

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CLAUDIA WILKEN, JUDGE

IN RE: NATIONAL COLLEGIATE)	
ATHLETIC ASSOCIATION)	NO. 14-MD-2541 CW
ATHLETIC GRANT-IN-AID CAP)	
<u>ANTITRUST LITIGATION</u>)	
)	
MARTIN JENKINS, ET AL.,)	NO. C-14-2758 CW
)	
PLAINTIFFS,)	
)	THURSDAY, JULY 19, 2018
VS.)	
)	
NATIONAL COLLEGIATE)	OAKLAND, CALIFORNIA
ATHLETIC ASSOCIATION, ET AL.)	
)	PRETRIAL CONFERENCE
DEFENDANTS.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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REPORTED BY:	DIANE E. SKILLMAN, CSR NO. 4909 OFFICIAL COURT REPORTER
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1 THURSDAY, JULY 19, 2018 TIME } .M.

2 P R O C E E D I N G S

3 (PROCEEDINGS HELD OUTSIDE THE PRESENCE OF THE COURT)

4 **THE CLERK:** HELLO, COUNSEL. MY NAME IS DOUG. I'M
5 JUDGE WILKEN'S COURTROOM DEPUTY.

6 WHAT I'M GOING TO DO IS STATE YOUR NAME AND PLEASE
7 ANNOUNCE YOUR PRESENCE.

8 ROBERT HUNT?

9 **MR. HUNT:** YES, PRESENT.

10 **THE CLERK:** THANK YOU.

11 MILTON WINTER?

12 **MR. WINTER:** YES, I'M HERE.

13 **THE CLERK:** MARK CUNNINGHAM?

14 **MR. CUNNINGHAM:** PRESENT. THANK YOU.

15 **THE CLERK:** ERIK ALBRIGHT? MR. ALBRIGHT?

16 (NO RESPONSE)

17 **THE CLERK:** BENJAMIN BLOCK?

18 (NO RESPONSE)

19 **THE CLERK:** BENJAMIN CHOJNACKI?

20 **MR. CHOJNACKI:** PRESENT.

21 **THE CLERK:** THANK YOU.

22 GREGORY CURTNER? MR. CURTNER?

23 **MR. CURTNER:** PRESENT.

24 **THE CLERK:** THANK YOU.

25 RICHARD FAVRETTO?

1 **MR. FAVRETTO:** PRESENT.

2 **THE CLERK:** THANK YOU.

3 JENNIFER JONES?

4 **MS. JONES:** PRESENT.

5 **THE CLERK:** THANK YOU.

6 BRITT MILLER?

7 **MS. MILLER:** PRESENT.

8 **THE COURT:** THANK YOU.

9 AMANDA PICKENS?

10 **MS. PICKENS:** PRESENT.

11 **THE CLERK:** THANK YOU.

12 ANDREW ROSENMAN?

13 **MR. ROSENMAN:** PRESENT.

14 **THE CLERK:** AND BRENT RYCHENER?

15 **MR. RYCHENER:** PRESENT.

16 **THE CLERK:** THANK YOU.

17 I'LL GO BACK TO MR. ALBRIGHT, ERIK ALBRIGHT?

18 (NO RESPONSE)

19 AND BENJAMIN BLOCK?

20 (NO RESPONSE)

21 IS THERE ANYBODY'S NAME WHO SIGNED UP FOR COURT CALL THAT
22 I DIDN'T CALL?

23 (NO RESPONSE)

24 OKAY. COUNSEL. WE WILL BE STARTING IN JUST A MOMENT.

25 **MR. BLOCK:** THIS IS BENJAMIN BLOCK. I DROPPED AND

1 RECONNECTED.

2 **THE CLERK:** CALLING CIVIL MATTER 14-2541 IN RE
3 NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID
4 CAP ANTITRUST LITIGATION AND CASE 14-2758 JENKINS VERSUS NCAA.

5 **THE COURT:** SO I THINK THE CLERK HAS ALREADY TAKEN
6 ALL OF YOUR APPEARANCES AS WELL AS THE APPEARANCES ON THE
7 PHONE. SO -- AND I HAVE A LIST OF WHO'S ANTICIPATED TO
8 ACTUALLY BE SPEAKING.

9 SO IF, FOR STARTERS, YOU COULD TELL ME WHO YOU ARE IF YOU
10 THINK I MIGHT NOT KNOW YOU ALREADY -- I GUESS I KNOW MOST OF
11 YOU.

12 THIS IS ON FOR PRETRIAL CONFERENCE AND MOTIONS IN LIMINE.

13 SO WE'LL START WITH THE MUNDANE AND PROCEED IN ORDER OF
14 MAGNITUDE TO THE MORE IMPORTANT STUFF.

15 FIRST THING IS, I DON'T LIKE THE COLORS OF YOUR DEPO
16 EXCERPTS. I CAN'T READ THE PURPLE ONES AND THE RED ONES. AND
17 I'M GOING TO ASK YOU, WHAT I REALLY WANT FOR THE DEPO EXCERPTS
18 AND THE WAY I DO THIS, IS I GET THE EXCERPT AND IT SAYS -- IT
19 HAS THE PARAGRAPH, AND THEN TO THE RIGHT OF THE PARAGRAPH, IT
20 SAYS "103", "701", "403", AND THEN THERE'S SOME ROOM TO THE
21 RIGHT OF THAT WHERE I WRITE "ADMIT", "EXCLUDE", "ADMIT",
22 "EXCLUDE", AND THEN I GIVE IT BACK TO YOU.

23 SO IF YOU COULD -- I'M SORRY TO BURDEN YOU WITH THIS AND I
24 SHOULD HAVE MADE MYSELF MORE CLEAR, BUT THIS IS HOW I LIKE TO
25 DO IT. THEN I CAN READ IT. I CAN'T READ IT IF IT HAS A RED

1 OR PURPLE BACKGROUND. IT'S JUST TOO DARK. I CAN'T THE STUFF.
2 I NEED LIKE A NICE PASTEL PINK AND A PASTEL GREEN, AND A FEW
3 COLORS LIKE THAT.

4 IF YOU COULD, I THINK YOU'VE GOT BIG ENOUGH MARGINS THERE
5 TO PUT EITHER A BOX OR JUST SOME SPACE AND PUT THE RULE. YOU
6 DON'T NEED TO SAY "FEDERAL RULE OF EVIDENCE" EVERY TIME. I'LL
7 ASSUME IT'S A FEDERAL RULE OF EVIDENCE UNLESS YOU SAY LET'S
8 SAY "R" IF IT'S AN FRPC CITE, THAT WAY YOU'LL HAVE MORE ROOM.
9 AND THEN LEAVE A SPOT FOR ME.

10 I'LL TRY TO FIGURE IT OUT ON MY IPAD SO THAT I CAN TYPE IN
11 "ADMIT", "EXCLUDE". USUALLY I HAND WRITE IT IN, BUT I SHOULD
12 BE ABLE TO TYPE IT IN, AND THEN I CAN REPRODUCE IT BACK FOR
13 YOU AND THEN YOU WILL KNOW WHAT'S IN AND WHAT'S OUT.

14 I WOULD LIKE TO DO THAT BEFORE THE TRIAL STARTS SO THAT
15 YOU KNOW WHAT'S IN AND WHAT'S OUT, BUT IT'S GOING TO TAKE ME A
16 LITTLE WHILE TO READ THAT SO IT KIND OF DEPENDS ON WHEN I GET
17 IT.

18 YOU MENTIONED THAT MAYBE YOU WOULD BE ABLE TO RESOLVE SOME
19 OF THE EVIDENTIARY DISPUTES, SO I DIDN'T EVEN START READING
20 THEM YET IT BECAUSE I WAS HOPING MAYBE YOU WOULD SO I DIDN'T
21 HAVE TO RULE ON SO MANY OBJECTIONS. SO IF YOU COULD ALL GET
22 TOGETHER AND MAYBE FIGURE OUT A TIME BY WHICH YOU CAN DECIDE
23 WHAT YOU REALLY NEED TO FIGHT ABOUT, DO A NEW VERSION WITH
24 BETTER COLORS AND SOME LITTLE BOXES, AND THEN TRY TO GET THAT
25 TO ME IDEALLY A FEW DAYS OR A WEEK BEFOREHAND SO I CAN RULE ON

1 IT BEFOREHAND AND GET IT BACK TO YOU.

2 I'M ACTUALLY GOING TO BE OUT FOR A COUPLE OF WEEKS IN
3 AUGUST, TOO, SO I DON'T KNOW HOW THAT'S GOING TO WORK. I MAY
4 HAVE TO DO IT ON A ROLLING BASIS DURING THE TRIAL.

5 **MS. WILKINSON:** YOUR HONOR, WE ARE HAPPY TO DO THAT.
6 WE HAVE BEEN WORKING WELL ON OUR MEET AND CONFERS, AND WE'LL
7 TRY TO AIM FOR THE WEEK BEFORE. SINCE YOU WILL BE OUT FOR A
8 FEW WEEKS, DO YOU THINK SOMEBODY FROM YOUR CHAMBERS COULD GIVE
9 US AN EXAMPLE OF HOW YOU LIKE IT DONE?

10 **THE COURT:** IS THERE NO ONE HERE FROM O'BANNON?

11 **MR. SIMON:** WE KNOW.

12 **MS. WILKINSON:** WE KNOW --

13 **THE COURT:** EVERYONE WHO HAS TRIED A CASE IN FRONT OF
14 ME HAS DONE IT.

15 **MS. WILKINSON:** WE WILL WORK WITH PLAINTIFF.

16 **THE COURT:** YOU JUST TAKE THE WIDE MARGIN, AND THERE
17 ARE WAYS TO DO THIS WITH A WORD PROCESSOR. YOU JUST PUT SORT
18 OF A COLUMN FOR THE NUMBER OF THE RULE, AND THEN LEAVE A WIDE
19 MARGIN SO THAT I CAN HAVE A COLUMN. I'M SURE YOU CAN FIGURE
20 IT OUT OR TALK TO SOMEONE --

21 **MR. KESSLER:** JEFFREY KESSLER FOR THE PLAINTIFFS.

22 WE ARE -- OUR INTENTION IS TO TRY TO WORK OUT AS MANY OF
23 THESE OBJECTIONS AS POSSIBLE --

24 **THE COURT:** THAT WOULD BE GOOD.

25 **MR. KESSLER:** -- SO THERE IS AS LITTLE FOR YOUR HONOR

1 TO RESOLVE AS POSSIBLE, AND THAT'S WHAT WE'RE WORKING ON TO
2 DO.

3 **THE COURT:** RIGHT. I STILL HAVE TO READ ALL THIS
4 STUFF, OF COURSE, EVEN IF I'M NOT RULING ON IT, BUT IT'S
5 EASIER TO READ IF YOU DON'T HAVE TO THINK ABOUT RULE 403 ALL
6 THE TIME.

7 ALL RIGHT. THERE IS WAY, WAY TOO MANY EXHIBITS. I MEAN,
8 I DON'T EVEN KNOW HOW MANY THERE ARE, BUT I KNOW THAT THE LIST
9 OF THEM IS, WHAT, 99 PAGES LONG. I DON'T KNOW HOW MANY
10 BANKER'S BOXES IN HARD COPY THIS WOULD BE, BUT YOU NEED TO
11 THINK ABOUT WHAT DO YOU ACTUALLY EXPECT ME TO SIT THERE AND
12 READ WORD-FOR-WORD. AND DON'T PUT IT IN IF YOU DON'T EXPECT
13 ME TO READ IT.

14 FOR EXAMPLE, ALL OF THE PRIOR NCAA BYLAWS FROM THIS YEAR,
15 LAST YEAR, THE YEAR BEFORE, THE YEAR BEFORE THAT, I'M NOT
16 GOING TO READ ALL THAT STUFF. SO IF YOU NEED TO TELL ME, AND
17 IN SOME CASES YOU DO AND I WISH YOU WOULD, WHAT MIGHT HAVE
18 CHANGED. DON'T GIVE ME THE WHOLE PACKET AGAIN.

19 JUST DO A STIPULATION THAT SETS OUT THE PRIOR RULES THAT
20 EACH OF YOU THINK ARE IMPORTANT. OKAY, WE WILL HAVE TO HAVE
21 PERHAPS ONE BIG SET OF EVERYTHING OR EVEN THE ONE BIG SET
22 DOESN'T HAVE TO HAVE EVERYTHING. WE DON'T NEED TO KNOW WHERE
23 THE 50-YARD LINE IS AT AND WHAT'S A FOUL, AND THINGS LIKE
24 THAT.

25 SO IF YOU COULD EVEN NARROW DOWN THE RULE BOOK TO THE

1 THINGS THAT ANYBODY THINKS MIGHT POSSIBLY BE SOMETHING I'D
2 WANT TO READ. AND THEN FROM THERE SAY, HERE'S A STIPULATION
3 THAT SAYS THAT IN 1953 THEY CHANGED RULE THIS TO RULES THAT,
4 AND HERE'S HOW THE OLD RULE WAS, AND ONLY GIVE ME THE OLD
5 RULES IF IT'S RELEVANT TO SOMETHING I NEED TO KNOW NOW AND TRY
6 TO KEEP IT DOWN.

7 AND THE SAME APPLIES TO ALL OF IT. FINANCIAL STATEMENTS;
8 I DON'T KNOW HOW LONG THOSE THINGS ARE. BUT I'M GUESSING A
9 FINANCIAL STATEMENT FROM THE NCAA IS REALLY LONG AND HAS A LOT
10 OF STUFF IN IT THAT I DON'T NEED TO KNOW ABOUT AND DON'T WANT
11 TO READ.

12 AGAIN, IF YOU CAN COME UP WITH A STIPULATION THAT SAYS,
13 NCAA IS WORTH X DOLLARS AND THE CATEGORIES THAT YOU THINK I
14 NEED TO KNOW ABOUT. IF YOU -- YOU DON'T NEED TO FIGHT ABOUT
15 WHAT THEY ARE. YOU CAN INCLUDE EVERYTHING EVERYBODY THINKS IS
16 RELEVANT, BUT JUST DON'T INCLUDE STUFF THAT NOBODY WOULD SAY
17 WAS RELEVANT. WE DON'T NEED TO KNOW HOW MANY RESTROOMS THERE
18 ARE IN THE BUILDING OR HOW MUCH THEY SPENT ON -- YOU GET THE
19 PICTURE.

20 I MEAN, SURELY YOU CAN COME UP WITH SOMETHING THAT
21 WON'T -- IF YOU JUST THINK OF IT, DO I WANT THE JUDGE IN THE
22 NINTH CIRCUIT TO ACTUALLY READ THIS WORD-FOR-WORD? AND IF
23 NOT, DON'T GIVE IT TO US. GIVE US LIKE 1003, A SUMMARY OF
24 VOLUMINOUS DOCUMENTS KIND OF THING.

25 **MR. KESSLER:** SO, YOUR HONOR, ON THAT POINT, I THINK

1 ON THE FINANCIAL DOCUMENTS, THAT'S PRIMARILY THE PLAINTIFFS
2 PUTTING IN THOSE. WHAT WE ARE TRYING TO DO IS EXACTLY WHAT
3 YOUR HONOR SUGGESTED, WHICH IS PUT IN SUMMARY EXHIBITS. BUT
4 AT LEAST AS WE UNDERSTAND THE RULE, WE STILL NEED TO -- WE
5 HAVE A SUMMARY EXHIBIT BUT WE NEED TO PUT IN ALL THIS OTHER
6 PAPER --

7 (SIMULTANEOUS COLLOQUY.)

8 **THE COURT:** I DON'T THINK THAT'S WHAT THE RULE SAYS.

9 **MR. KESSLER:** -- WE NEED TO PUT IN THE UNDERLYING
10 DOCUMENTS, JUST THE SUMMARY?

11 **THE COURT:** I DON'T THINK SO. RULE 1001, SUMMARY OF
12 VOLUMINOUS DOCUMENTS. YOU DON'T PUT IT ALL IN EVIDENCE. YOU
13 HAVE TO MAKE IT AVAILABLE TO THE OTHER SIDE.

14 **MR. KESSLER:** ALL RIGHT. AS LONG AS --

15 (SIMULTANEOUS COLLOQUY)

16 **THE COURT:** I THINK. THAT'S HOW I REMEMBER THE RULE.

17 **MR. KESSLER:** THAT'S FINE, YOUR HONOR. THE RULES
18 CITE, I THINK, IS MOSTLY THE DEFENDANTS WITH THE OLDER
19 MANUALS. AT LEAST WE WILL DO THAT ON THE FINANCIALS.

20 **THE COURT:** DON'T WORRY, I HAVE MORE EXAMPLES.

21 AGREEMENTS WITH NETWORKS? I'M NOT GOING TO READ WORD FOR
22 WORD CBC SAYS THIS AND NBC SAYS THAT, AND THE OTHER SAYS THE
23 OTHER. IF THERE'S A REASON WHY THEY ARE THERE, PUT IN THE
24 PAGE THAT HAS THE REASON OR EVEN THE WORD. IF YOU WANT TO
25 SAY, THIS CBS AGREEMENT IS FROM X YEAR TO Y YEAR AND IT'S X

1 DOLLARS AND IT HAS THIS TERM IN IT. AND THE NBC AGREEMENT IS
2 FROM Y YEAR TO Z YEAR AND IT'S FOR Z DOLLARS AND IT HAS THIS
3 TERM, WHICH IS DIFFERENT. YOU CAN DESCRIBE THAT IN A
4 STIPULATION OR YOU COULD REDACT IT HEAVILY IF I HAVE TO LOOK
5 AT IT. DON'T MAKE ME READ THE WHOLE THING WHEN I DON'T EVEN
6 KNOW WHY I'M READING IT.

7 VIDEOS? I DON'T WANT TO WATCH VIDEOS. IF IT'S A VIDEO OF
8 SOMEBODY SAYING SOMETHING THAT'S RELEVANT AND ADMISSIBLE, THEY
9 CAN TESTIFY THIS IS YOU OR I CAN READ A TRANSCRIPT. BUT I
10 DON'T WANT TO BE WATCHING VIDEOS AND THE NINTH CIRCUIT DOESN'T
11 WANT TO BE WATCHING VIDEOS I CAN ASSURE YOU.

12 COMMISSIONERS' REPORTS, THOSE ARE REALLY LONG PROBABLY.
13 TELL ME THE PART I NEED TO READ. DON'T GIVE ME THE WHOLE
14 THING.

15 DRAFT SPEECHES? WHY DO I WANT TO READ DRAFT SPEECHES?

16 NO, THOSE ARE ALL YOURS. YOU'VE GOT A MILLION OF THEM.

17 DRAFT SPEECHES, TALKING POINTS, DRAFT MEMOS. I DON'T KNOW
18 WHY -- AGAIN, ADMISSIONS OF A PARTY OPPONENT YOU CAN PUT IN,
19 BUT YOU CAN'T PUT IN YOUR OWN STATEMENTS. THAT'S ALL HEARSAY.

20 SO I DON'T KNOW WHY THAT'S ALL THERE. IF IT'S A SPEECH --
21 EVEN IF YOU THINK IT'S AN ADMISSION, YOU CAN'T PUT IT IN
22 YOURSELF. IT WOULD HAVE TO BE THE OTHER SIDE.

23 SO LOOK BACK AT THAT STUFF AND SEE WHAT ALL THAT'S ABOUT
24 AND WHETHER I ACTUALLY NEED TO READ IT.

25 UNIVERSITY ANNUAL REPORTS, SAME AS THE NCAA. I DON'T NEED

1 TO READ ABOUT THE WHOLE UNIVERSITY. JUST TELL ME WHAT YOU
2 THINK IS IMPORTANT OR WHAT YOU THINK I NEED TO KNOW ABOUT IT.
3 WHAT'S THE ATHLETIC BUDGET? HOW MUCH DID THEY SPEND ON THEIR
4 FACILITY OR WHATEVER THE CASE MAY BE.

5 AND I DON'T, LIKE I SAID, I DON'T NEED THE ACTUAL DOCUMENT
6 IF IT'S EASIER TO JUST COME UP WITH A STIPULATION THAT SAYS, X
7 UNIVERSITY SPENT X ON THIS AND Y ON THAT, AND Z UNIVERSITY
8 SPENT WHATEVER, WHATEVER.

9 OKAY. AND THEN I HOPE YOU'LL HAVE SOME JOINT EXHIBITS.
10 ONE ASSUMES THAT SOME THINGS ARE JOINT, AND THEN AT LEAST WE
11 DON'T HAVE TO WORRY ABOUT WHO WANTED TO ADMIT THEM.

12 I HESITATE TO EVEN MENTION THIS, BUT I'M KIND OF GUESSING
13 THERE'S GOING TO BE OBJECTIONS TO SOME OF EACH OTHER'S
14 EXHIBITS?

15 **MS. WILKINSON:** WE ARE WORKING THOSE OUT, YOUR HONOR.

16 **THE COURT:** I HOPE.

17 **MS. WILKINSON:** QUITE A FEW.

18 **THE COURT:** BUT FOR 99 PAGES, JUST OF THE LIST,
19 IT'S -- THAT WILL TAKE AWHILE IF I HAD TO RULE ON ALL KINDS OF
20 OBJECTIONS. SO IF YOU COULD FIRST CUT IT DOWN AND THEN FIGURE
21 OUT WHICH ONES ARE JOINT, AND THEN FIGURE OUT WHAT ARE
22 SEPARATE THAT YOU EACH OBJECT TO, AND GIVE ME SOME KIND OF
23 FORMAT IN WHICH I CAN RULE ON THAT.

24 IF I CAN DO IT IN ADVANCE, I WILL, WHICH I THINK WOULD BE
25 HELPFUL TO YOU. IF I CAN'T RULE ON IT IN ADVANCE, I WILL JUST

1 HAVE TO RULE ON IT WHEN YOU HAND IT UP. IF IT GETS DOWN TO
2 LIKE TWO OR THREE BANKER'S BOXES, I'LL LOOK AT THEM. OR IT
3 COULD BE ELECTRONIC, I SUPPOSE. ALTHOUGH FOR EXHIBITS IT'S
4 SOMETIMES BETTER TO HAVE SOME HARD COPY.

5 BUT ONCE YOU SEE WHAT'S LEFT, MAYBE YOU CAN FIGURE OUT
6 WHAT'S GOING TO BE THE BEST WAY TO GIVE IT TO ME TO TRY TO
7 RULE ON IT.

8 THE SEALING ORDERS I HAD TO REFER TO MAGISTRATE JUDGE
9 COUSINS BECAUSE I KNEW I WOULD NEVER BE ABLE TO DO IT. BUT AS
10 I WAS READING THROUGH THIS STUFF, IT OCCURRED TO ME THAT ONE
11 THING IS THE ATHLETES' NAMES. YOU DON'T NEED TO PUT THE NAME
12 OF THE POOR WOMAN WHOSE GRANDMOTHER DIED AND GOT A DRESS.
13 COME UP WITH A CODE FOR THE NAMES. I DON'T CARE WHAT THE
14 NAMES ARE, YOU DON'T CARE WHAT THE NAMES ARE.

15 TRY TO OBVIATE SOME OF THE NECESSITY FOR SEALING MOTIONS
16 AND SEALING ORDERS AND RESPECT THEIR -- PEOPLE'S PRIVACY WHEN
17 IT DOESN'T MATTER WHAT THEIR NAME IS.

18 OKAY. MOTIONS IN LIMINE.

19 I'LL GIVE YOU SOMEWHAT OF A TENTATIVE RULING ON MOST OF
20 THEM, ALTHOUGH SOME OF THEM ARE GOING TO NEED TO SEE WHAT IT
21 IS YOU'RE TALKING ABOUT.

22 STARTING WITH PLAINTIFFS. NO. 1, LAY OPINION. I'M NOT
23 GOING TO EXCLUDE IT ALTOGETHER. I WILL TELL YOU THAT IT'S NOT
24 HIGHLY PROBATIVE TO ME. THERE'S A LOT OF PEOPLE OUT THERE WHO
25 HAVE A LOT OF OPINIONS, AND I'LL HEAR A FEW OF THEM FOR SORT

1 OF LOCAL COLOR AND ATMOSPHERICS, BUT WE'RE OBVIOUSLY NOT GOING
2 TO HEAR THE OPINION OF EVERY ATHLETIC DIRECTOR, COACH,
3 COMMISSIONER AND ATHLETE IN THE UNITED STATES TO FIND OUT WHAT
4 THEY ALL THINK.

5 LIKE I SAY, I'LL LISTEN TO A FEW. TO THE EXTENT IT'S
6 BASED ON THEIR -- THE CASES THAT CALL FOR TALKING WITH A LAY
7 OPINION ABOUT YOUR BUSINESS, THAT'S MORE PROBATIVE AND MORE
8 ADMISSIBLE, LIKELY TO BE ADMISSIBLE THAN JUST RANDOM
9 HERE'S-WHAT-I-THINK TYPES OF TESTIMONY.

10 SO I'M NOT GOING TO EXCLUDE IT ALL, BUT EXERCISE SOME
11 DISCRETION. AND IN BUDGETING YOUR TIME, KEEP IN MIND THAT ANY
12 LAY OPINION I HEAR I'M GOING TO THINK, OKAY, THAT'S WHAT THAT
13 GUY THINKS. PROBABLY THERE'S SOMEBODY ELSE WHO THINKS
14 SOMETHING ELSE. AND IT'S NOT GOING TO BE ALL THAT PROBATIVE.

15 AND I'M JUST GOING TO HAVE TO RULE ON IT ON A CASE-BY-CASE
16 BASIS. IT FRANKLY DIDN'T STRIKE ME AS TOO MUCH. GIVEN THE
17 TIME LIMITATIONS THEY'VE GOT, THERE'S JUST NOT THAT MUCH OF
18 IT. AND I DIDN'T SEE ANYTHING THAT WAS WILDLY OUT OF WACK,
19 BUT IF -- PICK OUT YOUR WORST -- I DON'T WANT TO SAY YOUR
20 WORST ENEMY -- PICK OUT THE PERSON YOU THINK IS THE WORST, AND
21 RAISE IT AGAIN. MAYBE I WOULD EXCLUDED SOME OF IT, BUT I'M
22 NOT GOING TO EXCLUDE IT OUT OF HAND.

23 NO. 2 OF PLAINTIFFS.

24 **MR. BERMAN:** MAY I BE HEARD ON NO. 1, YOUR HONOR?

25 **THE COURT:** WHAT'S THAT?

1 **MR. BERMAN:** CAN I BE HEARD ON NO. 1? STEVE BERMAN.

2 **THE COURT:** WHY DON'T YOU LET ME DO IT ALL AND THEN
3 YOU CAN EACH SAY YOUR WORST, THE THING I DID THE WORST.

4 EXCLUDE EVIDENCE ABOUT THE OUTPUT. I DON'T KNOW EXACTLY
5 WHAT THAT MEANS. OUTPUT AS A PROPOSED PROCOMPETITIVE
6 JUSTIFICATION HAS BEEN RULED OUT.

7 WE'RE NOT GOING TO LIKE BAR THE USE OF THE WORD "OUTPUT".
8 I DON'T KNOW WHAT OUTPUT WE ARE TALKING ABOUT. OUTPUT OF MORE
9 GAMES? OUTPUT OF MORE SCHOLARSHIPS? OUTPUT OF WHAT? I DON'T
10 KNOW.

11 YES, WE WILL EXCLUDE ANY ATTEMPT TO RE-PROVE THE OUTPUT
12 JUSTIFICATION AS A THING. BUT THE NOTION THAT THERE MIGHT BE
13 MORE GAMES, OR MORE SCHOLARSHIPS, OR LESS SCHOLARSHIPS, OR
14 WHATEVER IS NOT GOING TO BE EXCLUDED AS A CONCEPT.

15 PLAINTIFF WANTS TO EXCLUDE DEFENDANTS' EXPERTS FROM SAYING
16 THINGS THAT WEREN'T IN THEIR REPORTS AND DEFENDANTS IN TURN
17 WANT TO EXCLUDE PLAINTIFFS FROM SAYING THINGS THAT WEREN'T IN
18 THEIR REPORTS.

19 I GENERALLY EXCLUDE THINGS THAT WEREN'T IN REPORTS.
20 PEOPLE ARE ALWAYS FIGHTING ABOUT THAT, AND THEY'RE ALWAYS
21 SAYING IT'S NOT IN THEIR REPORT AND WE WEREN'T TOLD ABOUT
22 THIS, AND DON'T KNOW ABOUT THIS, AND THIS IS PREJUDICIAL AND
23 NEW.

24 THE ONLY WAY TO REALLY ADJUDICATE THOSE THINGS WHEN YOU
25 DON'T KNOW THE ANSWER IS TO SAY, SHOW ME PAGE AND LINE WHERE

1 IT IS IN THE EXPERT REPORT. IF IT'S THERE, AT LEAST IN SAME
2 GENERAL PHRASEOLOGY, THEN IT'S THERE. AND IF IT'S NOT THERE,
3 IT'S NOT COMING IN.

4 **MR. KESSLER:** CAN I QUESTION ABOUT THAT?

5 **THE COURT:** I MUST SAY THERE'S MORE OF IT ON THE
6 PLAINTIFFS -- DEFENDANTS HAVE MORE DISPUTES ABOUT IT OR MORE
7 COMPLAINTS ABOUT IT THAN DEFENDANTS (SIC) DO -- I MEAN THAN
8 PLAINTIFFS DO.

9 BUT SPECIFICALLY ON ELZINGA, THERE'S CERTAINLY THINGS THAT
10 HE SAYS THAT ARE NEW, BUT HE SAYS THAT HE'S RESPONDING TO NEW
11 THINGS THAT RASCHER AND NOLL SAY. SO IF IT'S TRUE THAT
12 RASCHER AND NOLL SAY NEW THINGS, AND IF I ALLOW THEM FOR ONE
13 REASON OR ANOTHER, THEN I'M GOING TO ALLOW ELZINGA TO RESPOND
14 TO THEM.

15 WHEN WE GET TO DEFENDANTS, I'LL TELL YOU A LITTLE BIT MORE
16 ABOUT THIS BECAUSE -- WELL, WE'LL TALK MORE ABOUT IT IN A
17 MINUTE. AND I ALSO WANT TO TALK ABOUT ELZINGA MORE, BUT WE'LL
18 TALK ABOUT HIM LATER.

19 SO THAT'S PLAINTIFFS' MOTIONS.

20 DEFENDANTS' MOTIONS.

21 EXCLUDE THE O'BANNON TRIAL TRANSCRIPTS. YOU KNOW,
22 PORTIONS OF IT WILL COME IN, I'M GUESSING, AS IMPEACHMENT OR
23 PRIOR INCONSISTENT STATEMENTS. EACH OF YOU, I IMAGINE, WILL
24 FIND STUFF THAT SOMEBODY SAID BEFORE AND TRY TO IMPEACH THEM
25 WITH IT. SO TO THAT EXTENT THEY'LL COME IN.

1 I DON'T THINK THE NINTH CIRCUIT IS GOING TO APPRECIATE 15
2 VOLUMES ALL BEING OFFERED AS AN EXHIBIT IN THIS TRIAL. WE
3 CERTAINLY DON'T NEED ANOTHER SET OF IT. WE'VE ALREADY GOT ONE
4 SET. I DON'T THINK WE NEED THE WHOLE RECORD TO BE IN
5 EVIDENCE. I THINK IT'S SORT OF JUDICIAL NOTICE OR SOMETHING.
6 IF THE NINTH CIRCUIT WANTED IT ON APPEAL, THEY ALREADY HAVE
7 IT, TOO, OR THEY CAN GET IT. I DON'T THINK WE NEED TO
8 ACTUALLY SORT OF PHYSICALLY OFFER THE WHOLE THING INTO
9 EVIDENCE. BUT -- AND IT'S NOT ADMISSIBLE WILLY-NILLY UNLESS
10 IT COMES IN FOR SOME OTHER PURPOSE, LIKE IMPEACHMENT, OR LIKE
11 PRIOR INCONSISTENT STATEMENT, OR LIKE ADMISSION OF A PARTY
12 OPPONENT.

13 NOW, I DID SAY, I RECOGNIZE, THAT IF PEOPLE WERE GOING TO
14 SAY THE SAME EXACT THING THEY SAID IN O'BANNON THAT THEY COULD
15 JUST GIVE ME THE TRANSCRIPT INSTEAD OF REPEATING IT, I
16 PROBABLY SHOULDN'T HAVE DONE THAT BECAUSE IT MAKES IT SEEM
17 LIKE THE WHOLE THING IS COMING IN.

18 BUT, FOR EXAMPLE, SOMEBODY DID IT. WAS IT HECKMAN?

19 **MR. FRIEDMAN:** DR. HECKMAN?

20 **THE COURT:** HECKMAN GAVE, AS PART OF HIS REPORT, AND
21 I APPRECIATE IT, SAID HERE'S THE STUFF I SAID BEFORE AND I
22 ATTACHED IT. SO I READ THAT, AND I HAD ALREADY HEARD IT
23 BEFORE. THAT'S ALL DONE NOW SO YOU DON'T NEED TO DO THAT.

24 DEFENDANTS' MOTION TO EXCLUDE ARGUMENT ABOUT RULES
25 ADJUDICATED IN O'BANNON. WELL, NO. THAT WILL BE DENIED.

1 OBVIOUSLY THINGS THAT CHANGED ARE OF MORE CONCERN AND
2 RELEVANT, BUT WE ARE NOT GOING TO SAY THAT JUST BECAUSE IT WAS
3 IN THE MANUAL OF 2014, 6 INCHES WORTH, THAT IT CAN'T COME IN
4 NOW BECAUSE SOMEBODY MIGHT HAVE READ IT THEN.

5 NO. 2, PUBLIC COMMENTARY OF THIRD-PARTY OBSERVERS AND
6 MEDIA.

7 I DON'T KNOW EXACTLY WHAT WE'RE REFERRING TO HERE. IF YOU
8 ARE TALKING ABOUT, LET'S USE AS AN EXAMPLE, A NEWSPAPER
9 ARTICLE THAT SAYS, BASKETBALL TICKETS COST \$5, AND SOME
10 WITNESS CAME UP AND SOMEBODY ASKED HIM, IS THIS TRUE ABOUT
11 WHAT BASKETBALL TICKETS COST? AND THE WITNESS SAYS, YES.

12 WELL, THEN I SUPPOSE WE MIGHT HAVE TO HAVE THE NEWSPAPER
13 ARTICLE THAT SAYS IT WAS \$5 SINCE THE WITNESS DIDN'T SAY THAT.

14 ONE WOULD HOPE THAT A QUESTION WOULDN'T HAVE BEEN ASKED
15 LIKE THAT AND THE PERSON WOULD HAVE PUT THE FACTS IN THE
16 QUESTION, BUT IF THEY DIDN'T, OKAY, MAYBE WE HAVE TO LOOK AT
17 THE NEWSPAPER ARTICLE TO SEE THAT IT SAID \$5. BUT THAT, IN
18 TURN, DOESN'T MEAN THAT WE ARE GOING TO READ THE WHOLE REST OF
19 THE ARTICLE WITH HEARSAY FROM SIX OTHER PEOPLE TELLING ALL
20 KINDS OF OPINIONS THAT THEY MIGHT HAVE HAD ABOUT SOMETHING
21 ELSE.

22 AND THEN EVEN ON THE \$5 QUESTION OR AN ADMISSION AGAINST
23 INTEREST KIND OF QUESTION, OBVIOUSLY THE PERSON HAS TO ADMIT
24 OR ACKNOWLEDGE THAT THEY SAID IT BEFORE IT'S RELEVANT. AND IF
25 THEY DON'T ACKNOWLEDGE THAT THEY SAID IT OR DENY THAT THEY

1 SAID IT, THEN YOU HAVE TO BRING IN THE NEWSPAPER REPORTER, IF
2 IT'S THAT BIG OF A DEAL, AND HAVE THE REPORTER SAY, YEAH, HE
3 DID SAY THIS. BUT WE ARE NOT JUST GOING TO BE READING A LOT
4 OF NEWSPAPER ARTICLES AND MEDIA COMMENTARY.

5 IT WOULD BE -- TO THE EXTENT THAT IT'S NEEDED TO SHOW
6 EITHER AN ADMISSION AGAINST INTEREST OR -- I DON'T MEAN
7 AGAINST INTEREST, I MEAN ADMISSION BY A PARTY OPPONENT -- OR
8 TO EXPLAIN SOME STATEMENT THAT WAS CONCEDED LIKE THE \$5
9 BASKETBALL TICKET, THE BEST WAY TO DO THAT WOULD BE IF YOU
10 COULD GIVE ME THE DEPO EXCERPT WITH THE NEWSPAPER ARTICLE THAT
11 THEY'RE REFERRING TO.

12 I DON'T KNOW IF THAT'S GOING TO BE TOO HARD TO DO. THE
13 EASIEST WAY FOR ME TO DEAL WITH IT WOULD BE TO SAY HERE'S
14 MR. DOES DEPO EXCERPT. HE TALKED ABOUT THE COST OF THE
15 BASKETBALL TICKET. HERE'S THE ARTICLE HE WAS REFERRING TO,
16 EXHIBIT 6A. AND IF YOU LOOK AT IT, YOU'LL SEE IT SAYS THE
17 BASKETBALL TICKET COSTS \$5.

18 **MR. BERMAN:** THAT'S EXACTLY WHAT WE INTEND.

19 **THE COURT:** OKAY.

20 THE RAWLINGS REPORT I DON'T SEE COMING IN HOWEVER. YOU'VE
21 GOT AN ARGUMENT THAT... LIKE SOME CASES WHERE THERE WERE
22 COMMISSIONS AND MAYBE FIVE OUT OF SIX PEOPLE WROTE THE REPORT
23 AND THEY WERE ALL THE PARTY OPPONENT, THAT'S ONE THING. BUT
24 DELANY WAS ONLY ONE GUY OUT OF I DON'T KNOW HOW MANY WRITING
25 THE RAWLINGS REPORT. SO I DON'T THINK THAT THAT'S ENOUGH OF A

1 READ TO BRING IN THE WHOLE RAWLINGS REPORT.

2 NO. 3, PARTICULAR INFRACTIONS.

3 GENERALLY SPEAKING, I DON'T THINK THE INFRACTIONS ARE ALL
4 THAT PROBATIVE. AND I CERTAINLY DON'T WANT ANY SATELLITE
5 LITIGATION ABOUT, YOU KNOW, WAS THIS COURSE REALLY ANY GOOD OR
6 WASN'T IT, OR DID THIS PERSON GET MONEY IN THEIR ENVELOPE OR
7 DIDN'T THEY.

8 THE LIMITED PROBATIVE VALUE IS TO SORT OF MAKE THE
9 ARGUMENT THAT, OH, THE NCAA DOESN'T REALLY CARE ABOUT AMATEURS
10 AND BECAUSE THEY DON'T ENFORCE THEIR RULES WELL ENOUGH. IF
11 THAT'S GOING TO GET INTO A WHOLE DISPUTE ABOUT, WELL, HOW GOOD
12 IS WELL ENOUGH AND DID THEY DO ENOUGH HERE OR DID THEY NOT?
13 IT'S REALLY TANGENTIAL, I THINK. SO I'M NOT GOING TO SAY I'LL
14 NEVER HEAR A WORD ABOUT AN INFRACTION, BUT I DON'T WANT TO
15 HEAR A LOT OF WORDS ABOUT A LOT OF INFRACTION ARGUMENTS.

16 EXCLUDE DEPOSITION TESTIMONY OF BILAS. I DIDN'T READ IT
17 YET BECAUSE I WAS HOPING MAYBE YOU'D RESOLVED THE OBJECTIONS.
18 IT STRIKES ME THAT SOME OF IT MIGHT COME IN TO THE EXTENT THAT
19 IT'S THINGS THAT HE KNOWS FROM HIS BUSINESS AS BEING A MEDIA
20 COMMENTATOR. SOME OF IT MIGHT NOT COME IN IF IT'S JUST HIS
21 OWN PERSONAL OPINION OF THIS OR THAT.

22 SO ONCE YOU GIVE ME THE FINAL VERSION OF WHAT YOU REALLY
23 WANT AND WHAT YOU REALLY OBJECT TO, I WILL JUST RULE ON IT
24 LIKE I WILL THE REST OF THE DEPOSITION TESTIMONY.

25 NOW WHAT HAPPENED TO THE ONE ABOUT -- DID I SKIP ONE?

1 WHAT HAPPENED TO THE ONE ABOUT DEFENDANTS' COMPLAINING ABOUT
2 PLAINTIFFS PUTTING IN EXPERT OPINIONS THAT HADN'T BEEN....

3 **MR. SIMON:** IT WASN'T AN ACTUAL MOTION, YOUR HONOR.
4 IT WAS PART OF A RESPONSE TO ONE OF THE MOTIONS, WHICH WAS OUR
5 MOTION TO EXCLUDE NEW STUFF.

6 **THE COURT:** OH, OKAY.

7 **MR. SIMON:** SO THEY BASICALLY SAID YOU DID IT, TOO.

8 **THE COURT:** A GOOD FOR THE GOOSE, GOOD FOR THE GANDER
9 ARGUMENT.

10 **MR. SIMON:** THEY DIDN'T MOVE TO EXCLUDE.

11 **THE COURT:** THE SAME RULE WILL APPLY. AND, FRANKLY,
12 WHEN THEY MADE THEIR SHOWING OF WHAT YOUR TRIAL TESTIMONY OF
13 YOUR EXPERTS WAS GOING TO BE, WE DIDN'T HAVE -- I DON'T KNOW.
14 IT WASN'T FULLY BRIEFED AT A CERTAIN POINT AND WE DIDN'T KNOW
15 WHAT YOU WERE GOING TO BE RESPONDING TO. AND WHEN IT CAME IN,
16 THEN YOUR PAPERS HAD ALREADY BEEN FILED.

17 SO WE TRIED TO LOOK AT IT OURSELVES AND SEE WHETHER, IN
18 FACT, RASCHER AND NOLL HAD SAID NEW THINGS THAT THEY HADN'T
19 SAID BEFORE. AND IT SEEMED AS THOUGH SOME OF DEFENDANTS'
20 POINT WERE WELL-TAKEN, BUT AT THE SAME TIME I KNOW YOU HAVEN'T
21 HAD A CHANCE TO RESPOND TO THEM. SO I GUESS I'M GOING TO HAVE
22 TO JUST HAVE YOU FILE SOMETHING ELSE SHORT --

23 **MR. KESSLER:** THAT'S WHAT I WAS GOING TO ASK, YOUR
24 HONOR.

25 **THE COURT:** -- AND SOON.

1 **MR. KESSLER:** THE ORDER WAS WHEN WE FILED OUR MOTION
2 THAT THEY SHOULDN'T PUT IN NEW MATERIALS, WE ACTUALLY DID NOT
3 HAVE ANY OF THEIR EXPERT DECLARATIONS YET. SO WE WERE
4 ANTICIPATING THAT THERE WERE GOING TO BE NEW MATERIALS. WE
5 HAVE NOT DONE ANYTHING TO IDENTIFY FOR YOU YET WHAT IS NEW.

6 SIMILARLY, THEY HAD OURS WHEN THEY FILED THEIR RESPONSE
7 AND THEY MADE CERTAIN POINTS, AS YOUR HONOR NOTED, SAYING SOME
8 OF OURS WAS NEW, BUT WE HAVEN'T HAD A CHANCE TO RESPOND TO
9 THAT.

10 **THE COURT:** RIGHT.

11 **MR. KESSLER:** SO I WOULD SUGGEST, FOR YOUR HONOR'S
12 BENEFIT, THERE SHOULD PROBABLY BE SOME EXCHANGE WHERE ONE SIDE
13 IDENTIFIES, IF THEY WANT TO OBJECT, WHAT THEY THINK IS NEW AND
14 THE OTHER SIDE GETS TO RESPOND WITH SPECIFIC CITATIONS TO THE
15 REPORTS AND THE PARAGRAPH NUMBERS, AND YOUR HONOR CAN HAVE
16 THAT TO RULE ON BEFORE THE TRIAL, IF THAT MAKES SENSE FOR YOUR
17 HONOR.

18 **THE COURT:** IT DOES, BUT I THINK IT ONLY APPLIES TO
19 YOUR SIDE. I THINK THEY HAVE ALREADY RESPONDED TO YOUR
20 CRITICISMS OF THEIR NEW STUFF --

21 **MR. KESSLER:** NO, NO, WE'VE --

22 **THE COURT:** AND THEY'VE PUT IN NEW STUFF THAT THEY
23 WOULD OFFER IF YOUR NEW STUFF IS ALLOWED.

24 **MR. KESSLER:** NO, YOUR HONOR. WE HAVEN'T YET
25 IDENTIFIED WHAT PORTIONS OF THEIR DECLARATIONS WE THINK ARE

1 NEW BECAUSE WHAT WE PUT IN OUR OBJECTION, WE WERE GUESSING
2 WHAT WOULD BE IN THEIR DECLARATIONS. WE DIDN'T YET HAVE THEM.
3 THEY WERE FILED AFTER WE HAD TO FILE OUR MOTION IN LIMINE.

4 SO WHAT WE NEED TO DO IS TO SAY THIS SPECIFIC PARAGRAPHS
5 OF MR. ISAACSON IS NEW VERSUS HERE'S WHAT HE DID IN HIS OLD
6 REPORT VERSUS HERE, AND THEN THEY CAN RESPOND TO THAT.

7 I DON'T THINK WE HAVE TEED IT UP YET FOR YOUR HONOR IN
8 THAT WAY.

9 **THE COURT:** MAYBE. I JUST DON'T WANT IT TO BE ONE OF
10 THESE VANISHING THINGS WHERE IT JUST GOES BACK AND FORTH
11 FOREVER.

12 **MR. KESSLER:** I THINK MAYBE ONE EXCHANGE WHERE EACH
13 SIDE WOULD IDENTIFY THE SPECIFIC PARAGRAPHS FOR YOUR HONOR
14 BECAUSE NOW WE HAVE DECLARATIONS WITH PARAGRAPHS, AND THEN THE
15 OTHER ONE COULD RESPOND TO THOSE PARAGRAPHS, AND WE EVEN CAN
16 PUT IT IN ONE JOINT SUBMISSION SO IT IS VERY EASY FOR YOUR
17 HONOR TO RULE.

18 **THE COURT:** PERHAPS. BUT THEN THERE'S ALSO THE
19 QUESTION OF IF SOMETHING IS ALLOWED THAT YOU THINK IS NEW BUT
20 I SAY IT ISN'T NEW ENOUGH, THEN YOU MIGHT WANT TO SAY, WELL,
21 IF THAT'S GOING TO COME IN, THEN I NEED TO RESPOND TO IT. AND
22 THEN THEY ARE GOING TO SAY, OH, THAT'S NEW AND WE NEED ANOTHER
23 BRIEF TO SAY WHY THAT -- I DON'T KNOW.

24 I KNOW THAT I NEED SOMETHING FROM THE PLAINTIFFS ON
25 RASCHER AND NOLL FROM THEIR OBJECTIONS. SO I DO NEED THAT IN

1 MAYBE FIVE PAGES IN FIVE DAYS, OR SOMETHING LIKE THAT.

2 I DON'T KNOW THAT I NEED ANYTHING MORE FROM YOU. DO YOU
3 THINK I NEED ANYTHING MORE FROM YOU?

4 **MR. CASAZZA:** YOUR HONOR, WITH RESPECT TO --

5 **THE COURT:** SOME ARE NODDING YES AND SOME ARE NODDING
6 NO.

7 **MR. CASAZZA:** YOUR HONOR, JUST TO CLARIFY.

8 **THE COURT:** WE NEED TO KNOW WHO YOU ARE.

9 **MR. CASAZZA:** KYLE CASAZZA FROM PROSKAUER ROSE FOR
10 THE CONFERENCE DEFENDANTS.

11 WITH RESPECT TO THE TIME LINE, OBVIOUSLY PLAINTIFFS'
12 EXPERT DIRECT TESTIMONY WAS FILED AFTER WE FILED OUR ORIGINAL
13 MOTIONS IN LIMINE. IN OUR OPPOSITIONS, WHICH WERE FILED JUST
14 A FEW DAYS AFTER WE RECEIVED PLAINTIFFS' EXPERT DIRECT
15 TESTIMONY, WE PROVIDED A REPRESENTATIVE, BUT HARDLY EXHAUSTIVE
16 LIST OF WHAT WE WOULD CHARACTERIZE IN THEIR EXPERT DIRECT
17 TESTIMONY AS NEW OPINIONS.

18 SO WE WOULD ASK IF PLAINTIFFS ARE BEING AFFORDED THE
19 OPPORTUNITY TO RAISE COMPREHENSIVE OBJECTIONS TO WHAT THEY
20 CONTEND FROM DEFENDANTS' DIRECT TESTIMONY IS NEW, WE WOULD ASK
21 FOR THE SAME.

22 **THE COURT:** NO, NO. I'M ASKING THEM TO RESPOND TO
23 YOUR CLAIM THAT THEIR STUFF IS NEW. THAT'S THE PART I DON'T
24 THINK I HAVE.

25 YOU SAY THAT SOME OF RASCHER AND NOLL'S TRIAL TESTIMONY IS

1 NEW, AND IT SEEMED LIKE YOU MIGHT BE RIGHT ABOUT SOME OF THAT.
2 AND I DON'T HAVE A RESPONSE ON THAT. THAT'S THE THING I THINK
3 I NEED. I DON'T THINK I NEED ANYTHING ELSE.

4 **MR. KESSLER:** WE ALSO HAVE NOT IDENTIFIED FOR YOU
5 WHAT PORTIONS OF THEIR TRIAL TESTIMONY IS NEW BECAUSE WE
6 DIDN'T HAVE IT WHEN WE FILED OUR FIRST IN LIMINE.

7 SO I WILL GIVE YOU AN EXAMPLE. WE SAID WE ANTICIPATE THAT
8 PROFESSOR ELZINGER (SIC) MIGHT NOW DO THESE NEW SUBJECTS, AND
9 IF HE DOES, THEY'RE NEW. IN FACT, WE NOW HAVE HIS DIRECT
10 TESTIMONY, AND HE'S DONE SOME NEW THINGS WE DIDN'T ANTICIPATE
11 AND SOME OF THE THINGS WE THOUGHT HE MIGHT DO, HE DIDN'T DO.
12 SO I DON'T THINK YOU HAVE THE RIGHT RECORD YET.

13 **THE COURT:** OKAY. WHY DON'T YOU ALL TRY TO DISCUSS
14 THIS AMONGST YOURSELVES AND SEE IF YOU CAN FIGURE OUT SOME WAY
15 TO SOLVE IT.

16 MAYBE YOU COULD EACH AGREE THAT IT'S -- THAT YOU'VE GONE
17 BACK AND FORTH SO MANY TIMES THAT IF YOU DIDN'T KNOW IT
18 BEFORE, YOU'VE KNOWN IT FOR A WHILE NOW, AND YOU EACH HAVE
19 RESPONDED TO IT AND MAYBE IT WOULD BE BETTER JUST TO SAY,
20 OKAY, WE'LL ALLOW THAT SUBJECT TO COME IN AND WE WON'T GO BACK
21 AND FORTH ABOUT IT FOREVER.

22 IF YOU JUST GIVE ME WHAT I ASKED FOR, WHICH IS YOUR
23 RESPONSE TO THEIR COMPLAINT ABOUT RASCHER AND NOLL. AND THEN
24 TRY TO AGREE AMONGST YOURSELVES; IF YOU CAN'T RESOLVE SOME OF
25 IT, OR IF NOT, HOW MANY PAGES AND IN HOW MANY DAYS I HAVE TO

1 READ THIS STUFF FOR.

2 **MR. KESSLER:** WE WILL TRY TO WORK THIS OUT AMONG US.
3 IF NOT, COME UP WITH A PROCEDURE THAT YOU CAN USE TO RESOLVE
4 IT.

5 **THE COURT:** YOU HAVE BEEN FILING EXPERT REPORTS -- I
6 FINALLY GOT A LIST OF WHEN THEY WERE ALL FILED, WHO THEY WERE
7 ALL RESPONDING TO, AND WHAT DATE THEY WERE ALL FILED, AND IT'S
8 TWO PAGES LONG.

9 I MEAN, PEOPLE KNOW WHAT EACH OTHER HAS TO SAY. IT'S NOT
10 A BIG SURPRISE AND IT'S NOT A JURY TRIAL, AND YOU KNOW NOW
11 WHAT'S GOING TO HAPPEN A MONTH FROM NOW.

12 I THINK YOU MIGHT BE ABLE TO AGREE ON PERHAPS A LITTLE
13 MORE LEEWAY THAN THE NORMAL JURY TRIAL. AND SEE IF YOU CAN'T
14 PUT A SORT OF FINITE END TO WHEN WE STOP OBJECTING TO EACH
15 OTHER'S NEW STUFF. AND THEN MAKE A PROPOSAL TO ME OF WHAT
16 MORE BRIEFING YOU THINK YOU NEED AND WHEN YOU CAN DO IT.

17 AND I GUESS, I DON'T KNOW, GIVE ME -- IT'S HARD TO GO BACK
18 AND FORTH OVER THESE HUNDREDS OF PAGES. I CAN'T THINK OF A
19 GOOD WAY FOR YOU TO SHOW ME WHAT'S THERE AND WHAT ISN'T THERE.
20 I GUESS PAGE AND LINE AND PARAGRAPH NUMBER IS THE BEST WE CAN
21 DO.

22 AND IT'S SORT OF HARD TO PROVE A NEGATIVE. YOU KNOW, READ
23 ALL 500 PAGES OF THIS AND SEE IF YOU CAN FIND IT. BUT ANYWAY,
24 SEE IF YOU CAN COME UP WITH SOMETHING.

25 OKAY. I GUESS THAT'S IT FOR THE MOTIONS IN LIMINE. I

1 HAVE A FEW OTHER THINGS I WANT TO TALK ABOUT, BUT IF YOU HAVE
2 OTHER PROBLEMS WITH WHAT I SAID ON THE MOTIONS IN LIMINE,
3 STARTING WITH PLAINTIFFS, YOU CAN DO THAT.

4 **MR. BERMAN:** I'M TALKING NOW ABOUT -- STEVE BERMAN --
5 ABOUT PLAINTIFFS' MOTION NO. 1, AND THAT IS THE LAY OPINION
6 TESTIMONY. AND I HEARD YOUR HONOR.

7 I GUESS THE ISSUE I HAVE IS I THINK THAT THIS IS ALL ABOUT
8 THE NINTH CIRCUIT BECAUSE THEY DON'T HAVE AN ECONOMIST TO SAY
9 THAT DEMAND WOULD BE HARMED. SO THE ONLY EVIDENCE THEY'RE
10 TRYING TO GET IN TO SAY CONSUMER DEMAND WOULD BE HARMED IF THE
11 RULES WERE CHANGED IS REALLY THE LAY OPINIONS OF PEOPLE LIKE
12 THE NCAA PRESIDENT WHO SAID HIS OPINION WAS SPECULATION.

13 AND SO I'M HEARING YOUR HONOR SAY THAT YOU'RE GOING TO LET
14 IT IN BECAUSE IT ONLY HAS SO MUCH CREDIBILITY BECAUSE
15 EVERYBODY HAS AN OPINION, BUT THERE'S GOING TO BE A STATEMENT
16 OUT THERE IN THE RECORD FOR THE NINTH CIRCUIT THAT WE THINK
17 VIOLATES THE RULES BECAUSE IT'S NOT BASED ON CONCRETE FACTS,
18 IT'S BASED ON HEARSAY, WHICH IT CANNOT BE BASED ON. AND SO
19 I'M A LITTLE TROUBLED BY THE NOTION THAT YOU'LL JUST NOT GIVE
20 IT A LOT OF CREDIBILITY AND IT GETS IN.

21 SO I UNDERSTAND YOU MAY PERHAPS TODAY RULED AGAINST ME ON
22 THIS ISSUE, BUT I THINK WHAT'S GOING TO HAPPEN -- I'M JUST
23 ALERTING THE COURT TO THIS -- I THINK THERE'S GOING TO BE A
24 LOT OF OBJECTIONS AT TRIAL THAT THE WITNESS LACKS NECESSARY
25 CONCRETE FACTS, HASN'T LAID A FOUNDATION, AND WE'LL HAVE TO DO

1 THAT SO WE PRESERVE OUR RECORD FOR THE NINTH CIRCUIT.

2 **THE COURT:** THAT'S OKAY. BUT WHAT YOU COULD DO
3 INSTEAD IS CROSS-EXAMINE AND POINT OUT --

4 **MR. BERMAN:** I UNDERSTAND THAT.

5 **THE COURT:** -- I'M GUESSING THAT PEOPLE AREN'T GOING
6 TO BE ABLE TO SAY, I TALKED TO SO AND SO ON JULY 3RD AND HE
7 TOLD ME THIS. THEY'RE JUST GOING TO SAY, I JUST TALKED TO A
8 LOT OF PEOPLE ALL THE TIME, AND HERE'S THE KIND OF THING I
9 THINK, AND THAT'S NOT GOING TO BE PROBATIVE TO ANYBODY.

10 **MR. BERMAN:** OKAY. WE WILL DO THAT.

11 **THE COURT:** YOU CAN POINT THAT OUT, I THINK, MORE
12 EFFECTIVELY ON CROSS THAN YOU CAN WITH FOUNDATIONAL
13 OBJECTIONS --

14 **MR. BERMAN:** I HEAR YOU, YOUR HONOR.

15 **THE COURT:** -- BUT YOU CAN CERTAINLY MAKE THOSE.

16 **MR. WILLIAMS:** YOUR HONOR, MAY I BE HEARD ON THAT
17 VERY BRIEFLY?

18 **THE COURT:** YES. YOU ARE?

19 **MR. WILLIAMS:** I'M BART WILLIAMS ON BEHALF OF THE
20 CONFERENCE DEFENDANTS, YOUR HONOR.

21 WITH RESPECT TO THE LAY OPINION TESTIMONY, WE DO AGREE
22 WITH THE WAY THE COURT CAST IT ORIGINALLY, WHICH IS THAT WE
23 NEED TO LAY A FOUNDATION. WE EXPECT TO BE ABLE TO DO THAT
24 WITH OUR WITNESSES AS WAS DONE IN *O'BANNON*, SOMETIMES MORE OR
25 LESS DEPENDING UPON THE WITNESS.

1 BUT THE ONLY THING I WANTED TO PUSH BACK A LITTLE BIT ON
2 WHAT MR. BERMAN SAID WAS THIS NOTION THAT THERE HAS TO BE AN
3 ABILITY TO, I THINK HE USED THE PHRASE "CONCRETE FACTS" AND
4 THEN THE COURT COMMENTED THAT YOU DON'T EXPECT WITNESSES TO BE
5 ABLE TO SAY, I SPOKE WITH SO AND SO ON THIS DATE OR THAT DATE.

6 WE ARGUE THAT THAT'S NOT WHAT THE CASES WOULD REQUIRE, BUT
7 RATHER THAT PEOPLE WHO ARE INVOLVED IN RUNNING BUSINESSES,
8 SUCH AS RUNNING A UNIVERSITY, RUNNING AN ATHLETIC DEPARTMENT,
9 DO, BY VIRTUE OF WHAT THEY DO, HAVE KNOWLEDGE THAT IS BASED
10 UPON THEIR DOING THEIR JOBS, IN THIS CASE, FOR DECADES.

11 **THE COURT:** PERHAPS, BUT IT WOULD BE -- IF HE SAYS,
12 PART OF MY JOB IS TO INTERVIEW A.D.'S, ALL OF THEM, ONCE A
13 YEAR. SO EVERY YEAR I GO AND I SPEAK TO EVERY A.D. FROM EVERY
14 UNIVERSITY, AND IN SPEAKING WITH 300 OF THEM, MY LAY OPINION
15 IS THAT MOST OF THEM THINK WHATEVER. VERSUS, YOU KNOW,
16 EVERYWHERE I GO AT A COCKTAIL PARTY, SOMEBODY COMES UP AND
17 SAYS, OH, WHAT ABOUT THE NCAA AND I CHAT WITH THEM AND THEY
18 SAY WHATEVER.

19 THAT'S NOT A FOUNDATION. MAYBE THE FORMER IS. IT SHOULD
20 BE BASED ON SOMETHING SPECIFIC HAVING TO DO WITH THEIR JOB --

21 **MR. WILLIAMS:** INDEED.

22 **THE COURT:** -- AND NOT JUST, I GO TO COCKTAIL PARTIES
23 AND PEOPLE COME UP AND ASK ME, YOU KNOW, HOW DO I GET OUT OF
24 JURY DUTY OR WHAT DO I THINK ABOUT THE NCAA.

25 **MR. WILLIAMS:** I WOULD AGREE THAT IT HAS TO DO WITH

1 THEIR JOB ABSOLUTELY, AND WE WILL TRY TO LAY THAT FOUNDATION,
2 YOUR HONOR, FOR YOUR SATISFACTION.

3 BUT WE WOULD PUSH BACK ON THE NOTION THAT IF YOU ARE
4 TALKING ABOUT AN ATHLETIC DIRECTOR, AND THEY ARE OUT IN THE
5 WORLD SPEAKING ABOUT -- SPEAKING TO AND WITH CUSTOMERS WHO ARE
6 THE PEOPLE WHO COME TO THE GAMES, THAT THAT IS RELEVANT TO
7 ULTIMATELY --

8 **THE COURT:** I DON'T KNOW IF THEY SPEAK TO CUSTOMERS.

9 **MR. WILLIAMS:** RIGHT.

10 **THE COURT:** THEY PROBABLY SIT IN THEIR OFFICES.
11 WHAT, DO THEY GO OUT IN THE STANDS AND ASK PEOPLE DOWN THE
12 ROW, WHAT DO YOU THINK ABOUT THE NCAA'S AMATEURISM RULES? OR
13 IN THE HOT DOG LINE SOMEBODY SAYS SOMETHING? I JUST DON'T
14 KNOW HOW THESE CONVERSATIONS HAPPEN TO COME ABOUT.

15 **MR. WILLIAMS:** I DOUBT THEY DO IT IN THAT WAY, BUT I
16 BELIEVE THEY DO DO IT IN OTHER WAYS WHERE THEY ARE IN SETTINGS
17 AROUND PEOPLE WHO ARE TICKET HOLDERS, WHO ARE PEOPLE WHO ARE
18 FANS WHO COME, AND WE WILL LAY THAT FOUNDATION, YOUR HONOR.

19 **THE COURT:** WHAT ARE THEY TALKING ABOUT? YOU KNOW,
20 DO THEY SAY, OH, WE LOVE AMATEURISM. DO THEY SAY WHAT THEY
21 MEAN BY AMATEURISM? DO THEY SAY THEY UNDERSTAND WHAT THE NCAA
22 MEANS BY AMATEURISM? JUST BECAUSE SOMEBODY MIGHT USE THE WORD
23 "AMATEURISM" ISN'T GOING TO BE TERRIBLY PROBATIVE EITHER.

24 **MR. WILLIAMS:** WE DO RECOGNIZE THAT THERE WILL BE
25 DIFFERENT PROBATIVE VALUE TO THE EVIDENCE DEPENDING UPON THE

1 WITNESS. WE ALSO WOULD PUSH BACK ON WHAT I BELIEVE MR. BERMAN
2 SAID REGARDING NOT HAVING ANY OTHER EVIDENCE WITH RESPECT TO
3 DEMAND. WE WILL HAVE OTHER EVIDENCE WITH REGARD TO CONSUMER
4 DEMAND THAT WE WILL PRESENT IN THE CASE.

5 **THE COURT:** WELL, WE ALL KNOW WHAT IT IS SO --

6 **MR. WILLIAMS:** THANK YOU, YOUR HONOR.

7 **THE COURT:** OKAY. ANYTHING ELSE?

8 OKAY. SO I HAVE --

9 **MS. WILKINSON:** YOUR HONOR, MAY THE DEFENSE ALSO
10 RAISE ANY ISSUES WE HAVE WITH --

11 **THE COURT:** OH, SURE. SORRY.

12 **MS. WILKINSON:** JUST ONE, AND I THINK YOU PUT THIS
13 OFF.

14 BUT ONE OF OUR NOTED OBJECTIONS TO ALL OF THE NEWSPAPER
15 ARTICLES THEY HAVE AND THE REPORT THAT I UNDERSTAND YOU
16 EXCLUDED, THEY COME BACK AND SAY, WELL, IT'S ONLY GOING TO BE
17 INTRODUCED FOR NOTICE.

18 AND, YOU KNOW, YOU WANT US TO CUT BACK THE EXHIBIT LIST?
19 I DON'T UNDERSTAND WHAT PROVISION OR WHAT STATE OF MIND THEY
20 ARE TALKING ABOUT THAT WOULD JUSTIFY ALL THESE DOCUMENTS. I
21 JUST HAVE ONE IN FRONT OF ME, AN ARTICLE FROM A PROFESSOR THAT
22 WAS SENT TO SOMEONE AT THE BIG TEN. AND THEY SAY -- PROFESSOR
23 JO POTUTO -- THAT SHOULD COME IN BECAUSE IT SHOWS NOTICE ON
24 THE PART OF THE BIG TEN. I THINK THE --

25 **THE COURT:** OF WHAT?

1 **MS. WILKINSON:** IT'S A POLICY COMPLAINT ABOUT THE
2 NCAA. I DON'T THINK THERE'S ANY DISPUTE HERE THAT EVERYONE AT
3 THE NCAA AND THE CONFERENCES UNDERSTANDS THAT PEOPLE CRITICIZE
4 THE NCAA FOR THE RULES AND WHETHER THEY SHOULD BE, YOU KNOW,
5 PROHIBITING PAY, AND ALL THOSE THINGS. THAT'S NOT ANYTHING
6 THAT THERE'S ANY DISPUTE ABOUT IN THIS CASE; THAT EVERYONE,
7 ALL THE DEFENDANTS ARE ON NOTICE ABOUT THOSE ISSUES.

8 THIS CASE IS ABOUT WHETHER THERE'S AN ANTITRUST VIOLATION
9 HERE. AND THE THINGS YOU ARE ALLOWING US TO TRY, AS I
10 UNDERSTAND IT, ARE ONLY TWO THINGS. YOU'VE HELD THE MARKET
11 WAS ALREADY DECIDED. YOU HELD THAT THERE'S BEEN, YOU KNOW,
12 THAT THE RULES ARE ANTICOMPETITIVE, OR AT LEAST THERE'S
13 RESTRICTIONS, AND WE HAVE TO PROVE THE PROCOMPETITIVE BENEFITS
14 WHICH HAVE NOTHING TO DO WITH THE STATE OF MIND OF THE NCAA,
15 IT HAS TO DO WITH THE CONDUCT AND THE ACTION, AND THEN THE
16 LESS RESTRICTIVE ALTERNATIVES.

17 SO I DON'T UNDERSTAND WHY ALL THESE DOCUMENTS WOULD BE ON
18 THE EXHIBIT LIST WITH THE PROVISION THAT THEY COME IN FOR SOME
19 KIND OF NOTICE.

20 **THE COURT:** I WOULD HAVE TO HEAR WHAT IT WAS. I
21 ASSUME FROM THAT THAT THEY MEANT THAT THERE WAS SOMETHING THAT
22 NCAA DENIED KNOWING ABOUT AND THAT THEY WOULD BE ABLE TO
23 IMPEACH THEIR DENIAL BY SAYING -- LET'S SAY THE NCAA DOESN'T
24 KNOW THAT PEOPLE ARE CHARGING \$5 FOR A TICKET TO A BASKETBALL
25 GAME, AND SO YOU USE THE NEWSPAPER ARTICLE TO SAY THIS

1 CONSUMER SENT YOU A LETTER ON THIS DATE, AND IT SAID THAT THEY
2 WERE CHARGING ME \$5 FOR A BASKETBALL GAME, AND THIS --
3 SOMETHING LIKE THAT, YEAH.

4 JUST SORT OF A GENERAL NOTION THAT THE NCAA KNOWS THAT
5 PEOPLE AREN'T HAPPY, NO, THAT --

6 **MS. WILKINSON:** YOUR HONOR, THAT'S NOT WHAT THESE
7 ARTICLES SHOW. I KNOW YOU'RE TRYING --

8 **THE COURT:** I DON'T HAVE THE ARTICLE, SO I DON'T
9 KNOW.

10 **MS. WILKINSON:** BUT THAT'S NOT -- THESE ARE ARTICLE
11 AFTER ARTICLE --

12 **THE COURT:** THE TYPE THAT WOULD COME IN WOULD BE
13 SOMETHING THAT SAID SOMETHING SPECIFIC THAT THE NCAA SEEMED TO
14 BE DENYING KNOWING ABOUT, AND THAT THEY COULD PROVE THAT THEY
15 GOT A COPY OF THE ARTICLE AND READ IT, AND THUS DID KNOW ABOUT
16 IT. IT WOULDN'T BE JUST GENERAL BAD STUFF ABOUT THE NCAA.

17 **MS. WILKINSON:** PEOPLE CRITICIZING.

18 **THE COURT:** I CAN'T SAY TOO MUCH MORE ABOUT IT
19 BECAUSE I HAVEN'T SEEN THE ARTICLES. BUT YOU'LL KEEP THAT IN
20 MIND IN TRYING TO OFFER ARTICLES THAT JUST TAKE GENERAL BAD
21 THINGS ABOUT THE NCAA.

22 **MR. FRIEDMAN:** OF COURSE, YOUR HONOR.

23 **THE COURT:** OKAY.

24 **MR. FRIEDMAN:** CAN I BRIEFLY RESPOND, YOUR HONOR?
25 VERY BRIEFLY ON THAT?

1 **THE COURT:** OKAY. AND YOU ARE?

2 **MR. FRIEDMAN:** I AM JEFF FRIEDMAN ON BEHALF OF
3 PLAINTIFFS.

4 I THINK THE COURT'S RIGHT; IN A VACUUM YOU CAN'T MAKE
5 OBJECTIONS OR RULE ON OBJECTIONS IN A VACUUM. SPECIFICALLY,
6 SOME OF THIS, WHAT WE ARE TALKING ABOUT, YOUR HONOR, TO THE
7 EXTENT THERE ARE FACTS BEING -- WHETHER IT'S A SURVEY OR
8 THERE'S FACTS IN THE PUBLIC RECORD THAT THE NCAA IS PUT ON
9 NOTICE ABOUT THAT THEY FAIL TO REACT TO.

10 FOR EXAMPLE, TIME DEMANDS. THE OVERWHELMING TIME DEMANDS
11 ON THE NCAA ATHLETES. AND IF THEY COME IN AND SAY, WE ARE
12 JUSTIFYING A CERTAIN RULE BECAUSE OF THE FACT WE ARE TAKING
13 CARE OF TIME DEMANDS, AND WE PUT IN ESSENTIALLY ARTICLES OR
14 STATEMENTS OR SURVEYS THAT REFUTE THEIR PROCOMPETITIVE
15 JUSTIFICATION THAT THEY ARE ASSERTING THAT THE RULES ARE
16 NECESSARY AND EFFECTIVE TO MEET.

17 SO WE ARE PROVIDING CONTRARY EVIDENCE TO THEIR
18 PROCOMPETITIVE JUSTIFICATION THAT THEY ARE EFFECTIVE AND
19 NECESSARY IN MEETING WHAT THEY CLAIM IS THE PROCOMPETITIVE
20 JUSTIFICATION.

21 AGAIN, WE ARE IN A VACUUM, YOUR HONOR, BUT I WANTED TO
22 GIVE YOU AN EXAMPLE.

23 **THE COURT:** THAT DOESN'T SOUND LIKE SOMETHING THAT
24 WOULD COME IN. AND YOUR ANSWER IS TO SAY THERE'S A NEWSPAPER
25 ARTICLE THAT SAYS THAT STUDENTS HAVE DIFFICULT TIME DEMANDS

1 AND YOU SHOULD HAVE SEEN IT IN THE *NEW YORK TIMES* ON THUS AND
2 SUCH DATE?

3 **MR. FRIEDMAN:** NO, YOUR HONOR. LET'S SAY THERE'S A
4 SURVEY THAT'S DONE BY AN OUTSIDE SOURCE AND THEY ARE CLAIMING
5 IT'S HEARSAY.

6 **THE COURT:** YOU CAN PROVE THAT THEY SAW IT AND READ
7 IT?

8 **MR. FRIEDMAN:** CORRECT.

9 **THE COURT:** SOME PARTICULAR PERSON WHO WAS IN CHARGE
10 OF TIME DEMAND SAW AND READ THIS SURVEY AND IS NOW DENYING
11 THEY KNEW ABOUT TIME DEMANDS AND DIDN'T FIX TIME DEMANDS
12 MAYBE?

13 **MR. FRIEDMAN:** THAT'S -- CORRECT, YOUR HONOR.

14 **THE COURT:** OKAY. WELL, WE'LL SEE IF WE SEE ANYTHING
15 LIKE THAT.

16 **MR. KESSLER:** YOUR HONOR, I THINK THIS IS A GOOD
17 ILLUSTRATION. YOUR HONOR IS RIGHT, YOU SHOULD DECIDE THIS AS
18 THE DOCUMENTS COME IN BECAUSE YOU NEED CONTEXT FOR THIS.

19 JUST ONE GENERAL --

20 **THE COURT:** I WOULD RATHER DECIDE IT IN ADVANCE. THE
21 REASON I'M TALKING ABOUT IT IS TO TRY TO GIVE YOU SOME IDEA OF
22 WHAT SORT OF THING YOU MIGHT THINK YOU COULD GET IN SO YOU
23 DON'T TRY TO GET IN MORE OR LESS THAN IS LOGICALLY LIKELY.

24 **MS. WILKINSON:** WE DON'T HAVE A LONG EXHIBIT LIST,
25 YOUR HONOR. THAT IS ONE OF OUR BIG OBJECTIONS.

1 **THE COURT:** YEAH. LOOK AT YOUR ARTICLES AND SEE
2 WHETHER YOU MEET THIS KIND OF CRITERIA.

3 BUT I'M SORRY, GO AHEAD.

4 **MR. KESSLER:** I THINK THIS IS VERY HELPFUL GIVING US
5 THIS GUIDANCE. I HAVE TWO IN THAT REGARD ALTHOUGH I MUST SAY
6 I'M CONFUSED BY DEFENDANTS' COMMENT BECAUSE WE CUT DOWN OUR
7 EXHIBIT LIST WHERE IT'S ABOUT 200, THEY HAVE OVER A THOUSAND
8 EXHIBITS, YOUR HONOR.

9 SO I DO AGREE VERY MUCH IT NEEDS TO BE CUT DOWN, BUT WE'VE
10 DONE THAT WORK. 200 EXHIBITS, AS YOUR HONOR KNOWS, IS ABOUT
11 THE NUMBER FOR THIS TYPE OF A CASE. THEY HAVE FIVE TIMES THAT
12 NUMBER.

13 **THE COURT:** IT DEPENDS ON HOW MANY PAGES EACH EXHIBIT
14 IS.

15 **MR. KESSLER:** I AGREE WITH THAT, TOO, YOUR HONOR.
16 THERE'S NO QUESTION THAT NUMBERS ALONE DON'T TELL IT. BUT I
17 THINK WHETHER YOU LOOK AT NUMBERS OR VOLUMES, THEY ARE ABOUT
18 FIVE TIMES US.

19 YOUR HONOR, ON PRINCIPLES, JUST TWO THINGS, IF I MAY. ONE
20 IS THAT ON THE ISSUE OF LAY OPINION, ONE PRINCIPLE THAT WE
21 BELIEVE YOUR HONOR MAY BE ABLE TO GIVE US SOME GUIDANCE ON IS
22 FUTURE PREDICTIONS.

23 BECAUSE MUCH OF THE TESTIMONY THAT WE THINK THAT THEY WANT
24 TO OFFER FOR WHAT THEY'VE CITED IS NOT SOMEONE SAYING BASED ON
25 MY WORK EXPERIENCE HERE'S WHAT I BELIEVE IS NOW HAPPENING OR

1 HAS HAPPENED, IS THAT I THINK IF WE -- IF THIS CHANGE IS MADE
2 IN THE FUTURE, HERE'S HOW OTHER SCHOOLS WILL REACT OR HERE'S
3 WHAT FANS WILL DO IN THE FUTURE.

4 AND I THINK BY NATURE PREDICTIVE COMMENTS THAT ARE NOT BY
5 AN EXPERT, NOT BY A SURVEY EXPERT, NOT BY SOMEONE ELSE WHO
6 STUDIED IT, I THINK, (A), ARE NOT ADMISSIBLE UNDER THE FEDERAL
7 RULES BECAUSE IT IS PURE JUST SPECULATIVE OPINIONS BY THE LAY
8 PERSON AND, TWO, IT'S OBVIOUSLY HAS VERY LITTLE PROBATIVE
9 VALUE. SORT OF FILL THE TRIAL WITH PEOPLE GETTING UP AND
10 SAYING, HERE'S WHAT WE THINK WILL HAPPEN IN THE FUTURE, I
11 THINK, YOUR HONOR, IS A GUIDE THAT YOU CAN GIVE US ABOUT THAT
12 THAT WILL BE USEFUL.

13 **THE COURT:** THAT'S PROBABLY TRUE. IT WOULD BE LESS
14 LIKELY THAT A LAY WITNESS WOULD HAVE ANY FOUNDATION OR
15 BUSINESS ACUMEN TO KNOW WHAT SOMEONE OTHER THAN HIMSELF MIGHT
16 DO IN THE FUTURE. I MEAN, CONCEIVABLY WHEN THEY'RE IN THE HOT
17 DOG LINE AND THEY'VE TALKED TO SIX HUNDRED PEOPLE AND THEY'VE
18 ALL SAID, I SURE HOPE YOU DON'T START PAYING THESE ATHLETES
19 BECAUSE I WON'T COME TO GAMES ANYMORE, MAYBE SOMETHING LIKE
20 THAT WOULD --

21 **MR. KESSLER:** EXACTLY. AND THIS CAME UP A LITTLE BIT
22 IN *O'BANNON* WHERE YOUR HONOR HAD SOME OF THAT TESTIMONY AND
23 SAID YOU DIDN'T REALLY GIVE IT ANY WEIGHT. SO I THINK JUST IN
24 TERMS OF GIVING US GUIDANCE, BECAUSE WE WILL HAVE A LIMITED
25 AMOUNT OF TIME WHICH WE UNDERSTAND. WE UNDERSTAND, YOUR

1 HONOR, YOU DIDN'T PUT IN YOUR ORDER, WE UNDERSTAND BASED ON
2 YOUR TRIAL DATES, WE EACH WOULD HAVE 22 AND A HALF HOURS. I
3 THINK THAT'S CORRECT, SO WE'LL BE ON THE CLOCK, IN EFFECT; IS
4 THAT RIGHT, YOUR HONOR?

5 **THE COURT:** YES. 8:30 TO 1:30 WITH TWO 15-MINUTE
6 BREAKS, NO LUNCH BREAK.

7 **MR. KESSLER:** SO GIVEN THAT, WE ARE BOTH GOING TO
8 HAVE TO BE VERY PRUDENT IN OUR ASSESSMENT, SO THIS TYPE OF
9 GUIDANCE IS HELPFUL TO US.

10 THE OTHER ONE, YOUR HONOR, IS THAT I BELIEVE IN THE
11 DISCUSSION OF NEW MATERIALS FOR EXPERTS, I THINK THERE'S A
12 DIFFERENCE, YOUR HONOR, BETWEEN A NEW OPINION WHICH HAS NOT
13 BEEN DISCLOSED PREVIOUSLY, SAYS AN OLD OPINION THAT WAS
14 DISCLOSED BUT SOME NEW FACT HAS HAPPENED, A NEW STUDY HAS BEEN
15 PUBLISHED SINCE THE REPORTS WERE DONE BUT IT'S THE SAME
16 OPINION, I THINK THEY HAVE TWO DIFFERENT CONSEQUENCES UNDER
17 RULE 26 IN TERMS OF WHAT THE REMEDY SHOULD BE.

18 I'M JUST CALLING THAT OUT TO YOUR HONOR BECAUSE I THINK
19 SOME OF THE THINGS WE MAY OR MAY NOT RESOLVE MAY HAVE TO DO
20 WITH THAT DISTINCTION IN TERMS OF THAT.

21 **THE COURT:** I DON'T THINK THAT NEW SUPPORTING
22 INFORMATION COMES IN UNLESS YOU CAN AGREE ON IT SOMEHOW,
23 UNLESS MAYBE BOTH SIDES AGREE THAT THEY BOTH WANT TO ADDRESS
24 THIS NEW STUDY, OR BOTH SIDES AGREE THAT NEITHER WILL ADDRESS
25 IT, OR BOTH SIDES THINK THEY NEED A BRIEF TELEPHONE DEPOSITION

1 OF EACH EXPERT TO SAY WHAT THEY THINK OF THE NEW STUDY.

2 **MR. KESSLER:** SO THAT'S A GOOD EXAMPLE, YOUR HONOR,
3 TO JUST GIVE YOU ONE EXAMPLE.

4 SO A NEW EXPERT PUBLISHED WORK ACTUALLY ON THE CHANGE AND
5 COST OF ATTENDANCE WAS PUBLISHED SINCE ALL THE EXPERT REPORTS
6 WERE DONE, AND ONE OF OUR EXPERTS, PROFESSOR NOLL, SAID HERE'S
7 A BRAND NEW STUDY THAT SUPPORTS --

8 **THE COURT:** BAKER?

9 **MR. KESSLER:** EXCUSE ME?

10 **THE COURT:** BAKER?

11 **MR. KESSLER:** YES. AND -- AND THE QUESTION IS THAT
12 WAS A STUDY THAT WAS ISSUED SINCE THE REPORT --

13 **THE COURT:** I DON'T THINK SO. I DON'T THINK SO.

14 **MR. KESSLER:** YOUR VIEW WOULD BE THAT SHOULD NOT COME
15 IN?

16 **THE COURT:** THAT WOULD BE MY VIEW, YES.

17 **MR. KESSLER:** THAT'S HELPFUL TO KNOW, YOUR HONOR.
18 THANK YOU. WE APPRECIATE THAT.

19 **THE COURT:** UNLESS THEY LIKE BAKER TOO, AND YOU BOTH
20 WANTED TO HAVE YOUR EXPERTS --

21 **MS. WILKINSON:** NO, YOUR HONOR.

22 **THE COURT:** -- BE ABLE TO TALK ABOUT BAKER --

23 **MS. WILKINSON:** WE DON'T WANT NEW STUDIES COMING IN.

24 **MR. KESSLER:** THEY WOULD NOT LIKE BAKER SINCE IT
25 GOES --

1 **THE COURT:** OR MAYBE THEY HAVE A NEW STUDY AND
2 THEY'LL TRADE YOUR BAKER FOR THEIR WHATEVER.

3 **MS. WILKINSON:** NO.

4 **MR. KESSLER:** WE UNDERSTAND YOUR HONOR'S THINKING.
5 SO YOU WANT EVERYTHING THAT'S NOT IN THE PRIOR REPORTS TO COME
6 IN, AND WE WILL FOCUS ON IT THAT WAY.

7 THANK YOU, YOUR HONOR.

8 **THE COURT:** CAN I TELL YOU MY PROBLEMS? ARE YOU
9 ALMOST FINISHED?

10 **MR. WILLIAMS:** YES, YOUR HONOR. JUST A FEW MORE
11 POINTS, IF I MAY.

12 **THE COURT:** OKAY.

13 **MR. WILLIAMS:** FIRST OF ALL --

14 **THE COURT:** YOU ARE SPEAKING ON MY RULINGS ON THE
15 MOTIONS IN LIMINE?

16 **MR. WILLIAMS:** CORRECT, YOUR HONOR, I AM.

17 **THE COURT:** OKAY.

18 **MR. WILLIAMS:** THE FIRST THING I WANTED TO TALK ABOUT
19 IS WHAT WE JUST HEARD FROM MR. KESSLER REGARDING THE LAY
20 WITNESS TESTIMONY.

21 HE MADE THE STATEMENT THAT HE WOULD BELIEVE THAT ANYTHING
22 THAT THE BUSINESS PERSON WOULD HAVE TO SAY ABOUT WHAT THE
23 FUTURE MAY HOLD WOULD BE THE TYPE OF THING THAT WOULD NOT BE
24 ADMISSIBLE. WE DON'T BELIEVE THAT THAT'S ACCURATE AND WE'D
25 REFER THE COURT TO THE CASES THAT WE CITE THAT TALK ABOUT

1 BUSINESS PEOPLE WHO ARE ALLOWED TO TESTIFY ABOUT THEIR
2 BUSINESS BASED UPON THEIR KNOWLEDGE OF THEIR BUSINESS.

3 THERE IS A PREDICTIVE QUALITY TO THAT, WHICH IS, WHAT DO
4 MY CUSTOMERS LIKE OR NOT LIKE? WHAT DRIVES MY CUSTOMERS BASED
5 UPON MY YEARS OF EXPERIENCE?

6 SO WE THINK THAT THE CASE LAW MAKES IT FAIRLY CLEAR THAT
7 IT ISN'T AN ACCURATE STATEMENT OF THE LAW TO SIMPLY SAY THAT
8 YOU COULD NOT HAVE ANY PREDICTIVE QUALITY TO A LAY OPINION.

9 **THE COURT:** I THINK A PREDICTION IS WAY LESS LIKELY
10 TO BE CREDIBLE THAN A STATEMENT OF THINGS THAT THE PERSON HAS
11 ALREADY OBSERVED IN THE COURSE OF DOING THEIR BUSINESS.

12 **MR. WILLIAMS:** INDEED, AND THAT'S --

13 **THE COURT:** I CAN'T SAY IT WOULD NEVER COME IN.

14 I'LL TRY MY BEST TO BE CONSISTENT ON THESE THINGS, BUT
15 THINGS COME UP IN ALL DIFFERENT CONTEXT AND I --

16 **MR. WILLIAMS:** UNDERSTOOD.

17 **THE COURT:** -- WILL RULE ON THEM AS I SEE THEM WHEN
18 THEY COME UP.

19 **MR. WILLIAMS:** UNDERSTOOD, YOUR HONOR. THAT'S THE
20 ONLY THING I WANTED TO RESPOND TO ON THAT.

21 THE LAST THING IS, I WANTED TO SAY SOMETHING ABOUT
22 DEFENDANTS' MOTION IN LIMINE NO. 1, WHICH IS THE ONE THAT HAS
23 TO DO WITH THE RULES ADJUDICATED IN O'BANNON.

24 THE COURT IN SAYING THAT YOU WOULD DENY THAT MOTION STATED
25 THAT, LOOK, IT'S A LONG LIST, IT'S A LONG SET OF RULES. JUST

1 BECAUSE THAT LONG SET OF RULES MAY HAVE BEEN BEFORE THE COURT
2 OR ADMITTED INTO EVIDENCE IN A PREVIOUS CASE, YOU KNOW, THAT
3 DOESN'T MEAN THAT EVERYTHING IS DONE.

4 I WANTED TO CLARIFY THAT THAT'S NOT WHAT WE ARE ARGUING.
5 HERE'S WHAT WE ARE ARGUING THERE. WHEN THE COURT DENIED THE
6 MOTION FOR SUMMARY JUDGMENT BROUGHT BY THE DEFENSE, THE BASIS
7 FOR YOUR ORDER WAS -- IN THIS REGARD, WAS THAT WHILE -- I'M
8 QUOTING ON PAGE 21 OF YOUR ORDER:

9 "WHILE THE RESTRAINTS CHALLENGED IN THIS CASE OVERLAP
10 WITH THOSE IN *O'BANNON*, THE SPECIFIC RULES AT ISSUE
11 ARE NOT THE SAME."

12 THE COURT WENT ON:

13 "CHALLENGES TO THE NCAA'S RULES MUST BE ASSESSED ON A
14 CASE-BY-CASE BASIS UNDER THE RULE OF REASON, AND
15 *O'BANNON*'S HOLDING THAT THERE WERE PROCOMPETITIVE
16 JUSTIFICATIONS FOR THE RULES CHALLENGED IN THAT CASE
17 WOULD NOT NECESSARILY REQUIRE THE COURT TO FIND THAT
18 DIFFERENT RULES, CHALLENGED IN THIS CASE, ALSO HAVE
19 THE SAME PROCOMPETITIVE EFFECTS."

20 SO OUR POINT IS, ARE THE RULES DIFFERENT OR ARE THEY NOT?
21 AND HERE'S THE BOTTOM LINE ON THAT.

22 YOU'LL RECOGNIZE THAT WE ATTACHED AS EXHIBITS TO OUR
23 OPENING BRIEF EXHIBITS A, B, AND C, A SUMMARY CHART OF THE
24 RULES. THERE ARE 25 THAT PLAINTIFFS FOCUS ON BECAUSE THERE
25 ARE 55, YOU WILL RECALL, THAT PLAINTIFFS HAVE SAID ARE SIMPLY

1 THE CONFERENCES IMPLEMENTING THE NCAA RULES.

2 SO ON THE 25, 18 OF THEM ARE IDENTICAL IN EVERY WAY, EVERY
3 SINGLE WORD. TWO OF THEM ARE DIFFERENT ONLY BY ADDING THE --

4 **THE COURT:** OKAY.

5 **MR. WILLIAMS:** -- COST OF ATTENDANCE.

6 **THE COURT:** I UNDERSTAND YOUR ARGUMENT. BUT IF YOU
7 ARE TRYING TO SAY YOU MAY NOT BREATHE A WORD ABOUT SOME RULE
8 THAT ISN'T ONE OF THESE NEW ONES, THAT'S NOT GOING TO HAPPEN.
9 IT'S AN INTERLOCKING SET OF RULES THAT AFFECT EACH OTHER THAT
10 CHANGE THROUGH TIME PERHAPS OR THAT THE CIRCUMSTANCES CHANGE;
11 SO WHILE YOU CAN MAKE YOUR ARGUMENT THAT THE SUM TOTAL AND
12 EFFECT OF THE SITUATION IS NO DIFFERENT, AND I'LL LISTEN TO
13 THAT ARGUMENT, BUT I'M NOT GOING TO HAVE YOU SAY, OH, RULE 6.2
14 WAS ALREADY THERE SO YOU CAN'T MENTION A WORD ABOUT RULE 6.2.

15 YOU CAN IF IT INTERACTS WITH NEW RULE 6.3 OR IF IT'S
16 DIFFERENT NOW BECAUSE SOMETHING ELSE HAS HAPPENED IN THE
17 MEANTIME. THERE'S JUST NOT A STRICTURE AGAINST MENTIONING AN
18 OLD RULE JUST BECAUSE IT WAS IN EXISTENCE IN THE RULE BOOK
19 FOUR YEARS AGO.

20 **MR. WILLIAMS:** UNDERSTOOD THERE. BUT HERE'S THE
21 POINT: WITH RESPECT TO THE RULES THAT WERE FRONT AND CENTER
22 IN *O'BANNON*, SO, FOR EXAMPLE, THE RULES IN SECTION 12 OR
23 CHAPTER 12 OF THE RULES, WHAT WE ARE GETTING AT IS THAT THOSE
24 RULES WERE, IN FACT, ADJUDICATED, THE ONES THAT SAY YOU HAVE
25 TO BE AN AMATEUR, THE ONES THAT SAY YOU CANNOT BE PAID, THE

1 FINANCIAL ASSISTANCE RULES, WHICH WERE RIGHT DOWN THE MIDDLE
2 OF WHAT THE O'BANNON CASE WAS ABOUT.

3 WHAT WE ARE SAYING IS THAT SURELY THOSE RULES ARE NOT WHAT
4 THIS CASE IS ABOUT. YOU'LL REMEMBER --

5 **THE COURT:** THEY MAY NOT BE, BUT IF SOMEBODY SAYS THE
6 WORD "RULE 13" WE ARE NOT GOING TO EXCLUDE IT IF IT'S RELEVANT
7 TO SOMETHING.

8 **MR. WILLIAMS:** I SEE. I UNDERSTAND THE COURT'S
9 HESITANCY TO SIMPLY SAY WE ARE NOT GOING TO HEAR ANYTHING
10 ABOUT THIS OR THAT.

11 I MERELY WANTED TO MAKE THE POINT THAT WE ARE JUST TRYING
12 TO FIND OUT WHETHER AT THE TRIAL THAT'S UPCOMING EVERY SINGLE
13 RULE AMONG THE ENTIRE RULE BOOK ARE OPEN HERE. AND OUR VIEW
14 IS THAT THAT CAN'T BE BECAUSE O'BANNON --

15 **THE COURT:** ARE OPEN?

16 **MR. WILLIAMS:** ARE OPEN MEANING --

17 **THE COURT:** THEY ARE ADMISSIBLE, THEY CAN BE
18 MENTIONED? YES. ARE THEY -- HAVE THEY BEEN ATTACKED BY
19 PLAINTIFFS? NO.

20 **MR. WILLIAMS:** VERY WELL, YOUR HONOR. THANK YOU.

21 **MR. KESSLER:** YOUR HONOR, IF I MAY ON THAT POINT.

22 BECAUSE I THINK WHAT THEY ARE TRYING TO DO IS RE-LITIGATE
23 WHAT WAS THE SUMMARY JUDGMENT ARGUMENT THAT SOMEHOW THE
24 FACT --

25 **THE COURT:** ALL WE ARE TALKING ABOUT IS EVIDENCE.

1 AND IS EVIDENCE THAT SUCH A RULE EXISTS GOING TO COME IN?
2 YES, IT WILL IF IT'S RELEVANT TO SOMETHING NOW.

3 **MR. KESSLER:** RIGHT. AND I WILL NOTE, YOUR HONOR, IN
4 THE OPENING BRIEF THAT WAS JUST FILED, THE DEFENDANTS ACTUALLY
5 SAY, THIS IS ON PAGE 7 OF THEIR OPENING BRIEF:

6 "DEFENDANTS WILL DEMONSTRATE THAT THE CHALLENGED
7 RULES, WHICH OPERATE TOGETHER AS PART OF AN
8 INTEGRATED WHOLE," OKAY, "PROMOTE PROCOMPETITIVE
9 ENDS."

10 AND THEN THEY SAY IN FOOTNOTE 19:

11 "PLAINTIFFS SEEM TO AGREE THAT THERE IS NO NEED FOR
12 SEGREGATED RULE-BY-RULE ANALYSIS, THAT THE CHALLENGED
13 RULES ARE OVERLAPPING, AND THAT THEY ALL COLLECTIVELY
14 RISE OR FALL BASED UPON DEFENDANTS' IDENTICAL
15 AMATEURISM AND INTEGRATION JUSTIFICATIONS."

16 SO I DON'T EVEN UNDERSTAND THE BASIS OF THE COMPLAINT
17 BECAUSE BOTH SIDES HAVE NOW AGREED BASED ON THEIR OPENING THAT
18 WHAT WE ARE DOING IS WE HAVE IDENTIFIED THE RULES THAT WE ARE
19 CHALLENGING TOGETHER AS THEY OPERATE AS A WHOLE IN ORDER TO
20 RESTRICT THE COMPENSATION TO THESE ATHLETES, WHICH WERE NOT AT
21 ISSUE IN *O'BANNON* BECAUSE THERE WAS NAMES, IMAGES, AND
22 LIKENESSES, THERE THE FACTS WERE VERY DIFFERENT, THEY HAD THE
23 LESS RESTRICTIVE ALTERNATIVES, ALL OF WHICH YOUR HONOR NOTED
24 IN YOUR SUMMARY JUDGMENT RULING.

25 **THE COURT:** I HAVE SOME ISSUES I WANT TO RAISE.

1 ONE IS ELZINGA. MY INITIAL PROBLEM WITH ELZINGA IS THAT
2 HE HAD THIS MULTISIDED PLATFORM ARGUMENT, AND I READ HIS
3 INITIAL REPORT BACK WHEN WE WERE DOING SUMMARY JUDGMENT AND
4 *DAUBERT*, THE MARCH REPORT, AND IT APPEARED TO BE THAT
5 EVERYTHING HE HAD TO SAY WAS BASED ON THAT.

6 I MEAN, IT WAS MENTIONED IN BASICALLY EVERY PARAGRAPH, AND
7 I THINK HE EVEN SAID SOMEWHERE, ALTHOUGH I HAVEN'T BEEN ABLE
8 TO FIND IT SINCE, THAT HE THOUGHT PROCOMPETITIVE JUSTIFICATION
9 SHOULD BE PART OF THE FIRST STEP OF THE RULE-OF-REASON
10 ANALYSIS.

11 BUT, IN ANY EVENT, IN READING IT AGAIN AND READING ALL THE
12 ARGUMENTS AND READING THE RECAST TRIAL TESTIMONY, HE DOES SAY
13 THINGS ABOUT PROCOMPETITIVE JUSTIFICATIONS. IF YOU TAKE THEM
14 OUT OF THE CONTEXT OF WHETHER THEY SHOULD BE IN STEP ONE OR
15 STEP THREE, HE SAYS THEM AND I'LL HEAR THEM.

16 THE OTHER THING THAT'S... THAT'S HAPPENED IS THIS *AMEX*
17 CASE THAT JUST CAME OUT, AND BOTH SIDES HAVE ADDRESSED IT. I
18 THINK IT'S COMPLETELY DISTINGUISHABLE FROM THIS CASE, BUT
19 BECAUSE IT IS A NEW CASE, IF ANYONE FEELS LIKE THEY HAVEN'T
20 HAD AN ADEQUATE CHANCE TO ADDRESS IT, I'LL GIVE YOU SOME TIME
21 TO DO THAT NOW.

22 **MR. FRIEDMAN:** YOUR HONOR, JEFF FRIEDMAN FOR THE
23 PLAINTIFFS.

24 DOES THE COURT WANT TO HEAR FROM DEFENDANTS FIRST OR FROM
25 PLAINTIFFS?

1 **THE COURT:** OH, I SUPPOSE DEFENDANTS WOULD BE THE
2 ONES WHO WOULD... THINK THAT PERHAPS IT WAS RELEVANT.

3 **MR. COOPER:** YOUR HONOR, SCOTT COOPER FOR THE
4 DEFENDANTS.

5 MAYBE IT WOULD BE HELPFUL, YOUR HONOR, TO UNDERSTAND A
6 LITTLE BIT BETTER WHAT YOU WANT TO HEAR FROM US ON. WE AGREE
7 THAT --

8 **THE COURT:** YOU MENTIONED SOMETHING ABOUT THIS IS A
9 NEW CASE, YOU RULED BEFORE IT CAME OUT, NOW IT'S COME OUT IT
10 WOULD BE -- I DON'T KNOW IF IT WAS A DENIAL OF DUE PROCESS OR
11 SOME -- SOMETHING YOU SAID WOULD HAPPEN IF YOU DIDN'T GET A
12 CHANCE TO TELL ME WHAT YOU THOUGHT ABOUT AMEX. I THINK YOU
13 SAID THAT.

14 **MR. COOPER:** WELL, YOUR HONOR, I THINK --

15 **THE COURT:** SO I WAS JUST GOING TO GIVE YOU A CHANCE
16 TO SAY ANYTHING YOU FELT YOU HADN'T HAD A CHANCE TO SAY. IF
17 I'M -- I MEAN, YOU DON'T HAVE TO.

18 **MR. COOPER:** OH, NO, I WOULD BE HAPPY TO BE HEARD,
19 YOUR HONOR.

20 **THE COURT:** I THOUGHT YOU ASKED FOR IT.

21 **MR. COOPER:** AND WE DO BELIEVE IT'S IMPACTFUL.

22 YOUR HONOR PUT YOUR FINGER ON -- I THINK IN TALKING ABOUT
23 YOUR RE-READING OF DR. ELZINGA'S TESTIMONY, HIS REPORTS AND
24 HIS TESTIMONY. YOU PUT YOUR FINGER ON ONE ASPECT OF WHAT THE
25 MULTISIDED MARKET DOES. IT MOVES THE DISCUSSION OF THE MARKET

1 FUNCTION FROM ARGUABLY PRONGS 2 AND 3 TO PRONG 1, AND BECOMES
2 INTEGRAL IN THE QUESTION OF WHETHER THERE ARE ANY COMPETITIVE
3 EFFECTS IN THE FIRST INSTANCE THAT ARE PRONG 1.

4 THAT IS PRECISELY WHAT THE SUPREME COURT SAID IN *AMEX*. IT
5 DECIDED THAT IN A MULTISIDED MARKET, THE QUESTION OF WHETHER
6 THERE'S AN ANTICOMPETITIVE EFFECT IS DETERMINED BASED ON THIS
7 LOOKING AT BOTH SIDES OF A MULTISIDED MARKET. AND THAT'S WHAT
8 DR. ELZINGA ARGUED IN HIS OPENING REPORT AND THAT'S WHAT YOUR
9 HONOR EXCLUDED.

10 SO WE DO BELIEVE THAT *AMEX* HAS A VERY SPECIFIC EFFECT ON
11 THE PROPRIETY OF THAT ORIGINAL RULING. IT IS TRUE THAT
12 DR. ELZINGA, IN HIS REBUTTAL AND REPLY REPORTS, TALKED ABOUT
13 THE WAY THE MARKET THAT THE PLAINTIFFS ARGUE FOR OPERATES,
14 PROCOMPETITIVE JUSTIFICATIONS AND LESS RESTRICTIVE
15 ALTERNATIVES, THAT THAT'S ALL DISCUSSED IN HIS REBUTTAL AND
16 REPLY REPORT WHICH ARE NOW BEFORE YOUR HONOR IN HIS DIRECT
17 TESTIMONY.

18 WE BELIEVE THAT WHAT *AMEX* DID IS MOVE THAT CONSIDERATION
19 FROM PRONGS 2 AND 3 TO PRONG 1. THAT'S EXACTLY WHAT THE
20 EXCHANGE BETWEEN JUSTICE THOMAS FOR THE MAJORITY TALKED ABOUT
21 AND WHAT JUSTICE BREYER IN THE DISSENT TALKED ABOUT IN SECTION
22 4 (A) OF HIS DISSENT, WHERE HE TALKED ABOUT THAT PROPERLY BEING
23 PART OF THE PRONG 2 AND 3 ANALYSIS.

24 SO IT'S NOT A QUESTION OF WHETHER THE VARIOUS ASPECTS OF A
25 MARKET OUGHT TO BE CONSIDERED IN THE RULE OF REASON, BUT

1 RATHER WHETHER THEY BELONG IN PRONG 1 OR PRONGS 2 AND 3 BASED
2 UPON THE COURT'S DETERMINATION IN AMEX. WE THINK THAT'S WHY
3 AMEX IS SIGNIFICANT AS IT RELATES TO THIS CASE. IT'S A
4 QUESTION OF WHETHER THE ANTICOMPETITIVE EFFECTS OCCUR IN THE
5 FIRST INSTANCE IN A TWO-SIDED MARKET, OR WHETHER THAT'S ONLY A
6 QUESTION OF THE IMPACT OF THE PROCOMPETITIVE JUSTIFICATIONS
7 AND LESS RESTRICTIVE ALTERNATIVES IN THE SECOND AND THIRD
8 PORTION OF THE RULE-OF-REASON ANALYSIS.

9 **MR. FRIEDMAN:** YOUR HONOR, JEFF FRIEDMAN FOR THE
10 PLAINTIFFS.

11 JUST SO I UNDERSTAND THE COURT'S EARLIER COMMENTS, WHAT I
12 UNDERSTAND IS THAT THE COURT HAS MADE A RULING ABOUT THE
13 MARKET DEFINITION IN THE CASE. AND THAT MARKET DEFINITION IS
14 A ONE-SIDED MARKET. NOW --

15 **THE COURT:** THAT'S TRUE. BUT IF A NEW CASE HAD COME
16 OUT THAT CHANGED THE LAW, I WOULD HAVE TO PAY ATTENTION.

17 **MR. FRIEDMAN:** I TOTALLY AGREE WITH YOU AND I'LL GET
18 TO THAT IN A SECOND.

19 IN TERMS OF WHY THE COURT SHOULD NOT RECONSIDER OR, IF THE
20 COURT DOES RECONSIDER, THAT THE COURT WAS CORRECT IN THE FIRST
21 INSTANCE.

22 SO THE FIRST POINT OF THIS IS, IS THAT WHAT BECOMES
23 IMPORTANT FOR THE COURT TO DECIDE AND STAY WITH THE COURT'S
24 RULING, WHICH WAS CORRECT IN THE FIRST INSTANCE, IS IT A
25 TWO-SIDED MARKET OR ONE-SIDED MARKET, LIKE THE COURT RULED, IS

1 THAT AS DR. ELZINGA SETS UP HIS WHOLE THEORY, AND HE DOES THIS
2 IN HIS FIRST REPORT, WHICH IS THE FOLLOWING: HE SAYS IT'S A
3 MATTER OF TWO COMPETING HYPOTHESES. ONE IS, IF IT IS A
4 ONE-SIDED MARKET, HE SAYS THAT EITHER THE RULES ARE THE
5 IMPLEMENTATION OF A MONOPOLISTIC CARTEL IN A LABOR MARKET FOR
6 TALENTED YOUNG ATHLETES, WHICH IS WHAT THE COURT RULED THE
7 MARKET WAS, OR THERE ARE EFFICIENT SOCIAL ARRANGEMENT FOR
8 PREVENTING WHAT OTHERWISE BE AN EXTERNALLY INDUCED MARKET
9 FAILURE IN A COMPLEX MULTISIDED MARKET.

10 SO HE HAS SET UP A BINARY ANALYSIS. SO WHEN THE COURT
11 DECIDES IS IT THE ONE-SIDED MARKET, WHICH IT DECIDED AND IF IT
12 STICKS WITH THAT RULING, THEN EVERYTHING THAT FLOWS WITH
13 RESPECT TO HIS OPINIONS ABOUT MULTISIDED MARKETS AND THE
14 PROCOMPETITIVE EFFECTS ARE WRONG. OR I SHOULD SAY THIS: NOT
15 WRONG, HE HAS AN ABSENCE OF ANALYSIS FOR IT.

16 **THE COURT:** WELL, HE HAS ANALYSIS. I HAVE TO SAY
17 IT'S NOT... THERE ARE SOME CRITICISMS OF IT THAT YOU MAKE THAT
18 I THINK ARE JUSTIFIABLE, WHICH ARE THAT IT DEPENDS ON
19 INTERVIEWS WITH PEOPLE WHO WERE SELF-SELECTED AND GAVE THEIR
20 OWN VIEWS. THAT'S MOSTLY WHAT HE RELIES ON. SO --

21 **MR. FRIEDMAN:** I APPRECIATE THAT.

22 **THE COURT:** THAT SORT OF THING ISN'T THE MOST
23 PROBATIVE.

24 **MR. FRIEDMAN:** I AGREE WITH THE COURT. AND I SHOULD
25 THEN QUALIFY IT TO SAY IT LACKS RELIABLE PRINCIPLES AND

1 METHODOLOGIES IF HIS MULTISIDED MARKET IS NOT THE MARKET.

2 BECAUSE YOU'RE RIGHT, ALL HE'S LEFT WITH IS BASICALLY
3 PARROTING SOME OPINIONS BY A HANDFUL OF NCAA WITNESSES AND
4 JUST SAYING, IN A SENSE, THE RULES SAY WHAT THEY SAY AND
5 BECAUSE THEY KNOW WHAT THEY ARE DOING, THEY HAVE SET THE CAP
6 AT THE RIGHT LEVEL.

7 NOW, WHY THIS -- I JUST WANT TO COMMENT ABOUT AMEX FOR A
8 SECOND. AND THE COURT IS RIGHT, IT IS... DISTINGUISHABLE IS
9 AN UNDERSTATEMENT.

10 SO, YOUR HONOR, IN A MULTISIDED, OR I SHOULD SAY TWO-SIDED
11 MARKET, YOU HAVE A PLATFORM THAT IS SETTING A PRICE THAT IT'S
12 CHARGING TO BOTH SIDES OF THAT PLATFORM.

13 WHAT -- THERE'S NO PRICE BEING CHARGED TO LAW PROFESSORS
14 ON THIS SIDE OF THE PLATFORM OR TAVERN OWNERS OR BAND MEMBERS
15 OR ALL OF THESE OTHER CONSTITUENCIES THAT DR. ELZINGA SAYS IS
16 PART OF THIS PLATFORM. THERE'S NO PRICE BEING CHARGED BY
17 UNIVERSITY OF VIRGINIA TO U.C.L.A. WHICH HE SAYS ARE PART OF
18 THIS PLATFORM. EFFECTIVELY EVERYBODY IS PART OF THE PLATFORM
19 AND YET THERE'S NO SINGLE PRICE BEING CHARGED TO BOTH --

20 **THE COURT:** OR ANY PRICE AT ALL REALLY.

21 **MR. FRIEDMAN:** REALLY, YOUR HONOR.

22 **THE COURT:** IN SOME CASES THERE ARE SOME PRICES
23 FLOATING AROUND, BUT NOT IN ALL CASES.

24 **MR. FRIEDMAN:** CORRECT.

25 AND WHY THIS IS CRITICALLY IMPORTANT, YOUR HONOR, AND THIS

1 IS -- SORRY IF I OVERSTATED AND MISSTATED, BUT WHAT I WAS
2 TRYING TO SAY TO YOUR HONOR IS THE REASON THAT TWO-SIDED
3 PLATFORMS HAVE BEEN ACCEPTED IN THOSE RARE INSTANCES IS
4 BECAUSE THE PREDICATE ECONOMICS HAVE SHOWN THAT SUPPLY AND
5 DEMAND IS BEING MEDIATED BY THE PRICE THAT'S BEING CHARGED TO
6 THE TWO SIDES OF THE PLATFORM. AND THEY ARE MAXIMIZING THE
7 BENEFITS BY MEDIATING THAT PRICE.

8 AND SO WITH AMEX, YOU HAD BASICALLY MERCHANTS, PEOPLE THAT
9 ARE BEING CHARGED MONEY AND CONSUMERS, AND THE BANK AS THE
10 PLATFORM IS CHARGING THE TWO SIDES --

11 **THE COURT:** THE BANK IS THE INTERMEDIARY, I WOULD
12 SAY.

13 **MR. FRIEDMAN:** YOU GOT IT. THAT'S RIGHT. AND IT'S
14 SETTING, ESSENTIALLY, IF YOU ARE THINKING ABOUT THE OPTIMAL
15 PRICE, YOUR HONOR, TO EXTRACT FROM THE TRANSACTION IS A
16 DOLLAR, THEY ARE FIGURING OUT DO I CHARGE THE CONSUMER 10
17 CENTS AND THE MERCHANT 90 CENTS IN ORDER TO MAXIMIZE DEMAND
18 FROM THE CONSUMERS WHICH WILL HELP BRING MORE MERCHANTS, AND
19 THE MORE MERCHANTS THAT COME, THE MORE CONSUMERS WILL USE IT.
20 AND THAT'S WHAT THEY'RE DOING BY CHARGING AND MEDIATING THAT
21 PRICE.

22 SO THAT'S NOT -- NOT ONLY IS THERE NOT A PRICE BEING
23 CHARGED HERE, BUT EVEN SETTING THAT ASIDE, YOUR HONOR, THERE'S
24 NOT -- THE PRICE THAT IS BEING CHALLENGED HERE IS THE
25 SCHOLARSHIP PRICE. THEY HAVE SET AN ARTIFICIAL CAP ON THE

1 PRICE THAT'S BEING BASICALLY PAID, NOT CHARGED, BUT PAID TO
2 THE SCHOLARSHIP ATHLETES.

3 AND SO IF THE QUESTION IS, AS THE COURT CORRECTLY ANALYZED
4 IN ITS FRAMEWORK IS, IF YOU RAISE THE PRICE OF THE
5 SCHOLARSHIP, OKAY, IF YOU RAISE THAT PRICE, YOU'RE NOT
6 AFFECTING THE PRICE OF THE TAVERN OWNER. YOU'RE NOT AFFECTING
7 THE BAND MEMBER PRICE. YOU'RE NOT AFFECTING ANY OF THESE
8 PRICES. BUT WHY HE DID WHAT HE DID IS IT WAS A SUBSTITUTE FOR
9 A DEMAND ANALYSIS.

10 WHAT IS INTRINSIC ONCE YOU FIND THERE IS A MULTISIDED OR A
11 TWO-SIDED PLATFORM, IS THAT YOU HAVE FOUND THERE IS A SUPPLY
12 AND DEMAND RELATIONSHIP. THAT'S WHAT HAPPENS IN *AMEX*. BUT
13 YOU HAVE TO ESTABLISH THAT SUPPLY AND DEMAND RELATIONSHIP AS
14 IT RELATES TO PRICE IN THAT TWO-SIDED PLATFORM.

15 THEY FAILED -- HE FAILED TO DO THAT. AS A RESULT OF
16 FAILING TO DO THAT AND, THEREFORE, NOT HAVING A MULTISIDED
17 MARKET ANALYSIS, WHAT HE'S LEFT WITH NOW, IF YOU WERE TO LOOK
18 AT A ONE-SIDED CORRECT MARKET DEFINITION, IS HE HAS REALLY NO
19 ECONOMIC ANALYSIS TO SUPPORT HIS DEMAND OPINIONS, HIS
20 PROCOMPETITIVE EFFECTS.

21 SO THE COURT WAS CORRECT TO SAY, WHETHER HE USES THE WORD
22 "PROCOMPETITIVE EFFECT" OR HOW HE SORT OF FRAMES THINGS, WHAT
23 HE'S REALLY DOING IS HE'S DOING AN OPINION BUT HE SUBSTITUTES
24 THE WORD "EVERYONE VALUES AMATEURISM", ALL THESE PEOPLE ARE
25 VALUING AMATEURISM. THAT'S A SUBSTITUTE FOR DEMAND. BUT HE

1 CAN'T MAKE THAT OPINION ONCE HE DOESN'T HAVE THE ECONOMIC
2 SUPPORT OF MULTISIDED MARKETS.

3 AND SO -- I MEAN, HE COULD, HE CAN TESTIFY TO IT LIKE YOUR
4 HONOR SAID, SO MAYBE IT IS AN ARGUMENT JUST SIMPLY OF
5 PROBATIVENESS, BUT THAT'S THE HEART OF OUR ARGUMENT WHY
6 *DAUBERT* APPLIES TO HIM IS BECAUSE HE SHOULD, IN ORDER TO EVEN
7 OFFER THAT EXPERT TESTIMONY, HE'S GOT TO HAVE SUFFICIENT FACTS
8 AND DATA AND HE HAS TO APPLY A RELIABLE METHODOLOGY.

9 SO IF YOU STAY WITH YOUR RULING THAT THIS IS NOT A
10 MULTISIDED MARKET, WHICH I URGE THE COURT TO DO, HE,
11 THEREFORE, NO LONGER HAS PRINCIPLES OR FACTS OR DATA TO
12 SUPPORT HIS DEMAND PROCOMPETITIVE EFFECTS ANALYSIS.

13 **THE COURT:** OTHER THAN THE OPINIONS OF THE LAY
14 WITNESSES THAT HE SPOKE TO --

15 **MR. FRIEDMAN:** AND THEN -- RIGHT.

16 **THE COURT:** THE OTHER THING HE DOES IS CRITICIZE NOLL
17 AND RASCHER, AND THAT'S --

18 (SIMULTANEOUS COLLOQUY.)

19 **MR. FRIEDMAN:** ABSOLUTELY. SO WHAT I WANTED TO DO TO
20 HELP THE COURT IS -- TRULY, BECAUSE I KNOW THAT A LOT OF THESE
21 OPINIONS ARE SORT OF MISSION CREEP GOING ON, IS THE DEFENDANTS
22 SUBMITTED IN THEIR REPLY TO US, YOUR HONOR, ON JULY 2ND, THEY
23 LISTED 11 ITEMS THAT THEY CLAIMED WERE NOT IN ANY WAY LINKED
24 TO MULTISIDED MARKETS.

25 **THE COURT:** WELL, I'M NOT SO WORRIED ABOUT THAT ANY

1 MORE BECAUSE I NOW HAVE HIS PROPOSED TRIAL TESTIMONY AND I
2 THINK IT'S GENERALLY OKAY. IT DOESN'T SAY ANYTHING ABOUT
3 MULTISIDED MARKETS. IT DOES TALK ABOUT ALL THESE LAY
4 WITNESSES SELF-SELECTED, WHICH, AS I SAY, ARE NOT THE MOST
5 PROBATIVE AND IT DOES CRITICIZE NOLL AND RASCHER. SO
6 GENERALLY -- I DIDN'T PARSE IT PAGE AND LINE, AND IF YOU WANT
7 TO PARSE IT I GUESS YOU CAN, BUT I FELT THERE WAS ADMISSIBLE
8 STUFF IN THERE.

9 **MR. FRIEDMAN:** AND I APPRECIATE IT. I WAS -- I WON'T
10 WASTE THE COURT'S TIME BECAUSE I AGREE THAT THEY LISTED SOME
11 ITEMS, LIKE SPECIFIC CRITICISMS OF NOLL AND RASCHER THAT I
12 AGREE WITH THE COURT, THAT IT IS NOT DEPENDED ON MULTISIDED
13 MARKETS.

14 WHAT I WANT TO HIGHLIGHT FOR THE COURT, AND IF IT'S
15 THEREFORE (SIC) TO DO IT AT TRIAL, WE CAN DO IT AT TRIAL, BUT
16 IT'S A LOT BETTER IF WE HAD A BETTER UNDERSTANDING; IS THAT
17 WHEN HE USES LANGUAGE LIKE "THERE'S VALUE TO THESE DIFFERENT
18 CONSTITUENCIES AND, THEREFORE, THESE THINGS WILL HAPPEN IF
19 AMATEUR IN ANY WAY CHANGES", I JUST WANT TO REEMPHASIZE FOR
20 THE COURT, OTHER THAN THESE FIVE OR SO INTERVIEWS, HE DOESN'T
21 HAVE A BASIS TO MAKE THOSE CLAIMS ABOUT WHAT THE DEMAND EFFECT
22 WILL BE.

23 **THE COURT:** I THINK THAT'S PROBABLY TRUE.

24 **MR. FRIEDMAN:** OKAY.

25 **THE COURT:** AND ONE MIGHT ARGUE THAT IT'S UNRELIABLE

1 FOR THAT REASON, BUT SINCE IT'S A BENCH TRIAL, I WILL HEAR IT.

2 **MR. FRIEDMAN:** I UNDERSTAND.

3 **THE COURT:** BUT I DO HAVE A COUPLE OF THINGS I WANTED
4 TO ASK YOU.

5 **MR. COOPER:** MAY I, YOUR HONOR?

6 **THE COURT:** YES, AS SOON AS I'M FINISHED WITH
7 MR. FRIEDMAN.

8 YOU WERE TALKING ABOUT NOT BEING ANY PRICES AND NOT BEING
9 ANY RELATION -- SUPPLY AND DEMAND RELATIONSHIP WITH PRICES.
10 THEY WOULD SAY, I'M GUESSING, THAT IN SOME INSTANCES THERE IS
11 AN ARGUMENT THAT COULD BE MADE THAT IF YOU GIVE A BIGGER
12 SCHOLARSHIP TO AN ATHLETE, YOU'RE GOING TO HAVE LESS MONEY TO
13 PAY THE LAW PROFESSOR.

14 IF YOU GIVE A BIGGER SCHOLAR (SIC) TO AN ATHLETE, YOU'RE
15 GOING TO HAVE TO CHARGE \$6 FOR THE BASKETBALL TICKET AND NOT
16 \$5. SO THERE IS SOME -- I'M NOT SURE THERE'S ANY EVIDENCE OF
17 IT, BUT THERE'S SOME ARGUMENT THAT COULD BE MADE THAT THERE IS
18 SOME EFFECT IN THE WORLD WHEN ONE THING IS CHANGED, THAT
19 THERE'S OTHER THINGS COULD BE AFFECTED. SO I'M INTERESTED IN
20 THAT.

21 AND THEN I'M ALSO INTERESTED IN IF ONE WERE TO JUST THINK
22 ABOUT THE DOUBLE -- THE MULTI-PLATFORM MARKET THAT DR. ELZINGA
23 TALKS ABOUT, AND TRY TO FIT THAT INTO THE FRAMEWORK OF A
24 TWO-SIDED TRANSACTIONAL MARKET THAT'S DISCUSSED IN *AMEX*, AND
25 MAYBE THE DEFENDANT IS THE RIGHT PERSON TO ASK THIS, BUT IF

1 YOU WANTED TO ADDRESS IT AT ALL, I'M HAVING A HARD TIME
2 ANALYZING ELZINGA'S FRAMEWORK IN THE FRAMEWORK OF AN TWO-SIDED
3 MARKET WITH AN INTERMEDIARY AND A TRANSACTION.

4 **MR. FRIEDMAN:** SO I'LL TAKE THE FIRST ONE, YOUR
5 HONOR.

6 YOUR FIRST POINT IS TRUE IN THAT IN ANY SITUATION WHERE
7 YOU HAVE A LIMITED RESOURCE, IF YOU APPLY A RESOURCE IN ONE
8 DIRECTION, IT COULD AFFECT THE AMOUNT OF RESOURCES YOU USE IN
9 ANY OTHER DIRECTION. THAT'S, OF COURSE, TRUE. BUT THAT IS
10 COMPLETELY IRRELEVANT FOR ANTITRUST ANALYSIS UNLESS YOU FIT IT
11 IN TO A MARKET THAT YOU HAVE SHOWN A SUFFICIENT DIRECT
12 RELATIONSHIP BETWEEN SUPPLY AND DEMAND SUCH THAT YOU CHANGE
13 THE PRICE OF THIS AND IT DIRECTLY AFFECTS THE PRICE OF THAT.

14 AND I SAY THAT, AND I'LL GIVE YOU A COUPLE OF BACKDROPS TO
15 THAT. ONE IS, AS JUSTICE THOMAS RULED, SETTING ASIDE MY OWN
16 OPINIONS ABOUT THE RULINGS, JUSTICE THOMAS GAVE AN EXAMPLE
17 THAT WAS A MUCH TIGHTER FIT OF A POTENTIAL TWO-SIDED MARKET,
18 AND HE REFERENCED NEWSPAPERS IF THE COURT RECALLS.

19 **THE COURT:** AND DR. ELZINGA TALKED ABOUT THAT AS
20 WELL.

21 **MR. FRIEDMAN:** CORRECT.

22 AND IN THAT SITUATION, THOUGH, WHERE JUSTICE THOMAS SAID
23 THOSE EXTERNALITIES WERE EFFECTIVELY TOO INDIRECT THAT YOU
24 SHOULD LOOK AT A ONE-SIDED MARKET IN A NEWSPAPER CONTEXT, WHEN
25 YOU HAVE ADVERTISERS ON ONE SIDE OF THE PLATFORM, READERS ON

1 THE OTHER SIDE, AND NEWSPAPERS THAT ARE MEDIATING THAT PRICE.

2 SO EVEN UNDER *AMEX*, THAT'S WHY I STARTED WITH SAYING THE
3 COURT IS ABSOLUTELY CORRECT IN TERMS OF DISTINCTIONS IS THAT
4 EVEN UNDER *AMEX*, WHERE YOU HAVE A DIRECT TWO-SIDED ARGUMENT
5 FOR A PLATFORM, YOU HAVE A PRICE THAT'S BEING SET WHERE YOU'RE
6 TRYING TO INCREASE CIRCULATION BY LOWERING PRICE TO THE
7 READERS AND THAT AFFECTS WHAT YOU CHARGE THE ADVERTISERS, AND
8 YOU HAVE THIS SEE-SAW, DIRECT SEE-SAW, JUSTICE THOMAS SAID
9 THAT'S TOO INDIRECT.

10 SO DR. ELZINGA, AND MAYBE HE'LL SAY IT ON THE STAND IN
11 FRONT OF YOU, YOUR HONOR, BUT AT DEPOSITION, MY RECOLLECTION
12 IS WHEN WE CROSS-EXAMINED HIM, HE WAS NOT SAYING, OH, IF YOU
13 PAY THE STUDENT-ATHLETE MORE, WE'RE GOING TO HAVE LESS LAW
14 PROFESSORS OR ECONOMISTS.

15 HE WASN'T SAYING THAT, YOUR HONOR. HE WAS SIMPLY SAYING
16 EVERYBODY IS AFFECTED, EVERYBODY VALUES AMATEURISM, AND THE
17 MEDIATOR, BEING THE NCAA, IS SETTING THE OPTIMAL PRICE TO THE
18 STUDENT-ATHLETES.

19 AND SO IT'S JUST A PROXY. ALL IT REALLY IS IS A PROXY FOR
20 DEMAND WITHOUT SHOWING IT IF YOU DON'T ACCEPT IT'S WHAT HE
21 SAYS IT IS, WHICH IS THIS SUPPLY AND DEMAND RELATIONSHIP WHICH
22 HE HAS NEVER SHOWN. SO THAT'S MY FIRST RESPONSE TO THE
23 COURT'S QUESTION.

24 I GUESS THAT LEADS INTO THE NEXT ONE. MY COLLEAGUE, I'LL
25 TURN IT TO HIM VERY QUICKLY, WHICH IS, I HONESTLY -- THERE ARE

1 ARGUMENTS, OBVIOUSLY, ECONOMICALLY THAT ARE INTELLECTUALLY
2 SUPPORTABLE IS TO -- THAT THERE IS SUPPLY AND DEMAND
3 RELATIONSHIPS DIRECT CONNECTIONS ON PLATFORMS.

4 THIS IDEA THAT THE TAVERN OWNER, THE BAND MEMBER, THE LAW
5 PROFESSOR, EVERY SCHOOL IS PART OF THIS GIANT ECOSYSTEM THAT
6 IS ALL PART OF THIS MASSIVE INTERRELATED PLATFORM, YOUR HONOR,
7 FRANKLY, JUST HAS NO BASIS IN THE LITERATURE. OR IN -- AND
8 EVERY SINGLE ECONOMIST THAT'S EVER LOOKED AT THIS MARKET, AS
9 DR. ELZINGA ADMITS, HAS FOUND IT TO BE A ONE-SIDED MARKET AND
10 HAS VIEWED IT, WHEN HE TALKS ABOUT THE COMPETING HYPOTHESES,
11 EVERY SINGLE ECONOMIST, PEER-REVIEWED, LITERATURE, AND
12 OTHERWISE HAVE FOUND IT TO BE A CARTEL MODEL, A MONOPSONY
13 CARTEL MODEL, HE'S THE ONLY ONE THAT SAYS, WELL, NO, IT'S THIS
14 MASSIVE ECOSYSTEM.

15 **THE COURT:** IF YOU COULD TELL ME HOW IT WOULD WORK.
16 WHAT'S THE PLATFORM? WHO IS THE INTERMEDIARY? WHAT'S THE
17 TRANSACTION? WHERE IS THE -- WHAT'S THE PRODUCT? WHAT'S THE
18 REASONABLE SUBSTITUTE? WHAT'S THE CROSS ELASTICITY OF DEMAND?
19 HOW DOES WHAT DR. ELZINGA SAID FIT ANY SORT OF MODEL, WHETHER
20 IT BE *AMEX* OR ANY OTHER MODEL?

21 **MR. COOPER:** I THINK THERE ARE A NUMBER OF TERMS YOU
22 JUST USED, YOUR HONOR, THAT DON'T HAVE DIRECT APPLICATION TO
23 THE ANALYSIS THAT THE *AMEX* CASE CONCERNS, BUT LET ME JUST
24 START FROM BEGINNING AS MR. FRIEDMAN DID.

25 FIRST, I THINK WHAT THEY'RE URGING YOU TO DO IS TO EXCLUDE

1 DR. ELZINGA'S TESTIMONY ON THE FACTS ON WHICH A PROPER AMEX
2 ANALYSIS WOULD BE DONE, AND TO REACH A CONCLUSION APPLYING
3 AMEX TO THEIR VERSION OF DR. ELZINGA'S TESTIMONY RATHER THAN
4 ACCEPTING THE TESTIMONY, AND THAT CAN'T BE RIGHT AS A MATTER
5 OF LAW.

6 **THE COURT:** I READ THE TESTIMONY. I READ ALL FOUR
7 REPORTS.

8 **MR. COOPER:** I UNDERSTAND, YOUR HONOR, BUT THEY'RE
9 ASKING YOU TO EXCLUDE IT AND THAT'S WHAT'S BEFORE YOU RIGHT
10 NOW.

11 SO THE QUESTION IS WHETHER YOU'LL EXCLUDE IT, NOT HOW
12 YOU'LL WEIGH IT AFTER HEARING THE DIRECT TESTIMONY THAT HASN'T
13 BEEN PUT BEFORE YOU BECAUSE WE WEREN'T ALLOWED TO, AND
14 CROSS-EXAMINATION ON THAT ISSUE BOTH OF DR. ELZINGA AND THEIR
15 EXPERTS ON THE SAME SUBJECT IF THAT'S WHAT THE COURT WERE TO
16 RULE.

17 IF THE COURT IS GOING TO ALLOW THE TESTIMONY IN, THEN WE
18 OUGHT TO HAVE AN OPPORTUNITY TO PRESENT THAT TESTIMONY AT
19 TRIAL THE WAY ONE DOES IN ORDER TO THEN APPLY THE LAW AS THE
20 SUPREME COURT HAS FOUND IT.

21 SO I WOULD SUBMIT THAT THAT'S THE RIGHT ORDER IN WHICH
22 THINGS SHOULD HAPPEN RATHER THAN HAVE A CLOSING ARGUMENT HERE
23 ON THE BASIS OF WHAT MR. FRIEDMAN SAYS DR. ELZINGA'S TESTIMONY
24 IS. AND I TELL YOU FOR CERTAIN, YOUR HONOR, THAT HIS
25 REPRESENTATION OF DR. ELZINGA'S OPINIONS IS NOT ACCURATE. SO

1 THAT'S ONE.

2 **THE COURT:** I TOLD YOU I READ THEM ALL.

3 **MR. COOPER:** I UNDERSTAND THAT, YOUR HONOR.

4 **THE COURT:** IS THERE SOMETHING I DIDN'T READ?

5 **MR. COOPER:** WE'D LIKE -- WELL, YOU READ HIS
6 REPORTS --

7 **THE COURT:** MARCH 2017 --

8 **MR. COOPER:** RIGHT.

9 **THE COURT:** -- THE REPLY, THE REBUTTAL, AND THE TRIAL
10 TESTIMONY --

11 **MR. COOPER:** RIGHT.

12 **THE COURT:** -- WHICH ONE WAS NOT --

13 (SIMULTANEOUS COLLOQUY)

14 **MR. COOPER:** I'M SORRY, YOUR HONOR.

15 WE WOULD LIKE TO HAVE AN OPPORTUNITY TO ARGUE THOSE, WHICH
16 IS SOMETHING THAT WE HAVE NOT DONE. WE HAVE NOT ARGUED IN OUR
17 OPENING STATEMENT BECAUSE THEY WERE EXCLUDED. WE HAVE NOT PUT
18 THAT BEFORE YOU IN HIS DIRECT TESTIMONY BECAUSE IT WAS
19 EXCLUDED.

20 WE RECOGNIZE THAT IN HIS REPORT, HIS FIRST REPORT, THAT
21 THIS WAS INCLUDED, BUT AS OF RIGHT NOW, THAT HAS BEEN EXCLUDED
22 FROM THE RECORD IN THE CASE.

23 **THE COURT:** WELL, THERE WAS A SUMMARY JUDGMENT MOTION
24 AND A *DAUBERT* MOTION. I RULED THE WAY I DID ON SUMMARY
25 JUDGMENT AND I RULED THE WAY I DID ON *DAUBERT*. I BACKTRACKED

1 FROM THAT TO SOME DEGREE ON *DAUBERT* BY ALLOWING HIM TO TESTIFY
2 ABOUT NOLL AND RASCHER AND ABOUT -- SORT OF TRANSMOGRIFYING
3 THE PLATFORM TO BE A PROCOMPETITIVE JUSTIFICATION.

4 BUT THE ONLY THING THAT LEADS ME TO TALK TO YOU IS THE
5 FACT THAT SINCE I GRANTED THAT *DAUBERT* MOTION AND SUMMARY
6 JUDGMENT MOTION, THE *AMEX* CASE CAME OUT. I DON'T, AS I SAID
7 BEFORE, I DON'T THINK THAT THAT CHANGES THE OUTCOME AND I
8 DON'T THINK THAT THIS SITUATION IS -- COMES WITHIN *AMEX*, BUT
9 IF YOU WANT TO EXPLAIN TO ME --

10 **MR. COOPER:** I DO.

11 **THE COURT:** -- HOW IT DOES, I'LL BE HAPPY TO LISTEN
12 TO YOU.

13 **MR. COOPER:** I DO, YOUR HONOR.

14 **THE COURT:** GO AHEAD.

15 **MR. COOPER:** I WANT TO REACH THAT, BUT I DO THINK FOR
16 THE CLARITY OF THE RECORD IT'S IMPORTANT FOR US TO UNDERSTAND
17 WHAT YOU'RE SAYING.

18 WE BELIEVE THAT HIS REBUTTAL AND REPLY REPORTS THAT WE
19 HIGHLIGHTED LINE BY LINE AND SUBMITTED TO THE COURT DON'T
20 RELATE TO THE MULTISIDED MARKET ANALYSIS, AND THAT THEY OUGHT
21 TO BE IN THE RECORD BECAUSE THEY WERE NEVER PROPERLY EXCLUDED
22 BECAUSE THEY DON'T HAVE ANYTHING TO DO WITH THE MULTISIDED
23 MARKET ANALYSIS.

24 YOU SAID THEY WERE TRANSMOGRIFIED, BUT THEY WERE ACTUALLY
25 JUST REBUTTAL AND REPLY TO THE PLAINTIFFS' EXPERTS.

1 **THE COURT:** YEAH, BUT THEN I WAS GOING TO LOOK AT ALL
2 THOSE AND THEY WERE GOING TO TELL ME WHAT THEY THOUGHT WAS OR
3 WAS NOT DEPENDENT ON THE MULTIPLATFORMED MARKET, BUT BEFORE I
4 GOT AROUND TO DOING THAT, I GOT YOUR TRIAL DECLARATION. AND
5 THAT WAS COUCHED IN WHAT I BELIEVED TO BE ADMISSIBLE TERMS.

6 SO I WILL ALLOW MOST SUBJECT TO THEIR ANY LINE-BY-LINE
7 OBJECTIONS, I WOULD GENERALLY ALLOW WHAT'S IN YOUR TRIAL
8 DECLARATION WHICH IS GENERALLY WHAT WAS IN THE REBUTTAL AND
9 REPLY DECLARATIONS BECAUSE I DID READ THOSE.

10 **MR. COOPER:** OKAY. SO WE'RE ONLY TALKING THEN ABOUT
11 THE MATERIAL THAT RELATES DIRECTLY TO A MULTISIDED MARKET.

12 **THE COURT:** CORRECT.

13 **MR. COOPER:** WITH RESPECT TO THAT, I WOULD SUBMIT
14 THIS, YOUR HONOR: AMEX TALKS ABOUT WHAT HAPPENS WHEN THERE
15 ARE TWO SIDES TO A MARKET IN WHICH, AS MR. FRIEDMAN REFERRED
16 TO, THE DEMAND IS AFFECTED ON ONE SIDE OF THE MARKET BY
17 EFFECTS AND CHANGES ON THE OTHER SIDE OF THE MARKET.

18 THAT'S PRECISELY WHAT BOTH THIS COURT AND THE NINTH
19 CIRCUIT TALKED ABOUT IN *O'BANNON* AND WHAT THE SUPREME COURT
20 TALKED ABOUT IN *BOARD OF REGENTS*. THAT'S THE BALANCE BETWEEN
21 ON THE ONE SIDE THE DEFINITION OF AMATEURISM, THE
22 STUDENT-ATHLETE ISSUE, THIS QUESTION OF LIMITS ON COMPENSATION
23 THAT THIS CASE CONCERNS, AND THE DEMAND FOR COLLEGIATE
24 ATHLETICS ON THE OTHER SIDE. THAT IS PRECISELY WHAT THE
25 ARGUMENT IS --

1 **THE COURT:** NO, NO.

2 **MR. COOPER:** AND THOSE ARE THE TWO SIDES OF THE
3 DEMAND COMPONENT.

4 **THE COURT:** THE TWO SIDES ARE THE UNIVERSITIES AND
5 THE NCAA AGREEING AMONGST THEMSELVES AND THE STUDENT-ATHLETES
6 ON THE OTHER SIDE. AND THE RELATIONSHIP IS BETWEEN THOSE TWO
7 ENTITIES.

8 WHAT HAPPENS BASED ON THE DECISIONS THAT THEY MAKE MIGHT
9 HAVE, AS COUNSEL SAID, EFFECTS IN ALL OTHER PARTS OF THE
10 UNITED STATES, BUT THE MARKET IS THE MARKET FOR A COLLEGE
11 EDUCATION COMBINED WITH THE ABILITY TO PLAY TOP FLIGHT
12 ATHLETICS THAT IS ESSENTIALLY SOLD BY THE UNIVERSITY AND
13 PURCHASED BY THE ATHLETE.

14 OR, IF YOU WANT TO LOOK AT IT THE OTHER WAY AROUND, WHICH
15 I DID AND THE NINTH CIRCUIT DID AS WELL, ONE IS THE SELLER AND
16 ONE IS THE BUYER. ONE IS A MONOPSONY AND ONE IS A MONOPOLY.
17 BUT EITHER WAY, THERE'S TWO SIDES TO IT. THE UNIVERSITIES AND
18 THE NCAA ON THE ONE HAND, AND THE ATHLETES ON THE OTHER, AND
19 THE PRODUCT IS THE COLLEGE EDUCATION WITH ATHLETICS.

20 **MR. COOPER:** I UNDERSTAND, YOUR HONOR. THAT MAY
21 ULTIMATELY BE YOUR CONCLUSION ON THIS POINT, THAT'S NOT WHAT
22 DR. ELZINGA IS SAYING.

23 **THE COURT:** I KNOW. YOU TELL ME WHAT HE IS SAYING.
24 WHO'S THE INTERMEDIARY? WHAT'S THE OTHER SIDE?

25 **MR. COOPER:** THE UNIVERSITY.

1 **THE COURT:** WHAT IS THE PRODUCT?

2 **MR. COOPER:** I AM ATTEMPTING TO DO THAT, YOUR HONOR.
3 THE UNIVERSITY IS THE MEDIATOR, IF YOU WILL, IF THAT'S
4 WHAT YOU'RE TALKING ABOUT.

5 **THE COURT:** THE UNIVERSITY?

6 **MR. COOPER:** YES, YOUR HONOR.

7 **THE COURT:** WHY THE UNIVERSITY?

8 **MR. COOPER:** THE UNIVERSITY HAS ON THE ONE SIDE THE
9 STUDENT-ATHLETE TRANSACTION; ON THE OTHER SIDE, THE CONSUMER
10 OF COLLEGE ATHLETICS.

11 **THE COURT:** RIGHT. BUT THE UNIVERSITY ISN'T ACTING
12 ALONE. THE UNIVERSITY IS ACTING BY AN AGREEMENT WITH ALL THE
13 OTHER UNIVERSITIES AND THE NCAA TO REACH A DECISION ON WHAT
14 THE PRICE SHOULD BE. THAT'S THE ONE SIDE. IT'S A BIG SIDE.
15 THERE'S 351 OF THEM. BUT THAT'S THE ONE SIDE, NOT JUST ONE
16 UNIVERSITY. THE OTHER SIDE IS ALL THE STUDENT-ATHLETES.

17 **MR. COOPER:** YOUR HONOR, THE RULE THAT ALLOWS THE
18 ELIMINATION OF EXTERNALITIES AS BETWEEN THE VARIOUS
19 UNIVERSITIES -- YOUR HONOR, IT'S -- THESE ARE NOT SIMPLISTIC
20 ANALYSES. THESE ARE ALL COMPLICATED ISSUES.

21 **THE COURT:** RIGHT. BUT ELIMINATION OF EXTERNALITIES
22 IS THE NOT THE GOAL OF ANTITRUST LAW.

23 **MR. COOPER:** WELL, ACTUALLY, YOUR HONOR, THE
24 ELIMINATION OF NEGATIVE EXTERNALITIES IS PART OF THE WHOLE
25 CONCEPT OF JOINT VENTURE EXCEPTIONS TO THE ANTITRUST LAWS WITH

1 RESPECT TO HORIZONTAL AGREEMENTS. THAT'S THE WHOLE CONCEPT OF
2 IT.

3 **THE COURT:** RIGHT. BUT DR. ELZINGA DOESN'T TALK
4 ABOUT THE JOINT VENTURE EXCEPTION.

5 **MR. COOPER:** HE DOES, YOUR HONOR. THAT'S THE -- YOUR
6 HONOR, HE DOES. THE FACT IS HE TALKS ABOUT -- AND THERE'S A
7 DIAGRAM IN HIS ORIGINAL REPORT THAT SHOWS THE UNIVERSITY AS
8 THE CENTER OF THE PLATFORM THAT HE DESCRIBES.

9 AND ON ONE SIDE IS THE STUDENT-ATHLETE TRANSACTION AND ON
10 THE OTHER SIDE IS DEMAND FOR COLLEGIATE ATHLETICS. THAT'S HOW
11 HE DESCRIBES IT.

12 **THE COURT:** I UNDERSTAND. IF YOU WOULD --

13 **MR. COOPER:** YOU'VE ASKED ABOUT THAT AND I'M TRYING
14 TO DESCRIBE IT.

15 **THE COURT:** IF YOU WOULD GO BACK AGAIN. I
16 INTERRUPTED YOU BEFORE YOU FINISHED BECAUSE YOU WERE CONFUSING
17 ME BY SAYING THE UNIVERSITY WAS ON ONE SIDE.

18 IF YOU WOULD FINISH THAT PART AND TELL ME WHO ARE THE --
19 WHO ARE THE THREE SIDES AND WHAT IS -- WHAT IS THE TRANSACTION
20 AND/OR PRODUCT INVOLVED.

21 **MR. COOPER:** THE BASIC CONCEPT IS THAT THE UNIVERSITY
22 IS THE PLATFORM THROUGH WHICH THE DEMAND FOR COLLEGIATE
23 ATHLETICS AND AMATEURISM ON THE OTHER SIDE, THE LIMITATIONS ON
24 COMPENSATION TO STUDENT-ATHLETES IS MEDIATED. THAT IS THAT
25 THE DEMAND FOR AMATEUR ATHLETICS IN PARTICULAR DERIVES THE...

1 THE DEMAND FOR STUDENT-ATHLETES WITH THE CAPS IMPOSED BY THE
2 AGREEMENT BETWEEN THE MEMBERS OF THE NCAA.

3 THAT'S THE BASIC CONCEPT AND IT'S ABSOLUTELY WHAT'S
4 DESCRIBED IN THE MAJORITY OPINION OF *AMEX* AS TO WHAT A
5 TWO-SIDED PLATFORM IS AND HOW IT DIFFERS FROM OTHER MARKETS.

6 **THE COURT:** WELL, THE WAY I UNDERSTAND IT IS THEY ARE
7 TALKING ABOUT AN INTERMEDIARY AND TWO PARTIES.

8 SO IN *AMEX* WE HAVE THE INTERMEDIARY BEING AMERICAN EXPRESS
9 AND THE PARTIES BEING A BUNCH OF MERCHANTS ON ONE SIDE AND A
10 BUNCH OF CREDIT CARD HOLDERS ON THE OTHER SIDE. AND THERE'S
11 NOT EXACTLY A TANGIBLE PRODUCT BUT THERE IS A TRANSACTION.
12 AND THE PRICE OF -- BETWEEN -- SET BY THE INTERMEDIARY BETWEEN
13 THE TWO DIFFERENT OTHER PARTICIPANTS IS INTERDEPENDENT OR HAS
14 A PARTICULAR RELATIONSHIP.

15 SO HERE WE HAVE -- IF WE CAN START FROM THE NOTION THAT
16 IT'S A MARKET WITH TWO PARTICIPANTS, THE UNIVERSITIES AND THE
17 NCAA AND THE STUDENTS, AND THE TRANSACTION BEING THE COLLEGE
18 EDUCATION, AND TELL ME WHERE IS THE OTHER PARTY. DEMAND ISN'T
19 A PARTY. IF WE WANT A MULTISIDED MARKET, WE NEED SOME MORE
20 SIDES.

21 **MR. COOPER:** ACTUALLY, YOUR HONOR --

22 **THE COURT:** THAT'S A PARTY, NOT A CONCEPT.

23 **MR. COOPER:** JUST WITH RESPECT TO YOUR HONOR, I THINK
24 WHAT THE UNITED STATES SUPREME COURT DESCRIBED IN *AMEX* IS
25 DIFFERENT THAN WHAT YOU JUST DESCRIBED.

1 SO AMEX HAS RELATIONSHIPS ON THE ONE HAND WITH MERCHANTS
2 AND ON THE OTHER HAND WITH CARDHOLDERS. AND WHAT IT DOES IS
3 MEDIATE AND DECIDE HOW TO INCREASE DEMAND OVERALL, THAT IS, AS
4 BETWEEN MERCHANTS AND CARDHOLDERS BASED ON HOW IT TREATS EACH
5 OF THEM IN ITS RELATIONSHIP WITH EACH OF THEM. AND IT DECIDES
6 WHERE THE GREATEST DEMAND CAN BE CREATED ACROSS THE MARKET FOR
7 THE LARGEST NUMBER OF TRANSACTIONS.

8 BUT THE COURT DOES NOT FOCUS ON THE RELATIONSHIP BETWEEN
9 CARDHOLDER AND MERCHANT IN ITS ANALYSIS OF THE TWO-SIDED
10 MARKET. IT FOCUSES ON THE SEPARATE RELATIONSHIPS BETWEEN AMEX
11 AND THE MERCHANT AND AMEX AND THE CARDHOLDER. AND IT TALKS
12 ABOUT THE DEMAND IN AMEX'S VIEW THAT SHIFTS FROM CARDHOLDER TO
13 MERCHANT AND HOW IT CAN EXPAND THE OVERALL MARKET FOR AMEX
14 CARDS AND TRANSACTIONS ASSOCIATED WITH AMEX CARDS BY AFFECTING
15 ITS RELATIONSHIP AND SERVICES TO BOTH THE CARDHOLDER AND THE
16 MERCHANT.

17 BUT THAT IS A THREE-PART TRANSACTION WITH AMEX IN THE
18 CENTER OF THE TRANSACTION. SERVICES TO THE MERCHANTS,
19 SERVICES TO THE CARDHOLDERS, AND IT MEDIATES BETWEEN THE TWO
20 TO INCREASE THE TOTAL NUMBER OF TRANSACTIONS BETWEEN MERCHANT
21 AND CARDHOLDER. THAT'S WHAT THE GOAL IS OF THAT PARTICULAR
22 MARKET ANALYSIS.

23 **THE COURT:** DRAW THE ANALOGY TO OUR SITUATION. WHO'S
24 AMEX? WHO'S THE MERCHANT? WHO'S THE CREDIT CARD HOLDER?

25 **MR. COOPER:** SO THE UNIVERSITIES ACTING AS A GROUP

1 CREATE RULES BY WHICH THEY THEN MEDIATE IN THE TRANSACTIONS
2 BETWEEN STUDENT-ATHLETES ON THE ONE HAND AND CONSUMERS OF
3 COLLEGE ATHLETICS ON THE OTHER TO INCREASE THE OVERALL DEMAND
4 FOR COLLEGE ATHLETICS. THAT'S THE SIMPLE ANSWER TO YOUR
5 QUESTION.

6 **MR. FRIEDMAN:** YOUR HONOR, CAN I MAKE TWO QUICK
7 COMMENTS ON THIS?

8 **THE COURT:** OKAY.

9 **MR. FRIEDMAN:** NUMBER ONE IS THAT DR. ELZINGA, IN HIS
10 DEPOSITION TESTIMONY, ACKNOWLEDGED THE VERY POINT THAT THE
11 COURT RAISED, WHICH IS, EVEN FORGETTING THE PROBLEM IN TERMS
12 OF IDENTIFYING WHO IS ON WHICH SIDE, AND -- IT'S A VERTICAL
13 RELATIONSHIP IN AMEX. IT'S NOT AN ISSUE OF AMEX, VISA, AND
14 MASTERCARD AS THE COURT POINTED OUT.

15 DR. ELZINGA ADMITTED THAT THAT WOULD NOT BE APPROPRIATE
16 THAT YOU HAD AMEX, VISA, AND MASTERCARD AGREEING, EVEN IN THE
17 CONTEXT WHERE WE HAVE PRICE, RIGHT, WE DON'T EVEN HAVE THAT.
18 HE SKIPPED OVER THE PRICE ISSUE ON MEETING SUPPLY AND DEMAND.
19 EVEN WHEN YOU HAVE PRICE AS BEING WHAT'S BEING MEDIATED
20 BETWEEN THE TWO SIDES, YOU CAN'T HAVE A HORIZONTAL IN THE
21 CONTEXT OF A MULTISIDED MARKET.

22 AND WHAT THEY ARE BASICALLY DOING IS JUST SAYING ALL OF
23 THE UNIVERSITIES GETTING TOGETHER HORIZONTALLY AND, AGAIN, NOT
24 MEDIATING A PRICE, RIGHT, AND SO IT DOESN'T FLOW.

25 THE SECOND BRIEF COMMENT ON THIS, WHICH IS THIS PRICE

1 ISSUE, EVEN IN AMEX WHEN WE ARE TALKING ABOUT THIS, IT WAS THE
2 FOCUS OF JUSTICE THOMAS TO NOTE AND HIGHLIGHTING THIS PRICE
3 ISSUE IS IT'S A SIMULTANEOUS EXCHANGE, RIGHT? AND SO JUSTICE
4 THOMAS HIGHLIGHTED THAT FOR ALL INTENTS OF ECONOMIC PURPOSES,
5 YOUR HONOR, THAT THE CHARGE TO THE MERCHANTS AND THE CHARGE TO
6 THE CONSUMERS, THE CARDHOLDERS, IT'S ONE PRICE EFFECTIVELY.
7 IT'S THE TOTAL PRICE THEY CARE ABOUT AND, THEREFORE, IT'S THE
8 SIMULTANEOUS EXCHANGE AND SO THEY TREATED IT AS ONE PRODUCT
9 MARKET.

10 THERE IS NO SIMULTANEOUS EXCHANGE GOING ON HERE. THERE'S
11 NOT EVEN AN EXCHANGE BEING IDENTIFIED AT ALL BY DR. ELZINGA.
12 AND SO WE'RE SO FAR AFIELD....

13 MY ONLY POINT ON THIS, YOUR HONOR, IS, IS THAT I WANT IT
14 CLEAR, I KNOW THE COURT READ THE TRIAL TESTIMONY ALREADY OF
15 DR. ELZINGA, BUT DR. ELZINGA ACTUALLY, FOR THE RECORD TO BE
16 CLEAR, IN HIS TRIAL TESTIMONY IN SUMMARY OF OPINIONS SAYS THAT
17 BY PRESERVING THE NCAA SHARED DEFINITION OF AMATEURISM, THAT
18 IS AGREEING ON PRICE ACROSS EVERYBODY, THEN RESTRICTIONS
19 PRESERVE THE OVERALL DEMAND FOR COLLEGE SPORTS BY CONSUMERS OF
20 COLLEGE ATHLETICS, INCLUDING MEMBERS OF THE UNIVERSITY
21 COMMUNITY, THE GENERAL PUBLIC, BROADCASTERS, ADVERTISERS,
22 WISHING TO REACH THESE CONSTITUENCIES.

23 SO WHAT HE'S PUTTING FORTH IS, NOT USING MULTISIDED
24 MARKET, BUT HE'S SAYING THAT BY AGREEING HORIZONTALLY, THEY
25 ARE PRESERVING DEMAND FOR ALL THESE DIFFERENT CONSISTENCIES

1 AND YET THE ONLY ANALYSIS HE HAS -- I GO BACK TO IT -- IS HIS
2 MULTISIDED MARKET, WHICH IS WRONG, AND THE HANDFUL OF
3 INTERVIEWS THAT HE DID.

4 **THE COURT:** OKAY.

5 **MR. COOPER:** WE DISAGREE WITH THAT CHARACTERIZATION.
6 I WILL JUST OFFER YOUR HONOR THAT THIS IS ONE OF THE PERILS OF
7 TRYING TO MAKE WHAT ARE ULTIMATELY TRIAL DECISIONS IN THIS
8 CONTEXT.

9 THE NOTION THAT YOU CAN'T HAVE A MULTISIDED MARKET WITH
10 HORIZONTAL RELATIONSHIPS AS OPPOSED TO VERTICAL IS SIMPLY
11 WRONG. THERE IS ABSOLUTELY NO TRUTH TO THAT AS FAR AS THE
12 ANTITRUST LAW IS CONCERNED.

13 INDEED, VISA AND MASTERCARDS ARE THE PRODUCT OF HORIZONTAL
14 AGREEMENT. SO THE PRINCIPAL COMPETITOR IN THE MARKET AND THE
15 OTHER PARTY TO THE MARKET WHICH ENGAGES IN SIMILAR CONDUCT IS
16 ITSELF THE PRODUCT OF A HORIZONTAL AGREEMENT. SO THE NOTION
17 THAT YOU CAN'T HAVE HORIZONTAL AGREEMENTS IN MULTISIDED
18 MARKETS IS SIMPLY WRONG.

19 **THE COURT:** I DON'T THINK THAT'S WHAT HE'S SAYING AND
20 I DON'T THINK THAT'S OUR ISSUE HERE.

21 BUT I'M JUST INTERESTED TO HEAR YOU SAY THAT THE OTHER
22 SIDE OF THE MARKET IS THE CONSUMERS, BUT DR. ELZINGA MENTIONS
23 A LOT -- THE FANS, THE ALUMNI, AND OTHER PEOPLE, AND I DON'T
24 KNOW --

25 **MR. COOPER:** THE BROADCASTERS --

(SIMULTANEOUS COLLOQUY.)

1
2 **THE COURT:** I DON'T KNOW WHAT THE PRODUCT OR
3 TRANSACTION IS. ON THE ONE HAND WE'VE GOT THE COST OF A
4 SCHOLARSHIP AND A COLLEGE EDUCATION AND ON THE OTHER HAND WE
5 HAVE WHAT?

6 **MR. COOPER:** WELL, YOUR HONOR, THE SAME THINGS THAT
7 THEY POINT TO THROUGHOUT THEIR EXPERT REPORTS. THEY TALK
8 ABOUT THE REVENUES GENERATED BY THIS PRODUCT. AND THEY TALK
9 ABOUT BROADCAST REVENUES AND THEY TALK ABOUT TICKET REVENUES
10 AND THEY TALK ABOUT SPONSORSHIP REVENUES; PRECISELY THE SAME
11 THINGS THAT MR. FRIEDMAN JUST REFERRED TO.

12 THOSE ARE THE REVENUES THAT THEY SAY ARE THE BEST EVIDENCE
13 OF THE DEMAND FOR THIS PRODUCT. THE DEMAND SIDE THEY
14 CHARACTERIZE IN PRECISELY THE SAME TERMS THAT WE ARE
15 CHARACTERIZING THEM IN THIS RESPECT. THAT IS, THE OTHER SIDE
16 OF THIS TRANSACTION. THERE'S NO QUESTION THAT BOTH SIDES
17 TREAT IT THE SAME WAY.

18 **THE COURT:** OKAY. SO I HAVE A FEW OTHER QUESTIONS.
19 I'M CONCERNED ABOUT BALANCING AND WHEN THAT COMES IN. AND
20 WE SEEM TO HAVE A DISAGREEMENT.

21 IF WE'LL JUST GO BACK FOR A MOMENT TO THE MORE GARDEN
22 VARIETY ONE-SIDED MARKET. WE HAVE AN AGREEMENT, WE HAVE
23 ANTICOMPETITIVE EFFECT OF A RESTRAINT, WE HAVE PERHAPS
24 PROCOMPETITIVE JUSTIFICATIONS, AND IF SO, WE HAVE PERHAPS
25 LEAST RESTRICTIVE ALTERNATIVE, BUT ALL OF THE CASES TALK ABOUT

1 BALANCING THE ANTICOMPETITIVE AGAINST THE PROCOMPETITIVE, AND
2 MY QUESTION IS, WHERE DOES THAT COME IN?

3 DOES THAT COME IN ONLY IF THERE IS A SHOWING OF
4 PROCOMPETITIVE EFFECT BUT A FAILURE TO PROVE A LEAST
5 RESTRICTIVE ALTERNATIVE, THEN WE GO BACK TO THE PROCOMPETITIVE
6 VERSUS THE ANTICOMPETITIVE AND TRY TO BALANCE THEM OUT, OR DO
7 WE DO THAT BEFORE WE GET TO THE LESS RESTRICTIVE ALTERNATIVES?

8 **MR. KESSLER:** SO, YOUR HONOR, I THINK THE -- THERE
9 ARE TWO NINTH CIRCUIT DECISIONS WHICH WE HAVE CITED THAT
10 DESCRIBE THIS, IN EFFECT, AS A FOURTH STEP. THAT'S HOW THE
11 NINTH CIRCUIT IS TREATED --

12 **THE COURT:** AFTER THERE'S -- IF THERE'S NO LESS
13 RESTRICTIVE ALTERNATIVE.

14 **MR. KESSLER:** YES.

15 SO STEP ONE IS ANTICOMPETITIVE EFFECT IN A RELATIVE
16 MARKET, AND THAT'S ALREADY DECIDED IN THIS CASE.

17 STEP TWO IS THEIR BURDEN TO SHOW THERE IS A PROCOMPETITIVE
18 JUSTIFICATION. AND THE -- BUT IN -- THEY'VE EVEN ARTICULATED
19 THIS. THEY SAY THEY JUST NEED TO SHOW THE JUSTIFICATION. IT
20 DOESN'T MATTER IF IT'S A BIG ONE TO OUTWEIGH OR NOT AT THAT
21 STEP. THAT'S THEIR CLAIM AS TO HOW THEY ARTICULATE IT IN
22 THEIR BRIEF.

23 WE THINK IT HAS TO BE A SIGNIFICANT JUSTIFICATION THAT
24 ACTUALLY HAS AN EFFECT, BUT WHATEVER IT IS, IT'S NOT YET A
25 BALANCE. IF THEY SHOW THAT, THE BALANCE -- IT GOES BACK TO

1 THE BURDEN TO THE PLAINTIFFS TO SAY, IS THERE A LESS
2 RESTRICTIVE WAY TO ACHIEVE THAT JUSTIFICATION, AND THEN THE
3 FOURTH STEP ARTICULATED IN THE NINTH CIRCUIT --

4 **THE COURT:** OKAY. BUT GO BACK TO THE STEP.

5 IF YOU PROVE THERE IS ONE, THEN YOU DON'T HAVE TO GO ANY
6 FURTHER?

7 **MR. KESSLER:** THAT'S CORRECT.

8 THEN THE FOURTH STEP --

9 **THE COURT:** IF YOU DON'T PROVE THERE IS ONE THEN --

10 **MR. KESSLER:** RIGHT. SO THIS CAN HAPPEN IN ANYTHING.

11 SO IF WE FAIL IN STEP ONE, WE WOULD LOSE AND WE'D NEVER
12 GET TO STEP TWO.

13 IF THEY FAIL IN STEP TWO, NO PROCOMPETITIVE JUSTIFICATION,
14 THAT'S THE END. YOU DON'T HAVE TO GET TO STEP THREE.

15 IF THEY PREVAIL IN STEP TWO, WE HAVE TO SHOW LESS
16 RESTRICTIVE ALTERNATIVE. IF WE WIN, YOU DON'T GET TO STEP
17 FOUR. THAT'S HOW IT IS SET UP.

18 STEP FOUR IN THE NINTH CIRCUIT IS THAT -- IS THAT WE HAD
19 TO HAVE SHOWN STEP ONE. SO, REMEMBER, IT'S AN ANTICOMPETITIVE
20 EFFECT IN A RELEVANT MARKET, BUT THEY HAVE SHOWN
21 PROCOMPETITIVE JUSTIFICATION, AND WE FAILED TO SHOW LESS
22 RESTRICTIVE ALTERNATIVE, THEN THERE STILL HAS TO BE A
23 BALANCING ACCORDING TO THE NINTH CIRCUIT WHICH MAKES GREAT
24 SENSE --

25 **THE COURT:** A BALANCING OF?

1 **MR. KESSLER:** OF THE ANTICOMPETITIVE EFFECT VERSUS
2 THE PROCOMPETITIVE EFFECT TO DECIDE IF ON BALANCE --

3 **THE COURT:** OKAY. LET'S SAY --

4 **MR. KESSLER:** -- IT IS A REASONABLE OR UNREASONABLE
5 RESTRAINT OF TRADE.

6 **THE COURT:** I THINK THAT'S RIGHT, ALTHOUGH I WILL
7 HEAR FROM YOU IF YOU HAVE A DIFFERENT VIEW.

8 BUT LET'S SAY IT IS RIGHT, HOW -- AND WHAT IF I GET TO
9 THAT IN THIS CASE, HOW WOULD I DO THAT?

10 **MR. KESSLER:** THE WAY YOU WOULD DO THAT IS YOU WOULD
11 LOOK AT THE ANTICOMPETITIVE EFFECT THAT YOU GRANTED SUMMARY
12 JUDGMENT ON.

13 **THE COURT:** HOW WOULD I DO THAT?

14 **MR. KESSLER:** WHICH IN THIS CASE -- YOU'D SAY WHAT
15 TYPE OF AN EFFECT IS IT? HERE IT'S THE --

16 (SIMULTANEOUS COLLOQUY)

17 **THE COURT:** EXCUSE ME.

18 **MR. KESSLER:** -- COMPLETE ELIMINATION --

19 **THE COURT:** EXCUSE ME.

20 SO I WOULD LOOK AT THE EVIDENCE THAT WAS SUBMITTED ON
21 SUMMARY JUDGMENT?

22 **MR. KESSLER:** YES, YOUR HONOR. BUT YOU'VE ALREADY
23 FOUND THAT IT WAS A -- AND YOU DIDN'T JUST FIND IT WAS AN
24 ANTICOMPETITIVE EFFECT, YOU FOUND IT MET THE TEST OF A
25 SIGNIFICANT ANTICOMPETITIVE EFFECT IN THE RELEVANT MARKET AND

1 YOU WOULD NOTE WHAT WAS THE EFFECT YOU FOUND.

2 YOU FOUND IT WAS AN AGREEMENT TO ELIMINATE PRICE
3 COMPETITION FOR THE ATHLETES. THAT'S ESSENTIALLY WHAT YOU
4 FOUND. SO IT'S A SIGNIFICANT ANTICOMPETITIVE EFFECT AND
5 THEN --

6 (SIMULTANEOUS COLLOQUY)

7 **THE COURT:** -- COMFORTABLE THAT THERE'S ENOUGH IN THE
8 RECORD AND IN THE SUMMARY JUDGMENT MOTION THAT I WOULD BE ABLE
9 TO USE IN ORDER TO ENGAGE IN THAT BALANCING --

10 **MR. KESSLER:** ABSOLUTELY. ABSOLUTELY, YOUR HONOR.

11 BECAUSE I THINK THE WAY IT COMES OUT IS LET'S SAY YOU FIND
12 THAT THEY'VE SHOWN SOME PROCOMPETITIVE EFFECT BUT IT'S NOT
13 THAT SIGNIFICANT PROCOMPETITIVE EFFECT. THERE'S SOME, NOT A
14 LOT, BUT THERE'S SOME DEMAND EFFECT, THERE'S SOME INTEGRATION
15 EFFECT, BUT THAT'S THERE.

16 YOU STILL, AS THE COURT, IT IS NOT AN EASY TASK, BUT THAT
17 IS WHAT THE RULE-OF-REASON REQUIRES HAVE TO ULTIMATELY SAY,
18 LOOKING AT THE WHOLE, SAYS IS IT REASONABLE OR NOT. THAT'S
19 WHAT THE NINTH CIRCUIT HAS STATED IS THE TEST.

20 AND THE REASON IT MAKES SENSE IS BECAUSE IF YOU GO BACK TO
21 ALL THE SUPREME COURT CASES ON RULE OF REASON, IT'S ALWAYS
22 ABOUT THE BALANCE. GOING BACK TO THE ORIGINS OF THE RULE OF
23 REASON ALL THE WAY THROUGH, YOU KNOW, YOU ARE BALANCING PRO
24 AND ANTICOMPETITIVE EFFECTS.

25 NOW, YOU MAY NOT HAVE TO REACH THAT STEP HERE --

1 **THE COURT:** I JUST THINK WE SHOULD ALL BE THINKING
2 ABOUT WHAT HAPPENS IF WE DO.

3 **MR. KESSLER:** YES. I THINK, YOUR HONOR, I THINK THE
4 WAY WE WOULD DO IT, YOUR HONOR, IS IN OUR POST-TRIAL BRIEFING,
5 WHICH IS ACTUALLY SOMETHING I WAS GOING TO ASK ABOUT BEFORE WE
6 ADJOURNED TODAY, IS THAT YOUR HONOR HAD INDICATED THAT AFTER
7 THE TRIAL WE WOULD HAVE PROPOSED FINDINGS OF FACTS AND
8 CONCLUSIONS OF LAW AND YOU WANTED ALL OF THAT IN WRITING AND
9 THEN YOU MIGHT --

10 **THE COURT:** I DON'T WANT PROPOSED FINDINGS AND
11 CONCLUSIONS. I JUST WANT A CLOSING ARGUMENT.

12 **MR. KESSLER:** OKAY. CLOSING ARGUMENT BRIEF, I'M
13 SORRY, YOUR HONOR. AND THEN YOU SAID YOU MIGHT, YOU DIDN'T
14 KNOW, YOU MIGHT SCHEDULE A HEARING AFTER GETTING THE TWO
15 CLOSINGS. I THINK WE WOULD ADDRESS WHAT THE EVIDENCE HAS
16 SHOWN ON THE BALANCING POINT TO THE EXTENT THAT IT BECOMES
17 RELEVANT AT THAT POINT IN YOUR CLOSINGS.

18 **THE COURT:** KEEPING IN MIND THAT THE EVIDENCE ON THE
19 ANTICOMPETITIVE WOULD ONLY BE WHAT'S ON THE SUMMARY JUDGMENT.

20 **MR. KESSLER:** I THINK THAT'S RIGHT, YOUR HONOR.
21 THAT'S CORRECT.

22 **THE COURT:** YES, SIR.

23 **MR. CASAZZA:** YOUR HONOR, AS WE SET FORTH IN OUR
24 OPENING STATEMENT --

25 **THE COURT:** I'M SORRY, REMIND ME OF YOUR NAME.

1 **MR. CASAZZA:** KYLE CASAZZA FROM PROSKAUER FOR THE
2 CONFERENCE DEFENDANTS.

3 BOTH THIS COURT AND *O'BANNON* APPLIED A THREE-STEP TEST TO
4 ACCOMPLISH THIS BALANCING THAT MR. KESSLER IS REFERRING TO.
5 AND, IN FACT, THE SUPREME COURT IN *AMERICAN EXPRESS* ALSO
6 REFERRED TO A THREE-STEP TEST, SO NO REFERENCE TO THIS FOURTH
7 STEP.

8 **THE COURT:** OH, THERE IS ONE, THOUGH. COUNSEL'S
9 RIGHT, THERE'S TWO NINTH CIRCUIT CASES, *BONN* AND *TANAKA*, I
10 THINK ARE THEIR NAMES, THAT TALK ABOUT THAT, AND I DON'T THINK
11 THAT *AMEX* MAKES A CHANGE TO THAT.

12 NOW, WE DIDN'T GET TO IT IN EITHER *O'BANNON* CASE BECAUSE
13 WE FOUND LESS RESTRICTIVE ALTERNATIVES. BUT MY CONCERN IS
14 WHAT HAPPENS -- WELL, I GUESS ONE CONCERN IS DID I FORGET A
15 PART WHERE I AM SUPPOSED TO BALANCE SOMETHING BEFORE THAT, OR
16 IF NOT, WHAT WOULD HAPPEN IF WE DIDN'T FIND LESS RESTRICTIVE
17 ALTERNATIVES, IS THAT A POINT AT WHICH WE WOULD BALANCE. AND
18 IF SO, WHAT WOULD WE BALANCE AND WHERE WOULD WE GET THE
19 EVIDENCE AND THE LAW TO BALANCE WITH.

20 **MR. CASAZZA:** SO, YOUR HONOR, WITH RESPECT TO --

21 **THE COURT:** I GUESS WHAT YOU ARE SAYING IS THERE IS
22 NO BALANCE STEP AT ALL. IS THAT WHAT YOU'RE SAYING?

23 **MR. CASAZZA:** WE ARE SAYING THAT THE THREE STEPS ARE
24 INTENDED TO ACCOMPLISH THE BALANCING. IN FACT, WE HAVE LOOKED
25 AT DECADES OF RULE-OF-REASON CASES AND ARE NOT AWARE OF A

1 SINGLE CASE IN WHICH THE PLAINTIFFS FAILED AT STEP THREE, AND
2 THEN THE COURT ENGAGED IN A DISCRETE BALANCING ANALYSIS, AND
3 THEN DECIDED THE CHALLENGED RESTRAINT WAS ANTICOMPETITIVE
4 AFTER THE PLAINTIFF FAILING ON STEP THREE.

5 WE WOULD SUBMIT THAT TO THE EXTENT THERE ARE SUGGESTIONS
6 IN THE ACADEMIC LITERATURE THAT A COURT WOULD ENGAGE IN A
7 FOURTH STEP OF BALANCING, THAT THE LITERATURE SUPPORTS A COURT
8 APPLYING DEFERENCE TO AN ORGANIZATION LIKE THE NCAA THAT HAS
9 EXPERIENCE SETTING RESTRICTIONS ON COMPENSATION AND BENEFITS
10 FOR STUDENT-ATHLETES.

11 AND, INDEED, TO THE EXTENT THAT BALANCING TOOK PLACE IN
12 THE NINTH CIRCUIT'S ANALYSIS IN *O'BANNON*, THAT'S WHAT'S
13 REFERRING TO WHEN IT'S DISCUSSING THE AMPLE LATITUDE THAT
14 SHOULD BE AFFORDED THE NCAA TO SUPERINTEND COLLEGE ATHLETICS.

15 **THE COURT:** SO WHAT'S BALANCED? WHAT IS BALANCED?

16 IN *O'BANNON*, AT LEAST, WE FOUND AN ANTICOMPETITIVE EFFECT.
17 COUNSEL SAYS THERE WERE SOME ADJECTIVES IN THERE, I DON'T
18 REMEMBER THAT PART, BUT WE WEREN'T CALLED UPON TO SAY HOW --
19 WHETHER IT WAS ENOUGH, OR TOO MUCH, OR NOT ENOUGH, AND THEN WE
20 FOUND A PROCOMPETITIVE EFFECT, BUT WE WEREN'T ASKED TO SAY WAS
21 THAT BIGGER OR SMALLER THAN THE ANTICOMPETITIVE. AND THEN WE
22 FOUND A LESS RESTRICTIVE ALTERNATIVE, ALTHOUGH THERE WAS SOME
23 DISAGREEMENT ABOUT THAT, BUT NOWHERE WAS IT SAID THIS ONE IS
24 MORE OR LESS THAN -- I'M JUST -- I DON'T SEE ANY BALANCING
25 THAT TOOK PLACE THERE.

1 AND I DO SEE THE POTENTIAL FOR A BALANCING STEP, AND SO
2 THAT'S WHAT I'M TRYING TO GET AT IS WHERE THAT WOULD COME IN
3 AND WHAT WE DO AT THAT POINT.

4 **MR. CASAZZA:** YOUR HONOR, AGAIN, WE WOULD SUBMIT THAT
5 THAT BALANCING IS INTENDED TO TAKE PLACE ACROSS THE THREE-STEP
6 INQUIRY.

7 **THE COURT:** RIGHT -- TELL ME HOW THAT WORKED. WHAT
8 WAS THE BALANCE THAT HAPPENED IN *O'BANNON*, FOR EXAMPLE, IN THE
9 NINTH CIRCUIT.

10 **MR. CASAZZA:** IN *O'BANNON*, FOR EXAMPLE, ONCE IT WAS
11 FOUND THAT THERE WAS A SIGNIFICANT ANTICOMPETITIVE EFFECT, IT
12 SHIFTED TO THE DEFENDANTS ON PRONG TWO TO COME FORWARD WITH
13 EFFECT -- WITH EVIDENCE OF SOME PROCOMPETITIVE JUSTIFICATION.

14 ON PRONG TWO, THE DEFENDANTS DIDN'T HAVE TO PROVE, FOR
15 EXAMPLE, THAT THE CHALLENGED RESTRAINTS WERE NECESSARY TO
16 ACHIEVE THE PURPORTED PROCOMPETITIVE BENEFITS OR EVEN THAT
17 THEY CONTRIBUTED SIGNIFICANTLY TO THE PROCOMPETITIVE BENEFITS.

18 THEY JUST HAD TO SHOW SOME EVIDENCE TO SEND IT THEN BACK
19 TO THE PLAINTIFFS TO SHOW IN STEP THREE --

20 **THE COURT:** YOUR POSITION IS THERE ISN'T A SEPARATE
21 STEP, THAT IT'S KIND OF SMOOSHED IN THERE WITH THE FIRST THREE
22 STEPS AND NOT TO WORRY ABOUT IT.

23 **MR. CASAZZA:** YES. AND, INDEED, YOUR HONOR, WHEN THE
24 ANTICOMPETITIVE EFFECT AND THE PROCOMPETITIVE BENEFIT ARE
25 THINGS LIKE CHALLENGED RESTRICTION ON STUDENT-ATHLETE

1 COMPENSATION OR CONSUMER DEMAND AND ACADEMIC INTEGRATION ON
2 THE OTHER HAND, WE ARE TALKING ABOUT THREE THINGS THAT ARE
3 MEASURED IN DISCRETE UNITS. THERE'S NO -- THERE'S NO
4 QUANTITATIVE WAY TO WEIGH THE ONE AGAINST THE OTHER TWO.

5 **MR. KESSLER:** AND, YOUR HONOR --

6 **THE COURT:** OKAY. THAT'S ENOUGH. WE'RE GETTING LATE
7 HERE AND WE EITHER HAVE TO FINISH OR PROBABLY TAKE A BREAK.

8 **MR. KESSLER:** 30 SECONDS, YOUR HONOR?

9 I WOULD JUST SAY THAT SINCE THE NINTH CIRCUIT SAYS THERE
10 MUST BE THE FOURTH-STEP BALANCING, IF WE ARE GOING TO TAKE --
11 PLACE SOMEWHERE IN THE THREE STEPS, THEN YOUR HONOR WOULD, IN
12 THEIR SECOND STEP, HAVE TO FIND THAT THEY HAD A SIGNIFICANT
13 PROCOMPETITIVE EFFECT THAT WAS SUFFICIENT TO WEIGH.

14 IN OTHER WORDS, YOU CAN'T AVOID THE BALANCING. EITHER
15 IT'S A SEPARATE FOURTH STEP OR IT'S THEIR BURDEN IN THE SECOND
16 STEP, BUT THERE'S NO WAY TO READ THE NINTH CIRCUIT LAW AND
17 READ BALANCING OUT OF THE ANALYSIS, YOUR HONOR. I WOULD THINK
18 THAT WOULD BE LEGAL ERROR.

19 **THE COURT:** OKAY.

20 SO I'M CONCERNED ABOUT INTEGRATION. I'M THINKING THAT THE
21 ANALYSIS OF INTEGRATION WAS INSUFFICIENTLY RIGOROUS AND THAT
22 INTEGRATION IS SORT OF A COMBINATION OF A NUMBER OF OTHER
23 THINGS, SOME OF WHICH MAY BE APPROPRIATELY CONSIDERED AND SOME
24 OF WHICH MAY NOT BE.

25 AND THOSE THINGS ARE, ARE WE TALKING ABOUT THE INTEGRATION

1 WITHIN THE MIND OF THE INDIVIDUAL ATHLETE, LIKE I'M DOING A
2 LOT OF ATHLETICS BUT I'M ALSO DOING A LOT OF ACADEMICS? IS
3 THAT PROCOMPETITIVE?

4 OR ARE WE TALKING ABOUT THE INTEGRATION OF THE ATHLETE
5 WITH THE OTHER STUDENTS TO MAKE THE ATHLETE HAPPIER? SHE'S
6 GOT FRIENDS WHO AREN'T ATHLETES, SHE'S INTEGRATED, SHE'S
7 HAPPIER? IS THAT PROCOMPETITIVE? AND IN WHAT SENSE IS THAT
8 PROCOMPETITIVE?

9 OR ARE WE TALKING ABOUT THE HAPPINESS OF THE OTHER
10 STUDENTS WHO SAY, OH, GUESS WHAT? I SAW THE STAR BASKETBALL
11 PLAYER ON CAMPUS TODAY. I REALLY FEEL GREAT ABOUT THAT. I GO
12 TO A GREAT SCHOOL. IS THAT PROCOMPETITIVE?

13 OR IS THAT PERHAPS A COMPONENT OF THE DEMAND IN POPULARITY
14 OF COLLEGE ATHLETICS BECAUSE THE STUDENT -- AND IN THAT CASE,
15 ISN'T THAT THE SAME AS THE FIRST ONE?

16 AND/OR IS IT THE FUTURE, THE FUTURE OF THE ATHLETE WHO
17 WILL THEN GO ON TO HAVE BENEFITED FROM HER SCHOOLING AND HER
18 ATHLETICS AND GET A BETTER JOB AND HAVE MORE SOCIAL CAPITAL,
19 OR IS THAT A, WHILE A GOOD THING, A SOCIAL GOAL THAT ISN'T THE
20 JOB OF THE ANTITRUST CASE TO PROVIDE?

21 **MR. KESSLER:** YOUR HONOR --

22 **THE COURT:** WHICH OF THOSE THINGS, IF ANY, ARE WE
23 TALKING ABOUT? WHICH, IF ANY, IS A PROCOMPETITIVE
24 JUSTIFICATION?

25 **MR. COOPER:** YOUR HONOR, IT'S OUR PROCOMPETITIVE

1 JUSTIFICATION, SO PERHAPS I CAN ANSWER IT.

2 MR. KESSLER: GO FIRST AND I'LL RESPOND. THAT'S
3 FINE.

4 THE COURT: EXPLAIN.

5 MR. COOPER: IT'S TWO THINGS, YOUR HONOR, AND WE
6 THINK BOTH THE O'BANNON DECISION IN THE DISTRICT COURT AND THE
7 NINTH CIRCUIT MADE IT CLEAR THAT IT'S TWO THINGS. ONE IS THIS
8 INTEGRATION OF ATHLETICS AND ACADEMICS. IN OTHER WORDS --

9 THE COURT: WHERE, THOUGH, WITHIN THE MIND OF THE
10 INDIVIDUAL ATHLETE OR ON CAMPUS WALKING UP AND DOWN THE QUAD?
11 WHAT DOES THAT EXACTLY MEAN?

12 MR. COOPER: I DON'T BELIEVE IT'S THE FORMER. IT IS
13 THE FACT THAT THE RULES, THE WAY THEY ARE SET UP ARE INTENDED
14 TO BALANCE THE ACTIVITIES BETWEEN ATHLETICS AND ACADEMICS
15 WHICH ARE BOTH PART OF THE STUDENT-ATHLETE BARGAIN THAT THE
16 UNIVERSITIES STRIKE WITH THE --

17 THE COURT: YOU'RE TALKING THEN ABOUT THE INTEGRATION
18 WITHIN THE INDIVIDUAL ATHLETE OF SPENDING SOME TIME ON
19 ATHLETICS AND SOME TIME ON ACADEMICS.

20 MR. COOPER: WE THINK THE RULES ARE STRUCTURAL AND
21 THAT THEY --

22 THE COURT: THE RULES MAY OR MAY NOT BE STRUCTURE.
23 BUT WHAT I'M TRYING TO HEAR FROM YOU IS WHAT IS THE
24 INTEGRATION? INTEGRATION OF ONE THING AND ANOTHER. WHAT ARE
25 THE TWO THINGS?

1 **MR. COOPER:** IT IS THE TWO COMPONENTS OF THE
2 STUDENT-ATHLETES' EXPENDITURE OF TIME WHILE A STUDENT-ATHLETE
3 IN COLLEGE AND THE TWO COMPONENTS OF THE PRINCIPAL COMPONENTS
4 OF WHAT THE QUID PRO QUO IS BETWEEN STUDENT-ATHLETE AND
5 SCHOOL. SO THERE'S A BARGAIN BETWEEN THE TWO.

6 **THE COURT:** SO IT'S THE TIME AND EFFORT SPENT ON
7 ACADEMICS BEING INTEGRATED OR SOMEHOW BALANCED --

8 **MR. COOPER:** BALANCED, RIGHT.

9 **THE COURT:** -- BETWEEN THE TIME AND EFFORT SPENT ON
10 WHICHEVER ONE I DIDN'T SAY.

11 **MR. COOPER:** ACADEMICS AND ATHLETICS. YES, YOUR
12 HONOR.

13 **THE COURT:** OKAY. IS THAT PROCOMPETITIVE
14 JUSTIFICATION? HOW DOES THAT FOSTER COMPETITION? COMPETITION
15 OVER WHAT WITH WHOM?

16 **MR. COOPER:** WELL, THE PRODUCT WHICH THE UNIVERSITY
17 IS OFFERING THE STUDENT-ATHLETE AND THE BENEFIT THE
18 STUDENT-ATHLETE RECEIVES IN RETURN FOR THE BARGAIN BETWEEN IT
19 AND THE UNIVERSITY ARE BOTH AFFECTED BY THE RULES, AND IN THAT
20 SENSE THEY ARE PROCOMPETITIVE, YES.

21 **THE COURT:** BECAUSE THEY CAUSE ATHLETES TO COMPETE
22 WITH ONE ANOTHER TO GET A BETTER MIX? OR WHAT --

23 **MR. COOPER:** BECAUSE THEY MAKE THE PRODUCT THAT IS
24 OFFERED TO THE STUDENT-ATHLETE AND THE BENEFIT RECEIVED BY THE
25 STUDENT-ATHLETE THAT IT IMPROVES THAT PRODUCT.

1 **THE COURT:** OH, THEIR COLLEGE EDUCATION WITH THEIR
2 ATHLETIC EXPERIENCE.

3 **MR. COOPER:** YES.

4 **THE COURT:** IT IMPROVES THAT PRODUCT SO IT'S BETTER
5 FOR THEM TO NOT GET MORE FINANCIAL BENEFITS BECAUSE INSTEAD
6 THEY ARE GETTING THIS GOOD MIX OF ACADEMICS AND ATHLETICISM.

7 **MR. COOPER:** THAT IS ONE ASPECT OF IT. IT IS NOT THE
8 ONLY ASPECT OF IT. IT'S NOT THE ONLY THING THAT JUSTIFIES THE
9 RESTRAINTS.

10 BUT, YES, THE BALANCE BETWEEN THE INCENTIVES FOR ATHLETIC
11 ENDEAVORS AND THE INCENTIVES FOR ACADEMIC ENDEAVORS IS
12 SPECIFICALLY PART OF THE PROCOMPETITIVE JUSTIFICATION FOR THE
13 RULES. AND --

14 **THE COURT:** OKAY. AND THAT ALLOWS --

15 **MR. COOPER:** AND THAT'S ONE OF THE THINGS DR. HECKMAN
16 TALKS ABOUT.

17 **THE COURT:** -- THE ATHLETES THEN COMPETE OR MAKE
18 THEIR COMPETITIVE DECISIONS BASED ON HOW THEIR -- WHAT THEY'RE
19 GETTING OUT OF IT IN THOSE SENSES.

20 **MR. COOPER:** IT IMPROVES THE PRODUCT THAT THE
21 UNIVERSITY OFFERS --

22 **THE COURT:** SO THAT'S ONE THING.

23 **MR. COOPER:** -- AND IT IMPROVES THE PRODUCT THAT IS
24 OFFERED TO THE CONSUMERS IN THE SENSE THAT IT'S A CONSUMER
25 PRODUCT THAT INVOLVES AMATEUR STUDENT ATHLETICS. SO IT DOES

1 BOTH OF THOSE THINGS.

2 **THE COURT:** OKAY. SO THE FIRST ONE --

3 **MR. COOPER:** ON BOTH SIDES, IF YOU WILL, OF THE
4 TWO-SIDED MARKET.

5 **THE COURT:** LET'S NOT GET BACK INTO THAT.

6 **MR. COOPER:** AND YET THAT'S OUR ARGUMENT.

7 **THE COURT:** OKAY. SO THE ONE IS I UNDERSTAND.

8 THE SECOND IS THAT, WHAT? IF THE ATHLETE IS EXPERIENCING
9 A PROPER BALANCE BETWEEN HIS OR HER ACADEMICS AND ATHLETICISM,
10 THEN THE GAME IS BETTER AND THE CONSUMER LIKES IT MORE?

11 **MR. COOPER:** WELL, NO. THAT THE AMATEUR NATURE OF
12 THE PRODUCT IS ALSO MORE APPEALING TO THE CONSUMER.

13 **THE COURT:** SO THAT'S THE FIRST PRONG, THOUGH. WHAT
14 DID WE CALL THAT ONE?

15 **MR. COOPER:** IF I MAY, YOUR HONOR.

16 **THE COURT:** THAT'S THE....

17 **MS. WILKINSON:** FIRST PROCOMPETITIVE BENEFIT.

18 **THE COURT:** YEAH. BUT WHAT DO WE CALL IT?

19 **MR. COOPER:** AMATEURISM.

20 **THE COURT:** AMATEURISM. THAT'S THE FIRST PRONG. SO
21 THAT ISN'T INTEGRATION, THAT'S THE FIRST PRONG. SO WHAT I AM
22 TRYING TO TEASE OUT IS, ARE THERE TWO PRONGS OR IS THERE JUST
23 THE ONE PRONG ABOUT THE POPULARITY AND THE DEMAND FOR THE
24 SPORT?

25 **MR. COOPER:** THERE ARE TWO PROCOMPETITIVE

1 JUSTIFICATIONS. I THINK THAT'S WHAT YOU ARE REFERRING TO.
2 AND INTEGRATION IS DISTINCT FROM AMATEURISM.

3 **THE COURT:** WHY? I MEAN, THE FIRST -- YOU WERE
4 GIVING ME TWO PRONGS OF THE SECOND PRONG, AND I UNDERSTAND --

5 **MR. COOPER:** I WON'T USE THE WORD "PRONG" THOUGH
6 BECAUSE I THINK IT CONFUSES --

7 **THE COURT:** I UNDERSTAND THE FIRST PRONG OF YOUR
8 SECOND PRONG, BUT I THINK YOUR SECOND PRONG OF YOUR SECOND
9 PRONG IS THE SAME AS YOUR FIRST PRONG. SO THAT PART I DON'T
10 THINK IS GOING TO COUNT AND IT'S GOING TO BE ONLY THE QUESTION
11 OF THE INTEGRATION WITHIN THE PARTICULAR ATHLETE OF HIS OR HER
12 ACTIVITIES.

13 **MR. COOPER:** IF I MAY, YOUR HONOR.

14 THIS INTEGRATION OF ATHLETICS AND ACADEMICS, WHICH IS THE
15 FIRST ASPECT OF THE PROCOMPETITIVE JUSTIFICATION OF
16 INTEGRATION, IT ENCOURAGES, ECONOMICALLY INCENTIVIZES
17 STUDENT-ATHLETES TIME AND EFFORT TO BE BALANCED BETWEEN
18 ACADEMICS AND ATHLETICS MAKING THEM BONA FIDE AMATEUR
19 ATHLETES --

20 **THE COURT:** THAT GIVES --

21 **MR. COOPER:** -- WHO ARE ALSO STUDENTS.

22 **THE COURT:** THAT GIVES ME A STUB QUESTION. SORRY TO
23 INTERRUPT YOU, BUT I WANT TO ASK.

24 IN WHAT SENSE IS ATHLETICS INCENTIVIZED? IN OTHER WORDS,
25 I SOMEHOW HAVE IN MY MIND THAT THEY GIVE MULTIYEAR

1 SCHOLARSHIPS. AND TO SAY, OH, WE ARE INCENTIVIZING ATHLETICS
2 BY -- WE WOULD BE IF WE PAID THEM MORE -- THEY WOULD SPEND
3 MORE TIME ON ATHLETICS BECAUSE THEY WOULD WANT TO GET MORE
4 MONEY.

5 BUT I'M NOT SURE, DO THEY GET MORE MONEY BY PLAYING?
6 CERTAINLY THEY DON'T GET MORE MONEY FOR WORKING OUT LONGER OR
7 MAKING MORE TOUCHDOWNS. PERHAPS THEY GET TO KEEP THEIR
8 SCHOLARSHIP THAT THEY OTHERWISE MIGHT LOSE?

9 EXCEPT I HAD IN MY MIND THAT THEY ARE NOW MULTIYEAR
10 SCHOLARSHIPS AND THEY CAN'T LOSE THEIR SCHOLARSHIP. AM I
11 WRONG?

12 **MR. COOPER:** THEY MAY --

13 **THE COURT:** THEY CAN?

14 **MR. COOPER:** SCHOOLS MAY GIVE MULTIYEAR SCHOLARSHIPS.
15 THEY ARE NOT REQUIRED TO GIVE MULTIYEAR SCHOLARSHIPS.

16 **THE COURT:** SO THE SCHOOLS THAT DON'T GIVE MULTIYEAR
17 SCHOLARSHIPS, THEN THE ATHLETE IS WORKING HARDER BECAUSE THE
18 ATHLETE THINKS SHE MIGHT LOSE HER SCHOLARSHIP IF SHE DOESN'T
19 GET ENOUGH BASKETS, OR WHATEVER.

20 **MR. COOPER:** YOUR HONOR, I THINK THERE ARE MANY
21 REASONS WHY STUDENT-ATHLETES SPEND A LOT OF TIME ON ATHLETICS.
22 AND WHAT THEY PERCEIVE AS THEIR MOTIVATION TO DO THAT, THEIR
23 PREFERENCE TO DO THAT, SOME OF THEM PREFER TO BE ATHLETES THAN
24 STUDENTS, IN A BUT-FOR REQUIREMENTS THAT THEY BE STUDENTS,
25 THAT CAN BE BY DENT OF INCLINATION AS OPPOSED TO ANYTHING

1 ELSE. SOME OF THEM SEE THEMSELVES AS HAVING PRO CAREERS IN
2 THE FUTURE.

3 THERE ARE A WHOLE NUMBER OF DIFFERENT THINGS THAT MIGHT
4 MOTIVATE A STUDENT-ATHLETE TO FOCUS ATTENTION ON ATHLETICS.
5 BUT AMONG OTHER THINGS IT'S THAT THEY SEE THEMSELVES IN PART
6 AS ATHLETES.

7 **THE COURT:** I'M SORRY, I'M REALLY TRYING TO MOVE THIS
8 ALONG BECAUSE I DO HAVE SOME OTHER BIG QUESTIONS TO ASK AND
9 IT'S ALREADY 4:30.

10 **MR. KESSLER:** CAN I RESPOND BRIEFLY?

11 **THE COURT:** I WANT TO GET IT ALL OUT ON THE TABLE.

12 I SAY AGAIN, I UNDERSTAND THE NOTION OF -- AND IT'S MY
13 FAULT I WENT OFF ON A TANGENT, BUT I UNDERSTAND THE NOTION OF
14 AN ATHLETE HAVING AN APPROPRIATE BALANCE WITHIN THEIR OWN LIFE
15 OF DOING THEIR SCHOOL WORK AND DOING THEIR ATHLETICS. AND
16 YOU'RE SAYING THAT'S A PROCOMPETITIVE JUSTIFICATION BECAUSE
17 THE ATHLETE TAKES THAT INTO ACCOUNT WHEN DECIDING ON THE
18 COMPETITION FOR HIS ATTENDANCE FROM THE SCHOOLS. OKAY.

19 IS THERE ANY MORE THAN THAT?

20 **MR. COOPER:** THE SECOND COMPONENT IS THE INTEGRATION
21 INTO THE OVERALL CAMPUS COMMUNITY, WHICH IS THIS WEDGE ISSUE
22 THAT WAS TALKED ABOUT IN *O'BANNON*. AND, AGAIN, YOU WILL HEAR
23 ABOUT IT IN THIS TRIAL, ASSUMING THAT WE ARE RETRYING THAT
24 ISSUE.

25 AND THAT IS ABOUT THE DIVISION BETWEEN STUDENT-ATHLETES

1 AND OTHER STUDENTS AS IT RELATES TO THE PERCEPTION THAT
2 STUDENT-ATHLETES ALREADY GET MORE THAN THEY SHOULD. AND EACH
3 OF THE REPRESENTATIVE PLAINTIFFS WHO WERE DEPOSED TALKED ABOUT
4 THAT IN THEIR DEPOSITIONS, AND THAT'S SOMETHING WE WILL BRING
5 BEFORE YOUR HONOR.

6 **THE COURT:** IT'S A SOCIAL GOOD. IT'S NICE IF PEOPLE
7 GET ALONG. IN WHAT SENSE IS IT PROCOMPETITIVE?

8 **MR. COOPER:** IT'S ECONOMIC IN THE SENSE THAT IT GOES
9 TO THE QUESTION OF --

10 **THE COURT:** WHAT DO YOU MEAN BY "PROCOMPETITIVE"? IN
11 WHAT SENSE IS IT PROCOMPETITIVE?

12 **MR. COOPER:** THE SAME RULES THAT STRIKE THIS BALANCE
13 BETWEEN ACADEMICS AND ATHLETICS ALSO TALK ABOUT THE ISSUE
14 ABOUT HOW THE STUDENT-ATHLETE IS PART OF THE COMMUNITY. IT'S
15 VERY MUCH A PART OF THE EDUCATIONAL ASPECT OF IT.

16 **THE COURT:** HOW IS IT --

17 **MR. COOPER:** AND THEIR EXPERTS --

18 **THE COURT:** IS IT PROCOMPETITIVE BECAUSE THE
19 STUDENT-ATHLETE THINKS TO HERSELF, I'M GOING TO GO TO CAL
20 BECAUSE THERE I KNOW THAT I WILL HAVE MORE FRIENDS AND MORE
21 ACTIVITIES THAT ARE WITH THE WHOLE CAMPUS, SO IT'S
22 PROCOMPETITIVE BECAUSE THE STUDENT WILL CHOOSE -- THE
23 STUDENT-ATHLETE WILL CHOOSE THE SCHOOL BASED ON THE ADDITIONAL
24 BENEFIT OF HAVING AN INTEGRATED COMMUNITY? OR IS IT
25 CONVERSELY THE BENEFIT TO THE OTHER STUDENTS WHO LIKE HANGING

1 AROUND WITH THE ATHLETE?

2 I THINK IT CAN'T BE THAT BECAUSE THEY ARE NOT MARKET
3 PARTICIPANTS.

4 **MR. COOPER:** THAT GOES --

5 **THE COURT:** IT'S GOT TO BE THE ATHLETE. AND THEN I
6 GUESS IT'S THE SAME THING, THAT THE ATHLETE THINKS THAT IT'S
7 GOING TO BE A BETTER SCHOOL FOR THEM AND IT'S PART OF THEIR
8 SORT OF PACKAGE OF BENEFITS THAT THEY ARE GOING TO GET IS TO
9 GET TO GO TO A SCHOOL WHERE THEY WILL BE HANGING AROUND WITH
10 OTHER STUDENTS.

11 **MR. COOPER:** TO BE SURE, THERE IS NO QUESTION THAT
12 THAT ASPECT OF IT IMPACTS BOTH OF THE PROCOMPETITIVE
13 JUSTIFICATIONS. SO THIS PERCEPTION AS TO WHETHER
14 STUDENT-ATHLETES ARE REALLY AMATEURS AND SO ON, THAT --
15 THERE'S NO QUESTION THAT HAS AN IMPACT. SO WHEN YOU TALK
16 ABOUT OTHER STUDENTS AND SO ON, THAT'S DIFFERENT.

17 **THE COURT:** RIGHT. THAT'S PART OF THE DEMAND FOR THE
18 PRODUCT.

19 **MR. COOPER:** YES, YOUR HONOR.

20 BUT THIS QUESTION ABOUT THE INTEGRATION AS IT RELATES TO
21 THE STUDENT-ATHLETE ITSELF, OR HIM OR HERSELF, THAT GOES TO
22 THE QUALITY OF THE QUID PRO QUO AND THE PRODUCT ITSELF IN THE
23 SAME WAY THAT WE WERE TALKING ABOUT EARLIER.

24 **THE COURT:** IS THAT IT THEN?

25 **MR. COOPER:** IT'S A DIFFERENT COMPONENT.

1 **THE COURT:** RIGHT. IS THAT IT THEN?

2 **MR. COOPER:** AS FAR AS I UNDERSTAND YOUR QUESTION.

3 **THE COURT:** OKAY.

4 **MR. KESSLER:** YOUR HONOR, THREE THINGS THEY MENTION.
5 NUMBER ONE, YOUR HONOR IS EXACTLY RIGHT, ANY IMPACT ON
6 CONSUMER DEMAND IS JUST THE FIRST JUSTIFICATION. IT'S NOT A
7 SEPARATE JUSTIFICATION.

8 NUMBER TWO, THIS IDEA THAT YOU'RE INCREASING -- YOU'RE
9 PATERNALISTICALLY TELLING THE STUDENT YOU ARE BETTER OFF NOT
10 GETTING MONEY BECAUSE IT WILL INCREASE YOUR SOCIAL
11 INTEGRATION, YOU KNOW, THAT ASPECT OF IT, IS NOT A
12 PROCOMPETITIVE JUSTIFICATION. I CAN GIVE YOUR HONOR A
13 PERFECT --

14 **THE COURT:** WHY NOT?

15 **MR. KESSLER:** I WILL GIVE YOU A GOOD EXAMPLE.

16 (SIMULTANEOUS COLLOQUY)

17 **THE COURT:** I DON'T KNOW IF ACTUALLY THAT IS
18 SOMETHING --

19 (SIMULTANEOUS COLLOQUY)

20 **THE COURT:** SORRY, I NEED TO BE ABLE TO INTERRUPT.

21 **MR. KESSLER:** YOU CAN ALWAYS INTERRUPT.

22 **THE COURT:** THAT ISN'T MY INVARIABLE EXPERIENCE. GO
23 AHEAD.

24 **MR. KESSLER:** OKAY.

25 SO WHAT THE SUPREME COURT MADE CLEAR, AND THE RELEVANT

1 CASE IS *PROFESSIONAL ENGINEERS*, THAT WHEN A GROUP OF
2 COMPETITORS GET TOGETHER THEY CAN SAY IT'S PROCOMPETITIVE TO
3 ELIMINATE COMPETITION IN ORDER TO ACHIEVE SOME OTHER BENEFIT
4 FOR THE CUSTOMER THAT THEY THINK THE CUSTOMER MIGHT LIKE.

5 AND I'LL GIVE YOU WHAT WAS THERE. THERE IT WAS, THEY
6 SAID, WE ARE NOT GOING TO BID AGAINST EACH OTHER IF WE HAVE
7 THE JOBS BECAUSE IT WILL MAKE --

8 **THE COURT:** IS THIS THE *DIXON* CASE?

9 **MR. KESSLER:** THIS *PROFESSIONAL ENGINEERS. NATIONAL*
10 *SOCIETY OF PROFESSIONAL ENGINEERS* --

11 **THE COURT:** IS IT PRICE FIXING?

12 **MR. KESSLER:** YES. WELL, IT WAS A NO BID CASE
13 BECAUSE IF YOU BID FOR ANOTHER CUSTOMER, IT COULD LEAD TO
14 UNSAFE BIDS.

15 THESE WERE CONSTRUCTION THINGS. AND THEY SAID, THIS WILL
16 CAUSE MORE UNSAFE PROJECTS WHICH THE CUSTOMERS, THE PEOPLE
17 BUYING THE ENGINEERING, WE KNOW IT'S BETTER FOR YOU. YOU
18 DON'T WANT THIS COMPETITION THAT CREATES AN UNSAFE PRODUCT.

19 SUPREME COURT SAID NO. THAT MIGHT BE A SOCIAL POLICY
20 JUSTIFICATION OR SOMETHING CONGRESS SHOULD REGULATE OR A
21 STATE, BUT COMPETITORS DON'T GET TO SAY SOME ASPECTS OF THE
22 PRODUCT IS GOING TO CHANGE IN A WAY THAT'S NOT GOOD FOR YOU SO
23 WE ARE GOING TO REGULATE IT.

24 THAT IS EXACTLY THEIR JUSTIFICATION. THEY ARE SAYING WE
25 KNOW BETTER THAN YOU, STUDENTS. IF YOU GET PAID MONEY, YOU'RE

1 NOT GOING TO BE AS INTEGRATED, YOU'RE NOT GOING TO DEVOTE
2 ENOUGH EFFORT TO YOUR ACADEMICS.

3 AND THE WHOLE POINT IS, THERE'S A COMPLETE FACTUAL FAILURE
4 THERE, BUT AS A THEORETICAL MATTER, IT'S NOT -- IT DOESN'T
5 AFFECT DEMAND. IF IT DOESN'T AFFECT DEMAND, IF IT DOESN'T
6 INCREASE THE COMPETITION, THE FACT THAT IT MAKES A PRODUCT
7 BETTER OR WORSE, IS NOT IT.

8 THERE'S ANOTHER FAMOUS CASE, YOUR HONOR, CALLED *FTC VERSUS*
9 *MACARONI*. AND THIS IS A CASE WHERE THE MACARONI COMPANY
10 SAID --

11 **THE COURT:** I SEE WHAT YOUR ARGUMENT IS. I DON'T --
12 I THINK PERHAPS IT MIGHT BE A FACTUAL QUESTION WHETHER SUCH A
13 THING WOULD BE SOMETHING THAT AN ATHLETE WOULD CONSIDER AS
14 PART OF THEIR COMPETITION.

15 **MR. KESSLER:** I THINK EVEN --

16 **THE COURT:** IN ANY EVENT --

17 (SIMULTANEOUS COLLOQUY)

18 **MR. KESSLER:** WE CAN ADDRESS THAT IN OUR BRIEFING.

19 AND THE THIRD ONE, YOUR HONOR, JUST FOR THIS LAST ONE, IT
20 SAYS THAT THIS IDEA THAT IT'S GOING TO BE COMPETITIVE BASED ON
21 WEDGES, AND THAT SOMEHOW IT WOULD GO ACROSS THE SCHOOLS.

22 REMEMBER, THE RULES APPLY ACROSS ALL THE SCHOOLS. SO IT'S
23 NOT LIKE YOU CAN COMPETE BY SAYING THAT, OH, WE'RE GOING TO
24 ALLOW THIS AND NOT. RIGHT NOW THEIR RULES ARE UNIFORM ACROSS
25 ALL THE SCHOOLS SO IT HAS NOTHING TO DO WITH COMPETITION

1 BETWEEN THE SCHOOLS IN THAT SENSE.

2 I THINK THAT'S SUFFICIENT FOR YOUR PURPOSES RIGHT NOW,
3 YOUR HONOR. WE WILL CERTAINLY ADDRESS THAT IN CLOSING.

4 **THE COURT:** OKAY.

5 **MR. COOPER:** YOUR HONOR, THAT CONFLATES ABOUT FIVE
6 DIFFERENT ARGUMENTS. I WOULD BE HAPPY TO UNPACK THEM ALL AND
7 RESPOND TO THEM IF IT'S NECESSARY IN ORDER TO BE ABLE TO
8 ANSWER YOUR QUESTIONS.

9 **THE COURT:** NO, I THINK WE'RE JUST GOING TO HAVE TO
10 GO ON AND WE'LL HAVE TO ARGUE IT SOME OTHER TIME.

11 I'M TRYING TO FIGURE OUT WHETHER PLAINTIFFS FEEL LIKE PART
12 OF WHAT THEY ARE OBJECTING TO WOULD BE -- OR PART OF WHAT THEY
13 THINK WOULD HAVE TO BE CHANGED WOULD BE THAT ATHLETES WOULD
14 HAVE TO BE ALLOWED TO BE PAID DIFFERENT AMOUNTS OF MONEY
15 DEPENDING ON THEIR SKILL.

16 SO, IN OTHER WORDS, WOULD YOU SAY IT'S AN ANTITRUST
17 VIOLATION IF THERE'S OPEN BIDDING FOR ATHLETES BUT THE SCHOOL
18 HAS TO PLAY -- PAY ALL OF THE INCOMING TEAM THE SAME, THEY
19 CAN'T DO AN NBA KIND OF THING WHERE SOME PLAYERS GET MORE AND
20 SOME PLAYERS GET LESS?

21 **MR. KESSLER:** SO, YOUR HONOR, OUR VIEW --

22 **THE COURT:** MAKE IT SHORT.

23 **MR. KESSLER:** THE CONFERENCES WILL DECIDE. IF A
24 CONFERENCE DECIDED THAT THEY WANTED TO HAVE EVERYONE PAID THE
25 SAME THING ON THE TEAM, NO PROBLEM. WE SHOULD LEAVE THOSE

1 DECISIONS TO THE CONFERENCES.

2 **THE COURT:** WHAT IF WE DON'T? WHAT IF WE LEAVE IT UP
3 TO NCAA? WOULD IT BE PART OF AN ANTITRUST VIOLATION THAT NCAA
4 SAID, WE DON'T CARE HOW MUCH YOU PAY, BUT IT'S GOT TO BE THE
5 SAME FOR EVERYBODY?

6 **MR. KESSLER:** I THINK THAT WOULD BE LESS RESTRICTIVE
7 THAN THE CURRENT SYSTEM. SO THE CURRENT SYSTEM SAYS YOU'RE
8 CAPPED. IF YOU SAID THERE'S NO CAP, THAT IT HAS TO BE EQUAL,
9 THAT WOULD BE A LESS RESTRICTIVE SYSTEM THEN THE CURRENT
10 SYSTEM FOR SURE.

11 SO THAT IF YOU -- IF YOUR HONOR FOUND THAT WHATEVER
12 JUSTIFICATION THEY HAD WAS SOLVED BY UNIFORM PAY, THAT COULD
13 BE ANOTHER LESS RESTRICTIVE ALTERNATIVE IN ORDER TO MEET THAT
14 OBJECTIVE.

15 **THE COURT:** OKAY.

16 SO I READ YOUR SECOND ALTERNATIVE PROPOSED INJUNCTION AND
17 WHAT I COULDN'T BE SURE I UNDERSTOOD FROM IT IS WHETHER YOU'RE
18 SAYING THAT THE BENEFITS GIVEN -- WHAT THEY DESCRIBE AS
19 BENEFITS INCIDENTAL TO ATHLETIC PERFORMANCE CAN BE CAPPED.

20 AND I DON'T MEAN BUYING UNIFORMS. I MEAN GIFT CARDS --

21 **MR. KESSLER:** SO LET ME EXPLAIN.

22 **THE COURT:** -- WATCHES, THINGS LIKE THAT. COULD
23 THOSE BE CAPPED OR COULD THOSE NOT BE CAPPED?

24 **MR. KESSLER:** LET ME EXPLAIN THAT.

25 FIRST OF ALL, WE ARE ONLY TALKING ABOUT THE SPECIFIC LIST

1 IN THE APPENDIX ATTACHED TO THE INJUNCTION. WE ARE NOT
2 TALKING ABOUT A CONCEPT OF INCIDENTAL TO PARTICIPATION
3 BENEFITS. THESE WERE BENEFITS THAT WE WENT THROUGH IN
4 DEPOSITION WITH MR. LENNON. AND MR. LENNON IDENTIFIED IN
5 OUR --

6 **THE COURT:** I KNOW WHAT THEY ARE --

7 **MR. KESSLER:** YOUR HONOR, THIS IS WHY --

8 **THE COURT:** JUST TELL ME WHETHER YOU'RE PROPOSING
9 THAT THOSE COULD NOT BE CAPPED OR WOULD YOU SAY THOSE COULD BE
10 CAPPED?

11 **MR. KESSLER:** WE ARE SAYING THEY CANNOT BE CAPPED --

12 **THE COURT:** CANNOT BE CAPPED.

13 (INTERRUPTION ON THE PHONE)

14 **THE COURT:** I GUESS IT'S TIME TO GO.

15 **MR. KESSLER:** IF I CAN JUST FINISH, YOUR HONOR.

16 THE ONLY REASON WE SAY THAT IS ONLY ONE REASON. BECAUSE
17 OF MR. LENNON'S ADMISSION THAT THEY ARE NOT RELATED TO
18 PRINCIPLES OF AMATEURISM. AND ONCE YOU AGREE THAT A GIFT
19 SUITE HAS NO RELATIONSHIP TO PRINCIPLES OF AMATEURISM, THEN
20 THERE'S NO JUSTIFICATION FOR ANY CAP.

21 **THE COURT:** OKAY.

22 **MR. KESSLER:** SO THAT'S THE WHOLE BASIS OF OUR
23 ARGUMENT THERE.

24 **THE COURT:** OKAY.

25 SO IN TRYING TO FIGURE OUT YOUR RULES AND THINGS, I'M

1 TRYING TO FIND OUT WHERE IT SAYS WHAT THE GIFT SUITES CAN
2 HAVE.

3 I LOOKED AT THE CHART IN RULE 16.1 AND IT'S PRETTY
4 DETAILED ABOUT DIFFERENT MVP AWARDS AND THIS AND THAT. I
5 UNDERSTAND THAT THERE IS SUCH A THINGS AS GIFT SUITES. I
6 GATHER YOU GO IN AND LOOK AROUND AND SAY, I'LL HAVE A
7 MICROWAVE, I'LL HAVE A WATCH, I'LL HAVE \$450 BEST BUY GIFT
8 CARD. WHERE DOES IT SAY WHAT YOU ARE ALLOWED TO HAVE IN THOSE
9 GIFT SUITES? I COULDN'T FIND THAT IN THE MANUAL.

10 **MR. COOPER:** YOUR HONOR, I THINK THE CONCEPT OF A
11 GIFT SUITE MAY BE A LITTLE BIT EXAGGERATED AS FAR AS SOME OF
12 THE --

13 **THE COURT:** WHATEVER IT IS.

14 **MR. COOPER:** THE RULE SAYS THAT THERE ARE CERTAIN
15 KINDS OF AWARDS THAT ARE PERMITTED, AND IT HAS LISTS OF THE
16 MAXIMUM AMOUNT OF THE AWARD.

17 **THE COURT:** I SAW THAT ONE.

18 **MR. COOPER:** THAT'S THE RULE SO FAR AS I UNDERSTAND
19 IT.

20 **THE COURT:** WHY IS IT A VIOLATION TO HAVE A SUITE
21 WHERE YOU GO IN AND GET A \$450 GIFT CARD AND A WATCH --

22 **MR. COOPER:** THEY HAVE TO BE CONSISTENT WITH THOSE
23 RULES.

24 **THE COURT:** BUT THEY AREN'T.

25 **MR. COOPER:** BUT THEY ARE.

1 **THE COURT:** IT DOESN'T SAY ANYTHING ABOUT THAT.

2 **MS. WILKINSON:** IT DOES, YOUR HONOR.

3 **THE COURT:** SO YOU CAN GIVE ANYTHING AS LONG AS IT --

4 **MS. WILKINSON:** IT'S A VALUE LIMIT. AND YOU DON'T GO
5 INTO A ROOM.

6 **THE COURT:** WHERE IS IT?

7 **MS. WILKINSON:** IN THE -- THEY SAID IN THE RULES. IN
8 16-2. IT'S IN THERE.

9 **THE COURT:** WHERE YOU GET \$175 FOR MVP, THEY FIGURE
10 OUT HOW MUCH THE MICROWAVE IS WORTH?

11 **MS. WILKINSON:** YES. OF COURSE.

12 **THE COURT:** IT HAS TO BE WORTH LESS THAN 175?

13 **MS. WILKINSON:** YES. JUST LIKE IF YOU GIVE A GIFT --
14 WE GIVE A GIFT TO A CLIENT AND THE CLIENT HAS A RULE THAT YOU
15 CAN ONLY -- THEY CAN ONLY RECEIVE A GIFT WORTH A HUNDRED
16 DOLLARS, WE HAVE TO FIGURE OUT WHAT'S WORTH A HUNDRED DOLLARS.

17 **THE COURT:** OH, OKAY.

18 **MS. WILKINSON:** YOU CAN FIGURE IT OUT. THERE'S A
19 MARKET OUT THERE FOR WHAT THESE THINGS COST. YOU KNOW,
20 HEADPHONES AND THINGS LIKE THAT. IT'S NOT DIFFICULT.

21 AND THAT WAS ONLY DESIGNED BECAUSE PEOPLE WANTED DIFFERENT
22 KINDS OF THINGS AND THE NCAA THOUGHT AS LONG AS THEY'RE, YOU
23 KNOW, LIMITED IN VALUE SO IT DOESN'T BECOME DISGUISED PAY FOR
24 PLAY, THEY'LL SET THE LIMITS AND THEN FIGURE OUT WHAT THE
25 VALUE OF THOSE GIFTS ARE, AND THEY CAN'T EXCEED THAT.

1 **THE COURT:** OKAY. THAT'S IN 16 WHAT?

2 **MR. WILLIAMS:** 16-1, 16-2, AND 16-3.

3 **THE COURT:** IT'S NOT IN 1. THAT ONE I LOOKED AT. I
4 MEAN, THE AMOUNTS ARE --

5 **MS. WILKINSON:** IT IS, YOUR HONOR. IT SAYS RIGHT
6 HERE:

7 "PARTICIPATION IN ALL STAR GAMES OR POST-SEASON BOWL,
8 MAXIMUM VALUE OF AWARD \$400 INSTITUTION, \$550" --

9 **THE COURT:** I SAW ALL THAT. SO WHAT YOU ARE SAYING
10 IS, YOU GO IN THE GIFT SUITE AND YOU SAY, YOU CAN HAVE
11 WHATEVER GIFT YOU WANT EXCEPT HERE'S THE PRICE TAG AND YOU CAN
12 ONLY HAVE GIFTS WORTH UP TO \$400.

13 **MS. WILKINSON:** RIGHT.

14 **THE COURT:** WHAT ABOUT THE -- I WAS INTERESTED IN THE
15 SCHOLAR ATHLETE SCHOLARSHIP, THE \$10,000 A YEAR -- \$10,000
16 GRADUATE SCHOOL TUITION FOR TWO STUDENTS. WHERE IS THAT IN
17 THE BYLAWS?

18 **MS. WILKINSON:** I DON'T KNOW, YOUR HONOR.

19 **THE COURT:** MAYBE YOU CAN JUST TELL ME LATER.

20 **MS. WILKINSON:** SURE.

21 **THE COURT:** IN THE BYLAWS IT OFTEN SAYS, "EFFECTIVE
22 ON A CERTAIN DATE", AND THEN SOMETIMES IT SAYS "REVISED ON A
23 CERTAIN DATE". LIKE A LOT OF THINGS WERE REVISED ODDLY ENOUGH
24 ON AUGUST 7TH OF 2014.

25 HOW DO I FIND OUT WHAT WAS REVISED? LIKE IN THE FEDERAL

1 RULES, THERE WILL BE THE ADVISORY COMMITTEE NOTES AND THEY'LL
2 SAY, WE REVISED THIS IN 2014 TO CHANGE THIS AND THAT.

3 DO I HAVE TO GO BACK AND LOOK AT EVERY ONE BEFORE --

4 **MS. WILKINSON:** NO. I THINK MAYBE YOU HAVEN'T READ
5 OUR OPENING, BUT WE HAVE --

6 **THE COURT:** I HAVE.

7 **MS. WILKINSON:** THERE'S TABLES ATTACHED TO THAT, AND
8 WE LAY THAT OUT.

9 **THE COURT:** THE ONES THAT YOU WANT TO TALK ABOUT,
10 YES. BUT WHAT IF THERE'S ONE THAT I WANT TO KNOW?

11 **MS. WILKINSON:** WELL --

12 **THE COURT:** IS THERE A WAY TO FIND OUT?

13 **MS. WILKINSON:** IS IT NOT ONE THEY ARE CHALLENGING?
14 I'M CONFUSED. SORRY, YOUR HONOR.

15 **THE COURT:** AS A GENERAL QUESTION, LET'S SAY I HAPPEN
16 TO LOOK AT A RULE AND I NOTICED THAT IT HAD CHANGED AND I
17 WANTED TO KNOW WHAT IT CHANGED FROM. HOW WOULD I DO THAT?

18 **MS. WILKINSON:** WELL, WE WOULD HAVE TO GO BACK AND
19 SHOW YOU WHERE IT IS IF IT'S NOT A RULE AT ISSUE IN THE CASE.

20 **THE COURT:** THERE ISN'T ANY WRITTEN LEGISLATIVE
21 HISTORY OR RECORD OR SOMETHING?

22 **MS. WILKINSON:** WE WOULD HAVE TO GO BACK AND PUT THAT
23 TOGETHER. THERE IS, BUT IT'S NOT IN THE RECORD BECAUSE IT'S
24 NOT ONE OF THE RULES THEY ARE CHALLENGING.

25 IF YOU'RE SAYING THERE'S SOMETHING ELSE YOU'RE CURIOUS

1 ABOUT THAT'S NOT ONE OF THE RULES AT ISSUE, WE CAN FIND THAT
2 OUT IF YOU TELL US WHAT THAT IS.

3 AND HERE, I HAVE THE RULE ON THE SENIOR SCHOLAR ATHLETE,
4 WHICH IS 16.1.4. MY EYES ARE NOT ANY BETTER .1.1.

5 **MR. KESSLER:** YOUR HONOR, TWO --

6 **MS. WILKINSON:** EXCUSE ME.

7 **MR. KESSLER:** SORRY.

8 **THE COURT:** 16.1.4....

9 **MS. WILKINSON:** .1.1. AND IT'S TITLED SENIOR SCHOLAR
10 ATHLETE AWARD.

11 **THE COURT:** OKAY.

12 **MS. WILKINSON:** ARE YOU -- IS THERE A QUESTION OR DID
13 YOU JUST WANT TO KNOW THE NUMBER?

14 **THE COURT:** THAT'S IT.

15 **MR. KESSLER:** YOUR HONOR, JUST TWO POINTS ON THAT
16 DEPENDING ON YOUR HONOR'S INQUIRY.

17 WE WILL HAVE EVIDENCE PRESENTED IN THE RECORD ABOUT HOW
18 EVEN WHEN THE RULE DOESN'T CHANGE IN LANGUAGE, THE
19 INTERPRETATION HAS CHANGED. SO THAT ADDITIONAL AND GREATER
20 BENEFITS HAVE BEEN ALLOWED WITHOUT LITERALLY CHANGING THE
21 LANGUAGE OF THE RULE.

22 BECAUSE THE NCAA HAS AN INTERPRETATION SERVICE, AND THE
23 SCHOOLS KEEP ADVANCING NEW THINGS AND ALLOWING IT, SO THERE
24 HAVE BEEN A NUMBER OF CHANGES THERE, NUMBER ONE.

25 AND NUMBER TWO, WITH RESPECT TO THE SAF FUND BENEFITS,

1 BECAUSE THERE'S NO MONITORING OF HOW THE SCHOOLS DO THAT, THE
2 SCHOOLS HAVE MADE THEIR OWN DECISIONS ABOUT WHAT TO DISPENSE
3 WITH THESE MILLIONS OF DOLLARS IN FUNDS.

4 AND SO TO GIVE YOUR HONOR JUST ONE EXAMPLE --

5 **THE COURT:** NO, NO, NO.

6 **MR. KESSLER:** OKAY, NOT RIGHT NOW.

7 **THE COURT:** I HAVE ANOTHER QUESTION.

8 **MR. KESSLER:** YES.

9 **THE COURT:** I'M WONDERING ABOUT THE PORET SURVEY.
10 I'M SORRY I'M JUMPING AROUND HERE, BUT I HAVE A LIST.

11 I'M WONDERING ABOUT THE PORET SURVEY AND I'M WONDERING
12 ABOUT THE SCENARIOS THAT HE PRESENTED. AND I NOTICED THAT
13 MOST OF THE SCENARIOS HOVERED AROUND \$10,000 HERE AND THERE,
14 MAYBE \$10,000 ALTOGETHER, \$10,000 A YEAR, BUT THERE WEREN'T
15 ANY QUESTIONS OF ANYTHING MORE THAN \$10,000, OR MAYBE 20 IF IT
16 WAS TWO YEARS.

17 SO MY QUESTION IS, AM I TO GLEAN FROM THIS THAT YOU
18 WOULDN'T BE ARGUING THAT UNLIMITED COMPETITION SHOULD BE
19 ALLOWED? AND IF YOU ARE ARGUING THAT UNLIMITED COMPETITION
20 SHOULD BE ALLOWED, HOW WOULD ONE GO ABOUT -- IF YOU ARE
21 ARGUING IT SHOULDN'T BE UNLIMITED BUT IT SHOULDN'T NECESSARILY
22 BE \$10,000, HOW WOULD ONE GO ABOUT DECIDING WHERE IT SHOULD
23 BE?

24 **MR. KESSLER:** SO, AGAIN, OUR VIEW IS THE COURT SHOULD
25 NOT DECIDE THAT. THE CONFERENCES SHOULD DECIDE THAT. AND

1 THAT THEY CAN INDIVIDUALLY DETERMINE WHETHER THERE SHOULD BE
2 LIMITS AND WHERE. AND WHAT --

3 **THE COURT:** THAT'S ONE OF YOUR OPTIONS. LET'S TALK
4 ABOUT YOUR SECOND OPTION THEN.

5 **MR. KESSLER:** EVEN IN YOUR SECOND OPTION, WE DIDN'T
6 ASK FOR A SPECIFIC DOLLAR AMOUNT. WE ARE NOT TRYING TO DO
7 THAT. WE SAID THAT IN THE SECOND OPTION, WHAT -- CONSISTENT
8 WITH O'BANNON, IS THAT -- IS THE COURT COULD LET THEM PROHIBIT
9 CASH COMPENSATION UNTETHERED TO EDUCATION OR EVEN EXPENSES,
10 HOWEVER YOU WANTED TO DEFINE THAT IN THE LANGUAGE OF O'BANNON,
11 BUT THAT OTHER THINGS, THERE'S NO JUSTIFICATION FOR.

12 AND TO GO TO THE PORET SURVEY, THE PORET SURVEY WAS NOT --
13 THERE WERE SOME THAT WERE DOLLARS AS AN EXAMPLE. SUCH AS
14 PUTTING ASIDE MONEY TO ADVANCE EDUCATIONAL ACHIEVEMENT, BUT
15 MANY WERE OPEN ENDED.

16 SO WE SAID YOU COULD PROVIDE HEALTH CARE. THE HEALTH
17 CARE, YOUR HONOR, COULD BE WORTH HUNDREDS OF THOUSAND OF
18 DOLLARS. WE ASKED ABOUT THAT. WE ASKED ABOUT ALLOWING THEM
19 TO HAVE, YOU KNOW, A SCHOLARSHIP FOR GRADUATE SCHOOL NOT
20 LIMITED TO UNIVERSITY. THAT'S OBVIOUSLY WORTH MUCH MORE THAN
21 \$10,000 IF YOU GET A MULTIYEAR GRADUATE SCHOLARSHIP.

22 SO WE TESTED IN PORET, NOT A SPECIFIC NUMBER. WHAT WE
23 WERE TESTING IS DOES IT AFFECT YOUR FUTURE WATCHING OR VIEWING
24 BEHAVIOR IF ADDITIONAL BENEFITS BEYOND THE CURRENT ONES ARE
25 ALLOWED, AND WE BELIEVE THE EVIDENCE IS IT WOULD NOT.

1 **THE COURT:** I GUESS WHAT I'M WONDERING IS HOW WOULD I
2 DETERMINE WHETHER THERE WOULD BE LESSENING OF DEMAND FOR THE
3 PRODUCT IF COMPETITION WERE TOTALLY UNRESTRAINED AND BIDS
4 COULD BE MADE OF A MILLION --

5 **MS. WILKINSON:** THAT'S THE PROBLEM --

6 **THE COURT:** -- DOLLARS OR SOMETHING LIKE THAT. HOW
7 WOULD I DECIDE --

8 (SIMULTANEOUS COLLOQUY.)

9 **MR. KESSLER:** I THINK, YOUR HONOR, YOU HAVE TO LOOK
10 AT THE EVIDENCE THAT'S BEEN PRESENTED BY THE ECONOMISTS, AND
11 WHAT'S HAPPENED THE WHOLE HISTORY OF THE DIFFERENT RESTRAINTS
12 AND THE INCREASED COMP, YOU HAVE TO LOOK AT THE TESTIMONY AND
13 THE ECONOMIC EVIDENCE THAT'S THERE, YOU'LL LOOK AT THE SURVEY,
14 AND YOU WILL DECIDE HAVE THEY MET THEIR BURDEN OF SHOWING,
15 WHICH IS THEIR BURDEN, YOU KNOW, THAT THIS -- THAT THESE
16 RESTRICTIONS FURTHER THIS DEMAND OBJECTIVE.

17 WE DON'T THINK THEY ARE GOING TO MEET THAT BURDEN. IF
18 THEY DO, WHY COULDN'T THE INDIVIDUAL CONFERENCES --

19 **THE COURT:** THAT'S NOT THE QUESTION. I'M BACK IN THE
20 EARLIER STEP. HOW DO I KNOW THAT IF I WERE TO ACCEPT THE
21 SURVEY AND SAY, OKAY, \$10,000 A YEAR WON'T MAKE THE PRODUCT
22 ANY LESS --

23 **MR. KESSLER:** BECAUSE --

24 (SIMULTANEOUS COLLOQUY)

25 **THE COURT:** VALUABLE, BUT HOW WOULD I KNOW THAT A

1 MILLION DOLLARS A YEAR --

2 (SIMULTANEOUS COLLOQUY)

3 **THE COURT:** -- WON'T MAKE THE PRODUCT LESS VALUABLE?

4 **MR. KESSLER:** SORRY.

5 HERE'S WHY. BECAUSE THE ECONOMIC EVIDENCE WILL SHOW, AND
6 THIS WILL BE MR. RASCHER AND MR. NOLL AND OTHERS, THAT
7 COMPETITION WILL DECIDE THE APPROPRIATE NUMBER BECAUSE THE
8 SAME WITNESSES WHO THEY HAVE HERE WHO SAY IF YOU GIVE TOO MUCH
9 IT WILL HURT DEMAND, THEY WON'T OFFER THAT MUCH.

10 **THE COURT:** OKAY. I GET IT.

11 **MR. KESSLER:** SO IT'S THE COMPETITIVE MARKET THAT
12 DECIDES THAT.

13 **THE COURT:** SO THERE'S A FEW THINGS THAT I'M WANTING
14 FROM YOU. I'M NOT SURE IF I NEED TO SET DATES THAT I WILL GET
15 THEM AND HOW LONG THEY WILL BE, OR IF I SHOULD JUST LET YOU
16 USE YOUR BEST JUDGMENT. OR IF YOU WANT TO TALK AMONGST
17 YOURSELVES AND AGREE ON WHEN YOU SHOULD SUBMIT THEM.

18 **MS. WILKINSON:** YOUR HONOR, UNLESS THERE'S SOMETHING
19 THAT YOU WANT AT A CERTAIN TIME, I THINK YOU ASKED THEM FOR
20 THEIR COMMENTS ON OUR EXPERTS WHAT'S NEW WITHIN A WEEK, BUT
21 OTHER THAN THAT, I THINK WE HAVE DONE A GOOD JOB OF WORKING
22 TOGETHER. WE KNOW YOU WILL BE AWAY FOR A COUPLE OF WEEKS AND
23 WE CAN WORK OUT THOSE DEADLINES.

24 ALL I WOULD ASK IS WHEN WE DO THIS, I DON'T THINK IT
25 SHOULD BE REWARDED WHO'S THE LOUDEST AND INTERRUPTS THE MOST.

1 AND THAT SEEMS TO BE WHAT'S HAPPENING CONSTANTLY. I DON'T
2 WANT TO BE THAT PERSON WHO HAS TO STAND UP --

3 **THE COURT:** DON'T WORRY, I'M USED TO IT.

4 **MS. WILKINSON:** I KNOW YOU ARE. I KNOW, I AM TOO.
5 IT DOESN'T WORK VERY WELL. SO I'M SURE SOME PEOPLE DON'T EVEN
6 REALIZE THEY ARE DOING IT, BUT SOME OF US NOTICE IT HAPPENS
7 ALL THE TIME.

8 SO I WOULD APPRECIATE IF AT LEAST WHEN YOU TELL PEOPLE
9 THERE'S ENOUGH TIME, WE GET SOME TIME TO RESPOND. EVEN IF
10 IT'S JUST A MINUTE.

11 I THINK WE USE OUR TIME VERY CAREFULLY. WE DON'T GO ON
12 AND ON, BUT IT REALLY STARTS TO BE ANNOYING AND DOESN'T SEEM
13 TO MAKE THE RECORD, WHICH IS MUCH MORE IMPORTANT THAN HOW
14 ANNOYED I GET, WHEN WE HEAR GOING ON AND ON AND WE DON'T GET A
15 CHANCE TO RESPOND.

16 SO TO HIS ISSUE, THEY HAVE NO QUANTITATIVE ECONOMIC
17 ANALYSIS WHATSOEVER IN THIS CASE. NONE. DOCTOR -- PROFESSOR
18 NOLL KNOWS HOW TO DO A MODEL. HE DID A MODEL IN A CASE I HAD
19 AGAINST HIM WITH JUDGE SCHEINDLIN, AND SHE FOUND IT TO BE
20 UNRELIABLE AND SHE KICKED IT OUT AND A BILLION DOLLARS OF
21 DAMAGES.

22 THAT MAN AND MANY OF THEIR OTHER EXPERTS KNOW HOW TO DO
23 ECONOMIC MODELS TO GET YOU THE DATA THAT YOU WANTED. THEY
24 CHOSE NOT TO DO IT. SO YOU ARE NOT GOING TO HAVE ANY
25 QUANTITATIVE. YOU ARE GOING TO HAVE THEIR ANECDOTAL EVIDENCE

1 AND ALL THAT, BUT YOU ARE NOT GOING TO HAVE ANY QUANTITATIVE
2 EVIDENCE FROM THEM WHERE THEY'RE PAYING A PLAYER A MILLION
3 DOLLARS OR 25,000 WILL MAKE A DIFFERENCE. AND THEY ARE NOT
4 ANSWERING YOUR QUESTION.

5 BUT WHAT THEY ARE ASKING FOR BY LIFTING THOSE RULES IS
6 THERE WILL BE A MARKET SYSTEM, WHICH MEANS ONE PLAYER COULD
7 GET PAID ONE AMOUNT AND ANOTHER PLAYER COULD GET PAID ANOTHER.
8 AND THEY HAVE TO DATA TO SUPPORT WHAT THAT WOULD DO TO
9 CONSUMER DEMAND.

10 **THE COURT:** WELL, HE SAYS THAT THEY AREN'T DEMANDING
11 THAT AND THAT IT WOULDN'T -- THEY WOULDN'T ARGUE IT WAS AN
12 ANTITRUST VIOLATION IF THE AMOUNT WAS NOT CAPPED BUT WAS
13 REQUIRED TO BE THE SAME FOR EACH TEAM MEMBER.

14 AND I'M NOT REALLY SEEING HOW THAT WOULD BE AN ANTITRUST
15 VIOLATION, SO I'M THINKING MAYBE IT WOULDN'T BE. AND THAT
16 WOULD SOLVE ONE OF THE PROBLEMS YOU HAVE, WHICH IS, IT
17 WOULDN'T BE NICE TO PAY DIFFERENT PLAYERS DIFFERENT AMOUNTS.

18 **MS. WILKINSON:** I'M SORRY, I MISSED THAT. SO YOU
19 THINK IT MIGHT NOT BE AN ANTITRUST VIOLATION IF THEY PAID
20 EVERYONE THE SAME AMOUNT?

21 **THE COURT:** RIGHT.

22 **MS. WILKINSON:** WELL, ONE, I WOULD SAY YOU TRIED TO
23 DO THAT IN ONE WAY IN O'BANNON THE FIRST TIME, AND THE COURT
24 SAID NICE TRY, GOOD INTENT, BUT NO. AND I WOULD SAY THAT'S
25 THE SAME HERE.

1 BUT THE REASON THEY AREN'T ASKING YOU FOR THAT, YOUR
2 HONOR, IS THAT'S NOT REALLY WHAT THEY WANT. IF THEY WANTED
3 THAT, THEY COULD HAVE ASKED YOU. THEY HAVE THE BURDEN. THIS
4 IS THEIR CASE. THEY COULD HAVE PUT IN THAT INJUNCTION, WE
5 WANT YOU TO SAY THEY HAVE TO PAY THE SAME AMOUNT. THEY DIDN'T
6 DO THAT BECAUSE THEY WANT AN OPEN MARKET SYSTEM.

7 THAT'S WHAT THEY SAY. THEY WANT ALL THE RULES GONE THAT
8 RELATE TO COMPENSATION AND LIMIT THEM UNLESS IT'S ABOUT --
9 TETHERED TO EDUCATIONAL EXPENSES. AND THEY DON'T WANT YOU TO
10 PUT ANY LIMITS OR US TO PUT ANY LIMITS ON THAT COMPENSATION.
11 AND MY POINT IS, YOU WILL HAVE NO BASIS TO MAKE THAT, WHICH
12 WAS ONE OF THE CRITICISMS OF THE NINTH CIRCUIT TO YOUR RULING
13 IN THE FIRST PLACE THAT THERE WASN'T A SUFFICIENT BASIS FOR
14 THAT \$5,000.

15 AND WE WILL CERTAINLY MAKE THAT RESPECTFUL OBJECTION TO
16 YOU OVER AND OVER AGAIN IN THIS CASE IF YOU COME UP WITH A
17 NUMBER THAT THEY HAVEN'T PRESENTED, THEY HAVEN'T GIVEN YOU
18 QUANTITATIVE ANALYSIS TO SAY TO OUR PRODUCT YOU JUST NEED TO
19 CHANGE IT THIS WAY, WE DON'T REALLY KNOW WHAT'S GOING TO
20 HAPPEN, BUT, YOUR HONOR, WE THINK \$10,000 IS A NICE NUMBER, OR
21 \$50,000 IS A NICE NUMBER. THERE'S NOTHING IN THE RECORD TO
22 SUPPORT ANY OF THOSE NUMBERS, YOUR HONOR.

23 AND WHAT MR. PORET DIDN'T DO WAS ASK PEOPLE WHAT WOULD YOU
24 DO IF THESE PLAYERS WERE PAID IN A MARKET SYSTEM IF THEY WERE
25 PAID DIFFERENT, OR IF THEY WERE ALL PAID 5,000, 10,000, OR

1 \$20,000. THEY COULD HAVE DONE ANY OF THAT. THEY DIDN'T DO
2 IT.

3 **THE COURT:** OKAY. LET ME HAVE YOU ALL GET TOGETHER
4 WITH EACH OTHER AND TRY TO WORK OUT A SCHEDULE FOR WHEN YOU
5 ARE GOING TO DEAL WITH EXHIBITS, WHEN YOU'RE GOING TO DEAL
6 WITH DEPO EXCERPTS, AND ALL OF THAT. AND THEN WOULD YOU
7 SUBMIT IT TO ME AND LET ME LOOK AT IT AND SAY, OH, GOSH, I
8 DON'T COME BACK UNTIL THE NEXT DAY, OR PLEASE MAKE IT A LITTLE
9 EARLIER, WHATEVER.

10 I WOULD RATHER HAVE YOU DO SOMETHING THAT YOU FEEL COULD
11 WORK FOR YOU RATHER THAN ME MAKING IT UP. ALSO I DON'T WANT
12 TO WAIT AROUND.

13 **MS. WILKINSON:** MR. KESSLER AND I THINK OUR PEOPLE
14 HAVE DONE A VERY GOOD JOB OF WORKING IT OUT AND WE WON'T HAVE
15 ANY PROBLEM --

16 **MR. KESSLER:** WE HAVE NO TROUBLE GETTING ALONG AT
17 ALL, YOUR HONOR.

18 **THE COURT:** OKAY.

19 **MR. KESSLER:** YOUR HONOR, SHOULD WE INCLUDE IN THAT
20 LIST A PROPOSED SCHEDULE FOR EXCHANGING CLOSING BRIEFS AND
21 THEN SCHEDULING A TENTATIVE HEARING DATE WITH YOUR HONOR FOR
22 AFTER THE TRIAL?

23 I JUST WANT TO MAKE SURE EVERYTHING IS SET FORTH IN A WAY
24 YOUR HONOR FEELS IS APPROPRIATE.

25 **THE COURT:** YOU CAN TALK ABOUT THAT. IT MIGHT DEPEND

1 ON HOW THINGS GO. AND AT THAT POINT I DON'T HAVE ANY
2 DEADLINES SO I DON'T HAVE TO GET IT DONE BEFORE THE TRIAL
3 STARTS.

4 **MR. SIMON:** YOUR HONOR?

5 **THE COURT:** BUT I AM CONCERNED. ACTUALLY WE HAVE TWO
6 DAYS OF TRIAL THAT AREN'T SCHEDULED YET. DO YOU STILL HAVE
7 YOUR TRIAL SET ON OCTOBER --

8 **MS. WILKINSON:** OCTOBER 9TH, YES, YOUR HONOR.

9 **THE COURT:** OKAY.

10 **MS. WILKINSON:** BUT I HAVE A HEARING ON AUGUST 1ST,
11 AND IF JUDGE RAMOS CHANGES THE DATE, I WILL INFORM PLAINTIFFS
12 AND INFORM YOU BECAUSE I WOULD LOVE TO MOVE SOME OF THOSE DAYS
13 IN OCTOBER IF WE COULD.

14 **THE COURT:** WELL, WE'VE GOT EIGHT DAYS SET. FOUR
15 DAYS THE FIRST WEEK BECAUSE THERE'S A HOLIDAY AND FOUR DAYS
16 THE THIRD WEEK BECAUSE THERE'S A HOLIDAY. I SAID YOU COULD
17 HAVE TWO MORE DAYS IF YOU REALLY NEED THEM.

18 **MS. WILKINSON:** YOU DID NOTICE IN YOUR ORDER TWO
19 EXTRA DAYS THE FOLLOWING WEEK, WHICH, AGAIN, WOULD BE QUITE
20 DIFFICULT FOR ME WITH MY TRIAL. I THINK IF WE CAN WAIT UNTIL
21 AUGUST 1ST TO SEE IF THE JUDGE FOR THAT TRIAL DECIDES TO
22 ADJOURN IT. THERE'S SOME ISSUES PENDING IN THE SECOND CIRCUIT
23 THAT THE OTHER SIDE WANTS TO ADJOURN THE TRIAL. WE DON'T, BUT
24 THEY MAY PREVAIL.

25 **MR. SIMON:** CAN I ASK, YOUR HONOR -- BRUCE SIMON.

1 IN LIGHT OF YOUR GOING AWAY, EVEN THOUGH THERE IS A LOT OF
2 WORK TO BE DONE AND SOMETIMES WE HAVE DISAGREEMENTS, I THINK
3 IT WOULD BE HELPFUL TO HAVE A DATE THAT YOU GIVE US BY WHICH
4 WE NEED TO CUT DOWN EXHIBITS, DO ALL THE THINGS THAT YOU WANT
5 AS OPPOSED TO US JUST TALKING ABOUT WHEN THAT CAN BE DONE.
6 THAT WOULD BE, I THINK, PROPHYLACTICALLY HELP US GET TO WHERE
7 YOU NEED US TO BE.

8 **THE COURT:** WELL, I DON'T KNOW HOW LONG ANY OF THIS
9 TAKES. I HATE TO JUST MAKE UP STUFF. SO I WOULD RATHER YOU
10 PROPOSE IT. SEE IF YOU CAN WORK IT OUT. IF YOU HAVE TO
11 SUBMIT TWO SEPARATE COMPETING SCHEDULES, I COULD PICK ONE. IF
12 YOU CAN'T AGREE AT ALL, YOU CAN JUST -- EITHER TWO COMPETING
13 SCHEDULES OR SOMETHING FOR ME TO APPROVE. IF I LOOK AT IT AND
14 YOU SAY WE WILL HAVE ALL THIS IN AT MIDNIGHT THE NIGHT BEFORE
15 THE TRIAL, THEN I MIGHT SAY HOW ABOUT SOONER.

16 **MR. SIMON:** THANK YOU.

17 **THE COURT:** CERTAINLY A WEEK BEFORE THE TRIAL HAVE
18 EVERYTHING DONE WOULD BE PRETTY MUCH A BEAR MINIMUM. I DO
19 HAVE SOME STAFF, NOT A LOT, BUT I HAVE SOME STAFF WHO WILL BE
20 HERE EVEN AT THE TIMES THAT I'M NOT. SO IT DOESN'T ALL HAVE
21 TO COME AT THE SAME TIME. WE COULD HAVE ONE BATCH OF STUFF TO
22 WORK ON EARLIER AND ANOTHER BATCH TO WORK ON LATER.

23 **MR. SIMON:** I GUESS WHAT I'M SAYING IS, I THINK SINCE
24 I'M ONE OF THE GUYS IN THE TRENCHES AND BEEN ON THE CALLS,
25 THAT YOU MIGHT WANT IT MORE THAN A WEEK.

1 **THE COURT:** I WOULD LIKE IT TOMORROW.

2 **MR. SIMON:** AND SO I'M JUST SAYING WE WOULD LIKE TO
3 GET IT TO YOU SOONER AS OPPOSED TO LATER.

4 **THE COURT:** I WOULD DO, TOO, BUT I DON'T WANT TO BE
5 UNREASONABLE ABOUT IT. IT'S A LOT OF WORK. SEE WHAT YOU
6 THINK.

7 **MR. BERMAN:** ONE MORE POINT. ARE YOU TRYING TO -- IS
8 THIS IT, YOUR HONOR?

9 **THE COURT:** I'M TRYING TO LEAVE.

10 **MR. BERMAN:** WE HAD ONE VERY QUICK POINT ON TRIAL
11 PROCEDURE. AND IT MAY BE HELPFUL IN LIGHT OF YOUR HONOR'S
12 COMMENT ABOUT WHAT AM I GOING TO DO WITH ALL OF THESE
13 EXHIBITS.

14 SO THERE ARE LOTS OF EXHIBITS THAT MAY COME IN WITH NO
15 SPONSORING WITNESS. THEY'VE AGREED THERE DOESN'T HAVE TO BE A
16 SPONSORING WITNESS.

17 **THE COURT:** PERHAPS, ALTHOUGH I DON'T KNOW WHAT I'M
18 GOING DO WITH A DOCUMENT --

19 **MR. BERMAN:** HERE'S MY SUGGESTION.

20 **THE COURT:** -- WITH NO SPONSORING WITNESS. HOW AM I
21 GOING TO KNOW WHAT IT'S FOR?

22 **MR. BERMAN:** THAT'S WHERE I'M GOING. OKAY? I'VE
23 DONE THIS IN A COUPLE OF BENCH TRIALS.

24 WE HAD A DOCUMENT HOUR. WE WOULD PUT UP THE DOCUMENT ON
25 THE SCREEN AND EXPLAIN VERY BRIEFLY TO YOU WHY WE ARE

1 SUBMITTING IT AND WHY IT'S RELEVANT. I'VE DONE THAT IN THREE
2 BENCH TRIALS AND I THINK THE JUDGES LOVED IT. SO IF YOU'RE
3 OPEN TO THAT, MAYBE WE CAN WORK OUT HOW WE WOULD JOINTLY AGREE
4 TO THAT.

5 **MR. KESSLER:** WE CAN TAKE IT OUT OF OUR TIME. SO IF
6 WE HAVE 22 AND A HALF HOURS, IF WE WANT TO USE AN HOUR DOING
7 THAT, WE WILL USE AN HOUR FOR THE COURT'S BENEFIT. IF THEY
8 WANT TO USE TWO HOURS, THEY CAN USE TWO EACH. WE CAN EACH
9 DECIDE HOW TO, WITHOUT INCREASING THE LENGTH OF THE TRIAL,
10 JUST DECIDING HE HAS -- ALL WE WOULD DO, YOUR HONOR, IS JUST
11 WHAT YOU SAID. YOU DON'T HAVE TO READ THE WHOLE DOCUMENT.
12 HERE'S THE PART, HERE'S WHY IT'S IN, AND SO YOUR HONOR WILL
13 KNOW.

14 **MS. WILKINSON:** YOUR HONOR, I THINK WE SEE WHAT WILL
15 HAPPEN. WE'LL HAVE ARGUMENT AFTER ARGUMENT, NOT JUST TWO
16 MINUTES ON THE DOCUMENTS. WE DON'T WANT TO GIVE UP ANY OF OUR
17 TIME BECAUSE WE DON'T THINK WE HAVE ENOUGH TIME TO START WITH
18 BECAUSE OF WHAT WE HAVE TO PROVE.

19 SO I DON'T THINK THEY SHOULD BE PUTTING IN ALL KINDS OF
20 DOCUMENTS THAT THEY DON'T NEED AND THAT THEY HAVE TO EXPLAIN
21 TO YOU WHY THEY'RE RELEVANT. BUT IF YOU WANT TO ALLOW IT, AT
22 LEAST THEY SHOULD HAVE TO TAKE IT OUT OF THEIR TIME.

23 **THE COURT:** SO IT'S NOT SOMETHING YOU WOULD WANT TO
24 DO.

25 **MS. WILKINSON:** GENERALLY NO BECAUSE WE DON'T

1 THINK -- WE WOULD, BUT WE DON'T THINK WE HAVE ENOUGH TIME.

2 **THE COURT:** OKAY. BUT DO YOU HAVE DOCUMENTS THAT YOU
3 WANT TO PUT IN WITHOUT A SPONSORING WITNESS?

4 **MS. WILKINSON:** I'M SURE WE WILL --

5 (SIMULTANEOUS COLLOQUY)

6 **THE COURT:** -- THAT THEY ARE THERE FOR, AND YOU MIGHT
7 WHAT WANT A CHANCE TO EXPLAIN TO ME WHAT THEY'RE THERE FOR?

8 IT DOESN'T SOUND LIKE A BAD IDEA --

9 (SIMULTANEOUS COLLOQUY.)

10 **MS. WILKINSON:** I AM SURE WE WOULD HAVE SOME, BUT I
11 AM WORRIED ABOUT WE WILL JUST GET UP AND EXPLAIN FOR A FEW
12 MINUTES EVERY TIME THIS HAPPENS WE HAVE AN ARGUMENT. SO,
13 MEANING SOMEBODY ARGUES THEIR POINT.

14 **THE COURT:** OKAY. IF YOU CAN AGREE, IT'S FINE WITH
15 ME. IF YOU CAN'T, WE WON'T DO IT. HOWEVER, YOU WILL HAVE TO
16 COME UP WITH SOMETHING THAT WILL ALLOW ME TO KNOW WHAT TO DO
17 WITH AN EXHIBIT THAT DIDN'T HAVE A SPONSORING WITNESS TO
18 EXPLAIN TO ME WHAT I WAS SUPPOSED TO GET OUT OF IT.

19 **MS. WILKINSON:** I THINK WE COULD AGREE THAT WE WOULD
20 PUT TWO SENTENCES ON TOP OF THE DOCUMENT, PUT THE PAGE NUMBER
21 WHERE YOU SHOULD BE LOOKING, AND THEN WE COULD GIVE TO YOU.
22 WE DON'T NEED TO HAVE A BIG EXPLANATION BY EVERYBODY OFF THE
23 CUFF ARGUING IN FRONT OF YOU UNTIL SOMEONE INTERRUPTS THEM.

24 **THE COURT:** THEN THERE'S GOING TO BE THE OBJECTION TO
25 THE TWO SENTENCES.

1 **MS. WILKINSON:** WELL, NO, WE'D HAVE TO AGREE TO IT.

2 **MR. BERMAN:** I'M NOT TALKING ABOUT A LARGE ARGUMENT.
3 MOST OF THE GOOD DOCUMENTS FOR US ARE THEIR DOCUMENTS. WE
4 DON'T HAVE A SPONSORING WITNESS. WE WANT TO EXPLAIN BRIEFLY
5 TO YOU WHY THIS SHOULD BE USEFUL.

6 THEY DON'T HAVE THAT SAME ISSUE, RIGHT? EVEN IF THEY
7 DON'T AGREE TO IT, IF IT'S ON OUR TIME, WE WOULD RESPECTFULLY
8 ASK THAT WE BE ALLOWED TO DO THIS.

9 **THE COURT:** WELL, SEE IF YOU CAN AGREE ON SOME
10 PROCEDURE.

11 **MR. BERMAN:** OKAY. SECOND, REAL QUICK ISSUE?

12 **THE COURT:** YEAH.

13 **MR. BERMAN:** BECAUSE WE HAVE TO SET UP STUFF LIKE
14 SCREENS, DO YOU KNOW WHAT COURTROOM WE MIGHT BE IN?

15 **THE COURT:** CAN WE GO OFF THE RECORD?

16 **MR. BERMAN:** SURE.

17 **THE COURT:** POOR DIANE HAS BEEN GOING ON FOR TWO AND
18 A HALF HOURS HERE.

19 (DISCUSSION HELD OFF THE RECORD.)

20 (PROCEEDINGS ADJOURNED AT 5:05 P.M.)

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CERTIFICATE OF REPORTER

I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE
UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY
CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

A handwritten signature in cursive script, reading "Diane E. Skillman", is written over a horizontal line.

DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

TUESDAY, JULY 24, 2018