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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE NATHANAEL M. COUSINS

IN RE NCAA STUDENT-ATHLETE NAME )  
 LIKENESS LICENSING LITIGATION. ) NO. 09-1967 CW (NC)  
 ) SAN FRANCISCO, CALIFORNIA  
 ) WEDNESDAY  
 ) FEBRUARY 8, 2012  
 )

**TRANSCRIPT OF PROCEEDINGS****APPEARANCES:****FOR PLAINTIFFS**

HAUSFELD, LLP  
 44 MONTGOMERY STREET  
 SUITE 3400  
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**BY: JON T. KING, ESQUIRE  
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**BY: ELLEN MERIWETHER, ESQUIRE  
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(FURTHER APPEARANCES ON FOLLOWING PAGE)

**REPORTED BY: JOAN MARIE COLUMBINI, CSR 5435, RPR  
 OFFICIAL COURT REPORTER, U.S. DISTRICT COURT**

**APPEARANCES (CONTINUED) :**

**FOR FOX BROADCASTING  
AND BIG TEN NETWORK**

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**BY: DAVID R. SINGER, ESQUIRE**

**FOR THE BIG TEN  
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CHICAGO, ILLINOIS 60606

**BY: ANDREW S. ROSENMAN, ESQUIRE**

PROCEEDINGS; WEDNESDAY, FEBRUARY 8, 2012

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2  
3           **THE CLERK:** CALLING CIVIL 09-1967, IN RE: NCAA  
4 STUDENT-ATHLETE NAME LIKENESS LICENSING LITIGATION.

5           COUNSEL, PLEASE STATE YOUR APPEARANCES FOR THE  
6 RECORD.

7           **MR. KING:** GOOD AFTERNOON, YOUR HONOR. JON T. KING  
8 FROM HAUSFELD, LLP FOR THE ANTITRUST PLAINTIFFS.

9           **THE COURT:** GOOD AFTERNOON, MR. KING.

10          **MS. MERIWETHER:** GOOD AFTERNOON, YOUR HONOR. ELLEN  
11 MERIWETHER FOR CAFFERTY FAUCHER FOR THE ANTITRUST PLAINTIFFS.

12          **THE COURT:** GOOD AFTERNOON.

13          **MR. LEHMANN:** GOOD AFTERNOON, YOUR HONOR. MICHAEL  
14 LEHMANN FROM HAUSFELD, LLP FOR THE ANTITRUST PLAINTIFFS.

15          **THE COURT:** GOOD AFTERNOON.

16          **MR. WECKER:** AND BRUCE WECKER FROM HAUSFELD.

17          **THE COURT:** GOOD AFTERNOON.

18          **MR. ROSENMAN:** GOOD AFTERNOON, YOUR HONOR. ANDREW  
19 ROSENMAN FROM MAYER BROWN ON BEHALF OF THE BIG TEN CONFERENCE.

20          **MR. SINGER:** HELLO, YOUR HONOR. DAVID SINGER OF  
21 JENNER AND BLOCK ON BEHALF OF FOX BROADCASTING COMPANY AND THE  
22 BIG TEN NETWORK.

23          **THE COURT:** GOOD AFTERNOON. I THINK WE HAVE ON THE  
24 PHONE AN ADDITIONAL COUNSEL FOR THE PLAINTIFFS.

25          **MR. CLOBES:** GOOD AFTERNOON, YOUR HONOR. BRYAN

1 CLOBES FROM CAFFERTY FAUCHER, ALSO COUNSEL FOR ANTITRUST  
2 PLAINTIFFS.

3 **THE COURT:** THANK YOU, MR. CLOBES. I THINK YOU ARE  
4 THE ONLY ONE ON THE PHONE.

5 FOR THOSE WHO ARE HERE, WE'LL TRY TO IDENTIFY  
6 OURSELVES BY NAME SO YOU KNOW WHO'S SPEAKING, AND I'LL  
7 ANTICIPATE THAT WE WILL CHECK IN WITH YOU AT THE END TO MAKE  
8 SURE THERE'S NOTHING ELSE YOU WISH TO ADD BESIDES THE FOUR  
9 ATTORNEYS WHO ARE HERE.

10 **MR. CLOBES:** THANK YOU, YOUR HONOR.

11 **THE COURT:** ALL RIGHT. SO, FOR PURPOSES OF THE  
12 AUDIENCE, WE DO HAVE SOME STUDENTS HERE FROM HASTINGS LAW  
13 SCHOOL. I APPRECIATE THEM BEING HERE.

14 WE'RE HERE ON MOTIONS TO COMPEL FILED BY THE  
15 PLAINTIFFS AND COMPRISED OF SEVERAL DIFFERENT COMPONENTS.  
16 THERE ARE MOTIONS AGAINST THE BIG TEN CONFERENCE AND THE BIG  
17 TEN NETWORK, AS WELL AS FOX BROADCASTING. FOX AND THE BIG TEN  
18 CONFERENCE ARE PARENTS OR NOT -- PERHAPS NOT UNABLE PARENTS,  
19 BUT THEY ARE IN A PARENT RELATIONSHIP TO THE BIG TEN NETWORK.

20 ORIGINALLY, THERE WAS SOME OBJECTION CONCERNING THE  
21 SCOPE OF THE SUBPOENAS AS TO WHETHER THEY SHOULD BE DIRECTED TO  
22 FOX OR TO THE BEG TEN NETWORK. ESSENTIALLY, THAT ISSUE HAS  
23 BEEN TAKEN AWAY BY THE FACT THAT BOTH FOX AND THE BIG TEN  
24 NETWORK ARE HERE TODAY. SO THE REAL ISSUE IS THE SCOPE OF THE  
25 SUBPOENAS AND WHETHER THE SUBPOENAS ARE SEEKING RELEVANT

1 INFORMATION.

2 I'VE RECEIVED A LOT OF DOCUMENTATION, AND I WANT TO  
3 MAKE SURE THAT I'M NOT MISSING SOMETHING, SO I'LL START WITH  
4 THOSE PRELIMINARIES.

5 OF COURSE, WE HAVE THE MOVING MOTIONS TO COMPEL, AS  
6 WELL AS RESPONSES. AND WE HAVE A FRIEND-OF-THE-COURT BRIEF  
7 SUBMITTED BY THE SEC, AS WELL AS BY THE NCAA, WHICH IS A  
8 DEFENDANT IN THE CASE BUT IS NOT REPRESENTED HERE IN THE  
9 COURTROOM TODAY, BUT THEY DID FILE A BRIEF WHICH THE ANTITRUST  
10 PLAINTIFFS RESPONDED TO.

11 THEY ALSO FILED RESPONSIVE BRIEFS TO THE SEC  
12 POSITION.

13 AND A SPECIAL AWARD FOR COURAGE THIS MORNING. AFTER  
14 I FILED AN ORDER SAYING I WAS DISCOURAGING FURTHER BRIEFS, THEY  
15 EIGHT HOURS LATER SUBMITTED A REPLY BRIEF. I GOT THAT AS WELL,  
16 AND I REVIEWED IT, AND THERE'S BEEN NO ADDITIONAL PAPERS  
17 SUBMITTED SINCE THEN.

18 THE KEY ISSUE HERE -- AND I DID PUT OUT A TENTATIVE  
19 RULING WHICH THE PARTIES WILL BE ANXIOUS TO ADDRESS -- IS  
20 RELEVANCE, AND THAT'S UNDER RULE 26(B)(1). THE QUESTION IS  
21 WHETHER THE MATERIALS SOUGHT BY THE PLAINTIFFS ARE NOT  
22 PRIVILEGED AND RELEVANT TO ANY PARTY'S CLAIM OR DEFENSE. THE  
23 DOCUMENTS DON'T NEED TO BE ADMISSIBLE IF THEY ARE REASONABLY  
24 CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE.

25 THERE'S ALSO A BURDEN THAT'S BEEN ASSERTED BY THE

1 RESPONDING ENTITIES, I CALL THEM ENTITIES BECAUSE THEY ARE NOT  
2 PARTIES TO THE DISPUTE, AND THAT'S UNDER 26(B)(2)(C). IT'S A  
3 VERY BASIC ELEMENT. WE'RE LOOKING AT WHETHER THE BURDEN OF  
4 RESPONDING TO THE SUBPOENAS OUTWEIGHS THE BENEFITS OF THE  
5 INFORMATION THAT'S SOUGHT BY THE PLAINTIFFS.

6 NOW, UNDERSTANDABLY, THIS FOCUSES ON THE CLAIMS OR  
7 DEFENSES IN THE CASE, AND THAT'S WHERE THERE'S BEEN A LOT OF  
8 BACK AND FORTH AND DISAGREEMENT ABOUT WHAT EXACTLY THE CLAIMS  
9 AND DEFENSES ARE IN THE CASE. WE HAVE A NUMBER OF CASES THAT  
10 ARE CONSOLIDATED HERE. THERE HAVE BEEN AMENDMENTS TO THE  
11 COMPLAINTS.

12 THERE HAVE BEEN RULINGS FROM THE DISTRICT COURT ON  
13 MOTIONS TO DISMISS, AND BOTH -- ALL THE PARTIES, AS WELL AS THE  
14 RESPONDING ENTITIES, HAVE DIRECTED THE COURT TO LOOK AT JUDGE  
15 WILKEN'S RULINGS, PARTICULARLY THE FEBRUARY 8, 2010 RULING ON  
16 THE MOTIONS TO DISMISS. MY ANALYSIS OF THAT IS THAT JUDGE  
17 WILKEN WAS NOT RULING ON THE SCOPE OF DISCOVERY AT THAT TIME.  
18 SHE WAS LOOKING AT WHETHER THE CLAIMS SHOULD BE DISMISSED AT  
19 THE PLEADING STAGE, AND SHE MADE A NUMBER OF COMMENTS ABOUT  
20 WHAT THE CLAIMS WERE IN THE CASE AT THAT TIME, AND THAT DOES  
21 GUIDE MY ANALYSIS AS TO THE SCOPE OF THE CASE.

22 BUT SHE WAS NOT INTENDING TO SET FORTH THE SCOPE OF  
23 DISCOVERY, CERTAINLY NOT INTENDING TO SET FORTH THE SCOPE OF  
24 DISCOVERY AS TO THIRD PARTIES WHO ARE NOT BEFORE HER. SO IT'S  
25 AN IMPORTANT DECISION TO READ, BUT THAT WAS NOT THE ISSUE SHE

1 WAS RESOLVING AT THAT TIME. BOTH PARTIES HAVE GIVEN SOME  
2 INTERPRETATION TO THAT RULING, AND I'LL HEAR MORE ABOUT IT, BUT  
3 THAT WAS A BAR THAT THE ANTITRUST PLAINTIFFS GOT OVER AS FAR AS  
4 THE CASE CONTINUED, BUT IT DID NOT IN ANY WAY EXPLICITLY SAY  
5 HERE'S GOING TO BE THE SCOPE OF DISCOVERY AS TO THE BIG TEN, OR  
6 BIG TEN NETWORK, OR FOX GOING FORWARD.

7 SO THEN I'M REALLY LOOKING AT THE PLEADINGS IN THE  
8 CASE, THE COMPLAINT, THE ANSWER TO INTERPRET WHAT ARE THE  
9 CLAIMS OR DEFENSES. IF THE PURPOSE HERE WERE TO HAVE A HEARING  
10 ON AMATEURISM IN ATHLETICS, THEN THE RELEVANCE WOULD BE VERY,  
11 VERY BROAD, AND EVERY ONE OF THE MATERIALS THAT IS SOUGHT BY  
12 THE PLAINTIFFS WOULD BE RELEVANT TO THAT PURPOSE.

13 IF WE WERE INQUIRING INTO THE FINANCES OF COLLEGE  
14 ATHLETIC BROADCASTING, THAT WOULD BE -- ALL THESE THINGS WOULD  
15 BE CENTRAL TO THAT. IT MIGHT BE VERY INTERESTING TO THE PUBLIC  
16 TO KNOW HOW MUCH MONEY THE BIG TEN CONFERENCE, BIG TEN NETWORK  
17 PROCESSING IS PART OF THE LIVE BROADCAST OF THEIR SPORTING  
18 EVENTS.

19 THAT'S NOT THE PURPOSE OF THIS PROCEEDINGS. WE ARE  
20 LOOKING AT THE SCOPE OF DISCOVERY ARISING FROM AN ANTITRUST  
21 VERTICAL RESTRAINT OF TRADE ALLEGATION, AND BOTH PARTIES HAVE  
22 DONE -- AND ALL THE PARTIES HAVE DONE SOME INTERPRETING OF THE  
23 OTHER PARTIES' POSITIONS AS TO WHAT THE SCOPE OF THE CLAIMS  
24 ARE.

25 BUT THE REAL KEY QUESTION IS: ARE THE MATERIALS IN

1 THE POSSESSION OF THE BIG TEN NETWORK, BIG TEN CONFERENCE AND  
2 FOX, ARE THEY RELEVANT TO SOME OF THE CLAIMS THAT ARE MADE IN  
3 THE CASE? AND MY TENTATIVE RULING IN THE CASE IS THAT THE  
4 VERY, VERY -- IT'S A VERY, VERY BROAD REQUEST FROM THE  
5 PLAINTIFFS. IN APPROPRIATE CASES, THERE MIGHT BE A REASON TO  
6 HAVE VERY BROAD REQUESTS. IN ANTITRUST CASES, MANY TIMES TO  
7 FIND A CONSPIRACY, YOU NEED TO SEARCH UNDER EVERY ROCK TO FIND  
8 EVIDENCE OF THE CONSPIRACY. AND TO FIND DAMAGES, YOU NEED TO  
9 LOOK AT ALL COMPONENTS OF THE FINANCIAL TRANSACTIONS TO  
10 ESTABLISH WHAT THOSE DAMAGES ARE. SO I UNDERSTAND THAT THAT  
11 COULD BE A THEORY AS TO WHY THE DOCUMENTS ARE RELEVANT.

12 BUT HERE MY TENTATIVE ASSESSMENT OF THE REQUEST IS  
13 THAT THEY'RE OVERLY BROAD. THEY ARE GOING TO THIRD PARTIES.  
14 NOW, YOU CAN, OF COURSE, UNDER RULE 45 GET DISCOVERY FROM THIRD  
15 PARTIES. BUT THE BREADTH OF THESE REQUESTS IS SO BROAD THAT MY  
16 TENTATIVE FEELING IS THAT I'M SYMPATHETIC TO THE CLAIMS OF  
17 OVERBREADTH AND BURDEN THAT ARE ASSERTED BY THE BIG TEN  
18 CONFERENCE, NETWORK AND FOX.

19 I THINK THAT IF THE REQUESTS WERE LIMITED AND IF I  
20 HAD BEEN PRESENT WITH MUCH MORE LIMITED REQUESTS, I THINK THE  
21 BURDEN ON THE RESPONDING PARTIES WOULD BE MUCH LESS IN  
22 COMPARISON TO THE BENEFITS THAT MIGHT GO TO THE PLAINTIFFS.  
23 BUT HERE, GIVEN THE EXTREME BREADTH OF THE REQUEST, I THINK  
24 THERE'S MORE WEIGHT TO THE BURDEN ARGUMENTS THAT HAVE BEEN  
25 PRESENTED.



1            THAT'S REALLY THE SPIRIT OF MY TENTATIVE RULING, THAT  
2 THE REQUESTS SEEK A LOT OF INFORMATION THAT IS NOT RELEVANT TO  
3 THE CLAIMS AND DEFENSES AS I INTERPRET THEM IN THE OPERATIVE  
4 PLEADINGS, AND THAT ON THE MARGINS, GIVEN THE EXTREME  
5 OVERBREADTH THAT GIVES MORE SIGNIFICANCE TO THE BURDEN  
6 ARGUMENTS MADE BY THE RESPONDING PARTIES.

7            ONE ADDITIONAL COMMENT IS THAT I HAVE, OF COURSE,  
8 ADDRESSED SOME OTHER DISCOVERY ISSUES IN THE CASE THAT THE  
9 PARTIES HAVE COMMENTED ON, AND ONE OF THEM IS THE EFFORTS TO  
10 GET SOME DISCOVERY FROM THE NCAA, AND THE QUESTION PRESENTED A  
11 FEW MONTHS AGO WAS SHOULD THE NCAA BE COMPELLED TO PROVIDE  
12 DOCUMENTS AND INFORMATION ON BEHALF OF ITS MEMBERS, INCLUDING  
13 MEMBERS OF THE BIG TEN CONFERENCE AND ITS INSTITUTIONS IN THE  
14 BIG TEN. MY RESPONSE WAS, WELL, THE PLAINTIFFS DON'T NEED TO  
15 GET IT FROM THE NCAA BECAUSE THEY CAN SEEK DISCOVERY DIRECTLY  
16 FOR RULE 45 FROM THOSE ENTITIES.

17            THAT'S TRUE. I'M NOT SAYING THEY CAN'T SEEK  
18 DISCOVERY FROM THE BIG TEN CONFERENCE OR FROM ITS ENTITIES, BUT  
19 THE SCOPE OF THAT DISCOVERY WAS NOT ADDRESSED IN THAT EARLIER  
20 RULING, AND THAT'S WHAT WE'RE DEALING WITH NOW, IS HOW BROAD IS  
21 THAT THIRD PARTY DISCOVERY. AND MY TENTATIVE FEELING IS THAT  
22 THE REQUESTED INFORMATION IS MUCH TOO BROAD GIVEN THE CLAIMS  
23 AND DEFENSES THAT ARE AT ISSUE AND THAT THERE MUST BE SOME WAY  
24 TO LIMIT THEM TO, REALLY, BE MORE THE CORE CLAIMS THAT ARE  
25 PRESENTED IN THE CASE IN WHICH CASE THE BURDEN ON THE BIG TEN

1 TO RESPOND WOULD BE MUCH LESS.

2 SO, I'M GOING TO START IN A MOMENT HERE AND I'LL STOP  
3 TALKING, GIVE YOU A CHANCE -- MY REAL FOCUS FOR THE PLAINTIFFS  
4 IS, IF YOU CAN DISTILL FOR ME WHAT IS THE REAL RELEVANCE AND  
5 WHICH OF THE THINGS THAT YOU'RE SEEKING ARE THE MOST IMPORTANT  
6 TO YOU, BECAUSE YOU'VE ASKED FOR A LOT OF THINGS IN YOUR  
7 DOCUMENT REQUEST. I KNOW YOU CAN PRIORITIZE THOSE THAT YOU  
8 THINK ARE EXTREMELY CRITICAL TO YOU AS FAR AS WHETHER IT'S  
9 PROVING A CONSPIRACY OR PROVING DAMAGES OR PROVING SOME THEORY  
10 OF CAUSATION, AND WHICH ARE THE ONES THAT, YES, YOU'D LIKE TO  
11 HAVE THEM, BUT IF YOU WERE PRIORITIZING, THESE OTHER THINGS  
12 WOULD BE LESS IMPORTANT.

13 MY PRIMARY QUESTION FOR THE BIG TEN AND FOR FOX ARE,  
14 ARE THERE SOME STEPS -- AND I DID SEE IN THE MEET AND CONFER  
15 PROCESS, READING THE DECLARATIONS AND CORRESPONDENCE -- ARE  
16 THERE SOME THINGS WHICH YOU CAN PRODUCE IN A LESS BURDENSOME  
17 WAY THAT WOULD PROVIDE INFORMATION THAT THE PLAINTIFFS ARE  
18 SEEKING BUT WOULD NOT REALLY ENCUMBER THE BIG TEN AND FOX IN  
19 RESPONDING TO IT AND WOULD NOT HARM THEIR CONFIDENTIALITY  
20 CONCERNS WHICH THEY HAVE PRESENTED TO THE COURT?

21 SO I SEE THOSE AS BEING THE REAL CENTRAL ISSUES HERE.  
22 I TELL YOU THERE'S A FEW ISSUES WHICH THE PARTIES SPENT QUITE A  
23 BIT OF TIME WRITING ABOUT WHICH I DON'T SEE AS BEING ALL THAT  
24 IMPORTANT. ONE IS THE COPYRIGHT ACT AND WHETHER THAT SHOULD  
25 PREEMPT IN SOME WAY THE CLAIMS HERE OR WHETHER -- IT'S NOT

1 REALLY A PURE PREEMPTION QUESTION. IT'S WHETHER DISCOVERY INTO  
2 THE BROADCAST LICENSING DOCUMENTS SHOULD SOMEHOW BE TRUMPED,  
3 NOT USING DONALD TRUMPS' NAME, BUT SHOULD BE SOMEHOW SUPERSEDED  
4 BY THE COPYRIGHT ACT.

5 OBVIOUSLY, THE PLAINTIFFS DON'T INTERPRET THEIR OWN  
6 CLAIMS AS BEING COPYRIGHT CLAIMS. IT'S JUST A QUESTION OF IF  
7 THE COURT WERE INTERPRETING THEIR ANTITRUST CONSPIRACY IN A WAY  
8 THAT TOUCHED UPON COPYRIGHT, WOULD THAT LEAD THE COURT THEN TO  
9 EXCLUDE THE DOCUMENTS?

10 I DON'T VIEW THE PLAINTIFFS' THEORY OF A CONSPIRACY  
11 AS REALLY COLLIDING TOO HEAVILY WITH THE COPYRIGHT ACT, BUT, AS  
12 A MATTER OF LAW, I THINK COURTS HAVE PERMITTED WHERE THERE IS A  
13 COLLISION WITH COPYRIGHT.

14 SO THE BASIS OF MY TENTATIVE RULING IS NOT THAT I  
15 THINK THE COPYRIGHT ACT PRECLUDES DISCOVERY. I'M MORE FOCUSED  
16 ON THE RELEVANCE OF THE DOCUMENTS SOUGHT. I SUPPOSE IF I  
17 INTERPRETED THE PLAINTIFFS' CLAIMS DIFFERENTLY AND I THOUGHT  
18 THE VERY BASIC CLAIM THEY'RE ASSERTING IS ONE EMANATING FROM  
19 THE LIVE BROADCAST OF SPORTING EVENTS AND THAT IF SOMEHOW THEY  
20 WOULD GET THAT DISCOVERY, IT WOULD MAKE THIS MORE OF A  
21 COPYRIGHT CASE THAN AN ANTITRUST CASE, THEN I THINK THOSE  
22 ISSUES WOULD BE AS LIVE. BUT I DON'T VIEW THAT ISSUE AS  
23 CONTROLLING MY ANALYSIS HERE.

24 ALSO, FARTHER DOWN THE LIST OF THINGS WHICH I THINK  
25 ARE NOT CRITICAL IS WHETHER A PROTECTIVE ORDER COULD PROTECT

1 SOME OF THIS INFORMATION. I THINK, OBVIOUSLY, THE ANSWER IS  
2 YES. IF I ORDERED THE BIG TEN AND BIG TEN CONFERENCE AND --  
3 BIG TEN CONFERENCE AND NETWORK AND FOX TO PRODUCE VARIOUS  
4 LICENSING AGREEMENTS, OF COURSE, YES, EITHER THE CURRENT  
5 VERSION OF THE PROTECTIVE ORDER OR SOME MODIFICATION OF IT  
6 COULD PROTECT SOME OF THOSE INTERESTS. I'M NOT THERE YET AS  
7 FAR AS ORDERING IT, SO I, OF COURSE, WOULD LIKE THE RESPONDING  
8 PARTIES TO BE THINKING ABOUT, OKAY, WHAT PROTECTIVE ORDERS,  
9 WHAT MODIFICATIONS WOULD BE APPROPRIATE IF WE WERE TO PRODUCE  
10 SOME DOCUMENTS. BUT I THINK THAT'S NOT A REASON TO NOT PRODUCE  
11 DOCUMENTS AT ALL; IT'S JUST A WAY THAT COULD BE USED TO MAKE A  
12 MORE FLEXIBLE RESPONSE.

13 SO THOSE ARE ALL MY PRELIMINARY THOUGHTS, AND THEY  
14 ARE PRELIMINARY THOUGHTS, AND MY RULING IS A TENTATIVE RULING.  
15 OBVIOUSLY, I IDENTIFIED A NUMBER OF SUBJECT MATTERS AREAS,  
16 RATHER THAN GOING THROUGH EACH OF THE PARTICULAR DOCUMENT  
17 REQUESTS NUMBER BY NUMBER, SOME OF THEM THERE IS ONLY ONE  
18 DOCUMENT REQUEST THAT PERTAINS TO THAT CATEGORY, OTHERS HAVE  
19 MULTIPLE, AND I'VE SORT OF GROUPED THEM TOGETHER FOR PURPOSES  
20 OF GUIDING YOUR ANALYSIS.

21 BUT, REALLY, I WANT TO START WITH THE PLAINTIFFS, AND  
22 I'D LIKE YOU TO PRIORITIZE, AS I SAID, THE ISSUES THAT YOU  
23 THINK ARE REALLY MOST IMPORTANT TO YOU AND THE CATEGORIES OF  
24 DOCUMENTS THAT YOU THINK ARE MOST IMPORTANT TO YOU AND TO USE  
25 YOUR TIME TO FOCUS ON THOSE, BECAUSE I HAVE GOTTEN A LOT OF

1 PAPERS FROM ALL THE PARTIES ON ALL THESE TOPICS. WE CAN GO  
2 INTO SOME OF THEM IN GREAT DETAIL. OTHERS IT MIGHT NOT BE  
3 WORTH YOUR TIME TO REALLY TOUCH AT ALL.

4 PROBABLY, IF I WERE IN THE RESPONDING PARTIES' SHOES,  
5 I WOULD TRY TO SIT QUIET AT THIS HEARING AND NOT SAY ANYTHING.  
6 I WANT YOU TO RESIST THAT TEMPTATION, AND THE PRIMARY QUESTION  
7 I HAVE IS: ARE THERE SOME THINGS YOU COULD PRODUCE -- EVEN  
8 WITH MY TENTATIVE RULINGS, ARE THERE SOME CATEGORIES OF THINGS  
9 THAT YOU COULD RESPOND WITHOUT BEING UNDULY BURDENED THAT  
10 WOULD, WHEN YOU HEAR THE PLAINTIFFS SPEAK AS TO THE RELEVANCE,  
11 THAT WOULD ADDRESS THEIR CORE NEEDS?

12 LET ME START WITH THE PLAINTIFFS.

13 **MR. KING:** GOOD AFTERNOON, YOUR HONOR. JON KING FROM  
14 HAUSFELD. AND JUST TO ORIENT THE COURT, OUR FIRM, WE ARE IN  
15 SAN FRANCISCO. WITH MR. LEHMANN AND MR. WECKER, WE ARE THE  
16 LEAD COUNSEL FOR THE ANTITRUST CLAIMS. MS. MERIWETHER CAN  
17 ADDRESS THE SPECIFICS OF THE MEET AND CONFERS. AND I THINK WE  
18 CAN DO EXACTLY AS YOU SUGGEST AND PRIORITIZE.

19 I DO WANT TO SAY I THINK IT'S GREAT THE HASTINGS  
20 STUDENTS ARE HERE. I ALWAYS ENJOYED BEING ABLE TO COME DOWN TO  
21 COURT.

22 ONE BRIEF NOTE ABOUT THE BRIEF THIS MORNING, THAT WAS  
23 YOUR HONOR HAD GRANTED OUR PERMISSION FOR RELIEF TO FILE A  
24 RESPONSE TO AMICUS BRIEF PER THE RULE. WE WERE UNCERTAIN IF WE  
25 ACTUALLY NEEDED TO JUST FILE IT. IT'S NOTHING NEW. IT'S THE

1 SAME THAT'S BEEN --

2           **THE COURT:** I'VE REVIEWED IT. IT IS INCLUDED IN THE  
3 RECORD.

4           **MR. KING:** THE ONLY THING I'LL SAY ON THE ABILITY TO  
5 PRIORITIZE AND RELEVANCE IS THAT I HAVE BEEN INVOLVED WITH ALL  
6 OF THE PARTY AND THIRD-PARTY DISCOVERY FROM THE GET-GO IN THE  
7 CASE. AND THE COURT MAY OR MAY NOT BE AWARE, BUT, FOR EXAMPLE,  
8 THE BROADCAST CONTRACTS AND THE LICENSING CONTRACTS ARE VERY,  
9 VERY LONG-TERM CONTRACTS. THEY TYPICALLY RUN A DECADE OR MORE.

10           SO THE NICE THING HERE, FOR EFFICIENCY PURPOSES, IS  
11 WE'RE REALLY TALKING ABOUT -- IT'S NOT LIKE THERE ARE 7,500  
12 DOCUMENTS. IT'S A COUPLE OF CONTRACTS THAT COVER CATEGORY ONE  
13 AND TWO.

14           WITH THAT I'LL TURN IT OVER TO MS. MERIWETHER.

15           **MS. MERIWETHER:** GOOD AFTERNOON, YOUR HONOR.

16           **THE COURT:** GOOD AFTERNOON.

17           **MS. MERIWETHER:** PRIORITIZING WHAT IT IS THAT WE NEED  
18 REQUIRES FIRST FOR ME TO ADDRESS YOUR HONOR'S TENTATIVE RULING  
19 THAT THE TELEVISION BROADCASTING AGREEMENTS AND THE LICENSING  
20 AGREEMENTS ARE NOT RELEVANT TO A CLAIM OR DEFENSE.

21           I'D LIKE TO CONVINCING YOUR HONOR OTHERWISE, BUT I WILL  
22 AGREE THAT OUR CLAIMS DO NOT EMANATE FROM THE LIVE BROADCASTS.  
23 THE REASON WHY WE WANT THE ORIGINAL TELEVISION BROADCAST  
24 CONTRACTS IS BECAUSE THOSE CONTRACTS NOT ONLY COVER THE ACTUAL  
25 LIVE BROADCAST AND THOSE ARRANGEMENTS, BUT ALSO COVER AND

1 CONVEY USES, REUSES, LICENSING, COPYRIGHT OWNERSHIP, WHO GETS  
2 TO DO WHAT WITH THE FOOTAGE THEREAFTER.

3           THOSE CONTRACTS ARE THE FIRST PLACE IN WHICH THE  
4 RIGHTS TO NAME, IMAGE, AND LIKENESS ARE FIRST TALKED ABOUT AND  
5 THEN CONVEYED.

6           AND LICENSING AGREEMENTS ALSO HAVE THE SAME OPERATION  
7 HERE. THE LICENSING AGREEMENTS THAT WE SEEK ARE THE DOCUMENTS  
8 BY WHICH THE OWNERS OF THE -- THE PUTATIVE OWNERS OF THE RIGHTS  
9 OF STUDENT ATHLETE IMAGE AND LIKENESS CONVEY THOSE RIGHTS IN  
10 RETURN FOR PAYMENTS TO OTHER PEOPLE.

11           THE THRUST OF THE ALLEGATIONS OF THE COMPLAINT -- AND  
12 THE CASE CALLED IN RE -- NOT TO BE GLIB OR ANYTHING -- THE IN  
13 RE: NCAA STUDENT-ATHLETE NAME AND LIKENESS LICENSING  
14 LITIGATION.

15           THE CASE IS ABOUT -- OR THE PRIMARY ANTITRUST CLAIM  
16 IN THE CASE IS THAT THE NCAA AND ITS MEMBERS AGREED OR  
17 CONSPIRED WITH ONE ANOTHER NOT TO COMPETE WITH ONE ANOTHER BY  
18 COMPENSATING FORMER STUDENT ATHLETES FOR USE OF THEIR IMAGE AND  
19 LIKENESS IN, BASICALLY, IN BROADCAST FOOTAGE FOLLOWING THEIR  
20 NCAA ELIGIBILITY.

21           WE DON'T CLAIM RIGHTS TO BE COMPENSATED FOR APPEARING  
22 IN LIVE BROADCASTS OR PLAYING ON THE FIELD, THE AMATEUR  
23 PRINCIPLES THAT HAVE BEEN SO HALLOWED.

24           BUT WE DO CLAIM THAT THE PLAINTIFFS MAINTAIN RIGHTS  
25 TO THE EXPLOITATION OF THEIR IMAGE AND LIKENESS FOLLOWING THEIR

1 COLLEGE PLAYING DAYS AND THAT THE GUTS OF THE CONSPIRACY IS  
2 THAT NEITHER THE NCAA, NOR ANY OF ITS MEMBER CONFERENCE SCHOOLS  
3 PAY THESE PLAINTIFFS FOR THESE RIGHTS OR CUT THE PLAINTIFFS  
4 INTO ANY OF THE REVENUES THAT THEY ENJOY FOR YEARS AND YEARS  
5 AND YEARS FOLLOWING THE END OF THEIR ELIGIBILITY WHEN THEY  
6 EXPLOIT THE BROADCAST FOOTAGE.

7 THAT'S REALLY THE BASIS OF THE CASE, AND THAT'S WHY  
8 THE ORIGINAL TELEVISION CONTRACT IS RELEVANT, BUT NOT BECAUSE  
9 OF THOSE LIVE BROADCAST RIGHTS BUT BECAUSE OF WHAT IT SAYS  
10 ABOUT THE USE AND CONVEYANCE OF THE RIGHTS IN PERPETUITY. SAME  
11 WITH THE LICENSING AGREEMENTS.

12 **THE COURT:** LET ME ASK THIS QUESTION: SO, IN ONE OF  
13 THE PROPOSED COMPROMISES -- AND I'M LOOKING AT FOX'S, IT WAS  
14 SUBMITTED AS A JOINT STIPULATION TO -- IN CASE 12-MC-80020, AND  
15 FOX'S PROPOSED COMPROMISE WOULD GIVE PLAINTIFFS A COPY OF ANY  
16 EXCERPT FROM ANY FOX BROADCAST TELEVISION AGREEMENT DATING BACK  
17 TO 2005 THAT MAKES ANY MENTION OF STUDENT ATHLETE'S NAME, IMAGE  
18 OR LIKENESS, AND THEY ALSO PROPOSE TO PRODUCE ANY WRITTEN  
19 NEGOTIATION OF THOSE PROVISIONS TO THE EXTENT THEY EXIST.

20 THEY SUBMIT THE PLAINTIFFS REJECTED THAT PROPOSAL AS  
21 BEING INSUFFICIENT TO GIVE YOU ALL THE RELEVANT DOCUMENTS YOU  
22 WERE ENTITLED TO. WHY WAS THAT PROPOSED COMPROMISE  
23 INSUFFICIENT?

24 **MS. MERIWETHER:** YOUR HONOR, BECAUSE THERE'S MANY,  
25 MANY MORE PROVISIONS THAT RELATE TO THE BUNDLE OF RIGHTS THAT



1 ARE TRANSFERRED THROUGH EITHER THE TELEVISION OR THE LICENSING  
2 AGREEMENTS THAN A PROVISION THAT SPECIFICALLY MENTIONS NAME,  
3 IMAGE AND LIKENESS. IT MAY NOT SPECIFICALLY MENTION NAME,  
4 IMAGE AND LIKENESS. WITHOUT SEEING THE DOCUMENTS, WE CAN'T BE  
5 SURE WHAT WE WOULD BE GETTING WITH RESPECT TO SHORT CONTRACT  
6 PROVISIONS.

7 AND THE OTHER THING IS THAT ONE OF THE THINGS WE'RE  
8 GOING TO HAVE TO DO IS TO FIGURE OUT A WAY TO VALUE THE BUNDLE  
9 OF RIGHTS THAT WE CLAIM OUR NAMED PLAINTIFFS HAVE AN INTEREST  
10 IN AND HAVE BEEN DEPRIVED OF THROUGH THE ANTITRUST CONSPIRACY.  
11 AND THAT MAY REQUIRE THAT WE GET SOME INFORMATION ABOUT THE  
12 AMOUNTS THAT FOX PAYS TO THE CONVEYOR OF THOSE RIGHTS FOR  
13 WHATEVER BUNDLE OF RIGHTS IS CONVEYED SO WE CAN FIGURE OUT WHAT  
14 VALUE TO PLACE ON THE LICENSING RIGHT, THE REBROADCAST, REUSE  
15 ARCHIVAL RIGHTS THAT WE CLAIM ARE CENTER TO THE ANTITRUST  
16 CONSPIRACY.

17 THE COMPLAINT IS FULL OF REFERENCES TO LICENSES OR  
18 AGREEMENTS THAT CONVEY BETWEEN LIKE THE NCAA OR OTHER  
19 CONFERENCES OR MEMBERS THAT CONVEY REBROADCAST RIGHTS OR  
20 ARCHIVAL RIGHTS IN WHICH THE IMAGE AND LIKENESS OF PLAINTIFFS  
21 EXIST AND THAT THOSE USES ARE GENERATING LARGE VOLUME OF  
22 REVENUE TO THE MEMBER SCHOOLS AND CONFERENCES OR TO THE NCAA  
23 WHICH ARE NOT THEN SHARED WITH FORMER STUDENT ATHLETES UPON  
24 THEIR GRADUATION.

25 NOW, THIS IS VERY IMPORTANT. WE'RE TALKING ABOUT

1 FORMER STUDENT ATHLETES, AND WE'RE TALKING ABOUT THE END OF  
2 THEIR ELIGIBILITY. SO THERE ISN'T ANY REASON, ACCORDING TO THE  
3 NCAA, WHY THOSE FORMER STUDENT ATHLETES AREN'T PAID, BUT THEY  
4 AREN'T.

5 AND THE WHOLE BASIS OF THE COMPLAINT IS THAT WE  
6 ALLEGE IS THE REASON THEY'RE NOT PAID IS BECAUSE THERE'S  
7 AGREEMENT NOT TO PAY THEM AND THAT THE AGREEMENT IS CARRIED OUT  
8 IN THE FIRST INSTANCE BY THE NCAA'S RULES, REGULATIONS, BYLAWS,  
9 CONSTITUTIONS AND INTERPRETATIONS THAT REQUIRE STUDENT ATHLETES  
10 AS A CONDITION OF ELIGIBILITY IN THE FIRST INSTANCE TO RELEASE  
11 IN PERPETUITY THOSE RIGHTS.

12 **THE COURT:** AND YOUR THEORY IS THAT THESE BROADCAST  
13 AGREEMENTS MAY BE EVIDENCE OF THE CONSPIRACY.

14 **MS. MERIWETHER:** THEY'RE THE MECHANISMS BY WHICH THE  
15 CONSPIRACY IS CARRIED OUT, BECAUSE THESE ARE THE AGREEMENTS  
16 THROUGH WHICH THE RIGHTS THAT WE CLAIM THE NCAA AND THE MEMBER  
17 SCHOOLS AND CONFERENCES DON'T HAVE, THAT IS RIGHTS TO THE  
18 STUDENT ATHLETE IMAGE AND LIKENESS IN PERPETUITY, THOSE ARE THE  
19 MECHANISMS BY WHICH THOSE RIGHTS ARE CONVEYED TO A NETWORK OR  
20 OTHER LICENSEE AND BY WHICH EVENTUALLY CREATE VALUABLE PRODUCT  
21 THAT THE NCAA AND ITS MEMBER SCHOOLS AND CONFERENCES NEVER  
22 SHARE WITH PLAINTIFFS LIKE O'BANNON.

23 WITH RESPECT TO THE RELEVANCE OF THOSE AGREEMENTS TO  
24 THE CLAIMS AND DEFENSES, BOTH PARTIES HAVE TALKED ABOUT WHAT  
25 JUDGE WILKEN SAID AND DIDN'T SAY. THE FACT OF THE MATTER IS

1 THAT SHE CERTAINLY IDENTIFIED THAT THE CLAIMS ARISE FROM USES  
2 RELATING TO BROADCAST FOOTAGE.

3 I COULD GIVE YOU A BUNCH OF EXAMPLES ABOUT IT, BUT  
4 LET ME JUST GIVE YOU A COUPLE, IF YOU DON'T MIND.

5 **THE COURT:** GIVE ME YOUR BEST ONES.

6 **MS. MERIWETHER:** ALL RIGHT. PAGE SEVEN OF HER FIRST  
7 RULING ON THE MOTION TO DISMISS, SHE SAYS:

8 "O'BANNON PLEADS AGREEMENT AMONG  
9 NCAA, ITS MEMBERS," WHICH OF COURSE IS THE  
10 BIG TEN SITTING RIGHT HERE, "CLC AND VARIOUS  
11 DISTRIBUTORS OF MATERIAL RELATING TO COLLEGE  
12 SPORTS. THESE ALLEGED AGREEMENTS ARE FOR  
13 LICENSES TO DISTRIBUTE PRODUCTS OR MEDIA  
14 CONTAINING THE IMAGES OF O'BANNON AND OTHER  
15 FORMER STUDENT ATHLETES."

16 "LICENSES TO DISTRIBUTE PRODUCTS OR MEDIA." "MEDIA"  
17 IS THE BROADCAST FOOTAGE. "PRODUCTS OR MEDIA" INCLUDES THE  
18 BROADCAST FOOTAGE.

19 WHETHER OR NOT WE'LL WIN ON THIS CASE, IT'S CLEAR  
20 THAT JUDGE WILKEN AT LEAST READS THE COMPLAINT TO ENCOMPASS  
21 CLAIMS RELATING TO THE LICENSES OF -- THE LICENSES TO  
22 DISTRIBUTE PRODUCTS AND MEDIA.

23 SHE SPECIFICALLY REFERS TO AN AGREEMENT BETWEEN THE  
24 NCAA AND THOUGHT EQUITY MOTION TO OFFER CLASSIC COLLEGE  
25 FOOTBALL GAMES ONLINE, WHICH, OBVIOUSLY, INCLUDE O'BANNON'S

1 IMAGE AND LIKENESS. SHE'S IDENTIFIED THAT AS A CLAIM IN THE  
2 SUIT.

3 SHE IDENTIFIES THAT AGREEMENTS ENTERED INTO BY THE  
4 NCAA AND ITS MEMBERS INCLUDE AGREEMENTS FOR THE BROADCAST OF  
5 ATHLETIC EVENTS.

6 AGAIN, WE'RE NOT SEEKING THE ORIGINAL BROADCASTS, BUT  
7 THOSE BROADCASTS THEN CONVEY RIGHTS THAT GO ON AND ON IN  
8 PERPETUITY WITH RESPECT TO THE RIGHT TO USE AND CONTROL NAMED  
9 PLAINTIFFS' FOOTAGE.

10 SO, WHAT WE'RE ATTEMPTING TO DO IS TO GET COPIES OF  
11 THE TELEVISION CONTRACTS --

12 AND, BY THE WAY, IN MEET AND CONFERS WITH ENTITIES  
13 THAT HAVE DISCUSSED THESE ISSUES WITH US, WE HAVE SAID, IF THE  
14 TELEVISION CONTRACT IS JUST FOR LIVE BROADCAST, WE DON'T WANT  
15 IT. OKAY? WE DON'T WANT IT. WHAT WE WANT ARE BROADCAST  
16 CONTRACTS THAT HAVE RIGHTS NOT ONLY TO THE INITIAL BROADCAST --  
17 IN FACT, MAYBE WE DON'T EVEN NEED THOSE PROVISIONS, BUT TO THE  
18 REUSE, REBROADCAST CONVEYANCE OF RIGHTS, WHO OWNS THE  
19 COPYRIGHT, WHAT THE LICENSING TERM -- NOT THE TERMS, BUT LIKE  
20 WHO HAS THE RIGHTS TO LICENSE, AND, TO THE EXTENT THEY EXIST IN  
21 THOSE CONTRACTS, THE REVENUE THAT'S PAID FOR THE BUNDLE OF  
22 RIGHTS SO THAT OUR EXPERTS CAN FIGURE OUT WHAT PART OF THE  
23 PAYMENT RELATES TO WHAT WE CLAIM HAS BEEN CONSPIRATORIALLY  
24 DENIED TO THE PLAINTIFFS, THAT IS, THE RIGHT TO SHARE IN  
25 REVENUES ENJOYED FROM THE USE OF THEIR IMAGE AND LIKENESS IN

1 REBROADCAST.

2           **THE COURT:** SO WHAT I'M HEARING FROM YOU IS THAT --  
3 AS TO THAT ASPECT OF YOUR REQUEST, IT'S RELEVANT TO DAMAGES AND  
4 YOUR EXPERT'S CALCULATION OF DAMAGES.

5           **MS. MERIWETHER:** YES, IT'S DEFINITELY RELEVANT TO  
6 DAMAGES, BUT IT ALSO SHOWS THE RULES AND REGULATIONS OF THE  
7 NCAA AND HOW THEY APPEAR IN THE CONTRACTS, WHICH WE ALLEGE IS  
8 WHAT HAPPENS, AND THEN HOW THAT'S CARRIED FORWARD IN THE  
9 LICENSES THAT ALSO THEN CONVEY RIGHTS TO USE NAME, IMAGE, AND  
10 LIKENESS.

11           SO THEY DO ALSO DEMONSTRATE THE OPERATION OF THE  
12 CONSPIRACY THROUGH GETTING THE PROVISIONS, THE AGREEMENT INTO  
13 THE BUSINESS CONTRACTS THAT ARE EXECUTED. SO THEY ARE  
14 PERTINENT ON BOTH POINTS, BUT CERTAINLY PERTINENT ON DAMAGES.

15           EQUALLY IMPORTANT, YOUR HONOR, IS THE CONSENT.  
16 THERE'S AN ALLEGATION THAT THERE'S A RELEASE FORM OR A CONSENT  
17 FORM THAT THE NCAA REQUIRES ITS STUDENT ATHLETES TO EXECUTE AS  
18 A CONDITION FOR THEIR ELIGIBILITY. WE CLAIM THAT THAT CONSENT  
19 FORM HAS BEEN INTERPRETED TO REQUIRE STUDENT ATHLETES TO GIVE  
20 UP RIGHTS IN PERPETUITY TO IMAGE AND LIKENESS.

21           CONSENT IS A BIG ISSUE. WHAT IS THE NATURE OF THE  
22 CONSENT? WHAT FORMS DO THE PLAINTIFFS SIGN? WHAT DO THEY  
23 MEAN? WHAT IS THEIR EFFECT? AND, CLEARLY, THAT'S ESPECIALLY  
24 RELEVANT NOW. THE EFFECT OF THE FORMS THAT ANY PLAINTIFFS  
25 SIGN, BECAUSE NOW WHAT THE DEFENDANTS ARE SAYING THAT IT

1 DOESN'T MATTER WHETHER THEY -- WHETHER THE PLAINTIFFS CONSENTED  
2 OR NOT; THEY HAVE ABSOLUTELY TOTAL PRIVILEGE TO USE AND TO MAKE  
3 ALL USES, WHATEVER THEY WANT, OF BROADCAST FOOTAGE IN  
4 PERPETUITY. IT DOESN'T MATTER WHETHER OR NOT THERE WAS ANY  
5 CONSENT. THEY HAVE THOSE RIGHTS BECAUSE OF THEIR COPYRIGHTS  
6 BECAUSE OF THE FIRST AMENDMENT.

7 SO, THE NATURE OF THE CONSENTS, WHAT FORMS THE  
8 STUDENTS SIGN, WHAT THEY SAY, HOW THEY ARE INTERPRETED, WHAT  
9 THEY MEAN, THAT'S A VERY RELEVANT POINT AS WELL.

10 **THE COURT:** WHAT'S THE BASIS TO BELIEVE THAT THE BIG  
11 TEN CONFERENCE IS THE ONE THAT'S GOT POSSESSION OF THOSE  
12 CONSENTS?

13 **MS. MERIWETHER:** WELL, WE HAVE ONE FORM THAT  
14 UNIVERSITY OF MICHIGAN DID PRODUCE. BIG TEN DID NOT. BUT IT  
15 SAYS "BIG TEN CONFERENCE" ON THE TOP, THE BIG BANNER. WE  
16 HAVEN'T BEEN TOLD THEY DON'T HAVE THEM.

17 IN FACT, BEFORE WE MET WITH YOUR HONOR WE DISCUSSED  
18 THESE ISSUES WITH BIG TEN COUNSEL, AND WE SPECIFICALLY SAID  
19 THIS IS WHAT WE WANT: WE WANT THE BIG TEN RELEASE FORM, EVERY  
20 YEAR IN THE CLASS PERIOD, INCLUDING TWO YEARS -- THREE YEARS  
21 EARLIER, FROM 2002 TO THE PRESENT. WE'RE TALKING ABOUT ONE  
22 DOCUMENT, NOT EVERY FORM THAT EVERY STUDENT FILLED OUT BUT THE  
23 CONSENT FORM.

24 **THE COURT:** YOU ARE SAYING THE EXEMPLAR?

25 **MS. MERIWETHER:** THE EXEMPLAR. WE'RE TALKING ABOUT

1 TEN DOCUMENTS THERE, RIGHT?

2 THEN WE SAID WHAT WE WANTED WAS A FILE, IF THERE WERE  
3 ANY, THAT DISCUSSED SPECIFICALLY THE FORMS THEMSELVES, CHANGES  
4 TO THE FORMS, WHAT THEY SHOULD SAY, WHAT THEY SHOULDN'T SAY.

5 AND, IN FACT, WE CERTAINLY WOULD BE WILLING TO WORK  
6 WITH THE BIG TEN WITH RESPECT TO CUSTODIANS WHOSE FILES NEEDED  
7 TO BE SEARCHED FOR THAT. BUT WE DON'T THINK -- WE HAVE NO  
8 REASON TO BELIEVE THAT SORT OF PRODUCTION IS BURDENSOME, AND  
9 THOSE ARE THE KINDS OF DOCUMENTS, BESIDES THE BROADCAST  
10 CONTRACTS AND LICENSING AGREEMENTS THAT WE NEED.

11 **THE COURT:** JUST TO FOLLOW ON THIS PARTICULAR POINT  
12 OF THE CONSENTS, WHICH OF THE PARTICULAR DOCUMENT REQUESTS  
13 TOUCH ON THAT TOPIC?

14 **MS. MERIWETHER:** IN YOUR --

15 **THE COURT:** I'M LOOKING AT YOUR DECLARATION.

16 **MS. MERIWETHER:** OH, IN MY DECLARATION. EXEMPLAR  
17 STUDENT CONSENT FORMS. I THINK IT MIGHT BE SIX. I DON'T HAVE  
18 MY DECLARATION UP HERE WITH ME.

19 EXEMPLAR STUDENT RELEASE FORMS IS NUMBER SIX, AND IN  
20 YOUR TENTATIVE RULING IT'S THE CATEGORY THREE, COLLECTED IN  
21 CATEGORY THREE.

22 OTHER -- THAT'S -- I GUESS THEN WE'VE GONE THROUGH,  
23 IN SOME SENSE, CATEGORY ONE, TWO, AND THREE. THANK YOU.

24 WITH RESPECT TO THE BIG TEN, THERE'S -- WE TALKED  
25 ABOUT LIMITING THE REQUESTS IN THAT WE DON'T NEED OR WANT ALL

1 DOCUMENTS RELATING TO. SO WE'RE NOT -- WHAT WE'RE TRYING TO  
2 DO, FOR INSTANCE, IN CATEGORY NUMBER FOUR --

3 **THE COURT:** YOU ARE MOVING ON TO CATEGORY NUMBER FOUR  
4 NOW?

5 **MS. MERIWETHER:** CATEGORY NUMBER FOUR. POLICIES  
6 REGARDING COPYRIGHT, OWNERSHIP, LICENSING OF PRODUCTS  
7 INCORPORATING THE NAME, IMAGE, AND LIKENESS OF STUDENT  
8 ATHLETES.

9 OUR VIEW, AND I'M SURE MY LEARNED COUNSEL WILL COME  
10 UP AND SAY THEY DISAGREE WITH THIS. OUR VIEW OF PRODUCTS IS  
11 PRODUCTS AND MEDIA. PRODUCTS INCLUDES FOOTAGE. WE'VE ALWAYS  
12 LOOKED AT IT THAT WAY.

13 MY -- I DON'T UNDERSTAND THAT JUDGE WILKEN, OR  
14 PERHAPS YOUR HONOR DID, BUT I DIDN'T UNDERSTAND YOUR HONOR TO  
15 BE LIMITING IT TO BOBBLEHEADS, OR T-SHIRTS, OR COFFEE MUGS, OR  
16 EVEN EA GAME THINGS.

17 OUR REQUESTS AND REALLY THE GRAVAMEN OF OUR CASE, THE  
18 ANTITRUST CASE, HAS TO DO WITH THE BROADCAST FOOTAGE AND HAS TO  
19 DO WITH RIGHTS TO IMAGE AND LIKENESS THAT THE PLAINTIFFS  
20 MAINTAIN.

21 SO WE'RE ASKING FOR SPECIFIC DOCUMENTS EMBODYING  
22 THOSE POLICIES RELATING TO OWNERSHIP, LICENSING, AND IT MAY BE  
23 CATEGORY FOUR IS THE SAME.

24 **THE COURT:** CAN YOU GIVE ME SOME EXAMPLES? I MEAN,  
25 WHEN I READ JUST THE BASIC -- THE PLAIN LANGUAGE, THE RELATING



1 TO NAME, IMAGE, AND LIKENESS, WHAT ARE SOME EXAMPLES OF THE  
2 DOCUMENTS YOU WOULD HOPE TO GET?

3 **MS. MERIWETHER:** ONE EXAMPLE IS THAT THE BIG TEN  
4 COMMISSIONER DELANEY ATTENDED A CONFERENCE OF THE COLLEGIATE  
5 COMMISSIONERS' ASSOCIATION, AND IN -- BEFORE DOING SO, WROTE A  
6 MEMO AND CIRCULATED IT THAT RELATED TO NCAA POLICIES CONCERNING  
7 THE USE OF STUDENT NAME, IMAGE, AND LIKENESS. SO, A DOCUMENT  
8 LIKE THAT IS, IN OUR VIEW, CLEARLY RESPONSIVE AND OBVIOUSLY  
9 CALLED FOR BY CATEGORY NUMBER FOUR.

10 THERE ARE A NUMBER OF NCAA POLICIES -- WELL, ANY OF  
11 THE DOCUMENTS THAT RELATE TO THAT PARTICULAR NCAA POLICY, OR  
12 THE BIG TEN'S POSITION ON NCAA POLICIES REGARDING USE OF NAME,  
13 IMAGE, AND LIKENESS, OR COPYRIGHT OWNERSHIP.

14 HERE'S ANOTHER ONE: WE FOUND A DOCUMENT THAT WAS  
15 CIRCULATED BY CLC TO THE CONFERENCES THAT DISCUSSED WHAT THE  
16 CONFERENCES SHOULD BE DOING IN NEGOTIATING TO RETAIN THE  
17 COPYRIGHT IN THE BROADCAST FOOTAGE. SO DOCUMENTS LIKE THAT  
18 WOULD BE RESPONSIVE TO THOSE REQUESTS.

19 MR. KING MAY HAVE SOME ADDITIONAL EXAMPLES SINCE HE  
20 HAS HAD THE THRILL OF REVIEWING THE DOCUMENTS THAT HAVE BEEN  
21 PRODUCED BY THE OTHER CONFERENCES, BUT THERE HAVE BEEN  
22 DOCUMENTS RELATING TO POLICIES AND THESE ISSUES PRODUCED BY  
23 OTHER CONFERENCES.

24 WE'RE NOT ASKING -- WE DON'T WANT THE -- WE DON'T  
25 NEED TO IMPOSE A BURDEN ON THE BIG TEN TO REVIEW EVERY SINGLE

1 E-MAIL THAT COULD POSSIBLY RELATE TO THESE THINGS.

2           **THE COURT:** I THINK THE MORE SPECIFIC YOU CAN BE  
3 ABOUT WHAT EXACTLY THIS PARTICULAR COMMUNICATION INVOLVES, IF  
4 IT'S A COMMISSION, THE COMMISSIONER TO CLC, OR IF IT'S ON A  
5 PARTICULAR TIME PERIOD OR PARTICULAR THING, AS DRAFTED -- I  
6 THINK TO RESPOND TO THE REQUEST AS DRAFTED, YOU HAVE TO LOOK AT  
7 EVERY E-MAIL, EVERY DOCUMENT IN THE ENTIRE ORGANIZATION TO  
8 FIGURE OUT IF YOU HAVE RESPONSIVE MATERIALS, AND THAT'S OVERLY  
9 BROAD. IF YOU CAN TARGET PARTICULAR COMMUNICATIONS AND TOPICS,  
10 I THINK IT MAKES THE BURDEN ARGUMENT MUCH MORE CHALLENGING.

11           **MS. MERIWETHER:** WE HAVE DISCUSSED THAT ACTUAL FACT  
12 WITH MR. ROSENMAN AND DISCUSSED THAT WE WERE ACTUALLY  
13 INTERESTED IN THE DOCUMENTS DISCUSSING THE POLICIES, ACTUALLY  
14 RELATING -- I MEAN, DISCUSSING THEM. THAT CAN BE KEYED  
15 DIRECTLY TO THE POLICIES TO AVOID THE SITUATION WHERE A  
16 CONFERENCE-WIDE SEARCH WOULD HAVE TO BE MADE.

17           WE ALSO MADE IT CLEAR TO MR. ROSENMAN THAT WE'RE ONLY  
18 TALKING ABOUT WHAT THE BIG TEN HAS AND NOT, FOLLOWING YOUR  
19 HONOR'S GUIDANCE IN OTHER AREAS, WHAT THE BIG TEN MEMBER  
20 SCHOOLS HAVE. TO THE EXTENT WE SEEK DOCUMENTS FROM THEM, WE'LL  
21 GO TO THEM.

22           **THE COURT:** AND THAT PROCESS HAS ALREADY BEGUN?

23           **MS. MERIWETHER:** RIGHT, RIGHT.

24           **THE COURT:** OKAY.

25           **MS. MERIWETHER:** WE TALKED TO MR. ROSENMAN ALSO ABOUT

1 DOCUMENTS RELATED TO EA SPORTS. WE HAVE TOLD HIM THAT --  
2 CONFIRMED WITH HIM THAT ANY DOCUMENT THAT EA SPORTS HAS OR HAS  
3 PRODUCED THE BIG TEN DOES NOT NEED TO PRODUCE.

4 WE ARE INTERESTED, HOWEVER, IN DOCUMENTS THAT THE BIG  
5 TEN HAS THAT EA DOESN'T HAVE. SO THAT WOULD BE AN INTERNAL  
6 DOCUMENT BETWEEN TWO BIG TEN EMPLOYEES THAT ARE INVOLVED IN,  
7 FOR INSTANCE, LICENSING BIG TEN LOGO TO EA SPORTS FOR THEIR USE  
8 IN THE VIDEO GAMES.

9 **THE COURT:** DO YOU KNOW AT THIS POINT THE PARTICULAR  
10 BIG TEN EMPLOYEES WHO ARE INVOLVED IN THAT PROCESS?

11 **MS. MERIWETHER:** I DO NOT KNOW THAT. WE NEVER GOT  
12 VERY FAR IN THE MEET AND CONFERS. ORIGINALLY, THE  
13 CONVERSATIONS WERE COMPLETELY HELD UP ON THE RELEVANCE ISSUE,  
14 WITH THE CONFERENCE TAKING THE POSITION THEY DIDN'T THINK  
15 ANYTHING WAS RELEVANT. SO WE NEVER BOILED DOWN TO HOW MANY  
16 CUSTODIANS ARE THERE, WHO ARE THEY, SEARCH THEIR FILES, SEARCH  
17 FROM THIS PERIOD OF TIME, AND IF YOU NEED SEARCH TERMS, WE'LL  
18 GIVE YOU THOSE, BECAUSE WE CAN DO THAT AS WELL. AND WE HAVE  
19 DONE THAT. WE HAVE PROVIDED SEARCH TERMS TO CONFERENCES THAT  
20 HAVE ENABLED THEM TO LIMIT THEIR SEARCH AND THEN AGREED TO  
21 PARTICULAR CUSTODIANS THAT HAVE ENABLED CONFERENCES TO LIMIT  
22 THEIR SEARCHES.

23 **THE COURT:** DO YOU KNOW AS A MATTER OF FACT THAT  
24 THERE IS SOMEONE FROM THE BIG TEN WHO HAS HAD COMMUNICATIONS  
25 WITH EA SPORTS ABOUT THESE TOPICS?

1           **MS. MERIWETHER:** I DON'T KNOW THAT AS A MATTER OF  
2 FACT.

3           **THE COURT:** SO IT MIGHT BE THAT THERE'S NOT MANY  
4 RESPONSIVE DOCUMENTS, OR THERE COULD BE MORE; YOU DON'T KNOW?

5           **MS. MERIWETHER:** I WOULD SPECULATE THERE AREN'T MANY  
6 RESPONSIVE DOCUMENTS, THAT MOST OF THE DOCUMENTS PROBABLY WE'VE  
7 GOTTEN FROM EA, OR WILL GET FROM EA, WHO IS MAKING A ROLLING  
8 PRODUCTION. WE CAN'T SAY, HERE ARE THE BIG TEN DOCUMENTS.

9           IF WE CAN SAY THAT, WE'LL DO IT. WE'LL SAY THEY'VE  
10 ALREADY PRODUCED THESE. BUT I DON'T KNOW WHETHER OR NOT -- THE  
11 PRODUCTION IS ROLLING -- WHETHER OR NOT WE'VE GOTTEN THE BIG  
12 TEN DOCUMENTS.

13           **THE COURT:** DO YOU KNOW FROM, THE MATERIALS YOU HAVE  
14 RECEIVED FROM EA, WHETHER THAT REVEALS SOME COMMUNICATION WITH  
15 BIG TEN CONFERENCE OR BIG TEN NETWORK?

16           **MS. MERIWETHER:** WELL, THERE ARE COMMUNICATIONS  
17 BETWEEN EA AND THE CONFERENCES, AND WE HAVE GOTTEN VERY MANY --  
18 WE HAVE GOTTEN COPIES OF THOSE. FOR INSTANCE, ROYALTY REPORTS,  
19 EA SENDS ROYALTY REPORTS TO THE CONFERENCES WHO ARE TO PAY FOR  
20 THE USE OF THE LOGO AND OTHER CONFERENCE PARAPHERNALIA IN  
21 CONNECTION WITH THE GAMES.

22           DO I KNOW THAT I'VE GOTTEN BIG TEN'S? NO. BUT I  
23 HAVE SEEN THOSE DOCUMENTS PRODUCED FROM OTHER CONFERENCES AND  
24 SCHOOLS. LIKE THE IVY LEAGUE, FOR INSTANCE, I SAW THOSE, AND  
25 MANY OF THE OTHER CONFERENCES I HAVE SEEN THOSE DOCUMENTS. BUT

1 I HAVE NOT SEEN THOSE DOCUMENTS FROM EA YET WITH RESPECT TO THE  
2 BIG TEN.

3 **THE COURT:** OKAY.

4 **MS. MERIWETHER:** I'M GOING TO SKIP CATEGORY SIX AND  
5 COME BACK TO THAT. WE DIDN'T REALLY GET VERY FAR IN OUR  
6 DISCUSSION WITH THAT. THAT'S A BONE OF CONTENTION.

7 BUT DOCUMENTS SEVEN AND EIGHT SORT OF RELATE TO SOME  
8 OF THE SAME THINGS. THERE HAVE BEEN TRADE ASSOCIATION MEETINGS  
9 WHERE RIGHTS TO STUDENT ATHLETE NAME, IMAGE, AND LIKENESS HAVE  
10 BEEN DISCUSSED. ONE OF THEM WAS THE COLLEGIATE COMMISSIONERS'  
11 ASSOCIATION THAT I MENTIONED EARLIER. WE WANT THOSE DOCUMENTS.

12 **THE COURT:** WHAT DOCUMENTS ABOUT THE COLLEGIATE  
13 COMMISSIONERS' ASSOCIATION DO YOU WANT? I MEAN, IS IT --

14 **MS. MERIWETHER:** THAT RELATES TO THE NEXT ONE. THE  
15 ONE I KNOW OF FOR SURE RIGHT NOW ARE DOCUMENTS RELATING TO NCAA  
16 LEGISLATIVE PROPOSAL 2010-26, WHICH HAS TO DO WITH CHANGES TO  
17 THE NCAA'S CURRENT POLICIES RELATING TO USE OF STUDENT ATHLETE  
18 IMAGE AND LIKENESS.

19 WE HAVE GOTTEN SOME OF THOSE DOCUMENTS FROM OTHERS,  
20 NOTHING FROM THE BIG TEN. BUT, CLEARLY, THAT SORT OF DOCUMENT  
21 IS RESPONSIVE AND WE BELIEVE CLEARLY RELEVANT TO A CLAIM OR  
22 DEFENSE IN THE SUIT; NOT ONLY TO OUR CLAIMS, BUT ALSO VERY  
23 SPECIFICALLY TO THE AFFIRMATIVE DEFENSES THAT HAVE BEEN RAISED  
24 BY THE NCAA REGARDING THE PRINCIPLES OF COMPETITIVE BALANCE AND  
25 COMMERCIALISM AND THAT SORT OF THING.

1           **THE COURT:** ASSUME FOR THE PURPOSES OF DISCUSSION  
2 THAT THERE'S A MEETING INVOLVING, YOU KNOW, THE NCAA 2010-26  
3 AND THAT THERE WAS DISCUSSIONS ABOUT HOW THEY COULD CONSPIRE  
4 TOGETHER TO PREVENT ED O'BANNON FROM EVER GETTING A DOLLAR. SO  
5 THERE'S THAT MEETING.

6           **MS. MERIWETHER:** RIGHT.

7           **THE COURT:** BUT THE REQUEST IS ALL DOCUMENTS  
8 CONCERNING AMATEUR STATUS OF STUDENT ATHLETES. THAT REQUEST  
9 COULD BE TRUCKLOADS OR MORE TRUCKLOADS, LANDFILLS OF MATERIALS.  
10 I THINK WE NEED TO GET YOU TO FOCUS TO THE PARTICULARS OF --

11           **MS. MERIWETHER:** YOUR HONOR, I'M SORRY TO INTERRUPT  
12 YOU.

13           **THE COURT:** GO AHEAD.

14           **MS. MERIWETHER:** IN MY DECLARATION AND AS AN EXHIBIT  
15 TO MY DECLARATION -- I WILL FISH IT OUT FOR YOU; I HAVE IT ON  
16 THE DESK OVER THERE -- WE SENT A NARROWING OF THAT REQUEST  
17 WHICH BECAME THEN VERY SPECIFIC THROUGH AN E-MAIL. SO IT ISN'T  
18 ANY MORE ALL DOCUMENTS CONCERNING THE AMATEUR STATUS.

19           IT IS SPECIFICALLY DOCUMENTS GENERATED WITHIN THE  
20 LAST TWO YEARS THAT RELATE TO POTENTIAL CHANGES IN THE  
21 COLLEGIATE MODEL, COMPETITIVE BALANCE ISSUES, COMMERCIALISM  
22 DEBATES, INCLUDING RELATED TO NCAA LEGISLATIVE PROPOSAL  
23 2010-26. THEN THERE'S SOME MORE THINGS, BUT IT ALSO SAYS THE  
24 DOCUMENTS SHOULD INCLUDE MATERIALS PERTAINING TO NCAA PRESIDENT  
25 EMMERT'S AUGUST PRESIDENTIAL RETREAT.

1 SO WE TRIED, BECAUSE WE DID GET THIS PUSHBACK -- I  
2 DON'T KNOW WHAT YOU MEAN BY AMATEURISM. AMATEURISM --

3 **THE COURT:** WHEN I HEAR COMPETITIVE BALANCE ISSUES,  
4 THAT'S MUCH BROADER THAN THE CLAIMS YOU'VE GOT IN THE  
5 LITIGATION. THERE'S A WHOLE NUMBER OF POTENTIAL ANTITRUST  
6 CASES YOU COULD BRING RELATING TO COMPETITIVE BALANCE ISSUES.  
7 THAT COULD BE CURRENT ATHLETES. IT COULD BE FUTURE ATHLETES.  
8 IT COULD BE THINGS INVOLVING PEOPLE WHO AREN'T ATHLETES AT ALL.  
9 TO ME THAT TERM HAS A SIMILAR PROBLEM TO AMATEURISM. IT JUST  
10 COULD BE EVERY DOCUMENT AT EVERY ONE OF THE INSTITUTIONS AT THE  
11 BIG TEN.

12 WHERE ARE YOU LOOKING AT SO I CAN BE LOOKING AT THE  
13 SAME PLACE?

14 **MS. MERIWETHER:** THIS IS DECLARATION -- THE  
15 MERIWETHER DECLARATION, WHICH HAS BEEN FILED IN THIS COURT, I  
16 ONLY HAVE THE DOCKET NUMBER FROM THE ILLINOIS FILING BUT IT IS  
17 OF RECORD IN THIS COURT, MERIWETHER DECLARATION. IT IS EXHIBIT  
18 D, WHICH IS THE E-MAIL THAT WE SENT.

19 **THE COURT:** ALL RIGHT.

20 **MS. MERIWETHER:** THE BIG TEN TRIMMING DOWN THAT --

21 **THE COURT:** I HAVE THAT.

22 **MS. MERIWETHER:** I HEAR YOU, THOUGH, ON THE  
23 COMPETITIVE BALANCE AND THE LIKE, AND WE CAN WORK FURTHER TO  
24 SPECIFY THE TYPES OF CONVERSATIONS THAT WE'RE INTERESTED IN IN  
25 TRADE ASSOCIATION MEETINGS.

1           **THE COURT:** WHEN YOU FOCUS ON THE PARTICULAR TRADE  
2 ASSOCIATION MEETING THAT YOU KNOW ABOUT, THAT MAKES THE BURDEN  
3 OF RESPONDING TO IT MUCH LESS THAN ALL DOCUMENTS FROM EVERY  
4 ONE -- YOU KNOW, FROM THE ENTIRE CONFERENCE ABOUT AMATEURISM OR  
5 ABOUT COMPETITIVE BALANCE. I THINK IT MAKES THE BURDEN OF  
6 RESPONDING MUCH LESS IF YOU CAN TARGET PARTICULAR PERSONS,  
7 PARTICULAR TOPICS, PARTICULAR TIME PERIODS.

8           I'M NOT SAYING -- I CAN'T DRAW THE LINES FOR YOU  
9 RIGHT NOW, BUT THAT'S THE DIRECTION I WANT TO GET YOU MOVING.

10           OKAY. ANYTHING ELSE?

11           **MS. MERIWETHER:** YES, ONE LAST ISSUE HAS ARISEN WITH  
12 RESPECT TO OUR REQUEST THAT THEY PRODUCE ALL DOCUMENTS  
13 REFERENCING OR REFERRING TO THIS LITIGATION, INCLUDING  
14 DOCUMENTS RELATING TO THE SUBPOENAS.

15           IN MEET AND CONFER DISCUSSIONS WITH -- I BELIEVE  
16 BEFORE TODAY WITH THESE COUNSEL, BUT CERTAINLY TODAY, WE MADE  
17 IT CLEAR THAT THERE'S CERTAIN THINGS THAT WE'RE NOT INTERESTED  
18 IN.

19           SO, FOR INSTANCE, WE ARE NOT INTERESTED IN  
20 ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS, AND WE HAVE  
21 REQUESTED SIMPLY THAT A LOG BE GIVEN TO US THAT WOULD LIST  
22 THOSE COMMUNICATIONS THAT WERE NOT BEING PRODUCED ON THE BASIS  
23 OF ATTORNEY-CLIENT PRIVILEGE. BUT WE'VE ALSO SAID THAT WE  
24 WOULDN'T REQUIRE THE LOG TO INCLUDE CONVERSATIONS BETWEEN THE  
25 PARTY -- THE BIG TEN AND ITS COUNSEL OR THE BIG TEN NETWORK AND



1 ITS COUNSEL, YOU KNOW. SO WE'RE NOT TALKING ABOUT THOSE KINDS  
2 OF COMMUNICATIONS.

3 BUT THERE HAVE BEEN NUMEROUS COMMUNICATIONS, AND  
4 WE'VE SEEN THEM IN OTHER PEOPLE'S LOGS, AND WE'VE SEEN SOME  
5 PRODUCTIONS, BETWEEN NONPARTIES, BETWEEN, LET'S SAY, JUST FOR  
6 AN EXAMPLE, THE BIG TEN, COUNSEL FOR THE BIG TEN AND COUNSEL  
7 FOR ESPN. WE DO NOT BELIEVE AS WE STAND HERE TODAY THAT THOSE  
8 WOULD BE PRIVILEGED COMMUNICATIONS BUT WE UNDERSTAND THAT SOME  
9 CONFERENCES OR NETWORKS ARE TAKING THE POSITION THAT THEY ARE.

10 WE CAN'T ASSESS THAT CLAIM OF PRIVILEGE UNTIL WE KNOW  
11 WHO THEY'RE FROM, WHO THEY'RE TO, WHAT THEY'RE ABOUT, AND  
12 THERE'S SOME SORT OF UNDERSTANDING OF WHAT JOINT DEFENSE  
13 PRINCIPLE GOVERNS THAT COMMUNICATION.

14 **THE COURT:** WHAT IS YOUR ASSERTION AS TO THE  
15 RELEVANCE OF A HYPOTHETICAL DISCUSSION BETWEEN BIG TEN COUNSEL  
16 AND ESPN COUNSEL ABOUT -- IN WHICH THEY'RE DISCUSSING THE  
17 LITIGATION?

18 **MS. MERIWETHER:** WELL, ONE HYPOTHETICAL RELEVANCE  
19 WOULD BE IF THEY'RE COORDINATING A RESPONSE TO OUR DOCUMENT  
20 PRODUCTION REQUESTS THAT THERE'S BEEN SOME DISCUSSION THAT  
21 CERTAIN PARTIES HAVE TOLD OTHER PARTIES WHAT THEY'RE SUPPOSED  
22 TO DO WITH RESPECT TO THOSE RESPONSES.

23 **THE COURT:** AND WHAT WOULD THAT BE PROBATIVE OF IN  
24 YOUR CASE? AND I UNDERSTAND IN A LITIGATION, IN THE COMBAT OF  
25 LITIGATION, IT'S A GREAT DOCUMENT TO KNOW ABOUT, BUT WHAT CLAIM

1 DOES IT TEND TO PROVE IF YOU HAVE A --

2 **MS. MERIWETHER:** WELL, IT MAY REVEAL COMMUNICATIONS  
3 ABOUT -- WORRIES ABOUT WHAT THE CONTRACTUAL DOCUMENTS SAY WITH  
4 RESPECT TO THE PARTICULAR ISSUES AT HAND.

5 SO, YOU KNOW, FURTHER SUPPOSE THERE WAS A  
6 COMMUNICATION THAT SAID, YOU KNOW, WHOA, WE CAN'T GIVE THEM  
7 THIS BECAUSE IT SHOWS THAT WE'RE, YOU KNOW, CONVEYING CERTAIN  
8 RIGHTS AND WE DON'T HAVE THE RELEASES THAT WOULD BE NECESSARY  
9 TO CONVEY THOSE RIGHTS; OR YOU KNOW, THE COPYRIGHT LANGUAGE,  
10 YOU KNOW, DOESN'T SAY WHAT IT'S SUPPOSED TO SAY AND THAT SORT  
11 OF THING.

12 SO BESIDES, I THINK IT IS RELEVANT THAT NONPARTIES  
13 ARE COORDINATING RESPONSES AND STANDING IN THE WAY OF GETTING  
14 THE DOCUMENTS PRODUCED IN THE LITIGATION THAT NEED TO BE  
15 PRODUCED. I THINK THAT'S RELEVANT, BUT THERE COULD CONCEIVABLY  
16 BE RELEVANCE --

17 **THE COURT:** IT HAS TO BE RELEVANT TO A CLAIM OR A  
18 DEFENSE.

19 **MS. MERIWETHER:** YES. I'VE DESCRIBED POTENTIAL  
20 RELEVANCE TO A CLAIM OR DEFENSE IN THAT.

21 AND THERE ARE CASES, YOUR HONOR, WE CITED THEM IN OUR  
22 BRIEFS, THE PARTIES' DISCUSSION OF THE CLAIMS AND DEFENSES IS  
23 RELEVANT TO THE CLAIMS AND DEFENSES, JUST, YOU KNOW, NO MATTER  
24 WHAT IT SAYS, BUT THEIR DISCUSSION OF IT IS.

25 **THE COURT:** THEIR RESPONSE -- AND I'LL GIVE THEM A

1 CHANCE TO RESPOND FOR THEMSELVES -- IS THAT IF THEY HAVE TO  
2 SEARCH FOR EVERY DOCUMENT IN THEIR POSSESSION, CUSTODY, OR  
3 CONTROL REFERENCING THIS LITIGATION, THAT'S A VERY UNLIMITED  
4 SCOPE OF A SEARCH, AND THE BURDEN OF THAT GRAVELY OUTWEIGHS THE  
5 BENEFIT TO THE PLAINTIFFS OF GETTING INFORMATION, PARTICULARLY  
6 TALKING ABOUT A THIRD PARTY, AND YOU'RE TALKING ABOUT THIRD  
7 PARTY COMMUNICATIONS WITH ANOTHER THIRD PARTY. WE'RE GETTING  
8 FAR AWAY FROM THE HEART OF THE CLAIMS IN THIS CASE.

9 **MS. MERIWETHER:** JUST TWO THINGS ON THAT POINT, YOUR  
10 HONOR.

11 WE HAVE LIMITED THOSE SEARCHES TO CUSTODIANS. IN  
12 OTHER WORDS, WE HAVEN'T MADE PEOPLE GO AND LOOK AT EVERYBODY'S  
13 FILES IN THEIR ENTIRE ORGANIZATION. WE'VE LIMITED THOSE  
14 SEARCHES WITH OTHER CONFERENCES TO CUSTODIANS, AND WE'VE ALSO  
15 GIVEN SEARCH TERMS THAT HAVE BEEN RUN, REALLY, WITHOUT INCIDENT  
16 AND RETURNED RELATIVE FEW DOCUMENTS. SO THERE'S WAYS AROUND  
17 THE BURDEN ISSUE THAT WE CAN WORK ON, AND WE HAVE BEEN DOING  
18 THAT WITH THE OTHER NONPARTIES.

19 **THE COURT:** ARE THERE PARTICULAR INDIVIDUALS THAT THE  
20 BIG TEN, BIG TEN NETWORK, OR FOX THAT YOU THINK ARE ENGAGED IN  
21 CONVERSATIONS REGARDING THE LITIGATION THAT ARE NOT PRIVILEGED  
22 CONVERSATIONS THAT YOU THINK -- THAT YOU ARE ENTITLED TO  
23 DISCOVER?

24 **MS. MERIWETHER:** I DON'T KNOW, BECAUSE I HAVE NOT  
25 BEEN PRIVY TO ANY CUSTODIANS, OR WHO HAS WHAT, OR HOW ANY

1 SEARCHES HAVE BEEN CONDUCTED, WHETHER ANY SEARCHES HAVE BEEN  
2 CONDUCTED, BECAUSE CERTAINLY WITH RESPECT TO THE BIG TEN AND  
3 GENERALLY, BUT NOT COMPLETELY WITH RESPECT TO THE BIG TEN  
4 NETWORK AND FOX, THE POSITION'S BEEN IT'S NOT RELEVANT, WE'RE  
5 ARE NOT GOING TO PRODUCE IT, AND, I THINK, WE'RE NOT GOING TO  
6 SEARCH FOR IT, BECAUSE I HAVE NOT BEEN PROVIDED WITH  
7 INFORMATION AS TO WHAT'S RESPONSIVE AND WHAT'S THE VOLUME OF  
8 RESPONSIVE DOCUMENTS WITH RESPECT TO MOST OF THESE REQUESTS.

9 **THE COURT:** ALL RIGHT. ANYTHING ELSE?

10 I APPRECIATE YOUR PRIORITIZING, AND YOUR FOCUS ON THE  
11 MOST IMPORTANT THINGS.

12 **MS. MERIWETHER:** THANK YOU, YOUR HONOR. I APPRECIATE  
13 IT.

14 **THE COURT:** ANY OTHER ISSUES?

15 **MS. MERIWETHER:** I'M SURE I'LL HAVE SOME A LITTLE  
16 LATER TODAY.

17 **THE COURT:** THANK YOU. LET ME TURN TO -- WHETHER  
18 IT'S BIG TEN, BIG TEN NETWORK, FOX, HOWEVER YOU'D LIKE TO  
19 PROCEED, I'LL LEAVE IT TO YOU.

20 **MR. SINGER:** HI, YOUR HONOR. DAVID SINGER ON BEHALF  
21 OF FOX BROADCASTING COMPANY AND THE BIG TEN NETWORK.

22 SO, IF I MAY JUST RESET THE TABLE A LITTLE BIT, THE  
23 PLAINTIFFS' LAWSUIT -- IT'S A VERY LONG COMPLAINT; I'M SURE  
24 YOUR HONOR HAS HAD A CHANCE TO MULL THROUGH IT.

25 **THE COURT:** THAT WAS ONE OF THE THINGS I REVIEWED,

1 YES.

2           **MR. SINGER:** FIVE HUNDRED TWENTY-TWO PARAGRAPHS OR  
3 SO.

4           THE GIST OF THEIR CLAIM, OF THE ANTITRUST CLAIM, IS  
5 THEY WERE FORECLOSED FROM THE RIGHT OF PUBLICITY LICENSING  
6 MARKET, AND THE COMPLAINT ALLEGES LOTS OF WAYS THIS HAPPENED.  
7 IT TALKS ABOUT PROMINENTLY ELECTRONIC ARTS VIDEO GAMES. IT  
8 TALKS ABOUT OTHER MERCHANDISE LIKE CLOTHING AND PENNANTS AND  
9 THINGS LIKE THAT. IT DOES TALK ABOUT BROADCASTS, AND LIVE  
10 BROADCASTS, AND CLASSIC GAMES AND SO FORTH.

11           BUT WHERE WE'RE AT TODAY, WHERE WE'VE BASICALLY SORT  
12 OF DRAWN IN SOME FOCUS FOR TODAY'S HEARING, WE KNOW WE'RE NOT  
13 TALKING ANY MORE ABOUT THE LIVE BROADCASTS. THEY ARE NOT  
14 SEEKING DOCUMENTS THAT SHED LIGHT ON THAT. THAT SEEMS TO HAVE  
15 GONE OVERBOARD, AT LEAST FOR NOW.

16           WE ALSO KNOW THEY'RE NOT TALKING ABOUT DOCUMENTS  
17 CONCERNING WHAT IS TYPICALLY PERCEIVED AS RIGHT OF PUBLICITY,  
18 SUCH AS ENDORSEMENT AND ADVERTISEMENTS AND WHAT CALIFORNIA AND  
19 OTHER STATES AND FEDERAL LAW RECOGNIZE AS RIGHTS OF PUBLICITY.  
20 WE'RE NO LONGER TALKING ABOUT THOSE DOCUMENTS, NATURALLY SO,  
21 BECAUSE AS TELEVISION NETWORKS, WE DON'T BUY RIGHTS FOR STUDENT  
22 ATHLETE ENDORSEMENT, AND WE DON'T SELL THOSE RIGHTS TO OTHER  
23 PEOPLE. WE'RE TV NETWORKS.

24           SO, WHAT WE'RE TALKING ABOUT TODAY IS THIS NARROW SET  
25 OF DOCUMENTS. WE'RE TALKING ABOUT THE DOCUMENTS RELATED TO

1 JUST THE MERE DISTRIBUTION AND SALE OF CLIPS AND VIDEO FOOTAGE  
2 OF THE LIVE BROADCASTS OR PHOTOS FROM THOSE. THOSE ARE  
3 ESSENTIALLY DERIVATIVE WORKS OF THE LIVE BROADCASTS.

4 I'M SURE EVERYONE IN THE ROOM KNOWS THIS WHO IS PART  
5 OF THIS LITIGATION, BUT IT BEARS REPEATING, THAT THESE TV  
6 AGREEMENTS THAT FOX AND BIG TEN NETWORK ENTER INTO THAT ARE,  
7 YOU KNOW, MULTI-MILLION, BILLION DOLLAR AGREEMENTS, THE RIGHTS  
8 THAT ARE BEING BOUGHT ARE THE LIVE BROADCAST FOOTAGE. THESE  
9 LITTLE CLIP RIGHTS OF THE FOOTAGE, THOSE DERIVATIVE WORKS THAT  
10 THEY SHOW ON THE NEWS OR A WEBSITE, I MEAN, THAT IS JUST  
11 INFINITESIMAL. THAT'S NOT SOMETHING THAT IS EVEN REALLY  
12 ADDRESSED IN THESE AGREEMENTS IN TERMS OF THE VALUE OF THEM.

13 **THE COURT:** IS IT ADDRESSED IN THE AGREEMENTS? I  
14 MEAN, IF IS IT NOT ADDRESSED IN THE AGREEMENTS --

15 **MR. SINGER:** THOSE RIGHTS ARE THROW-INS. THEY'VE  
16 SEEN THE TYPES OF AGREEMENTS WE ARE TALKING ABOUT. THESE ARE  
17 LONG AGREEMENTS. THEY ARE HIGHLY CONFIDENTIAL. WHEN THE  
18 PARTIES GO IN TO NEGOTIATE THESE MULTI-MILLION DOLLAR DEALS,  
19 THE MONEY IS ABOUT THE LIVE BROADCAST RIGHTS. THE REST ARE  
20 THESE THROW-INS.

21 OF COURSE, THIS LAWSUIT NOW, COUNSEL IS SAYING IT'S  
22 PREDOMINANTLY ABOUT IT, BUT IT STARTED PREDOMINANTLY ABOUT EA,  
23 WHICH MADE A GAZILLION DOLLARS ON VIDEO GAMES. SO NOW, TODAY,  
24 TO THEM IT'S ABOUT THIS TINY SLIVER BECAUSE THEY WANT THEIR  
25 EXPERTS TO SEE THIS BIG NUMBER FOR THE LIVE BROADCAST RIGHTS

1 AND DO WHAT EXPERTS DO AND CHURN SOMETHING OUT.

2 BUT THAT'S REALLY JUST A LITTLE BACKGROUND.

3 NOW, IN TERMS OF THE TELEVISION BROADCAST AGREEMENTS,  
4 WHAT THE PLAINTIFFS ARE REALLY CLAIMING, THEY'RE SAYING THAT  
5 OUR DOCUMENTS, OUR TV BROADCAST AGREEMENTS WILL SHED LIGHT ON  
6 THEIR DAMAGES CLAIM. THEY'VE ALREADY SAID THAT THE NETWORKS  
7 ARE NOT PART OF ANY CONSPIRACY. THESE AGREEMENTS -- THEY'VE  
8 CONCEDED THAT OVER AND OVER AGAIN.

9 SO, WHAT THEY'RE REALLY CLAIMING IS OUR TV BROADCAST  
10 AGREEMENTS AND RELATED DOCUMENTS WILL SHED LIGHT ON THE MONEY  
11 THAT THEY GOT SHAFTED OUT OF FOR THESE LITTLE USES OF CLIPS AND  
12 FOOTAGE.

13 YOU KNOW, WHAT WE'VE ARGUED IN THE PAPERS AND I WON'T  
14 BELABOR, BUT IN TERMS OF THEIR DAMAGE CLAIM, IN ORDER TO  
15 ESTABLISH RELEVANCE -- THEY CAN'T DO THAT. THERE'S A MISSING  
16 LINK, BECAUSE THE MONEY THAT GETS GENERATED FROM THE USE OF  
17 THESE CLIPS THEY ABSOLUTELY UNDER THE LAW DO NOT HAVE A RIGHT  
18 TO.

19 SO THAT CAN'T POSSIBLY SHED LIGHT -- WHATEVER THEIR  
20 CLAIM IS, AND I UNDERSTAND THERE'S THIS FINE LINE BETWEEN  
21 RELEVANCE AND THE MERITS, BUT WE WERE NOT ASKING THE COURT TO  
22 RULE ON THE MERITS. THEIR CLAIM IS WHAT IT IS. IT'S BROAD AND  
23 SWEEPING. AND I'M SURE THEY'LL COME UP WITH SOME DAMAGE CLAIM.

24 BUT OUR DOCUMENTS, THESE TV BROADCAST AGREEMENTS, THE  
25 MONEY WE MAKE, HOWEVER SMALL IT IS FROM CLIPS OR FOOTAGE, OR

1 WHATEVER IT IS, THAT CAN'T POSSIBLY -- THEY CANNOT HAVE A RIGHT  
2 TO THAT MONEY UNDER THE LAW, AND THAT'S BOTH FEDERAL AND  
3 CALIFORNIA.

4           THERE'S -- I WON'T GET INTO THE COPYRIGHT ASPECT OF  
5 IT BECAUSE YOUR HONOR CAUTIONED AGAINST IT, BUT THERE IS  
6 STATUTORY LAW IN CALIFORNIA, AND THAT'S THE CIVIL CODE 3344,  
7 THAT CLEARLY SAYS THAT NO CONSENT'S REQUIRED TO USE THE NAME  
8 AND LIKENESS OF SOMEONE, AN ATHLETE, WHEN YOU'RE SHOWING A  
9 SPORTS BROADCAST.

10           **THE COURT:** ON THAT ISSUE I WILL STOP YOU. I THINK  
11 THAT'S ABSOLUTELY RIGHT. BUT WE ARE HERE JUST ON DISCOVERY, SO  
12 IT DOESN'T MEAN AS A MATTER OF LAW THEY COULDN'T HAVE DISCOVERY  
13 OF SOMETHING THAT OVERLAPS INTO THAT.

14           **MR. SINGER:** BUT A FINDING OF RELEVANCE NECESSITATES  
15 A FINDING THAT THEY ARE SOMEHOW OR OTHER ENTITLED TO SOME OF  
16 THE MONEY WE MAKE FROM JUST SHOWING THIS STUFF. I'M NOT  
17 TALKING ABOUT -- IF WE WERE USING THESE CLIPS TO SELL GATORADE,  
18 OR TO SELL CARS, OR TO PROMOTE A RESTAURANT, THAT WOULD BE A  
19 WHOLE DIFFERENT STORY. THAT COULD BE PART OF THE MARKET  
20 THEY'RE FORECLOSED FROM.

21           BUT WHAT THEY'RE BASICALLY SAYING -- IN ORDER TO  
22 ARGUE RELEVANCE, THEY'RE SAYING SOME OF THE MONEY WE'RE MAKING  
23 FROM THESE CLIPS THEY'RE ENTITLED TO. WHAT WE'RE SAYING IS  
24 THAT CAN'T BE. THEY CAN'T MAKE THAT RELEVANCE ARGUMENT. IT  
25 DOESN'T WORK.



1           **THE COURT:**  THEY DON'T NEED TO MAKE THAT ARGUMENT.  
2  THEY JUST NEED TO SAY THE DISCOVERY OF THAT MATERIAL IS  
3  REASONABLY LIKELY TO LEAD TO THE DISCOVERY OF SOME OTHER  
4  INFORMATION.  IT DOESN'T HAVE TO BE THAT PARTICULAR LICENSING  
5  AGREEMENT IS GOING TO BE ADMISSIBLE TO PROVE THEIR DAMAGES.  IT  
6  COULD BE ONE LINK AWAY.  BUT I HAVEN'T DETERMINED THAT THEY'VE  
7  ESTABLISHED THAT, SO --

8           **MR. SINGER:**  IT WOULD STILL NEED TO BE PROBATIVE OF  
9  THEIR DAMAGES.

10          **THE COURT:**  THAT'S RIGHT.

11          **MR. SINGER:**  AND IN ORDER TO BE PROBATIVE, THEY WOULD  
12  HAVE TO HAVE SOME ENTITLEMENT TO IT.

13                 ODDLY, THEY'RE SAYING AND CONCEDING THAT THEY DON'T  
14  HAVE ANY ENTITLEMENTS TO THE MONEY THAT THE NETWORKS MAKE FROM  
15  THIS, YET THEY ARE SAYING THAT THEY NEED TO KNOW WHAT'S IN OUR  
16  AGREEMENTS AND HOW MUCH WE'RE PAYING FOR THESE RIGHTS, AND I  
17  HAVE BEEN UNABLE TO SQUARE THOSE TWO CONCEPTS.

18                 BUT THEY SEEM TO RECOGNIZE THEY HAVE A PROBLEM THAT  
19  THEY'RE NOT ENTITLED TO THIS MONEY, BUT THERE IS A PROBLEM  
20  THERE.  AND THE WAY THEY'RE COMING AT IT IS SAYING, WE JUST  
21  NEED TO KNOW HOW MUCH YOU'VE PAID, OR WHAT'S IN THESE  
22  CONTRACTS.  AND, AGAIN, THE ONLY WAY TO GET TO RELEVANCE, THE  
23  ONLY WAY THIS COULD SHED LIGHT ON DAMAGES IS IF YOU ACCEPT THE  
24  NOTION THAT THERE'S SOME ENTITLEMENT TO IT.

25                 AND, YOU KNOW, AGAIN WE CITED HEAVILY TO JOHN FRIEDA,

1 WHICH IS A CASE THAT JUDGE WILKEN CITED, AND THAT CASE WAS  
2 DIRECTLY ON POINT. THAT DEALT WITH FOOTAGE AND CLIPS. IT EVEN  
3 DEALT WITH TELEVISION BROADCAST. IT DEALT WITH STUFF FROM 60  
4 YEARS AGO. IT'S EXACTLY WHAT WE'RE TALKING ABOUT TODAY. AND  
5 THE CALIFORNIA COURT OF APPEALS SAID NO WAY, THAT'S NOT --  
6 THERE'S NO -- ATHLETES AREN'T ENTITLED TO ANY OF THAT MONEY.

7 SO, I THINK IT'S VERY PERTINENT TO THE RELEVANCE  
8 DISCUSSION, BECAUSE YOU CAN'T LINK -- OUR TELEVISION AGREEMENT  
9 ONLY COMES INTO PLAY IF YOU ACCEPT THE IDEA THAT SOMEHOW  
10 THEY'RE ENTITLED TO A PIECE OF THAT ACTION.

11 AND JUDGE WILKEN IN HER ORDER DISMISSING EA'S -- EA'S  
12 MOTION, THEY -- SHE SAID THAT WITH RESPECT TO EA, THAT'S A  
13 TRANSFORMATIVE USE, BUT IT DOESN'T QUITE MEET THE  
14 TRANSFORMATIVE TEST. SHE DID IT SAY IT DOESN'T QUALIFY AS THIS  
15 SORT OF MATTER OF PUBLIC INTEREST BECAUSE IT'S NOT REALLY  
16 REPORTING ON THE FACTS. SHE DOVE REALLY DEEPLY INTO ALL THE  
17 ISSUES. I THINK ALL THE THINGS JUDGE WILKEN HAS WRITTEN ABOUT,  
18 THAT'S THE MOST TELLING HERE.

19 IN TERMS OF HER REFERENCE TO THE BROADCAST  
20 AGREEMENTS, WHAT SHE WAS TALKING ABOUT THERE IS -- THE  
21 COMPLAINT, IF YOU GO BACK TO IT, IT STARTED OUT THAT THEY WERE  
22 ACCUSING THE NETWORKS OF BEING PART OF THE CONSPIRACY.

23 IN JUNE WE GOT A LETTER, FOX AND BIG TEN NETWORK GOT  
24 LETTERS SAYING, CEASE AND DESIST, STOP WHAT YOU'RE DOING, WE  
25 HAVE TO RENEGOTIATE THE AGREEMENT, YOU DON'T HAVE A RIGHT TO DO

1 THIS. THEY SENT THIS LETTER IN JUNE. THAT'S HOW THE WHOLE  
2 ATTACK STARTED, AND, YOU KNOW, NOW THAT THEY'VE GOTTEN INTO HOT  
3 WATER, IT'S SORT OF THIS REVERSE COURSE.

4 I THINK THAT IF WE WERE TO GO THROUGH THE REQUESTS,  
5 AGAIN THE ISSUE THAT IS GOING TO KEEP COMING BACK IS THIS IDEA  
6 OF WHETHER THEY CAN DIVE INTO OUR MOST CONFIDENTIAL -- I MEAN,  
7 THIS IS THE GUTS OF THESE TELEVISION NETWORKS, YOU KNOW,  
8 COLLEGE SPORTS OPERATIONS.

9 **THE COURT:** LET ME ASK ABOUT THE PARSABILITY OF THE  
10 BROADCAST AGREEMENTS AND THE LICENSING AGREEMENTS THAT YOU  
11 HAVE. AND I'M STARTING WITH THE PROPOSED COMPROMISE AND  
12 LOOKING AT DOCUMENT TWO AT PAGE 27 WHERE FOX --

13 **MR. SINGER:** ARE YOU GOING THROUGH YOUR TENTATIVE?

14 **THE COURT:** I'M LOOKING BACK TO SOMETHING THAT FOX  
15 SUBMITTED, THE JOINT STIPULATION CONCERNING THE SUBPOENA TO  
16 FOX. AND I'M JUST SAYING -- I'M STARTING WITH CATEGORY ONE AS  
17 FAR AS WHERE I AM IN MY TENTATIVE, BUT I'M WONDERING IF THERE  
18 IS SOME COMPONENT OF THE BROADCAST AGREEMENTS THAT FOX COULD  
19 PRODUCE NOT CONCERNING THE LIVE BROADCAST RIGHTS, BUT WE'RE  
20 HEARING TODAY THEY ARE NOT ASSERTING A RIGHT TO THOSE.

21 BUT THE PARTS FOR REBROADCAST, FOR EXAMPLE, ARE THEY  
22 PARSABLE IN A WAY THAT COULD PROTECT THE PARTS THAT ARE  
23 CONFIDENTIAL WHILE STILL PRODUCING SOME INFORMATION?

24 **MR. SINGER:** I WOULD -- AGAIN, WITHOUT WAIVING MY  
25 ARGUMENT AS TO THE RELEVANCE, BECAUSE WE DO FEEL, OBVIOUSLY,

1 VERY STRONGLY ABOUT THAT, IF THERE WERE PORTIONS OF THE  
2 AGREEMENT THAT ASSIGN VALUE, IF I UNDERSTAND YOUR HONOR, TO  
3 THESE, YOU KNOW, THESE SLIVER OF RIGHTS THAT THEY'RE TALKING  
4 ABOUT --

5 **THE COURT:** RIGHT.

6 **MR. SINGER:** THEN, YOU KNOW, THAT WOULD BE SOMETHING  
7 TO CONSIDER.

8 BUT MY UNDERSTANDING, BASED ON MY RECOLLECTION OF  
9 LOOKING AT THIS, AND IT'S SOMETHING I'VE THOUGHT ABOUT, IS THAT  
10 THAT IS ABSOLUTELY NOT THE CASE. IN FACT, IT'S -- YOU KNOW, I  
11 GET A CHUCKLE FROM THOSE WHO ARE INVOLVED, THAT THE CONCEPT OF  
12 EVEN ASSIGNING A VALUE TO THAT WOULD BE --

13 **THE COURT:** I'M NOT TALKING ABOUT ASSIGNING A VALUE,  
14 BUT IS THERE SOME ASSIGNMENT OF RIGHTS? IS THERE A COPYRIGHT  
15 THAT'S ASSIGNED IN THE BROADCAST AGREEMENTS AS TO WHO POSSESSES  
16 IT FOR A REBROADCAST RIGHT?

17 **MR. SINGER:** WELL, THE AGREEMENTS ARE TYPICALLY SET  
18 UP WHERE THEY'LL GIVE LIVE BROADCASTS, AND THERE'S DIFFERENT  
19 WINDOWS, AND IT INCLUDES REBROADCAST RIGHTS. AND THEN THERE'S  
20 A SCOPE OF OTHER RIGHTS THAT THAT WOULD INCLUDE, LIKE, YOU  
21 KNOW, REUSE OR SLICING AND DICING OF THE FOOTAGE.

22 I MEAN, ESSENTIALLY, THE NETWORKS GET AN EXCLUSIVE  
23 LICENSE TO USE THAT, AND THEN THE CONFERENCE OWNS THE  
24 COPYRIGHT, SO IT'S OUR FOOTAGE TO DO WITH AS WE PLEASE.

25 NOW, IF WE WERE TO USE THAT IN A WAY THAT EXPLOITED

1 SOMEONE'S PUBLICITY BY ENDORSING A PRODUCT, THAT WOULD BE  
2 DIFFERENT, AND THOSE ARE DOCUMENTS WE'VE MET AND CONFERRED  
3 ABOUT. I MEAN, THAT'S NOT OUT THERE.

4 SO THERE'S -- I GUESS TO ANSWER YOUR QUESTION, IN  
5 TERMS OF SLICING AND DICING THE AGREEMENT, I MEAN, THESE ARE  
6 BROADCAST AGREEMENTS. ARE THERE SECTIONS THAT WOULD REFERENCE  
7 THE FULL -- YOU KNOW, WHAT THESE ANCILLARY RIGHTS INCLUDE,  
8 YEAH, THERE WOULD BE. BUT THESE ARE ALSO VERY LONG, HIGHLY  
9 CONFIDENTIAL AGREEMENTS.

10 SO, YOU KNOW, ONCE YOU GET INTO THE REALM OF, YOU  
11 KNOW, EVERY PROVISION THAT MAY RELATE TO THIS SLIVER OF RIGHTS,  
12 YOU COULD SORT OF FALL INTO THE TRAP OF, WELL, THE WHOLE  
13 AGREEMENT RELATES TO THAT BECAUSE...

14 **THE COURT:** THIS IS YOUR LANGUAGE. IT'S FROM YOUR  
15 DECLARATION, THAT FOX PROPOSED TO GIVE PLAINTIFFS A COPY OF ANY  
16 EXCERPT FROM ANY FOX TV BROADCAST AGREEMENT THAT MAKES ANY  
17 MENTION OF STUDENT ATHLETES' RIGHT OF PUBLICITY, NAME, IMAGE,  
18 OR LIKENESS.

19 **MR. SINGER:** RIGHT. I THOUGHT THAT WAS A FAIR  
20 COMPROMISE GIVEN THAT'S WHAT THIS CASE WAS ABOUT.

21 **THE COURT:** HOW WOULD YOU DO THAT? HOW WOULD YOU  
22 PHYSICALLY --

23 **MR. SINGER:** WELL, THERE ARE -- ANY PROVISION --  
24 THERE ARE PROVISIONS IN THERE, I THINK, THAT IF THEY  
25 SPECIFICALLY CALL OUT, LIKE, FOR EXAMPLE, THAT YOU CAN'T -- YOU

1 DON'T -- WE'RE NOT GIVING YOU THE RIGHT TO USE THIS AND GO SELL  
2 CADILLACS WITH IT. IF THERE WAS A PROVISION LIKE THAT, YOU  
3 KNOW, THAT WAS WHAT WE WERE PREPARED TO SHOW THEM, AND WE  
4 THOUGHT THAT WAS A FAIR COMPROMISE.

5           WHAT THEY WANTED TO SEE WAS EVERYTHING HAVING TO DO  
6 WITH EVERY GRANT, EVERY RESERVATION OF RIGHTS, EVERY COPYRIGHT.  
7 AND THEN YOU START GETTING INTO NOT JUST THE CONFIDENTIAL  
8 FINANCIAL COMPONENT, THAT'S THE BIGGEST COMPONENT OF IT, BUT  
9 ALSO THE WAY WE DO THESE AGREEMENTS. IT IS DIFFERENT THAN OUR  
10 COMPETITOR'S. IT SAYS A LOT ABOUT OUR BUSINESS INTERNALLY.  
11 THEY'RE HIGHLY CONFIDENTIAL.

12           AND THIS IS NOT A REGULAR CASE WHERE -- I  
13 UNDERSTAND -- I'VE RARELY SEEN A CASE WHERE A PROTECTIVE ORDER  
14 CAN'T BE ISSUED THAT WORKS. I THINK THE ONE THAT'S IN PLACE  
15 NOW IS -- DOES HAVE A LOT OF LOOPHOLES AS WE POINTED OUT. BUT  
16 THIS CASE HAS LOTS OF LAWYERS, LIKE OVER A HUNDRED LAWYERS.  
17 IT'S A VERY INCESTUOUS BUSINESS. THEY ALL WORK FOR, YOU KNOW,  
18 THE SAME COMPANIES AND THE SAME PLAINTIFFS SUING THE SAME  
19 COMPANIES, AND THEY HIRE EXPERTS, AND THIS STUFF WE FEEL WOULD  
20 NOT BE PROTECTED.

21           NOW, HAVING, LIKE I PROPOSE, THAT TYPE OF EXCERPT IS  
22 SOMETHING THAT WE COULD LIVE WITH, AND I'M NOT SAYING THAT  
23 THERE'S NOT OTHER EXCERPTS THAT WE COULD LIVE WITH, TOO. I  
24 THINK THERE ARE, AND I WOULD BE PREPARED TO REVISIT THAT. BUT  
25 IF YOU SAW IN THE CORRESPONDENCE, THE COMEBACK WAS A LOT

1 BROADER. IT WAS SORT OF THE WHOLE SCOPE OF RIGHTS GRANTED.

2 NOW, IF WE ARE JUST TALKING ABOUT THE LITTLE SLIVER  
3 AND MAYBE THAT PLUS ANYTHING THAT MENTIONS NAME AND LIKENESS, I  
4 THINK THAT MIGHT -- THAT'S STARTING TO GET BACK INTO FAIR  
5 TERRITORY.

6 **THE COURT:** LET ME MOVE ON TO CATEGORY THREE.

7 **MR. SINGER:** MAY I JUST GET THE TENTATIVE?

8 **THE COURT:** YES.

9 **MR. SINGER:** YOU'RE READING FROM THE TENTATIVE NOW,  
10 YOUR HONOR?

11 **THE COURT:** YES. IT'S THE EXEMPLAR RELEASES.  
12 MS. MERIWETHER SUGGESTED THEY'RE REALLY ONLY SEEKING TEN  
13 DOCUMENTS, THE EXEMPLARS OF THE BIG TEN RELEASE DOCUMENTS, AND  
14 THAT THAT -- THAT, THEREFORE, IS NOT OVERLY BURDENSOME  
15 BECAUSE --

16 **MR. SINGER:** I DON'T REALLY THINK THIS WAS WRITTEN OR  
17 MEANT FOR US. LIKE I SAID, WE HAVE OUR TV AGREEMENTS. I THINK  
18 I MENTIONED THIS TO COUNSEL, I THINK. THERE'S MAYBE A TIME OR  
19 TWO WHERE SOME STUDENTS GAVE THEIR PERMISSION TO MAKE  
20 BOBBLEHEADS FOR SOME TV SHOW.

21 **THE COURT:** THIS IS PROBABLY A BETTER QUESTION FOR  
22 THE BIG TEN CONFERENCE.

23 **MR. SINGER:** IT IS DIRECTED TO US, SO YOUR HONOR IS  
24 CORRECT TO BRING IT UP.

25 WHAT HAPPENED IN OUR MEET AND CONFER IS -- IT COMES

1 BACK TO THIS QUESTION OF I UNDERSTAND, WHEN YOU SAID DOCUMENTS  
2 RELATING TO A RIGHTS TO SELL PRODUCTS THAT HAVE THEIR IMAGE,  
3 I'M THINKING T-SHIRTS OR PENNANTS OR ALL THE COLLEGE STUFF THAT  
4 YOU SEE THAT'S OUT THERE WITH COLLEGE ATHLETES, THAT'S A BIG  
5 MARKET, TOO. THAT'S WHAT I'M THINKING. WE'RE NOT IN THAT  
6 BUSINESS, BUT I THINK IT WOULD BE FAIR, YOU KNOW, FOR US TO  
7 LOOK FOR THAT AND MAKE SURE WE DON'T HAVE IT.

8 BUT IF THEY'RE DEFINING PRODUCTS TO INCLUDE LIVE  
9 BROADCAST, THE CLIPS, YOU ARE SORT OF BACK TO THE TV  
10 AGREEMENTS, BUT, ANYWAYS, WE CAN MOVE ON.

11 THE SAME WOULD BE TRUE WITH CATEGORY FOUR. AGAIN, IF  
12 THERE WERE SPECIFIC POLICIES DEALING WITH THE EXPLOITATION OF  
13 RIGHTS OF PUBLICITY OF STUDENTS ATHLETES, AS THAT TERM HAS  
14 ALWAYS BEEN UNDERSTOOD IN CALIFORNIA AND UNDER FEDERAL LAW, I  
15 THINK THAT WOULD BE A MUCH MORE FAIR GAME TYPE OF REQUEST.

16 IF THEIR DEFINITION OF PRODUCT IS OUR TV BROADCAST  
17 OR, YOU KNOW, SLICES AND DICES OF THAT, OR REBROADCASTS, THEN,  
18 AGAIN, YOU'RE BACK TO SOMETHING THAT I THINK IS FAR AFIELD FROM  
19 WHAT IS RELEVANT AND AT THE CORE OF THE CASE.

20 **THE COURT:** ALL RIGHT. I'M GOING TO JUMP AHEAD A  
21 LITTLE BIT, BUT, PLEASE, IF THERE ARE PARTICULAR ISSUES YOU  
22 WANT TO ADDRESS, PLEASE DO.

23 THE CATEGORY SIX DOCUMENTS REFERENCING OR REFERRING  
24 TO THE LITIGATION, WHAT'S YOUR -- DO YOU HAVE A PARTICULAR VIEW  
25 ON THAT?



1           **MR. SINGER:** YOU KNOW, I WAS LOOKING FORWARD TO THAT  
2 PART OF YOUR DISCUSSION WITH OPPOSING COUNSEL, BECAUSE I'M  
3 STILL SCRATCHING MY HEAD. I MEAN, THEY'RE BASICALLY -- THAT'S  
4 NOT -- I HATE TO USE THE WORD "FISHING EXPEDITION" BECAUSE IT'S  
5 QUITE OVERUSED.

6           BUT THEY'RE BASICALLY SAYING, IF THERE'S A DOCUMENT  
7 OUT THERE -- AND, REMEMBER, MY CLIENTS ARE NOT ALLEGED TO BE  
8 PART OF ANY CONSPIRACY, AND WE'RE NOT DEFENDANTS, AND WE'RE  
9 DOING BUSINESS WITH A PARTY THAT'S NOT A PARTY.

10           SO -- BUT THEY'RE BASICALLY SAYING IF THERE'S ANY  
11 DOCUMENTS OUT THERE WHERE YOU'RE DISCUSSING SOMETHING THAT  
12 COULD SOMEHOW BE USED AGAINST THE DEFENDANT IN OUR CASE, THEN  
13 WE WANT IT. I THINK YOUR HONOR ADDRESSED THAT AS WELL AS IT  
14 COULD BE ADDRESSED. I MEAN, THESE HYPOTHETICALS I DON'T THINK  
15 ARE WHAT RULE 45 HAD IN MIND WHEN IT CAME TO THIRD PARTY  
16 DISCOVERY.

17           **THE COURT:** ALL RIGHT. FISHING EXPEDITIONS, IF YOU  
18 DO A SEARCH, THERE ARE A NUMBER OF CASES PERMITTING FISHING  
19 EXPEDITIONS. IT'S A QUESTION OF WHETHER YOU'RE USING A HOOK OR  
20 DYNAMITE TO DO THE FISHING. I THINK YOU DON'T NEED TO SAY  
21 ANYTHING MORE ON THIS TOPIC. I THINK THE SCOPE OF IT IS OVERLY  
22 BROAD.

23           ANYTHING ELSE IN RESPONDING TO MS. MERIWETHER?

24           **MR. SINGER:** WE JUMPED OVER CATEGORY FIVE. I WOULD  
25 SAY, AGAIN, THAT'S ONE WHERE, AGAIN -- I DON'T KNOW IF IT WAS

1 THE EXACT WORDING. WE ESSENTIALLY AGREED TO PRODUCE THAT IF WE  
2 HAD -- WE UNDERSTAND THE COMPONENT OF THIS LAWSUIT AGAINST EA.  
3 THAT MAKES SENSE.

4 SO, AGAIN, YOU KNOW, I THINK THAT THE BIG CONCERN FOR  
5 US HERE IS THIS ATTEMPT TO DIVE INTO OUR TELEVISION BROADCAST  
6 AGREEMENTS WHEN THEY'RE CLAIMING LIVE BROADCAST ISN'T PART OF  
7 IT, AND IT'S SORT OF JUST A VERY, VERY THIN READ TO GET INTO A  
8 DOCUMENT THAT IS JUST EXTREMELY CONFIDENTIAL.

9 AND I'M ASSUMING AT THIS POINT "ALL THE DOCUMENTS  
10 RELATED TO" HAS SORT OF BEEN THROWN OVERBOARD AS WELL. THAT,  
11 AS YOU CAN IMAGINE, GAVE US QUITE A SCARE, TOO.

12 **THE COURT:** RIGHT. I THINK THE "RELATING TO" EVEN  
13 THOUGH IT'S JUST TWO WORDS, LEADS TO A LOT OF POTENTIAL  
14 OVERBREADTH, AND IF WE WERE TO LIMIT IT TO THE PARTICULAR  
15 BROADCAST CONTRACTS AND IF WE'RE TO ELIMINATE THE LIVE  
16 BROADCAST COMPONENT OF IT, NOW WE ARE TALKING ABOUT A MUCH  
17 SMALLER SUBSET OF MATERIAL.

18 **MR. SINGER:** I SUPPOSE THE ONLY OTHER -- THE TWO  
19 THINGS I WOULD ADD, THE FIRST IS, YOU KNOW, WITH EVERYTHING  
20 THAT'S GONE ON IN THE CASE, I WOULD THINK THERE'S A WAY FOR  
21 THEM OR FOR THEIR EXPERTS TO TRY TO VALUE THIS SLIVER OF  
22 CLIPPED FOOTAGE RIGHTS, YOU KNOW, THAT'S A LOT LESS INTRUSIVE  
23 AND INVASIVE WHEN YOU'RE TALKING ABOUT NONPARTIES AND HIGHLY  
24 CONFIDENTIAL MATERIAL, WHETHER IT'S THROUGH INTERROGATORIES OF  
25 THE DEFENDANTS OR DEPOSITIONS OF THE DEFENDANTS WHO ARE

1 ULTIMATELY GOING TO GET THE JUDGMENT AGAINST THEM, SO IF THE  
2 DAMAGES ARE THERE -- EITHER THEY SUED THE WRONG PEOPLE, OR  
3 THEY'RE DOING THEIR DAMAGE DISCOVERY IN THE WRONG PLACE, AND I  
4 THINK THAT THERE'S GOT TO BE MORE EFFICIENT, SIMPLER, CHEAPER,  
5 LESS INVASIVE WAYS FOR THEM TO DO IT.

6 AND THEN MY LAST POINT IS THEY -- THE PLAINTIFFS SORT  
7 OF -- WELL, THEY SAID THAT WE WERE BEING ALARMIST ABOUT THE  
8 CHILLING EFFECT ON FREE SPEECH, AND I DO BEG TO DIFFER WITH  
9 THAT.

10 I MEAN, AS I REMINDED THE COURT, BACK IN JUNE, NOT  
11 LONG AGO, WE GOT CEASE AND DESIST LETTERS CALLING INTO QUESTION  
12 OUR RIGHT, FOX'S RIGHT, TO BROADCAST COLLEGE SPORTS WITHOUT  
13 ENTERING INTO DEALS WITH EACH AND EVERY ATHLETE THAT'S IN  
14 THERE. THAT IS -- THAT'S ABSOLUTELY NOT THE LAW IN CALIFORNIA  
15 OR UNDER FEDERAL LAW. AND NOW THEY'RE SORT OF SAYING, WELL,  
16 YOU KNOW, WE DIDN'T MEAN THAT, AND WE'RE NOT GOING AFTER YOU,  
17 YET THEY WANT TO LOOK AT ALL OF OUR STUFF.

18 THERE IS SORT OF A DAMOCLES HANGING OVER US, AND THEY  
19 ARE BY -- YOU KNOW, IF THIS RELEVANCE ARGUMENT IS ACCEPTED AND  
20 IF THEY'RE ENTITLED TO MONEY FROM OUR BROADCAST WHICH HAS BEEN  
21 REJECTED BY PRETTY MUCH EVERY COURT THAT'S LOOKED AT IT, THAT  
22 IS QUITE CHILLING IF YOU ARE A TELEVISION NETWORK, AND THAT  
23 DOES CAUSE SERIOUS FIRST AMENDMENT CONCERNS FOR US, SO...

24 **THE COURT:** THANK YOU.

25 **MR. SINGER:** THANK YOU.

1           **THE COURT:** ALL RIGHT, MR. ROSENMAN, THANK YOU FOR  
2 WAITING. WE'LL GET BACK TO THE PLAINTIFFS. LET ME GET  
3 MR. ROSENMAN -- I'M HAVING HIM ADDRESS ANYTHING THAT'S, OF  
4 COURSE, NOT ISOLATED TO THE BIG TEN CONFERENCE, BUT THE  
5 EXEMPLAR RELEASES, CATEGORY THREE, I THINK IS SOMETHING I'M  
6 PARTICULARLY INTERESTED IN.

7           **MR. ROSENMAN:** THANK YOU, YOUR HONOR. ANDREW  
8 ROSENMAN. ALTHOUGH I ECHO MUCH OF WHAT MR. SINGER SAID, IN THE  
9 INTEREST OF TIME, I WILL NOT REPEAT AS MUCH AS POSSIBLE ALL THE  
10 ARGUMENTS HE MADE.

11           LET ME BEGIN, I THINK IT MAY BE SIMPLEST, GIVEN THAT  
12 MS. MERIWETHER WENT THROUGH THE CATEGORIES IN THE SAME ORDER,  
13 IF YOUR HONOR PERMITS, MAYBE I'LL DO THE SAME HERE.

14           **THE COURT:** SUPER.

15           **MR. ROSENMAN:** LET ME ADD ONE POINT MR. SINGER DIDN'T  
16 ADDRESS WITH RESPECT TO THE RELEVANCE OF THESE BROADCAST  
17 AGREEMENTS.

18           WE HIGHLIGHTED IN THE BRIEF, BUT I CAN'T OVERSTATE IT  
19 ENOUGH, IS THE FACT THAT THESE AGREEMENTS WERE BETWEEN  
20 NONPARTIES WITH OTHER NONPARTIES FROM WHICH THE NCAA DOESN'T  
21 PARTICIPATE. IT DOESN'T DERIVE ANY REVENUES. IT DOESN'T HAVE  
22 ANY KNOWLEDGE OF THE AGREEMENTS. AND THE NCAA COMPETES WITH  
23 US, AND WE COMPETE WITH OTHER CONFERENCES. AND, THEREFORE, FOR  
24 ALL OF THOSE REASONS, I DON'T SEE HOW ANY OF THESE AGREEMENTS  
25 POSSIBLY HAVE ANY RELEVANCE TO THE ISSUE OF DAMAGES OR TO THE

1 ISSUE OF ANY ANTITRUST CONSPIRACY.

2 IN FACT, IF ANYTHING, THESE AGREEMENTS -- THE  
3 EXISTENCE OF THESE AGREEMENTS DISPROVE ANY CONSPIRACY BECAUSE  
4 WE'RE NEGOTIATING THEM ON OUR OWN WITH OTHER NONPARTIES, AND  
5 THAT FACT, WHILE IT DOESN'T APPLY TO THE ARGUMENTS MR. SINGER  
6 MADE ON BEHALF OF THE NETWORKS, IT CERTAINLY APPLIES TO THE  
7 CONFERENCES VIS-A-VIS OTHER CONFERENCES AND THE DEFENDANTS IN  
8 THIS CASE.

9 **THE COURT:** IF IT DISPROVES A CONSPIRACY, IT MIGHT BE  
10 THEN IT'S RELEVANT TO A DEFENSE THE NCAA IS MAKING, BUT YOU'RE  
11 NOT SAYING IT NECESSARILY IS NEEDED TO DISPROVE IT.

12 **MR. ROSENMAN:** THAT'S AN ARGUMENT FOR THE NCAA TO  
13 MAKE. BUT FOR OUR PURPOSES IT'S A CONFIDENTIALITY AGREEMENT  
14 BETWEEN NONPARTIES CONSISTENT WITH THE MOON CASE, WHICH IS ONE  
15 OF THE CASES WE CITED IN OUR BRIEFS. THAT TYPE OF INFORMATION  
16 IS IRRELEVANT. AND IT'S CONFIDENTIAL AND PROPRIETARY FOR ALL  
17 THE REASONS WE'VE ARTICULATED.

18 THE SAME WOULD APPLY WITH RESPECT TO LICENSING  
19 AGREEMENTS. SO BOTH -- I WOULD SAY THOSE AGREEMENTS APPLY AS  
20 TO CATEGORIES ONE AND TWO.

21 LET ME ADDRESS YOUR HONOR'S QUESTION ABOUT THE  
22 RELEASE FORMS. FIRST OF ALL, WITH RESPECT TO ALL THE  
23 CATEGORIES THAT ARE ADDRESSED IN THE TENTATIVE RULING, THE  
24 PLAINTIFF'S POSITION WAS EXCEPT FOR THE LAST ONE, THAT THEY  
25 WANT TO GO BACK TO JANUARY OF 2002. NOW, WE THINK THAT'S

1 OVERBROAD WITH RESPECT TO NONPARTIES GIVEN THE MANDATE AND  
2 DIRECTIVES OF RULE 45. BUT ALSO, THE -- IN PARTICULAR AS TO  
3 CERTAIN TYPES OF CATEGORIES LIKE THIS ONE ON THE CONSENT FORMS,  
4 THEY'RE ASKING FOR MORE THAN JUST THE CONSENT FORM. THEY'RE  
5 ASKING FOR ANY DISCUSSIONS RELATED TO CHANGES IN THE FORM.

6 IT SEEMS TO ME THEY CAN SEE WHAT CHANGES WERE MADE  
7 SIMPLY BY COMPARING ONE FORM IN ONE YEAR TO ONE IN THE NEXT.  
8 THEY ALREADY HAVE SOME OF THESE FORMS, FOR EXAMPLE, THE ONE  
9 FROM THE UNIVERSITY OF MICHIGAN THAT THEY ATTACHED IN THEIR  
10 BRIEFS.

11 SO, AS A MATTER OF COURSE, WOULD IT BE A BURDEN TO  
12 PRODUCE TEN DOCUMENTS? I DON'T THINK I CAN HONESTLY SAY TO  
13 YOUR HONOR THAT THAT BY ITSELF IS BURDENSOME. BUT WHETHER  
14 WE'RE REQUIRED TO SEARCH THROUGH POTENTIAL UNKNOWN NUMBER OF  
15 CUSTODIAN'S E-MAILS GOING BACK FOR A TEN-YEAR PERIOD SEEMS TO  
16 ME TO BE UNREASONABLE. WHETHER OR NOT THE CONSENT FORMS ARE  
17 RELEVANT, OF COURSE, IS ANOTHER QUESTION, AND WE'VE ADDRESSED  
18 THAT IN THE BRIEF AS WELL.

19 OKAY. LET ME MOVE ON TO CATEGORY FOUR THEN, WHICH  
20 DEALS WITH THE DOCUMENTS RELATING TO POLICIES. I THINK THIS  
21 CATEGORY IS AN EXAMPLE, YOUR HONOR, OF THE DIFFICULTY WE HAVE  
22 IN TRYING TO DEAL WITH THE SUBPOENA.

23 THEY ASKED US FOR ANY DOCUMENTS RELATED TO THE  
24 POLICIES. WE INITIALLY TOLD THEM WE DON'T HAVE ANY DOCUMENTS.  
25 THEIR MOTION TO COMPEL ACCUSES US OF NOT DISCLOSING THE FACT

1 THAT COMMISSIONER DELANEY MADE A COMMENT ON AN NCAA PROPOSAL.  
2 AND THAT ISN'T A POLICY, YOUR HONOR. IT'S AN OPINION OF THE  
3 COMMISSIONER OF THE CONFERENCE ON A PROPOSAL THAT'S NOT IN  
4 PLACE.

5 AND SO, YOU KNOW, THEY'RE ATTEMPTING TO MAKE US LOOK  
6 BAD WHEN WE HAVE TO ENGAGE IN THIS SORT OF GUESSWORK, IS IT A  
7 POLICY, IS IT NOT A POLICY, DOES IT RELATE TO A POLICY? IT'S  
8 ALL UNCLEAR. AND THAT'S THE CHALLENGE THAT WE FACE.

9 WE DID -- NOBODY'S MENTIONED IT YET, YOUR HONOR, BUT  
10 WE DID, IN ACCORDANCE WITH YOUR INSTRUCTIONS, THIS AFTERNOON  
11 MEET FOR AN HOUR PRIOR TO THE HEARING BECAUSE MR. SINGER WAS  
12 TRAVELING; I CAME IN LAST NIGHT. WE ALL MET AND STARTED TO GO  
13 THROUGH THE CATEGORIES. WE DIDN'T GET THROUGH ALL OF THEM.

14 **THE COURT:** I'M PLEASED EVERYONE IS DOING THAT, AND I  
15 APPRECIATE THAT.

16 **MR. ROSENMAN:** SO DOCUMENTS RELATING TO POLICIES,  
17 I -- AGAIN, I THINK YOUR HONOR HAS ADDRESSED THE CONCERN THAT  
18 THE COURT HAS ABOUT "DOCUMENTS RELATING TO."

19 WITH RESPECT TO CATEGORY FIVE, DOCUMENTS RELATING TO  
20 EA SPORTS, WE UNDERSTAND YOUR HONOR'S DECISION THERE. THE  
21 CONCERN, AGAIN, I HAVE IS THERE ARE -- ANY DOCUMENT THAT  
22 MENTIONS AN EA SPORTS GAME COULD INVOLVE ANYBODY AT THE  
23 CONFERENCE OVER A TEN-YEAR PERIOD WITH RESPECT TO ANY TOPIC  
24 REGARDLESS OF THE CONTENT. AND THE CHALLENGE, AGAIN, WE HAVE  
25 IS SUPPOSE YOU HAVE TWO EMPLOYEES OF THE CONFERENCE SAYING,

1 HEY, I JUST GOT THIS GREAT EA SPORTS GAME FOR MY KID, HE REALLY  
2 ENJOYS IT. THAT HAS NO RELEVANCE, OF COURSE, TO THE CLAIMS.  
3 IF WE'RE REQUIRED TO ENGAGE IN THAT SORT OF A SEARCH, I THINK  
4 THAT GOES WELL BEYOND THE BOUNDS OF RULE 45 AND PARTICULARLY  
5 RULE 45(C)(1).

6 **THE COURT:** LET ME ASK ABOUT THE TIME FRAME. THE  
7 REASON I ASK THIS IS SOMETIMES IN THE DOCUMENT RETENTIONS THERE  
8 ARE CERTAIN TIME PERIODS WHERE IT BECOMES MORE BURDENSOME TO GO  
9 BACK TO LOOK AT THE PRESERVED TAPES AND IT WOULD BE LESS  
10 BURDENSOME AFTERWARDS TO A CERTAIN POINT WHERE YOU HAVE THE  
11 MATERIALS MORE EASILY SEARCHABLE. DO YOU HAVE A SUGGESTION FOR  
12 AN ALTERNATE DATE AS TO 2002 THAT WOULD SIGNIFICANTLY CHANGE  
13 THE BURDEN TO THE BIG TEN IN RESPONDING TO THESE REQUESTS?

14 **MR. ROSENMAN:** I THINK SOME OF THEM MAY DEPEND ON  
15 REQUESTS. THE CONSENT FORM IS A DESIGNATED DOCUMENT. THAT'S  
16 SOMETHING THAT COMPLIES WITH RULE 45(A) IN THAT WE KNOW WHAT IT  
17 IS. WHEN YOU GET TO THESE ISSUES OF WHAT RELATES TO AND WHAT  
18 DOESN'T, IT BECOMES MUCH MORE CHALLENGING.

19 WITH RESPECT TO THE 11TH CATEGORY, THEY AGREED TO  
20 LIMIT IT TO THE LAST TWO YEARS. IT SEEMS TO ME THAT'S FAR MORE  
21 REASONABLE THAN GOING BACK TEN YEARS, PARTICULARLY FOR  
22 NON-PARTIES. EVEN THEN, YOU KNOW, TWO YEARS AS TO DOCUMENTS  
23 RELATING TO EA SPORTS, I DON'T KNOW HOW WE SEARCH FOR THAT  
24 WITHOUT LOOKING AT EVERY SINGLE EMPLOYEE'S FILES.

25 MS. MERIWETHER MENTIONED THE IDEA OF SEARCH TERMS AND



1 CUSTODIANS. THAT NEVER CAME UP IN THE MEET AND CONFER  
2 DISCUSSIONS. AND WITHOUT ASSIGNING ANY BLAME, I DON'T THINK  
3 IT'S OUR BURDEN AS A NONPARTY TO COME UP WITH THOSE PROPOSALS  
4 BUT, RATHER, THE REQUESTING PARTY IN ACCORDANCE WITH WHAT  
5 RULE 45 ASKS FOR.

6 YOU KNOW, ONE APPROACH MAY BE FOR THEM TO IDENTIFY  
7 THE DOCUMENTS THAT THEY HAVE FROM EA SPORTS AND THEN TELL US  
8 WHAT SPECIFICALLY THEY'RE LOOKING FOR AS TO A PARTICULAR TOPIC  
9 ABOUT THOSE DOCUMENTS, PERHAPS. YOU KNOW, I THINK THERE ARE A  
10 LOT OF WAYS TO APPROACH THAT TOPIC. BUT JUST THIS SORT OF  
11 GENERAL REQUEST, I DON'T KNOW HOW WE ADDRESS IT.

12 CATEGORY SIX IS VERY PROBLEMATIC FROM OUR  
13 PERSPECTIVE. WE'VE IDENTIFIED A LOT OF THOSE REASONS IN THE  
14 BRIEF, AND I WON'T REHASH THEM HERE. BUT I THINK IN ADDITION  
15 TO YOUR HONOR'S CONCLUSION THEY ARE OVERLY BROAD AND  
16 BURDENSOME, WE HAVE SIGNIFICANT PRIVILEGE QUESTIONS THERE.

17 AND, YOU KNOW, IT SEEMS TO ME THAT YOUR HONOR HIT ON  
18 THE RIGHT POINTS IN ASKING MS. MERIWETHER, HOW IS THIS  
19 PROBATIVE OF ANYTHING RELATED TO THE UNDERLYING ANTITRUST  
20 CLAIMS? I DON'T SEE HOW IT IS.

21 ALL THEY'RE ASKING FOR IS POST-LAWSUIT  
22 COMMUNICATIONS. AND IN MY OCTOBER 25TH, 2011 LETTER BACK TO  
23 THEM, ON THIS PARTICULAR ISSUE I POINTED OUT THAT THE ONLY  
24 DOCUMENTS THAT WE HAVE ARE COMMUNICATIONS BETWEEN THE  
25 CONFERENCE AND ITS COUNSEL, OUR LAW FIRM.

1           AND SO AS A RESULT OF THAT, ANYTHING ELSE BEYOND  
2 THAT, IT SEEMS TO ME, IS NOT ONLY IRRELEVANT, BUT IT'S ALSO  
3 PRIVILEGED. I MEAN, THAT'S MY WORK PRODUCT ABOUT WHAT I THINK  
4 OF THE CASE, AND DISCUSSIONS THAT I MAY HAVE WITH ESPN COUNSEL  
5 OR NCAA COUNSEL OR ANY OTHER COUNSEL CLEARLY FALL WITHIN THAT  
6 WORK PRODUCT. NOWHERE IN THEIR BRIEFS OR EVEN WHEN  
7 MS. MERIWETHER GOT UP HERE DID SHE SAY WHY THEY HAVE A NEED,  
8 MUCH LESS A SUBSTANTIAL NEED, THAT OVERCOMES THE PROTECTIONS  
9 THOSE PRIVILEGES PROVIDE.

10           **THE COURT:** AND I THINK HER ARGUMENT WAS NOT -- I  
11 THINK HER ARGUMENT WAS SOME COMMUNICATIONS WITH OTHER  
12 NONPARTIES EVEN AT THE COUNSEL STAGE MAY NOT ACTUALLY BE  
13 PRIVILEGED, THERE COULD BE A WAIVER. BUT I HEAR YOUR POSITION.

14           **MR. ROSENMAN:** RIGHT. AND THEY DIDN'T LIMIT IT, YOUR  
15 HONOR, TO COMMUNICATIONS FROM A PRESIDENT OF A UNIVERSITY TO  
16 SOMEBODY ELSE THAT MAY BE IN THE CONFERENCE'S POSSESSION.  
17 MAYBE UNDER THAT CIRCUMSTANCE, IT'S MORE LIMITED, AND THEY  
18 MIGHT HAVE A LEGITIMATE NEED FOR IT, BUT NOT AS TO THE  
19 CONFERENCE'S OUTSIDE COUNSEL.

20           THE LAST TWO REQUESTS -- THE FIRST ONE IS REQUEST  
21 NUMBER TEN, AND YOUR HONOR HAD ASKED MS. MERIWETHER WHERE THAT  
22 REQUEST WAS ADDRESSED. SHE IDENTIFIED IT IN HER DECLARATION.  
23 FOR MY PURPOSES, IT'S ATTACHED AS EXHIBIT 8 TO OUR OPPOSITION  
24 BRIEF. AND THIS FOLLOWED ON TWO MEET AND CONFER CALLS. I'M  
25 SORRY. AFTER THE FIRST MEET AND CONFER CALL IS WHEN THEY SENT

1 THIS.

2 IN REQUEST TEN, THEY IDENTIFY THESE FOUR PARTICULAR  
3 TRADE ASSOCIATION MEETINGS, AND WE RESPONDED TO THAT IN OUR  
4 LETTER BY SAYING WE DON'T HAVE ANY DOCUMENTS.

5 NOW, THEY COME IN THEIR MOTION AND THEY ACCUSE US OF  
6 NOT HAVING PRODUCTED DELAYNEY'S MEMO WITH THE COLLEGIATE  
7 COMMISSIONER'S ASSOCIATION, CCA. IT'S NOT EVEN ONE OF THESE  
8 FOUR MEETINGS. SO WHY IS THAT DOCUMENT RESPONSIVE TO THIS  
9 REQUEST? IT'S NOT.

10 WE'VE TOLD THEM WE DON'T HAVE ANY OTHER RESPONSIVE  
11 DOCUMENTS TO NUMBER TEN. TO THE EXTENT THEY WANT TO CHANGE THE  
12 REQUEST AGAIN FOR PURPOSES OF TODAY, YOU KNOW, THAT CREATES  
13 MORE PROBLEMS FROM OUR PERSPECTIVE, AS TO KNOW WHAT IT IS WE  
14 WERE SUPPOSED TO BE TRYING TO ADDRESS IN RESPONSE.

15 AND THEN THE FINAL REQUEST IS -- RELATES TO THE  
16 AMATEUR STATUS OF STUDENT ATHLETES. MS. MERIWETHER IS RIGHT.  
17 THEY MODIFIED THAT SOMEWHAT IN REQUEST NUMBER 11. WE'VE  
18 HIGHLIGHTED IN OUR BRIEF, AND I THINK YOUR HONOR HAS PICKED UP  
19 ON OUR CONCERNS ABOUT SOME OF THESE SEARCH TERMS.  
20 COMMERCIALISM DEBATES, BUT THAT'S NOT THE ONLY ONE.  
21 COMPETITIVE BALANCE ISSUES THAT YOUR HONOR IDENTIFIED.  
22 INCREASED PLAYER BENEFITS. IT IS SORT OF AN ENDLESS SCOPE. SO  
23 THAT, TOO, IS ANOTHER CONCERN FROM OUR PERSPECTIVE AS TO MANY  
24 OF THESE REQUESTS.

25 SO UNLESS YOUR HONOR HAS FURTHER QUESTIONS...

1           **THE COURT:** I DO NOT, AND I APPRECIATE YOU GOING  
2 THOROUGHLY THROUGH IT ALL.

3           **MR. ROSENMAN:** THANK YOU.

4           **THE COURT:** ALL RIGHT. MS. MERIWETHER, LET ME GIVE  
5 YOU A CHANCE TO RESPOND.

6           **MS. MERIWETHER:** THANK YOU, YOUR HONOR. I WILL BE  
7 BRIEF.

8           **THE COURT:** SUPER.

9           **MS. MERIWETHER:** LET ME RESPOND FIRST TO MR. SINGER'S  
10 ARGUMENT ON BEHALF OF FOX AND THE BIG TEN NETWORK.

11           THERE TRULY IS A DISCONNECT BETWEEN WHAT MR. SINGER  
12 THINKS WE ASKED FOR AND WHAT WE'VE ASKED FOR AND WHAT  
13 MR. SINGER THINKS WE'RE CLAIMING ENTITLEMENT AND WHAT WE'RE  
14 CLAIMING AN ENTITLEMENT TO.

15           WE HAVEN'T ASKED FOR DOCUMENTS THAT WOULD SHOW FOX'S  
16 REVENUES FROM SPORTS BROADCASTS. WE HAVEN'T ASKED FOR A PIECE  
17 OF FOX'S REVENUES FROM SPORTS BROADCASTS. WE ASKED FOR  
18 DOCUMENTS THAT SHOW HOW MUCH FOX PAID TO NCAA OR ITS MEMBER  
19 SCHOOLS AND CONFERENCES, THE ALLEGED CO-CONSPIRATORS IN THIS  
20 CASE, FOR THE TRANSFER OF THE BUNDLE OF RIGHTS THAT WE CLAIM  
21 THEY HAVE CONSPIRED TO DEPRIVE OUR PLAINTIFFS OF. SO, WE WANT  
22 TO KNOW WHAT FOX PAID FOR THE BUNDLE OF RIGHTS.

23           NOW, MR. SINGER SOMEWHAT DISMISSIVELY SAYS THE BIG  
24 MONEY'S FOR THE LIVE BROADCAST AND THIS IS A TINY LITTLE  
25 SLIVER, IT IS NOTHING, IT'S NOTHING. THE COMPLAINT GOES

1 THROUGH MANY, MANY EXAMPLES OF MONETIZATION OF GAME FOOTAGE OF  
2 THINGS LIKE THE BIG TEN NETWORK. THE BIG TEN NETWORK PLAYS BIG  
3 TEN GAMES, ARCHIVAL FOOTAGE 24/7. IT DOESN'T JUST PLAY THIS  
4 WEEK'S GAME.

5 AND THOSE RIGHTS GOT TO THE BIG TEN NETWORK SOMEHOW.  
6 THEY GOT THERE FROM THE BIG TEN, I THINK. I MEAN, I'M JUST  
7 GUESSING THAT. OKAY? THAT'S WHAT WE WANT.

8 WE WANT DOCUMENTS THAT SHOW THE TRANSFER, THE  
9 LICENSING OF THOSE RIGHTS TO ARCHIVAL GAME FOOTAGE WHAT  
10 MR. SINGER SAYS IS A TINY LITTLE PIECE. IT'S BIG TO US. WE  
11 WOULD LIKE DOCUMENTS THAT SHOW THE LICENSING AND THE AMOUNTS  
12 PAID FOR THOSE RIGHTS. THAT'S WHAT WE WANT.

13 I'LL REST ON THE BRIEFS WITH RESPECT TO THE BREADTH  
14 OF THE BROADCASTING PRIVILEGE. I WOULD REITERATE ONLY THAT  
15 WE'RE NOT CLAIMING THAT FOX CAN'T BROADCAST TELEVISION EVENTS,  
16 AND WE'RE NOT CLAIMING THAT THEY HAVE TO PAY THE PLAINTIFFS  
17 WHEN THEY DO A LIVE BROADCAST. WE'RE NOT CLAIMING ANY OF THOSE  
18 THINGS. WE ARE ASKING FOR THE LICENSING AGREEMENTS BY WHICH  
19 FOX OR THE BIG TEN NETWORKS TRANSFER RIGHTS AND OLD FOOTAGE OF  
20 IMAGE AND LIKENESS WHERE FORMER STUDENT ATHLETES' NAMES AND  
21 LIKENESSES ARE BEING UTILIZED.

22 WITH RESPECT TO THE CONFIDENTIALITY PROVISION, THE  
23 PROBLEM WITH THE REDACTIONS IS THAT THEN YOU GET INTO A BIG  
24 ARGUMENT OVER WHAT TO REDACT, AND, APPARENTLY, THERE'S ALL  
25 SORTS OF FIGHTS NOW BETWEEN THE NCAA AND PLAINTIFFS WITH

1 RESPECT TO WHICH PROVISIONS THEY'VE REDACTED AND WHETHER THEY  
2 SHOULD HAVE REDACTED MORE OR LESS.

3           **THE COURT:** LET ME -- WHAT'S BEEN YOUR EXPERIENCE  
4 WITH OTHER CONFERENCES AND INSTITUTIONS? I THINK THE PARTIES  
5 HAVE REPRESENTED THAT SOME OTHERS HAVE VOLUNTARILY PRODUCED AT  
6 LEAST PARTIAL MATERIALS?

7           **MS. MERIWETHER:** YES.

8           **THE COURT:** WHAT HAVE YOU GARNERED FROM THOSE?

9           **MS. MERIWETHER:** THERE'S TWO POINTS I WANT TO MAKE  
10 ABOUT THIS.

11           ONE IS THAT WE'VE GOT A WHOLE LOT OF UNREDACTED  
12 CONTRACTS. THAT'S BECAUSE WE DID OPEN RECORDS REQUESTS TO  
13 PUBLIC UNIVERSITIES WHO PRODUCED THEIR TELEVISION CONTRACTS  
14 OVER THE OBJECTIONS OF THE CONFERENCE ON CONFIDENTIALITY  
15 GROUNDS WHICH WERE REJECTED BY THE ATTORNEYS GENERAL. THAT  
16 HAPPENED -- IT'S ATTACHED TO OUR BRIEF. THAT HAPPENED IN  
17 TEXAS, FOR EXAMPLE.

18           SO, WE HAVE FOX'S -- WE ALSO DID AN OPEN RECORDS  
19 REQUEST TO THE UNIVERSITY OF FLORIDA. WE HAVE FOX'S UNIVERSITY  
20 OF FLORIDA. NOTHING IS REDACTED. I THINK NOTHING IS REDACTED.  
21 IF ANYTHING IS REDACTED, IT'S JUST THE AMOUNTS PAID PER YEAR  
22 FOR THE LIVE BROADCAST RIGHTS. THOSE FIGURES ARE REDACTED.

23           ALL THE RIGHTS LANGUAGE ARE IN THERE. THE COPYRIGHT  
24 LANGUAGE IS IN THERE. THE TRANSFER OF THE COPYRIGHT, WHAT SORT  
25 OF USES THE LICENSEE IS ALLOWED, WHAT KIND OF LICENSE RIGHTS

1 THEY HAVE. SPECIFIC PROVISIONS REGARDING TRANSFER OF IMAGE AND  
2 LIKENESS RIGHTS ARE IN THERE.

3 AND, FOR INSTANCE, WE GOT -- HAD A PRODUCTION FROM A  
4 MAJOR NETWORK OF A NUMBER OF CONTRACTS AFTER A LONG MEET AND  
5 CONFER WHERE WE NARROWED DOWN THEIR LIST OF THIS TO A LIST OF  
6 THIS, AND THEY PRODUCED THEIR CONTRACTS WITH THE FINANCIAL  
7 TERMS REDACTED. THAT'S ALL THEY'VE REDACTED.

8 SO THAT KIND OF WAY TO WORK THINGS OUT EXISTS THERE.

9 WITH RESPECT TO THE CONFIDENTIALITY ISSUES, THE  
10 CONFIDENTIALITY PROVISIONS CAN PROTECT ANYTHING PRODUCED SO  
11 THAT ONLY THE PARTIES OUTSIDE COUNSEL CAN SEE IT. OKAY? SO,  
12 THE NCAA OUTSIDE COUNSEL COULD SEE SOMETHING THAT FOX OR THE  
13 BIG TEN PRODUCED, BUT THE SEC IS NOT GOING TO SEE IT, AND ALL  
14 THOSE OTHER COMPETITORS OUT THERE IN THIS BUSINESS AREN'T GOING  
15 TO SEE IT, NOR ARE ANY OF THE NETWORKS' COUNSEL GOING TO SEE  
16 IT; THEY'RE NOT PARTIES.

17 THE ONLY PEOPLE WHO WOULD SEE THE DOCUMENTS ARE  
18 NCAA'S COUNSEL AND US. AND IF THERE WOULD BE SOME COMFORT IN  
19 LIMITING THE PLAINTIFFS' COUNSEL TO A SPECIFIED GROUP, WE COULD  
20 DO THAT. WE COULD WORK ON THAT.

21 BUT THE CONFIDENTIALITY -- CONFIDENTIALITY CONCERNS  
22 SHOULD NOT BE A BASIS ON WHICH NOT TO PRODUCE THESE DOCUMENTS.  
23 WE CAN WORK THOSE THINGS OUT.

24 FINALLY, ONE THING THAT I REALLY THINK WE NEED TO  
25 ADDRESS IS THE FACT THAT WITH RESPECT TO THE FOOTBALL

1 TELEVISION CONTRACTS, THE NCAA DOESN'T HAVE THEM. OKAY?  
2 NCAA'S FOOTBALL IS A CONFERENCE-ORIENTED THING. CONFERENCES IN  
3 SOME SCHOOLS HAVE THEIR OWN, YOU KNOW, CONTRACTS. WE CAN'T GET  
4 THEM FROM THE NCAA. WE CAN'T DO INTERROGATORY REQUESTS TO THE  
5 NCAA AND ASK FOR THESE SORTS OF THINGS.

6 THE FOOTBALL CONTRACTS BETWEEN THE BIG TEN AND THE  
7 BIG TEN NETWORK OR FOX, OR WHOEVER THEY'RE BETWEEN, THE BIG TEN  
8 AND ESPN, THEY HAVE TO BE GOTTEN FROM THE BIG TEN WHO, AS YOUR  
9 HONOR IS AWARE FROM READING JUDGE WILKEN'S VARIOUS ORDERS, IS  
10 NOT A NAMED DEFENDANT, BUT IS AN ACTUAL NAMED CO-CONSPIRATOR.  
11 THE NCAA POLICIES AND ITS MEMBERS ARE THE NAMED  
12 CO-CONSPIRATORS, AND THEIR CONDUCT IN CARRYING OUT THE  
13 CONSPIRACY IN EXECUTING THESE AGREEMENTS IS RELEVANT TO THE  
14 CASE.

15 AND THIS IDEA THAT THE BIG TEN DOESN'T WANT TO  
16 PRODUCE DOCUMENTS BECAUSE IT'S A NONPARTY, BECAUSE IT'S WITH  
17 NONPARTIES REALLY CARRIES NO, NO WEIGHT IN A SITUATION WHERE  
18 WE'RE TALKING ABOUT GETTING DOCUMENTS FROM AN ALLEGED  
19 CO-CONSPIRATOR THAT ACTUALLY ARE ALLEGED TO BE THE MECHANISMS  
20 BY WHICH THE CONSPIRACY IS CARRIED OUT.

21 FINALLY, AS I SAID, WE HAVE HAD A LOT OF PRODUCTIVE  
22 CONVERSATIONS WITH OTHER CONFERENCES. WE'VE WORKED OUT SEARCH  
23 TERMS AND CUSTODIANS. WE'VE FIGURED OUT WAYS TO MAKE THE  
24 PRODUCTION -- THEY'VE FIGURED OUT WHAT THESE THINGS MEAN.  
25 THEY'VE TOLD US WHAT THEY HAVE. THEY'VE PRODUCED WHAT WE'VE



1 HAD. AND IT'S GONE ON SMOOTHLY. THAT'S WHAT WE'RE ASKING FOR  
2 HERE.

3 WE CAN WORK OUT, IF THERE CONTINUES TO BE  
4 MISUNDERSTANDINGS ABOUT WHAT IT IS WE NEED AND WHETHER "RELATED  
5 TO" MEANS WE HAVE TO SEARCH EVERY E-MAIL IN THE ENTIRE COMPANY  
6 FOR ANY POSSIBILITY RELATED-TO ISSUE, WE CAN CONFIRM THAT'S NOT  
7 WHAT WE'RE TRYING TO DO. AND WE CAN WORK OUT WAYS TO MAKE THIS  
8 PRODUCTION GO SMOOTHLY.

9 I'VE SEEN IT GO SMOOTHLY, AND I THINK THERE'S A WAY  
10 TO DO IT, AND THAT WOULD REQUIRE THE COOPERATION OF EVERYONE TO  
11 WORK IT OUT. AND SO FAR WE HAVEN'T GOT ANYWHERE ON THESE  
12 ISSUES BECAUSE, ESPECIALLY WITH RESPECT TO THE BIG TEN, THE  
13 POSITION WAS FIRMLY TAKEN THAT EVEN THE RELEASE FORM WAS  
14 IRRELEVANT.

15 SO, YOUR HONOR, THAT'S ALL I THINK I HAVE TO SAY  
16 UNLESS MY CO-COUNSEL HAS ANYTHING ELSE.

17 **MR. KING:** JUST ONE THING, YOUR HONOR. JON KING.

18 **THE COURT:** THERE'S NEVER JUST ONE THING, BUT IF YOU  
19 CAN DO JUST ONE THING, YOU ARE THE FIRST TO DO IT.

20 **MR. KING:** I WANT TO TAKE YOUR POINTS TO HEART ON  
21 LIMITING SOME OF THE THINGS, FOR EXAMPLE, ABOUT AMATEURISM.  
22 WHAT WE CAN DO IS TRANSMIT TO THEM -- THERE REALLY ARE ABOUT  
23 FOUR OR FIVE LEGISLATIVE PROPOSALS THAT HAVE STIRRED UP ALL THE  
24 DEBATE IN THE LAST COUPLE OF YEARS. I THINK THAT'S A SEARCH  
25 TERM THEY CAN RUN, FOR EXAMPLE, 2010-26. WE CAN LIVE WITH THE

1 RESULTS SO THEY DON'T HAVE TO DO A FREE FORM SEARCH FOR  
2 COLLEGIATE MODEL. IT IS A PRETTY DISCRETE GROUP THAT IS  
3 LIMITED BY TIME AND EVEN BY SPECIFIC TERMS. WE WOULD BE HAPPY  
4 TO DO THAT.

5 ON THE ISSUE OF COPYRIGHT POLICIES AND SUCH, I THINK  
6 IT'S IMPORTANT TO UNDERSTAND, AS MR. SINGER SAID, THESE ARE  
7 BILLION DOLLAR ENTERPRISES THAT -- FOR EXAMPLE, NCAA HAS  
8 SOMETHING CALLED THE BROADCASTING MANUAL. IT'S A HANDBOOK. IT  
9 LAYS OUT THEIR COPYRIGHT POLICIES. THAT'S THE TYPE OF DISCRETE  
10 STUFF WE CAN WORK WITH THEM TO ASK FOR. WE DON'T NEED THE BIG  
11 E-MAIL SEARCH. WE WILL MAKE IT EASY ON THEM IF THEY WILL  
12 ENGAGE.

13 **THE COURT:** THANK YOU VERY MUCH.

14 MR. CLOBES ON THE PHONE, I PROMISED TODAY AT THE  
15 BEGINNING I WOULD CHECK IN WITH YOU WHEN WE GOT TOWARDS THE  
16 END, I WOULD MAKE SURE IF THERE WAS SOMETHING ELSE YOU WANTED  
17 TO ADD, SO GO AHEAD AND --

18 **MR. CLOBES:** NOTHING FURTHER, YOUR HONOR. THANKS FOR  
19 CIRCLING BACK TO ME.

20 **THE COURT:** VERY GOOD. SUBMITTED? ANYTHING ELSE  
21 FROM ANY OF THE PARTIES?

22 NOT SEEING ANYONE JUMPING TO THE PODIUM, HERE IS MY  
23 REVISED THINKING FROM THE TENTATIVE RULING, AND I WILL HAVE A  
24 FORMAL ORDER TO FOLLOW.

25 I UNDERSTAND BETTER NOW THE PERSPECTIVE OF THE

1 RESPONDING PARTIES, PARTICULARLY THE FOX AND THE BIG TEN  
2 NETWORK. IF THEY'RE GETTING A CEASE AND DESIST -- CEASE AND  
3 DESIST LETTER AT THE SAME TIME PERIOD THEY'RE BEING ASKED TO  
4 PROVIDE THEIR TELEVISION BROADCAST CONTRACTS, I CAN UNDERSTAND  
5 THEIR CONCERN WITH THE BREADTH OF THE REQUEST IN THAT AREA.

6 ON THE OTHER HAND, FROM THE PLAINTIFF'S SIDE, I  
7 UNDERSTAND BETTER THE CORE THINGS THAT ARE REALLY FROM YOUR  
8 PERSPECTIVE AT ISSUE IN THE COMPLAINT, AND I UNDERSTAND BETTER  
9 SOME OF THE THINGS THAT I THINK ARE PROPERLY REQUESTED --  
10 THEY'RE REQUESTED IN YOUR DOCUMENT REQUEST, BUT I THINK,  
11 HEARING FROM YOU NOW, YOU DON'T REALLY NEED ALL THE THINGS THAT  
12 FACIALLY YOU'VE ASKED FOR IN THE REQUEST.

13 I THINK THERE'S A LOT OF MEETING IN THE MIDDLE THAT  
14 CAN BE DONE BETWEEN THE THIRD PARTIES HERE AND THE PLAINTIFFS  
15 THAT COULD GREATLY REDUCE THE BURDEN AND CAN REDUCE THE  
16 CONCERNS FOR CONFIDENTIALITY, AND AT THE SAME TIME GET THE  
17 PLAINTIFFS THE THINGS THEY'RE SAYING ARE REALLY THE CORE NEEDS.

18 I THINK ONE OF THE THINGS THE PLAINTIFF NEEDS TO DO  
19 IS TAKE ADVANTAGE OF THE DISCOVERY THEY ALREADY HAVE RECEIVED.  
20 YOU MENTIONED THE CONTRACTS YOU GOT FROM UNIVERSITY OF FLORIDA,  
21 UNIVERSITY OF TEXAS, WHERE YOU ALREADY DO KNOW SOME OF THE  
22 PARTS OF THOSE CONTRACTS WHERE YOU CAN EXTRAPOLATE -- AND I  
23 KNOW THESE CONTRACTS ARE GOING TO BE DIFFERENT, BUT AT LEAST  
24 YOU'LL HAVE SOME OF THE SUBJECT MATTER HEADINGS AND TOPICS AND  
25 TERMS THAT, REALLY, YOU COULD PERHAPS BE MORE PRECISE ABOUT THE

1 COMPONENTS OF THE BIG TEN NETWORK AND FOX CONTRACTS THAT YOU  
2 COULD BE TARGETING.

3 SIMILARLY, IN THE EA SPORTS AREA, YOU'VE RECEIVED  
4 SOME MATERIALS FROM EA SPORTS. I THINK YOU COULD LOOK AT THOSE  
5 AND IDENTIFY COMMUNICATIONS WITH THE BIG TEN, IF THERE ARE  
6 SOME, AND THEN ISOLATE PARTICULAR INDIVIDUALS OR TOPICS AND  
7 TIME PERIODS THAT COULD GREATLY REDUCE THE BURDEN ON THE BIG  
8 TEN IN PRODUCING DOCUMENTS CONCERNING EA SPORTS GAMES.

9 I THINK THOSE ARE SOME EXAMPLES, BUT I THINK IN EACH  
10 OF THESE CATEGORIES THERE CAN BE A LOT OF TIGHTENING OF THE  
11 REQUESTS. THE ONES THAT, YOU KNOW, I MADE MENTION OF  
12 THROUGHOUT, THE AMATEURISM IN SPORTS -- AS DRAFTED, A NUMBER OF  
13 THE REQUESTS I THINK CALLED FOR THE BIG TEN AND THE RESPONDING  
14 PARTIES TO SEARCH FOR EVERY DOCUMENT IN THEIR POSSESSION, AND  
15 THE RELEVANCE IS VERY BORDERLINE AS DRAFTED.

16 I THINK IF YOU CUT OUT THE PARTS THAT ARE LESS  
17 RELEVANT, YOU ARE GOING TO BE ABLE TO GET SOME OF THE THINGS  
18 YOU NEED, MAYBE NOT ALL OF THEM, BUT THE CORE THINGS, WITHOUT  
19 OVERBURDENING THE DEFENDANTS -- EXCUSE ME -- THE RESPONDING  
20 PARTIES.

21 SO MY ORDER IS GOING TO BE IN THE MIDDLE HERE, WHICH  
22 IS TO -- AND PART OF IT IS GOING TO BE TO ORDER YOU TO CONFER  
23 FURTHER AND TO HAVE -- THE PLAINTIFFS, REALLY, THE BURDEN IS ON  
24 YOU TO REDUCE YOUR REQUESTS.

25 MR. KING, YOU JUST MENTIONED ISOLATING FOUR OR FIVE

1 PARTICULAR THINGS. YOU NEED TO GO THROUGH EACH OF THESE AND BE  
2 VERY PARTICULAR.

3 I'M GOING TO ASK YOU TO LIMIT THE TIME PERIODS IN THE  
4 CATEGORY OF THE EXEMPLAR RELEASES. I'M GOING TO HAVE IT BE  
5 JUST THE TEN DOCUMENTS THAT YOU MENTIONED, THE EXEMPLARS AND  
6 SOME VERY NARROW ADDITIONAL COMMUNICATIONS CONCERNING THOSE  
7 EXEMPLAR RELEASES, AND IT'S NOT -- I'M NOT INTENDING TO HAVE  
8 THESE THIRD PARTIES SEARCH EVERY ONE OF THEIR DOCUMENTS OR  
9 EVERY ONE OF THESE CATEGORIES.

10 SO, I WILL GIVE FURTHER GUIDANCE IN MY WRITTEN ORDER,  
11 BUT IT IS VERY MUCH GOING TO REQUIRE YOU TO CONFER FURTHER WITH  
12 EACH OTHER TO SEE AND LIMIT THE REQUESTS. THE BURDEN IS GOING  
13 TO BE ON THE PLAINTIFFS TO COMMUNICATE TO THE THIRD PARTIES  
14 EXACTLY WHAT IT IS YOU'RE SEEKING SO THEY'RE NOT GOING ON THIS  
15 LIMITLESS FISHING EXPEDITION.

16 IF YOU CAN'T MEET THE BURDEN OF LIMITING THEM AND  
17 MAKING IT AN EASIER TASK, THEN I WILL ULTIMATELY JUST DENY THE  
18 REQUEST.

19 AS PRESENTED TO ME HERE TODAY, THERE WAS A LOT OF  
20 MEET AND CONFERRING THAT WENT ON, BUT, ULTIMATELY, THE  
21 PLAINTIFFS DID MOVE TO COMPEL ON THE SUBPOENAS ALL TOGETHER,  
22 AND THE THIRD PARTY DID NOT PRODUCE ANY DOCUMENTS IN RESPONSE,  
23 AND YOU SORT OF WENT TO WAR ON EVERYTHING.

24 I UNDERSTAND WHY YOU DID THAT. IN SOME WAYS, THIS IS  
25 A BELLWETHER DECISION FOR YOU IN PURSUING DISCOVERY FROM OTHER

1 THIRD PARTIES. I AM ALSO SENSITIVE TO THE FACT THE NCAA HAS  
2 TOLD YOU, WE ARE NOT GOING TO PRODUCE THIS STUFF, TALK TO THE  
3 CONFERENCE, TALK TO THE SCHOOLS, AND THAT'S WHY YOU ARE  
4 PURSUING THIS APPROACH. I UNDERSTAND THE MOTIVE, BUT THE  
5 EXECUTION HAS TO BE MORE PRECISE.

6 SO, I WON'T GIVE YOU A DETAILED ANSWER FOR EACH THING  
7 HERE. I WILL ISSUE A WRITTEN ORDER, AND IT'S GOING TO  
8 NECESSITATE YOU GOING BACK AND NARROWING A NUMBER OF THESE  
9 REQUESTS AS YOU ALREADY STARTED TO, AND A LOT OF IT'S GOING TO  
10 BE BASED ON THE OFFERS OF COMPROMISE YOU MADE OVER THE COURSE  
11 OF YOUR E-MAIL AND CORRESPONDENCE.

12 IF IT'S HELPFUL TODAY, OF COURSE, YOU ARE WELCOME TO  
13 STAY HERE RIGHT NOW AND CONTINUE TO CONFER WITH EACH OTHER  
14 ABOUT HOW THE REQUESTS COULD BE LIMITED. IT MIGHT BE TIME WELL  
15 SPENT. YOU ARE ALL HERE TODAY TOGETHER.

16 AND IF THE PARTIES AFTER THAT CONFERRING, YOU KNOW,  
17 AND RECEIVING MY ORDER WANT TO CONFER FURTHER WITH THE COURT BY  
18 TELEPHONE, THAT'S CERTAINLY SOMETHING WE CAN DO TO SEE IF WE  
19 CAN FASHION THIS IN A WAY THAT GIVES EVERYONE SOME OF WHAT THEY  
20 WANT.

21 THAT WILL BE THE ORDER. I VERY MUCH APPRECIATE  
22 EVERYONE'S ATTENTION AND PREPARATION FOR THIS. I KNOW YOU DID  
23 A LOT OF WORK IN SUBMITTING ALL THE BRIEFS. IT WAS HELPFUL FOR  
24 ME. THANK YOU VERY MUCH.

25 **MS. MERIWETHER:** YOUR HONOR, I HAVE ONE QUESTION.

1 ARE YOU REVISING YOUR TENTATIVE RULING THAT THE BROADCASTING  
2 AGREEMENTS AND LICENSING AGREEMENTS ARE NOT RELEVANT?

3 **THE COURT:** I WILL, YES.

4 **MS. MERIWETHER:** THANK YOU, YOUR HONOR.

5 **THE COURT:** THANK YOU. WE'RE IN RECESS.

6 (PROCEEDINGS ADJOURNED.)

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**CERTIFICATE OF REPORTER**

I, JOAN MARIE COLUMBINI, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C 09-1967 CW (NC), IN RE: NCAA STUDENT-ATHLETE IMAGE AND LIKENESS LICENSING LITIGATION, WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.

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JOAN MARIE COLUMBINI, CSR 5435, RPR

MONDAY, FEBRUARY 13, 2012