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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE CLAUDIA WILKEN

IN RE: NATIONAL COLLEGIATE)
ATHLETIC ASSOCIATION ATHLETIC) CASE NOS. 14-MD-02541 CW
GRANT-IN-AID CAP ANTITRUST) 14-CV-02758 CW
LITIGATION.)
) OAKLAND, CALIFORNIA
) TUESDAY, JANUARY 16, 2018
)
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TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND

RECORDING 2:31 P.M. - 4:04 P.M.

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1 FRIDAY, NOVEMBER 17, 2017

9:07 A.M.

2 (TRANSCRIBER'S NOTE: DUE AT TIMES TO COUNSELS' FAILURE TO
3 IDENTIFY THEMSELVES WHEN SPEAKING, CERTAIN SPEAKER
4 ATTRIBUTIONS ARE BASED ON EDUCATED GUESS.)

5 ---000---

6
7 **THE CLERK:** CALLING CIVIL MATTERS 14-2541 AND
8 14-2758, IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
9 GRANT-IN-AID CASES.

10 **THE COURT:** WHAT I'D LIKE IS TO ASK MY QUESTIONS
11 FIRST TO MAKE SURE I HAVE TIME TO GET THEM ANSWERED BEFORE YOU
12 GIVE ANY PREPARED PRESENTATIONS. AND MAYBE YOU'VE GOT SIX
13 DIFFERENT PEOPLE LINED UP TO ADDRESS SIX DIFFERENT SUBJECTS.
14 IDEALLY, I'D LIKE ONE PERSON SORT OF PRESIDE WHO I COULD SPEAK
15 WITH AT THE SAME TIME AS THE OTHER, BUT IF YOU NEED TWO OR
16 THREE, I GUESS YOU CAN HAVE TWO OR THREE UP AT THE PODIUM.

17 **MR. BERMAN:** WE HAVE TWO PEOPLE, YOUR HONOR.

18 **THE COURT:** OKAY. GOOD. WELL, COME UP TO THE PODIUM
19 AND STATE YOUR APPEARANCES THEN.

20 **MR. BERMAN:** STEVE BERMAN ON BEHALF OF THE
21 CONSOLIDATED PLAINTIFFS.

22 **MR. KESSLER:** AND JEFFREY KESSLER ON BEHALF OF THE
23 PLAINTIFFS, YOUR HONOR.

24 **THE COURT:** IT'S THIS MIC HERE, AND WE HAVE NO
25 REPORTER, SO IF YOU WANT SOMETHING ATTRIBUTED TO YOU, YOU'LL,

1 I'M AFRAID, HAVE TO SAY YOUR NAME WHEN YOU SPEAK. MR. MERRY
2 WILL TRY TO NOTATE WHO'S SPEAKING AT THE DIFFERENT LINES OF THE
3 RECORDING.

4 AND WHO'S SPEAKING FOR DEFENDANTS?

5 **MS. WILKINSON:** GOOD AFTERNOON, YOUR HONOR.

6 BETH WILKINSON ON BEHALF THE NCAA. BECAUSE WE HAVE
7 MULTIPLE PARTIES, WE DO HAVE MULTIPLE SPEAKERS. THAT WILL
8 DEPEND ON YOUR HONOR'S QUESTIONS, OF COURSE, WHETHER THEY ALL
9 NEED TO SPEAK. SO I WOULD ASK THAT THE OTHER THREE INTRODUCE
10 THEMSELVES.

11 **THE COURT:** WHEN THEY --

12 **MS. WILKINSON:** WHETHER YOU'LL NEED IT OR NOT, I
13 DON'T KNOW.

14 **THE COURT:** YEAH, WHEN THEY GET UP THEY CAN.

15 **MS. WILKINSON:** THANK YOU.

16 **THE COURT:** AND IF I COULD HAVE SOMEBODY UP AT THE
17 PODIUM NOW?

18 **MR. KESSLER:** YES, YOUR HONOR.

19 **MS. WILKINSON:** WOULD YOU LIKE ME TO STAND HERE WHILE
20 YOU'RE ASKING HIM QUESTIONS? EXCUSE ME.

21 **THE COURT:** I'LL ASK YOU SOME QUESTIONS, TOO.

22 **MS. WILKINSON:** AT THE SAME?

23 **THE COURT:** YEAH.

24 **MS. WILKINSON:** OKAY.

25 **THE COURT:** SO STARTING WITH THE CROSS MOTIONS FOR

1 SUMMARY JUDGMENT, AM I RIGHT THAT WE'RE AGREED THAT THIS COURT
2 PREVIOUSLY, AS WELL AS THE COURT OF APPEAL, HELD THAT THERE HAD
3 BEEN AN AGREEMENT AMONGST PARTICIPANTS IN THE RELEVANT MARKET
4 THAT RESTRAINED TRADE, AND HAD AN ANTI-COMPETITIVE AFFECT?

5 **MS. WILKINSON:** WE AGREE WITH THAT YOU, YOUR HONOR,
6 AND THE NINTH CIRCUIT FOUND THAT, YES.

7 **THE COURT:** OKAY. AND ARE YOU -- IS IT -- YOU DIDN'T
8 MOVE FOR SUMMARY JUDGMENT THAT THAT WASN'T THE CASE?

9 **MS. WILKINSON:** WE DID NOT.

10 **THE COURT:** NOR DID YOU EVEN REALLY OPPOSE
11 PLAINTIFF'S MOTION THAT THAT WAS THE CASE.

12 **MS. WILKINSON:** WELL, I'M NOT SURE THAT'S QUITE
13 RIGHT, YOUR HONOR. I THINK BECAUSE OUR POSITION IS THAT
14 O'BANNON GOVERNS ALL OF THE ISSUES THAT PLAINTIFFS ARE NOW
15 BRINGING IN FRONT OF YOU, NOW THAT THE RECORD EVIDENCE IS
16 CLOSED, THAT BECAUSE WE ALSO BELIEVE THAT THE PRO-COMPETITIVE
17 JUSTIFICATIONS WERE DECIDED BY YOU AND BY THE NINTH CIRCUIT,
18 THAT ALL OF THAT IS NOT ANYTHING THAT WE COULD CHALLENGE AT
19 THIS POINT.

20 **THE COURT:** OKAY. WELL --

21 **MS. WILKINSON:** NOR COULD PLAINTIFFS, OBVIOUSLY.

22 **THE COURT:** I'M TAKING IT STEP BY STEP BECAUSE
23 PLAINTIFFS HAVE AN ARGUMENT THAT THE PRO-COMPETITIVE
24 JUSTIFICATIONS AND THE LEAST RESTRICTIVE ALTERNATIVES CAN BE
25 CHALLENGED. WHETHER THEY'RE RIGHT OR THEY'RE WRONG, I'M NOT

1 PREPARED TO SAY AT THE MOMENT, BUT AT LEAST THEY ARGUE THAT.
2 BUT I DON'T UNDERSTAND YOU ALL TO ARGUE THAT THE FIRST THREE
3 POINTS ARE NOT PROVED.

4 **MS. WILKINSON:** I DON'T MEAN TO BE PRECISE, BUT I
5 THINK I SHOULD BE.

6 (SIMULTANEOUS COLLOQUY.)

7 **MS. WILKINSON:** WE AGREE THAT YOU HAVE FOUND THAT AND
8 THE NINTH CIRCUIT HAS FOUND THAT.

9 **THE COURT:** RIGHT. OKAY. AND THAT'S ABOUT AS BAD AS
10 IT CAN GET.

11 **MS. WILKINSON:** I MEAN WE'RE GOING TO LIVE AND DIE
12 WITH O'BANNON, WE'RE GOING TO ASK YOU, RIGHT, THAT O'BANNON
13 GOVERNS THIS WHOLE CASE, SO I THINK IT WOULD BE A LITTLE HARD
14 TO STAND UP HERE AND TELL YOU WE ARE ONLY GOING TO PICK THE
15 PARTS WE LIKE.

16 **THE COURT:** IT WOULDN'T BE THE FIRST TIME SOMEONE HAD
17 DONE SUCH A THING, BUT OKAY.

18 **MS. WILKINSON:** I THINK IT'S BETTER NOT TO DO THAT.

19 **THE COURT:** HOWEVER, REGARDLESS OF WHAT WE'LL GET
20 INTO ABOUT ISSUE PRECLUSION AND STARE DECISIS AND SO FORTH, AT
21 THE VERY LEAST WE AT LEAST HAVE TO NOTE THE FACT THAT WOMEN
22 BASKETBALL PLAYERS WEREN'T INVOLVED IN O'BANNON, SO WOULD YOU
23 AGREE AS WELL THAT THIS COURT'S AND THE NINTH CIRCUIT'S
24 FINDINGS WITH RESPECT TO THE AGREEMENT, THE MARKET, AND THE
25 ANTI-COMPETITIVE EFFECT WOULD APPLY EQUALLY TO WOMEN'S -- THE

1 WOMEN'S BASKETBALL CLASS?

2 **MS. WILKINSON:** WE DO FOR THIS PURPOSE, YOUR HONOR,
3 BECAUSE WE SAY THEY ARE SIMILARLY SITUATED FOR THE OTHER LEGAL
4 ISSUES. I THINK YOU WERE REFERENCING RES JUDICATA, COLLATERAL
5 ESTOPPEL, AND STARE DECISIS, THAT THEY WERE REPRESENTED, YOU
6 KNOW, BY THE PARTIES THAT REPRESENTED THE O'BANNON PLAINTIFFS,
7 THAT THEY WERE THE SAME ISSUES, AND THEY WERE SITUATED
8 SIMILARLY.

9 **THE COURT:** OKAY. SO I WAS GOING TO DO *DAUBERT* LAST,
10 BUT I CAN'T RESIST MENTIONING AT THIS POINT THEN THAT
11 DR. ELZINGA'S TESTIMONY ABOUT A DIFFERENT RELEVANT MARKET WOULD
12 NOT REALLY BE RELEVANT.

13 **MS. WILKINSON:** WELL, IT COULD BE. AND, LUCKILY,
14 MS. WALSH IS GOING TO ANSWER THOSE QUESTIONS, IF THAT'S OKAY
15 WITH YOUR HONOR, BECAUSE THAT IS SOMETHING SHE'S EXPERT IN, IF
16 THAT WOULD BE APPROPRIATE FOR THE COURT.

17 **THE COURT:** OKAY. WELL, WE'LL GET TO THAT LATER
18 THEN.

19 **MS. WILKINSON:** OKAY.

20 **THE COURT:** SO, IF WE TAKE WHAT COUNSEL HAS SAID
21 ABOUT THE FIRST -- I'M GOING TO CALL THEM THREE POINTS, THEN
22 THE NEXT POINT IS WHETHER THERE ARE PRO-COMPETITIVE
23 JUSTIFICATIONS.

24 **MR. KESSLER:** THAT'S RIGHT, YOUR HONOR.

25 **THE COURT:** AND, LIKEWISE, THIS COURT -- AND THE

1 NINTH CIRCUIT -- AND THE SUPREME COURT DIDN'T TAKE IT UP --
2 SAID THAT THERE WERE SOME. AND YOU WOULD LIKE TO CONTEST THAT
3 AT THIS POINT FOR VARIOUS REASONS.

4 **MR. KESSLER:** YES, YOUR HONOR.

5 **THE COURT:** ONE OF THE REASONS THAT YOU HAVE PUT
6 FORWARD IS THAT THE FACTS ARE DIFFERENT, AND PERHAPS THAT MIGHT
7 BE AN ARGUMENT IF THE FACTS -- IF THERE WERE CHANGED FACTS, NOT
8 JUST FACTS THAT WERE RECENTLY DISCOVERED --

9 **MR. KESSLER:** YES.

10 **THE COURT:** -- OR RECENTLY ADMITTED, BUT ACTUALLY
11 CHANGED FACTS THAT WERE IMPORTANT, NOT JUST ANY OLD FACT. AND
12 I WOULD NOTE THAT -- OR AT LEAST AN ARGUMENT COULD BE MADE THAT
13 THE NINTH CIRCUIT'S RULING CONTEMPLATED THAT PERHAPS THERE
14 WOULD BE OTHER RULES THAT WOULD COME ALONG IN THE FUTURE THAT
15 COULD BE OBJECTED TO, OR SO FORTH, CHANGES OF CIRCUMSTANCE, BUT
16 THAT IT WOULDN'T -- WOULD NOT BE A QUESTION OF EVERY TIME SOME
17 LITTLE CHANGE HAPPENS, WE ALL RUN BACK INTO COURT AND PLAY
18 WHACK-A-MOLE WITH IT.

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

20 **THE COURT:** SO WHAT -- I KNOW YOU POINT OUT VARIOUS
21 THINGS, BUT IT WASN'T REAL CLEAR TO ME WHICH OF THEM MIGHT BE
22 ACTUALLY NEW CHANGES OF FACT AND WHICH OF THEM MIGHT BE
23 IMPORTANT ENOUGH TO REALLY JUSTIFY A REVISITATION OF THE
24 MATTER.

25 **MR. KESSLER:** SO, YOUR HONOR --

1 **THE CLERK:** COUNSEL, PLEASE STATE YOUR NAME.

2 **MR. KESSLER:** -- I WOULD LIKE TO ADDRESS THAT.

3 JEFFREY KESSLER.

4 **THE CLERK:** OKAY.

5 **MR. KESSLER:** OKAY? THERE ARE THREE PLAUSIBLE
6 INTERPRETATIONS OF *O'BANNON* THAT YOUR HONOR WILL BE LOOKING AT.
7 THE FIRST ONE --

8 **THE COURT:** OF THE NINTH CIRCUIT'S OPINION?

9 **MR. KESSLER:** OF THE NINTH CIRCUIT'S DECISION, YES.

10 THE FIRST ONE IS REALLY WHERE YOU WERE ON THE 12(C)
11 MOTION, WHICH WAS THAT *O'BANNON* CONCLUDED ONLY THAT YOU COULD
12 NOT -- YOU COULD HAVE RULES THAT PROHIBITED CASH COMPENSATION
13 THAT WAS UNTETHERED TO EDUCATION, WHICH WOULD STILL ALLOW US TO
14 CHALLENGE, EVEN UNDER THE MOST NARROW READING OF *O'BANNON* --
15 I'M SORRY, YOUR HONOR.

16 **THE COURT:** YOU'RE GETTING INTO LEAST RESTRICTIVE
17 ALTERNATIVES, AND I'M BACK ON PRO-COMPETITIVE JUSTIFICATION.

18 **MR. KESSLER:** OKAY. I'M SORRY, YOUR HONOR.

19 **THE COURT:** IF YOU WANT TO CONCEDE THE
20 PRO-COMPETITIVE JUSTIFICATIONS AND MOVE TO LEAST RESTRICTIVE
21 ALTERNATIVES, THAT'S FINE.

22 **MR. KESSLER:** YEAH. WHAT I GUESS I WAS SAYING IS
23 THAT THE ISSUE AS TO WHAT DEGREE ARE YOU PRECLUDED FROM LOOKING
24 AT PRO-COMPETITIVE JUSTIFICATIONS ANEW, RIGHT? BECAUSE WE PUT
25 IN SIGNIFICANT EVIDENCE, AND THE ISSUE IS DOES *O'BANNON* DECIDE

1 THE ISSUE OF PRO-COMPETITIVE JUSTIFICATION, AND WHAT I WAS
2 SAYING IS THAT THE -- WHERE WE WERE AT 12 (C) WAS THAT YOU HAD
3 INDICATED YOU THOUGHT O'BANNON DECIDED THERE WAS
4 PRO-COMPETITIVE JUSTIFICATION, OKAY? THAT YOU COULD NOT
5 RESTRICT -- YOU COULD NOT RESTRICT THE PAYMENT OF CASH
6 COMPENSATION UNTETHERED TO EDUCATION.

7 AND WHY I WANTED TO GET BEYOND THAT -- AND THIS GOES
8 TO THE CHANGED FACTS, YOUR HONOR -- IS THAT THERE ARE TWO
9 REASONS AT LEAST WHY PRO-COMPETITIVE JUSTIFICATION IS A NEW
10 ISSUE IN THIS CASE FOR OTHER PARTS OF THE RESTRAINTS, NUMBER
11 ONE.

12 **THE COURT:** FOR OTHER PARTS OF WHAT?

13 **MR. KESSLER:** FOR OTHER RESTRAINTS -- FOR OTHER
14 RESTRAINTS IN THE CASE BEYOND THOSE THAT ARE EDUCATIONAL.
15 OKAY? SO THERE'S A NEW -- THERE'S A NEW -- LET ME TRY TO
16 ARTICULATE THIS -- ARTICULATE THIS BETTER. OKAY?

17 SINCE O'BANNON WE HAVE THE FOLLOWING NEW FACTS --
18 MAYBE THAT'S THE BEST WAY TO GET AT THIS, OKAY? AND THAT --

19 **THE COURT:** LET ME SAY AGAIN. IF YOU WANT TO TALK
20 ABOUT PRO-COMPETITIVE JUSTIFICATIONS, THOSE ARE AMATEURISM AND
21 INTEGRATION.

22 **MR. KESSLER:** YES.

23 **THE COURT:** PERIOD.

24 **MR. KESSLER:** YES.

25 **THE COURT:** WE DON'T EVEN GET YET TO TETHERED OR

1 MONEY OR ANYTHING --

2 **MR. KESSLER:** I UNDERSTAND, YOUR HONOR.

3 **THE COURT:** MY QUESTION IS: IS THERE A
4 PRO-COMPETITIVE ASSISTANCE WITH POPULARITY OF THE SPORT DUE TO
5 A PERCEPTION --

6 **MR. KESSLER:** OKAY.

7 **THE COURT:** -- OF AMATEURISM, AND/OR DO THE
8 CHALLENGED RESTRICTIONS FURTHER A PRO-COMPETITIVE GOAL, AS SUCH
9 IT BE, OF INTEGRATION OF ACADEMICS WITH THE LIVES OF THESE
10 ATHLETES?

11 **MR. KESSLER:** I UNDERSTAND THAT. SO THE MAJOR NEW
12 FACTS THAT GO DIRECTLY TO THAT ARE THE FOLLOWING:

13 AFTER THE O'BANNON RECORD CLOSED, ALL THE POWER FIVE
14 CONFERENCES, AND MANY OTHERS, ADOPTED FULL COST OF ATTENDANCE.
15 AS YOU KNOW, THAT DIDN'T EXIST. SO WE NOW HAVE A RECORD OF
16 WHAT HAPPENS WHEN YOU COMBINE PAYING FULL COST OF ATTENDANCE,
17 PLUS PROVIDING A WHOLE HISTORY OF NEW ADDITIONAL BENEFITS AND
18 THE ADMISSION BY THEIR 30(B)(6) WITNESSES THAT THAT HAS NOT
19 HURT --

20 **THE COURT:** RIGHT.

21 **MR. KESSLER:** -- CONSUMER DEMAND. THAT'S ALL NEW.

22 **THE COURT:** RIGHT. THE PROBLEM ONE MIGHT RAISE WITH
23 THAT ARGUMENT IS, GOSH, YOU'VE MADE US DO THIS, AND NOW YOU'RE
24 GOING TO SAY BECAUSE WE DID IT, WE LOSE THE NEXT CASE? I MEAN,
25 ONE COULD ARGUE THAT.

1 **MR. KESSLER:** WELL, YOUR HONOR, I'M JUST --

2 **THE COURT:** (INDISCERNIBLE.) BECAUSE --

3 (SIMULTANEOUS COLLOQUY.)

4 **MR. KESSLER:** -- WHAT THE PROPER SCOPE IS OF WHAT
5 THEY'RE ARGUING, WHICH IS EITHER SOME TYPE OF ISSUE PRECLUSION
6 OR STARE DECISIS OR RES JUDICATA. THE O'BANNON COURT ACTUALLY
7 EXPLAINED THIS VERY WELL IN ITS OPINION. I WAS STRUCK BY THIS
8 LAST NIGHT.

9 THE O'BANNON COURT WAS LOOKING AT HOW THE SEVENTH
10 CIRCUIT IN AGNEW INTERPRETED *BOARD OF REGENTS*, AND WHAT THE
11 O'BANNON COURT SAID IS THE FOLLOWING:

12 **THE COURT:** OKAY. LET'S NOT GET --

13 (SIMULTANEOUS COLLOQUY.)

14 **MR. KESSLER:** BUT THIS GOES DIRECTLY TO THIS POINT.

15 **THE COURT:** YOU SAID YOU HAD THREE THINGS THAT
16 WOULD --

17 **MR. KESSLER:** YES.

18 **THE COURT:** -- TELL ME WHY I COULD REOPEN THE
19 DECISION THAT AMATEURISM WAS A PRO-COMPETITIVE JUSTIFICATION --

20 **MR. KESSLER:** OKAY.

21 **THE COURT:** -- THAT WAS AIDED TO SOME DEGREE --

22 **MR. KESSLER:** OKAY.

23 **THE COURT:** -- BY THE CHALLENGED RESTRAINTS.

24 **MR. KESSLER:** OKAY.

25 **THE COURT:** NUMBER ONE, THEY STARTED GIVING COA, AND

1 THE SKY DIDN'T FALL. I SAID WHAT'S THE COUNTERARGUMENT THAT I
2 WOULD SEE FOR THAT. WHAT'S TWO AND THREE? JUST SAY WHAT THEY
3 ARE.

4 **MR. KESSLER:** THEY -- OKAY. IN ADDITION TO COA, THEY
5 HAVE ADOPTED A NEW SERIES OF RULES AND MODIFICATIONS FOR WHAT'S
6 CALLED "INCIDENTAL TO PARTICIPATION BENEFITS," WHICH
7 MR. LENNON, THEIR WITNESS, SAID IS A SEPARATE BUCKET. HE SAID
8 THERE'S TWO BUCKETS, A SEPARATE BUCKET.

9 **THE COURT:** RIGHT --

10 (SIMULTANEOUS COLLOQUY.)

11 **MR. KESSLER:** (INDISCERNIBLE.)

12 **THE COURT:** (INDISCERNIBLE) -- THOSE THINGS. AND,
13 I'M SORRY, I'M GOING TO HAVE TO INTERRUPT YOU, I'M REALLY UNDER
14 SOME TIME PRESSURE HERE --

15 **MR. KESSLER:** RIGHT.

16 **THE COURT:** -- AND I NEED TO GET TO MY QUESTIONS.

17 **MR. KESSLER:** RIGHT.

18 **THE COURT:** SO I APOLOGIZE --

19 **MR. KESSLER:** NO. I APOLOGIZE IF I'M NOT ANSWERING
20 YOUR QUESTION.

21 **THE COURT:** ALL RIGHT. SO IT WASN'T CLEAR TO ME THAT
22 THOSE NEW THINGS WERE NEW. WERE THOSE CHANGES THAT WERE MADE
23 AFTER O'BANNON CAME OUT?

24 **MR. KESSLER:** YES, YOUR HONOR. SO WE ATTACHED AN
25 APPENDIX TO OUR BRIEF THAT GOES THROUGH ALL THE NEW RULE

1 CHANGES ONE BY ONE. SO, FOR EXAMPLE, TO GIVE YOU -- TO GIVE
2 YOU ONE --

3 **THE COURT:** WHICH APPENDIX?

4 **MR. KESSLER:** OKAY.

5 **THE COURT:** TO WHICH BRIEF?

6 **MR. KESSLER:** OKAY. THIS, YOUR HONOR, IS -- GIVE ME
7 ONE SECOND, AND I WILL HAVE IT FOR YOU.

8 THIS IS APPENDIX C -- APPENDIX B, OKAY? AND, IN
9 FACT, I -- APPENDIX B, AND THIS WAS TO OUR MEMORANDUM IN
10 OPPOSITION TO THEIR BRIEF. OKAY? AND IT'S ENTITLED -- IT'S
11 ENTITLED, "NEW DEVELOPMENTS SINCE THE O'BANNON RECORD CLOSED."

12 AND IT GOES THROUGH HERE EACH OF THE ADDITIONAL
13 RULES, THE ADDITIONAL DEVELOPMENTS, THINGS THAT ALL HAPPENED.
14 SOMETIMES IT'S MODIFYING A RULE. SOMETIMES IT'S A BRAND NEW
15 RULE. AND MOST IMPORTANTLY, YOUR HONOR, NONE OF THESE RULES,
16 THESE PARTICIPATION RULES, WERE DETERMINED IN O'BANNON.

17 AND THIS IS IMPORTANT BECAUSE THE POINT I WAS MAKING,
18 WHAT THE O'BANNON COURT SAID IS THAT IT WOULD NOT INTERPRET
19 AGGRESSIVELY *BOARD OF REGENTS* TO TRY TO MAKE PRONOUNCEMENTS
20 ABOUT RULES THAT IT DID NOT TERM, WHETHER OR NOT THE RULES EVEN
21 EXISTED OR NOT. AND HERE WE HAVE A WHOLE GROUP OF RULES THAT
22 HAVE NEVER BEEN CONSIDERED, FRANKLY, BY THIS COURT, WERE NOT
23 RULED UPON, WERE NOT CONSIDERED BY THE O'BANNON COURT. LET ME
24 GIVE YOU AN EXAMPLE OF SOME OF THE RULES. SO --

25 **THE COURT:** WELL, GIVE ME A FEW THAT YOU THINK ARE SO

1 IMPORTANT THAT THEY WOULD COME WITHIN WHAT THE O'BANNON OPINION
2 DESCRIBED AS -- I'VE FORGOTTEN EXACTLY WHAT THEY SAID, BUT
3 SOMETHING LIKE, WE'RE NOT GOING TO LOOK AT EVERY LITTLE RULE
4 THAT COMES ALONG --

5 **MR. KESSLER:** RIGHT.

6 **THE COURT:** -- WE'LL LOOK IF IT MAKES A BIG
7 DIFFERENCE.

8 **MR. KESSLER:** RIGHT.

9 **THE COURT:** AND SOME OF THESE HAVE DATES ON THEM, BUT
10 SOME OF THEM SAY, LIKE, MODIFIED ON A CERTAIN DATE, OR
11 ANNOUNCED ON A CERTAIN DATE. AND I GUESS I'LL HAVE TO HEAR
12 FROM DEFENDANT.

13 **MR. KESSLER:** RIGHT.

14 **THE COURT:** AND WE MIGHT EVEN HAVE TO HAVE ANOTHER
15 ROUND OF BRIEFING, FRANKLY, TO KNOW EXACTLY WHEN THESE THINGS
16 REALLY HAPPENED, ARE THEY REALLY NEW --

17 **MR. KESSLER:** RIGHT.

18 **THE COURT:** -- AND ARE THEY REALLY IMPORTANT.

19 **MR. KESSLER:** RIGHT, SO HERE'S --

20 (SIMULTANEOUS COLLOQUY.)

21 **THE COURT:** -- YOUR TWO MOST IMPORTANT ONES THAT YOU
22 THINK REALLY CHANGE THE LANDSCAPE.

23 **MR. KESSLER:** SO HERE'S ONE. OKAY? THEY HAVE
24 DRASTICALLY ALLOWED AN INCREASE IN WHAT'S CALLED GIFT SUITE
25 PARTICIPATION AWARDS, SO THAT NOW THEY COULD LITERALLY GIVE

1 YOU --

2 **THE COURT:** OKAY. I KNOW --

3 **MR. KESSLER:** -- A SIX --

4 **THE COURT:** A 450 BEST BUY CARD AND ALL THAT. GO
5 AHEAD.

6 **MR. KESSLER:** RIGHT.

7 **THE COURT:** WHAT ELSE? WHAT'S THE OTHER ONE?

8 **MR. KESSLER:** OKAY. THAT'S ONE.

9 ANOTHER ONE IS THEY ALLOW AND LIMIT PROFESSIONAL
10 INSURANCE, SO IF YOU'RE GOING TO TURN PRO, THEY COULD PAY
11 \$50,000, FOR EXAMPLE, FOR AN INSURANCE POLICY FOR YOU TO TURN
12 PRO. OKAY? AND THEY TESTIFIED THIS IS NOT RELATED TO AN
13 EDUCATION EXPENSE. THEY TESTIFIED THAT THE RECEIPT OF THESE
14 GIFT SUITES IS NOT TIED TO OUR PRINCIPLE OF AMATEURISM.

15 PER DIEMS, THEY NOW GIVE CASH WHEN YOU GO ON THE
16 ROAD. OKAY? AND THE IMPORTANCE HERE, YOUR HONOR, IS ON EACH
17 OF THESE RULES, THE TESTIMONY IS IT'S NOT BASED ON AMATEURISM.
18 IT'S SOLELY BASED ON THE VOTE OF THE MAJORITY. IF THE MAJORITY
19 WANTS TO SAY 5,000, IT'S 5,000.

20 **THE COURT:** OKAY.

21 **MR. KESSLER:** IF IT'S 8,000, IT'S 8,000. AND NONE OF
22 THAT WAS CONSIDERED IN O'BANNON, AND IN FACT --

23 **THE COURT:** OKAY.

24 **MR. KESSLER:** IF O'BANNON KNEW --

25 **THE COURT:** YEAH, I KNOW.

1 **MR. KESSLER:** OKAY.

2 **THE COURT:** SO -- WELL, I'LL HEAR FROM THE OTHER SIDE
3 ABOUT THOSE ARGUMENTS, BUT LET ME JUST ASK YOU BEFORE I DO
4 THAT. WE'RE TALKING ABOUT BOTH STARE DECISIS AND I GUESS WE
5 WOULD SAY ISSUE PRECLUSION. DOES IT MATTER WHICH IT IS? IS
6 IT -- DOES IT --

7 **MR. KESSLER:** THERE ARE DIFFERENT REQUIREMENTS FOR
8 EACH, BUT I THINK THEY'RE BOTH DEFEATED FOR THE SAME REASON.
9 THE CASE THAT I THINK IS MOST IMPORTANT, YOUR HONOR, TO LOOK AT
10 IS *HAWKINS AMUSEMENTS*, WHICH IS A NINTH CIRCUIT CASE THAT WAS
11 DECIDED ON THIS.

12 *HAWKINS* WAS THE SAME DEFENDANTS ENGAGED IN THE SAME
13 CONSPIRACY, AND THEY WON THE FIRST TIME. THEN A SECOND CASE
14 WAS BROUGHT SAYING THE CONSPIRACY CONTINUED BUT HAD NEW
15 CONDUCT -- SOME NEW CONDUCT ADDED TO IT, AND THE NINTH CIRCUIT
16 SAID CLEARLY THAT THIS IS NOT BARRED. OKAY? IT'S NOT BARRED
17 UNDER RES JUDICATA. IT WOULDN'T BE BARRED UNDER COLLATERAL
18 ESTOPPEL. IT WASN'T BARRED BECAUSE THE NEW CONDUCT THAT
19 OCCURRED, EVEN THOUGH IT'S A CONTINUATION, CREATED A NEW CAUSE
20 OF ACTION THAT WASN'T THERE. THIS, YOUR HONOR, IS
21 890 FED.2D 181.

22 **THE COURT:** RIGHT. WHAT'S THE INDUSTRY?

23 **MR. KESSLER:** EXCUSE ME. IT IS *HAWKINS* --

24 **THE COURT:** WHAT'S THE INDUSTRY? WAS IT --

25 **MR. KESSLER:** OH, THE INDUSTRY WAS MOVIE -- MOVIE

1 THEATERS. IT'S VERSUS -- *HAWKINS AMUSEMENTS ENTERPRISES* WAS
2 THE PLAINTIFF. IT INVOLVED CONSPIRACY ALLEGEDLY INVOLVING THE
3 SHOWING OF MOVIES. AND IF YOU'LL LOOK, THEY SAY THERE'S NO
4 DOUBT THERE WAS PRECLUSION FOR THE OLD CONDUCT THAT WAS RULED
5 UPON, BUT THEY SAID FOR WHAT HAPPENED AFTERWARDS, TO CONTINUE
6 IT WAS NOT CONCLUSIVELY RULED UPON, AND THAT BECAUSE OF THAT,
7 THEY ALLEGE NEW ANTITRUST CONDUCT SUBSEQUENT TO THAT DATE. AND
8 AS THEY CITE THE AREEDA ANTITRUST TREATISE:

9 "IT CANNOT BE EMPHASIZED TOO
10 STRONGLY THAT THE CONTINUATION OF CONDUCT
11 UNDER ATTACK IN A PRIOR ANTITRUST SUIT IS
12 GENERALLY HELD TO GIVE RISE TO A NEW CAUSE OF
13 ACTION WHICH CAN BE CHALLENGED, EVEN IF IT'S
14 LOST, IF IT HAS NEW BEHAVIOR THAT IS
15 ASSOCIATED WITH IT -- "
16 WHICH IS WHY WE GET TO THESE FACTS TO DO THIS.
17 SO I THINK THE MOST EXTREME IS ISSUE PRECLUSION AND
18 RES JUDICATA. I DON'T THINK THAT THAT APPLIES VERSUS DIFFERENT
19 PARTIES, BECAUSE THEY'RE DIFFERENT CLAIMS VERSUS DIFFERENT
20 RULES. BUT UNDER BOTH RES JUDICATA AND STARE DECISIS, THE KEY
21 IS THAT THESE PARTICIPATION RULES, FOR EXAMPLE, WERE NEVER
22 RULED UPON BY *O'BANNON*, THEREFORE, THEY'RE OPENED.

23 **THE COURT:** DO YOU WANT TO ADDRESS --

24 **MS. WILKINSON:** I DO, YOUR HONOR.

25 **THE COURT:** WHAT I'M INTERESTED IN IS ARE THERE OR

1 ARE THERE NOT NEW FACTS, AND ARE THEY OR ARE THEY NOT
2 IMPORTANT, AND DOES --

3 **MS. WILKINSON:** THERE ARE ALMOST NEW FACTS, YOUR
4 HONOR, AND THERE ARE NONE THAT ARE MATERIAL, AS THE O'BANNON
5 OPINION ALLUDES TO IT AND AS YOU DESCRIBED.

6 SO WHAT PLAINTIFFS ARE TRYING TO DO IS EXACTLY WHAT I
7 THINK THE O'BANNON OPINION IN THE NINTH CIRCUIT SAID THEY
8 SHOULD NOT DO, AND AS YOU DESCRIBED IN THE 12/6 HEARING, THE
9 WHACK-A-MOLE, WHICH IS COMING IN WITH THESE SMALL BENEFITS OR
10 CHANGES, FIRST AND FOREMOST, I THINK BECAUSE THE COURT
11 RECOGNIZED THAT THE NCAA IS ALLOWED AMPLE LATITUDE TO MAKE SOME
12 OF THESE CHANGES.

13 SO IT DOESN'T MAKE ANY SENSE TO BRING THESE SMALL
14 CHANGES, SOME OF THE ONES THAT MR. KESSLER IS DISCUSSING, IN
15 FRONT OF THE COURT TO MAKE A BENEFIT BY BENEFIT, YOU KNOW,
16 ADJUSTMENT. THAT'S NOT WHAT THE ANTITRUST LAWS ARE FOR. BUT
17 LET'S START WITH YOUR SPECIFIC QUESTIONS IN RESPONSE TO WHAT
18 THE PLAINTIFF SAID.

19 HE SAID THAT THERE'S A NEW GIFT SUITE LIMIT, RIGHT?
20 YOUR HONOR KNOWS. YOU HEARD ABOUT THAT ALREADY. THAT IS ONE
21 OF THE BENEFITS INCIDENTAL TO PARTICIPATION. PLAINTIFFS SEEM
22 TO MAKE A BIG DEAL OUT OF THAT. THERE ARE TWO BUCKETS OF
23 COMPENSATION STUDENT ATHLETES CAN RECEIVE. THAT --

24 **THE COURT:** RIGHT. BUT IS THE SECOND BUCKET A NEW
25 BUCKET --

1 (SIMULTANEOUS COLLOQUY.)

2 **MS. WILKINSON:** IT'S NOT A NEW BUCKET AT ALL, YOUR
3 HONOR. IT WAS IN THE RECORD. IT'S BEEN IN THE RULEBOOKS
4 FOREVER. IT HAS CHANGED SOME OF THESE -- AS HE'S SAYING, THE
5 GIFT LIMIT, BUT THAT'S -- THAT IS ABOUT THE SMALLEST CHANGE YOU
6 COULD HAVE IN TERMS OF AMPLE LATITUDE --

7 **THE COURT:** THE GIFT LIMIT OR THE GIFT ALLOWABILITY
8 AT ALL? I MEAN, NOW YOU GET A 450 BEST BUY CARD, BEFORE YOU
9 GOT A 250, OR BEFORE YOU DIDN'T GET ONE AT ALL?

10 **MS. WILKINSON:** RIGHT. WELL, THE GIFT CARD, I THINK,
11 IS NEW, BUT LET'S GO BACK --

12 **THE COURT:** OR THE WATCH --

13 **MS. WILKINSON:** RIGHT.

14 **THE COURT:** -- OR THE SUNGLASSES OR THE WHATEVERS.

15 **MS. WILKINSON:** I MEAN, JUST YOUR BEING ABLE TO
16 RECITE ALL THESE DETAILS I THINK PROVES OUR POINT THAT YOU --

17 **THE COURT:** NO, NO, I GOT THEM FROM READING THE --

18 **MS. WILKINSON:** YOU HEARD ABOUT THAT.

19 **THE COURT:** NO, I DON'T REMEMBER THAT FROM O'BANNON.
20 I GOT THEM FROM READING THESE PAPERS.

21 **MS. WILKINSON:** WELL, LET'S TALK ABOUT WHAT YOU
22 QUOTED. I MEAN, YOU CITED EXHIBITS DESCRIBING GIFTS FOR
23 TOURNAMENT PARTICIPANTS IN YOUR OPINION AT PAGES 1147 THROUGH
24 -48. YOU CITED DR. STEROWSKI (PHONETIC), WHICH SHE WROTE A
25 WHOLE REPORT ABOUT THESE ISSUES, AND SHE OPINED THAT BASKETBALL

1 AND FOOTBALL PLAYERS RECEIVED AWARDS AND GIFTS UP TO \$6,280.
2 AND THAT REPORT WAS PRESENTED BY THE O'BANNON PLAINTIFFS.
3 PLAINTIFFS' EXPERT, DR. RASCHER WHICH IS -- HE'S ALSO AN EXPERT
4 IN THIS CASE -- TESTIFIED ABOUT GIFT CARDS STUDENT ATHLETES
5 COULD RECEIVE FOR PARTICIPATING IN FOOTBALL GAMES. THAT'S AT
6 TRANSCRIPT CITE 908/16, THROUGH 909 LINE 14.

7 **THE COURT:** OKAY. DO YOU THINK YOU WERE ABLE TO
8 BRIEF THIS ADEQUATELY? I MEAN, THEY'VE GOT THIS APPENDIX WITH
9 ALL THESE THINGS IN IT. WILL I, IF I GO BACK --

10 **MS. WILKINSON:** COULD YOU FIND EVERY ONE OF THOSE
11 CITES?

12 (SIMULTANEOUS COLLOQUY.)

13 **THE COURT:** -- WILL I FIND THEM ALL AND BE ABLE TO
14 DETERMINE WHEN THIS CHANGE HAPPENED?

15 **MS. WILKINSON:** I'M NOT SURE WE HAD THAT KIND OF
16 DETAIL BECAUSE WE WEREN'T SURE EXACTLY WHAT THEY WERE SAYING,
17 BUT THIS HANDY DANDY SUMMARY CHART I HAVE I WOULD LOVE TO HAND
18 UP TO THE COURT TO AT LEAST GIVE YOU THE CITES THAT WE WOULD
19 MAKE. WE WOULD BE HAPPY TO BRIEF IT --

20 **THE COURT:** WHAT I MAY END UP DOING, IF I THINK THAT
21 IT'S NECESSARY, IS HAVE IT BRIEFED SOME MORE, BECAUSE IT WAS
22 DIFFICULT TO COMPARE AN APPENDIX WITH A LIST OF THINGS THAT
23 WASN'T ALWAYS COMPLETE WITH A NOT APPENDIX, AND YOU ADDRESSING
24 SOME OF THEM, BUT I WAS AFRAID NOT ALL. I WASN'T ABLE TO
25 REALLY TOTALLY --

1 **MS. WILKINSON:** RIGHT. WE DON'T HAVE THIS KIND OF
2 DETAIL --

3 **THE COURT:** OKAY.

4 **MS. WILKINSON:** -- WHICH WE DID IN PREPARING FOR THE
5 ARGUMENT, AND WE WOULD LIKE TO BRIEF THAT, YOUR HONOR, SO WE
6 COULD SHOW YOU --

7 **THE COURT:** OKAY. BUT LET'S GO ON THEN TO THE ISSUE
8 OF THE DIFFERENCE BETWEEN RES JUDICATA AND STARE DECISIS,
9 WHETHER IT MATTERS, AND SORT OF THE LEGAL QUESTION THAT COUNSEL
10 ADDRESSED.

11 **MS. WILKINSON:** WELL, OUR MOST BASIC POINT -- AND,
12 AGAIN, MR. COOPER WAS PREPARED TO DISCUSS THIS WITH YOU IN
13 DETAIL -- IS THE ISSUE PRECLUSION OCCURS NO MATTER WHICH
14 DOCTRINE YOU PICK.

15 **THE COURT:** LET'S CALL IT RES JUDICATA.

16 **MS. WILKINSON:** OKAY. RES JUDICATA.

17 (SIMULTANEOUS COLLOQUY.)

18 **THE COURT:** -- RES JUDICATA AND CLAIM PRECLUSION
19 MIXED UP. RES JUDICATA AND --

20 (SIMULTANEOUS COLLOQUY.)

21 **MS. WILKINSON:** AND STARE DECISIS.

22 **THE COURT:** STARE DECISIS.

23 (SIMULTANEOUS COLLOQUY.)

24 **THE COURT:** DOES IT MATTER?

25 **MS. WILKINSON:** SO IT WOULDN'T MATTER WHICH DOCTRINE

1 YOU DECIDED UNDER -- THEY COULD NOT BRING THESE CLAIMS AGAIN;
2 THEY'VE ALREADY BEEN DECIDED NO MATTER WHICH DOCUMENT YOU LOOK
3 AT.

4 **THE COURT:** AND IT DOESN'T MATTER IN TERMS OF THE
5 TEST OF REOPENING OR ANYTHING ELSE? IT'S JUST ONE OR THE
6 OTHER?

7 **MS. WILKINSON:** I MEAN, THERE ARE DIFFERENT STEPS, AS
8 YOU'RE DISCUSSING, BUT IN THE END THEY STILL GET YOU TO THE
9 SAME RESULT, WHICH IS THAT THEY CAN'T BE DECIDED AGAIN.

10 **THE COURT:** OKAY. SO WE HAVE TO DECIDE WHETHER WE
11 CAN LOOK BACK AT ALL ON THE ISSUE OF AMATEURISM AND
12 INTEGRATION. I'M A LITTLE WORRIED ABOUT INTEGRATION NOW THAT
13 I'VE SEEN SOME OF THE BRIEFING IN THIS MATTER, WHETHER THE
14 INTEGRATION RATIONALE IS A GOOD ONE.

15 I NOTE THAT YOU DIDN'T DEFEND IT IN THE NINTH
16 CIRCUIT, AND THE NINTH CIRCUIT SORT OF SAID, WELL, THEY DIDN'T
17 DEFEND IT, BUT THE JUDGE SAID THERE WAS SOME, SO WE'LL GO WITH
18 IT, WHICH I WONDERED ABOUT.

19 DO YOU STILL WANT TO HANG YOUR HAT ON THAT?

20 **MS. WILKINSON:** WE DO, YES, WE DO.

21 **THE COURT:** OR CAN WE --

22 (SIMULTANEOUS COLLOQUY.)

23 **MS. WILKINSON:** -- ON BOTH OF THOSE PRO-COMPETITIVE
24 JUSTIFICATIONS BECAUSE THERE WAS EVIDENCE, YOU MADE YOUR
25 FINDING -- YOUR FINDINGS. YOU HAD OTHERS THAT YOU DID NOT

1 AGREE WITH, AND THE NINTH CIRCUIT RELIED ON YOU AS THE FACT
2 FINDER.

3 SO WE CERTAINLY THINK AS A MATTER OF LAW YOU MADE
4 THOSE FINDINGS, AND TO REOPEN THEM JUST BECAUSE, YOU KNOW,
5 PLAINTIFFS SAY THEY THINK THEY'RE NOT AS GOOD OF A
6 JUSTIFICATION ANY MORE, YOU STARTED WITH THE RIGHT ISSUE, WHICH
7 IS WHAT ARE THE MATERIAL NEW FACTS? OTHERWISE WE WILL BE BACK
8 HERE EVERY TIME THE NCAA CHANGES ANY RULES OR MODIFIES THE
9 RULES.

10 AND ALL THE THINGS THIS COUNSEL'S TALKING ABOUT,
11 THEY'RE NOT LIMITATIONS, YOUR HONOR. THE INTERESTING THING
12 ABOUT WHAT THEY'RE SAYING, THEY ARE NAMING THINGS OF WHERE
13 WE'RE PROVIDING MORE BENEFITS. SO LIKE THE HIGHER GIFT
14 LIMITS --

15 **THE COURT:** WELL, I NOTICED THAT, TOO. BUT THE
16 DIFFERENCE -- THE RELEVANCE OF IT IS I THINK IS THEIR ARGUMENT
17 THAT IF THEY ARE GIVING MORE MONEY AND THE SKY DIDN'T FALL,
18 THAT PROVES THAT YOU WERE WRONG AND AMATEURISM WASN'T REALLY
19 THAT IMPORTANT TO THE MARKET BECAUSE THE MARKET WENT
20 GANGBUSTERS EVEN WITH HIGHER GIFTS, AND SO ON.

21 AND ONE MIGHT ALSO USE IT TO SAY, WELL, BY ANALOGY,
22 IF YOU THINK A \$450 BEST BUY CARD ISN'T A VIOLATION OF
23 AMATEURISM, THEN PERHAPS A \$450 TUTOR ISN'T A VIOLATION OF
24 AMATEURISM EITHER, SO --

25 **MR. KESSLER:** YOUR HONOR, I THINK YOUR HONOR HAS YOUR

1 FINGER EXACTLY ON THE ISSUE AND THAT THE NEW EVIDENCE IS NOT
2 JUST THAT NOW YOU CAN GIVE \$5,000 IN GIFT SUITE, IT'S THEIR
3 ADMISSION THAT THE FACTS SHOW DEMAND FOR THE SPORTS HAVE GONE
4 UP IN ATTENDANCE AND REVENUES DESPITE THOSE HIGHER PAYMENTS.
5 SO IT'S THE COMBINATION THAT WASN'T AVAILABLE AT ALL TO YOUR
6 HONOR IN THE DISTRICT COURT OR TO THE NINTH CIRCUIT IN
7 O'BANNON.

8 **THE COURT:** RIGHT, BUT I STILL THINK IT WOULD NEED TO
9 BE A MEANINGFUL CHANGE AND NOT A --

10 **MR. KESSLER:** NO PRESSURE, BUT WE KNOW THIS IS
11 MEANINGFUL --

12 **THE COURT:** LET ME JUST FINISH WITH COUNSEL.

13 **MR. KESSLER:** I'M SORRY, YOUR HONOR.

14 **THE COURT:** AND I'LL GET BACK TO YOU SHORTLY.

15 MY CONCERN WITH INTEGRATION IS IN READING SOME OF THE
16 CASES THAT THE PLAINTIFF CITED PERHAPS ON SOME OTHER POINT,
17 THAT THESE PRO-COMPETITIVE JUSTIFICATIONS ARE MEANT TO BE
18 ECONOMIC JUSTIFICATIONS, COMPETITION JUSTIFICATIONS, NOT FEEL
19 GOOD, WOULDN'T THAT BE NICE, WARM AND FUZZY KIND OF
20 JUSTIFICATIONS --

21 **MS. WILKINSON:** BUT THE NINTH CIRCUIT ADDRESSED THAT,
22 YOUR HONOR.

23 **THE COURT:** SO I'M WONDERING IF YOU REALLY WANTED TO
24 PURSUE THIS INTEGRATION THEORY OR IF IT REALLY WAS MORE OF A --
25 (SIMULTANEOUS COLLOQUY.)

1 **MS. WILKINSON:** NO, WE THINK IT IS A JUSTIFIED --

2 **THE COURT:** SAY WHY.

3 **MS. WILKINSON:** WHY?

4 **THE COURT:** WHY IS IT AN ECONOMIC -- AN ECONOMIC
5 COMPETITION-RELATED KIND OF JUSTIFICATION AS OPPOSED TO A FEEL
6 KIND OF JUSTIFICATION.

7 **MS. WILKINSON:** WELL --

8 **THE COURT:** SOCIAL GOOD KIND OF JUSTIFICATION.

9 **MS. WILKINSON:** I MEAN, THE CENTRAL TENET OF OUR
10 STUDENT ATHLETES IN COLLEGE SPORTS IS THAT THESE ARE STUDENTS
11 WHO PLAY COLLEGE SPORTS AND THEY ARE PART OF THE COMMUNITY, AND
12 PART OF WHAT MAKES THE PRODUCT ATTRACTIVE TO PEOPLE IS THEY ARE
13 PART OF THE COMMUNITY. THEY BELIEVE THEY ARE STUDENTS THAT ARE
14 STILL PLAYING, AND THEY ARE STILL STUDENTS -- AND THEY'RE PART
15 OF THAT COMMUNITY. THAT MEANS THE OTHER STUDENTS FEEL LIKE
16 THEY'RE PART OF IT. THEY'RE GETTING THE EDUCATIONAL BENEFITS.
17 IT'S THE REASON WHY WE HAVE LIMITATIONS.

18 PLAINTIFFS CAN TAKE THAT ON, AND THEY DID THAT IN
19 FRONT OF YOU IN THE PRIOR CASE, BUT THAT'S WHY THERE'S
20 LIMITATIONS ON THE TIME THEY CAN SPEND ON SPORTS.

21 SO IT'S ALL PART OF WHAT MAKES IT IMPORTANT FOR THESE
22 ATHLETES TO BE STUDENTS. AND IF THEY'RE NOT INTEGRATED INTO
23 THE COMMUNITY AND NOT BENEFITING FROM THE EDUCATIONAL
24 OPPORTUNITIES, THEN THEY ARE JUST PROFESSIONAL ATHLETES. SO IT
25 HAS TO BE PART OF WHAT IS --

1 **THE COURT:** OKAY. I SEE WHAT YOU'RE SAYING.

2 **MS. WILKINSON:** -- WHAT THE PRODUCT IS AND WHAT'S
3 ATTRACTIVE.

4 **THE COURT:** I'M GOING TO MOVE ON TO ANOTHER POINT
5 WHILE I'M WITH COUNSEL HERE, AND THEN I'LL COME BACK TO YOU FOR
6 THE NEW POINT, WHICH IS, ASSUMING WE EITHER DO OR DON'T GO
7 BEYOND THE AMATEURISM AND INTEGRATION PRO-COMPETITIVE
8 JUSTIFICATIONS, EITHER WAY WE WOULD NEED TO -- UNLESS WE FOUND
9 IT WAS TOTALLY GONE, BUT PROBABLY WE WOULD NEED TO MOVE ON TO
10 LESS RESTRICTIVE ALTERNATIVES, AND THIS COURT HAD FOUND TWO
11 LESS RESTRICTIVE ALTERNATIVES. NINTH CIRCUIT AGREED WITH ONE
12 BUT NOT THE OTHER AND ADDRESSED IT IN CERTAIN WAYS, MOST
13 UNDERSTANDABLY THE PHRASE, "PAYMENTS UNTETHERED TO EDUCATION."

14 SO THE PLAINTIFFS NOW COME UP WITH A NUMBER OF OTHER
15 ARGUABLE LESS RESTRICTIVE ALTERNATIVES THAT EITHER WEREN'T
16 CONSIDERED OR AT LEAST WEREN'T ADOPTED PREVIOUSLY AND HAD
17 ANOTHER APPENDIX PROPOSING ALL OF THOSE, AND MY QUESTION TO YOU
18 IS: DO YOU FEEL LIKE YOU BRIEFED THOSE ADEQUATELY, WHAT DO YOU
19 THINK ABOUT ALL OF THOSE AS POTENTIAL --

20 **MS. WILKINSON:** UNLESS YOU'RE ALREADY CONVINCED --

21 **THE COURT:** (INDISCERNIBLE.)

22 (SIMULTANEOUS COLLOQUY.)

23 **MS. WILKINSON:** -- I DON'T THINK WE BRIEFED THEM
24 ADEQUATELY, SO I COULD SAY WE WOULD ALWAYS WANT MORE BRIEFING,
25 UNLESS YOU TELL ME YOU'RE ALREADY CONVINCED BUT --

1 **THE COURT:** WELL, YOU COULD JUST SAY GO BACK AND READ
2 PAGES 19 THROUGH 20, YOU MISSED IT.

3 **MS. WILKINSON:** WELL, I THINK PART OF THE PROBLEM IS
4 THERE IS EVIDENCE -- THERE IS ARGUMENT AND THERE IS EVIDENCE,
5 BUT THE PLAINTIFFS WERE NOT CLEAR ON WHAT THEIR LESSER
6 RESTRICTIVE ALTERNATIVE WAS. THEY ARE ASKING YOU TO LIFT 80 --

7 **THE COURT:** WELL, THAT'S A DIFFERENT QUESTION.

8 **MS. WILKINSON:** SO WHAT IS THE LESS RESTRICTABLE --

9 **THE COURT:** THAT'S THE WHACK-A-MOLE QUESTION.

10 **MS. WILKINSON:** RIGHT.

11 -- ALTERNATIVE IF THEY'RE SAYING WE'RE GOING TO LIFT
12 ALL THESE, AND WE DON'T HAVE TO WORRY ABOUT WHAT HAPPENS,
13 EVERYBODY WILL EITHER DECIDE AT A CONFERENCE LEVEL TO HAVE THE
14 RULES BE THE EXACT SAME -- BUT THEY HAVE NO IDEA AND THEY HAVE
15 PRESENTED NO EVIDENCE TO YOU OR US IN THE RECORD.

16 **THE COURT:** OKAY, OKAY, OKAY.

17 **MS. WILKINSON:** SO THAT'S WHY YOU DON'T HAVE AS MUCH
18 DETAIL.

19 **THE COURT:** WELL, THERE'S TWO WAYS IT COULD GO. ONE
20 WOULD BE TO SAY PLAINTIFFS HAVE PROPOSED CERTAIN POSSIBILITIES
21 AND YOU COULD TELL ME WHY SOME OR ALL OF THEM ARE --

22 **MS. WILKINSON:** WHICH I COULD DO.

23 **THE COURT:** -- AND THE COURT COULD THEN TRY AGAIN TO
24 COME UP WITH ONE OR MORE THAT WAS NOT BARRED BY THE NINTH
25 CIRCUIT'S OPINION, TO WIT, WAS NOT A CASH PAYMENT UNTETHERED TO

1 EDUCATIONAL EXPENSES.

2 AND THE OTHER POSSIBILITY IS ONE THAT PLAINTIFFS WERE
3 PROPOSING -- AND MAYBE STILL ARE; I'M NOT TOO SURE -- WHICH IS
4 TO SAY DON'T TRY TO PICK THE LESS RESTRICTIVE ALTERNATIVES,
5 DON'T TELL US WHAT WE CAN DO, JUST SAY YOU CAN'T DO WHAT YOU'RE
6 DOING NOW, TRY AGAIN.

7 **MS. WILKINSON:** WHICH SEEMS PRETTY FUNDAMENTALLY --

8 **THE COURT:** WHICH IS WHY I CALL IT THE WHACK-A-MOLE
9 PROBLEM, BUT IT'S CERTAINLY NOT --

10 **MS. WILKINSON:** WELL, IT'S TO THE BASIC ANTITRUST
11 ANALYSIS THAT YOU WENT THROUGH AND THE NINTH CIRCUIT WENT
12 THROUGH.

13 **THE COURT:** WELL, THAT'S WHAT I --

14 (SIMULTANEOUS COLLOQUY.)

15 **MS. WILKINSON:** -- AFTER WE PROVE PRO-COMPETITIVE
16 JUSTIFICATIONS.

17 THE COURT HAS BEEN CLEAR THEY HAVE TO PRESENT
18 EVIDENCE ON WHAT THE LESSER INCLUSIVE ALTERNATIVE IS.

19 **THE COURT:** YES.

20 **MS. WILKINSON:** NOT JUST GET RID OF THE RULES, WE
21 DON'T LIKE THEM, THEY'RE ANTI-COMPETITIVE.

22 **THE COURT:** THEY WOULD HAVE TO SHOW THAT THERE COULD
23 BE SOME, BUT IT'S NOT NECESSARILY THE CASE THAT THE COURT HAS
24 TO ORDER THEM. THE COURT COULD HAVE SIMPLY --

25 **MR. KESSLER:** RIGHT.

1 **THE COURT:** -- SAID THERE ARE LESS RESTRICTIVE
2 ALTERNATIVES, HERE'S SOME POSSIBILITIES, YOU CAN DO THESE, OR
3 YOU CAN COME UP WITH YOUR OWN LESS RESTRICTIVE ALTERNATIVES,
4 JUST DON'T VIOLATE THE ANTITRUST LAWS. THAT'S --

5 **MS. WILKINSON:** BUT, YOUR HONOR --

6 **THE COURT:** -- THE LEAST ANALYTICALLY POSSIBLE
7 OUTCOME THAT COULD HAVE COME OUT, NOT THE ONE THAT I CHOSE AT
8 THE TIME, BUT ONE THAT CONCEIVABLY I COULD CHOOSE NOW.

9 **MS. WILKINSON:** I DON'T THINK YOU COULD CHOOSE
10 THAT --

11 **THE COURT:** WHY?

12 **MS. WILKINSON:** -- AND YOUR OPINION LAST TIME WENT
13 OUT OF ITS WAY TO SAY SPECIFICALLY WHAT THE NCAA COULD DO AND
14 COULD NOT DO, BECAUSE YOU REALIZED OTHERWISE ALL THOSE
15 QUESTIONS WOULD HAVE ARISEN EVEN FROM THE TWO --

16 **THE COURT:** THAT'S WHAT I DID.

17 **MS. WILKINSON:** -- LESSER RESTRICTIVE ALTERNATIVES --
18 (SIMULTANEOUS COLLOQUY.)

19 **THE COURT:** I'M SAYING IT'S NOT CLEAR TO ME THAT
20 THAT'S WHAT I HAD TO DO, NOR IS IT CLEAR TO ME THAT'S WHAT I
21 WOULD HAVE TO DO NOW.

22 **MS. WILKINSON:** WELL, IF YOU LOOK AT THE EVIDENTIARY
23 REQUIREMENTS, THEY DO HAVE TO PROVE THAT IT'S SUBSTANTIALLY
24 LESS RESTRICTIVE, RIGHT? AND THAT IT'S -- VIRTUALLY ACHIEVES
25 THE SAME GOALS, AND THAT IT DOESN'T INCREASE THE COSTS.

1 HOW IN THE WORLD COULD YOU MAKE THOSE FINDINGS AS A
2 FACT FINDER IF THEY DON'T PRESENT EVIDENCE TO YOU ON THAT?
3 THEY HAVE NOT PUT ANY EVIDENCE AS TO THAT INTO THE RECORD. SO
4 THEY CAN'T NOW GO BACK AND SAY WE WANT TO EITHER REOPEN THE
5 RECORD OR, EVEN EASIER FOR YOU, JUST SAY LIFT THE RULES AND SEE
6 WHAT HAPPENS.

7 THOSE REQUIREMENTS ARE IN THE LAW. YOU CITE THEM IN
8 YOUR OWN OPINION, YOUR HONOR, AND SO DOES THE NINTH CIRCUIT.
9 BUT YOU -- I JUST REREAD YOUR OPINION. YOU CITE THOSE THREE
10 THINGS. IT HAS TO BE SUBSTANTIALLY LESS RESTRICTIVE. IT HAS
11 TO BE -- VIRTUALLY ACHIEVE THE SAME OUTCOME, AND IT HAS TO --
12 IT CAN'T INCREASE THE COSTS.

13 AND THEY DON'T HAVE THE EVIDENCE TO DO THAT, YOUR
14 HONOR. THE THINGS THEY EVEN CLAIM ARE LESS RESTRICTIVE
15 ALTERNATIVES, I THINK, ARE YOU SHOULD ALLOW ANYTHING THAT'S
16 ABOVE THE COST OF ATTENDANCE AS LONG AS THEY CALL IT TETHERED
17 TO EDUCATION, BUT, AS YOU KNOW, IT'S TETHERED TO EDUCATIONAL
18 EXPENSES, WHICH IS DIFFERENT. SO THEY MIGHT WANT TO SUGGEST
19 THAT WE PERMIT THE SCHOOLS TO PAY A GRADUATION BONUS OR -- OR
20 A -- YOU KNOW, YOU MAINTAIN YOUR GPA. THAT'S NOT AN EXPENSE OF
21 A STUDENT.

22 **THE COURT:** IS THAT WHAT THE PHRASE IS?

23 **MS. WILKINSON:** YES. IN YOUR OPINION AND IN THE
24 COURT'S OPINION WHEN THEY TALK ABOUT, YOU KNOW, THE QUANTUM
25 LEAP, THE DIFFERENCE -- LET'S SEE. QUANTUM LEAP ON PAGE 1078

1 OF THE O'BANNON NINTH CIRCUIT OPINION, THEY SAY:

2 "THE DIFFERENCE BETWEEN OFFERING
3 STUDENT ATHLETES EDUCATION-RELATED
4 COMPENSATION AND OFFERING THEM CASH SUMS
5 UNTETHERED TO EDUCATIONAL EXPENSES IS NOT
6 MINOR. IT'S A QUANTUM LEAP."

7 SO IT'S EXPENSES, WHICH IS WHY COST OF ATTENDANCE WAS
8 CONSIDERED PERMISSIBLE, I THINK BY YOU AND BY THE NINTH
9 CIRCUIT, BECAUSE THOSE ARE COSTS THAT A STUDENT INCURS BY GOING
10 TO SCHOOL, AND THAT PUTS THEM IN A SIMILAR SITUATION, A STUDENT
11 ATHLETE TO ANOTHER STUDENT.

12 IF YOU START PAYING PEOPLE FOR THINGS ABOVE COST OF
13 ATTENDANCE THAT YOU JUST SAY ARE RELATED TO EDUCATION
14 GENERALLY, IN THEORY I GUESS PLAINTIFFS WOULD SAY, WELL, YOU
15 COULD PAY SOMEONE TO KEEP THEIR GPA UP. YOU WOULD NOT DO THAT
16 FOR ANOTHER STUDENT. THAT'S NOT AN EXPENSE OF GOING TO SCHOOL.
17 THAT WOULD BE A REWARD OR SOME KIND OF --

18 **THE COURT:** WHAT ABOUT A COMPUTER, A MUSICAL
19 INSTRUMENT?

20 **MS. WILKINSON:** THAT'S PAID FOR.

21 **THE COURT:** TUTORING.

22 **MS. WILKINSON:** THOSE THINGS COME UNDER OR CAN BE
23 USED UNDER THE COST OF ATTENDANCE. WHEN THE MONEY IS GIVEN TO
24 THE STUDENT, THEY CAN USE THAT MONEY FOR A COMPUTER AS A COST
25 OF ATTENDANCE. MOST KIDS NEED A COMPUTER WHEN THEY GO TO

1 COLLEGE. IT'S ALLOWED. THEY'RE ALLOWED TO GO BUY A COMPUTER.

2 **THE COURT:** BUT SOME OF THEIR PROPOSALS WAS, IN
3 ADDITION TO THE COST OF ATTENDANCE, WAS TO ALLOW PAYMENT FOR --
4 THE ONES THAT ARE COMING TO MIND ARE MUSICAL INSTRUMENT, A
5 COMPUTER, TUTORING.

6 **MS. WILKINSON:** WELL, THEY GET TUTORING UNDER THE
7 OTHER BUCKET, THE BENEFITS INCIDENTAL TO PARTICIPATION, BECAUSE
8 THAT'S SOMETHING THEY NEED AS STUDENT ATHLETES. SO THERE'S
9 THOSE TWO BUCKETS. ONE IS DIRECTLY RELATED TO EDUCATION. THE
10 OTHER IS INCIDENTAL TO PARTICIPATION. BUT IT IS CABINED OR
11 LIMITED SO THAT IT DOESN'T UNDERMINE AMATEURISM. SO YOU CAN'T
12 HAVE UNLIMITED PAYMENTS ON THOSE BENEFITS INCIDENTAL. LIKE,
13 YOU CAN'T HAVE A, YOU KNOW, \$500,000 GIFT SUITE BECAUSE THE
14 NCAA BELIEVES THAT WOULD BE A WAY OF SCHOOLS UNDERMINING THE
15 LIMIT TO NOT COMPENSATING PLAYERS FOR PAY, BUT THOSE BENEFITS
16 INCIDENTAL TO PARTICIPATION INCLUDE MOST OF THE THINGS THAT
17 YOU'VE TALKED ABOUT.

18 THEY'RE EITHER ALLOWED TO GET THEM UNDER THE STUDENT
19 ASSISTANCE FUND, OR THEY'RE ALLOWED TO GET THEM WITH THE MONEY
20 THEY GET FOR COST OF ATTENDANCE, OR THEY CAN GET THEM AS A MORE
21 SPECIFIC BENEFIT INCIDENTAL TO PARTICIPATION. THOSE HAVE CAPS
22 ON THEM BECAUSE THEY CANNOT BE USED, AGAIN, AS AN END RUN TO
23 GET AROUND PAY FOR PLAY

24 **THE COURT:** OKAY. MAYBE I'LL NEED TO HAVE YOU GO
25 THROUGH EACH AND EVERY ONE OF THEM AND EXPLAIN --

1 **MS. WILKINSON:** SURE.

2 **THE COURT:** -- WHY THEY AREN'T -- WHY THEY DON'T
3 QUALIFY.

4 IF YOU'D LIKE TO ADDRESS THOSE POINTS I WENT OVER
5 WITH COUNSEL?

6 (SIMULTANEOUS COLLOQUY.)

7 **MR. BERMAN:** I'D LIKE TO ADDRESS THE LEAST
8 RESTRICTIVE ALTERNATIVES. STEVE BERMAN.

9 YOUR HONOR, WE STARTED FASHIONING OUR LEAST
10 RESTRICTIVE ALTERNATIVES WITH THE QUOTATION THAT COUNSEL JUST
11 GAVE YOU FROM THE O'BANNON CASE, WHICH SAYS THERE'S A
12 DIFFERENCE BETWEEN OFFERING STUDENT ATHLETES EDUCATION-RELATED
13 COMPENSATION.

14 SO WE LOOKED AT WHAT EDUCATION-RELATED COMPENSATION
15 COULD BE OFFERED. WE CAME UP WITH 17 DIFFERENT ITEMS THAT WE
16 BELIEVE IN A RESTRAINED-FREE WORLD WOULD BE OFFERED BY THESE
17 SCHOOLS, SUCH AS A --

18 **THE COURT:** AND THAT'S YOUR APPENDIX --

19 **MR. BERMAN:** THAT'S OUR APPENDIX.

20 **THE COURT:** -- THAT YOU'RE TALKING ABOUT?

21 **MR. BERMAN:** THAT'S CORRECT. APPENDIX B.
22 COULD I JUST FINISH?

23 ONE THING, FOR EXAMPLE, COUNSEL JUST SAID, THAT
24 TUTORING IS ALLOWED, WELL, IN OUR APPENDIX WE ASKED WHETHER
25 SUBSIDIZED TUTORING WOULD BE ALLOWED. THAT'S AN

1 EDUCATION-RELATED BENEFIT AND MR. LENNON, THEIR 30(B)(6)
2 WITNESS, SAID NO.

3 NOW, SHE ALSO SAID THERE WAS AN ABSENCE OF EVIDENCE
4 FROM US THAT THE LESS RESTRICTIVE ALTERNATIVES THAT WE OFFER
5 WOULD BE PERMISSIBLE IN AN ANTITRUST WORLD. THAT'S NOT TRUE.
6 THE ABSENCE OF PROOF IS ON THEIR SIDE.

7 WE WENT OUT AND HIRED A SURVEY EXPERT, AND WE DID A
8 SURVEY WHERE WE TESTED THE EDUCATIONALLY-TETHERED BENEFITS,
9 WOULD THOSE EDUCATIONALLY-TETHERED BENEFITS, IF OFFERED TO
10 CONSUMERS, REDUCE DEMAND, BECAUSE THAT'S THE PRINCIPLE OF WHY
11 YOU LOOK AT AMATEURS, AND YOU DON'T WANT TO AFFECT THE AMATEURS
12 IN DEMAND. AND OUR EXPERT CAME UP WITH A RESOUNDING NO. AND,
13 IN FACT, RECIPIENTS OF THE SURVEY LOOKED ON THE NCAA'S PRODUCT
14 MORE FAVORABLY IF WE OFFERED THESE THINGS.

15 SO WE MET OUR BURDEN OF PROOF THAT THERE ARE LESS
16 RESTRICTIVE ALTERNATIVES ECONOMICALLY. THEY HAVE NOT. THEY
17 PICKED A SURVEY EXPERT WHO DID THE OPPOSITE OF WHAT HE TRIED TO
18 DO IN O'BANNON. HE DIDN'T LOOK AT THE IMPACT ON DEMAND,
19 PURPOSELY DID NOT.

20 **THE COURT:** OKAY. SO YOU HAVE PROPOSED A NUMBER OF
21 LESS RESTRICTIVE ALTERNATIVES, AND THOSE ARE THINGS THAT YOU
22 AGREE YOU HAVE TO PROVE.

23 **MR. KESSLER:** WELL, YOUR HONOR --

24 **THE COURT:** THAT THERE ARE SUCH, AM I RIGHT?

25 **MR. BERMAN:** YES, WE DO HAVE TO PROVE THAT.

1 **THE COURT:** BUT I GUESS A SLIGHTLY DIFFERENT QUESTION
2 IS THEN DOES THE COURT HAVE TO ORDER THAT, OR WOULD YOU THEN BE
3 SAYING TO THE COURT: THESE ARE THE POTENTIAL LESS RESTRICTIVE
4 ALTERNATIVES, BUT I'M NOT GOING TO ORDER ANY OF THEM IN
5 PARTICULAR, NCAA, YOU JUST HAVE TO DO SOMETHING.

6 **MR. KESSLER:** THAT'S EXACTLY WHAT WE SUGGEST YOUR
7 HONOR, LESS RESTRICTIVE --

8 (SIMULTANEOUS COLLOQUY.)

9 **THE COURT:** BUT ISN'T -- WHY ISN'T THAT A
10 WHACK-A-MOLE?

11 **MR. KESSLER:** I WON'T BE -- LET ME EXPLAIN THAT.
12 SO THE LIABILITY ISSUE IS ARE THERE LESS RESTRICTIVE
13 ALTERNATIVES.

14 **THE COURT:** RIGHT.

15 **MR. KESSLER:** AND, FRANKLY, IF THERE'S ONE YOU WIN ON
16 LIABILITY.

17 **THE COURT:** RIGHT.

18 **MR. KESSLER:** THE RELIEF ISSUE IS NEXT.

19 **THE COURT:** RIGHT. THAT'S WHAT I'M TRYING TO SAY.

20 **MR. KESSLER:** AND ON THE RELIEF ISSUE, BY FAR -- AND
21 I CAN CITE YOU TREATISE AFTER TREATISE ON THIS -- THE PREFERRED
22 INJUNCTION ALTERNATIVE IN AN ANTITRUST CASE IS SIMPLY TO ENJOIN
23 THE OVERBROAD RESTRAINT TO HAVE AN INFORMED OPINION, WHICH YOU
24 WOULD HAVE, WHICH WOULD GIVE GUIDANCE AS TO THIS COULD BE LESS
25 RESTRICTIVE, THIS COULD BE -- IN OTHER WORDS, YOU WOULD DISCUSS

1 THAT IN YOUR OPINION. AND THEN IT IS UP TO THE PARTICIPANTS IN
2 THE MARKETPLACE TO DECIDE DO THEY WANT -- HOW DO THEY WANT TO
3 SHAPE THEIR BEHAVIOR.

4 IT'S NOT WHACK-A-MOLE, YOUR HONOR. IT'S WHAT EVERY
5 BUSINESS IN THIS COUNTRY GOES THROUGH. AND IF YOU HAVE AN
6 INFORMED OPINION -- WHAT WE STILL ACTUALLY SUGGESTED, IS THAT
7 YOU STAY YOUR INJUNCTION FOR 60 DAYS, AND IN THOSE 60 DAYS
8 EITHER THE CONFERENCES COULD ADOPT RULES -- AND BY THE WAY, THE
9 CONFERENCES, BECAUSE IT'S A RULE OF REASON, AS YOUR HONOR HAS
10 RULED -- THAT'S THE LAW IN CIRCUIT -- RULE OF REASON, BECAUSE
11 EACH INDIVIDUAL CONFERENCE HAS NO MARKET POWER AS LONG AS
12 THEY'RE COMPETING WITH EACH OTHER, THE CONFERENCE COULD ADOPT
13 ANY RULE THAT THEY WANTED TO.

14 SO IF THEY WANTED TO SAY, WE ARE GOING TO NOT ALLOW
15 THESE THINGS, THEY COULD DO THAT. THE IVY LEAGUE DOESN'T ALLOW
16 SCHOLARSHIPS, EVEN FOR ATHLETIC SCHOLARSHIPS. BUT IF ANOTHER
17 CONFERENCE, THE SCC WANTS TO OFFER THE MORE GENEROUS TO THEIR
18 STUDENTS -- WHY? BECAUSE THEY HAVE HUNDREDS OF MILLIONS OF
19 DOLLARS FLOWING OUT OF THEIR POCKETS SO EVEN THEIR PRESIDENTS
20 ARE EMBARRASSED -- AND SAY WE SHOULD DO MORE FOR THE SCHOOLS IF
21 WE CAN.

22 IF THEY WANT TO DO THAT, THEN THEY CAN. OR THE NCAA
23 CAN LOOK AT YOUR OPINION. AND IF YOU SAID IN YOUR OPINION,
24 WELL, YOU CAN HAVE A RULE -- IF YOU WERE TO REJECT MY POSITION,
25 YOU COULD HAVE A RULE THAT STILL BLOCKS CASH COMPENSATION

1 UNTETHERED TO EDUCATION EXPENSE, BUT YOU CAN'T REGULATE
2 ANYTHING BEYOND THAT.

3 LET'S SAY YOUR HONOR WERE TO RULE THAT, THEN YOU
4 WOULD ENTER AN INJUNCTION THAT SAID, YOU CAN'T HAVE, NCAA, ANY
5 RULES, EXCEPT I'M NOT GOING TO STOP YOU FROM HAVING THAT, AND
6 IF THEY WANTED TO HAVE IT, THEY COULD.

7 SO THERE'S A LOT OF WAYS TO GET AT THIS.

8 **THE COURT:** OKAY.

9 **MR. KESSLER:** AND IT DEPENDS ON WHERE YOUR HONOR
10 DRAWS THE LINE AS TO WHAT'S PERMISSIBLE AND NOT PERMISSIBLE.

11 **THE COURT:** THAT REMINDS ME. AND I APOLOGIZE IF I
12 ALREADY RAISED THIS ONE, BUT THAT REMINDS ME OF ANOTHER
13 APPENDIX, WHICH IS THE BAD BYLAW APPENDIX.

14 **MR. KESSLER:** YES.

15 **THE COURT:** AND I'M WONDERING IF YOU ARE SUGGESTING
16 THAT THE COURT WOULD THEN GO THROUGH ALL THOSE BYLAWS AND SAY
17 WHICH ONES YOU COULD HAVE AND WHICH ONES YOU COULDN'T HAVE.

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

19 **THE COURT:** AND I'M GOING TO ASK COUNSEL THE SAME
20 QUESTION ABOUT WHETHER THEY HAD AN OPPORTUNITY TO ADDRESS --

21 **MR. KESSLER:** OKAY.

22 **THE COURT:** -- ALL THOSE BYLAWS SPECIFICALLY
23 INDIVIDUALLY, IF THAT'S THE ROUTE YOU'RE PROPOSING THAT I --

24 **MR. KESSLER:** YOUR HONOR HAS TO RULE ON ALL THESE
25 BYLAWS BECAUSE WE'RE CHALLENGING THEM ALL TO SOME DEGREE, BUT

1 THEY'RE NOT 83 DIFFERENT ISSUES. THEY ARE MOSTLY JOINED BY
2 COMMON ISSUES.

3 SO, FOR EXAMPLE, SOME LARGE NUMBER OF THE BYLAWS
4 SIMPLY SAYS IF YOU GET ONE DOLLAR MORE THAN COST OF ATTENDANCE,
5 YOU'RE NOT ELIGIBLE, YOU CAN'T DO THIS. IT'S ALL -- IT'S ALL
6 GOING TO THE SAME SINGULAR PRINCIPLE THROUGH 8, 12, 14
7 DIFFERENT BYLAWS. SO YOU COULD DECIDE THAT ISSUE ONCE, AND IT
8 WILL APPLY TO THE 14 BYLAWS.

9 FOR THE INCIDENTALS OF PARTICIPATION ISSUE, FOR EACH
10 AND EVERY ONE OF THEM, WE GOT COMMON TESTIMONY FROM THEIR
11 30(B)(6) WITNESS THAT THEY ARE JUST DECIDED BY MEMBERSHIP VOTE,
12 THEY'RE NOT RELATED TO PRINCIPLES OF AMATEURISM, AND THEY HAVE
13 NOT HURT CONSUMER DEMAND AT ALL.

14 WE BASE ON THOSE THREE FACTS, YOU CAN GO THROUGH ALL
15 THE INCIDENTALS OF PARTICIPATION BYLAWS AND SAY THEIR LIMITS
16 ARE SIMPLY ARBITRARY, UNLESS THEY COME IN AND JUSTIFY A LIMIT
17 THROUGH THEIR BURDEN -- THE PRO-COMPETITIVE EFFECT IS THEIR
18 BURDEN -- UNLESS THEY CAN COME IN AND JUSTIFY WHY THE GIFT
19 SUITE HAS TO BE 6,000 AND NOT 8,000.

20 YOU CAN'T JUST HAVE AN ARBITRARY LIMIT TO THAT UNLESS
21 YOU LET THE CONFERENCES DO THAT. THE CONFERENCES COULD DECIDE
22 THAT BECAUSE THEY HAVE NO MARKET POWER. THE PROBLEM THEY HAVE
23 IS -- AND THIS IS THE PROBLEM WITH A CARTEL-LIKE ENTERPRISE.
24 INSTEAD OF ALLOWING THE RICH CONFERENCES WHO COULD REWARD THEIR
25 STUDENTS TO REWARD THEM, THE RULES GET PASSED FOR THE BENEFIT

1 OF THE CONFERENCES WHO HAVE THE LEAST AMOUNT OF MONEY, WHO
2 REALLY DON'T COMPETE WITH THOSE POWER FIVE CONFERENCES, AND
3 THAT'S EXACTLY WHY O'BANNON STRUCK DOWN THE FULL COURSE OF
4 ATTENDANCE.

5 YOU'LL NOTE WHERE THEY ENDED UP WITH IS FIRST THE
6 FIVE POWER CONFERENCES ADOPTED FULL COURSE ATTENDANCE, THEN A
7 NUMBER OF SCHOOLS FOLLOWED ON, AND THERE ARE MANY SCHOOLS WHO
8 DON'T PAY FULL COST OF ATTENDANCE TO THIS DAY. THAT'S A
9 DIFFERENT -- THAT'S THEIR DECISION IN TERMS OF THAT.

10 **THE COURT:** OKAY. NOW YOU'VE RAISED ANOTHER PROBLEM
11 THAT I HAD PLANNED TO ASK ABOUT, AND THAT IS HOW BADLY YOU WANT
12 TO HAVE THE RESULT BE THAT ALL OF THESE THINGS CAN BE DONE AS
13 LONG AS THEY'RE ONLY DONE BY THE CONFERENCES.

14 I'M NOT SURE HOW -- I'M HAVING A HARD TIME IMAGINING
15 HOW THAT WOULD WORK.

16 **MR. KESSLER:** WELL, IT WOULD WORK --

17 **THE COURT:** IT DOESN'T SOUND LIKE THE SORT OF THING
18 THAT THE COURTS WOULD BE INCLINED TO SAY.

19 **MR. KESSLER:** IT'S NOT REQUIRED BECAUSE, AS WE SAID,
20 WE THINK THE NCAA COULD ADOPT NEW RULES ITSELF THAT ARE
21 CONSISTENT WITH YOUR HONOR'S OPINION AS TO WHAT MEETS THE RULE
22 OF REASON TEST AND WHAT DOESN'T. SO WE'RE NOT PRECLUDING THAT,
23 BUT WE'RE SAYING ACTUALLY THE WHOLE TREND IN THE NCAA HAS BEEN
24 TO ALLOW THIS, SO FOR EXAMPLE --

25 **THE COURT:** WHAT ARE YOU SUGGESTING THE COURT WOULD

1 DO? THE COURT WOULD SAY YOU MUST ALLOW THE CONFERENCES --

2 **MR. KESSLER:** ABSOLUTELY NOT, ABSOLUTELY NOT.
3 AGAIN --

4 **THE COURT:** -- (INDISCERNIBLE) MAY ALLOW THE
5 CONFERENCES, AND IF YOU'LL DO, YOU'LL BE OKAY?

6 **MR. KESSLER:** YOU DON'T EVEN HAVE -- WELL, HERE'S HOW
7 I TAKE -- THE INJUNCTION WOULD JUST SAY THESE NCAA RULES ARE
8 ENJOINED TO THE EXTENT THEY DO THE FOLLOWING: YOU KNOW, THEY
9 LIMIT OR CAP COMPENSATION OR BENEFITS. YOU KNOW, WE HAVE A
10 LIST OF THINGS THAT -- THE REASON I SAY THAT, SOMETIMES THE
11 RULE DOES A WHOLE BUNCH OF OTHER THINGS WE'RE NOT CHALLENGING.

12 SO YOU WOULD SAY, TO THE EXTENT THESE RULES DO THE
13 FOLLOWING, THEY ARE ENJOINED. THEN YOUR OPINION WOULD MAKE
14 CLEAR IN JUST WRITING IT, BY THE WAY, SINCE THE CONFERENCES
15 DON'T HAVE MARKET POWER, THEY'D BE FREE IF THEY WANT TO. IT'S
16 NOT COMPELLING ANYTHING BECAUSE THEY COULD ALWAYS ADOPT RULES.
17 BUT YOU'D, IN EFFECT, BE GIVING THEM A BLESSING SO THAT THEY
18 KNOW INDIVIDUAL CONFERENCES CAN ADOPT THEIR OWN RULES, WHICH IS
19 EXACTLY WHERE THE NCAA HAS BEEN GOING.

20 THE POWER FIVE NOW ALLOW MANY MORE THINGS THAT
21 OTHERS --

22 **THE COURT:** OKAY. IT SOUNDS KIND OF LIKE AN ADVISORY
23 OPINION.

24 **MR. KESSLER:** WELL, NO, YOUR HONOR. I'D SAY IT'S
25 JUST AN OPINION.

1 YOUR LEGAL ANALYSIS OF THE RECORD IS WHAT -- SO THIS
2 IS WHAT WE DO FOR A LIVING AS ANTITRUST LAWYERS. CLIENTS COME
3 TO US, AND THEY GO, WHAT APPLIES. WE GO, THE RULE OF REASON.
4 THEY GO, OKAY, IS THIS CONDUCT GOING TO BE REASONABLE OR NOT?
5 AND WHAT DO WE DO? WE STUDY THE OPINIONS.

6 HERE THERE WOULD BE A VERY GOOD OPINION BY YOUR HONOR
7 EXPLAINING WHAT YOU FOUND, EXPLAINING WHAT'S THERE, AND WE GET
8 ADVISED THIS IS TO BE PERMISSIBLE, THIS WON'T BE. THAT'S WHAT
9 LAWYERS DO.

10 **THE COURT:** OKAY. I HAVE A FEW MORE QUESTIONS FOR
11 YOU, BUT IF YOU WOULD WRITE IN YOUR NOTES TO PLEASE ADDRESS
12 THIS ISSUE OF SAYING THAT THE CONFERENCES CO --

13 **MS. WILKINSON:** YES, I WOULD LIKE TO ADDRESS THAT.

14 **THE COURT:** I'M CONCERNED ABOUT WHETHER I HAVE A
15 RECORD TO DO THAT.

16 **MR. KESSLER:** WE WOULD MAKE A RECORD FOR THAT.

17 **THE COURT:** WHEN WOULD THAT BE?

18 **MR. KESSLER:** THAT'S OUR EXPERT WHO'S ALREADY
19 ADDRESSED THAT ECONOMICALLY.

20 **THE COURT:** THAT WOULD BE IN A TRIAL?

21 **MR. KESSLER:** CERTAINLY, YOUR HONOR.

22 MR. RASCHER IS PREPARED TO TESTIFY THEY DON'T HAVE
23 MARKET POWER, HE PUT IT IN HIS REPORT, AND THAT BASED ON THEIR
24 ABSENCE OF MARKET POWER, SINCE IT WILL BE A RULE OF REASON
25 ANALYSIS, THEN, THERE, ?? THINGS WOULDN'T BE ANTI-COMPETITIVE IN

1 THE ABSENCE OF MARKET POWER. SO YOU WOULD KNOW THAT.

2 **THE COURT:** OKAY, OKAY. SO THAT LEADS INTO MY NEXT
3 QUESTION OR SET OF QUESTIONS FOR YOU, AND THEN I'LL GET BACK TO
4 YOU ON IT.

5 WHAT WOULD THIS TRIAL LOOK LIKE? IF WE ALREADY KNOW,
6 NOW, THAT WE DON'T NEED TO TRY -- IF THERE'S AN AGREEMENT, WE
7 DON'T NEED TO TRY THAT IT'S ANTI-COMPETITIVE, WE DON'T NEED TO
8 TRY THE THIRD THING.

9 **MS. WILKINSON:** PRO-COMPETITIVE.

10 **THE COURT:** WE MAY OR MAY NOT NEED TO TRY AMATEURISM
11 AND INTEGRATION, BUT WE DO NEED, I GUESS, REGARDLESS, TO TRY
12 LESS RESTRICTIVE ALTERNATIVES. WOULD YOU AGREE WITH THAT?

13 **MR. KESSLER:** WE WOULD SAY WE WOULD HAVE TO --

14 **THE COURT:** SO YOUR MOTION FOR SUMMARY JUDGMENT IS
15 NOT CASE DISPOSITIVE?

16 **MR. KESSLER:** YEAH. WE WOULD SAY THAT ON
17 PRO-COMPETITIVE, EITHER YOU WOULD RULE FOR US THAT THEY HAVEN'T
18 MET THEIR BURDEN BASED ON THE EVIDENCE, OR THERE ARE GENUINE
19 ISSUES OF FACT AS TO PRO-COMPETITIVE BASED ON ALL THE EVIDENCE
20 WE PUT IN ABOUT THAT.

21 SO YOU'D HAVE TO TRY THEIR PRO-COMPETITIVE BURDEN
22 DEFENSE, AND THEN IF THEY MET THEIR BURDEN, WE WOULD ALSO AT
23 THE SAME TRIAL ADDRESS THE LEAST RESTRICTIVE ALTERNATIVES,
24 WHICH IS OUR BURDEN, SO THAT THOSE WOULD BE THE TWO THINGS TO
25 BE TRIED, BECAUSE I AGREE WITH YOUR HONOR, IT DOESN'T SEEM

1 ANYONE CAN TEST EITHER AGREEMENT OR THAT IT RESTRICTS
2 COMPETITION --

3 **THE COURT:** OKAY.

4 **MR. KESSLER:** -- IN THE RELEVANT MARKET.

5 **THE COURT:** BUT THE THIRD ALTERNATIVE THAT I KNOW YOU
6 DON'T WANT TO MENTION IS THAT THE COURT COULD FIND THAT THE
7 PRO-COMPETITIVE JUSTIFICATIONS ARE STARE DECISIS BASED ON
8 *O'BANNON* --

9 **MR. KESSLER:** WHAT I WOULD --

10 **THE COURT:** -- AND THAT WE THEN HAVE LEFT ONLY THE
11 LESS RESTRICTIVE ALTERNATIVES, AND YOU WOULD AGREE THEN THAT
12 THOSE NECESSARILY INVOLVE QUESTIONS OF FACT AND WOULD HAVE TO
13 BE TRIED. IS THAT WHAT YOU'RE SAYING?

14 **MR. KESSLER:** EXCEPT, YOUR HONOR, IF YOU'RE TALKING
15 ABOUT THE MOST NARROW READING OF *O'BANNON*, WHICH IS -- WHICH IS
16 ALLOWING EDUCATION-RELATED COMPENSATION, I DON'T THINK THERE'S
17 ANY WAY TO LEGALLY FIND THAT *O'BANNON* SAID IT WAS
18 PRO-COMPETITIVE TO RESTRICT EDUCATION-RELATED COMPENSATION.

19 *O'BANNON* SAYS THE OPPOSITE. THEY SAID THERE WAS NO
20 SHOWING OF PRO-COMPETITIVE FOR THE EDUCATED-RELATED
21 COMPENSATION.

22 SO FOR THE 17 BENEFITS THAT WE'VE IDENTIFIED AS
23 EXAMPLES OF EDUCATION-RELATED COMPENSATION, EITHER -- EITHER WE
24 WIN THAT THEY HAVEN'T PUT IN THEIR RECORD, OR IT HAS TO BE
25 TRIED. IT'S INCONCEIVABLE THAT *O'BANNON* RULED EDUCATED-RELATED

1 COMPENSATION BENEFITS WERE JUSTIFIED BY A PRO COMPETITIVE
2 OBJECTIVE, BECAUSE IT RULED THE OPPOSITE.

3 THAT WAS -- THERE WAS A QUANTUM LEAP, SO WE HAVE A
4 QUANTUM LEAP. YOU HAVE THE GOOD STUFF O'BANNON SAID, WHICH IS
5 EDUCATED-RELATED COMPENSATION, AND THEN YOU HAVE THE BAD STUFF
6 WHICH O'BANNON SAID, WHICH WAS CASH COMPENSATION UNTETHERED TO
7 EDUCATIONAL EXPENSE. IT CLEARLY DID NOT RULE THERE WAS ANY
8 JUSTIFICATION FOR THE GOOD STUFF. WE'VE COME UP WITH 17
9 EXAMPLES OF GOOD STUFF UNDER O'BANNON THAT THEIR EXPERT SAID IS
10 NOT ALLOWED, CONTRARY TO WHAT WAS THERE.

11 **THE COURT:** OKAY. SO WHAT -- WHAT IS YOUR DESIRE
12 WITH RESPECT TO YOUR CASE? AND I'M SPEAKING NOW OF *JENKINS*.

13 **MR. KESSLER:** YES.

14 **THE COURT:** THAT CASE WASN'T TRANSFERRED HERE FOR
15 TRIAL. YOU DROPPED A FOOTNOTE IN ONE OF YOUR BRIEFS CITING
16 *LEXICON*, AND COUNSEL RESPONDED TO IT. WHEN DO YOU WANT TO BE
17 SENT BACK, IF AT ALL?

18 **MR. KESSLER:** I THINK THIS IS A DETERMINATION TO BE
19 MADE AFTER YOUR HONOR IS GOING TO REACH ITS SUMMARY JUDGMENT
20 RULINGS, BECAUSE --

21 **THE COURT:** SO YOU WANT ME TO RULE ON THE SUMMARY
22 JUDGMENT --

23 **MR. KESSLER:** I WANT YOU TO RULE ON SUMMARY JUDGMENT.
24 THE ONLY THING I WOULD SAY IS IF YOU ARE GOING TO
25 ACCEPT -- WHICH I DON'T BELIEVE YOUR HONOR WILL -- THE EXTREME

1 VIEW THAT THE CONSOLIDATED CASE SHOULD BE COMPLETELY THROWN OUT
2 UNDER O'BANNON, THAT IT'S PRECLUDED, WHICH IS THEIR MOST
3 EXTREME ARGUMENT ON SUMMARY JUDGMENT, IT WAS NOTHING TO TRY IN
4 THE CONSOLIDATED CASE, THEY WIN.

5 IF YOU WERE GOING TO RULE THAT, I WOULD ASK THAT YOU
6 ONLY RULE ON THAT IN CONSOLIDATED AND INDICATE THAT THAT'S
7 APPLYING O'BANNON, BECAUSE YOU'RE ACCEPTING THEIR ARGUMENT TO
8 THE EXTENT IT APPLIES.

9 LET ME THEN GO BACK TO THE THIRD CIRCUIT AND SEE IF
10 THE DISTRICT COURT OF NEW JERSEY AGREES THAT O'BANNON WOULD
11 HAVE THAT EFFECT ON THAT OTHER -- ON THAT OTHER CLASS.

12 **THE COURT:** I'M NOT SURE I CAN DO THAT. YOU'D BE
13 SAYING I'LL TAKE THE GOOD PARTS --

14 **MS. WILKINSON:** RIGHT.

15 **THE COURT:** -- SPEAKING OF GOOD PARTS AND BAD PARTS,
16 I'LL TAKE THE GOOD PARTS OF YOUR SUMMARY JUDGMENT RULING, BUT I
17 WON'T TAKE THE BAD PARTS? CAN I DO THAT?

18 **MR. KESSLER:** WELL, I THINK --

19 (SIMULTANEOUS COLLOQUY.)

20 **THE COURT:** CAN I (INDISCERNIBLE) THE COURT IN THE
21 THIRD CIRCUIT OR WHATEVER DISTRICT OF NEW JERSEY --

22 **MR. KESSLER:** I THINK --

23 **THE COURT:** WAIT UNTIL I FINISH.

24 **MR. KESSLER:** SORRY.

25 **THE COURT:** THAT I MADE THIS RULING, BUT I'M NOT

1 GOING -- I'M ONLY GOING TO APPLY SOME OF THAT TO THAT JUDGE'S
2 CASE BUT NOT ALL OF IT? I'M NOT SURE I COULD DO THAT.

3 **MR. KESSLER:** NO, NO.

4 **THE COURT:** YOU COULD ASK NOW TO BE REMANDED. YOU
5 COULD SAY REMAND MAYBE BEFORE YOU RULE ON SUMMARY JUDGMENT, OR
6 YOU COULD WAIT UNTIL THE SUMMARY JUDGMENT IS RULED ON, TAKE
7 YOUR CHANCES AND THEN ASK TO BE REMANDED.

8 **MR. KESSLER:** OKAY.

9 **THE COURT:** BUT I'M NOT SURE YOU CAN SAY I'LL TAKE
10 THE GOOD PARTS, BUT NOT THE BAD PARTS.

11 **MR. KESSLER:** I THINK YOU DO HAVE THE DISCRETION --
12 NOT TO TAKE THE GOOD AND THE BAD -- TO DECIDE THAT YOU'RE NOT
13 GOING TO RULE, IN EFFECT, ON, AS YOUR HONOR'S SUGGESTING, TO
14 SUMMARY JUDGMENT AT ALL SAYS -- AND THEN (INDISCERNIBLE) THAT'S
15 WITHIN YOUR DISCRETION TO LET IT BE RULED ON THERE.

16 WHAT I WAS SUGGESTING IS THAT WHILE WE WOULD MAKE
17 THAT REQUEST IF YOUR HONOR WAS INCLINED TO ACCEPT THEIR EXTREME
18 VIEW ON O'BANNON, SINCE I DON'T THINK YOUR HONOR'S GOING --

19 **THE COURT:** RIGHT. I'M NOT SURE YOU'RE RESPONDING TO
20 MY QUESTION.

21 IF I SEND IT BACK BEFORE I RULE ON SUMMARY JUDGMENT
22 WITH RESPECT TO YOUR CLIENT, THEN YOU DON'T HAVE A RULING THAT
23 THERE'S EVEN AN ANTITRUST VIOLATION AT ALL.

24 **MR. KESSLER:** CORRECT.

25 **THE COURT:** YOU WOULD HAVE TO PROVE THAT IN NEW

1 JERSEY.

2 **MR. KESSLER:** I UNDERSTAND. IF THAT WAS SENT BACK, I
3 DON'T HAVE THE BENEFIT OF YOUR RULING AT ALL.

4 **THE COURT:** RIGHT.

5 **MR. KESSLER:** SO WHAT I'M SAYING IS -- AND, AGAIN,
6 I'M TRYING TO BE OPEN WITH THE COURT. I BELIEVE THE COURT AT A
7 MINIMUM IS GOING TO BE WHERE YOU WERE ON 12(C) WHICH IS THAT WE
8 STILL ARE GOING TO, NO MATTER WHAT, BE ABLE TO TRY OUR 17
9 ALTERNATIVES OF EDUCATION-RELATED COMPENSATION AND OTHER
10 NON-CASH CONSIDERATION, EVEN IF NOTHING ELSE HAPPENED, AND IF
11 THAT'S THERE, YOUR HONOR, THEN WE WOULD SAY, YOU KNOW, WE'LL
12 APPLY SUMMARY JUDGMENT TO EVERYONE, OR WE'LL KEEP GOING FORWARD
13 IN TERMS OF THAT.

14 BUT IN THE UNLIKELY EVENT YOUR HONOR WAS THINKING YOU
15 MIGHT BE PREPARED TO JUST DISMISS CONSOLIDATED, THEN I WOULD
16 SAY, DON'T GIVE ME ANY BENEFITS OF YOUR RULING OR DETRIMENTS
17 THAT INSTEAD BECAUSE WE FILED THE THIRD CIRCUIT AND --

18 **THE COURT:** OKAY.

19 **MR. KESSLER:** -- AND O'BANNON DOESN'T GOVERN --

20 **THE COURT:** OKAY.

21 **MR. KESSLER:** -- THEN RATHER THAN RULE AT ALL IN
22 JENKINS, SEND US BACK AND WE HAVE TO PROVE OUR CASE ON OUR
23 RECORD IN TERMS OF THAT.

24 **THE COURT:** OKAY.

25 **MR. KESSLER:** -- AND IT'S NOT MIXING --

1 **THE COURT:** OKAY, OKAY.

2 **MR. KESSLER:** AND I THINK IT'S PURELY A DISCRETION
3 DECISION FOR THE JUDGE WHETHER TO DO THIS OR NOT.

4 **THE COURT:** SO WHAT WOULD THIS TRIAL BE LIKE? WHAT
5 WOULD WE HAVE, LIKE, EXPERT WITNESSES TALKING ABOUT LESS
6 RESTRICTIVE ALTERNATIVES --

7 (SIMULTANEOUS COLLOQUY.)

8 **MR. KESSLER:** YOU'D HAVE EXPERT -- YOU'D HAVE EXPERT
9 WITNESSES TALKING ABOUT THAT. YOU'D HAVE EXPERT WITNESSES
10 TALKING ABOUT CONSUMER DEMAND AND, YOU KNOW, AND SURVEY
11 EVIDENCE.

12 YOU WOULD HAVE -- IF WE'VE ALREADY ESTABLISHED
13 ANTI-COMPETITIVE EFFECT AND RELEVANT MARKET, WE MAY NOT NEED
14 TOO MUCH PLAYER TESTIMONY BECAUSE THEY WOULD BE TESTIFYING
15 ABOUT THEIR ANTI-COMPETITIVE EFFECT, BUT THEY MIGHT TESTIFY
16 ABOUT INTEGRATION. FOR EXAMPLE, IF INTEGRATION IS STILL PART
17 OF THE CASE, WE MIGHT HAVE THIS -- THE ATHLETES TESTIFY ABOUT
18 THE LACK OF INTEGRATION.

19 **THE COURT:** YES, I CAN PICTURE -- YES. I CAN PICTURE
20 WHAT HAPPENS IF WE'RE RETRYING AMATEURS AND THEN INTEGRATION --

21 **MR. KESSLER:** RIGHT.

22 **THE COURT:** -- BECAUSE I'VE BEEN THERE, DONE THAT.

23 **MR. KESSLER:** RIGHT.

24 **THE COURT:** WHAT I'M TRYING TO PICTURE IS WHAT WOULD
25 BE THE EVIDENCE OF LESS RESTRICTIVE ALTERNATIVES.

1 **MR. KESSLER:** RIGHT.

2 **THE COURT:** WOULD IT BE SIMPLY EXPERT WITNESSES
3 THAT --

4 (SIMULTANEOUS COLLOQUY.)

5 **MR. KESSLER:** I BELIEVE IT WOULD JUST PRIMARILY BE
6 EXPERT WITNESSES AND FACTUAL SUPPORT DOCUMENTS, REPORTS, OTHER
7 THINGS THAT THE EXPERTS ARE RELYING UPON IN ORDER TO --

8 **THE COURT:** OKAY.

9 **MR. KESSLER:** -- ADDRESS THAT IN TERMS OF LESS
10 RESTRICTIVE ALTERNATIVES.

11 **THE COURT:** ALL RIGHT. LET ME ASK YOU TO RESPOND,
12 TOO.

13 **MS. WILKINSON:** CAN I RESPOND TO EVERYTHING? I'LL
14 START AT THE END.

15 **THE COURT:** IF YOU CAN REMEMBER IT ALL.

16 **MS. WILKINSON:** I TRY. I'LL PUT MY NOTES IN FRONT OF
17 ME. I'LL DO MY BEST. I'M SURE YOU'LL REMIND ME IF I DON'T
18 ADDRESS EVERYTHING.

19 START WITH THE, YOU KNOW, CAN YOU JUST REMAND THIS
20 CASE BEFORE YOU DECIDE SUMMARY JUDGMENT? NO, YOU CAN'T. THE
21 JPML TOLD YOU --

22 **THE COURT:** OH, YEAH, I COULD REMAND. HE'S NOT
23 ASKING FOR THAT, SO WE DON'T HAVE TO WORRY ABOUT IT, BUT I
24 THINK I CAN.

25 **MS. WILKINSON:** I THOUGHT THEY SAID YOU HAVE TO

1 DECIDE THE DISPOSITIVE MOTION. IN OTHER CASES THAT I'VE BEEN
2 IN THAT ARE CONSOLIDATED, THAT'S NORMALLY WHAT HAPPENS. THE
3 PRESIDING JUDGE --

4 **THE COURT:** IT IS NORMALLY WHAT HAPPENS, BUT I --
5 (SIMULTANEOUS COLLOQUY.)

6 **MS. WILKINSON:** I'VE NEVER SEEN WHAT YOU'RE
7 SUGGESTING, BUT IF YOU'RE SAYING THEY'RE NOT ASKING FOR THAT --
8 CERTAINLY ONCE YOU DECIDE, IT APPLIES TO *JENKINS* AS WELL,
9 BECAUSE THESE ARE THE SAME CLASS MEMBERS. EVERYONE IN THE
10 *JENKINS* CLASS, IT'S A NATIONAL CLASS, ARE MEMBERS OF THE
11 CONSOLIDATED CLASS.

12 SO YOU DON'T GET TO SAY, WELL, YOU'RE THE SAME CLASS
13 MEMBERS, BUT YOU GET TO TRY IT UNDER THE NINTH CIRCUIT, AND IF
14 YOU DON'T GET, YOU KNOW, THE ANSWER YOU LIKE, YOU GET TO GO TO
15 THE THIRD CIRCUIT.

16 THIS IS NOT NEW, DOING A CONSOLIDATED CLASS ACTION.
17 YOU APPLY THE LAW OF THE DISTRICT WHERE THE JUDGE AND THE
18 CIRCUIT -- IT'S FEDERAL LAW. THAT APPLIES NO MATTER WHERE THE
19 PLAINTIFFS ORIGINALLY FILED THE CASE WHEN IT'S A NATIONAL CLASS
20 ACTION AND THEY'RE ALL THE SAME CLASS MEMBERS.

21 *JENKINS* IS A SUBSET, RIGHT, BECAUSE THEY DON'T HAVE
22 WOMEN BASKETBALL PLAYERS, BUT EVERYONE THAT'S A MEMBER OF THE
23 *JENKINS* CLASS IS A MEMBER OF THE CONSOLIDATED CLASS. SO ONCE
24 YOU RULE, EVEN IF YOU SOMEHOW COULD SEND IT BACK TO NEW JERSEY,
25 WHICH I DON'T -- YOU CAN'T, THERE WOULD BE A STAY. YOU WOULD

1 MAKE A RULING, AND THAT WOULD APPLY TO THOSE CLASS MEMBERS.
2 THEY DON'T GET TO HAVE ANOTHER TRIAL.

3 **THE COURT:** WELL, IF --

4 **MS. WILKINSON:** NO CLASS GETS TO TRY TWICE. I MEAN,
5 YOU COULD JUST HUNT -- PLAINTIFFS COULD FILE NATIONAL CLASS
6 ACTIONS IN EVERY JURISDICTION IF THAT WAS RIGHT. IT DOESN'T
7 EVEN MAKE SENSE.

8 **THE COURT:** IF THERE WERE TO BE A TRIAL, I'D HAVE TO
9 SEND THE TRIAL BACK. THAT'S WHAT *LEXICON* SAYS.

10 **MS. WILKINSON:** BUT THAT DOESN'T MEAN THAT ANYTHING
11 WOULD HAPPEN IN PRACTICE, BECAUSE IT'S A CLASS ACTION --

12 **THE COURT:** YEAH, I DON'T KNOW WHAT --

13 **MS. WILKINSON:** -- WITH THE SAME CLASS MEMBERS.

14 **THE COURT:** IT'S JUDGE WOLFSON, I GUESS, RIGHT?

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

16 **THE COURT:** I DON'T KNOW WHAT SHE WOULD DO WITH IT,
17 BUT I WOULD HAVE -- IF THERE WERE SOMETHING LEFT TO TRY, AND
18 MR. KESSLER WANTED TO GO BACK, THAT'S THE ONE THING I DO KNOW,
19 IS THAT I WOULD HAVE TO SEND IT BACK FOR TRIAL.

20 NOW, WHETHER SHE WOULD BE THEN AMENABLE TO AN
21 ARGUMENT SHE COULDN'T TRY IT BECAUSE THEY WERE ALL BOUND BY THE
22 CONSOLIDATED CASE, BE THAT AS IT MAY, I DON'T KNOW. BUT THE
23 ONE THING I DO KNOW IS *LEXICON* SAYS I HAVE TO SEND IT BACK FOR
24 TRIAL.

25 **MS. WILKINSON:** I THINK IT'S THE CLASS ACTION NATURE

1 OF IT, YOUR HONOR --

2 **THE COURT:** MAYBE.

3 **MS. WILKINSON:** -- THAT WOULD MAKE THAT MAYBE YOU
4 WOULD SEND IT BACK, BUT IT WOULD SERVE NO PURPOSE, BECAUSE THE
5 FIRST ARGUMENT WOULD BE THESE CLASS MEMBERS HAVE ALREADY --
6 THEIR CLIENTS HAVE BEEN ADJUDICATED.

7 **THE COURT:** RIGHT, BUT THAT WOULD BE JUDGE WOLFSON'S
8 PROBLEM, NOT MINE. SO ANYWAY --

9 **MS. WILKINSON:** SO LET'S GO BACK TO ALL THE THINGS
10 THAT PLAINTIFF WAS SUGGESTING.

11 THERE'S NO BASIS FOR YOU TO REOPEN THE
12 PRO-COMPETITIVE JUSTIFICATIONS. THOSE WERE DECIDED BY YOU AND
13 BY THE O'BANNON COURT, AND THEY WERE USED AS THE BASIS TO MAKE
14 THE FINDINGS THAT EVEN THIS COUNSEL IS TALKING ABOUT, THAT YOU
15 HAVE TO HAVE EDUCATIONAL -- IT HAS TO BE TETHERED TO
16 EDUCATIONAL EXPENSES. SO THE REASON THAT WE CAN DO THAT --

17 **THE COURT:** WELL, NOW THAT YOU READ THAT WHOLE
18 CLAUSE, IT'S A LITTLE UNCLEAR. THERE'S ONE PHRASE THAT SAYS
19 COMPENSATION, AND ONE PHRASE THAT SAYS EXPENSES. SO --

20 (SIMULTANEOUS COLLOQUY.)

21 **MS. WILKINSON:** IF YOU LOOK THROUGHOUT YOUR OPINION
22 AND THE NINTH CIRCUIT OPINION, IT'S CONSISTENTLY EXPENSES,
23 THERE'S A SHORTHAND, BUT IT'S EXPENSES.

24 (SIMULTANEOUS COLLOQUY.)

25 **MS. WILKINSON:** BUT THE ULTIMATE HOLDING OF O'BANNON

1 IS THE RULE OF REASON REQUIRES THE NCAA TO PERMIT ITS SCHOOLS
2 TO PROVIDE UP TO THE COST OF ATTENDANCE TO THEIR STUDENT
3 ATHLETES. IT DOES NOT REQUIRE MORE.

4 SO THEY'VE SAID THERE ARE NOT MORE BENEFITS TETHERED
5 TO EDUCATION THAT WE ARE REQUIRED TO PAY OTHER THAN COST OF
6 ATTENDANCE. THAT'S BEEN DECIDED BY THE COURT. YOU SAID THAT
7 IN THE 12(C), HEARING, AND YOU SAID THAT COSTS THAT ARE NOT
8 TETHERED TO EDUCATION, THAT YOU CAN'T ORDER THOSE.

9 I MEAN, THIS WAS -- BECAUSE THE OPINION IS
10 CIRCUMSCRIBED BY THAT ANALYSIS, BY SAYING THE NCAA IS PERMITTED
11 TO CREATE THESE RESTRAINTS, TO REINFORCE AND UPHOLD AMATEURISM
12 AND STUDENT INTEGRATION, AND SO ALL THOSE THINGS WERE DECIDED
13 IN THIS CASE BECAUSE THEY WERE TALKING ABOUT CAN YOU PAY
14 PLAYERS, AND THAT'S EXACTLY WHAT THEY'RE TALKING ABOUT.

15 ON THE BENEFIT SIDE, NONE OF THOSE -- I DON'T KNOW
16 WHY THEY THINK MR. LENNON'S TESTIMONY IS SO MAGNIFICENT FOR
17 THEM. IT IS SUPPOSED TO BE INCIDENTAL TO PARTICIPATION,
18 WHETHER IT'S THE JERSEY THAT THE PLAYER GETS, IT'S THE AWARD
19 THEY GET FOR WINNING THE CHAMPIONSHIP. THOSE ARE NOT FOR
20 EDUCATIONAL PURPOSES. THOSE ARE BENEFITS INCIDENTAL TO
21 PARTICIPATION.

22 AND WHETHER HE THINKS THE LIMIT SHOULD BE \$500 OR A
23 THOUSAND DOLLARS, OR MOST RESPECTFULLY TO YOU THAT YOU DO,
24 THAT'S NOT AN ANTITRUST VIOLATION. THAT'S CERTAINLY AT BEST
25 AMPLE LATITUDE.

1 I CAN'T BELIEVE WE'RE GOING TO HAVE A TRIAL WHERE
2 THEY COME IN AND TELL YOU, HERE ARE THE BENEFITS AND WE THINK
3 THERE SHOULD BE A HIGHER CAP, OR THERE SHOULD BE NO CAP? THERE
4 CAN'T BE NO CAP BECAUSE THEY ARE NOT TETHERED TO EDUCATION.
5 HOW CAN THERE BE NO CAP? THEY'RE INCIDENTAL TO PARTICIPATION
6 IN SPORTS, AND SO --

7 **THE COURT:** BUT IS THAT OKAY?

8 **MS. WILKINSON:** OF COURSE IT'S OKAY. YOU WERE AWARE
9 OF THAT IN YOUR OPINION AND IN THE TRIAL.

10 **THE COURT:** WHAT ABOUT THE NINTH CIRCUIT?

11 **MS. WILKINSON:** AND THE NINTH CIRCUIT WAS, TOO, AND
12 THERE'S A DISCUSSION IN THE NINTH CIRCUIT OPINIONS ABOUT SOME
13 OF THESE BENEFITS.

14 SO NOBODY TRIED TO SAY THAT PEOPLE WHO -- STUDENT
15 ATHLETES WHO PARTICIPATE IN SPORTS DON'T GET CERTAIN BENEFITS
16 FOR PLAYING. AGAIN, I THINK THE SIMPLEST THING IS THE
17 BASKETBALL PLAYER THAT GETS HIS JERSEY AND SHORTS AND HER
18 SHOES, THOSE ARE NOT TIED TO EDUCATION OTHER THAN THE GRAND
19 SCHEME OF, YOU KNOW, YOU LEARN SOMETHING FROM PLAYING SPORTS.

20 **THE COURT:** I WAS CURIOUS ABOUT WHETHER THOSE CAN BE
21 UNLIMITED.

22 **MS. WILKINSON:** BUT THEY'RE NOT UNLIMITED.

23 (SIMULTANEOUS COLLOQUY.)

24 **THE COURT:** IF YOU GO BEYOND THE JERSEY AND THE
25 TENNIS SHOES AND GO INTO LETTING THE FAMILY COME, PAYING FOR

1 THE PLANE FARE FOR MOM AND DAD --

2 (SIMULTANEOUS COLLOQUY.)

3 **MS. WILKINSON:** THEY'RE NOT UNLIMITED, YOUR HONOR.

4 **THE COURT:** -- PUTTING THEM UP IN A HOTEL, THE BEST
5 BUY CARD, THE WATCH, THE SUNGLASSES --

6 (SIMULTANEOUS COLLOQUY.)

7 **MS. WILKINSON:** BUT THEY'RE NOT UNLIMITED ONLY
8 BECAUSE -- I MEAN, THAT'S NOT AN ANTITRUST ISSUE. THIS IS A
9 BENEFIT FOR THE STUDENT PLAYING SPORT. THE LIMITATION IS TO
10 MAKE SURE THEY'RE NOT USED AS AN END RUN TO PAY PLAYERS.

11 SO WHETHER IT'S A GIFT SUITE OF \$6,000 OR \$4,000 OR
12 \$10,000, HOW IS THAT PART OF THE ANTITRUST RUBRIC AND STRUCTURE
13 THAT YOU WOULD HAVE AT A TRIAL TO SAY WHETHER THAT'S A PROPER
14 LIMIT ON A BENEFIT INCIDENTAL TO PARTICIPATION?

15 IF WE HAD NO LIMIT, YOU MIGHT SAY THAT'S A WAY OF
16 PAYING PLAYERS TO PLAY AND UNDERMINING OUR ISSUE OF AMATEURISM.
17 THE LIMITS THAT ARE PUT IN PLACE ARE TO MAKE SURE THEY AREN'T
18 USED TO PAY THE PLAYERS.

19 SO LET'S SAY YOU HAD A GIFT SUITE OF A MILLION
20 DOLLARS. ONE MIGHT ARGUE THEN YOU WERE REALLY TRYING TO FUNNEL
21 MONEY TO PLAYERS ONLY FOR -- YOU KNOW, TO PAY THEM TO PLAY.

22 **THE COURT:** WHY AREN'T CAPS ON THINGS INCIDENTAL TO
23 PLAYING A POTENTIAL ANTITRUST VIOLATION AS WELL IF EVERYONE --
24 IF EVERYONE AGREES, NO, WE'RE NOT GOING TO ALLOW THE SCHOOLS TO
25 OFFER MOM AND DAD AND GRANDMA TO COME, THEY CAN ONLY OFFER MOM

1 AND DAD. WOULDND'T -- COULDN'T AN ARGUMENT BE MADE THAT WOULD
2 BE AN ANTITRUST VIOLATION AS WELL, A LIMITATION ON --

3 **MS. WILKINSON:** I DON'T BELIEVE SO.

4 **THE COURT:** -- COMPETITION?

5 **MS. WILKINSON:** I DON'T BELIEVE SO, YOUR HONOR,
6 BECAUSE IT'S INCIDENTAL -- FIRST OF ALL, IT'S IN THE RULE BOOK.
7 IT'S BEEN IN THE RULE BOOK. IT'S PART OF ALL THE TRIALS.

8 BUT IT'S -- WOULD YOU SAY THEN THEY COULD ONLY
9 RECEIVE TWO PAIR OF SNEAKERS AND NOT THREE PAIR OF SNEAKERS.
10 THAT'S THE AMPLE LATITUDE THAT THE NCAA IS ENTITLED TO AND
11 EVERY COURT HAS RECOGNIZED SO THEY CAN MAKE THOSE CHANGES IN
12 THE RULES AND PROVIDE THE BENEFITS TO THE ATHLETES.

13 BUT THAT'S NOT AN ANTITRUST VIOLATION OF SOME WAY OF,
14 AS THE PLAINTIFFS SAY, THAT WE'RE REALLY PAYING THE PLAYERS AND
15 WE SHOULD BE ABLE TO HAVE SOME KIND OF MARKET-BASED SYSTEM
16 WHERE WE ALLOW ANY KIND OF PAYMENTS TO THE PLAYERS.

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

18 **THE COURT:** I THINK THEY WOULD SAY THAT YOU'RE
19 RESTRICTING THE PAYMENTS.

20 **MS. WILKINSON:** NO, YOUR HONOR --

21 **THE COURT:** THAT'S --

22 **MS. WILKINSON:** -- THESE ARE NEW BENEFITS -- THAT'S
23 THE IRONY OF WHAT THEY'RE DOING.

24 WE PUT MORE BENEFITS, AND THEY'RE USING THOSE TO TRY
25 AND CONVINCING YOU THAT SOMEHOW EITHER THE BENEFITS SHOULD BE

1 UNLIMITED, WHICH REALLY GOES BACK TO PAYMENTS TOTALLY
2 UNTETHERED, EITHER TO INCIDENTAL PARTICIPATION OR EDUCATION, OR
3 THEY'RE SAYING THEY'RE LIMITED AND THEY SHOULDN'T BE LIMITED,
4 BECAUSE THEY'RE INCIDENTAL TO --

5 **THE COURT:** OKAY.

6 **MR. KESSLER:** YOUR HONOR, HERE --

7 **THE COURT:** I'LL GET BACK TO YOU IN A MINUTE, BUT IF
8 YOU WOULD JUST -- I DON'T KNOW IF THERE WERE OTHER POINTS TO BE
9 DISCUSSED.

10 **MS. WILKINSON:** YES, YOUR HONOR. THE OTHER -- WHEN
11 YOU WERE TALKING ABOUT WHAT THE TRIAL WOULD LOOK LIKE, WHEN
12 YOU'RE TALKING ABOUT THE LESSER RESTRICTIVE ALTERNATIVES, I
13 THINK WE WOULD NEED ADDITIONAL BRIEFING BECAUSE THEY HAVE NOT
14 BEEN CLEAR ABOUT EXACTLY WHAT IT IS THEY ASKED FOR.

15 WHEN YOU LOOK AT THEIR BRIEF, THEY CITE TO
16 DR. RASCHER WHO SAYS, WELL, I THINK THERE'S A WAY TO, IN HIS
17 REPORT, TO PAY FOR ALL PAYMENTS TETHERED TO EDUCATIONAL
18 EXPENSES -- AND HE USES THE WORD "EXPENSES" AGAIN -- NOT JUST
19 THOSE AT COST OF ATTENDANCE. AND THEN HE CITES THEIR SURVEY
20 EXPERT DR. PORET, WHO ONLY TESTED FOUR OF THE THINGS -- OR
21 RASCHER ONLY TALKS ABOUT FOUR THAT MR. PORET TESTED, WHICH HE
22 TESTED ONE AT A TIME. HE DIDN'T SAY WHAT WILL HAPPEN IF ALL
23 THESE RESTRICTIONS ARE GONE.

24 AND THE ONLY FOUR THAT DR. RASCHER CITES ARE
25 SCHOLARSHIPS AT OTHER INSTITUTIONS, WHICH I THINK YOUR HONOR

1 ALLUDED TO IN THE 12 -- RULE 12 HEARING, THAT PAYING CASH TO GO
2 TO ANOTHER SCHOOL YOU THOUGHT WAS ALREADY PROHIBITED.
3 SCHOLARSHIPS FOR GRADUATE SCHOOL; STUDY ABROAD, WHICH, BY THE
4 WAY, IS ALREADY PERMITTED. JUST SO YOU KNOW, YOUR HONOR, STUDY
5 ABROAD IS ALREADY PERMITTED IF A STUDENT ATHLETE'S ELIGIBILITY
6 HAS EXPIRED BUT THEY'RE STILL ENROLLED. SO THEY CAN GO TO
7 STUDY ABROAD, AND THOSE ARE THE -- THOSE ARE THE THINGS THAT --
8 THE ONLY THINGS THAT THEY POINTED US TO IN A VERY SPECIFIC WAY
9 THAT THEY SAY ARE THINGS THAT ARE TETHERED TO EDUCATIONAL
10 EXPENSE, THAT ARE NOT PART OF COA, THAT THEY SAY WOULD, QUOTE,
11 BE A LESSER RESTRICTIVE ALTERNATIVE.

12 SO WE NEED YOU TO ORDER THEM TO DO A BRIEFING
13 SPECIFICALLY ABOUT WHAT THOSE LESSER RESTRICTIVE ALTERNATIVES
14 ARE SO WE CAN ADDRESS WITH YOU WHETHER THEY'RE EVEN ALREADY
15 PROVIDED FOR, WHETHER THEY SOMEHOW ARE LESSER RESTRICTIVE
16 ALTERNATIVES, AND WHETHER YOU NEED TO HAVE ANY TRIAL
17 WHATSOEVER, BECAUSE WHEN THEY START TO GO BACK TALKING TO YOU
18 ABOUT, OH, WELL, ALL THESE RULES, DON'T WORRY, YOU'RE NOT GOING
19 TO HEAR ABOUT EVERY SINGLE ONE OF THE 80, YOU KNOW, RULES IN
20 THEIR -- WHAT WAS IT -- THEIR APPENDIX A THAT YOU REFERRED TO.

21 WHAT COUNSEL, I THINK I HEARD HIM SAY, WELL, THOSE --
22 THEY'RE COMMON ISSUES. HE'S RIGHT THEY'RE COMMON ISSUES. THEY
23 ARE ALL ABOUT CONTROLLING COMPENSATION TO STUDENT ATHLETES SO
24 THEY'RE NOT PAID TO PLAY. THAT WAS DECIDED BY YOU AND
25 BY O'BANNON IN THE NINTH CIRCUIT.

1 **THE COURT:** OKAY.

2 **MR. KESSLER:** YOUR HONOR, IF I COULD JUST QUICKLY --
3 JUST A FEW POINTS?

4 ONE IS IT'S JUST NOT TRUE THAT THE FOUR SHE MENTIONED
5 OR THE THREE SHE MENTIONED IS WHAT WE'VE IDENTIFIED. WE'VE
6 IDENTIFIED AT LEAST 17 IN APPENDIX B, AND YOUR HONOR HAS THAT,
7 AND WE MADE A RECORD ON IT. WE'RE HAPPY TO MAKE A FURTHER
8 RECORD ON IT.

9 SECOND, YOUR HONOR IS A HUNDRED PERCENT RIGHT. IT
10 CAN BE AN ANTITRUST VIOLATION TO CAP A BENEFIT, AND LET'S SEE
11 WHY. YOUR HONOR SAID IT MUST BE SIGNIFICANT. IN *O'BANNON* THE
12 NINTH CIRCUIT SAID ALLOWING \$5,000 UNTETHERED WOULD BE
13 SIGNIFICANT. IT WOULD BE A QUANTUM LEAP. THEY PROHIBITED
14 THAT.

15 AFTER THAT THEY NOW ALLOW OVER \$5,000 IN GIFTS
16 UNRELATED TO EDUCATIONAL EXPENSE TO THE WINNERS WHO -- PEOPLE
17 WHO GO TO TOURNAMENTS AS A REWARD. AND THEY TESTIFIED THAT HAS
18 NOTHING TO DO WITH AMATEURISM, IT'S FINE. SO HAVING LIMITS ON
19 THOSE TYPES OF GIFTS AND THINGS THEY HAVE TO JUSTIFY. THERE'S
20 NO RECORD ON THAT.

21 NONE OF THESE BENEFITS WAS RULED ON IN *O'BANNON* WITH
22 RESPECT TO PRO-COMPETITIVE EFFECT. AND, AGAIN, I URGE YOUR
23 HONOR TO LOOK AT THE *O'BANNON* COURT'S DISCUSSION WHERE THEY SAY
24 IT WOULD BE AN AGGRESSIVE CONSTRUCTION OF WORDS TO SAY THAT IN
25 *BOARD OF REGENTS* THE SUPREME COURT WAS RULING ON ANTITRUST

1 IMMUNITY OR PROTECTION FOR RULES THAT IT DIDN'T ACTUALLY
2 CONSIDER.

3 HERE WHAT THEY WANT TO DO IS SAY THERE ARE ALL THESE
4 ADDITIONAL RULES WHICH WERE NOT RULED ON IN O'BANNON AND THAT
5 SOMEHOW O'BANNON IS MEANT TO PROTECT THEM ALL. THE O'BANNON
6 MAJORITY WOULD REJECT THAT ARGUMENT. IT WAS PRESENTED TO THEM
7 BECAUSE THAT'S WHAT THEY WROTE ABOUT THE SUPREME COURT. I
8 DON'T THINK THEY THOUGHT THEY HAD MORE POWER THAN THE SUPREME
9 COURT OF THE UNITED STATES.

10 AND THE WHOLE POINT IS THAT THEIR WHOLE ARGUMENT FROM
11 THEM, YOUR HONOR, WAS ANYTHING ABOVE COST OF ATTENDANCE.
12 THAT'S WHAT THE O'BANNON COURT SAID WOULD BE A QUANTUM LEAP.
13 NOW THEY VOLUNTARILY ARE GIVING ALL THESE THINGS WHICH
14 DESTROY -- THAT'S THE NEW FACTS IN O'BANNON, WHICH IS WHY WE
15 BELIEVE THE PRO-COMPETITIVE ISSUE HAS TO BE LOOKED AT AGAIN
16 BECAUSE THAT IS A FACTUAL CHANGE.

17 THANK YOU, YOUR HONOR.

18 **THE COURT:** OKAY.

19 **MS. WILKINSON:** YOUR HONOR, THEY'RE NOT FACTUAL
20 CHANGES. I JUST WANT CLEAR. YOU HEARD THIS. THAT'S WHY WE
21 NEED TO BRIEF THIS FOR YOU.

22 THE DOLLAR NUMBER HE JUST SAID, THE \$6,280 THAT
23 PLAYERS RECEIVE AS AWARD AND GIFTS WAS IN THE REPORT AND IN THE
24 TRIAL OF O'BANNON. THAT NUMBER WAS THERE. THIS ISSUE ABOUT
25 BENEFITS, THAT WAS NOT HIDDEN. IT WAS TALKED TO -- TALKED

1 ABOUT BY ALMOST EVERY WITNESS THAT GOT ON THE STAND. SO THE
2 IDEA THAT --

3 (SIMULTANEOUS COLLOQUY.)

4 **MR. KESSLER:** THAT IS SO NOT TRUE. I'M SORRY.

5 **MS. WILKINSON:** -- BENEFITS INCIDENTAL TO
6 PARTICIPATION IS NOTHING NEW. AND IF THEY'RE TALKING ABOUT --
7 YOU ASKED -- YOUR FIRST QUESTION WAS, IS IT REALLY NEW, IS IT
8 REALLY MATERIAL. CHANGING A BENEFIT LIMIT IS CERTAINLY NOT
9 ANYTHING MATERIALLY NEW, AND IT'S NOT A BASIS FOR REOPENING ALL
10 THE PRO-COMPETITIVE JUSTIFICATION FINDINGS YOU MADE.

11 **THE COURT:** OKAY. I NEED TO TAKE A MINUTE TO LOOK AT
12 MY LIST OF QUESTIONS AND SEE IF I MISSED ANY OF THEM.

13 **MR. KESSLER:** CERTAINLY, YOUR HONOR.

14 **THE COURT:** LET ME HAVE A MINUTE HERE.

15 (PAUSE IN PROCEEDINGS.)

16 **THE COURT:** I HAD A COUPLE OF COUPLE OTHER THINGS FOR
17 DEFENDANTS.

18 **MS. WILKINSON:** YES, YOUR HONOR.

19 **THE COURT:** I WANTED TO HEAR WHAT YOU THOUGHT ABOUT
20 THIS IDEA ABOUT SAYING YOU CAN'T DO THIS AS THE NCAA, BUT IT'S
21 OKAY IF YOU LET THE CONFERENCES DO IT. DO YOU HAVE ANY
22 THOUGHTS ON THAT?

23 **MS. WILKINSON:** WELL, YES, WE DO.

24 ONE, WE AGREE WITH YOU THAT THERE'S NO EVIDENCE IN
25 THE RECORD TO SUPPORT THAT. THERE'S ONE STATEMENT FROM ONE

1 EXPERT. THERE'S NO EVIDENCE TELLING YOU HOW THAT WOULD HAPPEN.
2 AND AS I UNDERSTOOD COUNSEL, WHAT THEY WERE SAYING IS THEY'RE
3 JUST SAYING THAT COULD HAPPEN. THEY'RE NOT SAYING YOU SHOULD
4 ORDER IT.

5 IT'S THAT WHOLE IDEA THAT SOMEHOW YOU SHOULD JUST
6 ISSUE A GENERAL ORDER PROHIBITING US FROM ENFORCING ANY OF THE
7 RULES THAT THEY LIST IN APPENDIX A AND THEN HAVING 60 DAYS TO
8 SEE WHAT HAPPENS AND THEN WE COME BACK IN HERE. IF THAT ISN'T
9 WHACK-A-MOLE AND EXACTLY WHAT THE NINTH CIRCUIT SAID, WHICH IS
10 THEY'RE GOING --

11 **THE COURT:** I'M AFRAID WHACK-A-MOLE WAS ME, AND I --
12 (SIMULTANEOUS COLLOQUY.)

13 **MS. WILKINSON:** IT WAS YOU. IT WAS YOU. BUT IT WAS
14 JUST A MORE COMMON SENSE WAY OF SAYING WHAT THE NINTH CIRCUIT
15 SAID WHICH IS, IF YOU DO THIS, IF WE UPHELD THE \$5,000, FOR
16 EXAMPLE, THEY SAID PLAINTIFFS WILL BE IN, AND THEY'LL WANT TO
17 GET THE HIGHER VALUE AND THE HIGHER VALUE. THAT'S EXACTLY WHAT
18 YOU HEARD COUNSEL JUST SAY; WE DON'T -- WE THINK THAT LIMIT IS
19 EITHER TOO -- WE WANT TO GET IT HIGHER AND HIGHER.

20 THE NINTH CIRCUIT ADDRESSED THIS, YOUR HONOR. ALL
21 THE ISSUES THAT YOU HEARD THUS FAR, I HOPE IT'S CLEAR, MY
22 CO-COUNSEL WANTED ME TO MAKE IT CLEAR TO YOU. WE THINK ALL OF
23 THIS, EVEN THE LESSER RESTRICTIVE ALTERNATIVES, THEY'VE ALL
24 BEEN DECIDED ALREADY. WHETHER YOU USE RES JUDICATA, COLLATERAL
25 ESTOPPEL, OR STARE DECISIS, YOU DON'T GET TO PULL OUT THESE

1 LESS RESTRICTIVE ALTERNATIVES IF THE CLAIM HAS ALREADY BEEN
2 DECIDED.

3 **THE COURT:** HOW HAS THE LESS RESTRICTIVE
4 ALTERNATIVES' CLAIM BEEN DECIDED?

5 **MS. WILKINSON:** I THINK BY WHAT THE COURT -- WELL, I
6 DON'T THINK. BY WHAT THE COURT SAID WAS PERMISSIBLE OR WAS --
7 YOU HAD TO -- WE HAD TO BE ORDERED TO DO AND WHAT WE COULD DO
8 BUT AREN'T -- YOU CAN'T ORDER US TO DO UNDER THE ANTITRUST
9 LAWS. IT'S DIFFERENT TO SAY WE COULD DO IT.

10 WHAT THE COURT SAID IS WHAT THEY MUST DO, AND THEY
11 LAID OUT WHY, BECAUSE WE HAVE A PRINCIPLE THAT SAYS WE WILL PAY
12 EXPENSES FOR STUDENT ATHLETES, JUST LIKE OTHER STUDENTS ON
13 SCHOLARSHIP, FOR THE COST OF ATTENDING SCHOOL.

14 YOU AND THE NINTH CIRCUIT FOUND THAT INCLUDED THE
15 FULL COST OF ATTENDANCE, AND THEY SAID THAT'S WHAT THE
16 ANTITRUST LAWS REQUIRE, NOTHING MORE.

17 **THE COURT:** WELL, ONE MIGHT ARGUE THAT IN AN EARLIER
18 PORTION -- I MEAN, I KNOW THE PORTION YOU'RE REFERRING TO, AND
19 I TRIED TO FIGURE OUT WHAT THAT MEANT IN THE LIGHT OF AN
20 EARLIER PORTION OF THE OPINION WHICH IMPLIED THAT THERE WOULD
21 LIKELY BE FUTURE LITIGATION ABOUT OTHER KINDS OF RULES. SO I
22 THINK WHEN THEY SAID IT REQUIRES THIS BUT NOTHING MORE, THEY
23 DIDN'T MEAN NOTHING EVER NO MATTER WHAT --

24 **MS. WILKINSON:** NO. AND --

25 **THE COURT:** -- OF ANY OTHER KIND. I THINK IT LEFT

1 OPEN THE POSSIBILITY OF OTHER POSSIBILITIES THAT WOULD BE
2 TETHERED TO EDUCATIONAL COMPENSATION OR EDUCATIONAL EXPENSES.
3 SO I THINK THAT WAS CONTEMPLATED, OR CERTAINLY AN ARGUMENT
4 WOULD BE MADE TO THAT EFFECT, SO --

5 **MS. WILKINSON:** WELL, I THINK THEY WERE SAYING -- BY
6 SAYING NOTHING MORE, THEY WERE SAYING THIS IS WHAT'S REQUIRED.
7 THEY WEREN'T SAYING -- NOW, COULD THERE BE SOME MATERIAL CHANGE
8 THAT'S SO DRAMATIC, OF COURSE, THAT WE COULD BE BROUGHT BACK
9 IN? WE'RE NOT TAKING THE POSITION THAT NOW AND FOREVERMORE YOU
10 CAN NEVER CHALLENGE ANY OF THE NCAA RULES. BUT WHAT YOU ARE
11 SAYING WHAT WAS DECIDED BY YOU AND ULTIMATELY BY THE NINTH
12 CIRCUIT DOES PRECLUDE THE CLAIMS THAT THEY ARE TRYING TO BRING
13 HERE.

14 AND WHEN THEY WENT THROUGH AND REVERSED YOUR DECISION
15 ON THE 5,000, THAT'S EXACTLY WHAT THEY SAID, WHICH IS -- YOU'RE
16 GOING TO GET PEOPLE COMING BACK IN TO SECOND GUESS WHAT THIS
17 AMOUNT SHOULD BE. AND THAT'S EXACTLY WHAT THEY'RE TELLING YOU.
18 THEY'RE TELLING YOU THEY'RE GOING TO HAVE A LESS RESTRICTIVE
19 ALTERNATIVE AND GO BENEFIT BY BENEFIT TO TELL YOU, WE DON'T
20 THINK THE LIMIT SHOULD BE \$6,000 FOR GIFTS, WE THINK IT SHOULD
21 BE 10,000. THAT'S EXACTLY WHAT THE NINTH CIRCUIT SAID SHOULD
22 NOT HAPPEN, AND THAT'S WHAT AMPLE LATITUDE MEANS.

23 THEY DON'T GET TO DECIDE THAT YOU SHOULD STEP IN THE
24 SHOES OF THE NCAA -- AND I KNOW YOU DON'T WANT TO. IF YOU ASK
25 YOUR QUESTION -- AS A TRIAL LAWYER I THOUGHT ABOUT THIS, TOO.

1 WHAT IS YOUR TRIAL REALLY GOING TO BE LIKE? YOU'RE GOING TO BE
2 HEARING THESE BENEFITS AND HEARING US GET UP HERE AND ARGUE
3 THAT THEY SHOULD BE ABLE TO GET HEADPHONES WORTH \$500, NO, THEY
4 SHOULD BE ABLE TO GET HEADPHONES VERSUS A THOUSAND DOLLARS.

5 I THINK IF YOU THINK OF IT LIKE A PRACTICAL TRIAL
6 JUDGE AND A TRIAL LAWYER, YOU SEE HOW ABSURD THAT IS. IT'S
7 LIKE YOU'RE BECOMING THE REGULATOR, DECIDING EACH GRADATION OF
8 EACH BENEFIT, BY THE WAY, THEY'RE TALKING ABOUT. NOW THEY'RE
9 SAYING WE PROVIDE TOO MANY BENEFITS OR BENEFITS HAVE LIMITS
10 THAT ARE UNEXPLAINABLE, WHICH IS NOT TRUE, AND I REALLY WISH
11 YOU WOULD ALLOW US TO BRIEF THAT.

12 BUT I CAN'T IMAGINE, YOUR HONOR -- THAT'S WHAT THE
13 TRIAL WOULD BE LIKE IF YOU ALLOW THIS LESSER RESTRICTIVE
14 ALTERNATIVE GOING BENEFIT BY BENEFIT. YOU WILL BE STEPPING IN
15 AND BASICALLY DOING WHAT THE NCAA DOES.

16 **THE COURT:** WELL, WHAT THEY'RE ASKING FOR -- AND THIS
17 WAS THE OTHER THING I WANTED TO ASK YOU. THEY'RE SAYING WHAT
18 THEY HAVE TO PROVE IS THAT THERE IS PERHAPS ONE OR MORE LESS
19 RESTRICTIVE ALTERNATIVES, BUT THAT DOESN'T MEAN THAT THE COURT
20 HAS TO ORDER THAT THAT ONE AND NO OTHER BE ADOPTED. THE COURT
21 COULD SAY --

22 **MS. WILKINSON:** GO AHEAD.

23 **THE COURT:** -- THERE IS ONE, AND -- BUT YOU CAN DO
24 THAT ONE, OR YOU CAN DO A DIFFERENT ONE, AS LONG AS YOU DON'T
25 ENGAGE IN A PRICE -- ANTI-COMPETITIVE RESTRAINT THAT HAS NO

1 PRO-COMPETITIVE JUSTIFICATION.

2 **MS. WILKINSON:** BUT HOW COULD YOU DO THAT, YOUR
3 HONOR? YOU KNOW -- I MEAN, I LOOKED THROUGH YOUR OPINION. IF
4 YOU DID THAT, THAT'S LIKE SAYING THE WAY WE JUST GET TO YOU
5 ORDERING REMEDIES, WE JUST GIVE YOU SOMETHING, ONE THING, BUT
6 YOU DON'T HAVE TO ORDER IT.

7 THE COURTS -- THE ANTITRUST LAWS ARE VERY CLEAR, AND
8 YOU WERE CLEAR IN YOUR OPINION. YOU HAVE TO SAY SPECIFICALLY
9 WHAT IT IS, WHY IT IS SUBSTANTIALLY LESSER RESTRICTED. IF
10 THEY'RE SAYING, WHAT WOULD YOU DO ABOUT ALL THE OTHER THINGS?
11 YOU'RE NOT GIVING THE NCAA ANY SPECIFIC GUIDANCE. YOU'RE
12 SAYING HERE'S ONE, BUT I DON'T HAVE TO ORDER IT; I'LL GIVE THIS
13 GENERAL ONE. WE DON'T KNOW THAT THAT'S SUBSTANTIALLY LESS
14 RESTRICTIVE. WE DON'T KNOW THAT IT WILL ACHIEVE THE SAME
15 OUTCOME. AND WE DON'T KNOW THAT IT DOESN'T INCREASE COSTS.
16 THEY HAVE TO BE SPECIFIC.

17 **THE COURT:** WELL, I JUST DON'T KNOW. I'LL HAVE TO GO
18 BACK -- I DON'T KNOW IF THIS POINT WAS BRIEFED OR NOT, AND IF
19 IT'S NOT, MAYBE I'LL --

20 (SIMULTANEOUS COLLOQUY.)

21 **MR. KESSLER:** (INDISCERNIBLE) WE COULD CERTAINLY
22 BRIEF THE RELIEF POINT. I DON'T THINK WE NEED BRIEFING
23 NECESSARILY ON LESS RESTRICTIVE ALTERNATIVES, BUT I THINK IF
24 YOU WANT TO GO THERE, IT SHOULD BE TRIED -- AND WE SET FORTH 17
25 EXAMPLES. IT'S NOT LIKE THEY DON'T KNOW WHAT THE EXAMPLES ARE.

1 BUT ON THE RELIEF POINT, YOUR HONOR -- SO I HAD A
2 CASE AGAINST THE NATIONAL FOOTBALL LEAGUE AGAINST THEIR
3 RESTRICTIONS ON PLAYER MOVEMENT. IT WAS CALLED THE MCNEAL
4 CASE. WE WON. THE COURT ENJOINED THAT RESTRAINT, AND THE NFL
5 SAID, OKAY, THAT'S ILLEGAL, I'VE READ THE -- I'VE SEEN THE JURY
6 VERDICT, I READ THE COURT'S OPINIONS, AND NOW, INSTEAD OF
7 HAVING WHAT'S CALLED PLAN B, WHICH WE HELD UNLAWFUL, MAYBE WE
8 COULD DEVELOP PLAN C, THAT'S WHAT WAS REQUIRED UNDER THE
9 ANTITRUST LAWS, SOMETHING THEY THOUGHT WAS MORE JUSTIFIABLE.
10 THEN THE CASE SETTLED. BUT THAT'S HOW ANTITRUST CASES WORK.

11 IN OTHER WORDS --

12 **THE COURT:** WELL, YOU'RE TELLING ME THAT, AND COUNSEL
13 IS TELLING ME THE OTHER, AND I'VE HAD A FEW ANTITRUST CASES,
14 BUT NOT ENOUGH TO --

15 (SIMULTANEOUS COLLOQUY.)

16 **MR. KESSLER:** AND I GUESS I'D BE HAPPY, YOUR HONOR --

17 **THE COURT:** HOLD ON A SECOND.

18 **MR. KESSLER:** I'M SORRY.

19 **THE COURT:** MAYBE THESE TYPES OF CASES ARE BRIEFED
20 ADEQUATELY AND I CAN GO BACK AND LOOK AT THEM AGAIN AND I'LL
21 FIND OUT THAT AN INJUNCTION DOESN'T HAVE TO TRACK THE LESS
22 RESTRICTIVE ALTERNATIVES AND CAN BE MORE VAGUE, OR MAYBE I'LL
23 FIND OUT THAT EVERY COURT ALWAYS TRACKS THE LESS RESTRICTIVE
24 ALTERNATIVES AND DOESN'T MAKE IT VAGUE.

25 THERE'S GOT TO BE AN ANSWER OUT THERE, AND EITHER

1 I'LL FIND IT IN THE BRIEFS OR MAYBE I'LL --

2 (SIMULTANEOUS COLLOQUY.)

3 **MS. WILKINSON:** YOUR HONOR, MAY I MAKE A POINT
4 INSTEAD OF BEING TALKED OVER?

5 **THE COURT:** I'M SORRY?

6 **MS. WILKINSON:** CAN I MAKE A POINT, PLEASE? COUNSEL
7 HAS BEEN TALKING QUITE A BIT.

8 ANY OF THESE LESSER RESTRICTIVE ALTERNATIVES COULD
9 HAVE BEEN BROUGHT FORWARD IN THE LAST TRIAL. SO IT'S NOT JUST,
10 AS YOU SAID, WAS THE EXACT EVIDENCE OR THE CASE ARGUED THE WAY
11 THAT YOU WANTED TO. THEY COULD HAVE RAISED THESE LESSER
12 RESTRICTIVE ALTERNATIVES IN THE OTHER TRIAL, AND THEY DID NOT.

13 **THE COURT:** I DON'T KNOW THAT -- DO YOU KNOW THAT? I
14 DON'T KNOW THAT.

15 **MS. WILKINSON:** THAT THEY DIDN'T? WELL, IF THEY DID,
16 EITHER WAY WE WIN. IF THEY DID, YOU DIDN'T ACCEPT THEM.

17 (SIMULTANEOUS COLLOQUY.)

18 **MS. WILKINSON:** AND IF THEY DIDN'T, IT'S TOO LATE
19 BECAUSE THESE ARE, AGAIN, THEY'RE THE SAME ISSUES. YOU ASKED
20 THE QUESTION BECAUSE YOU KNOW THE WITNESSES ARE GOING TO BE
21 BASICALLY THE SAME. YOU'RE GOING TO HEAR THE SAME EVIDENCE.
22 AND THE ONLY DIFFERENCE IS THAT THEY'RE TRYING TO SAY THESE
23 LESSER RESTRICTIVE ALTERNATIVES, WHICH GO TO THE SAME POINT,
24 THEY SAID, ARE DIFFERENT. IF THEY ARE TO THE SAME POINT FOR
25 THE SAME PURPOSE AND THEY ARE JUST DIFFERENT UNDER ALL OF THE

1 DOCTRINES WE WERE JUST TALKING ABOUT, THEY'RE PRECLUDED. THEY
2 COULD HAVE BROUGHT THEM UP AND THEY DIDN'T.

3 **MR. KESSLER:** YOUR HONOR, I GAVE A PERFECT EXAMPLE
4 WHY THAT'S NOT CORRECT. THE NINTH CIRCUIT FOR THE FIRST TIME
5 IN *O'BANNON* ANNOUNCED THIS DISTINCTION BETWEEN COMPENSATION
6 UNTETHERED TO EDUCATIONAL EXPENSE AND EDUCATED-RELATED EXPENSE.
7 THAT'S WHEN THE WORLD HEARD ABOUT THIS DISTINCTION.

8 ONE OF OUR LESS RESTRICTIVE ALTERNATIVES NOW IS THE
9 NINTH CIRCUIT FOUND THERE'S NO JUSTIFICATION THAT THEY'VE SHOWN
10 IN *O'BANNON* -- AND WE BELIEVE THEY CAN'T SHOW IT -- HERE, FOR
11 RESTRICTING ANYTHING THAT'S RELATED TO EDUCATED-RELATED
12 COMPENSATION.

13 SO THAT WAS NOT RULED -- IF IT WAS RULED ON BY THE
14 NINTH CIRCUIT, WE WON. OKAY? BECAUSE THEY'VE HELD THERE
15 WASN'T A BASIS TO RESTRICT IT.

16 AND SO EITHER WE'VE ALREADY WON, WHICH IS IN PART
17 WHAT WE'VE ARGUED IN OUR SUMMARY JUDGMENT, OR IT HAS TO BE
18 TRIED. BUT IT'S IMPOSSIBLE FOR THEM TO ARGUE WE SHOULD HAVE
19 ARGUED THAT AND WE LOST IT THERE BECAUSE THE NINTH CIRCUIT
20 FOUND THE OPPOSITE.

21 **THE COURT:** OKAY. THE OTHER THING WE NEED TO TALK
22 ABOUT A LITTLE BIT IS THESE *DAUBERT* MOTIONS. *ELZINGA* -- I'M
23 NOT -- WELL, I GUESS REALLY I DON'T HAVE TO RULE ON THEM UNTIL
24 I FIND OUT WHAT'S LEFT TO BE TRIED.

25 **MS. WILKINSON:** THAT'S TRUE, YOUR HONOR.

1 **MR. KESSLER:** THAT IS TRUE.

2 **THE COURT:** THEY AREN'T REALLY RELEVANT TO WHAT I
3 HAVE BEFORE ME ON SUMMARY JUDGMENT, RIGHT? YOU'RE NOT RELYING
4 ON ANY OF THESE EXPERTS IN THE SUMMARY JUDGMENT MOTION?

5 **MR. KESSLER:** IT IS ARGUED, YOUR HONOR, THAT
6 PROFESSOR ELZINGA IS NOT RELEVANT TO THE SUMMARY JUDGMENT
7 ISSUES BEFORE YOU, YES.

8 **THE COURT:** I'M NOT SURE ANY OF THEM ARE.

9 **MS. WILKINSON:** WELL, WE MOVED TO EXCLUDE SOME OF
10 THEIR EXPERTS AND TESTIMONY, AND I THINK THEY ARE RELYING ON
11 THOSE TO MAKE SOME OF THEIR PROOF REQUIREMENTS, BUT I THINK
12 YOUR HONOR PROBABLY COULD DECIDE, AT LEAST ESPECIALLY WHERE I
13 THINK YOU'RE GOING, TO ASK FOR SOME ADDITIONAL BRIEFING. YOU
14 DON'T NEED TO DECIDE THOSE UNTIL WE CLARIFY THESE ISSUES,
15 WHICH, OF COURSE, I WANT TO BE CLEAR, I THINK OUR CLARIFICATION
16 WILL BE TO JUST LAY OUT THE BASIS FOR SHOWING THAT THEY'VE
17 ALREADY BEEN DECIDED OR THEY COULD HAVE BEEN BROUGHT.

18 IT'S NOT JUST -- THEY DON'T HAVE TO HAVE BEEN
19 BROUGHT. I THINK THAT'S WHAT MR. KESSLER IS SUGGESTING. THE
20 DOCTRINES DON'T SAY, IF YOU DIDN'T BRING EVERY SINGLE ARGUMENT
21 AND THERE'S ONE NEW ARGUMENT, YOU GET TO BRING THE CASE AGAIN.
22 THAT'S NOT TRUE.

23 IF THE ISSUES WERE THE SAME AND THE PARTIES WERE
24 ARGUING OVER THE SAME CONCEPTS, AND THE ISSUES WERE DECIDED AND
25 THEY DECIDED NOT TO PRESENT ONE LESSER INCLUDED -- LESSER

1 RESTRICTIVE ALTERNATIVE -- I'M SORRY -- BUT THEY COULD HAVE AND
2 THEY DIDN'T, THEY DON'T GET TO HAVE A WHOLE NEW TRIAL JUST
3 BECAUSE THEY DECIDED, OH, LOOK, WE CAME UP WITH ANOTHER ONE
4 THAT'S CONSISTENT WITH THE SAME GOALS THAT THE LAST CASE WAS
5 TRYING TO ACHIEVE.

6 **THE COURT:** OKAY. DR. ELZINGA, HOWEVER, THE THRUST
7 OF WHAT I GLEANED FROM HIS REPORT HAD TO DO WITH DEFINING THE
8 MARKETS DIFFERENTLY THAN THE COURTS HAVE DEFINED IT. SO I'M
9 NOT SAYING THAT THAT WOULD -- WHETHER IT'S RIGHT OR WRONG, I'M
10 NOT SAYING IT'S RELEVANT AT THIS POINT.

11 **MS. WILKINSON:** IF YOU REOPENED -- IF YOU REOPENED
12 PRO-COMPETITIVE JUSTIFICATIONS, WHICH WE DON'T THINK YOU COULD,
13 I THINK WE WOULD SAY IT'S RELEVANT TO THAT, TOO.

14 I'LL LET MS. WALSH ADDRESS THAT.

15 **MS. WALSH:** YES, YOUR HONOR -- ALEXANDRIA WALSH FOR
16 NCAA. THANK YOU.

17 GOOD AFTERNOON, YOUR HONOR.

18 DR. ELZINGA'S OPINION, ITS RELEVANCE AND PRECISELY
19 WHAT IT'S RELEVANT TO, I ABSOLUTELY AGREE YOUR HONOR IS RIGHT.
20 IT DEPENDS SOMEWHAT ON HOW YOU RULE ON THE PENDING SUMMARY
21 JUDGMENT MOTION. BUT HIS OPINIONS ARE RELEVANT IF, FOR
22 EXAMPLE, YOU ALLOW RE-LITIGATION ON THE ISSUE OF
23 PRO-COMPETITIVE JUSTIFICATIONS. HE OFFERS -- HIS OPINIONS DO,
24 IN FACT, GO TO THAT ANALYSIS?

25 **THE COURT:** THEY ALL GO TO THE RELEVANT MARKET. HE

1 TALKED ABOUT THE PLATFORM AND THE TWO-SIDED MARKET AND ALL OF
2 THAT, WHICH WE'RE NOT DEALING WITH. I AGREE HE TALKS ABOUT
3 AMATEURISM, BUT HE TALKS ABOUT IT IN THE CONTEXT OF DEFINING
4 THE MARKET, AND WE'RE NOT DEFINING THE MARKET ANYMORE.

5 **MS. WALSH:** YOUR HONOR, WHAT -- IT IS TRUE,
6 DR. ELZINGA DOES NOT REDEFINE THE MARKET FROM THE WAY IT WAS
7 DEFINED IN *O'BANNON* IN THE SENSE THAT *O'BANNON* DEFINED IT TO
8 INCLUDE DIVISION I COLLEGES AND UNIVERSITIES.

9 HE DOES, HOWEVER, OFFER AN OPINION THAT THOSE
10 DIVISION I COLLEGES AND UNIVERSITIES, THAT THEY ARE WHAT
11 ECONOMISTS REFER TO AS MULTI-SIDED PLATFORMS. AND THAT MEANS
12 WHAT THEY DO IS THEY BRING TOGETHER DIFFERENT CONSTITUENCIES
13 AND THEY FACILITATE INTERACTIONS BETWEEN THOSE CONSTITUENCIES,
14 AND IN DOING THAT, THEY CREATE VALUE.

15 THE FACT IS THAT IS HOW UNIVERSITIES OPERATE AND
16 THAT'S THEIR PROPER CLASSIFICATION, IN DR. ELZINGA'S OPINION,
17 AS A MATTER OF ECONOMICS, MEANS THAT WHAT YOU DID IN *O'BANNON*
18 AND WHAT THE NINTH CIRCUIT DID IN *O'BANNON*, AND WHAT THE NINTH
19 CIRCUIT DID IN *O'BANNON*, WHICH IS LOOK AT THE EFFECT OF THE
20 NCAA'S RULES ON CONSTITUENCIES OTHER THAN STUDENT ATHLETES --
21 SO YOU LOOKED AT HOW IT WOULD AFFECT CONSUMER DEMAND. YOU
22 LOOKED AT HOW IT WOULD AFFECT INTEGRATION.

23 DR. ELZINGA'S OPINION EXPLAINS WHY THAT MAKES SENSE
24 AS A MATTER OF ECONOMICS, BECAUSE WHEN YOU HAVE A MULTI-SIDED
25 PLATFORM AND YOU'RE LOOKING AT A RULE THAT'S CHALLENGED UNDER

1 THE ANTITRUST LAWS, YOU HAVE TO CONSIDER HOW THE REMOVAL OF
2 THAT RULE WILL AFFECT THE DIFFERENT CONSTITUENCIES TO THE
3 PLATFORM TO SEE -- TO ASSESS THE COMPETITIVE EFFECTS OF THE
4 RULE OR THE REMOVAL OF THE RULE.

5 **THE COURT:** AND THEN DR. HECKMAN DID TESTIFY AT THE
6 PREVIOUS TRIAL AND TALKED ABOUT THE BENEFITS TO ATHLETES OF
7 PARTICIPATING IN ATHLETICS, AND THAT'S ESSENTIALLY THE SAME
8 THING HE'S SAYING AGAIN, WHICH IS REALLY NOT DISPUTED AND --

9 **MS. WALSH:** WELL, YOUR HONOR, I DO THINK IT'S
10 DISPUTED BY THE PLAINTIFFS HERE.

11 **THE COURT:** IT WOULDN'T BE AFFECTED, BECAUSE THE
12 THINGS THAT ARE BENEFICIAL WOULD REMAIN AND WOULDN'T BE
13 ENJOINED. HE DOESN'T SAY, OH, THEY WON'T GET THESE BENEFITS IF
14 THEY GOT A \$5,000 TRUST FUND, FOR EXAMPLE, OR, THEY WON'T GET
15 THESE BENEFITS IF THEY GET A \$450 BEST BUY CARD.

16 **MS. WALSH:** WELL, I THINK THAT PART OF THE ARGUMENT
17 THAT WOULD BE MADE IF -- AND WE DON'T BELIEVE IT SHOULD BE, BUT
18 IF THE ISSUE OF PRO-JUSTIFICATIONS IS REAL, THEN IS WHETHER
19 THESE RULES THAT ARE IN PLACE, YOU KNOW, TOGETHER AS PART OF
20 THE OVERALL FRAMEWORK ARE NECESSARY TO ENSURE THAT THESE
21 STUDENT ATHLETES ARE, IN FACT, ABLE TO ACT -- TO HAVE A STUDENT
22 LIFE AND TO BE -- AND TO NOT BE TURNED INTO PAID PROFESSIONALS.

23 AND THEN DR. HECKMAN --

24 **THE COURT:** HE DOESN'T REALLY TALK ABOUT THAT,
25 THOUGH.

1 **MS. WALSH:** WELL, HE TALKS ABOUT THE --

2 **THE COURT:** HE TALKS ABOUT HOW BAD IT WOULD BE IF
3 THERE WEREN'T ANY STUDENT ATHLETICS. SO IF THE NOTION WAS IF
4 YOU DO THESE THINGS, THE SKY WILL FALL, AND THERE WON'T BE ANY
5 STUDENT ATHLETICS, AND NO ONE WILL GET TO BE A STUDENT ATHLETE
6 ANYMORE EVER, BUT I DON'T THINK ANYONE IS REALLY TALKING ABOUT
7 THAT.

8 **MS. WALSH:** I THINK CRITICAL TO HIS OPINION IS NOT
9 JUST THAT THESE STUDENT ATHLETES ARE PRESENT ON CAMPUS, BUT
10 THAT THEY ACTUALLY RECEIVE AN EDUCATION. AND IF YOU REOPEN THE
11 ISSUE OF PRO-COMPETITIVE JUSTIFICATIONS, ONE THING THAT WE WILL
12 ARGUE AND WE WILL SHOW IS THAT THIS WHOLE SYSTEM OF RULES IS
13 NECESSARY TO ENSURE THAT THE STUDENT ATHLETES ARE, IN FACT,
14 ABLE TO PARTICIPATE MEANINGFULLY IN THE COLLEGE COMMUNITY AND
15 GET AN EDUCATION, WHICH IS NECESSARY FOR THESE BENEFITS
16 DR. HECKMAN TALKS ABOUT TO OCCUR.

17 I THINK YOUR HONOR WAS RIGHT AT THE OUTSET, THAT THE
18 EXACT RELEVANCE OF EACH OF THESE EXPERTS WILL DEPEND IN PART ON
19 YOUR RULING AS TO WHAT ISSUES WILL REMAIN FOR TRIAL.

20 **THE COURT:** OKAY. IN TERMS OF YOUR MOTION ABOUT
21 THEIR EXPERTS, THE ONLY THINGS THAT I REALLY GOT FROM -- OR
22 THAT I WAS CONCERNED ABOUT WITH THEM WAS TWO POINTS THAT THEY
23 MADE THAT YOU THOUGHT WERE LEGAL CONCLUSIONS AND NOT EXPERT
24 CONCLUSIONS, AND THOSE WERE WHETHER THE COST OF ATTENDANCE WAS
25 REALLY THE COST OF ATTENDANCE OR WAS IT A SORT OF CONSTRUCT

1 MADE BY THE FEDERAL GOVERNMENT.

2 AND WHAT WAS THE OTHER ONE?

3 **MR. KESSLER:** WHETHER O'BANNON WAS CORRECTLY DECIDED,
4 YOUR HONOR. AND, YOUR HONOR, ON THE POINTS THAT -- ON THE
5 POINTS.

6 **MS. WALSH:** THAT SEEMS IMPROPER.

7 (SIMULTANEOUS COLLOQUY.)

8 **THE COURT:** NO, IT WAS -- DARN IT. I CAN'T REMEMBER.
9 ANYWAY, IT SEEMED AS THOSE -- YOU WERE PROBABLY
10 RIGHT, THOSE WEREN'T THE SUBJECT OF EXPERT TESTIMONY, BUT IT
11 ALSO SEEMED THAT THEY WERE TRUE AND THAT THE -- WOULDN'T REALLY
12 MATTER IF -- THAT MAYBE YOU HAD PROVED THAT IN SOME OTHER KIND
13 OF WAY.

14 **MR. KESSLER:** I WAS GOING TO SAY, YOUR HONOR, THESE
15 ARE THE TYPE OF OBJECTIONS THAT DON'T GO TO 99 PERCENT --

16 **THE COURT:** OH, OH, I KNOW WHAT IT WAS. IT WAS
17 LAZIERE (PHONETIC), AND HE WAS SAYING THAT UNDER ANTITRUST LAW,
18 IT'S SORT OF A GIVEN THAT COMPETITION IS BETTER THAN NOT
19 COMPETITION, AND SO YOU HAVE TO ASSUME THAT COMPETITION IS
20 BETTER THAN NOT COMPETITION. MAYBE THAT'S A LEGAL CONCLUSION
21 AND NOT AN EXPERT WITNESS CONCLUSION, BUT IT'S TRUE, SO IT
22 DOESN'T REALLY --

23 (SIMULTANEOUS COLLOQUY.)

24 **MS. WALSH:** -- THE TOPIC OF EXPERT TESTIMONY FOR THE
25 RECORD IN THE TRIAL.

1 (SIMULTANEOUS COLLOQUY.)

2 **THE COURT:** RIGHT. THE COURT COULD INSTRUCT ON
3 THAT --

4 (SIMULTANEOUS COLLOQUY.)

5 **MS. WALSH:** YES.

6 **MR. KESSLER:** AND WE WOULDN'T OFFER THAT, YOUR HONOR.
7 MY POINT WAS THESE WERE THINGS --

8 **THE COURT:** I'M SORRY. YOU WOULDN'T WHAT?

9 **MR. KESSLER:** WE WOULD NOT OFFER THAT.

10 **THE COURT:** OKAY.

11 **MR. KESSLER:** IN OTHER WORDS, THEY ASKED THE
12 WITNESSES QUESTIONS IN DEPOSITIONS. THE WITNESSES RESPONDED
13 ABOUT A LEGAL POINT, IF IT IS A LEGAL POINT, HAPPENS TO BE A
14 TRUE ONE, WE WOULD NOT ON OUR DIRECT EXAMINATION --

15 **THE COURT:** OKAY.

16 **MR. KESSLER:** -- OFFER THAT POINT. SO THIS IS THE
17 TYPE OF OBJECTION YOU DECIDE ON THE STAND AT TRIAL. THAT'S
18 ALL.

19 **THE COURT:** OKAY. ALL RIGHT.

20 NOW, THEN, WE HAVE A CASE MANAGEMENT CONFERENCE, AND
21 REALLY ALL WE'RE TALKING ABOUT -- WELL, YOU'RE SAYING THAT
22 YOU'RE NOT LIKELY TO SETTLE, WHICH I MUST SAY --

23 **MR. KESSLER:** UNFORTUNATELY, YOUR HONOR, NOT LIKELY
24 RIGHT NOW.

25 **THE COURT:** -- I HAVE TO AGREE WITH.

1 IF YOU THINK THERE IS ANY POSSIBILITY YOU COULD
2 CERTAINLY FIND SOMEONE WHO YOU'VE MET WITH BEFORE OR SOMEONE
3 YOU'VE NEVER MET WITH. JUDGE INFANTE WAS INVOLVED AT ONE TIME.
4 SOME OF THE OTHER --

5 **MR. KESSLER:** THE PARTIES HAVE EMPLOYED A MEDIATOR
6 SUCCESSFULLY FOR THE DAMAGES PART OF THE CASE, AND THAT
7 MEDIATOR HAS BEEN AVAILABLE --

8 **THE COURT:** WHO IS THAT?

9 **MR. KESSLER:** ERIC GREEN.

10 **THE COURT:** OH, YEAH.

11 **MR. KESSLER:** BUT THE ISSUE IS THE PARTIES JUST HAVE
12 BEEN REMOTELY --

13 **THE COURT:** OKAY.

14 **MR. KESSLER:** -- IN THE SAME PLACE.

15 **THE COURT:** WELL, I WOULD LIKE YOU TO AT LEAST
16 CONTINUE TALKING TO EACH OTHER ABOUT IT. MAYBE YOU'D LIKE WHAT
17 YOU COULD AGREE ON BETTER THAN WHAT I DO OR WHAT THE NINTH
18 CIRCUIT DOES. SO I DON'T PARTICULARLY WANT TO ORDER YOU TO.

19 **MR. BERMAN:** PROFESSOR GREEN REACHED OUT TO ME LAST
20 WEEK, AND WHEN I TOLD HIM ABOUT THE SUMMARY JUDGMENT HEARING,
21 HE SAID HE WAS GOING TO CONTACT EACH SIDE AFTER THE HEARING.

22 **THE COURT:** OKAY. WHY DON'T YOU DO THAT? AT LEAST
23 TALK TO HIM.

24 **MR. KESSLER:** WE'RE VERY AMENABLE TO THAT.

25 **THE COURT:** OKAY. YOU'LL TALK TO HIM ABOUT THAT.

1 **MR. COOPER:** WE REMAIN IN COMMUNICATION WITH
2 PROFESSOR GREEN, YOUR HONOR.

3 **THE COURT:** OKAY. GOOD.

4 **MR. COOPER:** AND WE'LL CONTINUE TO DO THAT --

5 **THE COURT:** OKAY. GOOD.

6 **MR. COOPER:** -- IF THERE'S ANYTHING THAT WOULD BE
7 PRODUCTIVE TO TALK ABOUT.

8 SCOTT COOPER. (INDISCERNIBLE)

9 **THE COURT:** GOOD.

10 THE OTHER ISSUE IS A TRIAL DATE, AND I JUST AM
11 RELUCTANT TO TRY TO SET ONE AT THIS POINT. I'VE GOT TRIALS SET
12 IN 2018. I MIGHT BE ABLE TO SQUEEZE IT IN SOMEWHERE TOWARDS
13 THE END OF 2018. BUT I'VE GOT TO GET THIS OUT. I MAY WANT
14 MORE BRIEFING, AND THEN I'D HAVE TO GET IT OUT AFTER THE MORE
15 BRIEFING, SO I JUST -- I DON'T REALLY SEE HOW I
16 CAN REALISTICALLY --

17 (SIMULTANEOUS COLLOQUY.)

18 **MR. KESSLER:** THE ONLY POINT WE HAVE, YOUR HONOR --

19 **THE COURT:** -- SET A TRIAL DATE -- AND LET ME MENTION
20 ANOTHER POINT, WHICH IS IT IS A BENCH TRIAL. SO I DON'T LIKE
21 TO DO THIS, BUT I COULD DO IT, YOU KNOW, DIVIDE IT UP AND HAVE
22 A WEEK HERE, A WITNESS HERE, ANOTHER WEEK, ANOTHER WITNESS. SO
23 WE DON'T NEED TO NECESSARILY HAVE THREE WEEKS. I DON'T THINK
24 IT WOULD TAKE THREE WEEKS NECESSARILY, BUT I THINK --

25 **MR. KESSLER:** THE ONLY POINT WE'D HAVE, YOUR HONOR --

1 AND, AGAIN, OF COURSE, BOTH SIDES HAVE MOVED FOR SUMMARY
2 JUDGMENT, SO BOTH SIDES SAY THERE SHOULDN'T BE A TRIAL.

3 **THE COURT:** WELL, YOU DON'T. YOU AGREE THERE HAS TO
4 BE A TRIAL ON LESSER --

5 (SIMULTANEOUS COLLOQUY.)

6 **MR. KESSLER:** OH, NO, WE MOVED FOR SUMMARY JUDGMENT
7 ON LIABILITY, BECAUSE IF YOU RULE FOR US, THAT THEY HAVEN'T MET
8 THEIR BURDEN AT ALL ON THE PRO-COMPETITIVE EFFECTIVENESS
9 RECORD, YOU NEVER GET TO THAT ISSUE.

10 **THE COURT:** OKAY, OKAY.

11 **MR. KESSLER:** BUT -- BUT ASSUMING IF YOUR HONOR SAYS
12 THERE'S GOING TO BE A TRIAL, OUR ONLY POINT WAS BECAUSE YOUR
13 HONOR'S SCHEDULE GETS FILLED UP, HAVING TENTATIVE DATES THAT
14 WOULD AT LEAST ALLOW COUNSEL TO BLOCK, THE WITNESSES TO BLOCK,
15 THE EXPERT, AND YOUR HONOR, AND IF WE DON'T NEED OR IF THEY
16 HAVE TO BE MOVED, THEY GET MOVED. BUT IT CERTAINLY HELPS FOR
17 PLANNING PURPOSE, AND WE HOPE THAT YOU WOULD FIND SOME DATES,
18 YOU KNOW, IN THIS YEAR, STARTING IN AUGUST GOING FORWARD, TO
19 TRY TO SET THAT. THAT WAS OUR REQUEST.

20 **THE COURT:** MAYBE DECEMBER.

21 **MR. WILLIAMS:** WELL, YOUR HONOR -- BART WILLIAMS ON
22 BEHALF THE PAC 12, YOUR HONOR.

23 I BELIEVE THE ISSUE WITH RESPECT TO DECEMBER IS
24 MS. WILKINSON'S LEAD COUNSEL FOR THE NCAA'S TRIAL SCHEDULE. I
25 THINK SHE HAS ONE ALREADY SET AT THAT TIME.

1 **THE COURT:** WELL, TRIALS DON'T ALWAYS --

2 **MR. WILLIAMS:** BUT SHE CAN SPEAK FOR HERSELF,
3 OBVIOUSLY.

4 **THE COURT:** BUT TRIALS DON'T ALWAYS GO.

5 **MS. WILKINSON:** YOUR HONOR, IF I COULD JUST -- I DO
6 HAVE A TRIAL THAT'S SET IN FRONT OF JUDGE RAMOS IN THE SOUTHERN
7 DISTRICT OF NEW YORK THAT STARTS IN THE MIDDLE OF OCTOBER, AND
8 I HAVE OTHER TRIALS BEFORE THAT. I HAVE A TRIAL IN JULY IS SET
9 DOWN IN THE CENTRAL DISTRICT OF NORTH CAROLINA, AND I HAVE A
10 TRIAL OUT IN L.A. IN APRIL. SO -- AND THEY'VE ALL BEEN SET FOR
11 A WHILE, AND I DON'T SEE -- ESPECIALLY THE -- I DON'T KNOW THAT
12 ANY WOULD EVER SETTLE, BUT CERTAINLY THE ONE THAT'S IN OCTOBER
13 WOULDN'T.

14 SO I WOULD ASK YOUR HONOR TO AT LEAST WAIT UNTIL YOU
15 MAKE A RULING AND SEE WHETHER YOU NEED MORE BRIEFING. WE CAN
16 HAVE A TELEPHONE CONFERENCE OVER SETTING A DATE, SUBJECT TO
17 YOUR SCHEDULE AND THE OTHERS, BUT THESE ARE NOT -- THESE ARE
18 NOT TRIALS THAT I CAN MOVE, AND THIS IS WHAT I DO FOR A LIVING.
19 I TRY CASES. I DON'T NORMALLY --

20 **THE COURT:** WHEN IS -- HOW LONG IS THE OCTOBER ONE
21 GOING TO TAKE?

22 **MS. WILKINSON:** UNFORTUNATELY, THE CITY AND THE STATE
23 OF NEW YORK ARE BRINGING THE CLAIMS, SO THINK IT'S A SIX- TO
24 EIGHT-WEEK TRIAL, AND I WILL NEED SOME TIME TO GET READY.

25 BUT I UNDERSTAND IF YOUR HONOR WERE SO INCLINED TO

1 TAKE, YOU KNOW, A WEEK HERE OR THERE, THAT WOULD BE TERRIFIC,
2 BUT I STILL HAVE TO PREPARE FOR MY OTHER TRIALS AND HAVE
3 OBLIGATIONS TO THOSE CLIENTS AND THOSE COURTS.

4 **THE COURT:** OKAY. WELL, THINK ABOUT DECEMBER FOR AT
5 LEAST SOME OF IT.

6 **MR. KESSLER:** OKAY. AND WE'LL MAKE OURSELVES
7 AVAILABLE, YOUR HONOR, AT ANY TIME IN THAT PERIOD IF YOU CAN.

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

9 **THE COURT:** OKAY.

10 **MR. KESSLER:** THANK YOU SO MUCH FOR YOUR TIME, YOUR
11 HONOR. WE APPRECIATE IT.

12 (PROCEEDINGS ADJOURNED AT 4:04 P.M.)
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CERTIFICATE OF TRANSCRIBER

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT
TRANSCRIPT, TO THE BEST OF MY ABILITY, OF THE ABOVE PAGES OF
THE OFFICIAL ELECTRONIC SOUND RECORDING PROVIDED TO ME BY THE
U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, OF THE
PROCEEDINGS TAKEN ON THE DATE AND TIME PREVIOUSLY STATED IN THE
ABOVE MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR,
RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN
WHICH THIS HEARING WAS TAKEN; AND, FURTHER, THAT I AM NOT
FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE
ACTION.

JOAN MARIE COLUMBINI

JANUARY 20, 2018