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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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|-------------------------|------------------------------|
| CARL OLSEN, | * Case No. CVCV066477 |
| | * |
| Petitioner, | * |
| vs. | * TRANSCRIPT OF PROCEEDINGS- |
| | * PETITION FOR JUDICIAL |
| | * REVIEW-ORAL ARGUMENT |
| | * |
| IOWA DEPARTMENT OF | * |
| INSPECTIONS, APPEALS, | * |
| AND LICENSING; | * |
| IOWA BOARD OF PHARMACY, | * |
| | * |
| Respondents. | * Friday, September 13, 2024 |

The above-captioned matter convened for hearing before the Honorable Lawrence P. McLellan, District Judge of the Fifth Judicial District of Iowa, at 8:59 a.m., on September 13, 2024, at the Polk County Historic Courthouse, courtroom 220, Des Moines, Iowa.

A P P E A R A N C E S

| | |
|--------------------|---|
| Pro Se Petitioner: | CARL OLSEN 130 E. Aurora Avenue Des Moines, IA 50313 |
| For Respondent: | KEVIN PROTZMANN Assistant Attorney General Agency Counsel Division Iowa Department of Justice 1305 E. Walnut Street Des Moines, IA 50319 |

JULIE A. MOON, CSR, RPR
Official Court Reporter
Des Moines, Iowa
Julie.Moon@iowacourts.gov

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I N D E X

WITNESSES

PAGE

(No witnesses were called.)

E X H I B I T S

(No exhibits were offered.)

P R O C E E D I N G S

1
2 (The proceedings convened at 8:59 a.m.,
3 on September 13, 2024, with the Court, counsel, and
4 petitioner present.)

5 THE COURT: Let the record reflect we're
6 here in the matter of Carl Olsen versus the Iowa
7 Department of Inspections, Appeals, and Licensing and,
8 as I understand it, the Iowa Board of Pharmacy. The
9 case number is CVCV066477. This is a petition for
10 judicial review based upon a petition that Mr. Olsen
11 filed with the respondent.

12 So I've read everything that everybody has
13 filed. As I understand, Mr. Olsen -- I just want to
14 make sure I understand exactly what you're asking for.

15 So in your petition before the Department,
16 you requested that they adopt some administrative rules
17 relating to the religious exception under the Uniform
18 Controlled Substances Act; correct?

19 MR. OLSEN: Correct.

20 THE COURT: And then you had a second
21 request that they then -- that the respondent in this
22 case, the Agency, propose legislation related to that
23 same issue. Correct?

24 MR. OLSEN: Sort of. I said that they had
25 options --

1 THE COURT: Okay.

2 MR. OLSEN: -- and that was one of them.

3 THE COURT: Okay. And then as I understand,
4 the Board issued a ruling, and they indicated in their
5 ruling they did not feel they had the statutory
6 authority to promulgate administrative rules affecting
7 this religious exception that you identified under the
8 Uniform Controlled Substances Act. Is that correct?

9 MR. OLSEN: That is correct.

10 THE COURT: Okay. And so that's the issue
11 you're filing the petition for judicial review on;
12 correct?

13 MR. OLSEN: Correct, including the options.

14 THE COURT: Right. Right.

15 MR. OLSEN: Just saying they have a, you
16 know, quiver full of arrows.

17 THE COURT: Okay. So go ahead then. I just
18 wanted to make sure I understood the issues. Go ahead
19 with your argument.

20 MR. OLSEN: All right. Well, the Agency
21 says it has no authority to accept and consider requests
22 for religious exceptions to the Iowa Controlled
23 Substances Act despite the fact the act already has a
24 religious exception in it.

25 In denying the petitioner's request for

1 rulemaking last fall, the Agency referred the request to
2 the pharmacy board which took no action on it.

3 THE COURT: Can I ask you a question,
4 Mr. Olsen?

5 MR. OLSEN: Sure.

6 THE COURT: So the religious exception that
7 you indicate is in the Act is the one found at
8 124.204(8); is that correct?

9 MR. OLSEN: Yeah.

10 THE COURT: Okay. The one on peyote?

11 MR. OLSEN: Right.

12 THE COURT: Okay.

13 MR. OLSEN: And there's a reference to it in
14 subsection (4)(p), I think; and then that says peyote
15 and then it refers to section 8.

16 THE COURT: Okay. Go ahead.

17 MR. OLSEN: Or subsection 8, however that
18 is.

19 Okay. So the Board took no action. The
20 Agency's final decision does not concede -- It doesn't
21 say anything about the peyote exemption that we just
22 talked about. The Agency's final decision omits an
23 essential fact. That's point 1.

24 The Agency says it has no legal authority to
25 accept and consider requests for religious exceptions,

1 that it omits the state and federal constitutions from
2 its definition of the term "law" as found in Iowa Code
3 Chapter 17A.23(3), which just uses the word "law."

4 The precedent the Agency relies on,
5 *Litterer v. Judge*, was not a case involving a
6 constitutional right to set limits on the percentage
7 of ethanol in gasoline, so it's not controlling. The
8 Agency's final decision omits essential law, the state
9 and federal constitutions. So that's point 2.

10 This spring the Iowa Legislature intervened
11 with corrective action, the Religious Freedom
12 Restoration Act. The Religious Freedom Restoration Act
13 requires both the Executive and Judicial Branches to
14 accept and evaluate requests for religious exceptions.
15 It applies to every law and regulation past, present,
16 and future, and it requires the most demanding test
17 known to constitutional law, the compelling interest
18 test.

19 The Religious Freedom Restoration Act is
20 controlling and retroactive, meaning the legislature has
21 ended any doubt that every act includes constitutional
22 protection of religious freedom, not just now but
23 always, past, present, and future.

24 The Agency's final decision is
25 unconstitutional. The Court should remand the petition

1 to the Agency with instructions to consider the
2 petitioner's constitutional claim.

3 And that's the end of my opening statement.

4 THE COURT: Okay. Thank you.

5 MR. OLSEN: Yeah, thank you.

6 THE COURT: And I didn't catch your name.

7 MR. PROTZMANN: Assistant Attorney General
8 Kevin Protzmann.

9 THE COURT: Okay. Go ahead, Mr. Protzmann.

10 MR. PROTZMANN: Good morning, Your Honor,
11 Mr. Olsen.

12 So the question before the Court today is
13 whether the Iowa Board of Pharmacy was correct when it
14 told Mr. Olsen that the law does not authorize the Board
15 to issue rules which would create religious exceptions
16 for controlled substances regulated by Iowa Code
17 Chapter 124.

18 Now, as background, of course, Iowa Code
19 Chapter 17A allows interested parties and persons to
20 petition any state agency or board to engage in
21 rulemaking, and the agency has 60 days to send a written
22 response on the merits denying the petition, or engage
23 in the requested rulemaking.

24 Now, Mr. Olsen petitioned the Board back
25 in -- or with the State back in September of 2023. The

1 Board denied his petition within 60 days. Specifically
2 on November 7, 2023, the Board of Pharmacy sent
3 Mr. Olsen a letter in which the Board explained, quote,
4 The Board does not have statutory authority to
5 promulgate administrative rules affecting religious
6 exceptions to the Iowa Uniform Controlled Substances
7 Act.

8 Accordingly, the legislature must take
9 specific action to grant the Board rulemaking authority
10 related to religious exceptions to the Iowa Uniform
11 Controlled Substances Act before the Board could adopt
12 any rules to that effect.

13 So the broad question before the Court is
14 was the Board's denial letter proper under Iowa Code
15 Chapter 17A.

16 Now, the controlling case for that inquiry
17 is *Litterer v. Judge*, which I believe both parties
18 briefed on. The State's brief discussed this case and
19 applied it to the matter at bar today.

20 At this time, Your Honor, I would like to
21 highlight a discrepancy in the State's brief that I
22 would like to correct on the record in oral argument.

23 THE COURT: Go ahead.

24 MR. PROTZMANN: So in short, the State
25 misapplied *Litterer*. We do maintain that *Litterer* --

1 excuse me -- that if *Litterer* is correctly applied, the
2 State still prevails in this case; but for the benefit
3 of the record, the State wants to clarify its position
4 and clarify how *Litterer* applies. So if you'll indulge
5 me, I'll walk through the case real quickly.

6 THE COURT: Yes, go ahead.

7 THE REPORTER: I'm sorry, would you slow
8 down just a little bit. Thank you.

9 MR. PROTZMANN: I'm so sorry.

10 So in *Litterer v. Judge*, the Iowa Supreme
11 Court noted that Chapter 17A requires agencies to
12 explain, quote, on the merits, why they have denied a
13 petition for rulemaking. So the Court held that this
14 requirement ordinarily means that agencies need to,
15 quote, engage in reasoned consideration of the
16 rulemaking request.

17 Now, the rationale here is that agencies and
18 boards usually have discretion to determine whether any
19 rule should be adopted or changed or maintained as is.

20 And so because of this the Court in *Litterer*
21 explored that discretionary aspect of rulemaking and
22 said that if agencies are petitioned to make a rule that
23 is in their discretion theoretically to create, they
24 need to -- and if they deny that petition on the merits,
25 all the agency has to do is provide a rationale that

1 explains why they've exercised their discretion not to
2 engage in rulemaking.

3 Now, in the State's brief, the State
4 correctly analyzed this test, but it doesn't actually
5 apply to the correct case at hand, because in *Litterer*
6 the Court goes on to discuss a situation like this one
7 where an agency has denied rulemaking because the agency
8 claims it does not have legal authority to make the
9 rule.

10 The Court reasoned that it's one thing for
11 an agency to deny rulemaking based on the agency's
12 exercise of discretion not to make a rule, but it's a
13 different thing for an agency to deny rulemaking based
14 on a claim it doesn't have legal authority to make the
15 rule.

16 The State's brief did not fully explore this
17 nuance, and I apologize for that, Your Honor.

18 But the nuance is important because under
19 *Litterer* when a state agency, like the Iowa Board of
20 Pharmacy, denies a petition for rulemaking on the basis
21 that it lacks statutory authority to make the rule, the
22 question before the Court is not did the agency provide
23 a rationale, the question before the Court is was the
24 agency correct that, as a matter of law, there is no
25 authority to make the rule.

1 So it's a different standard of review. It
2 doesn't look at is there a rationale. It requires a
3 Court to make a judicial determination whether the
4 agency was correct.

5 So now, even though the State did not fully
6 articulate this test in its brief, I would highlight
7 that both parties did explore the ultimate question.

8 In the State's brief, the State did argue
9 that the law does not authorize the Board of Pharmacy to
10 promulgate the rules requested by Mr. Olsen. And
11 Mr. Olsen has well-argued this point both in his brief
12 and in his reply brief. So the briefings on this issue
13 are sufficient to get to the ultimate question, the only
14 problem was the State didn't fully explain why that
15 question mattered.

16 So if we were to apply the appropriate
17 standard of review from *Litterer*, the State still
18 prevails in this case because the Board of Pharmacy was
19 correct, the law does not allow the Board to make the
20 rule requested by Mr. Olsen.

21 Mr. Olsen is correct that in Iowa Code
22 Chapter 124, the state legislature did create one
23 religious exemption for the Controlled Substances Act
24 which authorizes the use of peyote by the Native
25 American Church for religious purposes.

1 There are no other religious exemptions in
2 the Act; nor is there anything in the Act or anywhere
3 else in the Iowa Code which says that the Iowa Board of
4 Pharmacy is authorized to make administrative rules that
5 would allow one -- or would allow additional religious
6 groups to use other kinds of controlled substances
7 otherwise restricted by Iowa Code Chapter 124.

8 Iowa Code Chapter 17A, the Iowa
9 Administrative Procedures Act, is clear that, quote, An
10 agency shall have only that authority or discretion
11 delegated or conferred upon it by the law and shall not
12 expand or enlarge its discretion beyond the power
13 delegated to or conferred upon it. Quote, Unless
14 otherwise specifically provided for in statute, a grant
15 of rulemaking authority shall be construed narrowly.

16 So in this case the simple fact of the law
17 is that neither Mr. Olsen nor the State can identify any
18 clear delegation of authority in the law that would
19 allow the Board of Pharmacy to make the rules requested
20 by Mr. Olsen.

21 Now, Mr. Olsen does make an argument
22 invoking various constitutional and statutory
23 provisions: federal constitution, state constitution,
24 RFRA, but ultimately these are not relevant. There
25 needs to be something in law that expressly gives or

1 impliedly gives the Board of Pharmacy clear authority to
2 make additional religious exceptions to the Iowa
3 Controlled Substances Act.

4 The state legislature has done so for one
5 controlled substance for one particular religious group,
6 but there's nothing that the state legislature has said
7 or done in law which would give the Board additional
8 authority to expand those exceptions.

9 Now, Mr. Olsen has asked that the Court
10 remand the petition back to the Board for the Board to
11 explain how the constitution also does or does not allow
12 the Board to make rules.

13 And, Your Honor, I would emphasize that the
14 constitution, whether federal or state, does not
15 necessarily mandate that any particular state agency
16 issue specific rules, rather Code dictates when an
17 agency may or shall issue rules; and the constitution is
18 a barometer by which we measure do those rules pass
19 constitutional muster whether it be due process or equal
20 protection or various other requirements.

21 So the constitution itself, state or
22 federal, does not give any state agency specific
23 authority to engage in policymaking the way that
24 Mr. Olsen would like.

25 Now, if Mr. Olsen believes that the Iowa

1 Controlled Substances Act fails to pass muster under the
2 constitution, state or federal, he's certainly free to
3 bring that litigation in an appropriate forum, but
4 that's not the question before us today.

5 The sole question is does DIAL, the
6 Department of Inspections, Appeals, and Licensing, and
7 the Board of Pharmacy, do they have authority to
8 promulgate additional exceptions to the Controlled
9 Substances Act; and the answer is no, there is no clear
10 legal authority for that.

11 And so when the Board issued its letter
12 telling Mr. Olsen it couldn't engage in that rulemaking
13 because it lacked authority, the Board was correct, and
14 there is simply just no law that would support what
15 would essentially constitute a massive overreach by the
16 Executive Branch to engage in potentially legislating
17 the issue. It's up to the state legislature to pass
18 laws that would allow this.

19 And if there is a constitutional claim, it's
20 up to litigants to bring that question before an
21 appropriate forum to effect or otherwise expand the
22 scope of exceptions under the Controlled Substances Act,
23 but that's not what we're here to do today.

24 So with that, Your Honor, that is the
25 State's position, and I would entertain any questions

1 you may have.

2 THE COURT: Okay. Thank you.

3 Mr. Olsen, I'll let you reply.

4 MR. OLSEN: Yeah. I'm asking the Court to
5 remand to the Agency, not to the Board. The Agency has
6 broader authority. The Agency can bring a matter to the
7 attention of the legislature by prefiling a bill, and
8 the legislature could decide whether or not to adopt
9 that, and that would take care of the situation of
10 legislative authority.

11 The Department could certainly make the
12 legislature aware there's a problem, and they decided
13 not to do that. They used their discretion to decide to
14 ignore it, and that's an abuse of discretion. That's
15 one of the points I raised.

16 The other thing is that --

17 THE COURT: When you say remand to the
18 Agency, you're talking the Board of Pharmacy, I assume.

19 MR. OLSEN: No.

20 THE COURT: No?

21 MR. OLSEN: Well, no, that same way I filed
22 the case, it's identical, except for that they would
23 have to consider the constitutional claim. And if for
24 some reason that wasn't the case, the legislature has
25 intervened in the meantime and mandated that all

1 administrative agencies and judiciary respect the
2 freedom of religion. So now there's a statute that
3 actually gives them that authority that I didn't have
4 when I filed this.

5 So remanding back to them to consider the
6 whole thing over again with the addition of the
7 Religious Freedom Restoration Act would give everybody a
8 clean slate to start over again.

9 And I don't see any prejudice to the
10 Department to have to make a decision on whether a
11 statute gives them authority. They're saying that the
12 constitution doesn't give them any authority, only
13 statutory law. Well, now there is statutory law in
14 addition to the -- what I think is ridiculous, that the
15 constitution doesn't have to be considered, but
16 nevertheless now it does.

17 THE COURT: What's your response to that,
18 Mr. Protzmann?

19 MR. PROTZMANN: Yes, Your Honor. So two
20 points: There is no law which says that the Department
21 of Inspections, Appeals, and Licensing or the Iowa Board
22 of Pharmacy must propose legislation based on a petition
23 for rulemaking.

24 17A is -- The requirement that agencies
25 consider petitions for rulemaking is specific to

1 promulgating administrative rules in the administrative
2 code chapters under the purview of that agency. The
3 Board of Pharmacy is the appropriate entity for this
4 petition. But beyond that the Board is not required
5 under law to inform the legislature of proposed
6 legislation.

7 Mr. Olsen is correct that theoretically a
8 state agency like DIAL or the Board of Pharmacy could do
9 that, but there's nothing in law which says they must.
10 And in that respect that is an exercise of discretion;
11 and Mr. Olsen has not articulated how he himself has
12 been prejudiced by the Agency exercising that
13 discretion.

14 The other point I would make, Your Honor, is
15 the requested remedy. Now, Mr. Olsen would request a
16 remand so that the Board could actively consider the
17 constitutional claim that he's making.

18 But this goes to why the appropriate
19 application of *Litterer* is important here, because in
20 *Litterer* the Supreme Court clarified that if a state
21 agency is going to say that the law, whether it's
22 statutory or constitutional, does or does not allow the
23 agency to issue those rules, the court says ultimately
24 it's up to the courts to make that determination.

25 So now that we're here in court, this is the

1 appropriate forum for this Court to determine if the
2 statutory law in Iowa or the federal constitution or the
3 state constitution actually authorized the Board of
4 Pharmacy to issue these rules.

5 If the Court were to remand it back to the
6 Agency and to ask the Agency to consider the
7 constitutional requirement, that would contradict the
8 holding in *Litterer* that agencies don't have discretion
9 to decide what law requires them to do.

10 Certainly agencies need to answer petitions,
11 but if the answer is we don't have legal authority, it's
12 up to the Court to make a determination whether that's
13 accurate or not. And remanding it back to the Agency
14 would contradict the holding in *Litterer*.

15 THE COURT: So is it your position that the
16 Court would have to take up Mr. Olsen's argument on
17 whether the Agency has either constitutional statutory
18 authority to make those rules?

19 MR. PROTZMANN: Yes, Your Honor, that is the
20 State's position.

21 THE COURT: Okay.

22 MR. OLSEN: I'd like to correct that and
23 just say it's the Department. I never asked the Board
24 to do that, and I would not ask the Board to do that.
25 If the Agency thought the Board had the authority to do

1 that and wanted to present it to them, that would be
2 different, but they're saying that board doesn't have
3 that authority so that's an exercise in futility. It
4 should go to the department that has the authority to
5 file remedial legislation.

6 The Board's authority is narrow. It's
7 124.201. It can recommend changes to the schedules.
8 Anything outside of that is beyond the scope of what the
9 statute authorizes that board to do but not outside the
10 authority of what the statute authorizes the department
11 to do.

12 Chapter 2, Section 16 is that broader
13 authority. And I suppose the Department could farm out
14 Chapter 2, Section 16 to the Board and do it that way as
15 a surrogate for the Department. I suppose that would be
16 legitimate. But they're not offering to do that so...

17 THE COURT: What's the State's position with
18 regard -- As I understand Mr. Olsen's argument there at
19 the end, the Religious -- what's the name?

20 MR. OLSEN: The Religious Freedom
21 Restoration Act. And the word "Restoration" is key
22 there because it doesn't create anything, it restores
23 something. It overturns *Litterer v. Judge* for sure. It
24 overturns precedent.

25 THE COURT: And you're saying -- I want to

1 make sure I understand your argument. You're saying
2 that that statute, which was recently promulgated, gives
3 the Board the authority to make these religious
4 exceptions?

5 MR. OLSEN: I'm saying that it authorizes
6 the Department to exercise any authority that it has,
7 including the authority that the Religious Freedom
8 Restoration Act says it has, to consider a claim for
9 religious freedom.

10 THE COURT: Okay.

11 MR. OLSEN: And it's not a bald claim that
12 comes out of nowhere. It's based on an existing
13 religious exemption. Chapter 124 uses the term
14 "religious." It uses the term "church."

15 The Agency decision did not explain those
16 terms at all, it just -- it's like they didn't even
17 exist, like I was asking for the first time for a
18 religious exemption.

19 And those words "church" and "religious"
20 come from the constitution. The interpretation of those
21 words is found in the constitution. They're not defined
22 in Chapter 124 anywhere. So if 124 is borrowing
23 language from somewhere, it's quite obvious that that
24 language is coming from the constitution, state and
25 federal.

1 And my controlling case was *Employment*
2 *Division v. Smith* that says if the law isn't neutral
3 toward religion, it's not fair.

4 THE COURT: Okay. Any other comments,
5 Mr. Protzmann?

6 MR. PROTZMANN: Yes, Your Honor.

7 So the Iowa Religious Freedom Restoration
8 Act which was enacted earlier this year by the state
9 legislature, it adopts the compelling interest test.
10 And that test essentially says any facially neutral law
11 or regulation of the state, code or rule, that even if
12 it is neutral, if it substantially burdens religious
13 practice of any particular religious group that that law
14 or regulation is unlawful unless the state can show
15 there's a compelling interest that they're trying to
16 protect with the rule of general applicability and it's
17 the narrowest possible way to accomplish that goal.

18 Now, it may very well be that that was
19 enacted this year, but to the extent Mr. Olsen thinks
20 that that controls this case, it doesn't. That might
21 provide an avenue for a litigant to go to court to argue
22 that the Controlled Substances Act, you know, because it
23 restricts religious use of different products, like
24 marijuana, for example -- if Mr. Olsen wants to litigate
25 that, he's free to go to court and try to do so. That's

1 not what happened here. The question -- The sole
2 question here was, when the Board of Pharmacy denied his
3 petition for rulemaking whether the Board was correct it
4 lacked legal authority to make the requested rules.

5 And the fact that there may be a cognizable
6 claim under this new law that needs to be teased out in
7 the courts over the applicability of the Controlled
8 Substances Act and whether it passes muster under RFRA,
9 that's a separate question, and it does not in any way
10 mandate the Board to issue rules or decide that this new
11 statute somehow --

12 The Board of Pharmacy is not a court. The
13 Board of Pharmacy is not in a position, or DIAL is not
14 in a position to just declare by fiat that they have
15 determined that this new statute enacted by the
16 legislature means that the previous laws enacted by the
17 legislature are unconstitutional. That would be a
18 massive overreach. It would essentially be a subentity
19 of the Executive Branch engaging not only in legislation
20 but also in judicial decision-making, which would
21 completely disintegrate the separation of power that we
22 have for a reason.

23 THE COURT: Okay.

24 MR. OLSEN: I disagree. The Religious
25 Freedom Restoration Act says it applies to both judicial

1 and administrative proceedings, and it doesn't require
2 the judiciary to let the Department decide the issue, it
3 simply requires them to issue a decision which can be
4 reviewed by the judiciary independently.

5 Loper v. Bright [*sic*] just got decided
6 overturning the *Chevron* deference doctrine that was
7 precedent for decades.

8 Courts don't have to listen to agency
9 decisions but they are informed by them, and this issue
10 should get a decision by the Agency; and that should say
11 we're not going to issue any rules, we're not going to
12 recommend any legislation, we're not going to tell the
13 legislature there's anything unusual about having
14 religious language in the Controlled Substances Act and
15 state clearly that they considered that and decided not
16 to do it so that there's a complete decision from the
17 Agency for judicial review.

18 And this decision doesn't even mention the
19 fact there's an existing religious exemption. And
20 they're in control of that. They should know what that
21 is and what it means and be able to explain it and they
22 can't, and that's why they don't address it. They just
23 leave it out because they can't explain it. And we
24 should know that because that's a problem.

25 The people of Iowa have a right to have

1 religious freedom for everybody, not just a small group
2 of privileged individuals. And I think the Agency can
3 at least say, that's a problem, and they didn't do that.
4 They're just fine with that, just let -- And then
5 they're saying I could pursue a judicial case.

6 Well, when I filed this, the Religious
7 Freedom Restoration Act didn't exist, and you couldn't
8 just go into court and file a constitutional claim, you
9 had to have some legislative authority. Well, the
10 Religious Freedom Restoration Act does create the remedy
11 that he's saying, but it's not limited to that. You're
12 not forced to go and pursue a judicial remedy just
13 because it's available.

14 THE COURT: Okay. Anything else then?

15 MR. OLSEN: No.

16 MR. PROTZMANN: No, Your Honor.

17 THE COURT: Okay. I will consider it
18 submitted and get you a written ruling.

19 MR. OLSEN: Thank you.

20 THE COURT: All right. Thank you.

21 (Hearing concluded at 9:27 a.m.)
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