documents that
6 you brought with you today?

7 A. Yes.

8 Q. Let's turn back to four. Before we went off
9 the record we were talking about sort of a chronology
10 of events that led up to your resignation and I
11 believe -- well, why don't you tell us where in this
12 chronology of events that you have before you as
13 Exhibit 4 you left off?

14 A. We were essentially at the third item there,
15 3/5/04, the one case is what we have agreed to call
16 Case Y. I'm sorry. Yes. 3/5/04, the case in which
17 the hearing was demanded and the counterclaim filed as
18 Case Y.

19 Q. Okay. Now --

20 A. This also has the exact dates of the NAF
21 agreement, 8/30/01, and the 19 cases were decided
22 between January 7, '03 and February 12, '04.

23 Q. Okay. Now do you have the award of the
24 arbitrator before you in Case Y?

1 A. Yes. It has been marked as Exhibit 5.

2 Q. Was Exhibit 5 kept in the normal course of
3 your business as an arbitrator for the NAF?

4 A. Yes.

5 MR. SHULTZ: Just because I don't want to
6 get caught in this, I object to questioning concerning
7 the arbitration award because I think it exceeds the
8 bounds of what Judge Gershengorn ruled because although
9 the identifiers are redacted, the fact is this is the
10 award which, as I understand it, would be confidential.
11 I just don't want to be silent on that and be charged
12 with being a participant in violating the order.

13 MR. HOFFMAN: Paragraph 6 of Judge
14 Gershengorn's order refers to contents of any
15 arbitration awards which she issued, which under the
16 forum's code of procedure and are not confidential so
17 Mr. Shultz and I may have a disagreement as to what the
18 precise meaning of Paragraph 6 is, but as I read it,
19 Judge Gershengorn is ruling that the award is not
20 confidential.

21 MR. SHULTZ: I think we read it
22 differently.

23 MR. ZIGLER: I'm going to take the silence
24 as you two being okay with how the record reads now and

□

34

1 move on.

2 Q. The next entry in your chronology of key
3 events on Exhibit 4 states that allowed to rule in only
4 four more cases after that. Does that mean you only

5 issued four more rulings for the NAF following Case Y?

6 A. Yes.

7 Q. Under the -- sorry. In your employment as an
8 arbitrator for the NAF were you familiar with the rules
9 governing NAF arbitrations?

10 A. Yes.

11 Q. And did they call for a deadline for a date
12 to remove an arbitrator without cause?

13 A. Yes.

14 Q. And how much time did a party have to remove
15 an arbitrator without cause?

16 A. I believe it's ten days after the appointment
17 of the arbitrator.

18 Q. Your next entry on this chronology of key
19 events mentions that -- it says, two involved same
20 credit card co. and were involve in works for date for
21 removing me without cause having passed. Does that
22 mean of the four more cases you were -- that you ruled
23 on two of those were involving the same credit card
24 company?

□

35

1 MR. SHULTZ: Objection. Leading.

2 Q. I'll rephrase. Can you explain to me the
3 fourth paragraph of your chronology of key events?

4 A. When I issued the decision in Case Y, it was
5 issued on March 5th of 2004. There were two cases that
6 I had been appointed to some while back. I don't
7 exactly know when but I had them for a while because I
8 issued the decision in these two cases later in March

9 so that means I had to have had them for a while
10 because you get appointed in these cases and then
11 there's a period of time each side has to file more
12 papers and ask for discovery from the other side and in
13 which I make rulings on that so in two cases that had
14 previously been assigned to me in which I believe the
15 period, ten-day period for disqualification without
16 cause would had to have longed passed, I was allowed to
17 decided cases on the merits and did so and then there
18 were only two other cases that I was ever allowed to
19 decide on the merits after deciding Case Y.

20 Q. Okay. Your chronology of key events says
21 that two involved other claimants neither of which I
22 believe to be a credit card company.

23 A. Yes.

24 Q. Do you know if those two other claimants to

□

36

1 which you refer in your chronology if the date for
2 removing without case had passed on those cases as
3 well?

4 A. I don't know for sure but they were decided
5 significantly later. I would have to look at records
6 or records of records to get the exact date but I know
7 when I made up this chronology, since those cases were
8 decided some significant time after March 5th of '04, I
9 had no reason to believe that I could not have been
10 disqualified.

11 Q. Are you aware of anything that happened or
12 anything that you did between 2/12/2004 and 4/20/04

13 that would give reason for a party to move to
14 disqualify you for cause?

15 MR. SHULTZ: Objection. Calls for hearsay,
16 speculation. You're asking her to testify about what
17 somebody else did or reasons to a third party.

18 Q. You can answer the question.

19 A. No.

20 MR. SHULTZ: Excuse me. Let me also raise
21 the objection that characterization was that it was for
22 cause and I think that's not accurate.

23 A. Okay. As I understood the question, it was
24 about whether I was aware of any reason I could have

□

37

1 been disqualified for cause.

2 Q. That's right. I believe that was the
3 question.

4 A. That is what I understood be the question and
5 that's what I answered.

6 Q. Can you explain to me the fifth paragraph of
7 your chronology of key events?

8 A. Well, the -- on April 20th about a month and
9 a half after I issued the Case Y decision --

10 MR. SHULTZ: Excuse me. I'm going to have
11 to object. Number one, the form of the question is
12 calling for a narrative response. Number two, I think
13 you're talking -- your question is asking about a
14 different paragraph than what Professor Bartholet is
15 answering.

16 MR. ZIGLER: I'll agree with you on the

17 second part of the objection.

18 MR. SHULTZ: You'd have to agree on the
19 first one, too in a moment of candor.

20 A. What is the question or is there one before
21 me?

22 Q. Yes. That's okay. Professor Bartholet,
23 would you like to go ahead and number the paragraphs?
24 That might make it easier to go through this.

□

38

1 A. Sure.

2 Q. I believe one starts with 8/30/01.

3 A. May I number on this marked exhibit?

4 Q. Yes, you may.

5 MR. HOFFMAN: If counsel say you can, then
6 you can.

7 MR. SHULTZ: All right. That's fine.

8 A. One is 8/30/01. Two starts with 1/7/03.
9 Three starts with 3/5/04. Four, do you want a number
10 for the whole paragraph with the two subsections?

11 Q. Yes. Why don't we do that?

12 A. Four starts with allowed to rule. Five
13 starts with removed or credit card co. moved. Six
14 starts with removed in first three cases. Seven,
15 called NAF case administrator. Eight, meanwhile kept
16 being removed. Nine, 6/29/04 telephone conversation.
17 Ten, 12/16/04 and 11, letter of resignation. This will
18 be helpful. Thank you.

19 Q. Professor Bartholet, could you please explain
20 to me what your text in Paragraph 5 means? I don't

21 understand.

22 A. Paragraph 5.

23 Q. Yes, please.

24 A. So after the Case Y March 5, '04 ruling and

□

39

1 decision, two-page decision, I was removed or the
2 claimant credit card company moved to dismiss in all
3 other cases to which I was assigned which was a total
4 of 11 not counting the four cases that I describe in
5 Paragraph 4.

6 Q. Okay. Just so I make sure I'm clear on what
7 you're testifying happened there, when you say removed,
8 do you mean substituted without cause?

9 MR. SHULTZ: Objection. Leading.

10 Q. I'll rephrase. Can you explain to me what
11 removed from the case means?

12 A. I used removed to refer to the cases in which
13 the NAF case administrator sent me a note saying that I
14 had been removed. Exhibit No. 7 gives the language of
15 the type of letter that I am characterizing as a
16 removal decision. Exhibit No. 7 the language you have
17 been removed as the arbitrator for the above case. So
18 that's what I mean by removed when I got a notice like
19 Exhibit No. 7 notifying me that I had been removed.

20 Q. There are two pages following Exhibit No. 7
21 and what I have. would those have been exhibits to
22 Exhibit No. 7 or attachments to?

23 A. In cases where I was removed I, according to
24 my records, got different types of notices attached to

□

40

1 this cover removal notice. So I can describe to you
2 what I got in Paragraph 6. I'm saying that in three of
3 the cases, the first three cases in which I was
4 removed, I got a certain type of attachment to the
5 removal notice. In other cases I got other types of
6 attachments.

7 MR. HOFFMAN: Just so the record is clear,
8 the document marked Exhibit 7 is a three-page document.

9 MR. SHULTZ: Is there also a reference to
10 Exhibit 6 that I heard?

11 A. No. Paragraph 6. I was referring to
12 Paragraph 6 unless I misspoke. I think I meant
13 Paragraph 6 I was talking about.

14 MR. SHULTZ: I'm sure you're correct. It's
15 my fault.

16 Q. When you were testifying earlier about
17 Paragraph 5, you stated that the credit card company
18 moved to dismiss the case. Dismiss a number of cases
19 to which you were appointed to. Do you recall if that
20 was a voluntary dismissal or a non-voluntary dismissal?

21 A. I'm not sure what you mean by voluntary
22 dismissal or non-voluntary dismissal.

23 Q. Were they the claimant in that case or the
24 respondent in those cases?

□

41

1 A. To the best of my memory and based on the
Page 35

2 records I found, claimant moved to dismiss in four of
3 the 11 cases and in seven of the 11 cases I was
4 notified that I had been removed.

5 Q. So do I understand your testimony correctly
6 you're saying that you were assigned to 11 cases
7 following 3/5/04 and none of which you were able to
8 issue a substantive ruling?

9 MR. SHULTZ: Objection.

10 A. Not quite.

11 MR. SHULTZ: Excuse me. Objection.

12 Leading.

13 Q. You can answer the question.

14 A. It's not my testimony. My testimony is that
15 after Case Y, the March 5, 2004 decision, there were
16 two cases in the works where it was too late to
17 disqualify me without cause that I was allowed to
18 decide that involved the same credit card company at
19 issue in the previous 19 cases I had. There were two
20 other cases that I was allowed to decide that did not
21 involve that credit card company. Apart from those
22 four cases, there were 11 more cases that I'm aware of
23 having been assigned to after the 3/5/04 Case Y
24 decision, and out of those 11 cases, I was removed by

□

1 the NAF in seven and in the other four the Credit Card
2 Company X moved to dismiss the case and I granted the
3 dismissal.

4 MR. SHULTZ: I would move to strike the
5 latter portion of the answer as being non-responsive

6 including the characterization that NAF removed
7 Professor Bartholet.

8 Q. Can we turn to Exhibit 6 then, please?

9 MR. HOFFMAN: This, too is a three-page
10 exhibit.

11 Q. Can you please explain to me what it is
12 Exhibit 6 represents?

13 A. The first time I got a notice from NAF
14 telling me that I had been removed from a case, it came
15 with an attachment that looks like Exhibit 6. The
16 first -- by the first time I mean on April 20th. I was
17 notified on April 20th I was removed from three cases
18 and in each of the three cases I got the Exhibit 6
19 letter so this Exhibit 6 which contains three letters,
20 the three letters refer to three different cases.
21 Three different cases. Okay. So this was the letter.

22 Q. So Exhibit 6 represents three different
23 letters which were dated April 20, 2004 which you
24 received from whom?

□

43

1 A. Kelly Broberg, case coordinator.

2 Q. Do you know with whom she works?

3 A. NAF.

4 Q. Had you received letters like this before
5 from the NAF?

6 A. Never.

7 Q. These letters indicate that -- I'm sorry.
8 strike that. Were you the assigned arbitrator to these
9 three cases?

10 A. Yes.

11 Q. These letters state that you had a scheduling
12 conflict in those cases. Did you tell the NAF or one
13 of the parties that you had a scheduling conflict in
14 these three cases?

15 A. No.

16 MR. SHULTZ: Objection. The document
17 speaks for itself.

18 Q. What did you do after you received these
19 letters?

20 A. I called Kelly Broberg.

21 Q. Why did you call her?

22 A. I called her because I was concerned about
23 the process because the letter was untrue and because I
24 suddenly found myself being disqualified.

□

44

1 Q. You said the letter was untrue. How was it
2 untrue?

3 A. I never had a scheduling conflict that
4 prevented my deciding any NAF case including these
5 three cases and I never notified NAF that I did have a
6 scheduling conflict.

7 Q. What did you and Miss Broberg discuss during
8 your call?

9 A. I told her about my concern that I felt I was
10 being removed based on the fact that I had decided a
11 single significant case against Credit Card Company X
12 after having decided a whole lot for them which I knew
13 was somewhere between one and two dozen. I didn't know

14 the exact number at that time and I told her of my
15 concern that this letter was untrue and would be
16 misleading to the parties. This was a letter addressed
17 to the parties and would be misleading to the parties,
18 particularly the creditor party who would be misled as
19 to the reason that I would not be hearing the case.

20 Q. Did Miss Broberg give you any reason why this
21 letter had been sent?

22 MR. SHULTZ: Objection. Hearsay.

23 A. Yes, she did.

24 Q. What did she say?

□

45

1 MR. SHULTZ: Objection. Hearsay. Can I
2 just show a continuing line of objections to out of
3 court statements offered for the truth of the matter
4 asserted as to NAF or its employees?

5 MR. ZIGLER: Sure.

6 A. You want me to answer.

7 Q. Please.

8 A. And I'm sorry but I think you said what did
9 she --

10 Q. What did she say?

11 A. Say. In response to my statement that was
12 roughly do you think there could be any reason for them
13 disqualifying me other than the fact I ruled against
14 them in Case Y. She said no. She basically agreed
15 that that was the reason and in response to my concern
16 about this misleading letter about my unavailability
17 having been sent out, she said that it was a form

18 letter that was simply regularly sent out in all of the
19 cases and so it hadn't been -- I mean the implication
20 was, therefore, it had not been done particularly in
21 this case. It was just a form letter that was sent out
22 in all the cases.

23 Q. Did she say this letter was typically sent to
24 the arbitrator on the case?

□

46

1 A. We didn't discuss as best I remember whether
2 it was typically sent to the arbitrator.

3 Q. Earlier you testified that you felt that you
4 were being removed after deciding against Credit Card
5 Company X or I'm sorry. Because you were deciding --
6 had decided against Credit Card X. Why did you feel
7 that way?

8 A. Because I had never been removed before and
9 suddenly in the first cases in which they could remove
10 me without cause, I was removed in the first three
11 cases that I got.

12 Q. Professor Bartholet, could you move to
13 Exhibit 8, Page 3 of Exhibit 8.

14 A. Yes.

15 Q. Could you tell me what this is?

16 A. This is a document that I found when I went
17 back over my records because -- and I went back over my
18 records because I wanted to make sure that I had
19 everything that NAF had sent me with the April 20th
20 removal letter so I remembered -- when I was thinking
21 about this case afterwards, I remembered that I got

22 this misleading letter saying that I had a schedule
23 conflict. I didn't remember whether anything else had
24 come with the NAF e-mail. When I reviewed my records,

□

47

1 I located this as well as the scheduling conflict
2 letter, this claimant's objection and notice of removal
3 of arbitrator notice and I located it in two out of the
4 three cases in which I was removed on April 20th.

5 MR. ZIGLER: I'm passed a note that says we
6 need to change the tape so it sounds like this is a
7 good time for a break.

8 THE VIDEOGRAPHER: Here ends tape one.
9 Off the record 11:36 a.m.

10 (A break was taken.)

11 THE VIDEOGRAPHER: Here begins videotape
12 number two. Back on the record 11:51 a.m.

13 MR. HOFFMAN: I wanted to clarify for the
14 record or ask Professor Bartholet to clarify on the
15 record one piece of her testimony regarding Exhibit 6
16 and she had a concern that the document might be
17 misleading to -- particularly to a creditor party.
18 Professor Bartholet, did you want to clarify a portion
19 of your answer?

20 A. Yes. I just made a mistake which I'm now
21 realizing I have consistently made through this hearing
22 and I apologize but I meant debtor party so I meant --
23 we have the credit card company on one side and the
24 debtor on the other. I was worried that this letter

1 saying that I had a scheduling conflict would be
2 misleading to the debtor party, and as I say, I do know
3 that earlier this morning at several points I was
4 talking about creditor vis-a-vis credit card company
5 when I really meant alleged debtor versus credit card
6 company. I apologize for confusing the record that
7 way.

8 MR. SHULTZ: And let me just -- thank you,
9 Professor Bartholet. Let me just say that on behalf of
10 Gateway we've had a couple of breaks and several
11 discussions with regard to the redactions and I simply
12 would like the record to reflect that it continues to
13 be Gateway's position that there should be no
14 redactions. We are fully cognizant of the judge's
15 order. We understand it. We are attempting to abide
16 by it but I don't want my silence, if there is any,
17 with regard to the redactions or with regard to any
18 further redactions that may be contemplated to
19 constitute a waiver or an estoppel on the part of
20 Gateway. Our position is, I would hope that we could
21 reach an agreement on this, is that the original of
22 these documents apparently exist in an unredacted form
23 and that those sets of documents be preserved in an
24 unredacted manner in the event there are other

1 opportunities to challenge the redactions, the

2 propriety of them which certainly from our point ov
3 view would give me the opportunity to discuss with
4 Professor Bartholet the details of those arbitrations
5 and have the ability to refresh her recollection with
6 regards to names and dates and things of that sort.

7 MR. HOFFMAN: I'll just represent on behalf
8 of Professor Bartholet and for the record that those
9 unredacted originals will be preserved by Professor
10 Bartholet subject to any further order from the court.

11 MR. SHULTZ: Thank you.

12 Q. I'm almost done. That's the good news.
13 Following your telephone call with Kelly Broberg, which
14 is mentioned in Paragraph 7 of Exhibit 4 we have
15 already discussed, did you work as an arbitrator on
16 other matters for the National Arbitration Forum?

17 A. I continued to get some number of cases to
18 which I was assigned which I would then subsequently be
19 either told that I had been removed or I would be told
20 that claimant credit card company had moved to dismiss.

21 Q. Is that reflected in Paragraph 8 of your
22 chronology of key events?

23 MR. SHULTZ: Objection. Leading.

24 Q. You can answer.

□

50

1 A. So again you're telling me I can answer.

2 Yes.

3 Q. Do I understand Paragraph 8 correctly to mean
4 that following your call with Kelly Broberg that you
5 were either removed or the claimant dismissed 11 cases

6 to which you were the assigned mediator?

7 MR. SHULTZ: Objection. Leading. Improper
8 attempt to recapitulate testimony that has already been
9 given. Asked and answered.

10 A. And you're telling me?

11 Q. You can answer.

12 A. I'm only just trying to get what you're
13 saying on the record. That's not quite accurate
14 because the total of 11 cases in which I was removed or
15 in which claimant credit card company moved to dismiss
16 occurred from the time of Case Y up until the date of
17 my resignation so there's a total of 11 cases not
18 counting the four cases described in Paragraph 4.

19 Q. Did you later have a conversation with
20 another representative of the National Arbitration
21 Forum?

22 A. Yes, I did.

23 Q. When did that take place?

24 A. On June 29, 2004.

□

51

1 Q. Who did you speak with?

2 A. Colleen Askvig.

3 Q. Who is that?

4 A. She described herself to me as legal counsel
5 for NAF and as in charge of or supervising the case
6 administrators, Kelly Broberg having been a case
7 administrator.

8 Q. What did you two discuss?

9 MR. SHULTZ: Objection. Hearsay.

10 Q. You can answer.
11 A. She -- well, she was responding to my request
12 when I talked to Kelly Broberg that I be contacted by
13 some higher-up because I knew that Kelly Broberg was
14 just a case administrator and I assumed she was pretty
15 low on the NAF hierarchy. So we discussed the same
16 kind of thing I discussed with Kelly Broberg. I
17 discussed my concerns that I kept being removed or
18 claimant would move to dismiss and I discussed my
19 concerns about the scheduling conflict letter that NAF
20 had sent in three of the cases.
21 Q. Okay. Did you later send an e-mail to Nicole
22 Svoboda of the National Arbitration Forum?
23 A. Yes, I did.
24 Q. Is a printout of that e-mail attached as

□

52

1 Exhibit 9?
2 A. Yes.
3 Q. Was this e-mail retained by you in the normal
4 course of your business as an arbitrator for the
5 National Arbitration Forum?
6 A. Yes.
7 Q. Exhibit 9 is a true and accurate copy of that
8 e-mail?
9 A. Yes.
10 MR. SHULTZ: Subject to the redactions.
11 MR. ZIGLER: Subject to the redactions.
12 Q. Professor Bartholet, can you flip to
13 Exhibit 10 now, please?

14 A. Yes.

15 Q. Can you describe to me what Exhibit 10 is?

16 A. NAF's response to my letter of resignation.

17 Q. You said you believe this to be a response to
18 your Exhibit 1, letter of February 8, 2005?

19 A. Yes.

20 Q. Is Exhibit 10 a true -- I'm sorry. Did you
21 maintain Exhibit 10 in the course of your duties?

22 A. Yes.

23 Q. Is Exhibit 10 a true and accurate copy of the
24 letter that you received from the National Arbitration

□

53

1 Forum?

2 A. Yes.

3 MR. SHULTZ: Object. It is redacted.
4 Subject to the redactions which I don't know what they
5 are.

6 Q. There is some redaction on this page at the
7 top. There appears to be something blacked out. Do
8 you recall if that's your own personal notes or if
9 there was some sort of printing or writing there that
10 you received from the National Arbitration Forum?

11 A. There was some notes just indicating where in
12 my system I was asking for it to be filed.

13 Q. Did it have anything to do with the substance
14 of the letter?

15 A. No.

16 Q. Are there any other reasons other than what
17 we have talked about today why you believed, as you

18 stated in Exhibit 1, your notice of termination, that
19 gave rise to your concern about the ethics of the NAF
20 system providing ADR services and its apparent
21 systematic bias in favor of the financial services
22 industry?

23 A. Given that we have just discussed Exhibit 10,
24 I just want to clarify that I don't consider what the

□

54

1 NAF counsel wrote in Exhibit 10 to be an accurate
2 description of what I was saying in terms of my
3 concerns about the fairness of the process.

4 Q. How were your views different than what the
5 NAF's letter read to you?

6 A. The NAF letter characterizes my position as
7 being that I -- to quote, your concern regarding this
8 provision involves your perception that a party may
9 shop for just the right arbitrator and there are a few
10 other sentences in there that indicate that my position
11 was that their process was such that exactly that, that
12 a particular party could select a particular
13 arbitrator. That was never the fairness concern that I
14 expressed either to Colleen Askvig or to Kelly Broberg
15 in our conversations. The fairness concern I expressed
16 was that the repeat player credit card company was
17 allowed to eliminate an arbitrator that they found
18 coming out against them and that if that went on on a
19 repeated basis, then you would be left with a panel of
20 arbitrators that would be systematically biased so
21 that's the only way in which I want to clarify your

22 question to the degree your question characterizes my
23 testimony, but otherwise, I have testified basically
24 here in response to your questions as to the factual

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1 matters that had caused me the concerns that led me to
2 write my letter of resignation.

3 MR. ZIGLER: Thank you. I have no further
4 questions.

5

6 EXAMINATION BY MR. SHULTZ

7 Q. Professor Bartholet, my name is Barney
8 Shultz. I represent Gateway. I would like to ask you
9 some questions if I may. You were asked at the outset
10 about what you had done in order to prepare for the
11 deposition today.

12 A. Yes.

13 Q. And somewhere I got the range that from 30 to
14 40 hours total has been involved in this process since
15 you have been subpoenaed but more directly or more
16 immediately there were a couple of hours yesterday on
17 your own and an hour or so with your attorney and then
18 I gather some time this morning. Do you recall those
19 questions and those answers?

20 A. Now I'm realizing another inaccuracy. I
21 think that I spent some time Friday because my lawyer
22 and I met Friday, not yesterday. Now I don't remember
23 exactly what I testified to in terms of the date but we
24 did meet and I spent some time Friday of last week.

1 Yes, I think I did testify to that and then I spent a
2 little more time yesterday typing up the chronology and
3 putting some documents that I thought were relevant in
4 order.

5 Q. Okay. Now, that's actually what I wanted to
6 get to and that is there are more documents that you
7 have reviewed in order to prepare yourself for this
8 deposition than simply these exhibits that have been
9 marked as Exhibits 4 through 10 and Exhibit No. 1; is
10 that a fair characterization?

11 A. Yes.

12 Q. And can you give me some idea of the
13 nature -- first of all, do you have those documents,
14 those additional documents with you in this building?

15 A. Some of them. Only some of them.

16 Q. Would it be agreeable if we could take a look
17 at those documents as additional documents that you
18 have reviewed in preparation for us having this
19 deposition?

20 MR. HOFFMAN: Let me just object. Although
21 I haven't looked at every single one, I have looked at
22 a couple and they have information about individual
23 claimants and respondents. In other words, Professor
24 Bartholet has case folders for a number of her cases

1 possibly. I don't know if she has all of them. In any
2 event, we can not allow inspection of that material

3 without violating Judge Gershengorn's order.

4 MR. SHULTZ: Okay.

5 MR. ZIGLER: I would also like to put forth
6 a relevance objection at this point because it seems
7 like these were documents that may not be relevant to
8 her testimony. Subject to that, go ahead.

9 MR. SHULTZ: The only thing I would say is
10 that I think that Judge -- how do you pronounce the
11 judge's name?

12 MR. HOFFMAN: Gershengorn.

13 MR. SHULTZ: Judge Gershengorn's order
14 related to Professor Bartholet's ability to testify
15 subject to the protective order. I certainly am
16 willing to abide by the protective order to keep those
17 documents confidential but I think from Gateway's
18 perspective we would like to examine those documents
19 because they are the basis for the professor's
20 refreshing of her recollection as well as the
21 preparation Exhibit No. 4 which is the chronology and
22 time line.

23 MR. HOFFMAN: More accurately, I think it
24 was Professor Bartholet's testimony that she looked at

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58

1 those documents in order to prepare her chronology and
2 not -- the chronology, what she reviewed to prepare for
3 her testimony but if you want to get an order from
4 Judge Gershengorn that says that Gateway can look at
5 her case files, obviously we'll abide by whatever the
6 judge orders but I'm not comfortable with having

7 Professor Bartholet produce those for inspection.

8 MR. SHULTZ: At this time.

9 MR. HOFFMAN: At this time unless we get an
10 order otherwise.

11 MR. SHULTZ: Again, with the understanding
12 that those documents will be preserved as they are
13 currently maintained.

14 MR. HOFFMAN: Absolutely.

15 Q. So there are -- now we have established that
16 there are other documents that you reviewed and the
17 purpose of your reviewing those was for what,
18 Professor?

19 A. Although I knew generally the parameters of
20 the story that I told this morning, I didn't know the
21 exact number of cases that I had heard involving Credit
22 Card Company X prior to decision Y. I didn't know the
23 exact number of cases in which I was removed or the
24 exact number of cases in which there was a request for

□

59

1 dismissal so I wanted to get the details.

2 Q. All right. And in that sense your review of
3 those documents was of assistance to you in refreshing
4 your recollection as to what had transpired during this
5 period of time you were on the NAF panel of
6 arbitrators; is that a fair statement?

7 MR. ZIGLER: Objection. Vague as to which
8 documents.

9 MR. SHULTZ: The ill-defined documents
10 which are not hear today but which Professor Bartholet

11 testified that she had reviewed for the purpose of
12 preparing the chronology. That's my question.

13 A. I would say I didn't need them to refresh my
14 recollection as to the general parameters of the story,
15 that I needed them only so that I could say rather than
16 a dozen or two cases I could say 19 cases. That kind
17 of detail is what I wanted to fill in.

18 Q. That's fine. You had a general recollection
19 but to be specific and provide us with the degree of
20 detail that you have done in Exhibit No. 4, you needed
21 to review those documents?

22 A. Yes.

23 Q. And those documents are the ones that you and
24 your lawyer and I have talked about already.

□

60

1 A. Yes.

2 Q. For example, if we look at Paragraph 9 of
3 this chronology of events, it refers to a June 29, 2004
4 telephone conversation with a Colleen Askvig. Do you
5 see that?

6 A. Yes.

7 Q. And I may have mistaken something or
8 overlooked something but I didn't see any documents
9 that were attached here on Exhibits 4, 5, 6, 7, 8, 9 or
10 that indeed referenced that telephone conversation.
11 Am I wrong in my review of that?

12 A. No. You're right.

13 Q. And are there --

14 A. I'm sorry. You're right with respect to
Page 52

15 nine. I haven't checked the other paragraphs but there
16 is nothing -- no document attached that supports
17 Paragraph 9.

18 Q. And yet that gives a specific date and I
19 gather it's the kind of detail that you would need some
20 refreshing on in order to recall that; is that correct?

21 A. Yes.

22 Q. What indeed was it that you looked to in
23 order to provide you with that level of detail that you
24 could talk about this June 29, 2004 conversation?

□

61

1 A. I had a page of notes, handwritten notes the
2 day we had the conversation. I dated it. I wrote
3 these notes right after the conversation on the
4 telephone.

5 Q. Okay. And then also I think if we turn for
6 example to Exhibit No. 10. Would you do that with me,
7 please?

8 A. Yes.

9 Q. Up on the upper right-hand corner there's an
10 area of redaction?

11 A. Yes.

12 Q. And there was a brief discussion about that
13 but I just want to be clear in my mind that that
14 redaction on Exhibit No. 10 does not concern any
15 information that would specifically identify a claimant
16 or the respondent to the arbitration.

17 A. It does not.

18 Q. Okay. Indeed, in general terms tell me what
Page 53

19 is underneath that blacked out area?

20 A. It would have said F, standing for file, and
21 something indicating where it should be filed.

22 Q. All right. And that's a notation for whom or
23 to whom?

24 A. A notation that I would have made for my

□

62

1 secretary.

2 Q. So I'm just trying to get some idea of the
3 range or the sorts of different documents that you have
4 that relate to in a general sense your NAF duties.
5 There are apparently case files that you have that
6 relate specifically to the arbitrations that you did?

7 A. Yes.

8 Q. That's one grouping.

9 A. But very limited case files because usually I
10 threw out everything except the decision so I would
11 keep just the award as case files, throw out everything
12 else until the time that I decided Case Y and started
13 getting removed.

14 Q. So the case files, depending upon the time
15 frame, may be more complete than other case files. The
16 earlier ones may be less complete than the later ones;
17 is that a fair statement?

18 A. Yes.

19 Q. And you made a practice at that point after
20 the decision in Case Y to not discard the documents
21 that had been associated with your earlier -- with the
22 arbitration; true?

23 MR. ZIGLER: Objection. Mischaracterizes
24 prior testimony.

□

63

1 Q. I think I asked a poor question. Let me try
2 again. Following the Case Y decision and the
3 subsequent events regarding the request to have you
4 removed as an arbitrator or alternatively to move to
5 dismiss the arbitration. That was another --

6 A. Yes.

7 Q. -- act that occurred; is that right?

8 A. Yes.

9 MR. ZIGLER: Objection. Compound.

10 Q. You then made it your practice from that
11 point forward not to discard documents which you might
12 otherwise have discarded as to the earlier
13 arbitrations.

14 A. Sort of. I would just say that I wasn't
15 nearly as systematic as I'm sure all of you good
16 lawyers are with respect to your files. I mean this is
17 a little tiny bit of what I did in my working life and
18 I was trying to keep some records in these post Case Y
19 cases to figure out what's going on here but I didn't
20 in some very systematic way keep everything. I also
21 experienced various changes of secretaries and don't
22 have the most gorgeous filing system so with those
23 qualifications, I did try to keep more stuff post Case
24 Y.

□

1 Q. Fair enough. That's a much better
2 characterization than I could have given it. There is
3 also a set of handwritten records that you have kept
4 with regard to the issues between you and the NAF
5 concerning your assignment and your ability to hear
6 arbitrations?

7 A. I'm only aware of two pages of handwritten
8 records, one of which is the page that I referred to in
9 describing the conversation with Colleen Askvig.

10 Q. What's the other record?

11 A. It's a page in which I took notes after my
12 conversation with Kelly Broberg and similarly I dated
13 it and scribbled down these notes either immediately
14 afterwards or it's conceivable I scribbled some of
15 those notes in both cases during the phone
16 conversations.

17 Q. And that then this conversation with Kelly
18 Broberg that you referred to, is that referenced in
19 Paragraph 7 of Exhibit No. 4?

20 A. Yes.

21 Q. All right. So that I'm clear then, there are
22 at least two handwritten notes that were made at the
23 time of or shortly after the conversations that you had
24 with representatives from NAF where you recorded at

□

1 that time your true and accurate recollection of what
2 had just been discussed?

3 A. Yes, although they were scrappy notes so it's
4 not as if I tried to do the most complete true and
5 accurate.

6 Q. Absolutely. It wasn't a verbatim transcript
7 or recording such as we are going to have today?

8 A. Right.

9 Q. But they were contemporaneous and they were
10 accurate to the extent that you made the notes; true?

11 A. Yes.

12 Q. And you in fact have in preparation for this
13 deposition reviewed those two documents; is that right?

14 A. Yes.

15 Q. And what is recorded for example on Exhibit
16 No. 4 in Paragraph 7 and also in Paragraph 9 is not a
17 complete recitation of what is recorded in those notes,
18 is it?

19 A. No.

20 Q. Indeed, Exhibit No. 4, I think was
21 established but let me do it again, was made by you
22 yesterday; is that right?

23 A. Yes.

24 Q. And simply as an aid for you to be able to

□

1 testify to certain events?

2 A. Yes.

3 Q. We talked about the case files. We talked
4 about the handwritten notes and we also talked about on
5 Exhibit No. 9 the reference to the file. What file is
6 that? The redaction on Exhibit No. 9 is what I'm

7 speaking of.

8 MR. ZIGLER: I'm going to object to a
9 mischaracterization of prior testimony. I think she
10 had used file the noun -- I'm sorry. File the verb as
11 opposed to file the noun.

12 MR. HOFFMAN: Did you mean Exhibit 10?

13 MR. SHULTZ: Yes. I apologize. Exhibit 10
14 and the redaction in the upper right-hand corner.
15 Thank you.

16 A. A set of NAF case files. I have -- I've got
17 a set of arbitration files with different cases in them
18 and there's a section that is NAF and I would keep case
19 files there and then at a certain point, as I say, I
20 think I tried to keep a NAF removed pile of cases.

21 Q. Okay.

22 A. That would be a file. That would be a stack
23 that my secretary had somewhere.

24 Q. I won't dwell on this any further but if you

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67

1 will hold on to those records, we may try to ask the
2 judge to give us the opportunity to review those and if
3 in that event, I will just state for the record that
4 I'll reserve the right to conduct further
5 cross-examination of Professor Bartholet if there are
6 matters that come out of those review of the documents.

7 A. I have a brief question for you.

8 MR. HOFFMAN: Why don't we take a
9 two-minute break and go off the record.

10 THE VIDEOGRAPHER: Off the record

11 12:19 p.m.

12 (A break was taken.)

13 THE VIDEOGRAPHER: Back on the record

14 12:27 p.m.

15 Q. Professor Bartholet, during the break you and
16 your attorney handed me photocopies of two handwritten
17 notes and, if I could, let me mark this as Gateway No.
18 1 and Gateway No. 2.

19 MR. SCHULTZ: Madam Court Reporter, I'll
20 hand you those later for the exhibits.

21 Q. If I may, let me ask you just if you could
22 read what we marked as Gateway No. 1 into the record.

23 A. TC 4/21/04. That's supposed to be upper
24 right although it's kind of parallel here so it's -- do

□

68

1 you want me to explain it also or not?

2 Q. That's fine. Let's just go ahead and read it
3 and then if I have questions, I'll come back and ask.

4 A. TC 4/21/04. Kelly Broberg agreed that reason
5 they struck me was BC of redacted decision. She was
6 clear on that. Claim is that they always, underlined,
7 send out letter saying it's a schedule conflict when
8 either side strikes an arbitrator.

9 Q. Now the reference to TC refers to a telephone
10 conversation and on this one it's April 21, '04?

11 A. Yes.

12 Q. And then on the third line it says was BC and
13 that stands for because?

14 A. Yes.

15 Q. And then the redacted part is the identity
16 of -- some identifying information the Y decision I
17 believe; is that right?

18 A. Yes.

19 Q. Now, in this document here we have marked as
20 Gateway 1 what you're recording is that you understood
21 that it was the credit card company that had exercised
22 its right to strike you; is that true?

23 A. Yes.

24 Q. And that's why when you get down to the

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69

1 bottom it says, they always send out the schedule
2 conflict when either side strikes an arbitrator.
3 Again, that's consistent with your understanding that
4 it's the party to the arbitration that exercises the
5 strike; true?

6 A. Yes.

7 Q. What is also clear is that you understood on
8 the 21st of April 2004 that it wasn't NAF that had
9 removed you from the case; true?

10 A. Well, NAF sent me a letter saying you have
11 been removed from so I'm not sure if I think of them as
12 having removed me. I know that they -- if this was
13 they who removed me, it was because the credit card
14 company had asked for it to be done.

15 Q. Thank you. I understand that was a poor
16 question on my part. The reason the action was taken
17 to remove you was due to the actions of the credit card
18 company; true?

19 A. That was my understanding.

20 MR. ZIGLER: Objection. Outside the scope
21 of her knowledge.

22 Q. That in fact is what you recorded on Gateway
23 No. 1?

24 A. That was my understanding. I only know or I

□

70

1 mean I only think it based on the documents I got but
2 the documents I got did include a document indicating
3 that the initiative came from the credit card company
4 and also the conversation included a conversation about
5 how the NAF representative agreed with me that the
6 reason the credit card company took the action was
7 because of Case Y.

8 Q. Sure. And part of the documents that we have
9 marked today during the plaintiffs' examination for
10 example is -- do you have an Exhibit No. 8 in front of
11 you, Professor?

12 A. Yes.

13 Q. If you turn to the third page of that
14 exhibit, that in fact is a document that you received
15 along with several other documents on or about the 20th
16 of April; true?

17 A. In each of three cases on April 20th I
18 received an e-mail telling me I had been removed and an
19 attachment saying that -- telling the parties that it
20 was due to a scheduling conflict. In addition, in at
21 least two of the cases there was a -- and it may have
22 been also true on the third. I just couldn't find it.

23 There was an attachment that looked like this Page 3 of
24 Exhibit 8 labeled claimant's objection and notice of

□

71

1 removal of arbitrator.

2 Q. And the third page, which you just described
3 as the claimant's objection and notice of removal of
4 arbitrator, is a formal document filed with the
5 National Arbitration Forum by the credit card company;
6 is that right?

7 A. I take it to be that, yes.

8 Q. And in fact, it recites a rule of the
9 National Arbitration Forum, Rule 21C, which you
10 understand to be the provision that allows either side
11 to strike without cause an arbitrator that has been
12 assigned on one occasion?

13 A. Yes.

14 Q. And that was a rule that you were aware of?

15 A. I'm sorry. When you say an arbitrator that
16 has been assigned on one occasion, I'm not quite
17 sure --

18 Q. I think I got the one occasion in the wrong
19 place in that sentence.

20 A. Okay.

21 Q. You understood that Rule 21C is a rule that
22 allows each party one opportunity to strike an
23 arbitrator that has been assigned to the case without
24 any cause?

□

72

1 A. Yes.

2 Q. Okay. And that was your understanding back
3 in April of 2004 and in fact through 2004 up until
4 February of '05 and maybe to this present day actually
5 I guess; true?

6 A. Yes.

7 Q. And that rule is not unlike other arbitration
8 forums that you have been assigned to, true, or
9 participated in?

10 A. I don't know.

11 Q. All right. Are you familiar at all with the
12 Triple A provisions that allow parties to strike
13 arbitrators without cause?

14 A. I am not.

15 Q. Have you ever encountered that experience
16 through Triple A where somebody has stricken you as an
17 arbitrator?

18 A. Not to the best of my memory.

19 Q. All right. Are you familiar with procedures
20 for JAMS and the ability within the JAMS procedures for
21 the parties to strike an arbitrator that has been
22 assigned to a case without cause?

23 A. I'm not familiar with them.

24 Q. And you're just not familiar one way or

□

1 another?

2 A. Right, because I never had experiences with
3 those other organizations in which I developed any

4 awareness because nobody appeared at least in my case
5 to be exercising it.

6 Q. Absolutely. What we have here with the NAF
7 was the first time that anybody had stricken you as an
8 arbitrator in your 20 plus years of experience in
9 arbitrating cases.

10 A. To the best of my fallible memory.

11 Q. And it was a distasteful experience at the
12 beginning and then it became an annoyance?

13 MR. ZIGLER: I'm going to object to the
14 characterization.

15 A. No, that's not how I characterized it.

16 Q. NAF even after the credit card company struck
17 you as an arbitrator -- actually, let me strike that
18 and back up. There was some talk between you and
19 Mr. Zigler about 11 cases and that's not the full
20 number of cases that were assigned after the March 5,
21 2004 decision, is it?

22 A. There were --

23 MR. ZIGLER: Objection. Compound.

24 A. There were as to the best of my recollection

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74

1 based on records 11 plus four or 15 cases assigned to
2 me after Case Y.

3 Q. And indeed you still had cases assigned to
4 you which you returned to the NAF at the time that you
5 resigned?

6 A. Yes.

7 Q. And how long had you had those cases which

8 the NAF had assigned to you which were returned when
9 you resigned?

10 A. I believe a very short time.

11 Q. But in any event, NAF continued to send you
12 cases and in some instances the cases you were not --
13 you kept the cases but they later dismissed them; is
14 that true?

15 MR. ZIGLER: Objection. Compound.

16 A. In the beginning. Only in the beginning
17 did -- I'm sorry. Yes. After Case Y, I proceeded for
18 a period of time up until really the letter of
19 resignation to accept the cases to which I was assigned
20 and I was ready to act on them and then discovered
21 after four cases in which I was allowed to act that I
22 was not being allowed to act on the cases.

23 Q. But that wasn't strictly on account of the
24 fact that the credit card company was striking you in

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75

1 every instance, was it?

2 A. They didn't formally strike me in all 11
3 case. Right.

4 Q. In some cases the arbitration was dismissed,
5 weren't they?

6 A. In some cases the claimant credit card
7 company moved to dismiss.

8 Q. And in that instance from the point of view
9 of the debtor, the debtor prevailed; true?

10 MR. ZIGLER: Objection. Beyond the scope
11 of her knowledge.

12 A. I can't answer that yes or no. My memory is
13 that in at least some of the cases where the claimant
14 moved to dismiss it was based on what was described as
15 a settlement that involved some payment by the debtor.

16 Q. Of these 15 cases or is that just prior
17 experience?

18 A. Of the -- that's a breakdown of the 15 cases
19 so there were the four cases that came pretty shortly
20 after Case Y only two of which involved Credit Card
21 Company X and in those cases it was too late in the
22 game to dismiss me without cause. Then there were 11
23 more cases I got assigned.

24 Q. Then as to those four?

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76

1 A. As to those four I was allowed to decide two
2 involving the credit card company in which it was too
3 late for them to dismiss me without cause. I was
4 allowed to decide the other two cases which did not
5 involve a credit card company.

6 Q. And yet it was also possible as to those four
7 cases for the claimant which -- in fact, in each and
8 every instance we are talking about the claimant here
9 is always the credit card company and the respondent is
10 always the debtor; true?

11 A. Not in those four cases. In two of them the
12 claimant was the credit card company and in those two
13 it was too late for them to disqualify me. In the
14 other two cases it was not a credit card company at
15 all.

16 Q. Okay. Let me just ask you as to those two.
17 That involved the same credit card company?

18 A. Yes.

19 Q. They could have dismissed but they didn't and
20 the matter went to decision by you?

21 A. They couldn't dismiss because it was too late
22 for them to dismiss without cause.

23 Q. No. We're confusing two concepts here of
24 striking without cause or dismissing. It's always --

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77

1 A. I'm sorry. It was too late for them to
2 strike me, to disqualify me without cause. They could
3 have moved to dismiss.

4 Q. They didn't in those two cases.

5 A. They did not.

6 Q. You decided those matters to their
7 conclusion?

8 A. I granted the motion to dismiss in those two
9 cases.

10 Q. I'm sorry?

11 A. So I granted the claimant's motion to dismiss
12 in -- I'm sorry. Which cases are you asking me
13 about --

14 Q. The first two.

15 A. -- that I decided to their conclusion?

16 Q. The first two which you characterized --

17 A. Yes. I'm sorry. Yes. I did decide those
18 cases on the merits the first two described in
19 Paragraph 4.

20 Q. All right. The other next two cases
21 involved -- did not involve the same credit card
22 company. In fact, it didn't involve a credit card
23 company at all?

24 A. The other next two cases that I was allowed

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78

1 to decide, which were the final two cases in which I
2 was allowed to decide, those did not involve credit
3 card companies to the best of my knowledge based on the
4 names of the parties.

5 Q. Okay. Neither of them were Gateway either,
6 were they?

7 A. No.

8 Q. In fact, you have never decided or been
9 involved in an arbitration involving my client Gateway,
10 have you?

11 A. Not to the best of my knowledge.

12 Q. And in each of these cases, at least
13 involving the credit card companies, it is the credit
14 card company that is initiating the arbitration trying
15 to collect the debt from the customer or the debtor?

16 A. Yes.

17 Q. And you have no familiarity with the number
18 of instances in which Gateway has been involved in
19 arbitrations through the NAF?

20 A. No.

21 Q. No idea what the policies or procedures are
22 for Gateway with regard to NAF arbitrations?

23 MR. ZIGLER: I'm going to object to beyond
Page 68

24 the scope of cross and I don't understand the question.

□

79

1 Q. Go ahead.

2 A. I have no knowledge of any special procedures
3 involving Gateway and NAF that they might have agreed
4 to.

5 Q. All right. You just have no knowledge at all
6 as far as Gateway is concerned and the NAF process?

7 A. Correct.

8 Q. Then as to the 11 cases that remained, some
9 of those were dismissed and some you were stricken
10 pursuant to this Rule 21C?

11 A. Yes.

12 Q. As to the documents that -- let me go to
13 Exhibit No. 2 if I may, the Gateway Exhibit 2. Could
14 you read that for us, please?

15 A. Yes. NAF Colleen Askvig 6/29/04,
16 1-800-474-2371, X for extension 6738. Legal counsel
17 for NAF. Supervise case coordinators and under
18 coordinators is written manager folk. Deal w for with
19 arbitrators. Claim one, are, underlined, are other
20 templates that would say arbitrator was stricken under
21 rule X, dash, report back, dash. Two, argues removal
22 no diff, for different, than ability to get judge
23 removal. Will report to those revising rules. No
24 denial I was removed BC, for because, of case in which

□

80

1 came out versus card company. Card co. for company.

2 Q. The first number one that's circled, are
3 other templates, is that a question or is she telling
4 you that there are other templates that can be used for
5 the correspondence?

6 A. She is telling me that in relation to what
7 Kelly Broberg had said, Kelly Broberg having told me
8 this is a standard -- Kelly Broberg having told me that
9 the arbitrator had a conflict in her schedule letter
10 was the standard letter that was always sent out and
11 the reason it was sent out was just it's standard.
12 That's what we always do. Colleen Askvig said that was
13 not true, that there are other templates besides that
14 letter. It's not the only one we have and these other
15 templates would say that the arbitrator was stricken
16 under Rule -- probably under this 21C then the --
17 sorry. You didn't ask me about that.

18 Q. No. Go ahead. You anticipated my next
19 question. What does the reference to will report back
20 mean?

21 A. We argued back and forth in the conversation
22 about the fairness of this process, the problem as I
23 was seeing it of the scheduling conflict letter being
24 misleading for the non-repeat player debtor and not

□

81

1 revealing to that person the real reason for the
2 arbitrator departing the scene and so the will report
3 back is, you know, basically the larger conversation

4 was she doesn't agree with me that it's a problem but
5 she'll discuss it with superiors and get back to me.

6 Q. Okay. Second number two that's circled.
7 Argues removal no different than ability to get judge
8 removal. Do you have a recollection of that
9 conversation?

10 A. Yes, I do.

11 Q. And in that conversation does that record
12 what you and Colleen Askvig talked about in terms of
13 many state court judicial rules have the same provision
14 which allows a party to substitute a judge or change
15 away from a judge on one occasion?

16 A. I don't remember her saying that there were
17 many state rules to that effect but yes. She was
18 arguing this is a common practice, that preemptory
19 removal by a party is a common practice in the judicial
20 system. So that was her position and I was arguing why
21 I felt that it's a fairness issue in the arbitration
22 one repeat player context. It was different from the
23 situation that she was describing.

24 Q. Are you in fact personally aware that there

□

82

1 are similar provisions under the judicial rules of
2 several states which allow a party on one occasion
3 without cause to strike the assigned judge?

4 A. Actually, I am not aware of that but
5 certainly not in a position to say it's not true. I'm
6 just not aware of that as a common practice.

7 Q. well, not necessarily as a common practice

8 but whether there are --

9 A. I'm sorry. I'm not aware of that as a common
10 rule.

11 Q. All right. Are you aware of it as being a
12 rule under any state court procedures?

13 A. No. I have been a professor for many years
14 now so I am sort of removed from the litigation world.
15 I'm not aware of that.

16 Q. And actually you anticipated a question I was
17 going to ask. You're very active but you're not
18 actively engaged in litigation practice in the states
19 or federal courts; true?

20 A. That is true. I have not been for many
21 years.

22 Q. Although you were very active as I understand
23 from the time you left law school until you returned to
24 Harvard?

□

83

1 A. I was active for about a decade as a lawyer.

2 Q. Well, you in your duties as an arbitrator on
3 an NAF panel had to subscribe to a code of conduct?

4 A. Yes. I'm not sure what I'm doing with this.
5 You wanted this to go to --

6 Q. Hand that to the court reporter if you would,
7 please, and at the conclusion of the deposition when we
8 give her a break, she'll put the stickers on as the way
9 I have marked them on the bottom of those two
10 documents. When you served as an arbitrator under the
11 NAF, there was a code of conduct that you had to

12 subscribe to?

13 A. Yes.

14 Q. And indeed, every arbitrator that is on the
15 NAF panel has to subscribe to that same code of conduct
16 that you did?

17 MR. ZIGLER: Objection. That's beyond her
18 knowledge.

19 Q. To your knowledge.

20 A. I don't know. They sent it to me in what I
21 would assume was rote process by which they would send
22 to new arbitrators a bunch of documents but I don't
23 know what they sent to other arbitrators. I just know
24 that I got some documents when or soon after I signed

□

84

1 the agreement.

2 Q. Do you have your signed employment agreement
3 with the today?

4 A. I think I do. I don't have it here but I
5 think I do.

6 MR. SHULTZ: Counsel, could I trouble you
7 for a photocopy of it? I have an electronic version
8 which I can't very well put up and put the laptop in
9 front of the professor.

10 MR. HOFFMAN: Do you want to take a
11 two-minute break and I'll get it?

12 MR. SHULTZ: Thank you.

13 THE VIDEOGRAPHER: Off the record

14 12:50 p.m.

15 (A break was taken.)

16 0926bart.txt
(Gateway Exhibit No. 3 marked
17 for identification.)

18 THE VIDEOGRAPHER: Back on the record
19 1:28 p.m.

20 Q. Professor Bartholet, I have handed you what
21 we have marked as Gateway Exhibit No. 3. Do you
22 recognize that as being the arbitration and mediator
23 assignment agreement?

24 A. Yes.

□

85

1 Q. You executed that? Your signature appears on
2 the last page?

3 A. Yes.

4 Q. And you dated it and signed it on August 29,
5 '01?

6 A. Yes.

7 Q. For the sake of the record, this appears to
8 be a redacted copy; is that right?

9 A. Yes.

10 Q. And the redaction is under Paragraph 8, the
11 fees. That entire section has been redacted?

12 A. Yes.

13 MR. SHULTZ: And is it fair to characterize
14 or I guess represent, and everybody can object, that by
15 agreement of the parties we have agreed to use
16 Exhibit 8 in its redacted form which redacts Paragraph
17 8 and this is the same document that was attached to
18 the plaintiff's response filed in Massachusetts state
19 court as Exhibit 2 I believe.

20 MR. HOFFMAN: Exhibit G according to the
21 record I have.

22 MR. SHULTZ: As Exhibit G. Is that
23 acceptable?

24 MR. ZIGLER: With the subject that I don't

□

86

1 recall which exhibit it was but it is my understanding
2 that this is the document that was filed with the
3 Massachusetts court.

4 MR. SHULTZ: Thank you.

5 Q. Professor Bartholet --

6 A. So then do we understand NAF has no objection
7 to it?

8 MR. SHULTZ: Does NAF have an objection to
9 our using Exhibit 8 in its redacted form?

10 MS. VAN TASSEL: No.

11 MR. SHULTZ: Thanks.

12 Q. Professor Bartholet, I also was asking I
13 think before we took the break whether there was a code
14 of conduct and I think you told me that there was a
15 code of conduct and that you were familiar that there
16 was such a code.

17 A. There's a code of procedure. Is that what
18 you're asking me about?

19 Q. Well, the code of conduct as well.

20 MR. HOFFMAN: Are you referring to
21 Paragraph 10?

22 MR. SHULTZ: Yes.

23 A. Paragraph 10, the formal code of conduct for

24 arbitrators. I would have to actually look at it to

□

87

1 tell you whether I was familiar with it. I am sure
2 that I must have seen it and been familiar with it at
3 some point.

4 Q. Thanks. Just without -- I'm not even going
5 to go into the code of conduct. I just wanted to ask
6 you to turn if you would, please, to Paragraph 6 and do
7 I read this correctly, quote, neutral also agrees to
8 perform arbitrator, mediator and other neutral services
9 in a timely and expedient manner; fairly and
10 impartially; in compliance with all applicable rules,
11 regulations and laws; and in a manner consistent with
12 the obligations of a neutral fact finder, decision
13 maker.

14 A. Yes.

15 Q. And in your duties as an arbitrator with the
16 NAF organization, is it fair to say that you did in
17 fact conduct yourself and your arbitrator duties fairly
18 and impartially?

19 A. Yes.

20 Q. And in compliance with the rules or
21 regulations or laws that were applicable?

22 A. Yes.

23 Q. And in doing so you talked about a series of
24 decisions that you had made and I think there were a

□

88

1 total of 18 cases of the first 19 that you decided that
2 were decided in favor of the credit card company?

3 A. Yes.

4 Q. But each of those cases were decided on its
5 own merits; true?

6 A. Yes.

7 Q. And just because you found 18 out of 19 cases
8 in favor of one party doesn't suggest to you that you
9 were biased in favor of that party, does it?

10 A. No.

11 Q. Absolutely not in fact; true?

12 A. It doesn't suggest to me that I was biased.
13 I mean I tried to be fair in all the cases.

14 Q. And the same is true that simply looking at
15 the results of what the arbitrations are doesn't lead
16 somebody -- it doesn't necessarily follow that because
17 there are a certain percentage of cases that go one way
18 or another doesn't suggest there's bias involved in the
19 process?

20 MR. ZIGLER: I going to object. Improper
21 foundation.

22 A. Do you want me to answer? I would say it
23 would depend on the statistics what I would conclude
24 from them so I can testify about the cases in which I

□

1 decided because I know a lot as I dealt with these
2 cases about whether I felt I had enough to make a fair
3 decision.

4 Q. Let's just keep it to the cases that you

5 worked on. You're comfortable that you decided each of
6 every one of these 19 or 20 cases in a fair and
7 impartial manner?

8 A. I'm comfortable based on the information that
9 was given to me. It is true that I developed some
10 increasing anxiety as I decided these cases and got
11 briefing in some cases indicating problems that had
12 been raised about NAF and it is true that I worried
13 given that all these cases were just on the papers and
14 that it seemed as if one side was represented and the
15 other wasn't that I worried about the fairness so I did
16 my best and I did feel capable of rendering a decision
17 in all of those cases I decided that I felt comfortable
18 with.

19 Q. The reverse of it is you wouldn't have
20 participated in this process or wouldn't have allowed
21 yourself to be an arbitrator if you personally felt you
22 could not be fair or impartial; that's a true
23 statement, isn't it?

24 A. Yes.

□

1 Q. That's the essence of what your duties were;
2 true?

3 A. It is certainly the essence of what I
4 understand generally my duties to be as an arbitrator
5 with what other -- whatever service provider I'm
6 working with, yes, that I'm trying to render fair,
7 impartial decisions.

8 Q. Now, in those instances where the credit card
Page 78

9 company or the financial services company -- you
10 understand that Gateway is not a financial service
11 company or credit card company?

12 A. Yes.

13 Q. In those cases where the financial services
14 company or the credit card company chose to strike you,
15 your understanding was that there would be another
16 arbitrator appointed in your place; true?

17 A. Yes.

18 Q. And your understanding also was that that
19 next arbitrator would have to subscribe and follow the
20 same code of conduct and the same dictates of fairness
21 and impartiality that you would have to follow?

22 MR. ZIGLER: Objection. Improper
23 characterization of her prior testimony.

24 A. You want me to answer. I take it as a new

□

91

1 question and, no, I don't know that I can say how those
2 other arbitrators would decide. I feel sure they would
3 be given instructions to decide cases fairly and
4 impartially but I worried that the disqualification
5 process that I saw in operation would mean that NAF
6 arbitrators might well feel some pressure that if they
7 wanted to continue to get business, they ought to come
8 out on a certain side.

9 Q. You didn't feel that pressure, did you?

10 A. No.

11 Q. And in fact, when you formed the opinions
12 that you did, you chose to remove yourself from that

13 process so that you wouldn't be confronted with that
14 dilemma?

15 A. Yes.

16 Q. And that's what you would expect any other
17 arbitrator to do if he or she is going to discharge his
18 or her duties in a fair and impartial manner?

19 MR. ZIGLER: Calls for opinion.

20 A. No. I mean I wouldn't expect every
21 arbitrator to do that because many arbitrators are
22 either a hundred percent dependent on arbitration
23 income or very significantly dependent on it and I
24 worried that even if they might want to ask ethically

□

92

1 they could have a lot of financial pressure if that's
2 their situation to go along with the system that will
3 give them work if they come out in a certain way but
4 won't give them work if they don't.

5 MR. SHULTZ: I move to strike as not being
6 responsive to my question.

7 Q. You don't know to whom the cases were
8 assigned after you were recused?

9 A. There were names given on the motion to
10 disqualify. Sorry. On the notice of removal and the
11 attached letters but I did not know any of the people
12 involved.

13 Q. Okay. So you're not -- that's it. You
14 didn't know any of the names of the people involved who
15 subsequently were assigned to these cases?

16 A. No.

17 Q. You did understand that each party has only
18 one opportunity to strike an arbitrator for cause?

19 A. Each party has only one opportunity in a
20 given case.

21 Q. Okay. Thank you.

22 A. Yes.

23 Q. Now, if we look at Exhibit No. 6, I just want
24 to understand some of the nature of the redactions.

□

93

1 Does the first page of Exhibit No. 6 have a place where
2 the name of the arbitrator is given?

3 A. Of me as arbitrator or as the arbitrator
4 succeeding me?

5 Q. Succeeding you.

6 A. Yes. In the beginning of the second full
7 paragraph there would be the name of the person who had
8 been appointed to succeed me.

9 Q. Why is the name of that person who was the
10 subsequent arbitrator redacted if you know?

11 A. We're just, my lawyer and I, trying to
12 carefully follow the judge's order and make sure that
13 we don't give any unnecessary names and it's not a
14 party name but it seemed completely unnecessary to the
15 merits of this case to have the names so I guess excess
16 of caution.

17 Q. There's also a cc at the bottom that's
18 redacted. Again, still speaking of Exhibit 6.

19 MR. HOFFMAN: I'm happy to represent on the
20 record that the same name that was redacted in

21 Paragraph 2 appears as the cc in each of the letters
22 that have been marked as Exhibit 6.

23 MR. SHULTZ: It's the same as the cc in the
24 body or it's the same name throughout?

□

94

1 MR. HOFFMAN: There are three different
2 substitute arbitrators and in each letter the name of
3 the substitute arbitrator is in Paragraph 2 and also
4 shown as a cc.

5 MR. SHULTZ: Okay.

6 Q. If we turn then, please, to Exhibit No. 7,
7 the next exhibit. On the second page of that exhibit,
8 I think we talked about this exhibit previously, it's
9 the claimant's objection and notice of removal of the
10 arbitrator.

11 A. Yes.

12 Q. And at the bottom of that page you see a
13 certificate of service?

14 A. Where it says received or I'm sorry.
15 Certificate of service, yes.

16 Q. And beneath that there's a date of April 14th
17 of 2004.

18 A. Yes.

19 Q. Then immediately below that there is a
20 redaction; is that right?

21 A. Yes, and -- yes.

22 Q. The name that's redacted there, I don't know
23 the person's name, but it is in fact the name of the
24 debtor, is it not?

1 A. Yes. I believe that is the name of the
2 debtor. That's why we -- the alleged debtor. That's
3 why we redacted that.

4 Q. Based on your experiences as an attorney and
5 as a law professor this tells you that the debtor
6 received a copy of the credit card company objection
7 and notice of removal of you as an arbitrator.

8 A. Yes. I mean it tells me that -- I mean
9 certificate of service. It tells me that somebody
10 swore that this was mailed to the alleged debtor.

11 Q. All right. And this was, as you understand
12 it, directly from the credit card company going to the
13 debtor notifying the debtor that it is the credit card
14 company that's making the decision to strike the
15 arbitrator.

16 A. This is counsel for claimant certifying that
17 he sent this to the alleged debtor as well as to the
18 NAF, this objection and notice of removal.

19 Q. The claimant in fact is the credit card
20 company?

21 A. Yes.

22 Q. And we see that -- we don't know the name of
23 it but for example it says attorneys in the practice of
24 debt collection as being the people who represent the

1 claimant; correct?

2 A. Where is that?

3 Q. Under Wolpoff & Abramson in the italics.

4 A. Yes.

5 Q. And if we turn to Exhibit 8, the same thing
6 is true, that is the claimant is sending directly to
7 the debtor the paper in which the credit card company
8 is exercising its right to get a different arbitrator?

9 MR. ZIGLER: Mischaracterization of prior
10 testimony.

11 A. If we turn to this, the claimant says by this
12 certificate of service, the claimant's lawyer, that
13 they have mailed this to the alleged debtor.

14 Q. And your belief is that there very well may
15 be the same claimant's objection and notice of removal
16 of arbitrator for the third substitution or recusal but
17 you just have been unable to find it?

18 A. I have no way of knowing whether there is.
19 I did my best to find it but I don't -- I didn't spend
20 endless hours and I don't have a perfect system so I
21 don't know.

22 Q. I gather you have no objection to what the
23 NAF fee structure is for the participants?

24 MR. ZIGLER: Objection. Calls for an

□

1 opinion outside the scope of direct.

2 MR. SHULTZ: I'll withdraw it.

3 Q. These documents that you have produced here
4 today and particularly let's just talk about the

5 Exhibits 4 through ten. Actually five through ten.
6 Has anybody reviewed these documents other than you and
7 your lawyers before the deposition began today?

8 A. No.

9 Q. Mr. Zigler didn't see your files?

10 A. So you don't mean in preparation for the
11 deposition. You mean has anybody ever seen these
12 documents?

13 Q. Yes, ma'am. Other than you and your lawyer.
14 well, let me be more. Has anybody since you were
15 subpoenaed for the first time, which was around the
16 first part of June I think of this year, examined any
17 of your file materials relating to your work with NAF
18 other than you and Mr. Hoffman or Mr. Silverman?

19 A. No.

20 Q. Have you produced any documents out of your
21 file to Mr. Zigler or anybody that he's working with?

22 MR. ZIGLER: Barney, that seems pretty
23 broad in scope. Do you mean of all time or in this
24 case? She doesn't know everybody I ever worked with.

□

98

1 MR. HOFFMAN: I guess I would join in the
2 objection that we ought to keep the examination within
3 the scope of this case.

4 Q. As to these documents five through ten, who
5 else has looked at them since you were first subpoenaed
6 other than you and Mr. Hoffman and Mr. Silverman?

7 A. As best I'm aware, I have not shown these
8 documents to anybody other than those people during

9 that time period.

10 Q. What about before you were subpoenaed? Did
11 you show them to Mr. Zigler or anyone who you can now
12 identify at least as having been involved in this
13 litigation?

14 A. I also should make an exception in terms of
15 what I just said whether it's conceivable I asked my
16 secretary to copy anything. I don't know actually.
17 Since the subpoena. I have a question for you.

18 MR. HOFFMAN: There's a question pending so
19 answer as best you can and if we need to take a break,
20 we will, but as I understand Professor Bartholet's
21 testimony up to this point is that counsel, myself,
22 Mr. Silverman and her secretary and you have asked the
23 question whether prior to the service of the subpoena
24 anyone in connection with this case.

□

99

1 Q. We're going to get to it so I asked the broad
2 question. I want to know who else you have shared
3 these documents with whether it's Exhibits 5 through 10
4 or the other documents that you reviewed in preparation
5 for the deposition.

6 MR. HOFFMAN: The scope of your question
7 has to do with parties involved in this case.

8 MR. SHULTZ: I don't think so because --

9 MR. ZIGLER: I think that was your original
10 question but if you're changing it.

11 MR. SHULTZ: But now I'm asking a different
12 question.

13 MR. HOFFMAN: I'm just going to object to
14 the scope of the examination now getting outside Judge
15 Gershengorn's order which says in paragraph -- on Page
16 3. It is not a numbered paragraph. Quoting only part
17 of the opinion. Quote, due to confidentiality
18 considerations, the information Professor Bartholet may
19 testify to must be limited. Therefore, this court
20 orders the deposition of Professor Bartholet pursuant
21 to General Laws Chapter 223A, Section 11 subject to the
22 guidelines and limitations set forth below, end quote,
23 and I believe that the question you're asking her is
24 outside the scope of the six numbered items.

□

100

1 Q. Let me just ask this. Have you shared these
2 documents with people -- have you shared these
3 documents whether they're Exhibits 5 through 10 or the
4 other documents that you reviewed in preparation for
5 the deposition or as part of the preparation of Exhibit
6 No. 4 to people who are not associated with this
7 litigation?

8 MR. HOFFMAN: Again I'm going to object.
9 The question calls on the witness to answer a question
10 which goes beyond the scope of what Judge Gershengorn
11 ordered Professor Bartholet to testify to and the order
12 says that her testimony must be limited and so I'm
13 going to tell the witness that she is not at liberty to
14 answer.

15 MR. ZIGLER: Do you want me to go through
16 the list of my general co-counsel or people in my firm.

17

MR. SHULTZ: Yes.

18

MR. ZIGLER: I can prompt you with those

19

people if you want.

20

Q. Mr. Zigler is going to -- I'm going to ask

21

the same question. Let me ask the question.

22

Mr. Zigler will also identify other lawyers in his

23

office or with whom he is associated with working on

24

this case. My question is, Professor Bartholet, have

□

101

1

you shown the documents that you have reviewed in the

2

course of the preparing Exhibit No. 4 or the documents

3

you reviewed to prepare yourself to give this

4

deposition as they relate to your work for NAF or

5

Exhibits 5 through 10 to this deposition to anyone

6

involved in this litigation other than your lawyer

7

Mr. Hoffman and Mr. Silverman and your secretary

8

including Mr. Zigler's -- lawyers in Mr. Zigler's law

9

firm which is the Korein Tillery Law Firm including

10

people such as Mr. Steven Tillery?

11

A. Who?

12

Q. Mr. Tillery, Steven Tillery.

13

MR. SHULTZ: Aaron, who are the other

14

lawyers you're associated with on this case?

15

MR. ZIGLER: Why don't you list Steven

16

Swedlow and Max Gibbons. There's Tillery and me

17

working on this case. That's it but I can write up a

18

list of all the attorneys in the firm if that's what

19

you want.

20

Q. Of those names, Professor Bartholet.

21 A. No. There was one point at which we
22 considered preparing some kind of affidavit telling --
23 saying that the letter of resignation, my letter of
24 resignation was an accurate copy of the original but

□

102

1 Mr. Zigler had that letter and we never did that
2 affidavit but the answer to that question is no. To
3 the best of my knowledge never showed anything to
4 anybody who was involved with Mr. Zigler's firm.

5 Q. So is this a fair statement, to best of your
6 knowledge no one had looked at your file materials
7 related to NAF other than you, your lawyers,
8 Mr. Silverman and Mr. Hoffman, and your secretary.

9 A. Yes.

10 MR. ZIGLER: Mischaracterization of prior
11 testimony.

12 Q. And there are additional lawyers here. I'll
13 just read some names to you and see if any of these
14 ring a bell. Mr. Steven Tillery, Mr. Sander Korein,
15 Mr. Steven Katz, Mr. Doug Sprong, Mr. John Hoffman,
16 Mr. --

17 MR. ZIGLER: Howard.

18 Q. Mr. Howard Becker, Miss Lisa Kernan, Mr
19 Zigler.

20 MR. ZIGLER: John Libra.

21 Q. Mr. John Libra or --

22 MR. ZIGLER: Alexi.

23 Q. Alexi Tillery.

24 A. No. I never showed these documents, shared

□

1 these documents with those people.

2 Q. Do you have an understanding as to how
3 Mr. Zigler came into possession of your letter of
4 resignation?

5 A. I think answering that goes beyond the scope
6 of this -- again of this -- of the Gateway case that is
7 what this deposition is related to so given my lawyer's
8 instructions, I think that it violates the judge's
9 order in terms of what I have been told to testify to.

10 MR. SHULTZ: well, with all due respect,
11 the letter of resignation was the first exhibit to this
12 deposition today. It has formed the basis for the
13 taking of this deposition and the representations to
14 the Circuit Court in Madison County as to what
15 Professor Bartholet may testify to and in fact it has
16 directly involved her and brought her to this
17 deposition today so on that basis I don't see how it
18 could possibly could be outside the scope.

19 MR. HOFFMAN: I understand your point,
20 counsel, but you have asked the witness if she knows
21 how Mr. Zigler happened to have a copy of her letter of
22 resignation and not only is it beyond the scope, it is
23 not clear to me that the witness has knowledge of the
24 circumstances of Mr. Zigler's work on the case.

□

1 Q. Let me ask you that question. Do you have
Page 90

2 some knowledge as to how -- listen to my question. Do
3 you have some knowledge as to how Mr. Zigler came to
4 possession of your letter of resignation, Professor?

5 A. I don't know how he came into possession of
6 it but do I have any knowledge related to that where I
7 could guess? I don't -- I don't know how he came into
8 possession of it.

9 Q. Have you and Mr. Zigler met before today's
10 deposition?

11 A. We were in court together at the hearing
12 related to the subpoena and the court order so that I
13 believe is the first and only time before today that we
14 met.

15 THE VIDEOGRAPHER: Time. Here ends tape
16 number two. Off the record 1:57 a.m.

17 (A break was taken.)

18 THE VIDEOGRAPHER: Here begins tape three.
19 Back on the record 2:05 p.m.

20 Q. Have you ever shared the contents of your NAF
21 files with anybody from Shapiro, Haber & Urmy?

22 A. No.

23 Q. And including that, have you ever shared the
24 contents of your file with Adam Stewart and --

□

105

1 MR. ZIGLER: Tom Urmy.

2 Q. And Tom Urmy?

3 A. No.

4 Q. Or anybody that you associate as working with
5 or for them?

6 A. No.

7 Q. I was asking you whether you had met with
8 Mr. Zigler and is my answer -- my understanding correct
9 that the only time the two of you have ever met before
10 the deposition today was at the hearing on your motion
11 to quash?

12 A. Yes.

13 Q. And did you meet today face to face before
14 the deposition began?

15 A. With Mr. Zigler?

16 Q. Yes.

17 A. I saw him in the hallway when -- I actually
18 was the first person to arrive this morning and the
19 doors to this law collaborative were locked and then as
20 I went to call on the cell phone David Hoffman, I saw
21 the -- I think all three. One, two, three of the
22 lawyers here besides you, the other Gateway lawyer, the
23 NAF lawyer and Mr. Zigler arrived and to the degree we
24 talked, I said, could you let me know. I'm sitting out

□

106

1 on the exit stairs. Let me know if when somebody opens
2 the door. That's the extent to which I saw him or
3 talked to him before today.

4 Q. But you have communicated with him
5 previously?

6 A. The other communication other than seeing him
7 in court, when I just saw him in court, we did not
8 talk, was when I got the subpoena at my door back when,
9 I did call him to say what's this about and we talked

10 on the phone. I think that's the only other time that
11 we talked. I mean the only time really we talked at
12 all.

13 Q. What were your discussions? Tell me
14 everything that you recall that you said to him and
15 everything that you recall he said to you, please.

16 A. I think we talked primarily about the
17 deposition, that he wanted to depose me, where it would
18 take place, etc., but that's not I mean a hundred
19 percent of the conversation. We didn't talk about
20 particular documents like this, pieces of testimony.

21 Q. Have you told me everything that you recall
22 talking to Mr. Zigler about in that conversation on the
23 telephone?

24 A. No.

□

107

1 Q. What else did you discuss?

2 A. I don't know that I can testify about that
3 without talking to my lawyer. I mean I don't know that
4 there's anything that I should testify about related to
5 conversation on the phone. We didn't talk about
6 testimony or documents. We did talk some about -- we
7 did talk some about the general contours of my story as
8 to why I sent the letter of resignation and so in terms
9 of some of the story that I have given today, very
10 rough contours of that story, I do believe I told him
11 some of that.

12 Q. Have you now told me everything that you
13 recall that you and Mr. Zigler discussed in that

14 telephone conversation or are there still matters that
15 you're uncomfortable answering?

16 A. Actually, I don't know how much -- I don't
17 know specifically a variety of topics what I might have
18 said to my lawyer David Hoffman.

19 MR. HOFFMAN: which would be privileged.

20 A. In terms of what we should talk about or he
21 should talk about with Aaron Zigler or what I have
22 talked about directly.

23 Q. I'm asking only what -- I want to be clear.
24 I'm asking only about the telephone conversation with

□

108

1 Mr. Zigler.

2 A. Right.

3 Q. So that I'm clear in my mind this is a call
4 you made to him?

5 A. Right, because I had gotten the subpoena.

6 Q. And the subpoena that you got related to this
7 litigation; true?

8 A. Right, and I did learn something from him
9 about the nature of the litigation although I remained
10 confused for a while. I didn't really realize until
11 later that the exact nature of the underlying
12 litigation in Illinois but I discovered something about
13 it and that he wanted my deposition for purposes of
14 that. I think I didn't realize that NAF wasn't
15 directly involved in that litigation at that time, that
16 it was between a private party and Gateway. So I
17 learned something about the nature of that litigation

18 and that he wanted my deposition and I told him
19 something about the concerns I had had that led me to
20 resign.

21 Q. Did you ask Mr. Zigler why you opted to take
22 my deposition?

23 A. No.

24 Q. You said you got a deposition or you got a

□

109

1 subpoena served on you on a Saturday morning?

2 A. Maybe I did ask him that generally, yeah. I
3 mean I just don't remember asking that question but
4 yes. I wanted to know what it was about, what was
5 going on and why he wanted to take the deposition.

6 Q. And certainly didn't you ask why are you
7 contacting me?

8 A. He knew that I had resigned and I don't think
9 I did ask why he was contacting me because I -- it
10 would not be surprising that knowing that I had
11 resigned and if he had a case in which there was an
12 issue as to whether NAF arbitration should be the forum
13 that he would want me to testify.

14 Q. Certainly your resignation was not made
15 public by you, was it?

16 A. Resignation was not made public by me. I did
17 not keep a secret of my resignation so I have told some
18 number of people that in the abstract without
19 discussing any party names that I resigned from NAF and
20 that I had concerns about the fairness of the process.

21 Q. Were any of those people Mr. Zigler?

22 A. When he subpoenaed me and then we had a
23 telephone conversation, I am pretty sure that in that
24 conversation I would have generally related my concerns

□

110

1 about the fairness of the NAF process.

2 Q. You had said earlier that there were certain
3 things that you recalled that did you not feel as
4 though you could answer my questions without speaking
5 to an attorney or your attorney. That's a paraphrase.
6 That's not the exact.

7 A. Mm-mm.

8 Q. Is that still your position?

9 MR. HOFFMAN: Let me just say that the
10 witness also testified that there were certain subjects
11 that where she didn't recall whether she had discussed
12 them solely with me or whether they came up in
13 conversation with Mr. Zigler and I take it that what
14 you're asking her is other than that area of discomfort
15 because she wasn't sure of those things if there are
16 some other things.

17 Q. Well, it's a very straightforward question, a
18 very narrow area. We know that there was a
19 communication that you initiated by virtue of being
20 subpoenaed to give a deposition in this case. You
21 understand that it was relating to this litigation. I
22 simply want to know everything that you and Mr. Zigler
23 talked about in that telephone conversation.

24 A. I think those are possible. I'm just

1 remembering now that there would have been a second
2 conversation related to whether the deposition was
3 going forward and when and where and all of that. I
4 don't know and I don't know at what point in this time
5 Mr. Hoffman became my lawyer and I am simply not sure
6 with respect to certain topics other than my story
7 about concerns with respect to NAF fairness how much I
8 would have talked about with Mr. Hoffman as compared to
9 Mr. Zigler.

10 Q. Before you and Mr. Zigler ever talked by
11 telephone, you had another communication from him,
12 didn't you?

13 A. I had an e-mail telling me that he wanted to
14 subpoena me to take a deposition in connection with
15 some litigation that we had. I did not respond to that
16 e-mail by e-mail or telephone. I didn't respond at
17 all. Then I got the subpoena delivered at my door.

18 Q. Do you still have that e-mail?

19 A. I don't know actually. I haven't seen it
20 recently. I don't know that I ever -- I don't believe
21 I ever printed it out. I don't know.

22 Q. Do you still have it on your system?

23 MR. ZIGLER: I have it.

24 MR. SHULTZ: You have it. Would you

1 produce it?

2 MR. ZIGLER: If you ask me for it.
3 MR. SHULTZ: I'm asking.
4 MR. ZIGLER: Sure. I can't give it to you
5 now.

6 Q. Have there been other e-mail communications
7 with you or by you other than e-mails that are only
8 between you and your lawyers regarding this case?

9 A. Other e-mail communications with Mr. Zigler?

10 Q. With anybody relating to this case and I'm
11 excluding e-mail communications that exist only between
12 you and your lawyer. So if there are e-mail
13 communications that you are a party to between Mr.
14 Zigler, Mr. Hoffman, I would like to know that about.
15 If there are e-mail communications that you have from
16 somebody else who is not your lawyer regarding this
17 case, I would like to know about that.

18 A. E-mail communications related to this case
19 either from Mr. Zigler or from someone else?

20 Q. From anybody else other than one of your
21 lawyers.

22 MR. HOFFMAN: To clarify, you would like to
23 know from Professor Bartholet even if e-mails were of a
24 logistical or administrative nature concerning

□

113

1 scheduling and so forth, that sort of thing?

2 MR. SHULTZ: Yes. Any e-mail.

3 A. I don't know. I mean I have friends who know
4 that I'm being deposed and are concerned. Have they
5 ever e-mailed me about it? Could well have.

6 MR. HOFFMAN: He's talking about people
7 involved in this case, are you not?

8 MR. SHULTZ: Subject to the case. The
9 subject of the case.

10 A. Not to my knowledge.

11 Q. Give me the rundown if you would then because
12 the first contact -- my understanding of your testimony
13 would be the first contact, the first information that
14 you had regarding this lawsuit was an e-mail out of the
15 blue from Mr. Zigler?

16 A. Yes.

17 Q. Never met him before?

18 A. No.

19 Q. Wasn't a student of yours?

20 A. No, not to my knowledge.

21 MR. ZIGLER: St. Louis University is a fine
22 institution.

23 Q. Then you had a telephone conversation with
24 Mr. Zigler?

□

114

1 A. After I got the subpoena. After I got the
2 subpoena for the deposition, then I had a telephone
3 conversation with him and possibly a second one before
4 Mr. Hoffman was my lawyer. I can't remember.

5 Q. And is that the full extent of the
6 conversations that you have had with Mr. Zigler or
7 anybody from his law firm who is representing the
8 plaintiffs in this case?

9 A. There might have been a conversation that he

10 and my lawyer and I had, a three-way conversation I
11 might have had with my lawyer on the phone and there's
12 no other conversations.

13 MR. HOFFMAN: Let me just also say I think
14 your firm or at least Gateway's -- maybe not your firm
15 but Gateway's counsel and counsel for NAF were on the
16 phone with Mr. Zigler and I believe Professor Bartholet
17 in a phone conference that your client knows about.

18 A. And I also got an e-mail from NAF's general
19 counsel which I got an e-mail right before the first
20 scheduled deposition from NAF's general counsel saying
21 generally to the effect that they knew that I had been
22 subpoenaed for a deposition and I was an arbitrator and
23 there were confidentiality issues and I answered that
24 e-mail and got an e-mail back from them.

□

115

1 Q. I have seen those.

2 A. Excuse me?

3 Q. I have seen those.

4 A. Okay.

5 Q. This three-way conversation, was it more than
6 one three ways?

7 A. The first conversation that I talked about
8 that I was -- that I believe might have taken place
9 between Mr. Zigler and Mr. Hoffman and me on the phone.
10 You're looking as if you don't remember that. I
11 believe we might have had one but I'm not sure about
12 it, yeah.

13 Q. What is it that you think took place in that

14 conversation that you were a party to that involved
15 Mr. Zigler and Mr. Hoffman?

16 A. I was -- as soon as I first began talking to
17 Mr. Hoffman, which was pretty close to the time that I
18 got the subpoena and that I got the e-mail from NAF
19 general counsel, I at that point, once I got the e-mail
20 from NAF general counsel and realized that Mr. Zigler
21 was going to want to still go forward with the
22 subpoena, I realized that I should be getting legal
23 advice so I talked to a couple of people, law school
24 colleagues, about getting legal advice and I talked to

□

116

1 Mr. Hoffman and then I asked for that in the question I
2 was answering but what is it that -- are you asking
3 about the three-way --

4 Q. What did the three of you talk about?

5 A. And again, I just don't know that that
6 conversation took place. What I know is there was a
7 time period when Mr. Zigler wanted to move forward with
8 the deposition and when I was having some number of
9 conversations with Mr. Hoffman about what we should do
10 and I just don't know if we ever were all of us on the
11 phone but I know that Mr. Hoffman and I were talking
12 and at a certain point he was talking with Mr. Zigler.

13 Q. Would you pull out Exhibit No. 1 which I
14 think is your resignation letter.

15 A. Mm-mm.

16 Q. Then I think also Gateway Exhibit No. 3.
17 Your resignation letter on number one refers that you

18 were terminating your relationship in accordance with
19 Paragraph 16; is that true?

20 A. I hope it says 15 but do we have the --

21 Q. Exhibit No. 1.

22 A. It says Paragraph 16. Well, I don't know.
23 Yes. It does say Paragraph 16.

24 Q. And there is no Paragraph 16?

□

117

1 A. Right.

2 Q. My question is is there another agreement
3 that has 16 paragraphs?

4 A. No. I must have written this fairly fast and
5 just didn't -- wasn't accurate about the paragraph
6 number.

7 Q. Is there anyone -- are you being compensated
8 for your time today?

9 A. No.

10 Q. You have received only a subpoena fee?

11 A. I didn't receive a subpoena fee.

12 Q. You didn't even get that. Okay.

13 A. Somewhere I read something about what, eight
14 dollars or something. I don't know.

15 Q. Has anyone other than yourself compensating
16 Mr. Hoffman or his firm for the time they have devoted
17 in the representation of you in connection with this
18 lawsuit?

19 A. No.

20 MR. SHULTZ: Let me check my notes if I
21 can.

22

23 Q. Have you received any compensation for those
24 30 to 40 hours that you have spent on this case in one

□

118

1 form or another?

2 A. No.

3 Q. Have you been retained by anybody in
4 connection with this lawsuit as a consultant?

5 A. No.

6 Q. You did mention consulting earlier. I meant
7 to come back to that. Do you act as an expert witness
8 or a paid expert witness as part that consulting
9 capacity you told Mr. Zigler about?

10 MR. ZIGLER: I'm going to object. In fact,
11 I'll instruct her not to answer. You know consulting
12 witnesses are off limits but go ahead. She can answer.

13 MR. SHULTZ: Well, you raised the question
14 about her consulting. My question simply is whether
15 she acts --

16 MR. ZIGLER: As a consultant for me.

17 MR. SHULTZ: A consultant in litigation.

18 MR. ZIGLER: You couldn't ask me that
19 question. You can't ask her that question but I'm
20 going to let her answer because the answer is no but
21 you couldn't ask me that question.

22 MR. SHULTZ: I think I can ask you if you
23 have a consultant. That's all I'm asking is whether
24 she has acted as a consultant. I haven't asked her to

1 identify parties.

2 MR. ZIGLER: You said in this case.

3 A. I have never acted as a consultant paid or
4 otherwise in connection with testimony that has
5 anything to do with arbitration or mediation. I have
6 once been a witness in a case involving transracial
7 adoption which is one of my specialties and I served as
8 an unpaid expert witness on that topic and I have
9 served as a witness in U. S. Congressional hearings,
10 unpaid expert.

11 Q. In those congressional hearings has the topic
12 in general been child welfare or child care or adoption
13 or --

14 A. Yes. It has been something in that range and
15 nothing to do with ADR work.

16 Q. I see.

17 MR. SHULTZ: David, I would ask if you
18 would reconsider your portion with regard to the
19 redaction of the names of the arbitrators from the
20 exhibits that are in.

21 MR. HOFFMAN: Exhibit 6.

22 MR. SHULTZ: It may be more than six. I
23 think it's --

24 MR. HOFFMAN: Six, seven and eight.

1 MR. SHULTZ: Yes.

2 MR. ZIGLER: David, just for the record
Page 104

3 I'll indicate to you that the NAF has redacted
4 arbitrator names from everything they have produced to
5 me.

6 MR. HOFFMAN: Our view on this is that if
7 NAF has no objection, if no other party has an
8 objection, has no objection, it is not something that
9 we have a great deal of concern about but we want to
10 make sure that we're not getting in trouble with Judge
11 Gershengorn and we understand that NAF has a view on
12 this subject. So absent an order from Judge
13 Gershengorn or NAF saying that they don't object, we're
14 not inclined not to provide those names.

15 MS. VAN TASSEL: No, but I am going to
16 correct the record that we have produced arbitrator
17 names for arbitrators of Gateway arbitrations and those
18 were designated confidential pursuant to the
19 confidentiality order but given your position that
20 nothing in this production is governed by that order, I
21 can't say that we would consent to having arbitrators
22 of other disputes that have nothing to do with Gateway
23 made public.

24 MR. SHULTZ: Just so that I'm clear I think

□

121

1 that Judge Gershengorn's order is not so broad as to
2 exclude the names of the subsequent arbitrators to who
3 they're assigned and on that basis, I think we are
4 entitled to it and I think that the objection that NAF
5 has to the disclosure of that is irrelevant in this
6 context as far as Judge Gershengorn's order is

7 concerned.

8 MR. ZIGLER: Barney, are you done with your
9 questioning?

10 MR. HOFFMAN: Can we go off the record for
11 a minute?

12 THE VIDEOGRAPHER: Off the record

13 2:30 p.m.

14 (A break was taken.)

15 THE VIDEOGRAPHER: Back on the record 2:33
16 p.m.

17 MR. SHULTZ: We were -- my request is that
18 Mr. Hoffman and Professor Bartholet reconsider the
19 position as far as the redaction of the names of the
20 arbitrators from Exhibit 6, 7 and 8 as well as the
21 redaction on Exhibit 10 for this reason and that is we
22 have identified the redaction in the body of those
23 letters as containing the names of the arbitrators who
24 were subsequently assigned to hear the cases from which

□

122

1 she was removed by virtue of Rule 21C. That
2 information is contained in documents which Professor
3 Bartholet brought to the deposition today, produced at
4 the deposition, indeed summarized with Exhibit No. 4.
5 Judge Gershengorn's order does not permit the redaction
6 of such materials other than Paragraph 4 which is the
7 limitation that -- in fact, there is nothing regarding
8 redactions in Judge Gershengorn's order but she does
9 state that the witness, Professor Bartholet, is not
10 to -- she is not asked to disclose any information

11 regarding names of parties for which she acted as an
12 arbitrator or a neutral in the arbitration. That's the
13 only limitation as far as that I can see would be a
14 basis for redaction and we have established that what
15 has been redacted in this instance, in these three
16 instances, six, seven, eight, as well as ten does not
17 fit that limitation.

18 MR. HOFFMAN: So let me just say that with
19 respect to Exhibit 10, I will talk with Professor
20 Bartholet off the record for a moment and I suspect we
21 can probably give you the information that identifies
22 what part of her files this document was stored in.
23 With respect to the names of the arbitrators, I guess I
24 have to say I just read Paragraph 3 and the rest of

□

123

1 Judge Gershengorn's order in a way that does not make
2 it clear to me that she is to disclose the names of the
3 arbitrators but I'll just say on the record if NAF
4 waives its objection with regard to disclosing that
5 information, we have no objection to providing it and
6 with that, I would like suggest we just go off the for
7 two minutes.

8 MS. VAN TASSEL: Let me chime in here.

9 MR. SHULTZ: Let me hear what NAF has to
10 say.

11 MS. VAN TASSEL: We are not waiving our
12 objection to any of this. We think the judge's order
13 doesn't address documents at all and to the extent that
14 one or more of the parties claims to be entitled to

15 these documents because she has relied on them or
16 whatnot, we certainly have not -- that issue was not
17 briefed before Judge Gershengorn and it was not decided
18 and so I think we don't have any -- the only guidance
19 we have is the arbitrator and mediator assignment
20 agreement which has been marked as Gateway No. 3 which
21 says Professor Bartholet has agreed to keep this
22 information confidential and the exception to that are
23 the enumerated paragraphs in the judge's order but
24 beyond that, we think that anything she learned or any

□

124

1 documents she has or any identifying information
2 relating to the cases she arbitrated be kept
3 confidential absent court orders that it is not.

4 MR. SHULTZ: We disagree. I think it's a
5 serious disagreement.

6 Q. Let me ask you another question about Exhibit
7 No. 3. That was attached as Exhibit G to the
8 plaintiffs's response in the Massachusetts litigation.
9 Did you give that document to Mr. Zigler so that he
10 could attach it and use it in filing responsive papers?

11 A. No.

12 Q. How did he get that document?

13 A. I don't know.

14 MR. ZIGLER: Mr. Shultz, it was filed in
15 court prior to my filing those papers.

16 MR. SHULTZ: That was filed in court?

17 MR. ZIGLER: Before I filed those papers.

18 That was a post hearing brief.

19 MR. SHULTZ: You mean filed at the time of
20 the hearing?

21 MR. ZIGLER: Yes.

22 MR. SHULTZ: Who submitted it?

23 MR. ZIGLER: NAF.

24 Q. Do you know have you ever shared the names of

□

125

1 those arbitrators that are redacted from Exhibits 6, 7
2 and 8 with Mr. Zigler's office?

3 A. No.

4 MR. SHULTZ: Thank you.

5 MR. HOFFMAN: Let's go off the record for
6 two minutes if we may because I think we can satisfy
7 the concern that Mr. Shultz expressed about Exhibit 10
8 and we'll be back in two minutes.

9 THE VIDEOGRAPHER: Off the record 2:38 p.m.
10 (A break was taken.)

11 THE VIDEOGRAPHER: Back on the record
12 2:43 p.m.

13 MR. HOFFMAN: I have provided counsel with
14 an unredacted copy of Exhibit 10 which shows
15 handwriting in the upper right-hand corner and if
16 counsel would like to inquire of Professor Bartholet
17 what that writing is and what it signifies, I have no
18 objection. I just want to state for the record that to
19 the extent that Mr. Shultz feels that there has been
20 over-redaction of the two kinds he described. One,
21 we're going to try to satisfy his concern and I take
22 the full responsibility for suggesting that redaction

23 of this indicator of Professor Bartholet's, you know,
24 personal slash business files will be private, and

□

126

1 second, with respect to the names of substitute
2 arbitrators, not only do we have the contract that she
3 signed committing her to confidentiality, Judge
4 Gershengorn's limited exceptions to that, but these
5 individuals may have their own privacy interests that
6 would make me feel hesitant about identifying them so
7 if Judge Gershengorn says Gateway gets the names, we
8 are happy to provide them. Do you want to examine the
9 witness about what I have --

10 MR. SHULTZ: I would, please. Would the
11 court reporter mark that as Exhibit 10A, please?

12 (Exhibit No. 10A marked for
13 identification.)

14 Q. Professor Bartholet, Exhibit 10A is in front
15 of you. That's a document from your files?

16 A. Yes.

17 Q. On the upper right-hand corner there is some
18 handwriting. Would you read that handwriting to me,
19 please?

20 A. FNAF1H term of contract file.

21 Q. And explain what that notation means for us.

22 A. F would be for file so it's something I would
23 hand to my secretary and hope she could figure out
24 where to put this. NAF. There's going to be some NAF

□

1 files. 1H I feel pretty sure is the number and letter
2 designation of the NAF files all together and then this
3 would be a subfile that would be termination of
4 contract file in which I was collecting stuff related
5 to termination of contract which would probably be this
6 plus the letter that I sent them. Might have other
7 stuff.

8 Q. You've got the whole file with you today?

9 A. No.

10 Q. The whole file is kept where?

11 A. well, I might have the whole file with me
12 because I really don't know what ended up in that file.
13 I have my letter of resignation and I have this.
14 whether I would have thrown into this file the cases
15 that I have been disqualified in I don't think so. I
16 think they were in some other either subfile or just
17 stack somewhere.

18 Q. If we can go up one level. It's what?

19 NAF1H?

20 A. Mm-mm.

21 Q. What is the 1H?

22 A. I think the one is a set of arbitration and
23 mediation files and H is probably the NAF section of
24 one.

□

1 Q. And these files are kept in your offices at
2 the law school?

3 A. Yes.

4 Q. And they're still there?

5 A. Yes. There's nothing -- whatever is there is
6 there. Occasionally we go through the files and send
7 stuff off to archives so when I was trying to gather
8 NAF records to figure out how many cases fell into
9 which categories, I took all the files I could find and
10 looked in the computer but is everything there? I
11 don't know. Stuff might have been sent to archives or
12 lost but essentially everything I know I have related
13 to NAF is in my NAF files.

14 Q. I think we agreed that you will safeguard
15 those. You won't send them to archives.

16 A. Yes.

17 Q. You won't send them to periodic record
18 retention programs or anything like that?

19 A. Yes.

20 Q. Do you use a Gateway computer?

21 A. No.

22 MR. SHULTZ: Okay. Thank you.

23 MR. ZIGLER: I've got some redirect but
24 I'll be really quick.

□

129

1 FURTHER EXAMINATION BY MR. ZIGLER

2 Q. Professor Bartholet, Mr. Shultz asked you
3 about your NAF records and what you reviewed to prepare
4 Exhibit 4 and you stated earlier that you reviewed
5 those records, plural, to prepare Exhibit 4. Did you
6 need to review all of those records to prepare

7 Exhibit 4 or were just certain ones necessary to
8 prepare Exhibit 4?

9 A. All of the NAF records I had?

10 Q. Yes.

11 A. I didn't look at every piece of paper that I
12 had so, you know, for example I know I have a thick
13 case Y file and I never looked through it. I looked
14 for the decision. I looked for categories because I
15 was trying to think what would be relevant so I tried
16 to find all the cases in which I had been assigned a
17 case, in which I decided on the merits, what kind of
18 parties were involved by type of party.

19 Q. But my question was just really limited did
20 you have to look at every page in those case files?

21 A. No.

22 Q. Thank you. We talked about voluntarily
23 dismissed cases. Do you recall if pursuant to the NAF
24 rules a claimant can refile a voluntarily dismissed

□

130

1 case or if that voluntarily dismissal is with
2 prejudice?

3 A. At some point I did come to check into that
4 because with one of the cases I remember thinking
5 whether it should be dismissal with or without
6 prejudice and their form for awards has categories with
7 or without prejudice and I did look at the rules. I
8 even once had a conversation with an NAF case
9 administrator about when dismissal with prejudice I
10 think was appropriate. I mean I think I had this

11 conversation that I'm dimly recalling about when a
12 dismissal with prejudice as compared to without
13 prejudice was appropriate and I looked at the rules and
14 tried to figure that out. Does that answer your
15 question? What was your question again?

16 Q. No. My question was is a voluntary -- the
17 voluntarily dismissed cases that you talked about in
18 connection with Exhibit 4, were those voluntary
19 dismissals with or without prejudice?

20 MR. SHULTZ: Objection. The
21 characterization of voluntary dismissal is not one that
22 she made. The characterization was recusal or
23 dismissal.

24 A. I don't think that was my characterization

□

131

1 either just to -- but neither of you -- I mean I talked
2 about cases in which I had been notified that I was
3 removed and cases in which I was notified that the
4 claimant was requesting dismissal.

5 Q. In those cases where the claimant requested
6 dismissal, do you know what those dismissals were with
7 or without prejudice?

8 MR. SHULTZ: Objection. Overbroad, vague.

9 Q. Do you understand the question?

10 A. Yes. I think I understand the question. I
11 believe that sometimes they were with prejudice and
12 sometimes without because circumstances varied.
13 Sometimes there was a stipulation. Sometimes there
14 wasn't so I believe I did each type and I can't be more

15 specific.

16 Q. That's fine. When you were talking to
17 Mr. Shultz about your telephone conversation with Miss
18 Askvig.

19 A. Yes.

20 Q. You were discussing an argument you were
21 having with her over the difference between her
22 characterization of what your concern was and what was
23 actually happening.

24 MR. SHULTZ: Objection. That's a

□

132

1 mischaracterization of Professor Bartholet's testimony.
2 She never said she was having an argument.

3 A. Well, I believe I said I was having an
4 argument but it wasn't about that. If I can try to
5 clarify. So I testified that her letter responding to
6 my letter of resignation mischaracterized the concern
7 that I had expressed in the telephone conversation and
8 in the telephone conversation I did have an argument
9 with her in which I did make arguments about why the
10 problem that I felt I saw with NAF was different from
11 what she said went on with judges.

12 Q. Great. That gets us right to where I wanted
13 to ask my question. How was it different?

14 A. With NAF you have a repeat player which you
15 might have in certain court situations but with NAF you
16 not only have the repeat player who at least in the
17 cases I got was, you know, the same repeat player
18 engaged in debt collection and you also have a private

19 system of justice where the arbitrators are not elected
20 or appointed for terms or for life as different state
21 judges might differently be but with arbitrators you
22 have people for whom to some degree the job of decision
23 making is a job that they may or may not get the next
24 day, the next week, the next year as opposed to judges

□

133

1 who have regular business and regular salaries so I
2 argued to her, as I tried to argue to Kelly Broberg
3 also, that there was -- that this preemptory challenge
4 rule had the potential for unfairness in a different
5 way in the arbitration process and that NAF was in a
6 position to see that happening as I had seen it happen
7 and to do something about it in its rules by for
8 example changing the preemptory challenge process.

9 MR. ZIGLER: Now that's it for my
10 questions. I have just some record keeping issues. To
11 the extent that that is required, I want -- plaintiffs
12 need to let the record reflect that we adopt Gateway
13 Exhibit 1, 2 and 3 as well. I want to thank you for
14 keeping up so much because we have been going for a
15 long time now and haven't had a break for lunch so I
16 know my blood sugar is getting low so I appreciate your
17 patience with us.

18 MR. SHULTZ: I have one recross.

19 MR. ZIGLER: Okay.

20

21 FURTHER EXAMINATION BY MR. SHULTZ

22 Q. The question was -- the question is rather

23 this repeat player that you're speaking of specifically
24 was the same repeat player who you ruled in favor of on

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134

1 some 18 or 19 occasions; is that right?

2 A. The repeat player that I was aware of was
3 primarily the Credit Card Company X.

4 Q. That's my question.

5 A. Yes. There were two other credit card
6 companies that I believe either moved to disqualify me
7 or requested dismissal that, you know, I also -- I
8 think may also be somewhat similarly situated repeat
9 players with similar access to information.

10 MR. SHULTZ: Thanks.

11

12 FURTHER EXAMINATION BY MR. ZIGLER

13 Q. I just need a follow-up on your last sentence
14 there. We're getting more and more narrow. In the
15 last sentence you said that two other credit card
16 companies may have access to the same kind of
17 information. Can you elaborate on that a little bit
18 more?

19 A. I have to look at my chronology to remind
20 myself of what I once knew earlier today. In Paragraph
21 8 there were four cases in which after Case X claimant
22 requested dismissal. Two of those cases involved
23 Credit Card Company X and two involved other credit
24 card companies. To the best of my knowledge based on

□

135

1 the names of the companies that were not fully familiar
2 to me but sounded like credit card companies and the
3 nature of the dispute sounded very much like the Credit
4 Card X disputes.

5 Q. And then is it true that you believed that
6 these other credit card companies came to knowledge of
7 your finding in Case Y against Credit Card Company X?

8 MR. SHULTZ: Objection. Leading. Beyond
9 the scope of redirect. Of the recross.

10 Q. You can answer.

11 A. It is true that I was suspicious that in all
12 11 cases in which I was either removed or asked to
13 dismiss without reaching the merits, I was suspicious
14 that in all of those cases the claimant had information
15 about Case Y and was making its decision on that basis.
16 It's only suspicion but the pattern of statistics where
17 I have been allowed to decide 19 cases and then there
18 was Case Y, then suddenly there were 11 dismissals or
19 motions to dismiss, that did lead me to that suspicion.

20 MR. ZIGLER: That's all I have.

21

22 FURTHER EXAMINATION BY MR. SHULTZ

23 Q. The vast majority of those 11 were all the
24 same claimants, were they?

□

136

1 A. Yes, with the exception of these two other
2 credit card companies.

3 Q. As to those two, you can't rule out that they
Page 118

4 had the same lawyer, can you?

5 A. No.

6 MR. SHULTZ: Thank you.

7 MR. ZIGLER: I think we are all done. I
8 have a couple more comments for the record so then we
9 will be out of here. I would say thank you very much.
10 I know it's late in the day and none of us have had
11 lunch so I appreciate your patience with us today.
12 Mr. Shultz asked you some questions about our
13 interaction today so I'm just going to make an
14 observation for the record. The National Arbitration
15 Forum is represented here by Dawn Van Tassel of the
16 Maslon firm and although she hasn't asked any
17 questions, she has been meeting with counsel for
18 defendant Gateway during our breaks.

19 MS. VAN TASSEL: I would object to that
20 characterization.

21 MR. SHULTZ: I object, too.

22 MS. VAN TASSEL: I have been interacting
23 with Mr. Shultz. I have been interacting with you. I
24 have been interacting with Mr. Hoffman.

□

137

1 MR. ZIGLER: Okay. And I'm done. Anybody
2 have anything?

3 MS. VAN TASSEL: I will say that I will
4 reiterate what I said off the record that I expect
5 counsel to keep the deposition exhibits confidential at
6 least until such time as we can hammer out whatever
7 we're going to hammer out pursuant to the Hennepin

8 County protective order at least with respect to those
9 exhibits that contain information about parties to
10 arbitrations that don't involve Gateway.

11 MR. HOFFMAN: Counsel, do you mean
12 specifically the addresses of the people -- of the
13 respondents whose names were redacted?

14 MS. VAN TASSEL: I mean the addresses but I
15 also mean other information about cases that don't
16 involve Gateway. I understand that we may take
17 different positions about that but at least until such
18 time as we can hammer it out, while you've got these on
19 the plane or taking them home or whatever, I would
20 expect that since we made that designation that my
21 understanding is under the protective order you have to
22 keep it confidential until such as time as it may be
23 indicated otherwise.

24 MR. SHULTZ: Just so we're clear, what are

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138

1 you designating as confidential?

2 MS. VAN TASSEL: Exhibits.

3 MR. SHULTZ: Let's be clear. I don't to
4 run afoul of --

5 A. And for how long a period of time? Do people
6 know when the period of time clearly ends if it does
7 end. I'm just confused.

8 MR. HOFFMAN: Since I'm not involved in the
9 Hennepin County matter, am I correct in understanding
10 that there is some standing order with regard to this
11 case, confidentiality of documents produced?

12 MR. ZIGLER: There is an order that was
13 entered in a similar sort of -- in a subpoena situation
14 in Minnesota, in Hennepin County, Minnesota where there
15 was protective order governing the documents produced
16 in that miscellaneous action.

17 MR. SHULTZ: I don't that Gateway was a
18 party to that litigation.

19 MR. ZIGLER: I don't remember.

20 MS. VAN TASSEL: You were privy to the
21 protective order though. You signed the protective
22 order. I mean not you personally.

23 MR. SHULTZ: I think we may have signed the
24 protective order but we're not parties to that

□

139

1 litigation.

2 MR. ZIGLER: Well, you were a nominal
3 defendant in the miscellaneous action.

4 MR. SHULTZ: How small can you be other
5 than a nominal defendant in a miscellaneous action?

6 MS. VAN TASSEL: In any event, it is
7 Exhibit Nos. 6, 7, 8 and 9.

8 MR. HOFFMAN: And you're requesting that we
9 respect your position on confidentiality at least we
10 can hammer it out. That seems to be reasonable.

11 MS. VAN TASSEL: That's correct at this
12 time at least until we can fight about it later but for
13 purposes of your flight home or what have you.

14 THE WITNESS: So until you can reach
15 agreement or if there's no agreement, until you had a

16 chance to go to court which would be in Hennepin
17 Country not here or --

18 MS. VAN TASSEL: Just so I'm clear, I
19 understand that you have nothing to do with Hennepin
20 County. I'm not asking you to do anything or not do
21 anything. I'm just talking about counsel here who have
22 signed the protective order with and are bound by it.

23 MR. SHULTZ: That's fine. Thank you.

24 MR. ZIGLER: But I have one more question

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140

1 that follows up on Professor Bartholet's observation.
2 until we get a chance to work this out, it's really
3 sort of hard to get our hands around it. Can we pick a
4 date? I mean even if it's --

5 MS. VAN TASSEL: well, let me put it to you
6 this way. I'll send you a letter tomorrow.

7 MR. ZIGLER: Okay.

8 MS. VAN TASSEL: Saying that officially
9 here's what we're designating and not designating and
10 then I think from there the agreement sort of lays out
11 what the procedure is if you don't agree with me.

12 MR. ZIGLER: Okay. Without conceding that
13 the Hennepin County order applies to the documents
14 produced here today, I'm fine with not letting any of
15 them out of my sight until such time as I read your
16 letter tomorrow and we can further discuss it.

17 THE VIDEOGRAPHER: Here concludes today's
18 deposition. The number of tapes used was three. Off
19 the record 3:04 p.m.

20 (whereupon, at 3:04 p.m., the
21 deposition was concluded.)
22
23
24

□

1 C E R T I F I C A T E
2 I, ELIZABETH BARTHOLET, do hereby certify
3 that I have read the foregoing transcript of my
4 testimony, and further certify that it is a true and
5 accurate record of my testimony (with the exception of
6 the corrections listed below):

7	Page	Line	Correction
8	_____	_____	_____
9	_____	_____	_____
10	_____	_____	_____
11	_____	_____	_____
12	_____	_____	_____
13	_____	_____	_____
14	_____	_____	_____
15	_____	_____	_____
16	_____	_____	_____
17	_____	_____	_____
18			_____

19 ELIZABETH BARTHOLET
20 Sworn and subscribed to before me this ____ day
21 of _____, 2006.

22 _____

23 Notary Public
Page 123

24 My commission expires:

□

142

1 CERTIFICATE

2 Commonwealth of Massachusetts

3 Suffolk ss.

4

5 I, Karen A. Morgan, Certified Shorthand Reporter
6 and Notary Public in and for the Commonwealth of
7 Massachusetts, do hereby certify that ELIZABETH
8 BARTHOLET, the witness whose deposition is hereinbefore
9 set forth, was duly sworn by me and that such
10 deposition is a true record of the testimony given by
11 the witness.

12 I further certify that I am neither related to or
13 employed by any of the parties in or counsel to this
14 action, nor am I financially interested in the outcome
15 of this action.

16 In witness whereof, I have hereunto set my hand
17 and seal this sixth day of October, 2006.

18

19

20 Notary Public

21 CSR/RPR

22

23 My commission expires:

24 November 28, 2008

□