

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	CV No. 17-2511
)	
)	Washington, D.C.
vs.)	March 27, 2018
)	10:48 a.m.
AT&T, INC., ET AL.,)	
)	Morning Session
Defendants.)	
<hr/>		Day 3

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES:

For the Government:	Craig W. Conrath
	Eric D. Welsh
	Timothy B. Walthall
	Andrew C. Finch
	Nathan D. Brenner
	Melanie Kiser
	U.S. DEPARTMENT OF JUSTICE
	Antitrust Division
	450 Fifth Street, NW
	Washington, D.C. 20530
	(202) 532-4560
	craig.conrath@usdoj.gov
	eric.welsh@usdoj.gov
	timothy.walthall@usdoj.gov
	andrew.finch@usdoj.gov
	nathan.brenner@usdoj.gov
	melanie.kiser@usdoj.gov

APPEARANCES CONTINUED

For Defendant AT&T
and DirectTV Group
Holdings, LLC:

Katrina M. Robson
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
(202) 220-5052
krobson@omm.com

Daniel M. Petrocelli
M. Randall Oppenheimer
O'MELVENY & MYERS LLP
1999 Avenue of the Stars
8th Floor
Los Angeles, CA 90067
(310) 553-6700
dpetrocelli@omm.com
roppenheimer@omm.com

Michael L. Raiff
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Suite 1100
Dallas, TX 75201
(214) 698-3350
mraiff@gibsondunn.com

For Defendant
Time Warner, Inc.:

Kevin J. Orsini
Peter T. Barbur
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1140
korsini@cravath.com
pbarbur@cravath.com

APPEARANCES CONTINUED

Court Reporter:

William P. Zaremba
Registered Merit Reporter
Certified Realtime Reporter
Official Court Reporter
U.S. Courthouse
333 Constitution Avenue, NW
Room 6511
Washington, D.C. 20001
(202) 354-3249

Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription

- - -

WITNESS INDEX

- - -

WITNESSES

DIRECT CROSS REDIRECT RECROSS

GOVERNMENT'S:

WARREN SCHLICHTING 332

- - -

INDEX OF EXHIBITS

- - -

DEFENDANT'S

IDENTIFIED

ADMITTED

919 - 365

920 - 376

- - -

INDEX OF EXHIBITS

- - -

PLAINTIFF'S

IDENTIFIED

ADMITTED

414 385

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(Sealed proceedings held)

DEPUTY CLERK:

MS. KISER:

THE COURT:

MR. CONRATH:

THE COURT:

MR. WALTHERHALL:

THE COURT:

MR. FINCH:

THE COURT:

MR. WELSH:

1

THE COURT:

2

3

MR. BRENNER:

4

5

6

7

THE COURT:

8

MR. PETROCELLI:

9

10

THE COURT:

11

MR. RAIFF:

12

13

MR. OPPENHEIMER:

14

15

THE COURT:

16

MS. ROBSON:

17

18

MR. BARBUR:

19

20

THE COURT:

21

MR. ORSINI:

22

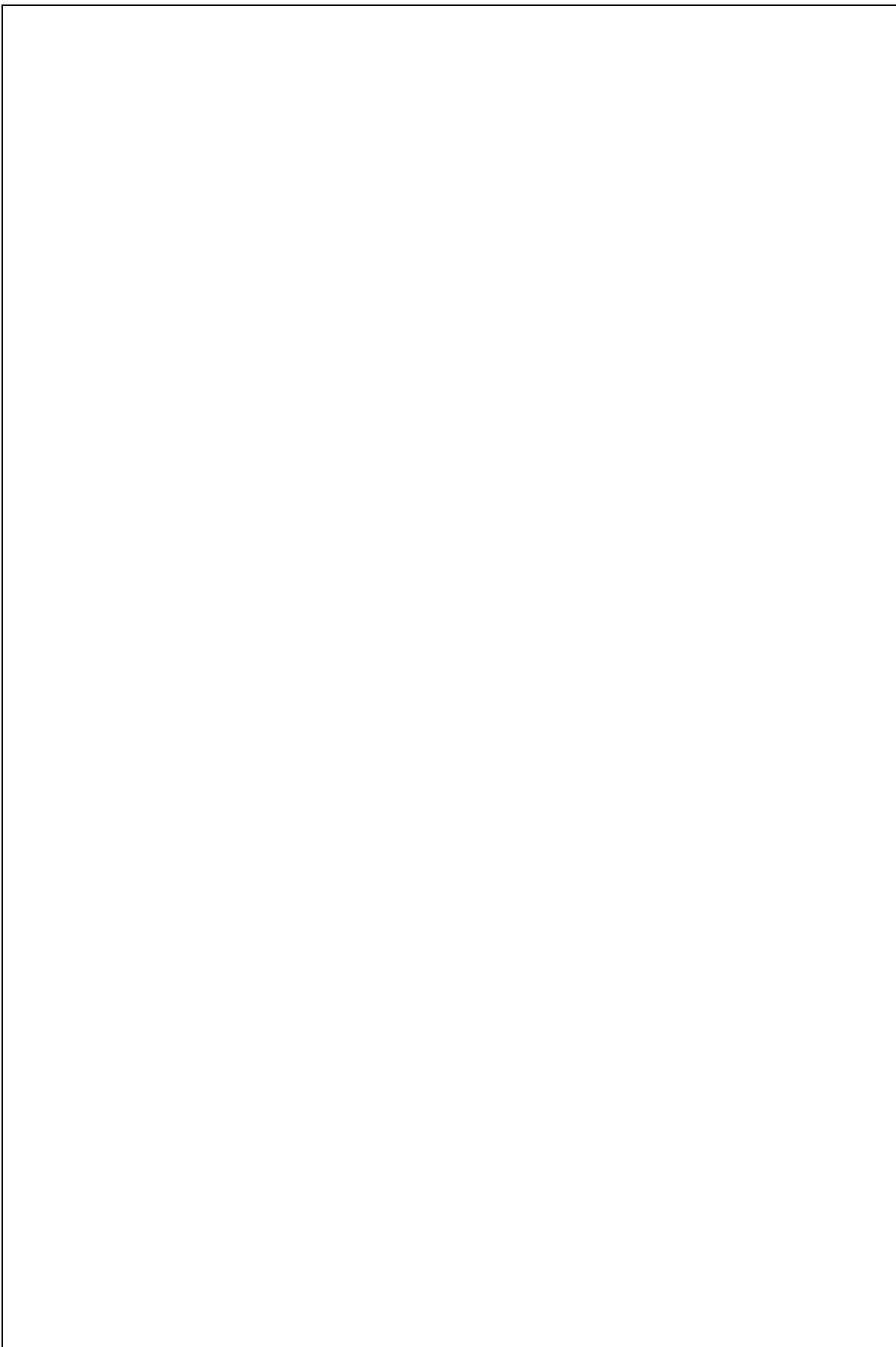
23

THE COURT:

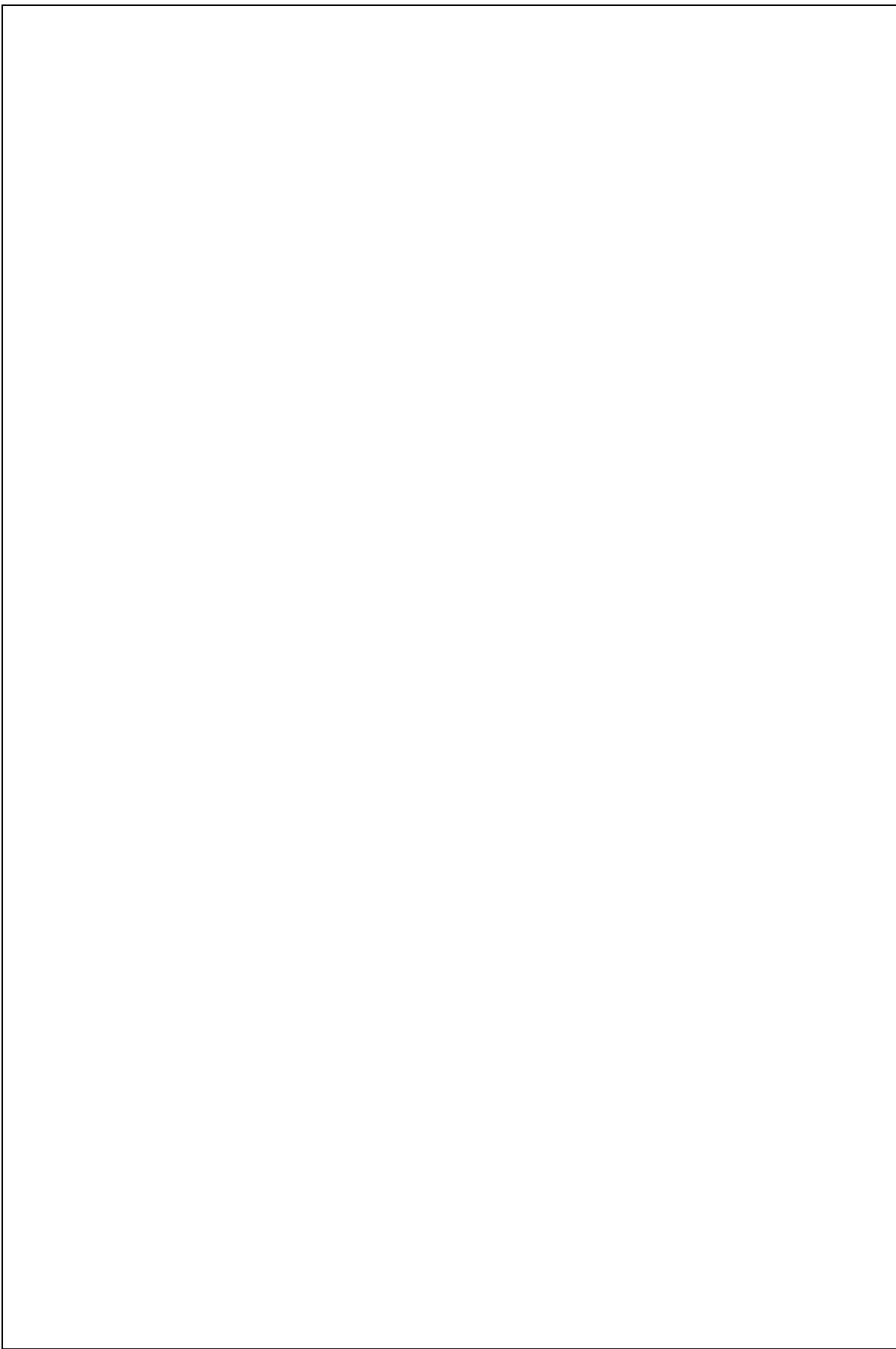
24

25

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25



- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. CONRATH:

THE COURT:

MR. CONRATH:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

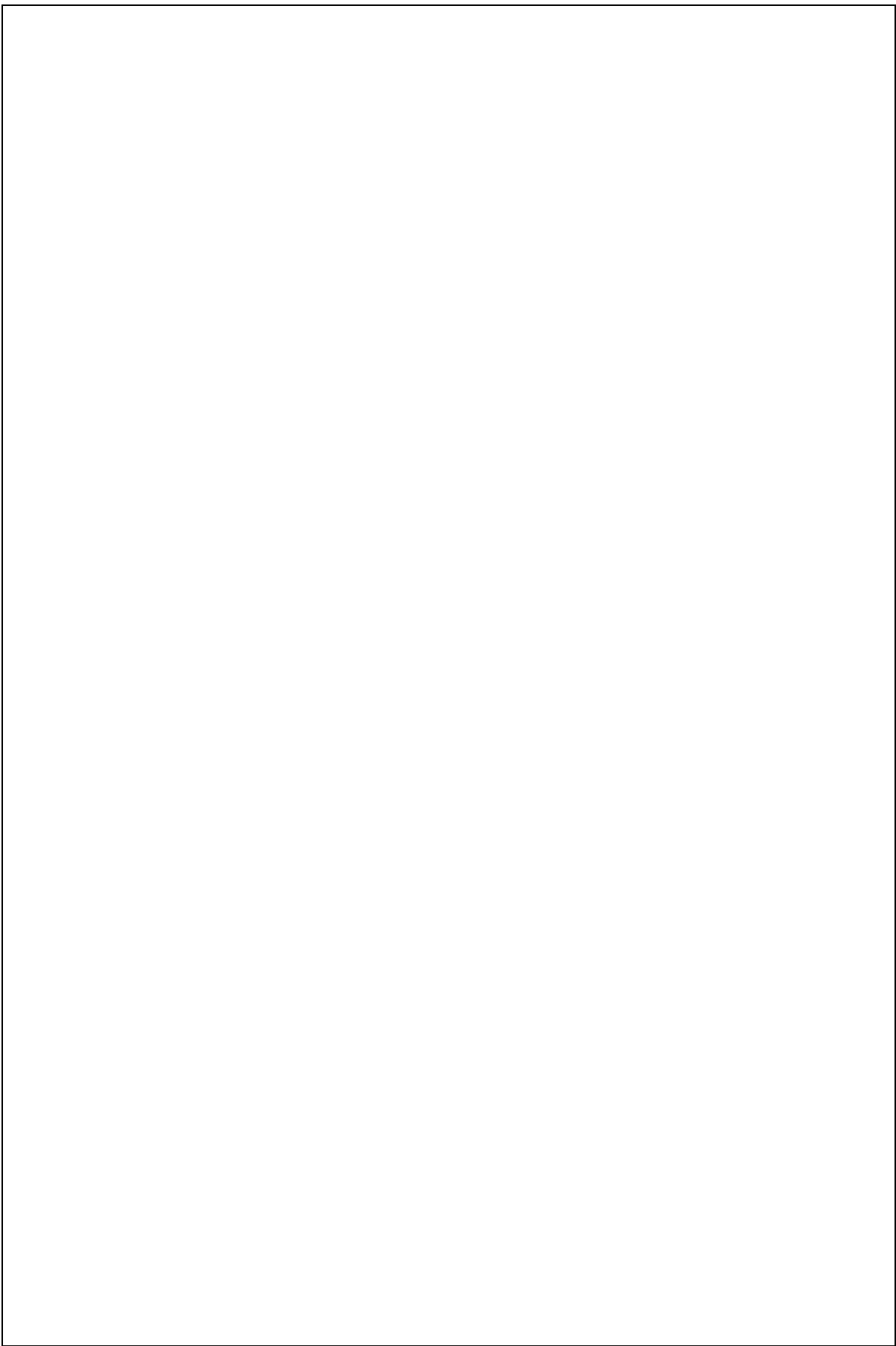
THE COURT:

MR. CONRATH:

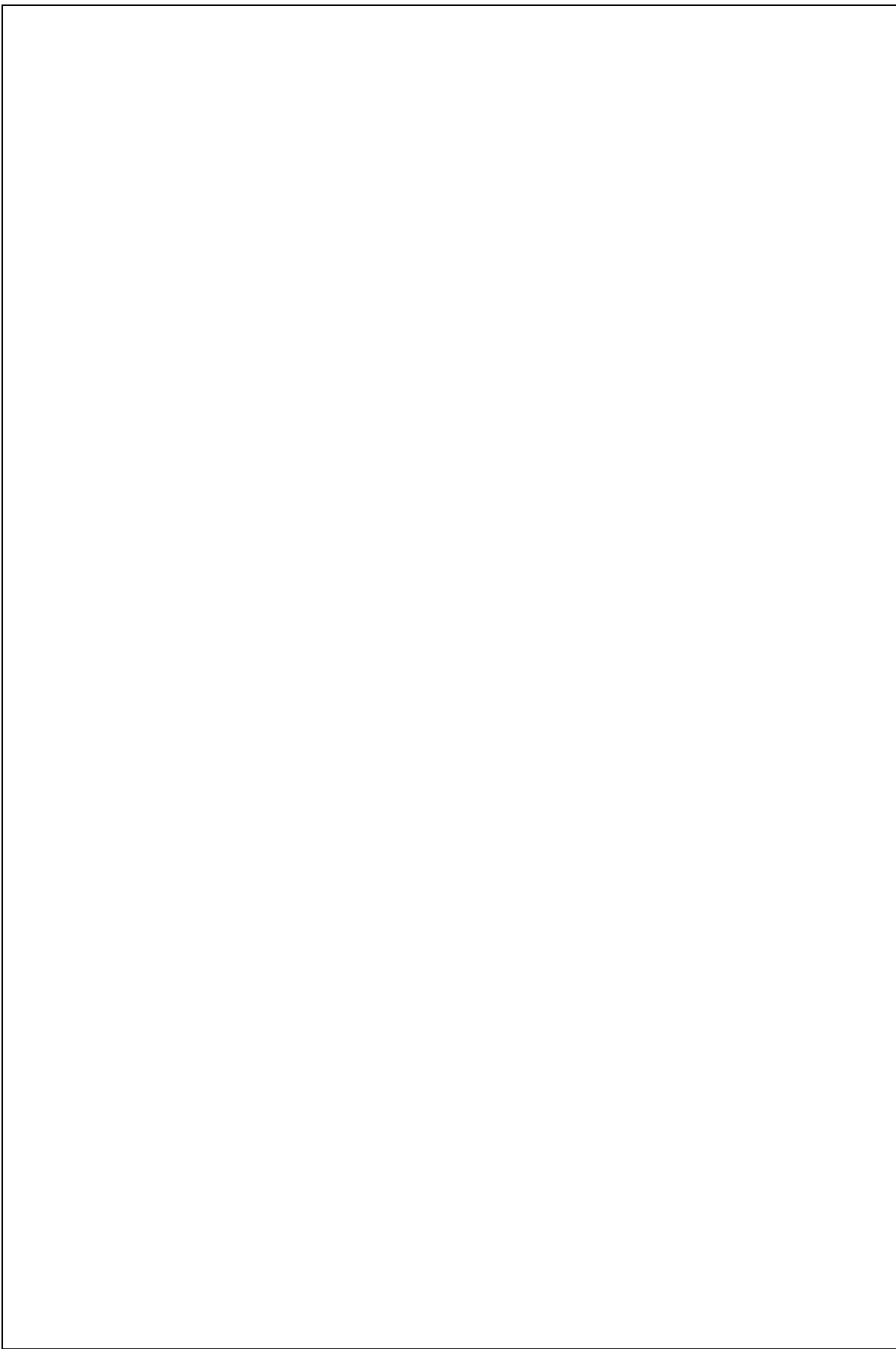
THE COURT:

MR. CONRATH:

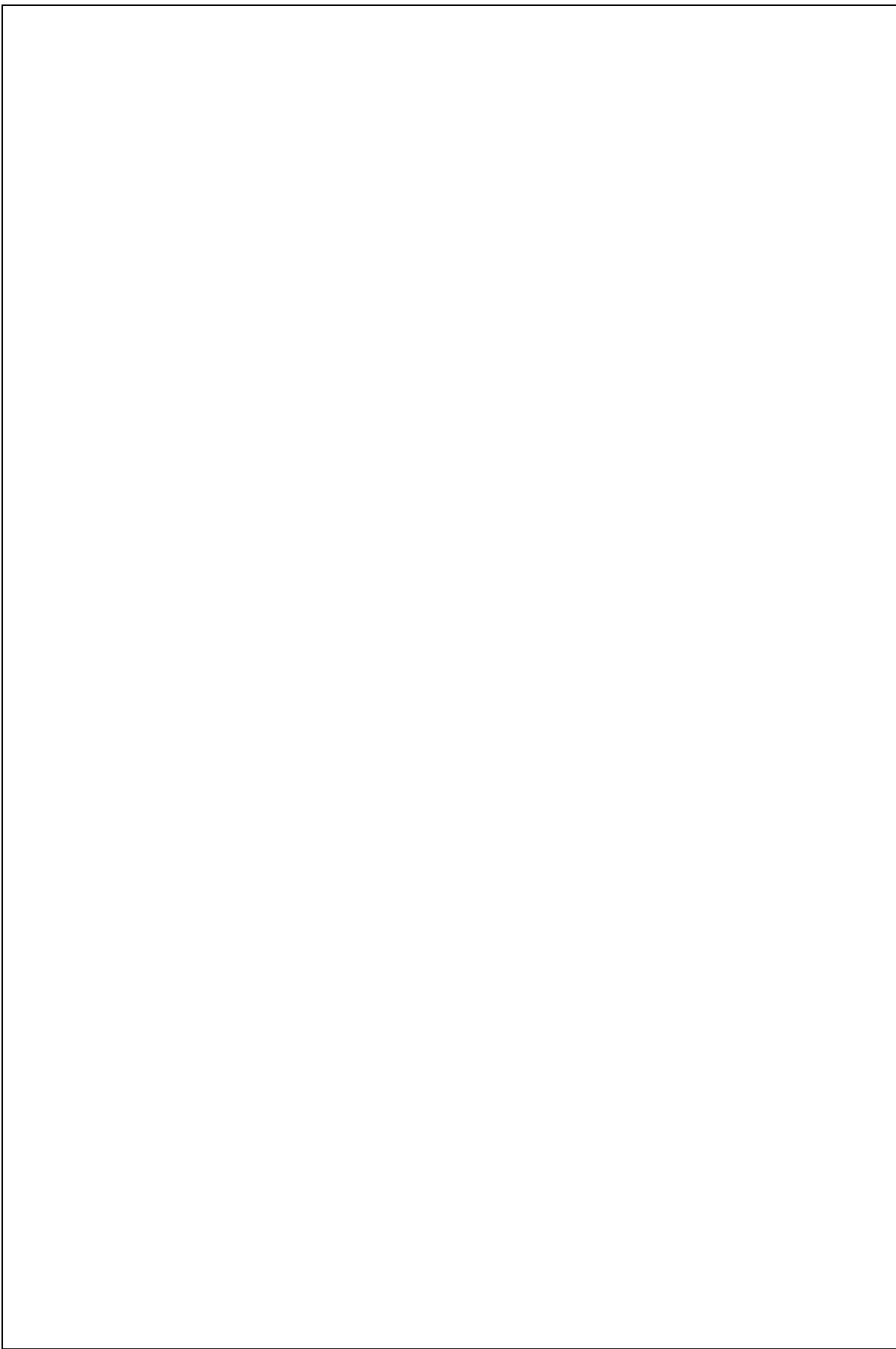
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25



- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25



- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

THE COURT :

MR. CONRATH :

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. CONRATH:

THE COURT:

MR. CONRATH:

THE COURT:

MR. CONRATH:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT :

MR. CONRATH :

THE COURT :

MR. PETROCELLI :

THE COURT :

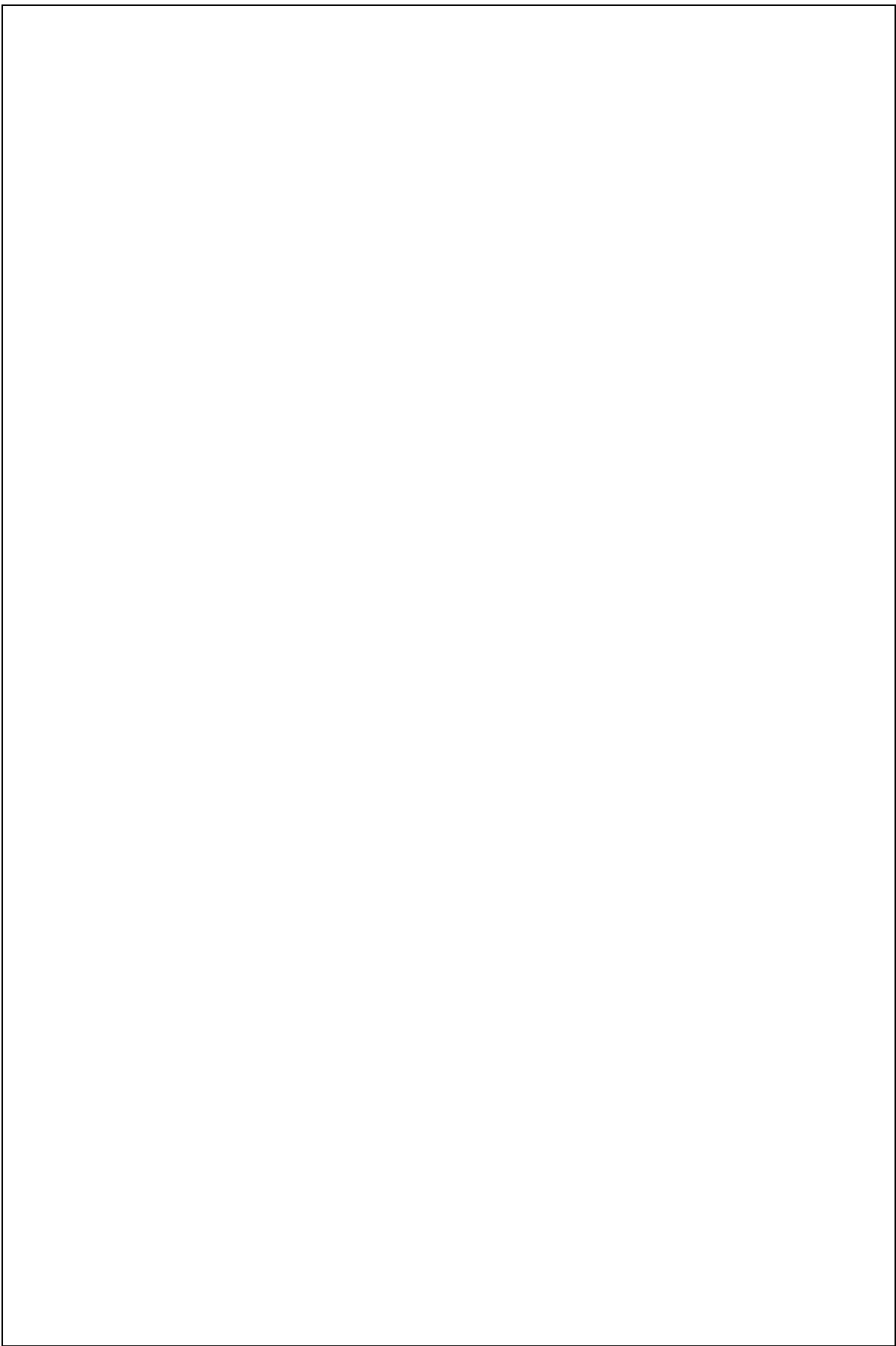
MR. PETROCELLI :

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

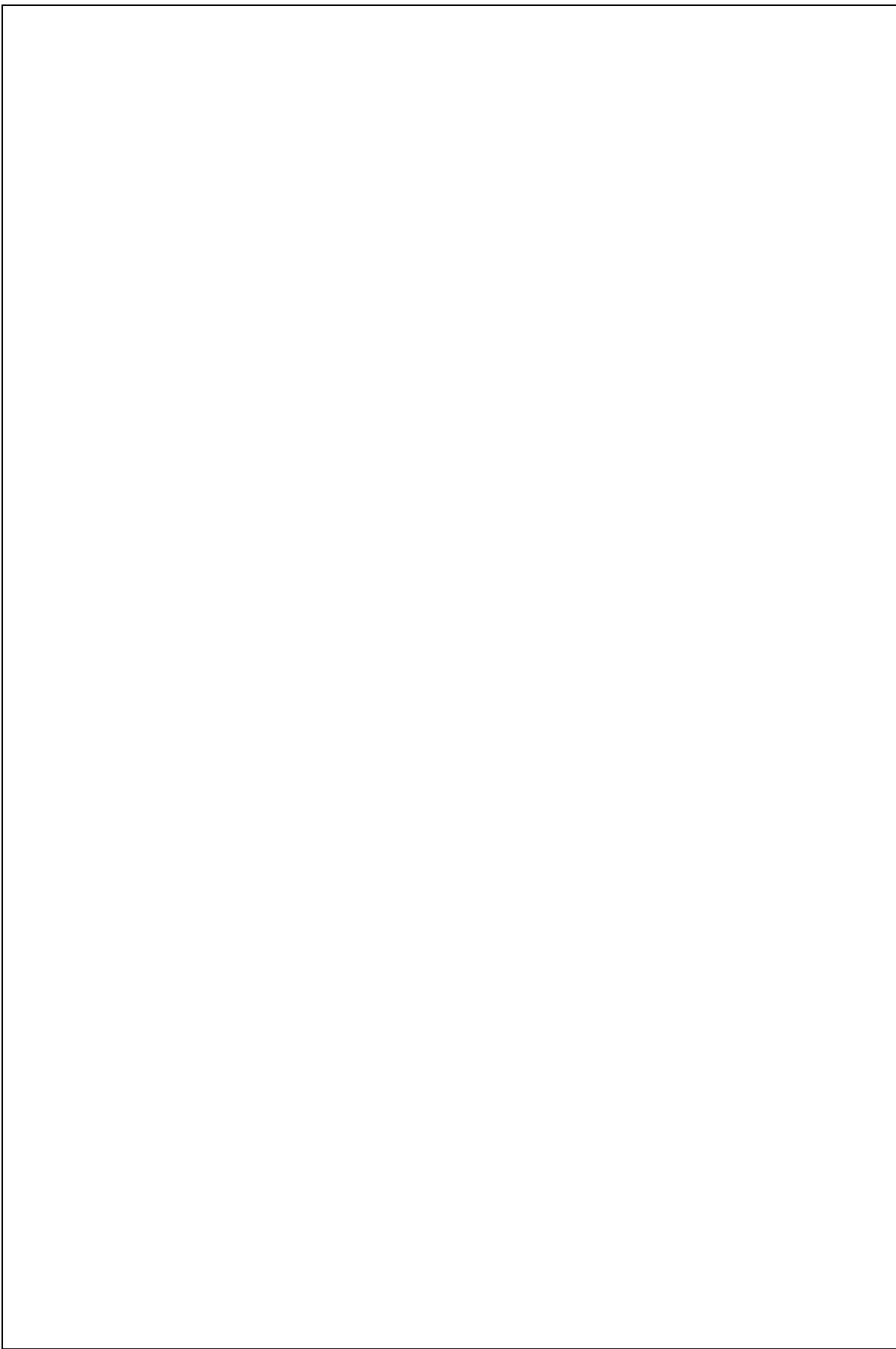
THE COURT:

MR. PETROCELLI:

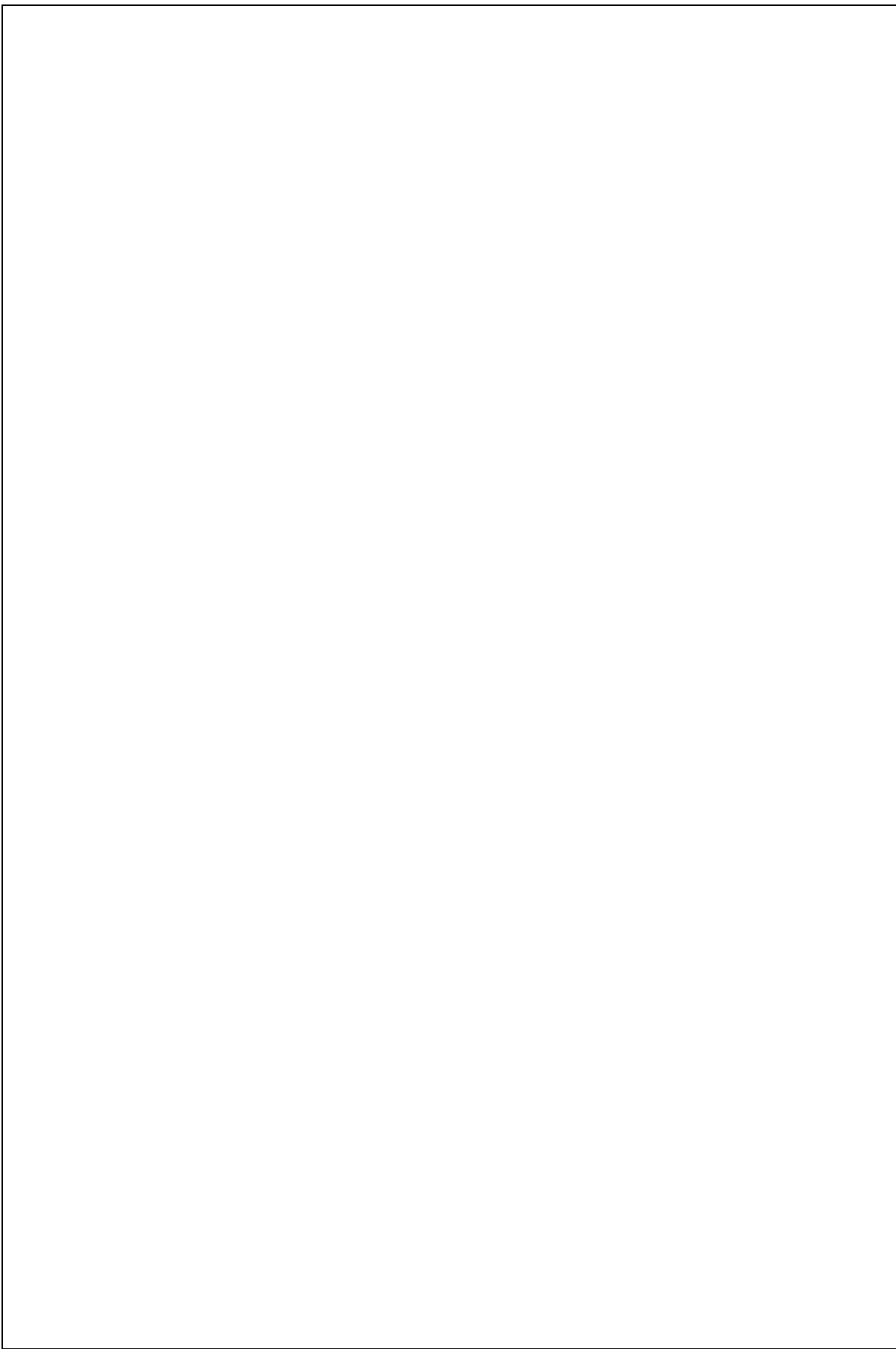
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25



- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25



- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT:

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

MR. CONRATH:

THE COURT:

MR. CONRATH:

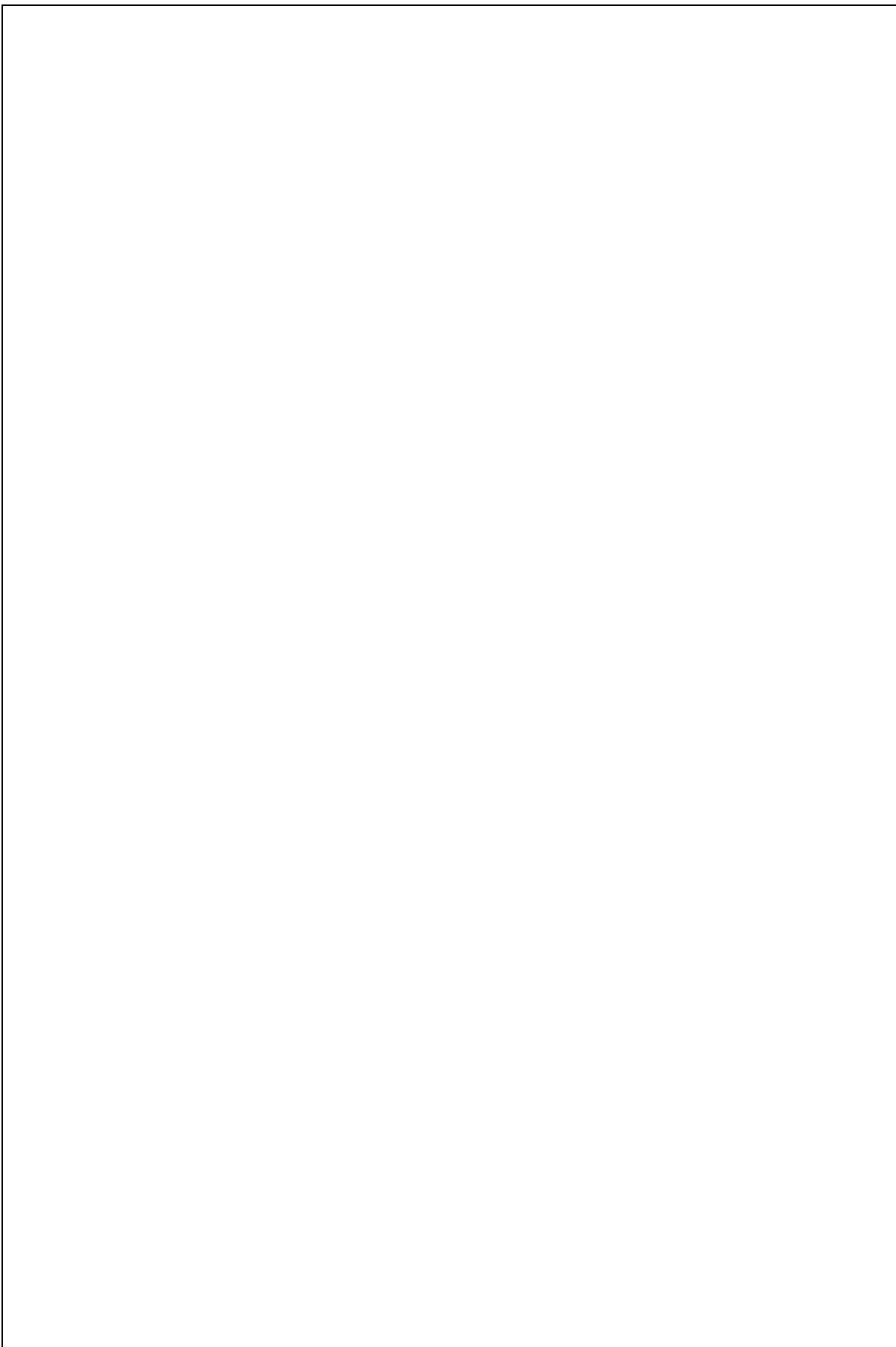
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT:

MR. CONRATH:

THE COURT:

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. PETROCELLI :

THE COURT :

MR. PETROCELLI :

THE COURT :

DEPUTY CLERK :

(Recess from 11:25 a.m. to 11:51 a.m.)

1 DEPUTY CLERK: The United States District Court
2 for the District of Columbia is again in session, the
3 Honorable Richard J. Leon presiding. God save the United
4 States and this Honorable Court. Please be seated and come
5 to order.

6 Your Honor, re-calling Civil Action No. 17-2511,
7 the United States of America v. AT&T, Incorporated, et al.

8 THE COURT: All right.

9 The witness can resume the stand. You remain
10 under oath.

11 Mr. Petrocelli, when you're ready,
12 cross-examination.

13 MR. PETROCELLI: Thank you, Your Honor.

14 MR. CONRATH: Your Honor, may I ask a process
15 question I should have asked before the break?

16 THE COURT: All right.

17 MR. CONRATH: If there are -- if there are
18 questions that are objectionable on privilege or
19 confidentiality, we may not know or be in a position to
20 object; and as a general issue with third-party witnesses,
21 may the third-party witnesses' counsel object on grounds of
22 privilege or confidentiality?

23 THE COURT: No.

24 MR. CONRATH: Very well.

25 THE COURT: No. All objections are done by

1 Justice Department attorneys.

2 MR. CONRATH: Thank you.

3 THE COURT: If you need to confer with them, you
4 can, but one lawyer per witness, per side.

5 MR. PETROCELLI: Thank you, Your Honor.

6 May I proceed?

7 THE COURT: You may.

8 MR. PETROCELLI: Thank you.

9 WARREN SCHLICHTING, WITNESS FOR THE GOVERNMENT, HAVING BEEN
10 PREVIOUSLY SWORN, RESUMED THE STAND AND TESTIFIED FURTHER AS
11 FOLLOWS:

12 CROSS-EXAMINATION

13 BY MR. PETROCELLI:

14 Q Mr. Schlichting, Dish regards DirectTV as its
15 primary competitor; is that right?

16 A I believe that's right.

17 Q And your company's opposing the merger --

18 A We are.

19 Q -- correct?

20 Okay. And in connection with your company's
21 opposition to this merger, you've met with the Department of
22 Justice, you and others from the company, on a number of
23 occasions, correct?

24 A I have, yes.

25 Q And a written submission was made to the

1 Department of Justice last summer, expressing opposition to
2 the merger, correct?

3 A That's correct.

4 Q And, also, proposing conditions to this merger in
5 the event the merger were to be approved, correct?

6 A The in the event it's approved.

7 Q Now, in preparing your testimony, you've worked
8 with the Department of Justice lawyers, right?

9 A I have.

10 Q And how long have you been in Washington, D.C.
11 prior to taking the stand yesterday?

12 A In D.C., I was here -- I arrived on Saturday, left
13 on Thursday, I believe, when -- or I guess it was Friday
14 when we didn't have court on Friday.

15 So it was sort of day for day. I kept waiting to
16 go on the stand.

17 Q And you met with the Department of Justice over
18 the weekend, correct?

19 A On Sunday afternoon.

20 Q Right.

21 Into the evening, right?

22 A Yes. I mean, we started late in the afternoon.

23 Q Now, where were you when you received the email
24 attaching the transcript of Ms. Fenwick's testimony?

25 A It was actually on an Amtrak train.

1 Q You were on the East Coast?

2 A Yes. I was training from D.C. to, I guess it must
3 have been from New York to Philadelphia.

4 Q And the email attached the transcript of Ms. Cox's
5 testimony, excuse me, Ms. Fenwick's testimony and also
6 highlighted portions of my cross-examination of her,
7 correct?

8 A It did.

9 Q Yeah.

10 And there was also a summary of the topics that I
11 covered with her, correct?

12 A So I guess those feel like one and the same, but
13 there was a list of various topics that you covered.

14 Q And you read the email, including the listing of
15 the topics, right?

16 A I did.

17 Q And you opened up the transcript, which had the
18 actual testimony, correct?

19 A I did.

20 Q Okay. And you saw a number of highlighted
21 portions of the testimony, correct?

22 A As I mentioned yesterday, I got just to the
23 highlighted portions when I received the email from
24 Mr. Blum.

25 Q Well, you didn't receive the email until about an

1 hour and 15 minutes after you had received the transcript,
2 correct?

3 A Right. But I didn't open up the email right away.
4 I was doing my email on the train.

5 Q So it's your testimony that the moment you were
6 starting to read the transcript, you saw the email and you
7 stopped? Is that your testimony?

8 A No.

9 My testimony is that I spent too much time on the
10 non-highlighted piece.

11 Q That wasn't my question.

12 My question is, are you telling the Court that you
13 did not review any of the actual testimony that was in the
14 transcript?

15 A So you have to --

16 MS. KISER: Objection; mischaracterizes his
17 testimony.

18 THE COURT: Objection overruled.

19 Answer the question that's been propounded,
20 please.

21 THE WITNESS: Yeah. I might be misunderstanding
22 it.

23 THE COURT: Well, ask for clarification if you
24 don't understand it.

25 THE WITNESS: Okay. Would you clarify what you

1 mean by "testimony."

2 BY MR. PETROCELLI:

3 Q You don't understand what "testimony" means?

4 A Well, I think I mentioned that I spent time
5 reading the first part of that, right?

6 And so if it's the --

7 BY MR. PETROCELLI:

8 Q Sir, I have the email here. The email is one, two
9 paragraphs. It covers about a half a page. That took you,
10 what, 20 seconds to read?

11 A So the email or the testimony?

12 Q The email.

13 A Okay.

14 So the email I read.

15 Q You read the email?

16 A Yes.

17 Q Okay. Then there was a transcript.

18 A Yes.

19 Q And you know what a transcript means. A
20 transcript of a trial proceedings, correct?

21 A I do.

22 Q And it was highlighted for you in yellow?

23 A Okay. I started, to my recollection, there are no
24 highlighted yellow pieces where I started. And I started
25 reading from the beginning of this transcript.

1 And, yes, when I got to the -- you know, I really
2 felt like I had just gotten to the good stuff when I got the
3 email from Jeff Blum.

4 Q But you didn't get to the good stuff, almost to
5 it?

6 A I did not read through the testimony.

7 Q And you didn't delete the email with the
8 transcript, correct?

9 A I did not.

10 Q You still have it, right?

11 A I still do.

12 Q And you had it all weekend, right?

13 A I did.

14 Q Now, you mentioned that -- let me rephrase the
15 question.

16 It is correct that in your business, it's a
17 relatively tight-knit community of people that do these
18 negotiations, and they frequently talk with one another,
19 correct?

20 A No, we do not frequently speak with each other.

21 Q Did you not tell that yesterday in our conference,
22 that it was a small community of people?

23 A I said it was a small group.

24 Q And did you not say that they often talk to one
25 another?

1 A I did not -- or at least I don't recollect saying
2 that.

3 Q And you said that you had never heard of
4 Suzanne Fenwick, correct?

5 A I said it surprised me that I did not know
6 Suzanne Fenwick.

7 Q Because you know most of the people who do these
8 deals, right?

9 A I do.

10 Q How long have you been in the business?

11 A Which business?

12 Q The business you're in.

13 A So I started with Comcast in 2002.

14 And I started with Dish in 2011.

15 Q And so you were at Comcast for nine years?

16 A I was.

17 Q And what did you do there?

18 A I oversaw their advanced advertising business.

19 Q And then when you came to Dish in 2011, what did
20 you do?

21 A Advanced advertising -- or, actually, I oversaw
22 the entire media sales group.

23 Q And then you started doing, heading up
24 negotiations of the carriage agreements in or about the fall
25 of 2014?

1 A That's right.

2 Q And --

3 A In mid September.

4 Q And you continue to do that in addition to you're
5 now the President of Sling, right?

6 A I do.

7 Q Okay. And your boss is Charlie Ergen?

8 A My boss technically is Erik Carlson, who's the CEO
9 of Dish, but I do speak with Charlie fairly often.

10 Q Well, Mr. Ergen is the founder of Dish, right?

11 A He is.

12 Q And he's the chairman of the company, right?

13 A He is.

14 Q And he's the principal stockholder, correct?

15 A He is.

16 Q And no major decisions get made without him,
17 correct?

18 A I would say that's fairly accurate.

19 Q Dish doesn't take any anybody dark without
20 Mr. Ergen's approval, correct?

21 A He is typically in the loop.

22 Q More than in the loop. That's his call, isn't it?

23 A So certainly when I began in programming, it was.
24 He has given us additional latitude over the years on some
25 of the transactions.

1 Q Now, yesterday, you gave some testimony about
2 Turner being must have.

3 A I did.

4 Q Now, this, to be clear, this phrase "must have" is
5 commonly used in the industry, right?

6 A Yeah. I'm not sure it has a commonly accepted
7 definition, but it is a, sort of a turn of phrase that's
8 used.

9 Q And it's used a lot in sales pitches, right?

10 A Certainly, in sales pitches.

11 Q Programmers pitching their content, right?

12 A That's right.

13 Q Now, I want to talk with you first about
14 Turner Sports, okay?

15 Do you know what percentage of national sports
16 viewing is accounted for by Turner programming?

17 A Can you define that further for me.

18 Q Yes.

19 Of all sports viewing, national sports viewing on
20 television, let's say, in 2017, what percentage is Turner,
21 do you know?

22 A It's not really a metric we use. It's not a
23 metric we find relevant.

24 Q I asked you if you knew.

25 A Yeah. No, I don't know.

1 Q You do know that Turner doesn't carry the NFL,
2 right?

3 A I do.

4 Q Okay. So no football games, right?

5 A That's right.

6 Q Never had the Super Bowl on Turner, right?

7 A No.

8 Q Doesn't carry any NCAA football games, correct?

9 A That's correct.

10 Q That's regular season, as well as college
11 playoffs, correct?

12 A That's correct.

13 Q No NASCAR, correct?

14 A No NASCAR.

15 Q Doesn't carry National Hockey League, correct?

16 A That's right.

17 Q No Major League Soccer, correct?

18 A I believe that's right.

19 Q No rights to the Olympics --

20 A That's right.

21 Q -- correct?

22 On the NBA, do you know how many regular-season
23 games did they broadcast?

24 A Again, it's just not a metric we look at.

25 Q I didn't ask you about the metrics. I'm simply

1 asking you whether you know.

2 A So since we don't look at it, since we don't find
3 it relevant, no.

4 Q So the answer is you don't know.

5 A It's --

6 Q I didn't ask you if it was relevant. I simply
7 asked you if you know how many games --

8 A Sense it's not relevant, no.

9 Q That's not my question.

10 A I answered it. I just answered it.

11 Q It's the Court's province to determine what's
12 relevant. I'm simply asking questions, okay?

13 Do you know how many basketball games the NBA
14 broadcasts?

15 A We did not look at that number.

16 THE COURT: Sir, you really have to answer the
17 question.

18 THE WITNESS: But I answered "no." I said,
19 because we don't look at the -- because find it relevant,
20 no.

21 Then he asked again. So I'm not sure where to go
22 next.

23 MR. PETROCELLI: Your Honor, I move to strike his
24 explanatory reasons for why he doesn't know certain things.
25 I'm entitled to ask these questions. They're

1 straightforward.

2 THE COURT: Just -- look. We don't need fencing
3 here.

4 THE WITNESS: Okay.

5 THE COURT: Listen to his question. If you don't
6 understand it, you can ask for clarification. Just answer
7 the question he asks.

8 THE WITNESS: Okay.

9 BY MR. PETROCELLI:

10 Q Do you know how many --

11 THE COURT: If you need to explain your answer,
12 you can ask to explain.

13 BY MR. PETROCELLI:

14 Q Do you know how many NBA games Turner carries in a
15 year, regular season?

16 A I do not.

17 Q Okay. Do you know whether they carry NBA playoff
18 games?

19 A I don't.

20 Q Now, yesterday, I thought I heard you say that you
21 can catch the NBA finals on Turner. Do you recall saying
22 that?

23 A I think I corrected that to say the all-star game.

24 Q Basketball all-star game, correct?

25 A Yes.

1 Q So not the finals?

2 A That's right. When I said "finals," I realized
3 that that was --

4 Q And Turner has never had the NBA finals, correct?

5 A To my knowledge.

6 Q That's on the broadcast station, correct?

7 Is that right?

8 A Yes.

9 Q Okay. Major League Baseball games, do you know
10 how many Turner carries in a year, regular season?

11 A I do not.

12 Q If I told you 13, would you accept that?

13 A I look at hours viewed. So I wouldn't know.

14 Q It's never had -- it's carried some
15 Major League Baseball playoff games? Do you know that?

16 A If you say so.

17 Q No. Do you know?

18 A No, I don't.

19 Q Okay. Has it ever had the broadcast rights to any
20 World Series?

21 A I don't believe so.

22 Q Does it have a regional sports network?

23 A It does not.

24 Q And Dish does not carry all regional sports
25 networks that are available, correct?

1 A We do not.

2 Q Now, you gave quite a bit of testimony about March
3 Madness. In fact, I think you said yesterday, if you don't
4 have March Madness, you're not in the pay-TV business.

5 Do you recall saying that?

6 A I do.

7 Q Okay. So let's follow up on that.

8 Now, you mentioned that right now we're in March
9 Madness, right?

10 A That's right.

11 Q But the Final Four is available on the Internet
12 right now for free, right?

13 A Three hours for free.

14 Q Per device, correct?

15 A Sure. I mean, if you want to go get a second and
16 third device, you can continue to sort of game the system.

17 Q And you can watch the -- and there are apps that
18 you can download to watch these games for free right now?

19 A That's correct.

20 Q And so your subscribers who may not have Turner,
21 for example, they can get March Madness for free, correct?

22 A When you say our subscribers, do you mean
23 satellite or Sling.

24 Q Well, let's take some of your -- on your Dish
25 subscribers, on the satellite, not everybody subscribes to

1 Turner, right?

2 A It's pretty broadly subscribed to. It's been both
3 Orange and Blue on Sling, so --

4 Q Let's stick with satellite.

5 Not everyone has the Turner network?

6 A Not 100 percent.

7 Q So those people that don't subscribe to the Turner
8 networks as part of your satellite package, they can get it
9 for free on the Internet, right?

10 A If they have the Internet.

11 Q If they have the Internet. Okay.

12 And you are aware that Mr. Ergen has publicly
13 commented that folks can get March Madness on the Internet
14 for free, correct?

15 A Can you give me the time or reference or some sort
16 of context for that.

17 Q Well, tell me if you recall Mr. Ergen saying the
18 following: "A lot of programming is available elsewhere.
19 It would be a little bit tougher if their original
20 programming" -- and this was talking specifically about
21 Turner now.

22 A When was this?

23 Q This is third quarter, 2014?

24 A So we were in the midst of negotiations then?

25 Q Well, I'm asking the questions, okay?

1 So let me put the statement to you, and you can
2 confirm that you're aware that Mr. --

3 MS. KISER: Objection, Your Honor.

4 BY MR. PETROCELLI:

5 Q -- Ergen made this statement.

6 THE COURT: Hold on. What's your objection?

7 MS. KISER: Mr. Ergen's statements are hearsay.

8 THE COURT: You can approach.

9 Step down, sir.

10 (Sealed bench conference)

11 MS. KISER:

12

13

14

15

16

17

18 THE COURT:

19 MR. PETROCELLI:

20 THE COURT:

21 MR. PETROCELLI:

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MS. KISER:

MR. PETROCELLI:

THE COURT:

1

2

3

MR. PETROCELLI :

4

5

6

THE COURT :

7

8

MR. PETROCELLI :

9

10

11

12

MS. KISER :

13

14

15

MR. PETROCELLI :

16

17

MS. KISER :

18

THE COURT :

19

MR. PETROCELLI :

20

THE COURT :

21

22

MR. PETROCELLI :

23

THE COURT :

24

25

1 MR. PETROCELLI:

2 THE COURT:

3

4

5

6

7 MS. KISER:

8

9 THE COURT:

10 (Open court)

11 THE COURT: You may proceed, consistent with the
12 discussion at the bench.

13 MR. PETROCELLI: Thank you, Your Honor.

14 BY MR. PETROCELLI:

15 Q So were you aware that on November 4th, 2014,
16 speaking about Turner specifically, Mr. Ergen publicly
17 stated, with respect to Turner, "A lot of their program is
18 available elsewhere.

19 "It would be a little tougher if the original
20 programming was a success, like AMC. But their original --
21 in fact, I don't know of an original program that they have
22 that that's in that category. And so a lot of the rerun
23 stuff is available on other avenues. Even the NBA is going
24 to be, a majority of it is on the ESPN and the NBA network.
25 And even things like the Final Four stuff are on the

1 Internet now."

2 Are you aware that the chairman of your company
3 made those comments publicly?

4 A I am.

5 Q Now, Turner, on your Sling package, you have the
6 Orange and the Blue package, correct?

7 A That's correct.

8 Q And the Blue package has no broadcast stations at
9 all, correct?

10 A No, that's not correct.

11 Q Excuse me. The Orange package has none, correct?

12 A The Orange base pack has no broadcast stations.
13 It has an opportunity to subscribe to ABC in a tier.

14 Q For extra money, right?

15 A Yes.

16 Q Okay. But the basic \$20 package that you talked
17 about, the Orange package, has no broadcast stations,
18 correct?

19 A That's correct.

20 Q And it doesn't have CBS, correct?

21 A That's correct.

22 Q And the Blue package doesn't have CBS, correct?

23 A That's correct.

24 Q CBS is not available at all on Sling, correct?

25 A Through Sling, it's not.

1 Q Through -- that was my question. It's not
2 available at all if you want to get Sling. You cannot get
3 CBS, correct?

4 A That's true.

5 Q Okay. Now, you're aware that CBS and Turner split
6 March Madness, correct?

7 A I'm aware.

8 Q So if you're a Sling customer and you want to
9 watch March Madness, you can't watch all the games because
10 some of them are on CBS, true?

11 A We encourage people to subscribe to
12 CBS All Access.

13 Q Well, that was not my question.

14 Let me repeat my question.

15 So if you're a Sling customer and you want to
16 watch March Madness, you cannot watch all the games in
17 March Madness because a number of them are on CBS, correct?

18 A You cannot watch all the games through Sling; that
19 is correct.

20 Q Okay. And so -- and every other year, Sling and
21 Turner alternate as to who gets the Final Four 4 and the
22 championship game, correct?

23 A You mean CBS and Turner?

24 Q Excuse me. CBS and Turner. Forgive me.

25 A They do.

1 Q Okay. So this year, Turner has it, right?

2 A That's right.

3 Q And next year CBS has it, right?

4 A That's correct.

5 Q And so next year if you're a Sling subscriber,
6 through Sling, you could not get the Final Four or the
7 championship game, which will be aired on CBS, correct?

8 A Through Sling, that's correct.

9 Q And there are a number of other sporting events
10 you can't get on Sling, correct?

11 A I'm sure that's the case.

12 Q So, for example -- well, let's stick with CBS.
13 They have the Super Bowl next year. So you can't -- if
14 you're a Sling customer, you can't watch the Super Bowl next
15 year on Sling, correct?

16 A Right.

17 Nothing that comes through CBS would appear on
18 Sling.

19 Q And on the Orange package, doesn't have NBC,
20 right?

21 A That's true.

22 Q And so you couldn't have watched the Super Bowl
23 this year on Sling, right?

24 A That's true.

25 Q And last year --

1 A Well, actually, on Sling Blue, you could have.

2 Q Not on Orange, right?

3 A That's correct.

4 Q And on Sling Orange you couldn't have watched the
5 Super Bowl the year before when it was on Fox, right?

6 A That's correct.

7 Q And the Masters is going to be on CBS in about a
8 week or so, correct?

9 A That's true.

10 Q Can't watch that on either Sling Orange or
11 Sling Blue?

12 A That's true.

13 Q And ESPN, you would agree that ESPN is the
14 dominant sports network, right?

15 A What do you mean by "dominant"?

16 Q Well, didn't you say that it accounts for about
17 80 percent of sports telecasts?

18 A Can you refresh my memory. That seems high.

19 Q Did you say that the biggest sports Cable Network
20 out there has 80 percent with most of its groups, and that
21 would be ESPN?

22 A So I don't remember that. That seems high. But
23 perhaps you can give me more context.

24 Q Would you agree that among the Cable Networks,
25 ESPN has, by far, the lion's share of sports programming, if

1 you exclude broadcast networks?

2 A I guess I would say that ESPN has more than any
3 other individual network.

4 But in total, I don't know if it's the
5 lion's share or not.

6 Q And ESPN is not available on Blue; is that right?

7 A That's correct.

8 Q And in terms of going beyond sports, in terms of
9 general entertainment, you said Turner was also must-have,
10 did I understand you correctly, because it has general
11 entertainment programming? Is that right?

12 A So I think my statement was that the suite of
13 Turner networks is must-have because of their sports,
14 entertainment -- live sports, live news, and entertainment.

15 Q Well, let's talk about entertainment for a moment.

16 Do you know how many, let's say, of the top-rated
17 500 shows of 2017, how many were Turner programs?

18 A So, again, I've never looked at that metric, so
19 no.

20 Q And in contrast, do you know how many CBS had?

21 A Again, it's the same answer. Because I don't look
22 at that metric, I don't know.

23 Q Do you know how many NBC had?

24 A No.

25 Q Would you agree with me that NBC alone has greater

1 viewership than all the Turners combined?

2 A I would not agree with that.

3 I don't have the specific numbers, but

4 I don't know that I can agree with that.

5 Q So Sling Orange, for example, has no NBC, right?

6 A That's true.

7 Q And if I told you that the NBC broadcast network
8 viewership share, is higher than all the Turner networks
9 combined, would you agree with that?

10 A Certainly not -- you know, when I look at Sling,
11 that's not the case.

12 We have NBC owned and operated in Blue. But
13 between Orange and Blue, hours viewed is not significantly
14 different.

15 Q So Sling, you said, was doing quite well, correct?

16 A We think it's doing well.

17 Q But you're doing quite well even though there's a
18 large segment of sports programming that that's not
19 available on Sling, as we just went through, correct?

20 A Well, we went through Sling Orange sports program
21 that's not available there.

22 Then we went through some of the things that are
23 not available through CBS.

24 But I would say, you know, one way or another, we
25 have a fairly healthy offering of sports across the two.

1 Q But as we have been through, there's significant
2 chunk of sports that you can't get on either Sling Orange or
3 Sling Blue?

4 A There are some events, some of the large events.

5 I mean, Super Bowl was available on NBC this year,
6 so that would have been Sling Blue.

7 But we won't have the Masters, for instance,
8 unless you subscribe to *CBS All Access*.

9 Q Were you comparing Super Bowl to March Madness in
10 terms of viewership and popularity?

11 A I wasn't.

12 Q Okay.

13 A I was actually saying that there are a number of
14 tentpole events that are important.

15 Q And you would agree with me that the viewership of
16 the Super Bowl, for example, is four or five times higher
17 than March Madness, right?

18 A Yeah. The Super Bowl is the granddaddy of them
19 all.

20 Q Now, you also said HBO scares you. Do you recall
21 that?

22 A Can you give me more context.

23 Q Well, yesterday on the witness stand, you said,
24 quote, HBO scares me, end of quotes.

25 Do you recall saying that?

1 A You've just got to give me more.

2 I don't remember the context in which I said that.

3 Q You don't remember testifying to that?

4 A I'm asking you for the context.

5 What did I -- what was the question that that was
6 the answer to?

7 Q Well, I'll take it that you don't remember saying
8 it.

9 A I said HBO, outside of the Consent Decree, is
10 scary, because it, you know -- I don't know if I used the
11 word "hammer," but it can be used against us.

12 Q Well, let me talk about how -- about HBO for a
13 second.

14 I think I heard you say yesterday that only one in
15 five of Dish describers actually gets HBO; is that right?

16 A That's a huge number for us.

17 Q But is that correct?

18 A It's roughly, roughly correct, approximately.

19 Q Okay. And hasn't HBO and folks at Time Warner
20 told you and told your boss, Charlie Ergen, that you -- that
21 Dish is absolutely the worst distributor of HBO?

22 A They have.

23 Q And haven't they told you that Dish's HBO
24 penetration is lower than any other distributor?

25 A As part of their sales pitch, they have.

1 Q Oh, you think that the data doesn't back it up?
2 Is that what you're suggesting?

3 A When we looked at the data, what we saw was that
4 nearly 90 percent of our subscribers had been exposed to
5 HBO. And the fact that roughly one in five subscribe tells
6 us that these, you know, that these sort of 18 to 20 percent
7 that do subscribe are hard-core and that everybody else has
8 chosen not to.

9 Q And, in fact, HBO is now available without even
10 getting a cable subscription. You tell get it over the top
11 under HBO Now, correct?

12 A Again, if you have Internet.

13 Q And CBS, for example, is also available over the
14 top, correct?

15 A That's correct.

16 Can I explain just something about why I keep
17 saying that?

18 You know, we pushed -- we've really tried to get
19 out of the urban areas with our satellite product. So we
20 pushed more and more rural.

21 And so many of our customers -- in fact, a growing
22 percentage -- do not have Internet or do not have Internet
23 that is video-capable.

24 So as we try to get out of the way of Comcast and
25 some of these big MSOs or MVPDs, we're pushing more towards

1 the hinterlands. So there are millions of our subscribers
2 who, many millions, who don't have really high-quality
3 broadband.

4 Q But your Sling business, which you spent most of
5 your time talking about, that's a business that depends
6 heavily on Internet connectivity --

7 A It does; that's correct.

8 Q -- correct?

9 A Right. That's correct.

10 So just to be clear, the HBO numbers that we were
11 just talking about, one in five, that's a satellite number,
12 so --

13 Q And let's now turn to CNN.

14 I think I heard you say CNN was also a must-have,
15 that you can't imagine an election without CNN; is that what
16 you said?

17 A It's grown in popularity.

18 Q Well, you went dark on CNN right in the middle of
19 an election back in 2014, correct?

20 A We did.

21 Q So you imagined, at that time, you could go dark
22 on CNN, right in the middle of mid-year elections, when
23 every single congressperson is up for reelection, correct?

24 A That's correct.

25 Q And Mr. Ergen publicly stated at that time that

1 CNN, 20 years ago, was must-have. It's not a must -- it's
2 not a top-10 network today anymore. He made that comment
3 publicly in the fall of 2014, correct?

4 A I call that negotiating in the press.

5 Q Well, he made that comment to investors.

6 Are you suggesting he was misleading investors; he
7 was lying to investors?

8 A I say that's negotiating in the press.

9 Q Well, that wasn't my question, sir.

10 You are aware that Mr. Ergen told investors on an
11 earning analyst --

12 A I'm aware of it.

13 Q Excuse me. I didn't finish my question.

14 20 years go, that CNN was a must-have. It's not a
15 must. It's not a top-10 network today anymore.

16 He told that to investors, correct?

17 A That's correct.

18 Q Was he being truthful or was he lying?

19 A He was being truthful.

20 Q It's true that he also said CNN is not quite the
21 product that they used to be.

22 You can imagine CNN down on an election night
23 would be a disaster, 15, 20 years ago, but now, it's --
24 there's plenty of other places for people to get news.

25 And when Mr. Ergen made that public statement, he

1 was also being truthful, correct?

2 MS. KISER: Objection, Your Honor. May we
3 approach?

4 THE COURT: You may.

5 (Sealed bench conference)

6 THE COURT:

7 MS. KISER:

8

9

10 THE COURT:

11 MS. KISER:

12

13

14 THE COURT:

15

16 MS. KISER:

17

18 MR. PETROCELLI:

19 THE COURT:

20

21

22

23 MS. KISER:

24

25 THE COURT:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(Open court)

THE COURT: You may proceed, consistent with the discussion at the bench.

MR. PETROCELLI: Thank you.

BY MR. PETROCELLI:

Q And, in fact, in the midst of an election, just in two thousand and -- back in 2014, one of the reasons you went dark on CNN is because you thought they were asking for too much money, right?

A The terms of the proposed deal, not just the money piece, but the terms were -- we were pretty far apart, so it wasn't just about the money.

Q Isn't it true that in an earnings call, Mr. Ergen referred to double-digit price increases, when CNN's viewership is half as much as it used to be?

Do you recall him making those statements?

A I don't.

But those are roughly congruent with the numbers that we would see, or the numbers that we saw at the time. CNN's gained popularity since then. But at the time, that was -- I think that was our belief.

Q In fact, you're in litigation with CNN -- with Turner right now over CNN, correct?

A That's true.

1 Q And your position in that litigation is that you
2 have been overpaying for CNN, correct?

3 A According to the contract, we believe we've been
4 overpaying.

5 Q And when you did go dark on CNN and the other
6 Turner networks other than TNT and TBS, Mr. Ergen publicly
7 stated that it was a non-event, correct?

8 A I believe he did state that.

9 Q A non-event, correct?

10 In fact, he went even further than that. He
11 stated that by going dark on Turner, by not carrying Turner,
12 Dish "would not have to raise our prices next year, and that
13 would be slightly cash positive for us, from a cash flow
14 perspective. And, yes, we'd lose some customers, but we'd
15 save a big, big, big check from a cash-flow perspective."

16 Do you recall those statements?

17 A I don't recall those specific statements.

18 You'll have to help me out there a little bit.

19 Q I will help you out. I'll show you the
20 statements.

21 MR. PETROCELLI: Can I have the -- I'm marking for
22 identification as Exhibit 919, Your Honor, the Dish earnings
23 call transcript of November 4, 2014.

24 This is defendant's, for identification, 919.

25 May I approach?

1 THE COURT: You may.

2 (Defendants' Exhibit 919
3 (was marked for identification.)

4 THE WITNESS: Sorry. I've got two copies here.

5 Are they the same?

6 Which page are you referring to?

7 BY MR. PETROCELLI:

8 Q Turn to page 7.

9 Do you have that in front of you?

10 A I do.

11 Where are you in that, on page 7?

12 Q If you turn, middle of the paragraph, second part
13 of the page.

14 Do you see where it says, "And you're in a
15 situation now, for example, with Turner," about two-thirds
16 down into the paragraph?

17 A I do see that.

18 Q It says, And you're in a situation now, for
19 example, where Turner, do you not do -- if Turner, we
20 can't -- if we're not going to be in a relationship with
21 Turner, we would not have to raise our prices next year,
22 all right? And that would be slightly cash positive for us
23 from a cash-flow perspective. And, yes, we'd lose some
24 customers, but we'd save a big, big, big check from a
25 cash-flow perspective.

Do you see that?

1 A I do.

2 Q And do you see above that, about the fifth line
3 down, beginning of that paragraph, in reference to going
4 dark on CNN and the other Turner networks that you went dark
5 on, Mr. Ergen publicly stated, "So it's not had a major
6 impact on our business yet."

7 Do you see that?

8 A I do.

9 Q And you agree with those statements, right?

10 A Can I explain the analysis that we did that goes
11 behind those?

12 Q No. I simply asked you if you agree with those
13 statements. You can say "yes" or "no."

14 THE COURT: You can explain it on redirect.

15 THE WITNESS: Pardon me?

16 THE COURT: You'll get to explain it on redirect
17 exam.

18 THE WITNESS: Okay. With the letter of these
19 statements, I would agree.

20 BY MR. PETROCELLI:

21 Q And turn to page 10 on that document.

22 And you'll see Mr. Ergen's comments on page 10,
23 again, to the investment community, to the analysts.

24 Do you see that?

25 A I do.

1 Q And down in the middle of the page, he says,
2 quote, We don't want any of our programmer partners to drop
3 off, but they'll self-select. And somebody's going to drop
4 off, and we'll keep our prices lower. And we'll lose some
5 subscribers, but we'll net-net be cash-flow positive on it,
6 which is how we look at it.

7 I hope it's not Turner, because Turner was the
8 very first company who signed with us in DVS. So that's
9 like the last -- it's one of the easier ones to take down,
10 in my opinion.

11 But it's like the last one I personally want to
12 take down, because they're the guys that helped us get in
13 business.

14 Now, Mr. Ergen's statement that the Turner
15 networks are among the easier ones to take down, one of the
16 easier ones to take down, you agree with that?

17 A You could get rid of all your customers and save a
18 lot of money, and it wouldn't be a business.

19 Q So do you think Mr. Ergen was actually telling the
20 investment community that he was going to get rid of all of
21 his customers, go out of business?

22 A We were in the midst of negotiations.

23 Q So you're saying that Mr. Ergen made these
24 statements, even though they were not truthful, just for
25 purposes of gaining an advantage in negotiations; is that

1 now your testimony?

2 A These are true statements, and you can make true
3 statements that are in the middle of negotiations and are --
4 you know, and send a message.

5 Q So the statements were true; Turner is one of the
6 easier --

7 A The statements are absolutely true.

8 Q Turner is one of the easier of all the networks to
9 take down, true?

10 A So Turner is not a network.

11 Q The Turner networks are among the easiest ones to
12 take down.

13 A Right. I just want to make sure we distinguish
14 between CNN, which at the time was on its heels, and all
15 Turner networks.

16 Q Well, I'm talking about "I hope it's not Turner."
17 He didn't say "CNN." He said "Turner." And you know
18 Turner -- at that time you were licensing how many networks
19 from Turner?

20 A You know, I guess all eight, in some form or
21 fashion.

22 Q My simple question is, do you agree that among all
23 the networks, Turner is the easiest one to take down?
24 Do you agree or disagree?

25 A So I guess personally I would have to disagree.

1 Q Now, I think I heard you say yesterday that you
2 don't -- your company doesn't like to go dark; is that
3 right?

4 A That's correct.

5 Q And I think you actually said that when your
6 company goes dark, it's like having a heart attack.

7 Do you remember that?

8 A I do. It hurts us.

9 Q But your company's had a lot of heart attacks,
10 hasn't it?

11 A We negotiate hard.

12 Q But you had a lot of heart attacks, right?

13 A We have.

14 Q More than any other distributor, right?

15 A I think they correspond with our sub decline.

16 Q So you take programmers down left and right, don't
17 you?

18 A I wouldn't say we take them down. I would say
19 that we negotiate hard and there's, when there's a gap, we
20 can't continue to display their content without their
21 permission. It takes two to tango on that.

22 Q But, for some reason, you guys take programmers
23 down more than any other distributor, and that's part of
24 your strategy to do that, correct?

25 A Our strategy is to --

1 Q Is that part of your strategy, yes or no, sir?

2 A I choose not to answer. It's just, our strategy
3 is about a lower price to the consumer. So we have to
4 negotiate hard.

5 Q You choose not to answer?

6 A Well, then I did answer, so --

7 Q Is it true that Charlie is a wildcat, and he's a
8 strong negotiator; is that true?

9 A I said that. I believe it.

10 Q Is it true that one of Charlie's maxims is "If you
11 let them push you around once, they'll push you around next
12 time for sure"?

13 A Yes.

14 Q And you know you testified to that in your
15 deposition --

16 A I do.

17 Q -- correct?

18 And you also testified that if you don't let them
19 push you around, hopefully, everybody in the neighborhood
20 sees Dish. Be careful, because Dish will take you down or
21 might take you down.

22 That's what you testified to, correct?

23 A I did.

24 Q And you testified to that, not because you were
25 negotiating, because you were telling the truth, correct?

1 A That's correct.

2 Q Now, let's talk about how many times you've taken
3 programmers down, to use your words.

4 You took CBS, the broadcast network, down just
5 last Thanksgiving, correct?

6 A So, again, I just want to be clear. We were far
7 apart on terms, and we can't display their content without
8 their permission.

9 Q Sir, I don't want to get into this semantic issue.
10 I'm referring to your testimony here: Dish will take you
11 down, okay?

12 And what you're talking about is, "Dish will take
13 you down" is when there's an impasse and Dish does not want
14 to agree the programmer's terms; Dish won't agree, such that
15 the programming will go dark, correct?

16 A We have -- we are unable to display programming
17 without the programmer's permission. So it takes two to
18 tango in this.

19 Q You're not suggesting to the Court that it's the
20 programmer who's taking you dark against your will, are you?

21 A The programmer has as much to do with this as we
22 do in terms of coming to some sort of agreement.

23 Q But you can simply agree with the programmer's
24 demands, and then you can broadcast the programming,
25 correct?

1 A We could.

2 But by the same token, we, with CBS, for instance,
3 we offered to extend on whatever terms that we agreed to
4 eventually so they would be retroactive. And CBS chose not
5 to.

6 Q But Dish --

7 A So in that case, it's a great example of a
8 programmer going dark with us.

9 Q So are you suggesting that it's always the
10 programmer's fault when you take down all these networks?

11 A So I said "in that case."

12 So I'd say -- I think I've also testified it's
13 50/50. I don't know if that's 50/50, 60/40. But it's a
14 clear example of them going dark, even though we offered to
15 true up, retroactively.

16 Q But they must have had good reasons why they
17 didn't want to agree to your terms?

18 A Both sides think they have good reasons every
19 time. That's 100 percent.

20 Q So without getting into who you're going to blame
21 for going dark, I just want to talk about the times in which
22 Dish has been involved in a blackout of a program.

23 So just bear with me, okay?

24 CBS in November of 2017, correct?

25 A Correct.

1 Q CBS in 2013, correct?

2 A That's right.

3 Q Fox News and Fox Business in December of 2014,
4 correct?

5 A That's true.

6 Q And that's right after the Turner networks were
7 taken down, correct?

8 A They saw a weak spot and they tried to take
9 advantage of it.

10 MR. PETROCELLI: I move to strike as
11 non-responsive, Your Honor.

12 THE COURT: Granted.

13 BY MR. PETROCELLI:

14 Q Can you please answer the question.

15 You had a takedown of Fox News and Fox Business in
16 December of 2014, right after the Turner blackout, correct?

17 A That's true.

18 Q By the way, Fox is an important network for Dish,
19 correct?

20 A Which Fox?

21 Q Fox News?

22 A It is important.

23 Q As important as it is, Mr. Ergen has publicly
24 stated, "If we had to live without Fox, we would have lost
25 more customers, but we would have gained customers long term

1 because of the cost savings."

2 Do you recall Mr. Ergen saying that in reference
3 to Fox?

4 A May I explain his negotiating strategy?

5 Q No. I just asked you if you recall his having
6 said so, publicly, to investors.

7 A Yes.

8 Q In 2012, Dish took down AMC, correct?

9 A I believe so. I wasn't -- I did not oversee
10 programming at that time.

11 Q AMC, of course, had the *Breaking Bad*, *Mad Men*, and
12 *The Walking Dead*, right?

13 A I believe so.

14 Q Those are all major, hit shows, right?

15 A They are.

16 Q In 2010, there was a blackout of ESPN news
17 high-def channels.

18 Do you recall that?

19 A I don't.

20 Q Disney HD and ABC Family HD, also in 2010, do you
21 recall that?

22 A That was before I joined the company.

23 Q Madison Square Garden in October 2010, do you
24 recall that?

25 A I joined in 2011.

1 Q I know, but you probably familiarized yourself
2 with the company's history.

3 A I don't recall it.

4 Q The Weather Channel, 2010, do you recall that?

5 A I don't.

6 Q Lifetime in 2006, do you recall that?

7 A No.

8 Q OLN, do you know what that stands for?

9 A Outdoor Life Network.

10 Q Which is now what?

11 A I believe it's Outdoor.

12 Q You took the blackout there in 2005, correct?

13 A If you say so.

14 Q Viacom, 2004, correct?

15 A (Shaking head.)

16 Q In fact, Mr. Ergen has publicly stated that there
17 is not a single channel that he wouldn't take down, correct?

18 A Again, if I could explain the negotiating
19 strategy.

20 Q That's not my question.

21 He has publicly stated that, correct?

22 A So I don't recall that specific statement.

23 Q Okay. Let me see if you recall this.

24 "There's not any channel I go to sleep at night
25 that I say, if the price is too high for our consumers based

1 on our analysis, that we wouldn't be willing to take down."

2 Do you recall Mr. Ergen saying that publicly?

3 A I don't. Perhaps you could give me just a little
4 bit more detail.

5 Q Yes, I will.

6 MR. PETROCELLI: Can I have the next one,
7 Exhibit 920, please.

8 May I approach, Your Honor?

9 THE COURT: You may.

10 (Defendant's Exhibit 920
11 was marked for identification.)

12 BY MR. PETROCELLI:

13 Q This is an interview, Charlie Ergen, on the state
14 of OTT --

15 A What page are you on?

16 Q -- adopted September 27th, 2017, page 10 and 11.

17 THE COURT: What are you marking these as for
18 identification?

19 MR. PETROCELLI: Yes, as Defendant's 920,
20 Your Honor.

21 THE WITNESS: Yes.

22 BY MR. PETROCELLI:

23 Q Reading at page, starting at page 10 at line 17:
24 "And so today, in today's market, Altice could take ESPN
25 down and survive it. Five years ago, that would not have
been an option. That would have been -- that would have

1 been suicidal. But today, they -- they could do it.
2 It would be painful, but they could do it. And there's not
3 any channel -- there's not any channel that I go to sleep at
4 night that the price is -- that I say if the price is too
5 high for my -- for our consumers, based on our analysis,
6 that we wouldn't be willing to take down."

7 Do you agree with those statements that your
8 chairman made?

9 A I don't necessarily agree with the statement. I
10 agree that he made them.

11 Q That's all I'm asking.

12 A Okay.

13 Q Now, you would agree with me that if this merger
14 is approved -- let's say we're at the day after the merger
15 and in negotiation now with Turner -- Charlie Ergen is still
16 going to be the wildcat, isn't he?

17 A Charlie is Charlie.

18 Q Charlie Ergen is still going to be the strong
19 negotiator who will take anybody down if the price isn't
20 right, correct, merger or no merger, true?

21 A You know, I can't speculate. We take each deal
22 one at a time.

23 Q Well, you were giving a lot of predictions and
24 prognostications in your direct testimony about what might
25 happen if there was a merger.

1 Do you recall that?

2 A I recall saying that we would lose subs if we go
3 dark.

4 Q Now --

5 A That's different than saying --

6 Q Now I'm asking you to make another protection.
7 Do you think that Mr. Ergen, as the founder and chairman of
8 your company, is going to pay a nickel more than what he
9 thinks the content is worth?

10 A We paid a nickel more in HBO last time, a lot more
11 than a nickel.

12 Q And that was your decision, even though only one
13 out of five get it?

14 A That was our decision because we felt we needed to
15 have it.

16 Q And Mr. Ergen isn't going to crumble and give in
17 to unjustified demands, given his public track record of
18 taking down programmer after programmer and stating that
19 there isn't a single one he wouldn't take down if the price
20 is right; he'll continue to be the same Charlie Ergen the
21 day after the merger, correct?

22 A So under a merger, I think it changes everything,
23 I think it changes our calculation of sub loss. It changes
24 our analysis of what we look at.

25 So I would -- I would --

1 Q We're going to get to that.

2 A Charlie is incredibly rational.

3 Q We're going to get to that, sir, but I'm simply
4 trying to make a very, very simple point.

5 A Okay. So I would answer the simple point with
6 Charlie is rational; and the day after the merger,
7 everything is different.

8 Q Yeah.

9 And Charlie will be different too?

10 A Charlie is rational, so he'll look at a different
11 set of facts.

12 Q Well, we'll talk about that.

13 Now, let's talk -- let's work ourselves to that by
14 first talking about this dispute or this negotiation in
15 which you guys decided to take down the Turner networks.

16 Now, I think you testified on direct that you were
17 negotiating two sets of agreements, one covering TNT and TBS
18 and the other one covering CNN, Cartoon Network, and the
19 other networks, right?

20 A That's correct.

21 Q And they were on separate timelines?

22 A That's correct.

23 Q And -- but over the course of the summer of 2014,
24 as this negotiation was going on and on and on and on, these
25 extensions, these timelines or expiration dates continued to

1 get extended and extended sometimes week by week by week,
2 correct?

3 A Yes. I joined -- I joined programming in sort of
4 mid-September. And so by then, that had been going on for a
5 while.

6 But that's roughly correct.

7 Q And now we're in the middle of October of 2014.
8 And one of the agreements is going to expire in a week or
9 so, and the other one is going to expire, let's call it a
10 couple of months later.

11 A Six weeks.

12 Q Six weeks, okay?

13 And do you know what happened, then, on
14 October 15, 2014, that interfered with these negotiations?

15 A I, you know, day by day, I don't have a specific
16 event. I mean, if you're referring to --

17 Q Well, let me see if I can refresh your
18 recollection.

19 A Okay.

20 Q On October 15, 2014, in the midst of these
21 negotiations that have been going on and on and on for
22 months, there was a public announcement by Time Warner, by
23 HBO in particular, that it was launching its HBO Now
24 over-the-top service.

25 Do you recall that?

1 A Actually, I didn't remember that it was in the
2 midst of those negotiations.

3 Q And do you recall that Mr. Ergen was extremely
4 unhappy about that?

5 A I don't recall that piece of it.

6 What I recall is that --

7 Q Well, I just asked you that question.

8 A Okay.

9 Q Do you recall that Mr. Ergen reached out to
10 Time Warner, in fact, to the chairman of Time Warner,
11 Jeff Bewkes, to the complain about this consumer offering
12 that HBO is making available?

13 Do you recall that?

14 A So I was not a part of that call. I'm sure he
15 must have. He had a couple of calls with Jeff Bewkes.

16 Q And it was shortly thereafter that after all the
17 extensions and all the work that had been going on over the
18 summer, suddenly, Mr. Ergen made a decision to stop
19 negotiating with Turner, correct?

20 A Those two are not linked, in my recollection.

21 Q I didn't ask you if they're linked, okay?

22 A So coincidentally --

23 Q I asked you -- I didn't say -- I didn't ask you
24 about coincidentally.

25 After Mr. Ergen's phone calls with Jeff Bewkes and

1 communications about HBO Now being launched and being made
2 available to the consumer, Charlie Ergen directed that the
3 company would go dark on Turner one week later, correct?

4 A I do not remember that as a sequence of events or
5 that directive.

6 Q But it is true that one week later, the blackout
7 occurred, correct?

8 A For reasons of contract expiration dates.

9 Q And it's also true that Mr. Ergen called
10 Mr. Martin up, or Mr. Martin called Mr. Ergen up; and in
11 that conversation, Mr. Martin agreed to fly out to Denver in
12 order to put off the blackout.

13 Do you recall that?

14 A I do.

15 Q And do you recall that Mr. Ergen said, nah, we're
16 going to go dark. We'll make more progress negotiating when
17 we go dark?

18 Do you recall Mr. Ergen making that statement?

19 A I don't.

20 Q Mr. Ergen is known for saying, "Real negotiating
21 starts when we go dark."

22 A I don't -- I don't remember a quote like that, but
23 I'll take your word for it.

24 Q You don't recall Mr. Ergen ever making that
25 comment or words to that effect?

1 A I don't recall it. That doesn't mean he didn't
2 say it.

3 Q Okay. Now, counsel showed you an agreement that
4 was marked and put into evidence under seal a contract that
5 was entered into, I think, dated on or about April 1,
6 2015 --

7 A April 1st, 2015.

8 Q -- right?

9 A That's right.

10 Q But that wasn't the first contract that was
11 entered into. There was a prior one that you were not
12 shown, correct?

13 A So you have to clarify there. We have a lot of
14 contracts with Turner. Which one are you referring to?

15 Q Well, the blackout lasted one month,
16 approximately, correct?

17 A It did.

18 Q Okay. And that blackout got resolved when an
19 agreement was made in or about November of 2014, correct?

20 A That's correct.

21 Q But that agreement was only for four months or so
22 to expire March 31 --

23 A That's correct.

24 Q -- 2015?

25 A That's correct.

1 Q Now, you talked about making concessions.

2 A Uh-huh.

3 Q Turner made substantial concessions --

4 A Both sides did.

5 Q -- correct.

6 Well, I'm talking about Turner. You said -- you
7 made a concession because you agreed to bring these dates
8 together for the Turner, TBS, and TNT contract and the
9 contract on the other networks, right?

10 A Plus we had a claim of about 40 million as well.

11 Q I'm going to get to it.

12 A Okay.

13 Q Now, you said it was an advantage to the
14 programmer when the distributor decided to make all the
15 networks come -- due for renegotiation at the same time,
16 correct, Yes?

17 A Correct.

18 Q But hasn't Mr. Ergen taken the position that it's
19 actually an advantage of Dish? Hasn't he said it's an
20 advantage of Dish because when you have all the networks
21 together, including HBO, you can play them off against one
22 another? You can play the deals off against one another?

23 A That doesn't sound even remotely like Charlie. If
24 he said that, that's -- the deal team cringed when he came
25 back with the coterminous give on our part.

1 Q So I'm going to show you now an exhibit. It's
2 actually a plaintiff exhibit. It's Exhibit 414. And this
3 is the November agreement.

4 MR. PETROCELLI: There's no objection to this,
5 Your Honor.

6 THE COURT: November of what year?

7 MR. PETROCELLI: This is November 2014.

8 THE COURT: Okay.

9 MR. PETROCELLI: May I approach?

10 THE COURT: You may.

11 MR. PETROCELLI: This one I will move into
12 evidence together with the one that counsel moved in, both
13 under seal, Your Honor.

14 THE COURT: Any objection?

15 MS. KISER: No objection.

16 THE COURT: It will be admitted under seal.

17 (Plaintiff's Exhibit 414
18 received into evidence.)

18 BY MR. PETROCELLI:

19 Q Okay. Now, I'm going to do this without being all
20 that specific, okay?

21 So I want you to look at the contract.

22 And let's see paragraph 5. Okay?

23 A Okay.

24 Q Do you see there that Turner, the Turner networks,
25 are releasing, entering into a release of claims?

1 A I do.

2 Q And who's being released as your company, correct?

3 A That's correct.

4 Q And without getting into specifics, that involved
5 a release of money claims, correct?

6 A That's true.

7 Q And now look at paragraph 6.

8 Paragraph 6, Turner is agreeing to pay money,
9 correct?

10 And the amount is specified there.

11 A So it's a most favored nation payment.

12 Q Well, okay. And that was a payment by Turner to
13 Dish, correct?

14 A Yes.

15 Q Okay. And in addition to this, Turner agreed to
16 allow four of its networks to be used in the trial run of
17 Sling, correct?

18 A Yes -- trial run, I guess you mean, we sought --
19 beta launch of Sling, yes.

20 Q Correct. Okay.

21 And when this agreement, with this agreement,
22 then, the networks were turned back on, correct?

23 A That's correct.

24 Q Okay. And then a new agreement was entered into
25 at the end of March, early April, correct?

1 A That's correct.

2 Q And then under that new agreement, to be clear,
3 there's only one contract now for all the Turner networks,
4 correct?

5 A Yes. That is -- yes.

6 Q And Dish is licensing the rights to carry all
7 eight or more of the Turner contracts, correct -- Turner
8 networks, correct?

9 A So I guess I want to be clear. HBO is a separate
10 piece of paper.

11 Q Separate piece of paper.

12 A You're talking about just Turner?

13 Q Just Turner, right.

14 A That's true.

15 Q You also did a deal with HBO at or about the same
16 time?

17 A At exactly the same time.

18 Q The same time. Okay. So you got it all done,
19 Turner and HBO?

20 A That's right.

21 Q But on the Turner contract, that's for essentially
22 all the Turner networks, right?

23 A That's true.

24 Q But you had the right under that Turner contract
25 to only use four of the Turner networks in your Sling

1 bundle, correct?

2 A That's true.

3 Q And that would be TNT, TBS, CNN, and
4 Cartoon Network, right?

5 A That's true.

6 Q So you don't have a separate contract for Sling
7 and the four networks. It's part of the bigger carriage
8 agreement for all the networks?

9 A I believe that's correct.

10 Q Now, did you do any analysis, sir, of how many
11 subs, how many of your subscribers Dish lost, if any, as a
12 result of the Turner blackout?

13 A We did.

14 Q Do you know what that number is?

15 A Well, sir, as I mentioned yesterday, we have a --

16 Q I just asked you if you know what the number is,
17 sir.

18 A So the number that we use internally is roughly
19 30,000.

20 Q Okay. Let me stop you there.

21 30,000 subscribers, okay.

22 Now, 30,000 subscribers is what percentage of --
23 I think you had at the time -- there's been, I know, some
24 cord cutting.

25 A Right.

1 Q But at the time you probably had 12, 13 million?

2 A Give or take, yeah.

3 Q Okay. So using your 30,000 figure, that's --
4 what's that, .2 percent? It's less than 1 percent, right?

5 A It's less than 1 percent.

6 Q Now -- but that 30,000, and, again, accepting your
7 figure of 30,000, that 30,000 also takes into account the
8 people who canceled on account of going dark on Fox News and
9 Fox Business, right?

10 A No.

11 What I've said is that it's --

12 MS. KISER: May we approach on a confidentiality
13 issue?

14 THE COURT: All right.

15 (Sealed bench conference)

16 MS. KISER:

17 THE COURT:

18

19 MS. KISER:

20

21

22

23 THE COURT:

24 MS. KISER:

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. PETROCELLI :

MS. KISER :

MR. PETROCELLI :

THE COURT :

MR. PETROCELLI :

MS. KISER :

MR. PETROCELLI :

THE COURT :

MS. KISER :

MR. PETROCELLI :

MS. KISER :

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. PETROCELLI :

THE COURT :

MR. PETROCELLI :

THE COURT :

MS. KISER :

THE COURT :

MS. KISER :

MR. PETROCELLI :

MS. KISER :

THE COURT :

1

2

3

MS. KISER:

4

THE COURT:

5

MR. PETROCELLI:

6

7

THE COURT:

8

MR. PETROCELLI:

9

MS. KISER:

10

THE COURT:

11

MR. PETROCELLI:

12

THE COURT:

13

14

MS. KISER:

15

16

(Open court)

17

THE COURT: All right. We're going to take -- you
can sit down.

19

THE WITNESS: All right.

20

THE COURT: We're going to take the luncheon
recess.

22

THE WITNESS: Okay.

23

THE COURT: So you remain a witness under oath in
the case.

25

THE WITNESS: Okay.

1 THE COURT: You know the rules: Don't discuss
2 your testimony so far or what it might be when you return
3 with anyone, including your counsel or the Justice
4 Department or anyone. Just stay independent of all others.

5 So be back here and ready to go at 2:30.

6 THE WITNESS: Okay.

7 THE COURT: And we're going to finish the
8 cross-exam; and then if there's redirect, there will be
9 redirect and then you'll be done.

10 THE WITNESS: Great.

11 THE COURT: All right?

12 So you can step down. You're excused.

13 THE WITNESS: Appreciate it.

14 THE COURT: All right.

15 THE WITNESS: What about these? Do these stay?

16 THE COURT: You leave that there.

17 THE WITNESS: Okay.

18 THE COURT: So, Counsel, please spend some portion
19 of the time over the break dealing with the issues that we
20 discussed in the closed session and this last bench
21 conference so that any necessary steps can be taken to
22 protect confidentiality. So make sure you engage in those
23 kind of cautionary work to protect them.

24 MR. PETROCELLI: Will do, Your Honor.

25 THE COURT: All right. We'll stand in recess.

1 DEPUTY CLERK: All rise.

2 This Honorable Court will stand in recess until
3 the return of court.

4 (Proceedings concluded at 1:04 p.m.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: March 27, 2018 /S/ William P. Zaremba

William P. Zaremba, RMR, CRR