

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

SYNANON FOUNDATION, INC.,

Plaintiffs,

v. SYNANON FOUNDATION, INC.

STUART BERNSTEIN, ET AL.,

Defendants.

Civil Action No. 7189-78

Washington, D. C.

Wednesday, August 10, 1983

The above-entitled action came on for a motions hearing before the Honorable LEONARD BRAMAN, Senior Judge, in Courtroom Number 10, commencing at approximately 9:30 a.m.

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APPEARANCES:

On behalf of the Plaintiffs:

GEOFFREY P. GITNER, Esquire
Washington, D. C.

PHILIP BOURDETTE, Esquire, THOMAS A. WADDEN, Esquire
Washington, D. C. Washington, D. C.

On behalf of the Defendants:

WARREN KAPLAN, Esquire
Washington, D. C.

DANIEL SULLIVAN, Esquire
Washington, D. C.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

APPEARANCES: (Cont'd)

JOHN COPE, Esquire
Washington, D. C.

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Washington, D. C.

THOMAS M. LAWLER, Esquire
Washington, D. C.

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P R O C E E D I N G S

(Thereupon, other proceedings were had, which were reported but are not transcribed herein.)

THE DEPUTY CLERK: Your Honor, recalling the matter of Synanon Foundation, Inc. vs. Bernstein, et al., Civil Action No. 7189-78.

THE COURT: We have before us this afternoon, the several motions which, for shorthand purposes, I have previously referred to as the Fleishman Motions.

We have in terms of chronological order, the first motion filed with Bernstein Cushner's Motion to dismiss and for other relief.

But the Court, upon having received yesterday, the Plaintiff, that is, Synanon Foundation, Inc. Motion for the appointment of an Examiner, stated at the pretrial hearing that it would be required that a copy of the Motion be served upon the Government.

Since there is now pending in the United States District Court, the case of the Synanon Church against the United States and the Fleishman Declaration was originally filed by the Government, the Defendant in that case, the Civil Action No. being 82-2303, is there a representative of the Government present?

MR. WADDEN: Yes, Your Honor. Mr. Lawler, I believe, is from the Civil Division of the Department of

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1 Justice, sitting in the Courtroom.

2 THE COURT: Mr. Lawler, would you please come
3 forward? Mr. Lawler, were you served with a copy -- step
4 around to the lectern, please, sir.

5 MR. LAWLER: Thank you, Your Honor.

6 THE COURT: Were you served with a copy of the
7 Synanon's Motion for the Appointment of the Examiner?

8 MR. LAWLER: Yes, I was, Your Honor.

9 THE COURT: For purposes of the record, I might
10 state that the Motion is lodged under Rule 28-I of the Local
11 Rules, the Examiner being sought in connection with the
12 deposition, prospective deposition, to be taken of
13 Bette Fleishman.

14 Mr. Lawler, does the Government have a position
15 which it desires the Court to be aware of in this matter?

16 MR. LAWLER: Yes, it does, Your Honor.

17 If I may --

18 THE COURT: Proceed, sir.

19 MR. LAWLER: If I may introduce myself to the
20 Court. My name is Thomas M. Lawler, L-A-W-L-E-R. I am
21 a trial attorney with the Tax Division of the U.S. Department
22 of Justice, and I am lead counsel of record in the tax case
23 pending before Judge Ritchie.

24 Your Honor, I have with me today for the benefit
25 of the Court, a motion which the United States filed on

1 July 11. That motion is pending before Judge Ritchie.

2 Basically, the Motion requires that Synanon produce
3 certain documents which it has heretofore hidden from the
4 public, or with respect to those documents, the United States
5 alleges Synanon destroyed, that a full accounting be made in
6 Judge Ritchie's Courtroom with respect to those destroyed
7 records. Failing that, the United States seeks dismissal of
8 Synanon's complaint in the tax case pending before Judge
9 Ritchie. That Motion is based, in part, upon the affidavit
10 of Bette Fleishman.

11 This afternoon, the Government finds itself in a
12 peculiar situation, Your Honor. Synanon's reply to our
13 pending motion is not due until tomorrow. I am led to
14 believe that Synanon has lodged with this Court, certain
15 arguments which it intends to make tomorrow in its papers to
16 be filed with Judge Ritchie.

17 In these peculiar circumstances, the Government is
18 very reluctant to let its position be known at this parti-
19 cular time due to the potential tactics or strategy that we
20 might be revealing prior to the time that Synanon has to
21 reply to our pending motion. We are in a very strange
22 situation this afternoon, Your Honor, indeed.

23 In any event, we, of course, would oppose any
24 deposition of Bette Fleishman for a variety of reasons. Bette
25 Fleishman has agreed pursuant to immunity having been granted

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1 to her to testify for the United States in the particular
2 case. That is, to voluntarily travel from where she is
3 located to the Federal District Court here in Washington, D.C.

4 Bette Fleishman is a long-time resident of Synanon.
5 She was in Synanon for over ten years. One basic concern of
6 Bette Fleishman is that she knows Synanon well and she knows
7 how Synanon conducts its discovery.

8 Indeed, Bette Flesihman was interviewed in the
9 Arizona criminal case within the last two to three weeks.
10 Mr. Bourdette himself conducted that interview.

11 THE COURT: Is that a deposition?

12 MR. LAWLER: Your Honor, it is a -- insofar as I
13 am aware, it is a very peculiar statute which, under the
14 Arizona Criminal Law, certain defendants under certain cir-
15 cumstances are entitled to take interviews of potential
16 prosecution witnesses.

17 I am told that those interviews are not under oath.
18 I am also told that there is a record of those interviews.
19 I cannot be of further assistance to the Court with respect
20 to what those procedures are.

21 THE COURT: Was the Government present during the
22 interview?

23 MR. ALWLER: Not the United States Government.

24 THE COURT: No, I mean in this case, the State.

25 MR. LAWELER: My understanding is that the State

1 was present. In any event, those interviews are --

2 THE COURT: Mr. Lawler, before you depart from
3 that, what is the nature of the proceeding in Arizona?

4 MR. LAWLER: It is my understanding, Your Honor --
5 and I believe Mr. Bourdette could speak with more authority
6 on this particular point. It is my understanding that Mr.
7 Dederich and 12 or 1 others were indicted by the State of
8 Arizona for certain security law violations.

9 THE COURT: All right, sir.

10 MR. LAWLER: In any event, pursuant to the
11 peculiarities of those State provisions, Mr. Bourdette and
12 other lawyers for the Defendants conducted interviews of
13 witnesses in Arizona. Among those witnesses were Ms.
14 Fleishman.

15 The interviews started by one Arnette Jamison,
16 accompanied Mr. Bourdette at that particular time. Arnette
17 Jamison is known as a Synanon imperial marine. Ms. Fleishman
18 became reluctant to testify in Ms. Jamison's presence. There
19 was a certain degree of, I am told, a certain degree of
20 difference at that particular point. There are some other
21 instances which have arisen which give Ms. Fleishman some
22 concern. And I think to expose Ms. Fleishman to a deposition
23 in these circumstances would have a ^{chilling} ~~killing~~ effect on the
24 United States' ability to fully have her cooperate in the tax
25 case pending before Judge Ritchie.

1 Now, I relay those facts to you, among a number of
2 others, based on what counsel for Ms. Fleishman has told me
3 this morning and at other times after that interview.

4 I believe it is in the best interests of the United
5 States Government that these depositions not occur.

6 As I say, Ms. Fleishman stands ready to testify if
7 the need arises and if Judge Ritchie finds there to be a need.
8 She, to our knowledge, stands ready to testify in person
9 before the District Court. We would not want to have anything
10 happen to impede her willingness to do that.

11 THE COURT: Mr. Lawler, in terms of time, are you
12 able to advise this Court as to how soon Ms. Fleishman could
13 testify before the District Court?

14 MR. LAWLER: As I am sure Your Honor can under-
15 stand, I am not aware of what Synanon's reply will be tomorrow
16 with respect to the Motion which I would like to tender to
17 the Court, for the Court's benefit.

18 THE COURT: Yes, yes.

19 Mr. Bush, would you please take the Motion?

20 MR. LAWLER: Your Honor, it depends, obviously, on
21 what they say and it depends on how we judge our reply to
22 what they say. So, with that, Your Honor, I cannot give the
23 Court any further guidance.

24 I might add this: That when Synanon replied to the
25 Government's Pending Motion for Summary Judgment, as I

1 perhaps think the Court is aware, the Government has a Motion
2 for Summary Judgment pending. Included in its reply were
3 319 affidavits, many thousands of pages of what they called
4 exhibits. And I don't know what to expect in those
5 circumstances.

6 THE COURT: I think that your response, Mr. Lawler,
7 has taken into consideration principally, the needs of the,
8 or the circumstances of the litigation. But from Ms.
9 Fleishman's point of view, assuming arguendo, that the
10 Government, that the Government was ready to go forward, and
11 Judge Ritchie was ready to go forward and Synanon was ready
12 to go forward next week, could Ms. Flesihman go forward next
13 week?

14 MR. LAWLER: Of course, I have not discussed that
15 with Ms. Fleishman or her counsel, but I am led to believe
16 that that could be arranged. I am led to believe that Ms.
17 Fleishman would appear in the District Court to testify on
18 behalf of the United States is that need arose. And, of
19 course, before we would determine and urge Judge Ritchie
20 whether or not that need exists, we would like to have the
21 benefit of Synanon's reply to our Motion relative to Ms.
22 Fleishman's affidavit.

23 I am not suggesting to the Court that I can
24 absolutely guarantee the fact that Judge Ritchie will order
25 Ms. Fleishman's testimony. I simply don't know what position

1 the United States will take on that particular point until
2 we have the benefit of Synanon's papers tomorrow and the
3 benefits, obviously, of studying those papers.

4 THE COURT: Are there any other representations,
5 Mr. Lawler, which you desire to put before the Court?

6 MR. LAWLER: I don't believe so, Your Honor. No,
7 I don't.

8 THE COURT: Mr. Lawler, the Court would be obliged
9 to you if you remained with us until I hear the parties on
10 this particular Motion. I have taken this Motion first in
11 order to accommodate you in particular. So, if you would,
12 please abide with us.

13 MR. LAWLER: I appreciate that.

14 THE COURT: Until I hear the parties.

15 MR. LAWLER: I certainly would, Your Honor.

16 MR. KAPLAN: Your Honor, excuse me.

17 THE COURT: Wait a moment. Wait a moment.

18 I have asked Mr. Lawler to take a seat. I am
19 going to hear everybody but I want Mr. Lawler to take a
20 seat in the meantime.

21 Mr. Wadden, this is your motion. I will hear you.
22 I presume you are going to argue it.

23 MR. WADDEN: It is a motion to --

24 THE COURT: For an Examiner.

25 MR. WADDEN: Yes, Your Honor.

1 THE COURT REPORTER: Your Honor, may counsel state
2 his name for the record?

3 MR. WADDEN: Thomas A. Wadden, W-A-D-D-E-N, Jr.

4 At the outset, Your Honor, I would suggest to the
5 Court that Mr. Lawler's understanding of what took place in
6 Arizona is not consistent with what I understand the facts
7 to be, but he is here to correct them if I am incorrect.

8 Mr. Bourdette did not ask the Witness Fleishman
9 any questions. He was not present while she was interrogated
10 by two attorneys from Arizona and two other defense attorneys
11 that were involved in the case from California.

12 Mr. Arnette Johnson did not Ms. Bourdette -- I mean
13 Ms. Fleishman any questions. So, those, that backdrop is
14 incorrect, Judge, unless he has information that I don't have.

15 Your Honor, we have filed with the Court which
16 you previously described to take the deposition of Ms.
17 Fleishman. We find ourselves here, Your Honor, in rather
18 unusual circumstances, because Your Honor, the existence of
19 Ms. Fleishman was known to counsel for the defense as early
20 as, I believe it was a deposition to Mr. Simon in 1980, in
21 which Mr. Simon, in his deposition, testified that Ms.
22 Fleishman was one of the top assistants he had in connection
23 with keeping and maintaining the archives.

24 Thereafter, Your Honor, there was a sanctioned
25 hearing, as I am sure you are aware, in I believe, November

1 of 1981, at which point Mr. Kaplan produced no witnesses
2 whatsoever to support his position for sanctions.

3 Your Honor, when we appeared before you a couple
4 of weeks ago, it was my understanding and I could certainly
5 be wrong, that Mr. Kaplan certainly left me under the
6 impression that Ms. Fleishman, he had made efforts to get
7 Ms. Fleishman to testify, but she was not available. She was
8 under the witness protection program.

9 I believe in his letter sent to us in response to
10 our letter of July 28, he entered on July 29, in which he
11 suggested he had been incorrect, that we had been incorrect,
12 that was our understanding.

13 Nevertheless, Your Honor, as we stand here today,
14 as far as I know, Mr. Kaplan has taken none of the normal
15 steps which would have been taken to produce this witness.
16 He has not invoked the rule that is applicable. He has
17 not noticed her deposition. I don't believe, Your Honor,
18 at the time we appeared before the Court last time Mr. Kaplan
19 had talked to her attorney, had attempted to find her. I
20 think he felt that he could ride in on the coattails of the
21 Government and just file this affidavit, which was another
22 step, I might say, in a long procession of steps that had
23 been taken to prevent this case from coming on to trial.

24 THE COURT: Mr. Wadden, I don't have before me at
25 this precise time, although obviously there is an overlap,

1 the Defendant's Motion to Dismiss, and I intend to hear you
2 fully with respect to that. I suppose if I deny the Motion,
3 that would render academic the Motion for an Examiner.

4 MR. WADDEN: That is correct, Your Honor.

5 THE COURT: All right. Insofar as the the Motion
6 to Dismiss is inextricably tied up with your arguments, I
7 will hear you on that. But bear in mind, that I intend to
8 call that motion up immediately after this one. So, that
9 unless you, your point goes to the Motion for Examiner, I will
10 ask you to defer on the other points.

11 MR. WADDEN: Your Honor, if we might, as I have
12 respectfully pointed out to the Court, my participation in
13 this case was more or less in connection with the Fleishman
14 problem, or the Fleishman affidavit. And I think Mr. Gitner
15 is in a much better position to actually oppose the Motion to
16 Dismiss than I am, if it is all right with Your Honor.

17 THE COURT: Of course, Fleishman is perhaps the
18 heart of the Defendant's Motion to Dismiss, Mr. Wadden.

19 MR. WADDEN: Your Honor, it seems to me that we are
20 in a situation which is -- Judge, I don't want to get into
21 good, bad faith or indifferent faith of Mr. Lawler. It seems
22 to me that is for Judge Ritchie to consider. But we have a
23 situation where I am informed on information and belief, Your
24 Honor, that the Government was in possession of the testimony
25 in one form or another of Ms. Fleishman in either late

1 April or early May of this year. The Government waited until
2 July 8 to even reduce that in writing so it could be thrown
3 at us on July 11 in the form of their Motion.

4 Judge, I don't hesitate to ask you to read that
5 Motion because I know that you will see the type of Motion it
6 is. And as far as I am concerned, Your Honor, it was a
7 Motion really to do nothing but to attempt to poison Judge
8 Ritchie's mind. I have never in all my years of practice
9 seen a Motion such as the one that has been handed to you
10 with some pride by Mr. Lawler.

11 The Judge closed discovery, Your Honor. And so,
12 having closed discovery they came up with this form of
13 Motion, most of which is to produce information, not to
14 produce documents. In the process of asking to get this
15 information, they lay out their theory of the case with all
16 the details and all the inferences that they drew from it.

17 Your Honor, we are prepared in a good faith effort
18 to take the examination of Ms. Fleishman. Ordinarily, I
19 think Your Honor would agree that it would be up to Mr. Kaplan
20 to proceed to take that. In view of the facts, Your Honor,
21 that some of the persons involved in the transactions
22 described have in good faith invoked their right against
23 privilege -- and I might say, Your Honor, I think in good
24 faith in view of the matters that have gone on before and
25 are presently going on -- I think, Your Honor, in this case,

1 along with another gentleman, Mr. Lawler, and another
2 gentleman who didn't see fit to show up, so he has invited
3 Mr. Goodwin, are conducting a joint civil and criminal
4 investigation. And this is an attempt in the civil investi-
5 gation to get the defendants to come in, or get the prospec-
6 tive defendants to come in, Mr. Bourdette and the others, and
7 take a position on these documents. And no matter whether
8 they answer truthfully or not, Your Honor, they are going to
9 be indicted for perjury and that is just the position the
10 Government wants to put them in.

11 So, Your Honor, I say with all sincerity that the
12 invocation of the privilege in this case was not taken
13 lightly. And there may come a time, Your Honor, where we will
14 be in a position to fully testify on this matter, but we
15 cannot do it at this time because it is a peril to Mr.
16 Bourdette and the others.

17 Your Honor, we, as I say are prepared to go forward
18 with this deposition. We filed a notice. That seems to me,
19 basically all there is to say about it, Judge.

20 THE COURT: Thank you, Mr. Wadden.

21 MR. KAPLAN: Your Honor, the Defendants Bernstein
22 and Cushern do not oppose the Motion for appointment of an
23 Examiner. But I think that an analysis of that Motion in
24 light of the realities of the situation suggest that the
25 granting of that Motion is putting formal -- the substance

1 and the likely results in no further elimination of the
2 issues before this Court.

3 Counsel for Plaintiff, when it files its opposition
4 to our original Motion to Dismiss a couple of weeks ago --

5 THE COURT: Why is that so, Mr. Kaplan, if Ms.
6 Fleishman is served?

7 MR. KAPLAN: There are two --

8 THE COURT: And she deposes beforehand?

9 MR. KAPLAN: There are two big if's. One if is if
10 she is served.

11 THE COURT: What do we have to lose by seeing if,
12 she can be served.

13 MR. KAPLAN: We have nothing to lose by that --
14 Judge, I am saying I don't oppose the Motion.

15 THE COURT: I understand, Mr. Kaplan. What is the
16 other big if?

17 MR. KAPLAN: Well, the other big if is whether she
18 is willing to testify. And counsel for Plaintiff has told us
19 at pages 14 through 17 of their original opposition of our
20 Motion to Dismiss that there is no reason to think that Ms.
21 Fleishman would be willing to testify.

22 In fact, it would be ludicrous to think that she
23 would testify without being granted immunity in our case.
24 They told us that. They said --

25 THE COURT: Yes, but Mr. Kaplan the Court can hardly

1 look to the Plaintiff to champion and protect Ms. Fleishman's
2 rights.

3 MR. KAPLAN: Well, Your Honor, I have no objection
4 to, as I say, to the Motion. But I just want to point out
5 to the Court that I believe that this is not done with the
6 expectation that we are going to get any further evidence
7 this way through Ms. Fleishman unless with one -- with one big
8 unless -- unless the Government would be willing to immunize
9 her for her testimony given in this case, which they might
10 very well do if asked, if asked to do so by the Court. They
11 have already done that, of course, in the tax case
12 proceedings.

13 And it would be a simple matter, I would think, to
14 extend that immunity to this case.

15 And I would think that, I have reason to believe
16 with my conversation with Ms. Fleishman's lawyer a few days
17 ago, which he averted to a few days ago in chambers'
18 conference, that Ms. Fleishman would not testify unless she
19 was given that immunity. That her attorney would advise her
20 not to testify on the grounds of self-incrimination unless
21 that immunity were extended to this case, just as Plaintiff
22 correctly designed when they filed their original opposition.

23 Now, it occurs to me in thinking about this further,
24 Judge, that it might make sense from everyone's point of
25 view -- the point of view of this Court, these litigants,

1 the Government, the tax case and Ms. Fleishman -- if Ms.
2 Fleishman's deposition, perhaps videotaped in Arizona, and
3 that deposition could be used jointly in both cases, that
4 would solve the immunity problem. It would solve the problem
5 of Ms. Fleishman having to travel to Washington. It would
6 solve the problem of having, making her testify twice and
7 I think it would protect everyone's interests.

8 THE COURT: Thank you, Mr. Kaplan.

9 MR. COPE: Your Honor, I don't desire to be heard
10 further on the matter.

11 THE COURT: Mr. Johnson?

12 MR. JOHNSON: The same response, Your Honor.

13 THE COURT: Mr. Wadden, is there rebuttal?

14 MR. WADDEN: A rejoinder rather than a rebuttal,
15 Your Honor.

16 THE COURT: All right. And I would like to hear
17 Synanon's response to Mr. Kaplan's suggestion.

18 MR. WADDEN: Your Honor, it seems to me the issues
19 in the Federal case are considerably broader, of greater
20 scope, and are pointed in directions other than the limited
21 issues in this case. And I don't think, Your Honor, that we
22 should get involved in that type of deposition unless --

23 THE COURT: Could you spell that out? I fail to
24 see off hand, how in regard to the Motion here and the Motion
25 in the Government's case -- I have not read the Motion, but

1 it is being described to me -- and Mr. Lawler's representation
2 as to what the Motion seeks to accomplish and why it is being
3 filed is virtually identical to the substance of the instant
4 Motion.

5 Now, I know in regard to the litigation at large,
6 the Government's, the case in the District Court, is
7 basically different, although some of the issues are the
8 same. But with regard to our two motions, wherein do they
9 raise different subject matters?

10 MR. WADDEN: Well, Judge, they may not raise
11 different subject matters, but they raise the issue, the broad
12 issue might well be the same. But we, in this case, have to
13 answer for the failure to produce documents which are ordered
14 or have been ordered to be produced by the Court as pertains
15 to the issues in this case.

16 The issues they are raising go into various cases
17 up and down the rainbow. And they basically, if Your Honor
18 will look at that motion, they just basically make these
19 broad allegations.

20 Now, we don't want to get into a deposition in this
21 case, Your Honor, in which we are wearing two hats. The
22 Government says, well, that applies to the broad issue we
23 have here on the A,B,C case or what they did in this case,
24 or what they did in this case. And we are saying, well, wait
25 a minute. We are here only in connection with the documents

1 that are involved in the Bernstein case.

2 Secondly, Your Honor, nothing has changed since
3 you discussed this as a rather novel suggestion about two
4 weeks ago. We have somewhat, I should say, a new suggestion,
5 Your Honor, rather than novel. We have the problem of who
6 is going to pass upon the materiality and relevancy of the
7 questions that are asked. You are Judge Ritchie in connec-
8 tion with the deposition.

9 THE COURT: Under the Federal Rules and our rules,
10 if a problem arises, it is the Court in the form where the
11 depositions are being conducted.

12 MR. WADDEN: Well, -- in other words, he is going
13 to wear two hats, one for you and one for Judge Ritchie?

14 THE COURT: That is correct.

15 MR. WADDEN: Well, Judge, why can't we -- if I may
16 respectfully say to the Court -- why can't we proceed to see
17 if this lady is willing to give us a deposition under your
18 court order in connection with the issues in this case?

19 The Government, I understand, has been paying for
20 lawyers in this case. I have yet to figure out -- I have
21 made the inquiry of Mr. Lawler and I have not gotten an
22 answer. I do not understand that she is under the Witness
23 Protection Program. And I see no reason if she is a witness
24 to the truth, Judge, why she can't tell the truth in your
25 Courtroom as well as she can tell it in any other Courtroom?

1 THE COURT: Why should Synanon have the
2 opportunity to depose her in this proceeding, an opportunity
3 to depose her in the District Court proceeding, all prior to
4 the hearing? Why shouldn't it be enough if Synanon has one
5 opportunity to depose her?

6 MR. WADDEN: Judge, if you feel that you can pass
7 on this motion without the -- we came forward and asked for
8 a deposition as an officer of the Court, Judge, because Your
9 Honor said, and I think very rightfully so, Your Honor was
10 concerned with the administration of justice. And when Mr.
11 Kaplan didn't come forward as I thought I would and say,
12 "Well, we will take her deposition under 28-I," we felt an
13 obligation as officers of the Court to suggest this.

14 We don't think we need her deposition to dispose
15 of this motion. We think her declaration or whatever it
16 stands for in Federal Court, does not comply with the
17 necessary form it has to be in to be of use in this case.

18 So, Judge, if we are in a, if you are in a
19 position, of feeling we are trying to take two bites of the
20 apples, we don't want two bites.

21 THE COURT: I have not, I have not case any
22 expressions regarding motivation of intent. I am merely
23 examining the practical effects. And I realize that, and
24 as I reflect when we get to the motion, I have great
25 difficulty -- I have told Mr. Kaplan this before in the,

1 stages conferences in this case -- I have a great deal of
2 difficulty with a proposition that I should dismiss on the
3 basis of a declaration, without the party making the
4 declaration being cross examined. But we will get to that
5 in due course. Do you have any other remarks that you wish
6 to make, Mr. Wadden?

7 MR. WADDEN: I have some others but I don't think
8 they would be appropriate, Judge.

9 THE COURT: All right. Mr. Lawler?

10 Mr. Lawler, the case before, the case in the
11 District Court is a civil case; is it not?

12 MR. LAWLER: Yes, Your Honor.

13 THE COURT: And I would presume that subject to the
14 declaration of the Court, the right to pursue a deposition
15 of a perspective witness is fully enjoined just as it over
16 here. Indeed, our rules are shaped on the Federal rules.

17 MR. LAWLER: Indeed, Your Honor. But if I might
18 state, it is my anticipation that we would object to any
19 deposition of Bette Fleishman.

20 THE COURT: And could you help me on that?

21 MR. LAWLER: Yes, Your Honor. In the event -- this
22 has come up in one other instance that Synanon wished to
23 take. We objected to that as well. Judge Ritchie allowed it.
24 Limiting it in certain ways, particularly with respect to the
25 time limitations. That particular time, Judge Ritchie asked

1 the parties -- and this is my recollection of that hearing --
2 whether or not we wanted him to preside over that
3 deposition.

4 To the extent that Judge Ritchie, to the extent that
5 Synanon would request a deposition from Judge Ritchie of
6 Ms. Fleishman, we would oppose it. However, in the event
7 he was inclined to allow it, we would seek a certain
8 protective order as we would then deem to be appropriate
9 under the circumstances.

10 And, again, I wish the Court to understand I am
11 dealing without having the benefit of Synanon's reply to
12 my Motion.

13 THE COURT: I understand that.

14 MR. LAWLER: I am not indicating to the Court what
15 in fact, I will do. I will simply have to judge the
16 circumstances as they may turn out to be. But it is my
17 expectation that I would object to any deposition of Ms.
18 Fleishman for reasons I would far rather, with all due
19 respect to this Court, articulate to Judge Ritchie at that
20 particular time.

21 I am mindful of what I will call the problem that
22 confront this Court with respect to Ms. Fleishman, but I
23 believe my duty is to serve the best interests of the United
24 States in the tax case.

25 We would certainly oppose any joint deposition of

1 Ms. Fleishman. It would be our expectation that if Synanon
2 properly raises a question of facts, there will be
3 substantial questions of credibility, and we would far rather
4 have Judge Ritchie in person, to judge Ms. Fleishman's
5 credibility as opposed to those that Synanon, those witnesses
6 that Synanon might produce.

7 THE COURT: Mr. Wadden?

8 MR. WADDEN: Judge, this is the whole problem with
9 dealing with Mr. Lawler and that part of the Justice
10 Department. They want special handling. They want Judge
11 Ritchie to be present. They didn't say one word to Judge
12 Ritchie about this, Ms. Fleishman in April, when they were
13 up here discussing more discovery, and there was an
14 extensive little conversation which took place between the
15 Judge and the Government and everybody else. Not one word
16 did they say when we said we wanted to take the deposition
17 of this agent. They sat quiet, although I believe at that
18 time, they knew of the existence of Ms. Fleishman.

19 They wait until now, and they say, "If we are
20 going to get to the truth, by God, we are going to get it
21 with Judge Ritchie sitting up there playing policeman."

22 Either this witness is a witness to the truth in
23 this Courtroom or this witness has no need to be in this
24 proceeding at all. And I have not heard one thing that
25 suggests that this witness can't be produced to testify on

1 the issues in this case truthfully without the benefits of
2 any guidance from the Government.

3 And, Your Honor, if you do see fit to order this
4 deposition be taken, I hope the Government counsel under-
5 stands that you don't expect him to interfere in any way
6 whatsoever with this lady giving testimony.

7 THE COURT: Mr. Wadden, are you able to tell us
8 whether in the filing tomorrow will seek the deposition of
9 Ms. Fleishman?

10 MR. WADDEN: Judge, I have to talk to my brains
11 here, if you will excuse me a moment?

12 THE COURT: All right.

13 MR. LAWLER: Shall I be seated, Your Honor?

14 THE COURT: Yes, you may, Mr. Lawler.

15 (Pause.)

16 MR. WADDEN: Judge, I guess I am supposed to stand
17 up here and tell you we are asking for it. I was, they
18 are drawing the papers and I am not, so they say that they
19 are asking for it.

20 One thing I don't think, Judge, has been made clear
21 to you at that point. Is at the time that they went out
22 and used the immunity statutes to secure the testimony of
23 Ms. Fleishman, the Judge had already closed discovery down.
24 That is why you have this --

25 THE COURT: It was stayed, as I understand it,

1 pending disposition of the cross motions for summary
2 judgment.

3 MR. WADDEN: Yes. And so they went and what they
4 did, Judge -- let's look at it -- they went out, and they
5 took the immunity statutes. They went to the Chief Judge,
6 they got immunity and they compelled testimony, if that is
7 what you want to call it, while discovery was stayed, which
8 does not sound to me like cricket, Judge.

9 THE COURT: Thank you, Mr. Wadden.

10 MR. LAWLER: May I be heard on that point, Your
11 Honor?

12 THE COURT: Yes, Mr. Lawler.

13 MR. LAWLER: Of course, we will be fully prepared
14 to address those issues before Judge Ritchie at the
15 appropriate time. I don't wish to leave this Court with any
16 notion that the Government acted improperly in any way, but
17 those matters I am simply not going to address here. I don't
18 think they are relevant to the issues before this Court.

19 However, as the need arises, they will be
20 addressed before Judge Ritchie.

21 THE COURT: I dare say they will have to be.

22 MR. LAWLER: I understand that, Your Honor.

23 THE COURT: Fleishman's declaration is obviously
24 central to the pending motion before this Court. I have a
25 motion filed by our plaintiff under Rule 28 which seeks to

1 take the deposition of Ms. Fleishman. There is no opposition
2 to that motion and the Court is of the view that the Motion
3 is well taken. The deposition should be permitted. However,
4 the terms and circumstances for the taking of that Motion
5 [sic] are matters --

6 MR. KAPLAN: Deposition.

7 THE COURT: -- are matters that the Court must
8 interest itself in.

9 MR. KAPLAN: Does Your Honor mean deposition?

10 THE COURT: I meant deposition. What did I say?

11 MR. KAPLAN: Motion.

12 THE COURT: I meant the deposition. The Court
13 must interest itself in the terms and conditions of the
14 deposition. The Court has that power under the Rules, and
15 can frame and shape its Order, in order to see that justice
16 is done. The Court is of the view that successive
17 depositions would not serve in the interests of justice.

18 Scanning the Government's Motion and the supporting
19 memorandum, I see that there is a Table of Contents. And
20 looking at the various parts of the Table of Contents, those
21 dealing with the facts as distinguished from the legal
22 presentation, I fail to see any subject matter or division
23 of subject matter that has not been the subject of discovery
24 in this case and the subject of briefings in this case.

25 The court, accordingly, is of the view that while

1 it wishes to state clearly and unequivocally that it will
2 grant the Motion, in issuing its order, the Court wishes to
3 have the benefit of how Judge Ritchie will treat the
4 deposition which will be sought in that case. It may be
5 that a joint deposition is not feasible, although that is
6 not, is not clear to me at the present time. But our
7 defendants have, up to this point, indicated to the Court,
8 that they would be willing to have the Motion decided by
9 the testimony taken of Ms. Fleishman in the District Court.

10 I am not sure that I am entirely satisfied with
11 that. I mention only to indicate that there are various
12 factors around which the Court can shape the taking of
13 Ms. Fleishman's deposition.

14 If, for any reason, Ms. Fleishman's deposition is
15 not taken in that Court, I want the record to show that as
16 the matter now stands before this Court, I propose to permit
17 the deposition to go forward, unless the Defendant's Motion
18 is withdrawn.

19 While that Motion is before the Court, I remain
20 profoundly concerned about the integrity of these, of this
21 proceeding. And I am not inclined, subject to hearing
22 argument on the Motion to Dismiss, to invoke that drastic
23 sanction on the declaration, or the declaration that has
24 been filed here.

25 Having enunciated my position, and having stated

1 that I will grant the motion, I will defer framing the Order,
2 at least for some period of time, until the dust settles in
3 the District Court.

4 Mr. Wadden?

5 MR. WADDEN: Your Honor, I understand and
6 appreciate everything the Court has said. One of our con-
7 cerns, of course, Your Honor, is not to lose a trial date we
8 have with this Court if the Court --

9 THE COURT: That is why I conducted the pretrial
10 hearings.

11 MR. WADDEN: -- orders us to trial. Judge, you
12 may not be able to do that at this time but you do have
13 some general framework in which, you know, you know the
14 District Court as well as I do, Judge, this may drift on
15 over until October or November.

16 THE COURT: I don't know that -- I have been
17 impressed by the fact that Judge Ritchie, insofar as I have
18 to view the manner in which he handles cases, is quite
19 expeditious.

20 MR. WADDEN: Does Your Honor have any general
21 time that we are going to wait for that Court to act? Or
22 does Your Honor want to take another look at it, say, a week
23 from now?

24 THE COURT: I don't want to draw any hard and fast
25 time parameters, Mr. Wadden. I don't intend to defer this

1 matter in an open-ended way and for the indefinite future.
2 I want to see how things unfold. I want to give myself
3 maximum flexibility, and I have every reason to believe that
4 the matter will be handled expeditiously in that Court.

5 And, Mr. Lawler, I trust that the Government is
6 going to handle the matter expeditiously.

7 MR. LAWLER: As best we can, Your Honor. I can
8 only impress upon this Court the fact that we don't what the
9 nature of the animal we are dealing with, and we won't know
10 that until tomorrow.

11 THE COURT: I understand that. But within -- taking
12 those matters into consideration, when the Government
13 decides what is the best response, I would expect the
14 Government to proceed promptly and expeditiously.

15 MR. LAWLER: To the extent, that is possible, we
16 certainly would attempt to do that, Your Honor. We intended
17 to do that.

18 MR. WADDEN: My only point, Your Honor, was we
19 do want the Court to realize we do have the trial date in
20 mind, and we hope we are not going to lose the trial date.

21 THE COURT: You have made that clear to the Court,
22 Mr. Wadden. If there is nothing further, the Court will
23 excuse Mr. Lawler.

24 MR. KAPLAN: Just one thing, Your Honor. Your
25 Honor, in connection with the motion that we are just

1 finishing up with, I would respectfully suggest and
2 request of the Court that in connection with framing the
3 order for the taking of Ms. Fleishman's deposition and in
4 communicating with Judge Ritchie concerning the scheduling
5 of proceedings in this case, that in order for the
6 deposition, the scheduled deposition of Ms. Fleishman not to
7 be an exercise in futility, it would seem to be essential for
8 her to receive immunity, and Judge Ritchie is in a position
9 to do that.

10 Judge Ritchie is in a position to grant immunity
11 that would extend to this case and the Government is in a
12 position, if it wishes to, to request that of Judge Ritchie.
13 So, I would respectfully ask the Court to request either the
14 Government or Judge Ritchie to confer that immunity so that
15 we could accomplish something by that deposition.

16 THE COURT: Mr. Lawler?

17 MR. LAWLER: Your Honor, I am a civil lawyer and
18 most unschooled in immunity matters. I know of no instance
19 when, at least the tax division of the Justice Department
20 granted immunity in a tax case involving two private civil
21 litigants. I cannot see how that can be done. But I speak
22 from an abundance of inexperience. I just cannot imagine
23 it could be accomplished and I am certainly am not prepared
24 to address that question.

25 THE COURT: Well, I will state at the present time

1 that the Motion which has been filed, the main Motion, that
2 is, does it seems to me, go to the heart of the integrity,
3 of any litigation, and it is something that should be
4 thoroughly ventilated. And it seems to me that it would be
5 a miscarriage for anyone, much less the Government to withhold
6 any measures that would assist the Court in ultimately
7 reaching a fair and just conclusion.

8 Now, I know the Government has this litigation, and
9 that is its first allegiance. But I don't think that the
10 matter which interests this Court is, in substance, basically
11 different than the matter which interests the District Court.
12 And I would hope that there would be an enlightened
13 consideration of this matter to the end that justice may be
14 promoted.

15 I would also hope that -- and I will ask the
16 reporter to transcribe this portion of the proceedings so
17 that it can be available in the event that Judge Ritchie
18 wishes to inform himself as to what transpired this
19 afternoon.

20 MR. LAWLER: I appreciate that, Your Honor. If I
21 may express a concern to this Court expressed to me by
22 Ms. Fleishman? And it is exactly that as a result of
23 cooperation with the United States, she would be dragged into
24 other civil litigation.

25 Now, I fully understand the problems confronting

1 this Court, but I merely wish the Court, with all due
2 respect, to have some understanding of the peculiar position
3 we find ourselves in with respect to dealing with Ms.
4 Fleishman.

5 THE COURT: That is why, Mr. Lawler -- if I may
6 interject, I don't want Ms. Fleishman, if I can avoid it, to
7 have to run a gauntlet.

8 MR. LAWLER: I appreciate that, Your Honor.

9 THE COURT: Of successive examinations.

10 MR. LAWLER: I appreciate that fact. I do believe,
11 as I perceive the issues before this Court and Mr. Kaplan's
12 and Judge Ritchie and our Motion, I do believe they are
13 different. I do believe they are different.

14 THE COURT: How so?

15 MR. LAWLER: As I understand what is involved --

16 THE COURT: Factually, I mean, from the standpoint
17 of examining a witness.

18 MR. LAWLER: I understand that, Your Honor. The
19 difference that I see is that there is an allegation here
20 that documents subpoenaed before this Court had been
21 destroyed, altered or hidden. The allegations of the
22 Government before Judge Ritchie are far broader, pertaining
23 to a number of, of different lawsuits, at least those law-
24 suits that we articulate in our Motion.

25 So, I am suggesting to this Court that the issues

1 before the Court, the Federal District Court in our case,
2 are somewhat broader than those issues are here.

3 THE COURT: But the material that was assertedly
4 withheld, concealed, and/or destroyed, was it not the same
5 material? That is the material going to allegedly the
6 violence, and the material going to financial aggrandizement.

7 MR. LAWLER: Your Honor, it is our allegation in
8 Federal District Court that these materials were, in fact,
9 destroyed, hidden, or otherwise not produced.

10 Please understand that I had enough to deal with
11 Judge Ritchie's Court to know exactly what it is that
12 allegedly was withheld here. But, as I perceive the issues,
13 we are involved in a broader inquiry than is before this
14 Court.

15 THE COURT: If we distinguish, if we look at the
16 matter from the standpoint of Ms. Fleishman and what
17 questions will be addressed to her and what precise manner,
18 is there a difference between the examination that would
19 take place here and the examination that would take place
20 in the District Court?

21 MR. LAWLER: With all due respect, Your Honor,
22 I believe that documents were destroyed in other litigation:
23 The ABC litigation, for example, a litigation involving
24 Attorney Morantz. This, I might add, is contained in our
25 pending motion. So, the inquiry would extend into those

1 other lawsuits.

2 THE COURT: Is it the same material?

3 MR. LAWLER: I suffer from having a lack of
4 understanding what it is that was allegedly to have been
5 destroyed.

6 THE COURT: Well, the incident that you have
7 recited in your table of contents, were they the stuff out
8 of which the so-called violence issue is made?

9 MR. LAWLER: I understand, Your Honor.

10 THE COURT: Well, in any event, is there anything
11 further, Mr. Lawler?

12 MR. LAWLER: No, Your Honor.

13 MR. KAPLAN: Your Honor, before we let Mr. Lawler
14 go, one of the arguments that has just been made by
15 Synanon in its Motion to Strike the Fleishman Affidavit is
16 a question raised as to whether in fact, it is the affidavit
17 of Ms. Fleishman. I think that Mr. Lawler can shed some
18 light on that.

19 THE COURT: Mr. Lawler?

20 MR. LAWLER: I believe that the affidavit we filed
21 in Federal District Court, a copy of which apparently Mr.
22 Kaplan has, is Ms. Fleishman's affidavit.

23 THE COURT: Were you personally involved?

24 MR. LAWLER: I did not. I was not there when she
25 signed it. However, I was involved in the content of that

1 particular affidavit, yes.

2 THE COURT: In other words, the interviews based
3 upon which the declaration was reduced to writing? The
4 declaration is a writing which reflects the interviews which
5 you attended?

6 MR. LAWLER: Your Honor, if I may --

7 THE COURT: I am merely asking you is that what
8 you were trying to say to the Court?

9 MR. LAWLER: Yes, Your Honor. I hope Your Honor
10 has some understanding of the fact that I am a bit reluctant
11 to get into the merits of what is pending before Judge
12 Ritchie absent --

13 THE COURT: I understand that.

14 MR. LAWLER: And I am attempting to convey that
15 to the Court to the extent that I can.

16 THE COURT: Thank you, Mr. Lawler. You are
17 excused.

18 MR. LAWLER: Thank you, Your Honor.

19 May I have one inquiry for the Court?

20 THE COURT: Yes.

21 MR. LAWLER: When will a transcript of these
22 proceedings be available?

23 THE COURT: I assume that counsel will wish copies
24 also?

25 MR. KAPLAN: Yes, Your Honor.

1 THE COURT: Mr. Wadden?
2 MR. WADDEN: Yes, Your Honor.
3 THE COURT: And Mr. Kaplan?
4 MR. KAPLAN: Yes, Your Honor.
5 THE COURT: Mr. Cope?
6 MR. COPE: Yes, Your Honor.
7 THE COURT: Mr. Johnson?
8 MR. JOHNSON: Yes, Your Honor.
9 THE COURT: Ms. Mack?
10 THE COURT REPORTER: How soon do you want it?
11 THE COURT: Well, as soon as possible. Gentlemen,
12 do you want it on a daily copy basis?
13 MR. KAPLAN: That is fine, Your Honor.
14 THE COURT: On a daily copy basis?
15 THE COURT REPORTER: Yes, Your Honor.
16 THE COURT: Thank you, Mr. Lawler.
17 MR. LAWLER: Thank you, Your Honor.
18 MR. WADDEN: Your Honor, there is one thing, if
19 I may address the Court, Your Honor? It seems to me that
20 the issue in this case, is whether the documents, the absence
21 of which are subject to this complaint were in existence on
22 the day they were called for by the Court; not whether they
23 were destroyed before or how they were destroyed or whether
24 they were in existence at the time they came under the
25 Court's process.

1 Also, Your Honor, in connection with, as I
2 understand it, the case for --

3 THE COURT: That comes, that deals with the Motion
4 to Dismiss, as I understand it, Mr. Wadden. That was a
5 Motion for an Examination.

6 MR. WADDEN: If we took her deposition, we would
7 be going to those documents and that material which was
8 not produced before Your Honor and depositions for an
9 explanation for her statements about it. We would not be
10 ranging all over the field about what happened in 1979, what
11 happened in 1980, what happened in 1981, what happened in
12 1976. We would have a limited focus of the questions that
13 would be asked her, and that is what we have addressed --

14 THE COURT: It is Mr. Kaplan's position, if I
15 understand it correctly, that there were outstanding
16 discovery questions emanating from this case, when according
17 to the Fleishman declaration, the program to destroy and
18 conceal took place. So, the materials may have desired, may
19 have been called for in multiple cases, but if I understand
20 it, one of those cases was this case. Am I correct; Mr.
21 Kaplan?

22 MR. KAPLAN: Essentially, yes, Your Honor. Ms.
23 Fleishman tells us that she became involved in the program
24 of destroying and concealing evidence in February, 1980, and
25 that that lasted for approximately six months, until August

1 of 1980.

2 During that period from between February and
3 August, 1980, there was an abundant discovery in this case.
4 Specifically, in March at the end of March, 1980, we filed
5 our first request for production of documents in which we
6 requested hundreds of tapes; and the answer we got a month
7 later, the response, saying most of it can't be found.

8 THE COURT: All right. So much for the Motion for
9 Examiner. As I have stated, I will defer framing of the Order
10 until the circumstances clarify themselves.

11 It would appear to me that Mr. Kaplan, Mr. Cope and
12 Mr. Johnson, clearly I am not able to consider granting the
13 Motion at this time. The disposition of this Motion will be
14 dependent upon a number of things, and one of those may well
15 be the Fleishman Deposition, assuming that she can be served
16 and the deposition can be had. So, is there any objection
17 to the Court deferring that Motion?

18 MR. JOHNSON: Your Honor -- excuse me, Mr. Kaplan.

19 MR. KAPLAN: Your Honor, I would not object to
20 that. It would seem logical.

21 THE COURT: It would seem that there are some
22 matters that are, that were raised in the recent filing.
23 That is yesterday's filing that go to the sufficiency issue
24 of the Fleishman declaration on its face which the Court
25 might hear. But that was served yesterday and I don't know

1 whether the Defendants are prepared to go forward on that.

2 MR. KAPLAN: We are prepared.

3 THE COURT: All right. Mr. Johnson?

4 MR. JOHNSON: Your Honor, just briefly.

5 Your Honor, clearly we have absolutely no
6 objection to and see the great need for the Fleishman
7 deposition, going forward. Our concern, of course, is that
8 will happen is what has been speculated upon. And that is,
9 without a grant of immunity, Ms. Fleishman will decline to
10 testify with respect to these items. Then we are left where,
11 essentially, we are today.

12 My client's position, Your Honor, is this: That
13 dismissal under Rule 37 is not, and indeed in the many cases
14 where it has been ordered previously under similar
15 circumstances is not dependent on the veracity or degree of
16 veracity of the Fleishman affidavits.

17 Dismissal under Rule 37 is, arises when the parties
18 in the case, the defendants have need for information which
19 is derived of them --

20 THE COURT: Mr. Johnson, I must interrupt you, I
21 don't believe that the main motion of Mr. Kaplan purports to
22 travel under Rule 37.

23 MR. KAPLAN: It does, Your Honor. If I understand
24 it, what it does is it involves the power of the Court to
25 protect itself against obstruction.

1 MR. JOHNSON: May I respond to that, Your Honor?

2 THE COURT: Yes.

3 MR. JOHNSON: There are two issues raised by the
4 Fleishman affidavit, if I may say so. One is the information
5 issue. That is what we, the defendants, are entitled to in
6 present our defenses in this case. The other is the fraud
7 on the Court issue. Has there been a perversion of the
8 processes which would invoke dismissal because of that fact?

9 What I am speaking to is the first issue. There is
10 information which has allegedly been destroyed that is vital
11 to the presentation of our defenses relating to violence,
12 relating to self-aggrandizement, relating to the specific
13 tapes with regard to the Boston House.

14 THE COURT: Was there an order outstanding that
15 required protection, Mr. Kaplan?

16 MR. KAPLAN: Your Honor, the order, the May 1981
17 order of Judge Fauntleroy required the defendants, required
18 the plaintiffs, rather -- excuse me -- to produce all of the
19 tapes which we had requested in our original March, 1981
20 request for production of documents in excess of 200 or 300
21 tapes. Those tapes --

22 THE COURT: Was that the order that was vacated
23 subsequently?

24 MR. KAPLAN: Yes, that order was subsequently
25 vacated in May, 1981, in the spring of 1981 by Judge

1 Fauntleroy based upon what now appears to have been the
2 perjured testimony of Mr. Simon, and which Mr. Simon got on
3 the witness stand and testified at great length that nothing
4 had ever been erased, nothing destroyed, nothing concealed.
5 And based on that testimony, Judge --

6 THE COURT: Now, you get into the Hazel-Atlas
7 Fraud (punc.) In other words, the theory is that a fraud
8 was perpetrated upon the Court and the Court, having been
9 taken in by the fraud, vacated the order?

10 MR. KAPLAN: Yes, Your Honor. May I just respond
11 to the Court's statement a moment ago, that we weren't
12 proceeding under Rule 37. In part, we proceeding under
13 Rule 37, and I say that for this reason. Rule 37-A provides
14 that a false or evasive answer to an interrogatory is the
15 equivalent to not answering at all. Rule 37-D provides that
16 in the event of violation of Court Order or in the event of
17 a failure of a party to answer interrogatories, the sanctions
18 of Rule 37 --

19 THE COURT: Do you have any cases that say that
20 an evasive answer triggers the sanction of dismissal? In
21 any event, gentlemen, it seems to me that the colloquy is
22 an exercise in futility.

23 Mr. Johnson. You inadvertently took the
24 lectern, Mr. Kaplan.

25 MR. JOHNSON: How in the world can I agree with

1 your position without crediting Fleishman?

2 MR. JOHNSON: That is what I was trying to explain,
3 Your Honor.

4 THE COURT: All right, go ahead.

5 MR. JOHNSON: The order that I am talking about --
6 I am not diminishing or disagreeing with Mr. Kaplan's
7 argument -- is that there is an order from this Court that
8 issued just several weeks ago requiring Synanon officials to
9 respond to depositions with respect to the Fleishman
10 affidavit.

11 The response to that from counsel was that all
12 of the individuals who were asserting their Fifth Amendment
13 privilege, that is information which was required to be
14 presented to this Court, which the individuals are asserting
15 their Fifth Amendment privileges on, which they are
16 entitled to do so, there are consequences, however, that
17 flow from that. And I want to impress upon the Court that
18 every State Court decision, every state that has addressed
19 this issue in a situation where relevant and material
20 information is declined to be provided by plaintiffs in a
21 civil case which is relevant to the defense of a defendant,
22 where they do that on the Fifth Amendment privilege, there
23 is dismissal. Every case.

24 THE COURT: Mr. Johnson, I am familiar with those
25 cases, and I don't believe that they are opposites for this

1 reason: Those cases deal with refusal avunucio to produce
2 discovery on the invocation of a privilege, usually the
3 Fifth Amendment.

4 In this case, materials had been produced. The
5 defendant's position is that not all of them had been
6 produced but that begs the argument in the sense that it
7 rests upon Fleishman.

8 Now, it is true that there was an invocation of
9 the privilege, but the invocation of that privilege didn't
10 withhold documents, if the plaintiffs are right. If the
11 plaintiff is right, the plaintiff produced all the documents.
12 It is Fleishman that has the sting.

13 What the plaintiff's agents have done is to invoke
14 the privilege in regards to responding to Fleishman, but
15 that has not been with regard to basic discovery. That has
16 been with regard to the inquiry to ascertain whether there
17 has been a basic withholding in discovery.

18 So, I don't see those cases as being opposite to
19 what I have before me. I don't think there is any way that
20 I can get to the root of the problem, and I don't see that
21 there is any way that I can get to the line of cases that
22 you are talking about without Fleishman, without crediting
23 Fleishman.

24 MR. JOHNSON: Your Honor, the Court has made up
25 its mind on that matter, and I just wanted to leave one

1 thought. The information that was sought pursuant to the
2 Court's order of a couple of weeks ago was with regard to
3 whether or not there was a destruction of this evidence. The
4 individuals asserted their Fifth Amendment privilege. That
5 information, whether or not there was a destruction, is
6 relevant to and can be used by the defendant in the case
7 before us, and inferences can be drawn from the jury, and I
8 think there is many cases to that effect.

9 Now, the fact that they have declined to provide
10 us with that information -- I am not talking about documents.
11 I am talking about that information -- is a delineation under
12 the Fifth Amendment, which brings us pursuant to the Court
13 order, which brings us right into the cases that I am
14 talking about. And that is my concern right now. I think
15 we are there with respect to that.

16 I agree that getting to the bottom of the Fleishman
17 affidavit is --

18 THE COURT: You are talking about obstructing the
19 defendants from creating an inference or presenting an
20 inference to the jury which the jury may or may, may or may
21 not draw. It is up to the jury.

22 MR. JOHNSON: They always may or may not draw it,
23 yes.

24 THE COURT: Yes.

25 MR. JOHNSON: But it is a piece of evidence that is

1 important to us. That is --

2 THE COURT: It is, it seems to me to be a fragile
3 reed to hang a dismissal on where an issue is involved where
4 the matter involved is, I think, peripheral. I am not sure
5 that the jury can't know that the Fifth Amendment has been
6 invoked.

7 MR. JOHNSON: We will probably have to deal with
8 that question.

9 THE COURT: Right. And the jury, query whether
10 the jury can draw any inferences out of that. But I am not
11 to dismiss this case on the basis of that circumstance,
12 Mr. Johnson. If I find that there has been destruction of
13 documents, the plaintiff is going to have to do a lot of
14 arguing to persuade me to withhold that sanction. I am not
15 saying that the plaintiff won't be successful but my
16 disposition will be to give that very, very serious
17 consideration.

18 MR. JOHNSON: We believe, Your Honor, that --

19 THE COURT: Yes, I am not going to dismiss the
20 cases on that basis, Mr. Johnson.

21 MR. JOHNSON: I understand that.

22 THE COURT: Mr. Kaplan, you want to take a crack at
23 it, too?

24 MR. KAPLAN: Your Honor, I would like to, I would
25 like to do this. I suggested a few moments ago that in view

1 of Your Honor's inclination to attempt to get the
2 deposition of Bette Fleishman, that perhaps it was premature
3 to argue the Motion to Dismiss this afternoon. And other
4 things being equal, that would certainly, that would
5 certainly seem logical. But other things are not equal.

6 And one of the things that is not equal is we have
7 a trial date just about one month from now. And as we get
8 closer to that trial date, we are going to be, everyone is
9 going to be, perhaps even the Court is going to be just by
10 the momentum of the thing, locked into the motion of there
11 having to have to be a trial.

12 We are also not going to be very likely, not in my
13 view, not going to be successful in trying to get the
14 deposition of Ms. Fleishman either because she won't be found
15 or because she won't testify --

16 THE COURT: Then I am going to have to decide what
17 to do in those circumstances. But, Mr. Kaplan, if you are
18 pressing the Court for a ruling on the motion now, I am
19 ready to deny it. If that is the alternative that's placed
20 before me, I will deny the motion straightaway based upon
21 the Fleishman declaration.

22 MR. KAPLAN: Your Honor, I am not, I am certainly
23 not going to place before you the alternative of waiting or
24 definitively passing upon and, therefore, denying the motion.
25 If those are the only alternatives which the Court is willing

1 to consider then, of course, I have nothing further to
2 say at this time.

3 But, if the Court would consider another
4 alternative which is the granting of the Motion at this time,
5 I would like to have an opportunity to try to persuade the
6 Court why that alternative is appropriate at this stage.

7 THE COURT: I assume that that is the alternative
8 that is described in your reply memorandum?

9 MR. KAPLAN: Yes, sir.

10 THE COURT: I am not persuaded by that, Mr. Kaplan.
11 I don't think that you can treat the declaration as
12 evidence. I am not going to treat it as evidence. I think
13 there has got to be cross examination. And before that
14 occurs, I don't believe this rises to the dignity of a,
15 of an evidentiary predicate for the invocation of the drastic
16 remedy of dismissal.

17 As I mentioned before, I view the Fleishman
18 declaration and the Motion as in the nature of newly
19 discovered evidence. And in the sense that Judge Fauntleroy
20 made a disposition, a ruling, now we have come in, and you
21 have come in proffering new evidence.

22 Now, it seems to me axiomatic that the party who
23 has gained the favorable ruling has a right to test the
24 proffered new evidence. And I intend to give the plaintiff
25 that opportunity before I bring down the curtain on this

1 case.

2

3 MR. KAPLAN: Very well.

4 THE COURT: Mr. Cope?

5 MR. COPE: Your Honor, if I may be heard to just
6 simply say that I totally concur in the Court's suggestion
7 that we defer argument on the Motion to Dismiss. And I do
8 so after having spent three days with the Court in the
9 pretrial and am confident that the figure that perhaps Mr.
10 Kaplan alluded to, that it simply would get lost in the
11 shuffle, will not be allowed to occur.

12 And based upon my understanding that the Court
13 plans to monitor the amount of time that we would devote to
14 trying to work out something with Judge Ritchie, that is
15 certainly fine with us, Your Honor.

16 THE COURT: Very well. On the Plaintiff's Motion
17 to Strike which was filed yesterday, which I stated was
18 really in substance a supplemental opposition to the original
19 opposition, I don't know whether based upon the Court's
20 remarks -- Mr. Gitner, are you taking this motion?

21 MR. GITNER: Yes, sir.

22 THE COURT: Whether based upon the Court's remarks
23 as to the importance of having something more than the
24 declaration, whether the motion is viable or whether you wish
25 to present it at the present time.

1 MR. GITNER: I don't think there is any need, Your
2 Honor. I will make only one observation that was raised
3 at our motion. And it seems that in this proceeding, there
4 has been occasion when, if something is said enough times,
5 either the parties themselves start to believe it, or the
6 record is so muddled that it seems to become a fact. And
7 that is the point that Judge Fauntleroy never ever ruled, as
8 Mr. Kaplan keeps saying it did.

9 Judge Fauntleroy never ruled that Synanon failed
10 to refuse to respond to discovery. If one looks at the
11 transcript of Judge Fauntleroy's initial hearings on April --

12 THE COURT: I know the point you are making. Your
13 point is that the order was, did it not accurately reflect --

14 MR. GITNER: Correct, Your Honor.

15 THE COURT: What was said. I am adverting to that,
16 Mr. Gitner.

17 MR. GITNER: Thank you, Your Honor.

18 THE COURT: Mr. Kaplan?

19 MR. KAPLAN: Your Honor, may I just clarify? Am
20 I correct in now understanding that the Court is going to
21 communicate with Judge Ritchie to determine what future --

22 THE COURT: I intended to send a written
23 communication to Judge Ritchie which would seek edification
24 on procedural aspects and the timing aspects. It would not
25 go to substance.

1 MR. WADDEN: That is agreeable with us, Your Honor.

2 THE COURT: Bernstein and Cushern have filed a
3 motion for additional discovery.

4 MR. GITNER: Your Honor --

5 THE COURT: Yes?

6 MR. GITNER: Before we respond --

7 THE COURT: Do you wish to, are you going to speak
8 to that motion?

9 MR. GITNER: The only thing I was going to ask
10 Your Honor, in light of everything else that occurred, if
11 we be allowed to have five minutes, to have a recess to
12 discuss our response to that motion?

13 THE COURT: Yes, I think that is appropriate.

14 MR. GITNER: Thank you, Your Honor.

15 THE COURT: We will stand in fifteen minute recess.

16 (Thereupon, a brief recess was taken.)

17 (Thereupon, other proceedings were had which were
18 taken, but are not transcribed herein.)

19 (Thereupon, the proceedings in the above-entitled
20 action were concluded for the day at approximately 4:30 p.m.)
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CERTIFICATE OF REPORTER

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3 I, Brenda Mack, an Official Court Reporter for the
4 Superior Court of the District of Columbia, do hereby certify
5 that I reported, by machine shorthand, in my official capacity,
6 the proceedings had and testimony adduced, upon the hearing
7 in the case of SYNANON FOUNDATION, INC. v. STUART BERNSTEIN,
8 ET AL, Civil Action No. 7189-78, in said Court, on the
9 10th day of August, 1983.

10 I further certify that the foregoing 53 pages
11 constitute the official transcript of excerpt of said
12 proceedings, as taken from my machine shorthand notes.

13 In witness whereof, I have hereto subscribed my
14 name, this the 12th day of August, 1983.

15 Brenda Mack
16 Official Court Reporter
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