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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CLAUDIA WILKEN, JUDGE

SAMUEL KELLER, PLAINTIFF, VS. ELECTRONIC ARTS, NCAA, COLLEGIATE LICENSING CO., DEFENDANTS.	NO. C-09-1967 CW THURSDAY, DECEMBER 17, 2009 OAKLAND, CALIFORNIA
EDWARD C. O'BANNON, PLAINTIFF, VS. NCAA AND COLLEGIATE LICENSING COMPANY, DEFENDANTS.	C-09-3329 CW
BRYON BISHOP, PLAINTIFF, VS. ELECTRONIC ARTS, NCAA AND COLLEGIATE LICENSING CO., DEFENDANTS.	C-09-4128 CW

CAPTION CONTINUED ON NEXT PAGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

REPORTED BY: DIANE E. SKILLMAN, CSR 4909, RPR, FCRR
OFFICIAL COURT REPORTER

CRAIG NEWSOME, PLAINTIFF, VS. NCAA AND COLLEGIATE LICENSING COMPANY, DEFENDANTS.	)	C-09-4882 CW
MICHAEL ANDERSON, PLAINTIFF, VS. NCAA AND COLLEGIATE LICENSING COMPANY, DEFENDANTS.	)	C-09-5100 CW
DANNY WIMPRINE, PLAINTIFF, VS. NCAA AND COLLEGIATE LICENSING COMPANY, DEFENDANTS.	)	C-09-5134 CW
SAMUEL JACOBSON, PLAINTIFF, VS. NCAA AND COLLEGIATE LICENSING COMPANY, DEFENDANTS.	)	C-09-5372 CW

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DAMIEN RHODES, PLAINTIFF, VS. NCAA AND COLLEGIATE LICENSING COMPANY, DEFENDANTS. C-09-5378 CW

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THURSDAY, DECEMBER 17, 2009 3:05 P.M.

THE CLERK: CALLING THE MATTER OF KELLER VERSUS ELECTRONIC ARTS, CIVIL ACTION C-09-1967, O'BANNON VERSUS NCAA, CIVIL ACTION NUMBER C-09-3329, BISHOP VERSUS ELECTRONIC ARTS, CIVIL ACTION C-09-4128, NEWSOME VERSUS NCAA, CIVIL ACTION NUMBER C-09-4882, ANDERSON VERSUS NCAA, CIVIL ACTION NUMBER C-09-5100, WIMPRINE VERSUS NCAA, CIVIL ACTION C-09-5134, JACOBSON VERSUS NCAA, CIVIL ACTION NUMBER C-09-5372 AND RHODES VERSUS NCAA, CIVIL ACTION NUMBER C-09-5378.

COUNSEL, PLEASE STATE YOUR APPEARANCES FOR THE RECORD.

THE COURT: DO IT IN THE ORDER THAT I SET. AND IF THERE IS MORE THAN ONE ATTORNEY FOR ANY GIVEN CLIENT, IF YOU CAN JUST INTRODUCE YOUR COLLEAGUE RATHER THAN HAVE EVERYBODY COME UP AND SAY THEIR NAME.

KELLER?

MR. CAREY: ROB CAREY FROM HAGENS BERMAN ALONG WITH LEONARD ARAGON HAGENS BERMAN AND STUART PAYNTER OF THE PAYNTER LAW FIRM ON BEHALF OF MR. KELLER.

MR. VAN NEST: BOB VAN NEST, YOUR HONOR, KEKER & VAN NEST FOR ELECTRONICS ARTS DEFENDANT IN THE KELLER CASE. I AM HERE WITH ADAM LAURIDSEN.

MR. HENN: I'M CHARLIE HENN WITH KILPATRICK STOCKTON. I'M HERE WITH PETE BOYLE FROM MY FIRM AND WE'RE HERE

ON BEHALF OF THE COLLEGIATE LICENSING COMPANY.

MR. CURTNER: GOOD AFTERNOON, YOUR HONOR, MY NAME IS GREG CURTNER. I'M HERE WITH MY PARTNER ROBERT WIERENGA AND ELSA KIRCHER COLE, WHO IS THE GENERAL COUNSEL OF THE NCAA.

THE COURT: OKAY.

O'BANNON.

MR. HAUSFELD: GOOD AFTERNOON, YOUR HONOR, MICHAEL --

MR. CURTNER: AND JASON GELLER. I'M SORRY. MR. GELLER IS HERE AS WELL.

MR. HAUSFELD: MICHAEL HAUSFELD FOR PLAINTIFF O'BANNON. WITH ME IS MICHAEL LEHMANN AND JON KING ALSO FROM OUR LAW FIRM.

THE COURT: OKAY. AND DO WE HAVE THE SAME DEFENDANT ATTORNEYS FOR ALL OF THE DEFENDANTS IN THAT CASE?

MR. CURTNER: YES.

THE COURT: SO, BISHOP?

MR. ASHER: GOOD AFTERNOON, YOUR HONOR, MY NAME IS STEVE ASHER. I'M FROM PHILADELPHIA, PENNSYLVANIA. I'M HERE FOR PLAINTIFF BRYON BISHOP. I AM HERE WITH CARL OLSON AND MIKE RAM FROM SAN FRANCISCO. THEY'RE LOCAL COUNSEL.

THE COURT: OKAY.

AGAIN, THE DEFENDANTS ARE THE SAME ATTORNEYS FOR ALL THESE CASES, I AM ASSUMING?

MR. BOYLE: THAT'S CORRECT, YOUR HONOR.

THE COURT: SO, NEWSOME? WHO HAS THE PLAINTIFF IN NEWSOME?

MS. DERMODY: GOOD AFTERNOON, YOUR HONOR, KELLY DERMODY AND MY PARTNER JOSEPH SAVERI FOR THE NEWSOME PLAINTIFFS.

MR. SAVERI: GOOD AFTERNOON, YOUR HONOR.

THE COURT: AND ANDERSON?

MR. CLOBES: GOOD AFTERNOON, YOUR HONOR, BRYAN CLOBES FROM PHILADELPHIA, CAFFERTY FAUCHER, COUNSEL FOR ANDERSON AND PLAINTIFF WIMPRINE AS WELL, IN BOTH THOSE CASES.

THE COURT: OKAY.

JACOBSON?

MR. BLANCHFIELD: GOOD AFTERNOON, YOUR HONOR, GARRETT BLANCHFIELD HERE ON BEHALF OF PLAINTIFF JACOBSON. I'M HERE WITH JESSICA GRANT, WHO IS LOCAL COUNSEL.

THE COURT: AND RHODES? ANYBODY HERE ON RHODES?

MR. CONNOLLY: GOOD AFTERNOON, YOUR HONOR, STEVE CONNOLLY ON BEHALF OF DAMIEN RHODES AND CO-COUNSEL JOSEPH SAVERI.

MR. SAVERI: I DIDN'T MEAN TO STAND IN MY CO-COUNSEL'S WAY.

GOOD AFTERNOON, YOUR HONOR JOSEPH SAVERI, AGAIN, ON BEHALF OF PLAINTIFF.

THE COURT: OKAY.

IN TERMS OF CONSOLIDATION, I'M GENERALLY INCLINED TO

CONSOLIDATE FOR ALL PURPOSES WITH THE POSSIBLE EXCEPTION OF TRIAL. AND IF I DO CONSOLIDATE ALL THE CASES, AND IT TURNS OUT THAT THE TRIAL ISN'T MANAGEABLE WITH ALL THOSE ISSUES, THEN WE CAN ALWAYS DE-CONSOLIDATE AND PICK AND CHOOSE WHAT ISSUES SHOULD BE TRIED TOGETHER OR SEPARATELY.

BUT IN TERMS OF SCHEDULING AND CASE MANAGEMENT AND DISCOVERY, I THINK IT MAKES SENSE TO CONSOLIDATE THEM AND DO THE THINGS IN THE MOST EFFICIENT WAY THAT WE CAN.

IN THAT REGARD, I AM SORT OF INTERESTED IN THESE TENNESSEE CASES AND THE NEW JERSEY CASE. I DON'T KNOW IF IT WOULD MAKE SENSE TO MOVE TO TRANSFER THE TENNESSEE CASES HERE OR MOVE TO TRANSFER THESE CASES TO TENNESSEE. YOU SAY YOU ARE GOING TO REMOVE THE NEW JERSEY CASE, OR TRY TO, YOU CAN THEN PERHAPS TRANSFER THAT, MAYBE SOMEONE WANTS TO SUGGEST AN MDL; DOES IT MAKE SENSE TO PROCEED IN BOTH TENNESSEE AND NEW JERSEY AND HERE ON THESE CASES?

MR. VAN NEST: YOUR HONOR, BOB VAN NEST FOR ELECTRONICS ARTS. WE ARE ONLY IN THE KELLER CASE, NOT IN O'BANNON.

WITH RESPECT TO THE TENNESSEE CASES, THE STATUS THERE IS THAT THEY WERE FILED IN STATE COURT, REMOVED, THERE HAS BEEN A MOTION TO REMAND, WHICH HAS NOT BEEN RESPONDED TO. SO THOSE CASES ARE NOT PERMANENTLY IN FEDERAL COURT YET.

THE COURT: ARE THEY ALL IN FRONT OF ONE JUDGE IN TENNESSEE?

MR. VAN NEST: THEY ARE.

THE COURT: WHO IS IT? DO WE KNOW THE --

MR. CURTNER: YOUR HONOR, JUST TO CLARIFY.

THE REPORTER: COUNSEL, I'M SORRY.

MR. CURTNER: I'M SORRY, GREG CURTNER FOR THE NCAA.

THE REPORTER: THANK YOU.

MR. CURTNER: IN THE TENNESSEE CASE, KNUCKLES, THERE WERE SEPARATE CASES FILED IN STATE COURT AGAINST EA AND NCAA AND CLC. THEY WERE BOTH REMOVED. I UNDERSTAND THERE HAS BEEN A MOTION TO REMAND THE EA SPORTS MATTER, BUT WE HAVE NOT YET RECEIVED A MOTION TO REMAND, ALTHOUGH WE WOULDN'T BE SURPRISED BUT THAT WE GET ONE.

THE COURT: THE QUESTION IS, DOES ANYONE KNOW WHO THE JUDGE IS IN TENNESSEE OR IF THERE IS MORE THAN ONE?

NO. OKAY.

YOU MIGHT KEEP THAT IN MIND.

MR. CURTNER: YOUR HONOR, WE CERTAINLY AGREE THAT IT WOULD MAKE SENSE IF THOSE STAY IN FEDERAL COURT THAT THEY BE ALL HEARD IN THE SAME PROCEEDING, AND WE WOULD INTEND TO MOVE.

YOU HAVE ALREADY RULED ON OUR MOTION TO CHANGE VENUE TO INDIANA, SO IT PROBABLY LOOKS LIKE OUR NEXT MOVE IS TO BRING IT ALL HERE. WE HAVE TO MAKE SURE IT'S GOING TO STAY IN FEDERAL COURT FIRST.

THE COURT: OKAY. WELL, YOU CAN EVEN TALK TO THE PLAINTIFFS AND TELL THEM ABOUT THIS CASE AND PERHAPS THEY WOULD

AGREE TO STAY IN FEDERAL COURT AND GET TRANSFERRED TO A PLACE WHERE THEY WOULD HAVE SO MUCH COMPANY.

MR. VAN NEST: I THINK THEY ARE WELL AWARE OF THIS CASE, YOUR HONOR.

THE COURT: OKAY.

AS FAR AS THE REST OF CASE MANAGEMENT, I GUESS WE WILL TALK ABOUT THAT LATER, BUT IN TERMS OF THE MOTION TO DISMISS, LET'S START WITH KELLER.

I CAN GIVE YOU MORE THAN A HALF AN HOUR, BUT I DON'T HAVE AN UNLIMITED AMOUNT OF TIME FOR ALL OF THESE MOTIONS, SO WE WILL HAVE TO DIVIDE IT UP IN SOME KIND OF WAY.

MR. VAN NEST: YOUR HONOR, ON THE DEFENSE SIDE, WE HAVE DONE THAT. I INTENDED TO START AND CONSOLIDATE BOTH THE MOTION TO DISMISS AND THE SLAPP MOTION FILED BY ELECTRONICS ARTS ON KELLER. THAT COVERS A LOT OF THE ISSUES, AND THEN THERE WOULD BE SHORT PRESENTATIONS FROM THE NCAA AND POSSIBLY CLC.

THE COURT: OKAY.

MR. VAN NEST: SO, HANDLING THOSE TWO MOTIONS TOGETHER, YOUR HONOR, I INTEND TO MAKE JUST FOUR POINTS.

AND THE FIRST POINT IS THAT ELECTRONIC ARTS VIDEO GAMES ARE CERTAINLY ENTITLED TO FIRST AMENDMENT PROTECTION JUST LIKE A NOVEL, OR A MOVIE, OR ANY OTHER EXPRESSIVE WORK.

THE COURT: IN GENERAL THAT'S TRUE UNLESS THEY FALL SHORT ON SOME OTHER GROUND.

MR. VAN NEST: INDEED. AND HERE, BOTH IN CALIFORNIA AND IN THE NINTH CIRCUIT, THE TRANSFORMATIVE USE TEST IS THE TEST THAT'S APPLIED IN DETERMINING WHETHER OR NOT THERE IS A CLAIM FOR PRIVACY.

AND HERE, THESE GAMES ARE SO TRANSFORMATIVE THAT THEY CLEARLY QUALIFY FOR FIRST AMENDMENT PROTECTION AS A MATTER OF LAW BECAUSE THEY ARE SO MULTIFEATURED, AS YOU WILL SEE IN A MINUTE, AND HAVE SO MANY ELEMENTS IN THEM, IT COULD NEVER BE SAID THAT THE LIKENESS OF MR. KELLER OR ANY OTHER ATHLETE, EVEN IF WE WERE USING IT, WAS THE SUM AND SUBSTANCE FOR THE ENTIRETY OF THE GAME ITSELF. SO UNDER THAT TRANSFORMATIVE USE TEST, AS I WILL GO INTO IN A MOMENT WE'RE ENTITLED TO A DISMISSAL NOW.

THE COURT: I AM NOT SURE I WOULD LOOK AT THE TRANSFORMATION THAT BROADLY. I THINK ONE WOULD NEED TO LOOK AT THE TRANSFORMATION OF THE INDIVIDUALS AND NOT JUST HOW MUCH OTHER STUFF THEY WERE PUT IN WITH.

MR. VAN NEST: WELL, LET'S GO TO THAT, YOUR HONOR, BECAUSE I THINK THE TEST REALLY IS IN BOTH THE WINTER CASE AND ALL THE CASES THAT HAVE LOOKED AT THIS, IS THE WORK AS A WHOLE TRANSFORMATIVE? IS THE WORK AS A WHOLE TRANSFORMATIVE?

WHAT WE ARE SAYING HERE TODAY IS EVEN IF WE WERE USING THE LIKENESS, WHICH WE DON'T CONCEDE AS A MATTER OF FACT, BUT AS A MATTER OF PLEADING FOR TODAY'S PURPOSES WE WILL CONCEDE IT, YOU LOOK AT THE WORK AS A WHOLE, AND SEE WHETHER OR NOT, GIVEN ALL ITS ASPECTS, IT'S TRANSFORMATIVE OR NOT.

SO, FOR EXAMPLE, LOOKING AT THESE VIDEO GAMES, THEY HAVE CONTAINED WITHIN THEM ORIGINAL GRAPHICS THROUGHOUT, ANIMATION OF PLAY ACTION, THEY HAVE MUSIC, THEY HAVE SOUND EFFECTS, THEY HAVE VOICE COMMENTARY, WHICH HAS NOTHING TO DO WITH ANY INDIVIDUAL LIKENESS OF ANY PARTICULAR ATHLETE. AND BEYOND THAT --

THE COURT: UNLESS YOU UPLOAD THE ADD-ONS, IN WHICH CASE THE ANNOUNCER USES THEIR NAME.

MR. VAN NEST: THE ANNOUNCER DOESN'T USE THE NAME. THE UPLOAD, YOUR HONOR, IS PROVIDED BY THIRD PARTIES. LET'S ASSUME FOR TODAY'S PURPOSE, LET'S ASSUME FOR TODAY'S PURPOSE THAT THAT'S PART OF THE GAME, EVEN THOUGH WE WOULDN'T CONCEDE THAT AS A MATTER OF FACT DOWN THE LINE.

EVEN THEN, YOU LOOK AT THE VISUAL EFFECTS AS A WHOLE. AND HERE YOU HAVE PLAY ACTION ON THE FIELD, YOU HAVE STADIUMS, YOU HAVE FANS --

THE COURT: THE STADIUMS ARE THE STADIUMS THAT THEY PLAYED IN.

MR. VAN NEST: THEY ARE.

THE COURT: THEY ARE NOT TRANSFORMED.

MR. VAN NEST: THEY ARE --

THE COURT: WHAT I'M LOOKING AT IS THIS ULALA CASE, WHERE NOT ONLY WAS MS. ULALA LOOKING DIFFERENT, BUT SHE WAS PUT IN THE 25TH CENTURY, AND SHE WAS A REPORTER INSTEAD OF A SINGER, AND HERE YOU HAVE GOT PEOPLE IN PRESENT TIME IN THEIR

PRESENT STADIUMS, THEY'RE FOOTBALL PLAYERS NOT 25TH CENTURY REPORTERS.

MR. VAN NEST: THAT'S ALL TRUE. BUT IN ULALA, YOUR HONOR, THEY TALKED ABOUT A LOT OF ASPECTS. THEY TALKED ABOUT THE CONTEXT, THE SURROUNDING, AND SO ON AND SO FORTH.

THE COURT: RIGHT.

MR. VAN NEST: IN THESE GAMES, AND I ENCOURAGE THE COURT TO LOOK AT THEM IF YOUR HONOR HASN'T, FOR EXAMPLE, THE STADIUMS THEY PLAY IN ARE GRAPHIC REPRESENTATIONS. THEY ARE ART IN AND OF THEMSELVES CREATED BY ELECTRONIC ARTS.

THE COURT: RIGHT, BUT THEY LOOK LIKE THE COLLEGE FOOTBALL STADIUMS THAT THE PEOPLE PLAYED IN. THEY AREN'T THE 25TH CENTURY, FOR EXAMPLE, OR OUTER SPACE.

MR. VAN NEST: THEY DO, BUT WHETHER OR NOT SOMETHING IS REALISTIC OR NOT IS NOT THE TEST. THERE ARE PLENTY OF EXAMPLES OF REALISTIC PORTRAYALS THAT ARE JUST AS ENTITLED TO FIRST AMENDMENT PROTECTION AS --

THE COURT: REALISM IS NOT TRANSFORMATION.

MR. VAN NEST: IT DEPENDS ON HOW YOU LOOK AT IT, YOUR HONOR. IF, FOR EXAMPLE, YOU PORTRAY THE LIFE OF RUDOLPH VALENTINO AS HIS LIFE WAS. THE FACT THAT YOU USE HIS NAME AND HIS LIKENESS AND AN ACTOR DRESSED UP TO LOOK LIKE HIM AND PLAY THAT ROLE, THAT'S CLEARLY ENTITLED TO FIRST AMENDMENT PROTECTION AND CAN BE TRANSFORMATIVE IN LIGHT OF THE ELEMENTS AROUND IT.

SIMILARLY, JUST LOOKING AT IT GRAPHICALLY, THIS PHOTOGRAPH OF TIGER WOODS -- HE HAS BEEN GETTING A LITTLE PRESS LATELY.

(COUNSEL DISPLAYS BLOWUP.)

THE COURT: THEY PAY HIM, DON'T THEY?

MR. VAN NEST: NOT HERE THEY DID NOT. NOT HERE.

THIS IS AN ETW CASE. THIS IS A LIKENESS OF TIGER WOODS ON A GOLF COURSE SURROUNDED BY FEATURES OF GREAT TOURNAMENTS. THIS WAS DECLARED BY THE SIXTH CIRCUIT TO BE TRANSFORMATIVE EVEN THOUGH THERE'S VERY LITTLE IN IT OTHER THAN JUST THE PICTURE OF TIGER WOODS.

SIMILARLY, IN THE WINTER CASE, ONE OF THE LEADING CALIFORNIA CASES, THE PLAINTIFF THERE WAS -- THE PLAINTIFFS WERE JOHNNY AND EDGAR WINTER. THE CHARACTERS IN THE COMIC BOOK WERE JOHNNY AND EDGAR AUTUMN. AS YOU CAN SEE, THE FACES ARE SIMILAR, THE CLOTHING IS SIMILAR, THE INSTRUMENTS ARE SIMILAR, THE PHRASES ARE SIMILAR.

THE COURT: THEY WERE.

MR. VAN NEST: THEY ARE, AND THE COURT FOUND THAT THIS WAS TRANSFORMATIVE.

SO THE FACT THAT SOMETHING IS REALISTIC DOES NOT TAKE IT OUTSIDE OF THE STANDARD AT ALL. THE TEST IS, IF YOU LOOK AT WINTER AND YOU LOOK AT KIRBY VERSUS SEGA, THE TEST IS WHAT DOES --

THE COURT: KIRBY IS ULALA?

MR. VAN NEST: RIGHT. IF YOU LOOK AT THAT CASE, YOUR HONOR, THE TEST IS WHAT DOES THE WORK AS A WHOLE CONSTITUTE?

IF I MAY JUST FOR A MINUTE HERE, THEY ARE CLAIMING THAT THEIR LIKENESS IS THE SUM AND SUBSTANCE OF THIS GAME AND THE VALUE OF THE GAME. AND ASSUMING FOR A MINUTE, EVEN IF WE USE THEIR LIKENESS, THERE ARE SO MANY FEATURES OF THIS, THEY HAVE NOTHING TO DO WITH THE LIKENESS OF KELLER OR ANY OTHER COLLEGE ATHLETE. YOU HAVE, FOR EXAMPLE, COMMENTATORS AND COMMENTARY WITH NO PLAYERS INVOLVED. YOU HAVE THE GAME --

THE COURT: ARE THE COMMENTATORS REAL PEOPLE?

MR. VAN NEST: SOMETIMES YES, SOMETIMES NO.

THE COURT: ARE THEY PAID?

MR. VAN NEST: IF THEY ARE PROFESSIONALS AND THEY COME IN AND DO TAPE-OVERS, AND ACT OUT THE ROLE, THEN THEY ARE PAID, BUT THEY CAN BE IMAGINARY AS WELL. BUT THERE THEY ARE BEING PAID FOR THEIR WORK AND DOING A VOICEOVER AND SO ON AND SO FORTH. THEY ARE IN A DIFFERENT CATEGORY ALTOGETHER.

THE USER CREATES THE IMAGE EVERY TIME. IT'S THE USER OF THE GAME THAT SELECTS THE OFFENSIVE PLAYS AND THE DEFENSIVE PLAYS. THEY ARE NOT REPLICATING ANY PARTICULAR REAL GAME, THEY ARE CREATING A NEW EXPRESSION EVERY TIME THEY PLAY.

AND, FOR EXAMPLE, A USER COULD PLAY THIS GAME FOR A YEAR AND NEVER SEE THE IMAGE THAT PLAINTIFFS CLAIM IS MR. KELLER BECAUSE HE, THE IMAGE THEY'RE TALKING ABOUT MIGHT

APPEAR ON ONE TEAM FOR ONE YEAR FOR SOME PLAYS AND NOT OTHERS. IT'S CERTAINLY NOT THE SUM AND SUBSTANCE OF THE GAME.

THIS IS WHAT YOU ACTUALLY SEE. YOU SEE PLAYERS IN HELMETS, IN JERSEYS WITH NUMBERS AND UNIFORMS THAT ARE LICENSED FROM THE NCAA, AND THEY PLAY BASED ON THE ACTION CREATED BY THE USER OF THE GAME.

THAT ACTION AND THAT DETERMINATION IS CREATED BY THE SOFTWARE AND THE ANIMATION DESIGNED BY EA. THE ONLY TIME IN THE GAME THAT YOU EVER EVEN SEE A FACE IS AT THE COIN TOSS WHEN THE CAPTAINS COME OUT. IT TURNS OUT MR. KELLER WAS NEVER A CAPTAIN.

EVEN HERE, THESE ARE NOT THE IMAGES OR THE NAMES OF THE PLAYERS. THESE ARE ARTISTIC FACES CREATED BY EA DESIGNERS AND ENGINEERS THAT THE USER CAN MODIFY, CHANGE, SWITCH, AND SUBSTITUTE. THESE INDIVIDUAL FACES ARE ARTWORK, THEY ARE NOT IMAGES.

AND IT GOES WITHOUT SAYING THEN, YOU'VE GOT LOTS OF OTHER FEATURES. YOU'VE GOT MASCOTS, CHEERLEADERS, REFEREES. YOU'VE GOT FANS IN THE STANDS. YOU'VE GOT ALL THE OTHER ACCOUTERMENTS THAT MAY OR MAY NOT APPEAR AT A COLLEGE FOOTBALL GAME.

AND GIVEN THE CASE LAW, YOUR HONOR, I WANT TO WALK THROUGH THESE FOR JUST A MINUTE, THESE GAMES ARE FAR MORE TRANSFORMATIVE THAN ANYTHING THAT HAS BEEN RULED UPON YET, INCLUDING THE WINTER CASE AND INCLUDING KIRBY. BECAUSE THOSE

CASES INVOLVE PRINTED EXPRESSION ON THE PAGE, OR IN CASE OF KIRBY, A VIDEO GAME WITH A FIGURE IN IT THAT LOOKS LIKE, TALKS LIKE, HAS LOTS OF SIMILAR CHARACTERISTICS TO THE ACTUAL ROCK ARTIST FROM THE '70S, AND THE COURT HELD THAT BECAUSE OF THE CONTEXT AND THE ENVIRONMENT AND THE TRANSFORMATIVE ELEMENTS, THAT WAS PROTECTED BY THE FIRST AMENDMENT AND NOT SUBJECT, NOT SUBJECT TO A CLAIM. SIMILARLY --

THE COURT: BOTH KIRBY AND WINTER STRIKE ME AS MORE TRANSFORMATIVE THAN THIS CASE.

MR. VAN NEST: I DON'T THINK SO, YOUR HONOR, BECAUSE HERE, AGAIN, IT'S NOT A QUESTION OF WHETHER OR NOT IT'S REALISTIC; IT'S A QUESTION OF WHAT ELEMENTS ARE IN THE GAME, OR THE BOOK, OR THE NOVEL BEYOND AND SURROUNDING THE QUOTE "LIKENESS" OF THE PLAINTIFF. IF, FOR EXAMPLE --

THE COURT: THE WORD "TRANSFORM" MEANS TO CHANGE. IT SEEMS TO ME IT'S MORE A QUESTION OF HOW MUCH HAVE YOU CHANGED FROM REALITY.

MR. VAN NEST: NO, IT'S, WITH ALL DUE RESPECT, YOUR HONOR, IT'S NOT HOW MUCH YOU'VE CHANGED FROM REALITY, IT'S HOW MUCH YOU'VE CHANGED FROM MERELY THE CELEBRITY OF THE PLAINTIFF.

FOR EXAMPLE, IN THE COMEDY III CASE, THE IMAGE WAS THIS IMAGE OF THE THREE STOOGES.

(COUNSEL DISPLAYS BLOWUP.)

THIS WAS RENDERED BY AN ARTIST, BUT IT IS NOTHING MORE THAN THE BARE, SORT OF UNADORNED IMAGE OF THE CELEBRITIES

THEMSELVES PLACED ON A T-SHIRT OR SOMETIMES ON A POSTER.

AND THE COURT SAID THAT IS NOT TRANSFORMATIVE BECAUSE THERE ARE NO OTHER ELEMENTS OF ARTISTIC CREATION AROUND IT.

IN OUR CASE, WE HAVE TAKEN FOOTBALL PLAYERS OF A GENERIC TYPE AND PLACED THEM IN A GAME THAT HAS LOTS OF OTHER ELEMENTS; HAS THE ABILITY FOR THE USER TO CHANGE IT, HAS THE ABILITY FOR THE USER TO PLAY A WHOLE TEAM FOR A YEAR, THE STUDENT ATHLETES IN IT CAN EVOLVE DURING THE YEAR, YOU CAN PLAY DIFFERENT TEAMS IN DIFFERENT STADIUMS, IN DIFFERENT TOWNS, TEAMS THAT NEVER PLAYED BEFORE CAN PLAY EACH OTHER. IN OTHER WORDS, THERE ARE SO MANY ARTISTIC ELEMENTS TO THE GAMES THAT THEY HAVE BEEN TRANSFORMED.

I WOULD SAY THIS CASE FALLS FAR TO THE RIGHT OF EVEN KIRBY WHERE THERE THE MAIN FEATURE WAS THIS ONE CHARACTER. YES, SHE WAS IN A DIFFERENT SETTING, BUT THE MAIN FEATURE OF THE GAME WAS MS. ULALA, UNLIKE THESE GAMES WHERE THERE IS AN ENTIRE EXPERIENCE AROUND COLLEGE FOOTBALL. YOU, IN FACT, EXPERIENCE AN ENTIRE AFTERNOON OR AN ENTIRE SEASON.

MOST OF THE CASES THAT THE PLAINTIFFS ARE RELYING ON ARE CASES IN WHICH THE IMAGE OF THE PLAINTIFF IS USED IN AN ADVERTISEMENT, A PROMOTION. YOU CAN'T PUT KAREEM ABDUL-JABBAR NEXT TO AN AUTOMOBILE AND SAY THAT IS TRANSFORMATIVE AND GET AWAY WITH IT BECAUSE HE IS BEING USED IN AN ADVERTISEMENT TO PROMOTE A PRODUCT THAT HE'S GOT NOTHING TO DO WITH.

THERE IS NO CLAIM HERE THAT MR. KELLER IS BEING USED TO ADVERTISE THIS PRODUCT OR TO ENGAGE IN SOME KIND OF COMMERCIAL SPEECH. IT IS A TRANSFORMATIVE WORK THAT IS -- HAS ELEMENTS ADDED TO IT THAT, AS A MATTER OF LAW, BASED ON THESE CALIFORNIA AND OTHER CIRCUIT CASES, ESTABLISH TRANSFORMATION.

THERE IS A SECOND POINT I WANT TO MAKE, YOUR HONOR, APART FROM TRANSFORMATION. THERE IS A SECOND TEST. AND THAT IS THE TEST OF PUBLIC INTEREST.

THESE GAMES ALSO ARE EXEMPT INDEPENDENT OF THE TRANSFORMATION TEST BECAUSE NCAA FOOTBALL AND BASKETBALL ARE MATTERS OF PUBLIC INTEREST. AND THERE ARE A HOST OF CASES DEALING WITH FANTASY FOOTBALL AND FANTASY BASEBALL WHERE ALL THE PUBLISHERS PRESENTING ARE THE NAMES, IN SOME CASES IMAGES, STATISTICS AND PERSONAL INFORMATION ABOUT REAL PLAYERS IN A REAL LIVE SEASON.

AND THE COURT IN CBS AND CBC ALL HELD THE PUBLIC INTEREST TEST MEANS PUBLISHERS HAVE A RIGHT TO MAKE THAT INFORMATION TO THE PUBLIC WHETHER THEY ARE DOING IT IN THE SATURDAY OR SUNDAY NEWSPAPER RIGHT AFTER THE CAL GAME, OR DOING IT FOR ENTERTAINMENT PURPOSES MONTHS OR YEARS LATER. THAT WAS THE RULING IN CBS, IN CBC --

THE COURT: TO ME, THAT'S SORT OF THE OTHER END OF THE SPECTRUM. THERE IS PROTECTION AT ONE END WHERE YOU ARE PROVIDING ESSENTIALLY NEWS, LIKE FACTS. HERE'S WHAT HAPPENED ON THIS DATE, HERE'S THE SCORE OF THAT GAME, HERE'S THE STAT.

ALL THOSE SORT OF THINGS THAT ARE REPORTING AS FACTS. THAT'S ONE END.

THEN YOU HAVE THE MIDDLE SECTION WHERE THERE MIGHT BE LIABILITY. AND THEN THE OTHER END WHERE YOU HAVE TRANSFORMED IT SO ARTISTICALLY AND DIFFERENTLY THAT THERE IS NO LIABILITY.

AND SO THE QUESTION IS, WHERE DO THOSE TWO ENDS STOP AND THE PART IN THE MIDDLE IS THE ONE WHO'S UNPROTECTED.

MR. VAN NEST: THOSE ARE REALLY DIFFERENT TESTS, YOUR HONOR.

THE COURT: I SEE THEM AS A CONTINUUM, ONE AT EITHER END.

MR. VAN NEST: IN EITHER CASE, I WOULD SUBMIT, THESE GAMES FALL COMPLETELY WITHIN THE SPHERE THAT IS PROTECTED.

ON THE PUBLIC INTEREST SIDE, IF YOU CAN PROTECT THE MERE PUBLICATION AS PART OF A GAME OF THE NAMES, PERSONAL INFORMATION AND STATISTICS OF A PLAYER, CERTAINLY YOU CAN PUBLISH INFORMATION HERE WHICH IS NOT EVEN THAT SPECIFIC ABOUT COLLEGE ATHLETES AND COLLEGE PERFORMANCE IN GENERAL. WE ARE CLEARLY WITHIN THE SPHERE OF THE PUBLIC INTEREST CASES.

AND AS I SAID ON THE TRANSFORMATION SIDE, IF YOU CAN TAKE A FIGURE OF TIGER WOODS AND PLACE A FEW ARTIFACTS AROUND IT THAT REPRESENT THE HISTORY OF HIS ACHIEVEMENTS IN GOLF, CERTAINLY TAKING GENERIC COLLEGE FOOTBALL PLAYERS AND PLACING THEM IN A CONTEXT OF AN INTERACTIVE, MULTIFEATURED GAME WITH

LOTS OF OTHER ELEMENTS, IT CLEARLY PASSES THAT TEST.

THE COURT: OKAY. YOU MIGHT WANT TO MOVE ON TO THE SLAPP SUIT.

MR. VAN NEST: THE SLAPP SUIT, I CAN BE VERY BRIEF.

THE COURT: THE MERITS OF IT ARE ESSENTIALLY THE --

MR. VAN NEST: THE MERITS ARE THE SAME --

THE COURT: -- OF WHAT YOU ARE SAYING --

MR. VAN NEST: THE POLICY ISSUE IS, IN CALIFORNIA, THE LEGISLATURE HAS DECLARED THAT THERE SHOULD BE SPECIAL PROTECTION FOR PUBLISHERS, ARTISTS, NOVELISTS, PEOPLE ENGAGING IN EXPRESSIVE WORKS, WHETHER THOSE ARE FOR HIRE OR NOT.

THE COURT: WHAT'S THE SLAPP SUIT -- WHAT ARE THE KINDS OF THINGS THAT THE LEGISLATURE CITED WHEN IT PASSED THE STATUTE? WHAT'S THE SORT OF GENERIC SLAPP SUIT?

MR. VAN NEST: IT WAS STARTED PROBABLY AS A RESULT OF VARIOUS LIBEL SUITS FILED BY BUSINESSES AGAINST PEOPLE WHO HAD SPOKEN OUT AGAINST THOSE BUSINESSES.

BUT TODAY THE ANTISLAPP STATUTE HAS GONE FAR BEYOND THAT. AND IN THE HILTON CASE, THE NINTH CIRCUIT HAS HELD IT APPLIES TO WORKS OF EXPRESSION LIKE THESE. IN THAT CASE IT HAPPENED TO BE A HALLMARK CARD.

THE COURT: DO YOU HAVE A PICTURE OF THAT ONE?

MR. VAN NEST: I SURE DO.

(LAUGHTER.)

(COUNSEL DISPLAYS BLOWUP.)

MR. VAN NEST: I'VE GOT THEM ALL.

THIS IS A HALLMARK CARD WITH THE FACE OF PARIS HILTON, HER NAME AND A STOCK PHRASE SHE USES, "THAT'S HOT".

SO THE NINTH CIRCUIT EVALUATED THIS AND DIDN'T SAY THAT THIS FELL OUTSIDE THE SPHERE OF TRANSFORMATION. IT SAID IT IS A QUESTION OF FACT. EVEN THOUGH THEY ARE USING HER FACE, HER NAME, HER EXPRESSION, THESE FEW OTHER ELEMENTS ON THE PAGE THEY SAID CREATE A QUESTION OF FACT.

THE COURT: THEY DIDN'T THROW IT OUT AS A SLAPP SUIT?

MR. VAN NEST: THEY DID NOT. THEY SAID THE SLAPP STATUTE APPLIES AND WOULD APPLY TO A WORK LIKE THIS, BUT IN THIS PARTICULAR CASE, THEY SAID THESE FEW OTHER ELEMENTS DO CREATE A QUESTION OF FACT, EVEN THOUGH HERE THEY ARE ACTUALLY USING THE FACE, THE NAME, AND A STOCK EXPRESSION. THIS IS FAR MORE -- FAR LESS PROTECTABLE THAN SOMETHING LIKE AN ELECTRONIC ARTS VIDEO GAME WITH ALL OF THESE OTHER ELEMENTS IN IT.

THE COURT: THEY SAID THERE WAS A QUESTION OF FACT OR THEY SAID THERE WAS A PROBABILITY OF SUCCESS?

MR. VAN NEST: WELL, THEY SAID PROBABILITY OF SUCCESS, QUESTION OF FACT, THEY BLURRED IT UP AND SAID WE CAN'T DECIDE THIS ON A SLAPP MOTION.

BUT AS YOUR HONOR KNOWS, IN THIS, OUR PARTICULAR CASE, IF WE DEMONSTRATE, AS WE HAVE, THAT OUR CONDUCT, THESE GAMES, ARE ACTS OF EXPRESSION, WHICH WE HAVE DONE, THEN THE

BURDEN SHIFTS TO THE PLAINTIFFS TO SHOW A PROBABILITY OF SUCCESS ON THE MERITS.

THAT'S THE KEY LEVERAGE OF THE ANTISLAPP STATUTE; THAT CHANGING OF THE BURDEN. AND HERE, I WOULD SUBMIT AS I HAVE, THAT BASED ON THE GAMES THEMSELVES, WHICH ARE BEFORE THE COURT ON A REQUEST FOR JUDICIAL NOTICE, WHICH IS NOT OPPOSED, THOSE GAMES ARE WHAT THEY ARE. THEY HAVE THE ELEMENTS THEY HAVE, THEY ARE BASED ON ALL THE FEATURES WE TALKED ABOUT; AS A MATTER OF LAW, THEY CANNOT ESTABLISH A PROBABILITY OF SUCCESS THAT WE HAVE VIOLATED THE PRIVACY RIGHTS OF MR. KELLER OR ANY OTHER PUTATIVE CLASS MEMBER.

THE COURT: LET ME SEE IF ANY OF YOUR COLLEAGUES HAVE ANYTHING THEY NEED TO SAY OR ONE OF THE OTHER DEFENDANTS THAT'S NOT REPETITIVE OF WHAT MR. VAN NEST SAID.

MR. CURTNER: GOOD AFTERNOON, YOUR HONOR, FOR THE RECORD, AGAIN, I'M GREG CURTNER ON BEHALF OF THE NCAA. I WILL ADDRESS ENTIRELY DIFFERENT ISSUES THAN MR. VAN NEST.

TO RESPOND TO YOUR PRIOR QUESTION, THE JUDGE IN TENNESSEE IS LEON JENKINS.

THE COURT: OKAY. HE HAS ALL OF THE TENNESSEE CASES? THERE'S LIKE THREE OF THEM, IT SEEMS LIKE.

MR. CURTNER: I THINK THERE'S ONLY TWO, BUT I BELIEVE THEY'RE BOTH IN FRONT OF THAT JUDGE. AND WE ARE COMFORTABLE LITIGATING THERE. CLOSE TO HOME FOR US.

LET ME JUST ADDRESS THE ISSUES THAT ARE PERTINENT

ONLY TO THE NCAA, AND THEY ARE REALLY DIFFERENT THAN MR. VAN NEST'S ISSUES. I WILL BE BRIEF.

I WANT TO MAKE FOUR POINTS, AND THEY RELATE TO THE FIRST, FOURTH AND SIXTH COUNTS OF THE KELLER COMPLAINT.

THE FIRST COUNT IS THE INDIANA RIGHT OF PUBLICITY STATUTE, AND IT IS ALLEGED ONLY AGAINST THE NCAA. AND THE STATUTE ON ITS FACE BY ITS EXPRESS AND UNAMBIGUOUS TERMS REQUIRES A USE OF THE LIKENESS OF THE PERSONALITY IN QUESTION.

THERE IS NO REAL DISPUTE THAT THE NCAA DOES NOT USE ANYWHERE, MUCH LESS IN INDIANA, THE LIKENESS OF ANYBODY. IF THERE IS ANY USE GOING ON HERE, IT'S CERTAINLY DISPUTED, IT IS BY ELECTRONIC ARTS, AND THE NCAA SIMPLY DOES NOT USE ANYTHING.

THE MOST THE ALLEGATIONS ARE AGAINST THE NCAA IS THAT IT SOMEHOW HAS TOLERATED, OR NOT STOPPED, OR NOT PROHIBITED THE USE BY EA OR --

THE COURT: OR CONSPIRED.

MR. CURTNER: I AM COMING TO THAT.

THE COURT: IS THERE A CONSPIRACY CLAIM AGAINST YOU?

MR. CURTNER: BUT THE FIRST COUNT IS NOT A CONSPIRACY COUNT; THE FIRST COUNT IS ONLY USE. AND THERE'S SIMPLY -- IT'S BASICALLY ADMITTED THAT THERE IS NO USE. AND YOU CANNOT REWRITE THE STATUTE, AS THE PLAINTIFFS WOULD HAVE THE COURT DO, TO MAKE IT THE EQUIVALENT OF TOLERATING, CONSPIRING, OR AIDING AND ABETTING, OR SOME OTHER KIND OF THING.

THE COURT: TO CHARGE CONSPIRACY, THEY HAVE TO ALLEGE THAT YOU DID SOME UNDERLYING TORT AS YOU, EITHER YOU OR YOUR COLLEAGUES BRIEFED, SO I GUESS THE SERIOUS THAT'S THE UNDERLYING TORT AND THE BASIS FOR LIABILITY IS CONSPIRACY TO COMMIT THAT TORT.

MR. CURTNER: EXCEPT THAT THE UNDERLYING TORT OR STATUTORY VIOLATION IS ALLEGED ONLY AGAINST THE NCAA, AND IT IS ONLY UNDER THE INDIANA STATUTE, AND THE INDIANA STATUTE REQUIRES A USE. SO THERE CANNOT BE THE UNDERLYING VIOLATION TO SUPPORT EITHER THE VIOLATION ITSELF OR THE CONSPIRACY TO VIOLATE BECAUSE THERE IS NO USE. AND THERE IS NO WAY THEY CAN GET OUT OF THAT BOX. IT'S A LOGICAL IMPOSSIBILITY SO LONG AS THERE'S NOTHING TO SUPPORT, AND THERE'S NO ALLEGATION THAT WOULD SUPPORT USE BY THE NCAA.

SECOND POINT. THE STATUTE BY ITS EXPRESS TERMS ALSO REQUIRES THAT SOME ATTRIBUTE OF THE PERSONALITY HAVE COMMERCIAL VALUE THAT IS BEING USED BY THE DEFENDANT.

HERE, THERE IS NO ALLEGATION THAT MR. KELLER HAS COMMERCIAL -- HIS PERSONALITY OR ANY ATTRIBUTE OF HIS PERSONALITY HAS COMMERCIAL VALUE. THE ONLY ARGUMENT THAT PLAINTIFFS MAKE IN RESPONSE TO OUR MOTION IS THAT THE GAME HAS VALUE. AND THERE IS CERTAINLY NO DOUBT THAT THE GAME HAS VALUE. THAT DOESN'T MEAN THAT ANY GIVEN INDIVIDUAL LIKE MR. KELLER HAS ANY VALUE WHATSOEVER. HE COULD HAVE ZERO VALUE, AND THERE IS NO ALLEGATION TO THE CONTRARY.

THE ONLY OTHER ARGUMENT THEY MAKE IS THAT IN SOME DIFFERENT CIRCUMSTANCES, IN SOME DIFFERENT GAMES, SOME NFL PLAYERS ARE PAID MONEY FOR THEIR LIKENESS AND FOR THE RIGHT TO USE THEIR NAMES AND PHOTOGRAPHS, ET CETERA, IN A MUCH DIFFERENT GAME, IN A MUCH MORE REALISTIC GAME. BUT, AGAIN, THAT SAYS NOTHING ABOUT THE CLAIM THAT MR. KELLER HAS ANY VALUE.

WE DO NOT KNOW WHETHER MR. KELLER'S LIKENESS, PERSONALITY OR ATTRIBUTES, WHATEVER THEY CLAIM ARE BEING USED BY EA, HAVE ANY VALUE WHATSOEVER ON THE FACE OF THESE PLEADINGS.

SO, THAT TAKES CARE OF COUNT ONE.

THE FOURTH COUNT IS THE CONSPIRACY COUNT. YOUR HONOR HAS IT EXACTLY RIGHT. THEY ALLEGE THE CONSPIRACY IS TO VIOLATE -- IT IS TO VIOLATE THE RIGHT OF PUBLICITY STATUTE, BUT THE NCAA CAN'T DO THAT BECAUSE IT DOESN'T USE ANYTHING.

NOW, PERHAPS, AND THEY DON'T SAY THIS, THEIR THEORY IS THAT IT IS A CONSPIRACY TO VIOLATE THE CALIFORNIA LAW ON PUBLICITY, BUT THEY PLEAD THEMSELVES INTO A CORNER THERE AS WELL BECAUSE THEY PLEAD EXPRESSLY IN THEIR COMPLAINT IN KELLER IN PARAGRAPH 13 AND PARAGRAPH 15 THAT BYLAW 12.5, WHICH PROHIBITS THE USE OF NAME, PICTURES AND LIKENESSES, IS MADE APPLICABLE TO CLC AND EA, AND THAT IN PARAGRAPH 15, THAT THE LICENSE AGREEMENT BETWEEN CLC AND EA FOR THE USE OF VARIOUS THINGS, WHICH INCLUDES THE NCAA NAME, AND THE STADIUMS, AND ALL THESE OTHER THINGS, EXPRESSLY PROHIBITS THE USE OF NAMES OR

LIKENESSES.

SO, ON THE FACE OF THIS COMPLAINT, THE NCAA IS ENFORCING ITS RULES THAT PROHIBIT THE USE OF NAMES, LIKENESSES, AND PICTURES. AND ON THE FACE OF THIS COMPLAINT, THE LICENSE TO EA PROHIBITS THEM FROM DOING THOSE THINGS.

NOW, SO MUCH FOR THE CONSPIRACY. THE CONSPIRACY ON ITS FACE IS TO DO WHAT IS PERMITTED BY THE NCAA RULES, WHICH PROHIBITS EXACTLY WHAT THEY CLAIM IS GOING ON.

SO THEN THEY SAY, OH, THERE IS A DIFFERENT CONSPIRACY REALLY GOING ON HERE, AND THAT IS A CONSPIRACY TO SORT OF SECRETLY VIOLATE THE NCAA BYLAW AND TO SECRETLY VIOLATE THE LICENSE AGREEMENT EXPRESS PROHIBITIONS, BUT AS TO THAT CONSPIRACY, THERE IS NOT A SHRED OF FACTUAL SUPPORT.

THERE IS A CONCLUSION OF CONSPIRACY, BUT THAT'S NOT ENOUGH AS THE COURT WELL KNOWS FROM OTHER CASES, IN THE STATIC RAM CASE AND VARIOUS OTHERS, AND TWOMBLY AND IQBAL, THAT'S NOT ENOUGH. THEY HAVE TO PLEAD FACTS TO SUPPORT THAT CONCLUSION, AND THEY CAN'T.

NOW, THEY DO PLEAD THAT THERE WERE CONVERSATIONS BETWEEN THE NCAA AND EA, BUT THOSE ARE EQUALLY CONSISTENT WITH ENFORCING THE AGREEMENTS AS WRITTEN WHICH PROHIBIT THE SO-CALLED IMPROPER USE. AND THERE IS NO ALLEGATION WHATSOEVER THAT WOULD SUPPORT THIS SORT OF SECRET SIDE CONSPIRACY OTHER THAN A SUSPICION AND A SUMMARY CONCLUSION. THAT DOESN'T GET THEM THERE.

MY LAST POINT, THE SIXTH COUNT AGAINST THE NCAA IS A CONTRACT THEORY. THE CONTRACT IS SAID TO BE THE SIGNATURE BY THE STUDENT ATHLETE DURING THE TIME THEY ARE A STUDENT ATHLETE ON AN ANNUAL CERTIFICATION UNDER BYLAW 12.5.

YOU HAVE THAT BYLAW BEFORE YOU BECAUSE IT'S PLEAD IN SOME OF THESE CASES, AND IT IS ATTACHED IN ITS ENTIRETY TO A DECLARATION IN THE, ONE OF THE OTHER PLEADINGS, BUT IT'S NOT A CONTRACT IN ANY FORM.

IT HAS NO QUID PRO QUO. IT HAS NO OFFER. IT HAS NO ACCEPTANCE, HAS NO PERFORMANCE BY THE NCAA. THERE IS NOTHING IN IT THAT MAKES IT INTO A CONTRACT. IT IS NOTHING BUT A CERTIFICATION.

THE COURT: OKAY.

MR. CURTNER: JUST TO FINISH ON THAT, THE THEORY THAT'S MADE IN THEIR BRIEF IS THAT THE -- THERE IS SOME IMPLIED DUTY IN THIS SO-CALLED CONTRACT BY THE NCAA NOT TO DO ANYTHING THAT WOULD PREVENT THEM FROM BEING ELIGIBLE.

WELL, MR. KELLER WAS ELIGIBLE DURING THE ENTIRE TIME PERIOD THAT HE WAS A STUDENT ATHLETE. AND SO THE NCAA HAS NOT IN ANY WAY BREACHED THIS CONTRACT, IF IT WAS A CONTRACT. AND SO THERE'S JUST NO BASIS FOR THE CONTRACT CLAIM EITHER.

THOSE ARE THE ONLY CLAIMS AGAINST MY CLIENT.

THANK YOU.

THE COURT: OKAY. THANK YOU.

MR. HENN: I'M CHARLIE HENN HERE ON BEHALF OF

COLLEGIATE LICENSING COMPANY. AND FOR THE MOST PART, OUR RESPONSES TO THE VARIOUS CLAIMS AGAINST CLC ARE IDENTICAL TO NCAA AND I AM NOT GOING TO REPEAT THOSE.

QUICKLY, JUST FOR THE RECORD, I UNDERSTAND THE JUDGE IN THE TENNESSEE CASE IS JUDGE JORDAN, LEON JORDAN.

THE COURT: RIGHT.

MR. HENN: CLC DOESN'T BELONG IN THIS CASE. CLC IS JUST AN AGENT. THEY ARE THE LICENSING AGENT FOR A NUMBER OF COLLEGES AND UNIVERSITIES AS WELL AS THE NCAA. THEIR -- THE CLAIMS THAT HAVE BEEN ASSERTED AGAINST CLC ARE JUST THE CIVIL CONSPIRACY COUNT AND THE UNJUST ENRICHMENT COUNT.

OUR UNJUST ENRICHMENT DEFENSE IS THE SAME AS THE OTHERS, WHICH IS THEY HAVE PLEADED THAT A CONTRACT COVERS THE SAME SUBJECT MATTER AND THUS THERE CAN'T BE A SEPARATE UNJUST ENRICHMENT CLAIM --

THE COURT: THEY PLEAD IN THE ALTERNATIVE AND THEY SAY IT'S A QUESTION OF FACT AS TO WHETHER YOU ARE AN AGENT FOR THIS POINT.

MR. HENN: WELL, I THINK IF YOU LOOK AT THE WAY THE COMPLAINT IS PLEADED, THEY PLEAD THAT WE ARE AN AGENT.

THE COURT: FOR SOME PURPOSES, BUT NOT NECESSARILY FOR EVERYTHING.

MR. HENN: WELL, THEY SAY THAT WE ARE THE LICENSING ARM OF THE NCAA. THEY SAY THAT AT THE TIME THAT WE ENGAGED IN THE ACTS IN THE COMPLAINT, WE REPRESENTED THE NCAA, WHICH IS

THE CALIFORNIA CIVIL CODE DEFINES AN AGENT AS ONE WHO REPRESENTS ANOTHER. SO THE COMPLAINT EXPRESSLY SAYS THAT.

IT SAYS THAT AT THE TIME WE WERE NEGOTIATING THE LICENSE, CLC WAS DIRECTED BY NCAA. IF WE WERE NOT THEIR AGENT, I AM NOT SURE HOW WE COULD HAVE BEEN DIRECTED BY THEM.

SO, IF YOU TAKE THE COMPLAINT AT ITS FACE VALUE, THEY PLEADED THAT CLC WAS AN AGENT. IT DID EVERYTHING THAT AN AGENT WOULD DO. THERE'S NO ALLEGATION IN THE COMPLAINT, FOR EXAMPLE, THAT THE CLC -- THAT CLC WASN'T AN AGENT AT ANY TIME DURING THE ACTIVITIES.

THE COURT: I DON'T THINK THEY HAVE TO ALLEGE TO THE CONTRARY.

MR. HENN: BUT --

THE COURT: ANYWAY, GO AHEAD.

MR. HENN: SO THEIR POINT IS, THEY SAY IT IS A QUESTION OF FACT, BUT THE CASE LAW, EVEREST INVESTMENTS, FOR EXAMPLE, SAID THAT WHEN THE COMPLAINT PLEADS THE ELEMENTS OF AGENCY, THE PLAINTIFF CAN'T GO BACK LATER AND SORT OF DISTANCE ITSELF FROM THOSE PLEADINGS AND SAY WELL, IT'S A QUESTION OF FACT. YOU MIGHT NOT BE AN AGENT, EVEN THOUGH I'VE SAID YOU ARE AN AGENT.

AND IN THAT CASE, THE EVEREST INVESTMENT CASE, THE COURT SPECIFICALLY SAID THAT WHEN -- THEY GRANTED A MOTION TO DISMISS IN THAT CASE WHERE THERE WAS AN ALLEGATION OF AGENCY. SO, WHERE THERE ARE THE ALLEGATION HERE, IT CAN BE DECIDED ON A

MOTION TO DISMISS.

IN THE TROOST CASE, WHICH WE CITE, THE COURT SAID THAT WHERE THE PLEADINGS ARE CLEAR, AND I THINK THE LANGUAGE WAS SOMETHING THAT THEY ARE SUSCEPTIBLE OF BUT A SINGLE INFERENCE, IT'S NOT A QUESTION OF FACT. THE COURT CAN ACTUALLY SAY, YES, YOU ARE PLEADING THEY ARE AN AGENT, THEREFORE, THE AGENT IMMUNITY DEFENSE APPLIES.

IN THIS INSTANCE, NO AMOUNT OF DISCOVERY WOULD CHANGE THE FACT THAT CLC IS AN AGENT. THAT'S WHAT THEY ARE.

THE COURT: OKAY. DID YOU WANT TO RESPOND?

MR. CAREY: THANK YOU, YOUR HONOR, ROB CAREY.

YOUR HONOR, THERE CLEARLY IS A TREMENDOUS MULTIFACETED EFFORT GOING ON HERE, BUT THE EFFORT IS TO MAKE THIS GAME AS REALISTIC AS POSSIBLE. IT'S TO BE AS UNTRANSFORMATIVE AS THEY CAN BE. SO IT'S MULTIFACETED AND THE MULTIFACET IS SAY OVER A PHOTO OR A FILM, OR THAT THEY HAVE ADDED TO ONE PRONG OF THE GAME.

THERE'S TWO PRONGS. THERE'S THE BIOGRAPHIES WITH THE PLAYERS ON THERE WITH ALL OF THEIR PERSONAL INFORMATION AND THEN THERE'S LITTLE GAME AVATAR. AND WHAT THEY HAVE DONE IS THEY MADE LITTLE GAME AVATAR ACT JUST LIKE THE REAL LIFE COUNTERPART WOULD ACT. THEY'VE MADE IT HAVE THE SAME PLAYING ABILITY, THE SAME CHARACTERISTICS. SO THE MULTIFACET GOING ON HERE IS THEY HAVE ADDED THOSE THINGS THAT DON'T EXIST IN FILM AND SNAPSHOTS.

THE COURT: WHAT ABOUT THE FILM OF THE LIFE OF RUDOLPH VALENTINO THAT IS ATTEMPTED TO BE MADE AS REALISTIC AS RUDOLPH VALENTINO'S LIFE AND TIMES?

MR. CAREY: EXCEPT THAT THE PLAINTIFFS IN THAT CASE ARGUED THAT IT WAS AN INACCURATE FALSE DEPICTION OF A LIFE STORY THAT'S NOT HIS. SO IT CLEARLY TRANSFORMED HIS LIFE TO SOMETHING THEY OBJECTED TO.

BUT IF I UNDERSTAND THEIR POINT CORRECTLY, IF YOU BACK THIS THREE STOOGES OUT AND MADE THEM DOLLS IN A FILM SETTING THAT WAS ONE OF THEIR FILMS, THAT WOULD BE TRANSFORMATIVE SOMEHOW.

THEN IF YOU ADD PLAYERS TO THE GAME WHO ARE PLAYERS THAT PLAY ON THE TEAM WITH MR. KELLER, OR ANY OF THE OTHER 2800 PLAYERS, THAT THAT VOLUME SOMEHOW TRANSFORMS IT FROM A FOOTBALL SETTING THAT IS EXACTLY THE SETTING THEY ARE IN ROUTINELY THAT THEY BUY LICENSING RIGHTS FOR, TO HAVE THE STADIUM, THE LOGOS, THE CHEERLEADERS, EVERYTHING LOOK JUST LIKE IT WAS WHEN THEY PLAYED.

I THINK THE HILTON CASE SHOWED THAT'S A PROBLEM. IT'S THE SETTING IN WHICH YOU WOULD FIND THAT PERSON.

BUT BEFORE I GO DOWN THAT ROAD, I WOULD LIKE TO TURN --

THE COURT: YOU DON'T REALLY SEE PARIS HILTON ACTING AS A WAITRESS.

MR. CAREY: COULD I SEE HER? WELL, ON HER SHOW,

YEAH. NO, NOT REALLY, BUT I HAVE ACTUALLY NEVER SEEN THAT SHOW.

THE COURT: I HAVEN'T EITHER.

MR. CAREY: THE TWO PROCEDURAL ISSUES I WOULD LIKE TO ADDRESS REAL BRIEFLY BEFORE I TURN TO THE TRANSFORMATIVE ELEMENTS HERE, ONE IS -- AND THIS APPLIES TO THE ANTISLAPP MOTION TOO. THIS RELATES TO WHAT I THINK IS A VERY IMPORTANT ISSUE.

IT'S THE CONTRACT -- IT'S THE ARGUMENT THAT THE EA SPORTS HAS CONTRACTED AWAY ITS FIRST AMENDMENT RIGHTS. IN THE BRIEF, IT GETS VERY SHORT SHRIFT ON THEIR BRIEF. THEY SAY PLAINTIFF HAS TO PLEAD THAT THERE WAS AN EXPRESS KNOWING AND VOLUNTARY RELINQUISHMENT OF THE FIRST AMENDMENT RIGHTS.

FIRST, THAT'S WRONG. THAT'S NOT WHAT THEY HAVE TO PLEAD. THEY HAVE TO PLEAD FACTS THAT, WHEN TAKEN IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF, COULD LEAD TO AN INFERENCE THAT THERE WAS A WAIVER OF FIRST AMENDMENT RIGHTS.

SO THERE'S TWO THINGS. ONE, IT IS AFFIRMATIVE DEFENSE. COMEDY III MAKES THAT CLEAR. IT'S AN AFFIRMATIVE DEFENSE. WE DON'T HAVE TO PLEAD ANYTHING IN OUR CLAIM GUESSING WHAT THEIR AFFIRMATIVE DEFENSES MIGHT BE. AND, FRANKLY, THE WAIVER IS AN AFFIRMATIVE DEFENSE TO THE FIRST AMENDMENT AFFIRMATIVE DEFENSE. SO WE DON'T HAVE TO ADD ANYTHING IN OUR COMPLAINT. BUT, MOREOVER, WE ACTUALLY DID.

THERE'S AN ALLEGATION IN THE COMPLAINT THAT SAYS

THERE'S A CONTRACT BETWEEN THESE TWO PARTIES WHERE EA SPORTS RELINQUISHED ITS FIRST AMENDMENT -- WHERE IT RELINQUISHED THE ABILITY TO PUT THE LIKENESSES IN THE GAME. THAT IS A FACT THAT A JURY COULD SAY, YOU KNOW WHAT? SOPHISTICATED PERSON, BARGAINING AT ARM'S LENGTH, THEY KNOW WHAT THEY ARE DOING, THEY AGREED TO NOT USE THOSE LIKENESSES. A JURY COULD INFER THAT THAT'S A WAIVER OF ITS FIRST AMENDMENT RIGHT.

WHY THAT'S IMPORTANT IS BECAUSE UNLIKE THIS SITUATION WHERE YOU ARE LOOKING AT THE TRANSFORMATIVENESS OF THE PRODUCT, AND YOU HAVE THE GAME INCORPORATED INTO THE COMPLAINT ESSENTIALLY, THE COURT, AS A MATTER OF LAW, COULD LOOK AT THAT AND SAY, THAT IS SO TRANSFORMATIVE I DON'T NEED TO SEE THE ACTUAL PERSON. I AM GOING TO FIND THAT IS TRANSFORMATIVE AS A MATTER OF LAW. IT COULD DO THAT BECAUSE THE GAME IS PART OF THE ANALYSIS.

IT CAN'T DO THAT FOR THE WAIVER ARGUMENT ON FIRST AMENDMENT. AND EVEN IF THE GAME IS TRANSFORMATIVE, IF THEY WAIVE THOSE RIGHTS, THE TRANSFORMATIVE DEFENSE DOESN'T APPLY.

SO, FROM A PRACTICAL STANDPOINT, ABSENT SOME INTENSIVE FACT HEARING ON THE AFFIRMATIVE DEFENSE OF WAIVER TO THE AFFIRMATIVE DEFENSE OF THE FIRST AMENDMENT, YOU CAN'T RESOLVE THE MOTION ON THE TRANSFORMATIVENESS OF THE MOTION.

SECOND, THE POSITION WE FIND OURSELVES IN IS THEY HAVE INTRODUCED THE GAME BY JUDICIAL NOTICE WHICH WE DID NOT OPPOSE, SO THE COURT HAS A MOTION TO DISMISS WITH THE GAME

INCLUDED.

THEY HAVE NOT -- WE ARE NOT LOOKING AT THE PLAYERS, WHAT THEY ACTUALLY LOOK LIKE, WHAT THEY REALLY LOOK LIKE, WHICH MEANS THAT ANY FINDING OF TRANSFORMATIVENESS WILL HAVE TO COME FROM SOMETHING OTHER THAN THE PLAYERS. BECAUSE OUR COMPLAINT SAYS THAT THEY ARE EXACT REPLICAS, THEY -- WE INTRODUCE THE GAME INTO IT, WE HAVE NOT HAD A CHANCE TO GO OUT AND LOOK AT WHETHER OR NOT IN REALITY THOSE PLAYERS LOOK EXACTLY LIKE THE PLAYERS.

AND THE SAME THING, I SUPPOSE, COULD BE SAID FOR THE CLC LICENSING ARGUMENT THAT THEY ARE INJECTING IN WHAT WE HAVE ALLEGED TO BE EXACTLY WHAT THE STADIUMS LOOK LIKE.

SO, IF THERE IS A TRANSFORMATIVE ELEMENT OF IT, IT'S GOING TO HAVE TO COME FROM SOMETHING OTHER THAN THOSE TWO THINGS. IT'S GOING TO HAVE TO COME FROM A STORY LINE OR SOMETHING OTHER THAN THE STADIUM AND THE PLAYERS, WHICH THERE IS NOTHING. IT'S AS HILTON SAID, THERE IS NO LARGER STORY HERE. THERE IS NO -- THEY DON'T HAVE A STORY.

THIS GAME SHIFTS STATICALLY. IT COMES OUT OF THEIR MANUFACTURING FACILITY WITH BIOGRAPHIES THAT NEVER CHANGE ANY AT POINT IN THIS GAME, WITH THOUSANDS OF PLAYERS ON THERE, WHERE THEY LIVE, HOW THEY PLAY, WHETHER THEY ARE RIGHT HANDED, WHAT THEIR HAIR LOOKS LIKE.

THE COURT: THEY SAY THE GAMES AREN'T THE REAL GAMES. YOU PLAY THEM AND THE REAL GAME THERE WAS A PASS AND

HERE THEY CAN MAKE IT A -- SOMETHING ELSE.

MR. CAREY: I UNDERSTAND THE ARGUMENT, BUT ALL THAT IS SAYING IS YOU CAN TAKE A VERY REAL LIFE REPLICA OF SAM KELLER AND MAKE IT DO WHAT YOU WANT.

THAT WOULD BE LIKE SAYING IF YOU GAVE A MAGIC MARKER TO THE THREE STOOGES T-SHIRT AND SAID CHANGE IT AFTER WE SELL IT TO YOU, IT SOMEHOW BECOMES TRANSFORMATIVE ON THEIR BEHALF. THEY DIDN'T TRANSFORM IT, THE PLAYERS DO.

THE COURT: WHAT ABOUT THE OTHER END OF IT? THE PUBLIC AFFAIRS REPORTING END, HOW DO YOU DISTINGUISH FANTASY FOOTBALL?

MR. CAREY: WELL, FANTASY FOOTBALL, I MEAN THEY ARE TAKING SAM KELLER'S AND EVERY OTHER PLAYER OUT THERE, THEY ARE TAKING THOSE PLAYERS' STYLE OF PLAY, CHARACTERISTICS AND EMBODYING THEM IN A PLAYER.

I THINK THE HILTON CASE SAID IT ON THESE VERY FACTS. THEY SAID, LOOK, IT'S ABOUT REPORTING. THAT STATUTE, THAT EXEMPTION TO THE STATUTE DEALS WITH REPORTING. THEY SPECIFICALLY EMPHASIZED THE WORD.

SO THERE'S NOTHING NEWSWORTHY HERE. THIS IS NOTHING -- THERE'S 2800 PLAYERS OR SOMETHING IN EVERY ONE OF THESE GAMES. THEY ARE NOT REPORTING FACTS. THE GAME'S NOT RELYING ON HOW THAT PERSON PLAYED THE WEEK BEFORE, SOME NEWSWORTHINESS ELEMENT TO HIS PLAY. THIS HAS TO DO WITH -- AND MR. KELLER COULD BE PUT BACK INTO A GAME RIGHT NOW. THERE IS

NOTHING TO STOP THEM FROM DOING THAT. THEY DO LEGACY GAMES. THERE'S NOTHING NEWSWORTHY ABOUT THAT.

BUT I DON'T THINK IT HAS ANYTHING NEAR WHAT IT NEEDS TO SAY IT FALLS UNDER THAT EXEMPTION. I AGREE WITH THE COURT; IT'S A CONTINUUM. IF YOU WANT TO BE NEWSWORTHY AND OUT THERE TELLING PEOPLE ABOUT SOMETHING, AN ISSUE OF PUBLIC INTEREST OR A PUBLIC ISSUE, THEN YOU HAVE TO HAVE SOMETHING PRETTY IMPORTANT.

THE OTHER CATEGORIES IN THAT STATUTE ARE POLITICAL CAMPAIGNS, NEWS OF THE DAY, THOSE TYPES OF THINGS, NOT JUST SOME FOOTBALL PLAYER WHO PEOPLE KNOW HIS NAME. I DON'T THINK THAT'S ENOUGH.

THE COURT: YOU WANT TO TALK ABOUT NCAA AND CLC?

MR. CAREY: YOUR HONOR, I WOULD TURN THAT OVER TO MR. PAYNTER, WHO IS GOING TO ADDRESS THAT.

THE COURT: ALL RIGHT.

MR. PAYNTER: YOUR HONOR, I AM HAPPY TO --

THE COURT: I'LL GIVE YOU A COUPLE OF MINUTES.

MR. PAYNTER: SURE. IF THERE'S ANYTHING IN PARTICULAR YOU WANT ME TO TALK ABOUT, JUST LET ME KNOW.

THE COURT: WELL, THE THINGS THAT THEY REFERENCED, THE -- WHAT YOUR CLAIM IS AS FAR AS NCAA VIOLATING THE INDIANA STATUTE AND CLC'S AGENCY -- THE AGENCY THEORY ON CLC.

MR. PAYNTER: SURE, YOUR HONOR.

SO, STARTING WITH THE NCAA. THE NCAA ARGUES THAT

OUR STATUTORY CLAIM FAILS BECAUSE WE DID NOT -- SAM KELLER -- IT DID NOT USE HIS LIKENESS AS THAT TERMS IS UTILIZED IN THE STATUTE, YOUR HONOR.

AND THERE ARE BASICALLY TWO PROBLEMS WITH THIS ARGUMENT. FIRST OF ALL, YOUR HONOR, THE NCAA DID USE SAM KELLER'S LIKENESS WHEN IT RECEIVED COPIES OF THE GAME IN ADVANCE. IT EXPRESSLY APPROVED --

THE COURT: COPIES OF WHAT?

MR. PAYNTER: RECEIVED COPIES OF THE GAME FROM ELECTRONICS ARTS IN ADVANCE OF ITS PUBLICATION. IT EXPRESSLY APPROVED THE USE OF ITS LIKENESS IN VIOLATION OF EXPRESS DUTIES NOT TO DO SO AND THEN IT PROFITED BY THE USE OF HIS LIKENESS.

AND, THUS, CLEARLY, YOUR HONOR, THAT IS A USE AS THAT TERM IS ORDINARILY UNDERSTOOD AND IN FAVOR OF ITS VERY RESTRICTIVE VIEW OF THE VERB "TO USE". ALL THAT NCAA CITES, YOUR HONOR, IS ONE RUNG OF THE MANY DEFINITIONS IN MERRIAM WEBSTER'S ONLINE DICTIONARY.

INCIDENTALLY, THEY CITE THE NOUN EVEN THOUGH IT'S USED IN THE STATUTE AS A VERB. BUT IF YOU LOOK IT UP, YOUR HONOR, YOU WOULD SEE THAT ONE OF THE OTHER COMMON DEFINITIONS WOULD BE, I AM QUOTING "TO CARRY OUT A PURPOSE OR ACTION BY MEANS OF," WHICH IT OBVIOUSLY WOULD APPLY HERE.

HERE, THE PURPOSE OF THE NCAA WAS TO PROFIT OFF NCAA'S STUDENT ATHLETES' NAMES AND LIKENESS JUST IN VIOLATION OF ITS CONTRACTUAL DUTIES WHILE OSTENSIBLY AND HYPOCRITICALLY,

YOUR HONOR, TO PROMOTE AMATEURISM, AND IT CARRIED OUT THAT PURPOSE BY EXPRESSLY APPROVING EA'S VIDEO GAMES KNOWING FULL WELL, YOUR HONOR, THOSE VIDEO GAMES CONTAINED PLAYER LIKENESSES.

SO, FOR THAT REASON, THE NCAA CERTAINLY USED KELLER'S LIKENESS, BUT EVEN IF YOU DID ADOPT THE NCAA'S VERY RESTRICTIVE DEFINITION OF THE VERB "TO USE", YOUR HONOR, AS YOUR HONOR POINTED OUT, WE HAVE ALLEGED THAT IT'S A CO-CONSPIRATOR. AS A CO-CONSPIRATOR, YOUR HONOR, THE NCAA IS LIABLE FOR ALL THE ACTIONS OF ELECTRONIC ARTS.

THE COURT: THEY SAY YOU DIDN'T ALLEGE THAT ELECTRONIC ARTS VIOLATED THE INDIANA STATUTE.

MR. PAYNTER: YOU ARE CORRECT, YOUR HONOR. THAT IS THEIR ONLY RESPONSE. THEY SAY BECAUSE WE HAVE NOT ACTUALLY ALLEGED A CAUSE OF ACTION AGAINST ELECTRONIC ARTS UNDER THE INDIANA STATUTE, WE SOMEHOW CANNOT CLAIM THAT THE NCAA CONSPIRED WITH THE EA IN VIOLATION OF THAT STATUTE.

YOUR HONOR, WHETHER OR NOT WE ALLEGE A CLAIM UNDER THE INDIANA STATUTE AGAINST ELECTRONIC ARTS, IN FACT, FOR THAT MATTER, YOUR HONOR, WHETHER OR NOT WE SUE ELECTRONIC ARTS AT ALL.

THE COURT: YOU DON'T HAVE TO NECESSARILY SUE THEM, BUT YOU HAVE TO ALLEGE THAT SOMEBODY COMMITTED THE TORT.

MR. PAYNTER: YES.

THE COURT: IF THEY ARE RIGHT THAT THEY CAN'T COMMIT

THE TORT, THEN SOMEBODY ELSE HAS TO BE ABLE TO COMMIT THE TORT BEFORE YOU CAN CONSPIRE WITH ANYONE TO --

MR. PAYNTER: CORRECT, YOUR HONOR --

THE COURT: -- HAVE THE TORT COMMITTED.

WHY DON'T YOU MOVE ON REAL QUICKLY TO THE CLC. WE NEED TO MOVE ON TO THE ANTITRUST CASE AS WELL.

MR. PAYNTER: SURE, NO PROBLEM.

I THINK IT SEEMS THE THRUST OF THEIR ARGUMENT YOU WERE MOST INTERESTED IN IS THIS AGENT IMMUNITY RULE, YOUR HONOR. AS YOUR HONOR CORRECTLY IDENTIFIED, IT IS AN ISSUE OF FACT. EVEN IF THE CLC WAS THE AGENT OF THE NCAA WHEN IT LICENSED THE NCAA LOGOS, IT WAS NOT ACTING AS AN AGENT OF THE NCAA WHEN IT AUTHORIZED THE USE OF -- WHEN IT AUTHORIZED THE USE OF PLAYER LIKENESSES, YOUR HONOR, IT WAS ACTING AS A CO-CONSPIRATOR OF THE NCAA.

BUT MORE TO THE POINT, YOUR HONOR, THE AGENT IMMUNITY RULE, AND THE CASES ARE CLEAR HERE, NEVER APPLIES, WOULD NOT APPLY IN THIS CASE BECAUSE THE CLC HAD INDEPENDENT DUTIES THAT WERE COMPLETELY SEPARATE AND APART FROM ANY DUTIES OF THE NCAA, YOUR HONOR.

THE COURT: WHAT DUTY DID IT HAVE TO THE ATHLETES?

MR. PAYNTER: IT HAD STATUTORY DUTIES NOT TO MISAPPROPRIATE LIKENESSES, YOUR HONOR.

SO IF YOU LOOK AT THE BERG CASE, IT SAYS SPECIFICALLY THAT THE AGENT IMMUNITY RULE NEVER APPLIES WHEN

THE DEFENDANT VIOLATES A DUTY THAT HE OR SHE INDEPENDENTLY OWES TO THE PLAINTIFF, YOUR HONOR HONOR.

SO, FOR EXAMPLE, IF I WENT OUT AND CONSPIRED WITH SOMEONE TO COMMIT BATTERY, YOUR HONOR, IT IS OBVIOUSLY NOT A DEFENSE IN A SUBSEQUENT SUIT BY THE VICTIM IN THIS COURT TO SAY THAT I WAS ONLY ACTING AS AN AGENT OF MY CO-CONSPIRATOR.

AND THE REASON IT WOULDN'T BE, YOUR HONOR, IS BECAUSE I HAVE AN INDEPENDENT DUTY NOT TO GO AROUND BATTERING PEOPLE. SIMILARLY, YOUR HONOR, THE CLC HAS AN INDEPENDENT DUTY THAT IS SEPARATE AND APART FROM ANY DUTIES OF THE NCAA NOT TO GO AROUND STEALING PLAYER LIKENESSES.

SO IT'S NOT SURPRISINGLY, YOUR HONOR, THAT CLC DOES NOT CITE A SINGLE CASE THAT APPLIED THE AGENT IMMUNITY RULE IN A SITUATION WHERE THE AGENT OWED AN INDEPENDENT DUTY ITSELF.

THE COURT: OKAY.

WHO WANTED TO TALK ABOUT ANTITRUST?

MR. CAREY: MAY I SAY ONE THING FOR THE RECORD?

THE TIGER WOODS PICTURE, AND I DON'T KNOW IF MY VERSION IS INCORRECT OR IF THIS IS ACCURATE, THE VERSION I HAVE SEEN ACTUALLY HAS A MANTLE ON THE BOTTOM WITH SOME WRITING ON IT. SO I DON'T KNOW IF THAT IS ACCURATE OR NOT ACCURATE, BUT TO CLIP THAT OFF IS -- I THINK NEEDS TO BE CORRECTED.

MR. CURTNER: GOOD AFTERNOON, YOUR HONOR, GREG CURTNER FOR THE NCAA. I WILL TAKE THE LEAD ON THE ANTITRUST ISSUES IN O'BANNON AND NEWSOME, AND I WILL TREAT THEM TOGETHER.

I THINK THE ISSUES ARE ESSENTIALLY THE SAME EVEN THOUGH THE NEWSOME COMPLAINT IS MUCH MORE STRIPPED DOWN THAN THE O'BANNON COMPLAINT. THERE ARE SOME THINGS IN THE O'BANNON COMPLAINT THAT WE THINK HELP US, BUT ESSENTIALLY THE NEWSOME COMPLAINT IS DEFICIENT ON THE SAME GROUNDS.

AND ESSENTIALLY, THAT IS, THEY ARE LACKING IN ANY COHERENT ANTITRUST THEORY OF WHO, WHAT, WHEN, WHERE -- WHEN OR WHY, AND DO NOT MEET THE STANDARDS OF TWOMBLY OR IQBAL.

I WANT TO TALK SPEAK ABOUT ARTICLE III STANDING, ANTITRUST STANDING, ANTITRUST INJURY, THE CONSPIRACY ALLEGATIONS, THEIR WAY -- THE PLAINTIFFS ATTEMPT TO CLAIM THAT IT IS A PER SE VIOLATION AND, THEREFORE, THEY DON'T NEED TO MEET SOME OF THESE REQUIREMENTS, AND THE ISSUE OF WHETHER THEY HAVE TO BE A MARKET PARTICIPANT OR NOT, THE ISSUE OF WHETHER THEY HAVE TO PLEAD IRRELEVANT MARKET OR NOT, AND FINALLY THE STATUTE OF LIMITATIONS.

I THINK AS TO EACH AND EVERY ONE OF THOSE, THE COMPLAINTS THAT WE HAVE ARE DEFICIENT, AND AS TO ALL OR NEARLY ALL OF THOSE, THEY CANNOT REMEDY IT THROUGH AMENDMENT.

FIRST OF ALL, THERE IS NO ALLEGATION THAT EITHER OF THEM DURING THE TIME THAT THEY WERE STUDENT ATHLETES, AND THIS GOES BACK TO '90S, THEY GRADUATED MOST RECENTLY IN 1995, THAT EITHER OF THEM EVEN SIGNED THESE FORMS THAT THEY COULD NOW COMPLAIN ABOUT.

THE COURT: WE WILL HEAR WHAT THEY HAVE TO SAY ABOUT

THAT.

MR. CURTNER: THAT THEY DID SO WILLINGLY OR UNWILLINGLY, THAT THEY MAY HAVE SIGNED SOME DIFFERENT FORMS THAT BEAR ON THESE ISSUES. IN FACT, WE HAVE REASON TO BELIEVE THAT SOME SCHOOLS AND SOME CONFERENCES HAVE THEIR OWN SETS OF RELEASES THAT BEAR ON THESE ISSUES.

THERE IS NO ALLEGATION THAT SINCE THEY GRADUATED THEY HAVE BEEN PROHIBITED, MUCH LESS EXCLUDED FROM DOING ANYTHING. SO FOR TEN YEARS THEY HAVE BEEN OUT OF SCHOOL, AT LEAST, AND THEY HAVE BEEN FREE TO COMPETE IN ANY MARKET THEY FELT LIKE COMPETING IN.

THERE IS NO ALLEGATION THAT THEY EVER TRIED TO SELL THEIR IMAGE, THAT THEY EVER TRIED TO MAKE A VIDEO OF THEMSELVES, THAT THEY EVER TOOK A PICTURE THAT THEIR MOTHER TOOK WHILE THEY WERE PLAYING FOOTBALL OR BASKETBALL AND TRIED TO HAVE IT BLOWN UP AND FRAMED AND SOLD THROUGH WHATEVER CHANNEL OF DISTRIBUTION THEY WANTED TO, THERE IS NO ALLEGATION THEY DID ANYTHING LIKE THAT.

THE COURT: SO DO YOU VIEW THE THINGS THAT THEY SIGNED, OR SOME PEOPLE MAY HAVE SIGNED, AND WHEN THEY GRADUATE FROM COLLEGE, AFTER THAT, THEY ARE NOT BOUND BY IT ANYMORE?

MR. CURTNER: IT DEPENDS ON WHICH THING WE ARE TALKING ABOUT, YOUR HONOR.

THE COURT: ANY OF THEM. DO THEY ALL END ON GRADUATION OR IS THERE SOME THAT YOU CONTEND REALLY DO CONTINUE

TO APPLY?

MR. CURTNER: THE FORM 08-3A AND 09-3A, BY THEIR TERMS, GIVE THE NCAA A LIMITED RIGHT, AND IT'S LIMITED TO USE CERTAIN LIKENESSES THAT WERE CREATED DURING THE TIME PERIOD THAT THE PERSON WAS A STUDENT ATHLETE FOR THE LIMITED PURPOSE OF PROMOTING NCAA CHAMPIONSHIPS AND GENERAL NCAA EVENTS.

THE COURT: ONLY UP UNTIL THE TIME THEY GRADUATE?

MR. CURTNER: NO, THAT CONTINUES. THAT IS A CONTINUED --

THE COURT: SO IF YOU WANT TO GIVE IT AWAY OR SELL IT, THEN I SUPPOSE IT WOULD BE HARDER FOR THEM TO SELL IT IF YOU HAVE ALREADY SOLD IT.

MR. CURTNER: THERE IS NO PROHIBITION AGAINST THEM DOING SO. THEY CAN TAKE THE SAME LIKENESS, THE SAME PHOTOGRAPH THAT WAS TAKEN AT THE SAME TIME, THE SAME VIDEO, THEY CAN MAKE NEW VIDEOS AND THEY CAN DO THE SAME.

THERE IS NO -- THERE'S A DIFFERENCE, I THINK, YOUR HONOR. I THINK IT'S REALLY AN IMPORTANT ONE. BETWEEN AN INTELLECTUAL PROPERTY RIGHT, THAT ESSENTIALLY OUR FIX AT THE TIME OF THE PERFORMANCE, OR AT THE TIME OF A PHOTOGRAPH, OR AT THE TIME OF THE GAME, OR AT THE TIME OF A BROADCAST, AND WHO OWNS THAT AT THAT TIME. AND, ESSENTIALLY, THAT OWNERSHIP IS FIXED AT THAT POINT IN TIME.

AND IF CBS TELEVISION BROADCASTS A BASKETBALL GAME OR THE CONTRACT PARTNER TO THE PAC-10 CONFERENCE BROADCASTS A

FOOTBALL GAME, THEY HAVE A COPYRIGHT. THEY HAVE SOME OWNERSHIP RIGHTS AS OF THAT MOMENT IN TIME.

THAT IS ENTIRELY DIFFERENT. OWNERSHIP IS DIFFERENT FROM EXCLUSION. EXCLUSION IS AN ANTITRUST CONCEPT. AND THE FACT THAT SOMEBODY IS OUT THERE WITH A PROPERTY RIGHT AND THERE IS ALL KINDS OF PROPERTY RIGHTS FLOATING AROUND HERE. THERE IS PROPERTY RIGHTS REGARDING HATS AND T-SHIRTS AND JERSEYS AND VIDEO GAMES AND ANTIQUE FOOTAGE AND ALL KINDS OF THINGS. PEOPLE HAVE RIGHTS IN THOSE VARIOUS PRODUCTS THAT ARE IN THE CHAIN OF DISTRIBUTION THAT ARE IN COMMERCE. NCAA DOESN'T CONTROL THEM, BUT THERE ARE A BUNCH OF THOSE RIGHTS.

THAT IS A COMPLETELY DIFFERENT CONCEPT THAN THE CONCEPT OF EXCLUDING SOMEBODY FROM PARTICIPATING IN THAT CHAIN OF COMMERCE. THEY CAN GO OUT AND CREATE WHATEVER THEY WANT. THEY WERE FREE AS SOON AS THEY STOPPED BEING A STUDENT ATHLETE TO ENGAGE IN COMMERCIAL ACTIVITY. AND THEY COULD HAVE TAKEN ANYTHING THAT THEY COULD GET THEIR HANDS ON AND TRIED TO SELL IT. THEY COULD HAVE CREATED NEW WORKS, THEY COULD HAVE TAKEN COPIES OF OLD WORKS SO LONG AS THEY COULD DO SO LEGALLY AND TRY. AND NOBODY HAS PREVENTED THEM. THERE IS NOTHING PREVENTING THEM FROM COMPETING IN THIS SO-CALLED MASS MARKET, WHICH IS ACTUALLY A BUNCH OF DIFFERENT MARKETS.

SO THERE IS A BIG DIFFERENCE BETWEEN THE FACT THAT SOME OF THESE RIGHTS ARE OWNED AND SOME OF THESE RIGHTS ARE NOT OWNED. AND THE PLAINTIFFS ARE FREE TO PURSUE COMMERCIAL

ACTIVITIES AFTER THEY CEASE BEING A STUDENT ATHLETE WITH REGARD TO THOSE RIGHTS.

AND WE KNOW THAT SOME OF THE PLAINTIFFS, SOME PEOPLE IN THESE GROUPS DO, AND THEY PLEAD IN THEIR COMPLAINT, IN THE O'BANNON COMPLAINT, IN PARAGRAPHS 133 THROUGH 145 THAT SUCH THINGS GO ON, AND THEY PLEAD THIS. THIS IS A --

THE COURT: YOU DON'T THINK THERE'S ANYTHING NEW THAT HAS HAPPENED RECENTLY THAT HAS ALLOWED THAT THAT WASN'T ALLOWED BEFORE?

MR. CURTNER: THIS HAS ALWAYS BEEN ALLOWED. THERE'S NOTHING NEW.

(COUNSEL DISPLAYS OBJECT.)

THIS HAS BEEN ON THE MARKET FOR SOME PERIOD OF TIME. THERE'S AT LEAST SIX OF THEM. THEY'RE SHOWN ON THE BACK FROM VARIOUS TEAMS. THEY HAVE THE COLLEGE UNIFORMS. THEY GET A LICENSE FOR THE USE OF THAT FROM THE COLLEGE THROUGH CLC. THIS COMES FROM THE NFL PLAYERS ASSOCIATION. THAT'S APPARENTLY WHO CLAIMS THEY HAVE THESE RIGHTS, AND THERE IS NO LICENSE FROM THE NCAA HERE. NONE. NCAA IS NOT INVOLVED IN THIS IN ANY WAY. IT DOESN'T HAVE ANY RIGHTS THAT ARE BEING ASSERTED AND, ACTUALLY, THEY LEAVE THE NIKE SWOOSH OFF OF THE UNIFORM, TOO. SO THEY DIDN'T HAVE TO GET A LICENSE FROM NIKE.

THE COURT: YOU MAY THINK THIS IS MORE MEANINGFUL TO ME THAN IT IS.

ARE YOU SAYING THAT IS A COLLEGE PERSON OR

SOMETHING?

(LAUGHTER.)

MR. CURTNER: LET ME TRY. THIS SHOWS THAT NO ONE IS BEING EXCLUDED.

THE COURT: BECAUSE THAT'S A COLLEGE PERSON?

MR. CURTNER: THIS WAS A COLLEGE PERSON WHO IS NOW A PRO PLAYER, BUT HE'S IN HIS COLLEGE UNIFORM. AND HE OBVIOUSLY IS ABLE TO COMPETE IN THIS BROAD MARKET AND IS SELLING THESE THINGS. WE BOUGHT IT AT A STORE FOR $16.95.

AND THERE'S ALWAYS BEEN OPPORTUNITIES FOR FORMER COLLEGE PLAYERS TO DO VARIOUS COMMERCIAL THINGS AS A RESULT OF THEIR NOTORIETY. SOME OF THEM COACH. SOME OF THEM TEACH. SOME OF THEM DO LEARNING VIDEOS THAT THEY SELL TO TEACH YOUNG PEOPLE HOW TO PLAY THOSE SPORTS. THERE IS A WIDE VARIETY OF THINGS THEY CAN DO.

THERE'S NOTHING THAT STOPS MR. O'BANNON FROM TAKING A PHOTO THAT HIS FATHER TOOK WHEN HE WAS A PLAYER, BLOWING IT UP AND MAKING IT GLOSSY, PUTTING A FRAME AROUND IT, SIGNING HIS NAME TO IT, WRITING HIS AUTOBIOGRAPHY, AND SELLING IT. NOTHING STOPPING HIM FROM DOING THAT.

AND THE IMPORTANT POINT IS THERE IS NO ALLEGATION THAT HE EVER DID THOSE THINGS, OR TRIED TO DO THOSE THINGS, WAS READY TO DO THOSE THINGS OR, MOST IMPORTANTLY, HAS BEEN PROHIBITED BY ANYBODY FROM DOING ANY OF THOSE THINGS.

THAT DEFEATS HIS ARTICLE III STANDING. THAT DEFEATS

ANTITRUST STANDING, AND THAT MEANS THAT HE CANNOT COMPLY WITH THE RULE THAT IS CLEAR IN THE NINTH CIRCUIT THAT HE HAS TO BE A MARKET PARTICIPANT OR BE READY TO BE A MARKET PARTICIPANT.

THEY TRIED TO DISTINGUISH --

THE COURT: WHAT ABOUT THE GROUP BOYCOTT THEORY?

MR. CURTNER: THEY TRY TO GET AROUND THAT AND SEVERAL OTHER THINGS BY SAYING THAT THIS IS A GROUP BOYCOTT. IT'S NOT A GROUP BOYCOTT.

THE NCAA IS NOT IN A HORIZONTAL RELATIONSHIP WITH ANY OF THESE FOLKS. WE'RE NOT COMPETITORS WITH ANY OF THESE OTHER DEFENDANTS, AND THE RELATIONSHIP BETWEEN THE NCAA AND CLC AND THE RELATIONSHIP BETWEEN CLC AND ELECTRONIC ARTS IS VERTICAL. ONE SUPPLIES THE OTHER TO THE OTHER.

AND THE SUPREME COURT IN NYNEX VERSUS DISCON MADE IT ABSOLUTELY CLEAR THAT THIS GROUP BOYCOTT THEORY CANNOT APPLY UNLESS YOU'VE GOT HORIZONTAL COMPETITORS, LIKE ALL OF THE PARTICIPANTS IN THE OIL BUSINESS, AGREEING TO USE THEIR POOLED POWER WHERE THAT POOLED POWER GIVES THEM MONOPOLY POSITION IN A MARKET TO COERCE THE BEHAVIOR OF ANOTHER COMPETITOR IN THAT MARKET.

THAT'S WHAT A GROUP BOYCOTT IS ALL ABOUT. AND THAT IS WHAT THE SUPREME COURT MADE ABSOLUTELY CLEAR, IF IT WASN'T CLEAR IN THE EARLIER CASES, IN NYNEX VERSUS DISCON, WE DON'T HAVE ANYTHING RESEMBLING THAT.

AND WE ALSO HAVE -- THERE'S NOTHING HERE RESEMBLING

A PRICE-FIXING AGREEMENT. THEY TRY TO SAY THIS IS PRICE-FIXING WHICH IS PER SE, BUT NONE OF THESE AGREEMENTS, THIS FORM 08-3, OR 09-3 AND BYLAW 12.5 OR 12.5.1 SAY NOTHING ABOUT PRICE.

NOW, IT IS TRUE THAT STUDENT ATHLETES ARE PROHIBITED FROM EARNING MONEY OUTSIDE OF THEIR SCHOLARSHIP WHILE THEY'RE A STUDENT ATHLETE, BUT NONE OF THESE THINGS SAY ANYTHING ABOUT THE PRICE OF ANYTHING AFTER THEY FINISH THEIR CAREER AS A STUDENT ATHLETE.

THE COURT: WHAT ABOUT DURING THE CAREER?

MR. CURTNER: THEY ARE NOT CHALLENGING THAT. THEY ARE NOT CHALLENGING THAT. AT LEAST I DON'T UNDERSTAND THEM TO BE DOING SO. THEY SAY THAT THEY ARE NOT CHALLENGING THE PRINCIPLE OF AMATEURISM. IF THEY WANT TO CHALLENGE THAT, THEN THEY RUN INTO THE PROBLEM THAT THE UNITED STATES SUPREME COURT HAS ALREADY PASSED THAT. AND THERE'S BOARD OF REGENTS VERSUS NCAA IN 1984, THE SUPREME COURT SAID IT'S OKAY TO HAVE RULES ABOUT COLLEGE SPORTS, INCLUDING "THEY SHALL NOT BE PAID," AND THAT'S A QUOTE.

THE COURT: HAVE YOU LICENSED THEIR LIKENESSES OR WHATEVER IT IS YOU LICENSE EVEN WHILE THEY ARE STILL IN SCHOOL AND THE GAMES INCLUDE STUDENTS WHO ARE STILL IN SCHOOL, NO?

MR. CURTNER: THE KELLER COMPLAINT DOES INCLUDE THAT, SOMETHING CLOSE TO THAT CLAIM.

THE COURT: BUT NOT O'BANNON?

MR. CURTNER: O'BANNON, IT'S UNCLEAR WHETHER HE IS

TRYING TO ALSO CLAIM SOMETHING THAT OVERLAPS WITH KELLER TO THAT REGARD.

BUT BOTH OF THEM AFFIRMATIVELY PLEAD THAT THE NCAA RULE AND THE NCAA LICENSES PROHIBIT EXACTLY WHAT THEY -- THIS COMMERCIAL ACTIVITY. THERE IS SOME LIMITED THINGS THAT ARE ALLOWED UNDER BYLAW 12.5 AND THE SCHOOLS, FOR EXAMPLE, ARE ALLOWED TO SELL T-SHIRTS AND JERSEYS ONLY ON CAMPUS AND FOR LIMITED PURPOSES, AND SOME DO AND SOME DON'T.

THE COURT: YOU LICENSE THEIR LIKENESSES TO BE USED CURRENTLY FOR MONEY-MAKING PURPOSES BY SOMEONE OTHER THAN THEM, AND FOR THEM NOT TO GET ANY OF IT.

MR. CURTNER: YOUR HONOR, I MUST RESPECTFULLY DISAGREE. WE ABSOLUTELY DO THE OPPOSITE. WE PROHIBIT THEIR LIKENESS.

THE COURT: THEIR STATS AND THEIR --

MR. CURTNER: WE DON'T LICENSE THAT EITHER. WE DON'T LICENSE ANYTHING ABOUT THEM.

EA USES CERTAIN ASPECTS OF THEM. THE NCAA'S LICENSE TO EA SPORTS IS OF THE NCAA'S LOGO. WE GIVE EA SPORTS THE RIGHT TO USE THE NCAA NAME, THE LITTLE BLUE BALL, AND VARIOUS OTHER MARKS OF NCAA. THERE IS ANOTHER LICENSOR CALLED NCAA FOOTBALL THAT'S OWNED BY A SEPARATE ORGANIZATION THAT'S ALSO LICENSED TO THEM.

THE NCAA DOES NOT LICENSE THEIR USE OF STUDENT ATHLETES' NAMES, LIKENESSES, PHOTOGRAPHS, REPLICAS, STATS, OR

ANYTHING OF THE KIND. THE NCAA PROHIBITS THEM FROM DOING THOSE THINGS AND THE NCAA POLICIES THOSE PROHIBITIONS TO MAKE SURE THEY DON'T GO OVER THAT LINE. AND THEY HAVE DONE THEIR BEST TO KEEP THEM FROM GOING OVER THAT LINE EVEN THOUGH IT'S CLEAR THAT EA WANTS TO MAKE THEIR GAME AS REALISTIC AS POSSIBLE.

WE DO NOT GIVE PERMISSION. THEY TAKE THAT ON THEIR OWN TO GET THOSE RIGHTS, EITHER PUBLICLY OR --

THE COURT: YOU GIVE THEM PERMISSION FOR A NUMBER OF THINGS AND CHARGE, I GUESS, A FAIR AMOUNT OF MONEY FOR DOING SO.

MR. CURTNER: IT'S NOT VERY MUCH MONEY, BUT THAT'S A DIFFERENT STORY.

BUT THE THINGS THAT THE NCAA LICENSES ARE ITS OWN MARKS AND ITS OWN NAMES, ITS OWN PROPERTY RIGHTS.

THE COURT: WHO LICENSES THE COLLEGE LOGOS AND THE COLLEGE FIGHT SONGS AND THE COLLEGE UNIFORMS --

MR. CURTNER: THE COLLEGES DO.

THE COURT: -- THE COLLEGE MASCOTS, AND ALL THAT?

MR. CURTNER: THE COLLEGES DO.

THE COURT: THROUGH YOU, THOUGH.

MR. CURTNER: THROUGH CLC. THE NCAA DOES NOT CONTROL THAT. THE NCAA IS A NONPARTICIPANT IN THAT.

THE NCAA ONLY CONTROLS ACTUALLY ONE THING, AND THAT IS -- OR ONE GROUP OF THINGS, AND THAT IS ITS POST-SEASON CHAMPIONSHIPS. AND ITS PRINCIPAL ONE IS COLLEGE BASKETBALL,

THAT'S MARCH MADNESS AND FINAL 4, AND ALL THAT STUFF. NCAA OWNS THAT AND IT SELLS THAT, AND IT GETS QUITE A LOT OF MONEY WHICH IT GIVES TO THE SCHOOLS. AND IT ALSO RUNS CHAMPIONSHIPS IN 28 OTHER SPORTS, INVOLVING 45,000 STUDENT ATHLETES OR SOMETHING LIKE THAT.

IT DOES NOT CONTROL THE BOWL GAMES. THOSE ARE OWNED BY THE BOWLS AND BY THE BCS, WHICH IS A CONSORTIUM OF CONFERENCES. THE NCAA HAS A VERY LIMITED ROLE IN ALL OF THESE THINGS AND IT DOES ITS BEST TO KEEP IT ALL NONCOMMERCIAL. THAT'S ITS FUNCTION IN THE WORLD.

SO THE SUPREME COURT HAS ALREADY SAID THAT THE NCAA'S FUNCTION IN ALL OF THESE THINGS SHOULD BE JUDGED UNDER THE RULE OF REASON, NOT UNDER ANY PER SE RULE. THAT'S WHAT BOARD OF REGENTS STANDS FOR.

THE PLAINTIFFS HAVE NOT PLEAD A COGNIZABLE RELEVANT MARKET. THEY HAVE A MESS OF MARKETS HERE. THEY HAVE DONE NONE OF THE THINGS THAT ARE REQUIRED TO PLEAD A PROPER RELEVANT MARKET THAT SHOW THE BOUNDARIES OF SUBSTITUTABILITY, WHAT ARE THE CLOSE SUBSTITUTES, WHAT ARE OUTSIDE OF THAT. THEY JUST SAY EVERYTHING COLLEGE COMPETES WITH EVERYTHING COLLEGE AND DOESN'T COMPETE WITH EVERYTHING ELSE. THAT'S NOT A RELEVANT MARKET. THAT CANNOT STAND.

FINALLY, MR. O'BANNON AND MR. NEWSOME HAVE BEEN OUT OF COLLEGE FOR 15 YEARS OR SO NOW, SINCE 1995.

THE COURT: CONTINUING THAT IS PART --

MR. CURTNER: NOTHING HAS CHANGED SINCE THE STATUTE OF LIMITATIONS BEGAN RUNNING.

THE COURT: WHO ELSE WANTS TO TALK ABOUT ANTITRUST BRIEFLY?

MR. BOYLE: YOUR HONOR, PETER BOYLE FOR CLC.

I WILL TRY TO KEEP THIS BRIEF. I KNOW WE ARE UNDER TIME CONSTRAINT.

LET ME QUICKLY HIT THE NEWSOME HIGHLIGHTS. NEWSOME IS A STRIP-DOWN VERSION OF THE O'BANNON COMPLAINT. IT IS SO STRIPPED DOWN IT BARELY SAYS ANYTHING IN TERMS OF FACTUAL CONTENT. AND SPECIFICALLY WITH RESPECT TO CLC, THERE ARE ONLY ABOUT SEVEN OR EIGHT ALLEGATIONS ABOUT CLC IN THE ENTIRE COMPLAINT. THEY ARE FAIRLY INNOCUOUS FOR THE MOST PART.

CLC IS A GEORGIA CORPORATION. IT IS FOR-PROFIT CORPORATION. THERE IS SOME QUOTES FROM THE WEBSITE THAT REALLY DON'T GO TO ANY CONSPIRACY THEORY.

AND WE'VE CITED BOTH IN THE O'BANNON MOTION AND THE NEWSOME MOTION CASES THAT SHOW, FOR THE PLAINTIFFS HERE TO STATE A CLAIM AGAINST CLC, THEY HAVE TO ALLEGE FACTUAL CONTENT THAT SHOWS CLC PARTICIPATED IN THESE CONSPIRACIES.

IN NEWSOME, THE ONLY THING ALLEGED ABOUT CLC --

THE COURT: COULD YOU TALK ABOUT O'BANNON INSTEAD?

MR. BOYLE: SURE, IF YOU PREFER.

THE COURT: IF THERE IS NOT ENOUGH IN NEWSOME AND IT'S IN O'BANNON, IT WILL BE IN NEWSOME SOON, SO YOU MIGHT AS

WELL TALK ABOUT O'BANNON.

MR. BOYLE: UNDERSTOOD, YOUR HONOR. UNDERSTOOD.

WITH RESPECT TO O'BANNON, AS A PRACTICAL MATTER, FOR O'BANNON TO STATE A CLAIM AGAINST CLC, HE HAS TO SHOW THAT CLC HAS LICENSED THESE PARTICULAR RIGHTS, THE RIGHTS OF PUBLICITY OF FORMER NCAA ATHLETES.

LET ME TELL YOU THREE REASONS WHY HE HASN'T DONE THAT AND HE CAN'T DO THAT.

NUMBER ONE, CLC IS A TRADEMARK COMPANY. IT ONLY HANDLES TRADEMARK RIGHTS. IT DOESN'T HANDLE THESE OTHER TYPES OF RIGHTS.

THERE IS NO CONSPIRACY REGARDING THESE NCAA FORMS THAT CONVEY ANY RIGHT WHATSOEVER TO THE PLAINTIFFS' LIKENESS OR NAME TO CLC FOR LICENSING PURPOSES.

AND AS MR. CURTNER SAID, THE FORMER NCAA ATHLETES ACTUALLY DO LICENSE THEIR IMAGES AND CLC ACTUALLY PARTICIPATES IN DEALS FOR FORMER NCAA ATHLETES. PUTATIVE CLASS MEMBERS LICENSE THEIR OWN RIGHTS.

NOW WITH RESPECT TO THE FIRST POINT --

THE COURT: DIRECTLY TO YOU AND YOU PAY FOR THEM?

MR. BOYLE: EXCUSE ME?

THE COURT: DIRECTLY TO YOU AND YOU PAY FOR THEM?

MR. BOYLE: WE DO NOT LICENSE THE RIGHTS OF PUBLICITY OF ANYONE. CLC ONLY LICENSES ITS TRADEMARK RIGHTS. IN FACT --

THE COURT: SO WHAT WERE YOU SAYING THAT YOU DO WITH NCAA ATHLETES?

MR. BOYLE: FORMER NCAA ATHLETES --

THE COURT: WHAT DO YOU DO WITH THEM?

MR. BOYLE: WE DON'T DO ANYTHING WITH THEM. LICENSEES WILL COME TO CLC AND SOMETIMES OBTAIN TRADEMARK LICENSES OF NCAA MARKS OR MAYBE SCHOOL MARKS. THE LICENSEES, IF THEY NEED TO DO SO, WILL SEPARATELY GO OUT AND OBTAIN LICENSES FROM PUTATIVE CLASS MEMBERS.

THE MCFARLAND TOYS DEAL, THE ACTION FIGURE THAT --

THE COURT: YOU ARE NOT INVOLVED IN THAT?

MR. BOYLE: WE ARE ONLY INVOLVED IN THE SENSE THAT WE ARE PROVIDING ONE PIECE OF THE PUZZLE. THE LICENSEE WILL INDEPENDENTLY GO OUT AND OBTAIN THE RIGHTS OF PUBLICITY IF IT NEEDS TO. IT DOESN'T ALWAYS NEED TO.

IN FACT, THE O'BANNON COMPLAINT SPECIFICALLY ALLEGES THAT CLC IS THE TRADEMARK LICENSING REPRESENTATIVE OF THE NCAA AND CERTAIN NCAA SCHOOLS.

THE O'BANNON COMPLAINT ALSO ALLEGES THAT THERE ARE OTHER COMPANIES THAT SERVE AS LICENSING AGENTS FOR OTHER RIGHTS. BROADCAST RIGHTS, VIDEOS, PHOTOS. CLC DOESN'T DO ANY OF THAT. CLC ONLY DOES TRADEMARK RIGHTS.

NOW, THE O'BANNON COMPLAINT, AND I BELIEVE THE O'BANNON BRIEF, AND I BELIEVE NEWSOME AS WELL, MAKES THE ARGUMENT THAT IF THERE IS NO CONSPIRACY HERE BETWEEN CLC AND

THE NCAA, WHAT ONE WOULD EXPECT TO HAPPEN IS THAT LICENSEES WOULD GO OUT AND OBTAIN LICENSES FROM THESE FORMER ATHLETES.

THAT'S EXACTLY WHAT HAPPENS. THE COMPLAINT ADMITS THAT HAPPENS. THERE IS VERY LITTLE IN THIS COMPLAINT ABOUT CLC. AS LONG AS IT IS, THERE IS VERY LITTLE FACTUAL CONTENT ALLEGED ABOUT CLC. AND THE FEW THINGS THAT ARE ALLEGED SHOW THAT CLC ACTUALLY COOPERATES WITH LICENSEES WHO WANT TO INDEPENDENTLY GO OUT AND OBTAIN LICENSES FROM FORMER NCAA ATHLETES.

CLC WILL PROVIDE TRADEMARK LICENSES IN THOSE INSTANCES SO WE CAN HAVE ACTION FIGURES. IN FACT, THE EA VIDEO DEAL THAT'S REFERENCED IN MR. O'BANNON'S COMPLAINT, IN THAT SITUATION, MR. O'BANNON'S ALLEGED THAT CLC PROVIDED SPECIFIC RIGHTS, TRADEMARK LICENSES, NOT ANY RIGHTS OF PUBLICITY.

EA ACTUALLY WENT OUT AND OBTAINED INDEPENDENTLY THE RIGHTS OF PUBLICITY FROM FORMER NCAA ATHLETES SO THEY CAN USE THE LIKENESSES OF THOSE ATHLETES ON THE COVER OF THE VIDEO GAME.

SO, IT MAKES NO SENSE TO US WHEN THE COMPLAINT SUGGESTS BUT DOES NOT SAY IN ANY WAY THAT'S COGNIZABLE THAT CLC HAD SOME ROLE IN THE CONSPIRACY. IT IS ALL BOILERPLATE. IT DOESN'T PAST THE TEST UNDER TWOMBLY. IT DOESN'T PASS THE TEST UNDER IQBAL.

ONE LAST POINT. I KNOW WE ARE SCRUNCHED FOR TIME. MR. O'BANNON AND MR. NEWSOME IN THEIR BRIEFS CITED THE GILLY

CASE. AND THEY CITE IT FOR THE PROPOSITION THAT IN THE NINTH CIRCUIT, THE NINTH CIRCUIT DISFAVORS DISMISSAL OF ANTITRUST CASES. JUST VERY RECENTLY, THE NINTH CIRCUIT WITHDREW THAT DECISION. AND, IN FACT, THEY ISSUED A NEW DECISION.

THE NEW DECISION AFFIRMS DISMISSAL OF AN ANTITRUST CASE AND IT ADOPTS THE TWOMBLY STANDARD WHICH SAYS, IF AN ANTITRUST CASE IS IMPLAUSIBLE ON ITS FACE AND FAILS TO STATE A CLAIM, THAT CLAIM SHOULD BE DISMISSED AT THE EARLIEST POSSIBLE TIME. AND THAT IS WHAT WE ASK THE COURT TO DO.

MR. HAUSFELD: MICHAEL HAUSFELD FOR PLAINTIFF O'BANNON.

AND I WOULD LIKE TO TAKE AN OPPORTUNITY TO THANK THE COURT FOR THE TIME THAT IT HAS EXTENDED WITH REGARD TO THE ARGUMENTS AND THE COURT REPORTER FOR NOT TAKING A BREAK AT THIS POINT.

I WOULD LIKE TO START WHERE COUNSEL JUST LEFT OFF IN TERMS OF THE PLAUSIBILITY OF THE COMPLAINT AND TO PLACE IN CONTEXT THE NCAA AND CLC.

I APPRECIATED THE FACT THAT COUNSEL FOR THE NCAA REFERRED TO THE SUPREME COURT'S DECISION IN THE OKLAHOMA CASE WHERE THE SUPREME COURT FOUND THAT THE NCAA IS A CLASSIC CARTEL AND OPERATES TO FIX PRICES AND ENGAGE IN GROUP BOYCOTTS.

IN FACT, THE SUPREME COURT --

THE COURT: BUT THEY SAID IT WAS ALL OKAY.

MR. HAUSFELD: AS JUSTIFIED. AND THAT'S WHAT WE

NEED TO LOOK AT. THAT WAS AN INTERESTING PART OF WHAT COUNSEL FOR THE NCAA SAID.

IT'S NOT THAT THEY HAVE AN EXEMPTION. THEY HAVE A DEFENSE. THE DEFENSE DOES NOT MEAN THAT THERE IS NO VIOLATION. IT MEANS THAT THERE IS A PLAUSIBLE COMPLAINT LITERALLY ON THE FACE OF AN ORGANIZATION WHICH THE SUPREME COURT NOTED REQUIRES MUTUAL COOPERATION IN ORDER TO MAKE ITS PRODUCT AVAILABLE AT ALL.

AND, IN FACT, THE SUPREME COURT SAID THAT THE NCAA COMMANDEERED THE RIGHTS OF ITS MEMBERS, THE UNIVERSITIES AND OTHER INSTITUTIONS, AND ENFORCES THOSE RIGHTS THROUGH PUNISHMENT, SANCTIONS, IF THERE IS A VIOLATION. THAT'S A CLASSIC CARTEL. AND IT'S A CLASSIC CARTEL BOTH WITH RESPECT TO FIXING PRICES AND A GROUP BOYCOTT.

IT HAS TWO IMPACTS. ONE, THERE IS NO QUESTION THAT THE NCAA AND ITS MEMBER INSTITUTIONS PROHIBIT ANY STUDENT ATHLETE TO RECEIVE ANY COMPENSATION WHILE THEY ARE A STUDENT ATHLETE IN ANY FORM OTHER THAN THEIR SCHOLARSHIP. THAT'S CLEAR. THEY ENFORCE THAT RULE THROUGH ALL OF THEIR MEMBER INSTITUTION.

THE COURT: ARE YOU COMPLAINING ABOUT CURRENT STUDENTS?

MR. HAUSFELD: THAT'S AN INTERESTING ISSUE. I MIGHT, BUT NOT NECESSARILY RIGHT NOW, BUT THERE IS A CARRYOVER AS YOUR HONOR SO APTLY QUESTIONED.

THE STUDENT ATHLETE HAS TO GIVE UP, HAS TO, IT IS TAKEN FROM THE STUDENT ATHLETE ALL RIGHTS THAT THEY MIGHT HAVE WHILE THEY ARE A STUDENT ATHLETE.

THE NCAA TAKES THOSE RIGHTS AND CONTINUES THEM IN PERPETUITY. THE NCAA SAYS AT ITS MEMBER INSTITUTIONS WITH REGARD TO ITS STUDENT ATHLETES THAT COMMERCIAL WORLD, WHEN YOU LOOK TO ANYONE TO PURCHASE A LICENSE WITH REGARD TO WHATEVER IT IS THAT WE SELL, YOU'VE GOT TO COME TO US. WE ARE THE EXCLUSIVE LICENSOR.

THE COURT: I DON'T KNOW ABOUT EXCLUSIVE, THEY'RE SAYING ALTHOUGH THEY RETAIN THE RIGHT THAT THE ATHLETES THEMSELVES ONCE THEY'RE OUT OF SCHOOL CAN GO AHEAD TRY AND SELL IT AS WELL, OR IN COMPETITION.

AND ONE THING THEY CRITICIZE YOU FOR, BEFORE I FORGET, I NEED TO KNOW WHETHER MR. O'BANNON SIGNED THE FORM OR NOT, AND WHETHER HE HAS EVER ATTEMPTED OR IS ALLEGING HE WOULD ATTEMPT TO SELL HIS LIKENESS, OR WHATEVER, IF HE COULD.

MR. HAUSFELD: HE DID SIGN THE FORM. IN FACT, I DON'T BELIEVE THE NCAA OR ANY INSTITUTION WOULD ARGUE THAT IT'S CLEAR THAT NO STUDENT ATHLETE WOULD BE ELIGIBLE TO COMPETE IN INTER-COLLEGIATE SPORTS UNLESS THEY SIGN THE FORM.

THE COURT: SO YOU COULD ALLEGE THAT IN AN AMENDED COMPLAINT?

MR. HAUSFELD: YES.

THE COURT: IS HE PLANNING OR WOULD HE LIKE TO SELL

HIS LIKENESS AND IS HE SAYING HE CAN'T OR CAN'T GET ENOUGH MONEY FOR IT BECAUSE OF THIS SITUATION?

MR. HAUSFELD: IF I CAN, YOUR HONOR, WHAT IS IT THAT, AGAIN, COUNSEL FOR THE NCAA SAID IN RESPONSE TO YOUR QUESTIONS, THEY ARE THE EXCLUSIVE LICENSEE.

THE COURT: THEY DIDN'T SAY "EXCLUSIVE". THEY DENIED THAT.

MR. HAUSFELD: THEY ARE THE EXCLUSIVE LICENSEE OF ALL RIGHTS THAT THEY HAVE WITH RESPECT TO WHATEVER IT IS THAT THEY'RE LICENSING. NO STUDENT ATHLETE HAS ANY RIGHTS WHILE THEY ARE A STUDENT ATHLETE.

THE COURT: NO, NOT WHILE THEY ARE A STUDENT, BUT AFTERWARDS.

MR. HAUSFELD: AND AFTERWARDS, WHAT DOES THE NCAA REPRESENT IN TERMS OF ITS LICENSING ARRANGEMENTS WITH OTHERS? THAT THEY ARE THE EXCLUSIVE LICENSEE OF ALL RIGHTS.

AND, IN FACT, THE DIFFICULTY HERE IS THAT THE RIGHTS AFTER GRADUATION DERIVE FROM THE PLAY DURING THE TIME THAT THEY WERE STUDENT ATHLETES. AND THE NCAA HAS CONTINUED THAT AS ITS ONE UNEFFECTED CONTINUUM THAT THEY ARE THE OWNERS OF ALL THOSE RIGHTS RELATED TO THOSE GAMES THAT WERE PLAYED WHILE THE ATHLETE WAS A STUDENT.

THE COURT: THE GAMES THEMSELVES, BUT THEY ARE SAYING THAT THIS ATHLETE COULD ON GO AND SELL PHOTOGRAPHS OF HIMSELF OR SELL ACTION FIGURES OR WHATEVER ELSE. BUT THE

GAMES, THAT'S A DIFFERENT QUESTION BECAUSE YOU DON'T PLAY THE GAME BY YOURSELF. THERE IS EVERYBODY ELSE IN IT. SO YOU CAN'T SELL EVERYBODY ELSE'S PARTICIPATION IN A GAME.

BUT THEY SAY THAT THEY COULD GO OUT AND SELL THEIR LIKENESS OR THEIR PHOTO OR THEIR ACTION FIGURE OR WHATEVER ELSE.

MR. HAUSFELD: THAT IS WHERE THE NCAA HAS DONE A FINE JOB IN MUDDYING THE WATERS. IT IS -- NO ONE IS CONTESTING THAT IF ANY POTENTIAL LICENSEE WOULD LIKE TO APPROACH ANY SPECIFIC SINGLE ATHLETE AND ASK FOR AN ENDORSEMENT OF A PRODUCT OR AN ADVERTISEMENT, THAT THEY ARE PROHIBITED FROM DOING THAT.

BUT WHAT IS THE NCAA DERIVING ITS REVENUE FROM? THE REPLAY, THE REBROADCAST, THE SALE OF THE GAME, THE PLAYERS, ALL OF THEM, THE TEAM. NO ONE PLAYER CAN DO THAT. THAT'S WHY WE HAVE REQUESTED THIS CASE BE CERTIFIED AS A CLASS.

IT'S THOSE RIGHTS BECAUSE THAT IS WHERE THE NCAA IS DERIVING PART OF ITS $4 BILLION ANNUAL REVENUE, FROM LICENSING. NOT ANY ONE PLAYER, BUT THE GAMES, THE SPORT THE INTER-COLLEGIATE -- THE COMPETITION ITSELF. THAT'S THE ESSENCE OF THIS.

NOW, WHAT IS INTERESTING WAS THE ADDITION BY COUNSEL FOR THE NCAA OF AN ELEMENT OVER AND ABOVE WHAT THE KENDALL CASE IDENTIFIED. THE KENDALL CASE IDENTIFIED WHO, WHAT, WHERE, AND WHEN.

WHAT COUNSEL FOR THE NCAA SAID THIS AFTERNOON WAS

WHY? I FIND THAT INTERESTING. WHY?

WHY DO THEY NOT PERMIT FORMER STUDENT ATHLETES TO PARTICIPATE IN THE ROYALTIES AND REVENUES DERIVED FROM THE REPLAY AND/OR THE SALE OF THE GAMES THAT THEY PARTICIPATED IN WHILE THEY WERE STUDENTS?

NOW, TRADITIONALLY, THE NCAA HAS SAID WE NEED THAT TO PROTECT THE AMATEURISM OF THE STUDENT ATHLETE. AND, IN FACT, THE SUPREME COURT NOTED IN THE OKLAHOMA CASE THAT THAT LITERALLY WHAT THE ESSENCE OF WHAT THE NCAA WAS INTENDED TO BE, AND THAT WAS PROTECTING THE AMATEURISM OF THE STUDENT ATHLETE.

THE COURT: COULD I ASK YOU AGAIN, WHAT YOU SAY TO THEIR ARGUMENT THAT MR. O'BANNON OR OTHERS IN THE CLASS DON'T ALLEGE THAT THEY ACTUALLY HAVE TRIED OR ARE PLANNING TO TRY OR WOULD LIKE TO BE A MARKET PARTICIPANT?

MR. HAUSFELD: BECAUSE, YOUR HONOR, THERE ARE SIGNIFICANT, ALMOST INSEPARABLE BARRIERS TO ENTRY AS A COLLECTIVE TEAM TO ASSERT A RIGHT TO PARTICIPATE IN THE LICENSING AND ROYALTIES FOR REVENUE RECEIVED AFTER THEY ARE NO LONGER STUDENTS DERIVED FROM THE TIME WHEN THEY WERE STUDENTS.

THE COURT: FOR A GAME, PERHAPS, BUT WHAT ABOUT THEIR INDIVIDUAL RIGHT OF PUBLICITY?

MR. HAUSFELD: THEIR INDIVIDUAL RIGHT OF PUBLICITY THEY HAVE.

THE COURT: ARE THEY A MARKET PARTICIPANT IN THAT?

MR. HAUSFELD: WITH REGARD TO THEIR ABILITY TO GET

AN ENDORSEMENT FOR A PARTICULAR PRODUCT ON AN INDIVIDUAL SITUATION, YES. THEY HAVE NOT BEEN A MARKET PARTICIPANT BECAUSE THEY WERE FORECLOSED FROM THEIR ABILITY TO PARTICIPATE IN THAT REVENUE AND THE ROYALTY DERIVED FROM THE TIME THAT THEY DID PLAY AS A STUDENT ATHLETE.

THE COURT: ARE YOU SAYING THAT THERE WAS SOME RECENT CHANGE THAT ALLOWED INDIVIDUALS TO BECOME MARKET PARTICIPANTS? YOU SEEM TO IMPLY THAT THAT HAPPENED RECENTLY FOR SOME REASON, AND I AM WONDERING WHAT THAT REASON WAS.

MR. HAUSFELD: NO, YOUR HONOR, TWO DIFFERENT MARKETS. ONE IS THE MARKET FOR AN INDIVIDUAL ENDORSEMENT BY A SPECIFIC ATHLETE. THERE IS NO PRECLUSION THERE. THE OTHER IS THE MARKET FOR THE LICENSING OF COLLEGIATE ATHLETICS, GAMES.

THE COURT: I KNOW. BUT YOU, MAYBE IT WASN'T YOU, BUT SOMEBODY SAID SOMETHING ABOUT THIS HAS HAPPENED A FEW TIMES RECENTLY, IMPLYING THAT SOMETHING HAD CHANGED PERHAPS THAT ALLOWED IT TO HAPPEN. MAYBE IT WASN'T YOU.

MR. HAUSFELD: NO, IT WAS COUNSEL FOR THE NCAA WHO HELD UP AN ACTION FIGURE.

THE COURT: NO, IT WAS IN THE BRIEFS. THAT'S ALL RIGHT.

COULD YOU TALK TO ME ABOUT -- IF THERE IS -- WELL, MAYBE BRIEFLY ABOUT WHY YOU THINK THERE'S A PER SE VIOLATION AND IF THERE ISN'T, WHAT YOUR RULE OF REASON ANALYSIS WOULD BE?

MR. HAUSFELD: WELL, YOUR HONOR --

THE COURT: YOU DID MOSTLY BRIEF THE FORMER, SO MAYBE YOU SHOULD TALK ABOUT THE LATTER. IF WE NEED TO LOOK TO THE RULE OF REASON, WHAT WOULD YOUR ARGUMENT BE?

MR. HAUSFELD: IN THE JUSTICE NCAA CASE, THE COURT NOTED THE USE OF THE PER SE AND THE USE OF THE RULE OF REASON.

THE RULE OF REASON CAN -- OR IS UTILIZED IN ATHLETIC ASSOCIATION CASES IF THERE IS A LEGITIMATE PRO-COMPETITIVE PURPOSE FOR THE OTHERWISE RESTRICTIVE RULE OR REGULATION. THAT'S THE WHY THAT WAS REFERENCED BY THE NCAA.

NOW, WHAT'S NOTED IN THE JUSTICE CASE, IS THAT IT'S CLEAR THAT THE NCAA IS NOW ENGAGED IN TWO DISTINCT KINDS OF RULE-MAKING ACTIVITY. ONE IS WHERE THERE IS CONCERN WITH THE PROTECTION OF AMATEURISM.

THE SECOND IS INCREASINGLY ACCOMPANIED BY A DISCERNIBLE ECONOMIC PURPOSE. WHERE THERE IS A DISCERNABLE ECONOMIC PURPOSE THEN A PER SE RULE APPLIES, NOT THE RULE OF REASON. IF THERE IS NO LEGITIMATE JUSTIFICATION AND, IN PARTICULAR, WITH THE NCAA, OF PROTECTING THE STUDENT ATHLETE, THEN THERE IS NO RULE OF REASON APPROACH BECAUSE IT IS A CLASSIC CARTEL WHICH HAS FIXED PRICES AND BOYCOTTED POTENTIAL COMPETITORS.

THE COURT: WELL, THEY SAY FIX PRICES ONLY IF IT'S A HORIZONTAL AGREEMENT, AND THIS ISN'T.

MR. HAUSFELD: WELL, IT IS A HORIZONTAL AGREEMENT, YOUR HONOR.

THE COURT: WHY?

MR. HAUSFELD: AS THE SUPREME COURT NOTED, BY DEFINITION, THE ASSOCIATION IS A CLASSIC CARTEL. THE CARTEL IMPOSES UPON ALL OF ITS MEMBERS A PROHIBITION AGAINST COMPETING WITH EACH OTHER FOR PLAYER SERVICES BY OFFERING COMPENSATION, PART OF WHICH COULD BE WHEN YOU GRADUATE, WE WILL GIVE YOU 20 PERCENT OF THE ROYALTIES FOR MERCHANDISE, OR 30 PERCENT OF THE ROYALTIES FOR MERCHANDISE.

THE OTHER AS WELL. IF THE PLAYERS COLLECTIVELY AS A TEAM HAVE A RIGHT TO LICENSE, THEN THEY ARE BEING EXCLUDED IN COMPETITION WITH THE NCAA WHEN THE NCAA ALONE SELLS THAT RIGHT AND ALONE DERIVES ALL OF THE REVENUE. SO THERE ARE TWO FORMS OF EXCLUSION AND NONCOMPETITION.

AT THIS POINT, WHATEVER REVENUE THE NCAA AND ITS MEMBER INSTITUTIONS EXTRACT FROM THE MARKET, THEY ARE KEEPING. AND, IN ESSENCE, IF THERE IS A RIGHT, AND WE CONTEND THAT THERE IS, OF THE FORMER STUDENT ATHLETE TO PARTICIPATE IN THAT MARKET, THEY ARE GETTING ZERO. THAT'S THE FIX.

AND THEY ARE ALSO BEING PRECLUDED FROM NEGOTIATING THAT RIGHT WHEN ENTERING THE MEMBER INSTITUTION. IF, AS THE NCAA SAYS, WELL, THERE IS NO PROHIBITION AND WE DON'T STOP THE TEAMS AT THE END OF THEIR ENROLLMENT FROM COLLECTING ON THE RIGHTS THAT THEY OTHERWISE WOULD HAVE AS LICENSEES.

SO, THE ISSUE IS WHETHER OR NOT YOU APPLY A RULE OF REASON OR A PER SE IS NOT THE BASIS TO GRANT THE MOTION TO

DISMISS. IT IS THE BASIS UPON WHICH THE COURT CAN GUIDE WHATEVER ANTITRUST PRINCIPLES APPLY TO THE CLAIM ASSERTED.

THE COURT: OKAY. IF I WERE TO DISMISS BOTH COMPLAINTS WITH LEAVE TO AMEND, OR AT LEAST DISMISS SOME PARTS OF THEM BUT WITH LEAVE TO AMEND, I AM GUESSING THAT YOUR IDEA IS TO FILE AN AMENDED CONSOLIDATED COMPLAINT WITH ALL OF THE CASES TOGETHER?

MR. HAUSFELD: WE THINK IT WOULD MAKE SENSE, YOUR HONOR, BECAUSE AS YOU SAID, WITH REGARD TO CONSOLIDATION, THERE IS AN OVERLAP.

THE COURT: COULD YOU FILE SOMETHING THAT COULD BE UNCONSOLIDATED? IN OTHER WORDS, DON'T MIX THEM UP TOO MUCH, HAVE THE CAUSES OF ACTION BE SOMEWHAT SEPARATE SO THAT IF WE HAD TO DECONSOLIDATE THEM FOR TRIAL, IT WOULDN'T BE TOO DIFFICULT TO DO?

MR. HAUSFELD: IT WOULD NOT BE DIFFICULT AT ALL, YOUR HONOR, BECAUSE THE DIFFERENT THEORIES WOULD BE IN DIFFERENT COUNTS.

THE COURT: OKAY.

AND IN TERMS OF INTERIM LEAD COUNSEL, YOUR IDEA WAS THAT YOUR FIRM AND THE --

MR. HAUSFELD: HAGENS BERMAN.

THE COURT: WHAT IS IT?

MR. HAUSFELD: HAGENS BERMAN.

THE COURT: HAGENS BERMAN FIRM WOULD BE CO-LEAD

COUNSEL, ONE CONCENTRATING ON THE ANTITRUST AND ONE CONCENTRATING ON THE RIGHT OF PUBLICITY?

MR. HAUSFELD: YES, AND BECAUSE OF THE FACT THAT THERE WOULD BE CLEARLY OVERLAP IN TERMS OF THE DISCOVERY THAT THERE BE COORDINATION AS A RESULT OF THAT.

THE COURT: AS FAR AS ALL THE OTHER CASES, MOST OF THEM, I GUESS, ARE AMENABLE TO CONSOLIDATION AND AGREEABLE TO YOU ALL AS BEING LEAD COUNSEL, BUT IT'S NOT CLEAR THAT EVERYONE IS.

MAYBE YOU CAN TRY TO TALK TO THEM ALL AND SEE IF YOU CAN REACH SOME SORT OF AGREEMENT?

MR. HAUSFELD: YES, YOUR HONOR.

THE COURT: THESE TWO FIRMS?

MR. HAUSFELD: YES.

THE COURT: I DON'T KNOW WHAT WE CAN DO IN TERMS OF THE CASE MANAGEMENT TODAY, EXCEPT PERHAPS JUST SET ANOTHER CONFERENCE BY WHICH I WILL HAVE RULED AND HOPEFULLY WE WILL HAVE MADE SOME PROGRESS.

MR. VAN NEST: YOUR HONOR, COULD I SAY JUST A WORD ABOUT CASE MANAGEMENT?

THE COURT: OKAY.

MR. VAN NEST: THAT IS, I KNOW YOUR HONOR HAS INDICATED AN INTENTION TO CONSOLIDATE THESE, AT LEAST FOR PRETRIAL NOW. I WOULD ASK YOU TO JUST PAUSE A MINUTE ON THAT.

WITH RESPECT TO ELECTRONIC ARTS AND THE KELLER CASE,

WHICH IS THE ONLY CASE IN WHICH WE ARE A DEFENDANT --

THE COURT: I AM AFRAID YOU MIGHT FIND YOURSELF AS A DEFENDANT IN SOME MORE CASES SOON.

MR. VAN NEST: PERHAPS, BUT WE WILL NOT HAVE HAD A CHANCE TO CHALLENGE THAT.

THERE ARE -- THERE IS A VERY SIGNIFICANT DIFFERENCE IN THE KELLER CASE IS VERY TARGETED AND WE FEEL AS THOUGH THAT CASE MIGHT BE ABLE TO MOVE MORE QUICKLY THAN THIS MUCH BROADER ANTITRUST CLAIM, WHICH GOES FAR BEYOND EA VIDEO GAME AND TALKS ABOUT ALL THE PRODUCTS THAT ARE SOLD AFFECTING COLLEGE ATHLETES. THAT'S ONE POINT.

THE SECOND POINT IS THAT WITH THE SLAPP MOTION, WHOEVER IS ON THE LOSING SIDE OF THAT, HAS THE RIGHT OF AN AUTOMATIC APPEAL AND I KNOW THERE WILL BE DISCUSSION BETWEEN US AND THE COURT ABOUT A STAY HOWEVER THAT MOTION COMES OUT.

SO MY ONLY CAUTION WOULD BE BEFORE YOU FORMALLY CONSOLIDATE, IT MIGHT BE BETTER TO SEE HOW THE MOTIONS COME OUT AND WHAT SORT OF AN AMENDED COMPLAINT OR COMPLAINTS ARE FILED BECAUSE IT MAY WELL BE THAT KELLER IS REALLY SEVERABLE AND COULD BE DISPOSED OF MUCH MORE QUICKLY THAN WHAT I SUSPECT WILL BE POTENTIALLY AT LEAST A MORE DRAWN OUT BATTLE.

THE COURT: THERE WILL BE A SEPARATE COUNT. I DON'T WANT TO KEEP FILING A LOT OF COMPLAINTS. I DON'T WANT TO HAVE TWO DIFFERENT AMENDED COMPLAINTS AND THEN SEE WHAT A CONSOLIDATED AMENDED COMPLAINT LOOKS LIKE. IT'S JUST A WASTE

OF TIME.

MR. VAN NEST: UNDERSTOOD.

THE COURT: I'D RATHER JUST SEE A CONSOLIDATED AMENDED COMPLAINT. THEY'VE AGREED TO HAVE EVERYTHING BE SEVERABLE AND EASILY DEFINABLE, SO IF WE HAD TO, WE COULD SEVER OUT THE COUNTS THAT YOU ARE IN. IF YOU END UP IN ANTITRUST COUNTS, WHICH I SUSPECT YOU WILL --

MR. VAN NEST: THEY WILL BE PLED WHETHER THEY CAN BE SUSTAINED OR NOT IS ANOTHER THING. THEY MAY WELL BE PLED, BUT THEY HAVEN'T BEEN PLED YET.

AS LONG AS WE HAVE THAT AS A BACKUP, THAT MAKES A LOST OF SENSE. BECAUSE I DO THINK THE KELLER WITH THE ANTISLAPP MOTION WILL HAVE SIGNIFICANT DIFFERENCES, BOTH PROCEDURALLY AND SUBSTANTIVELY FROM THE REST OF THIS CASE.

THE COURT: HOPEFULLY THEY WILL BE IN SEPARATE DISCERNIBLE CAUSES OF ACTION THAT IF NECESSARY CAN BE SEVERED BE AND STAYED OR PUT ON A FAST TRACK SOMETHING.

MR. CURTNER: YOUR HONOR, FROM THE NCAA'S PERSPECTIVE, WE BELIEVE THE WISEST COURSE WOULD BE TO DEFER FURTHER CASE MANAGEMENT UNTIL WE GET A LOOK AT THESE AMENDED COMPLAINT OR COMPLAINTS AND SEE WHAT THEORIES THEY CHOOSE TO PURSUE AND WHAT DEFENSES WE MAY OR MAY NOT HAVE, OR MOTIONS WE MAY OR MAY NOT HAVE.

WE THINK THERE IS GOING TO BE SUBSTANTIAL INFIRMITIES IN THE AMENDED COMPLAINT WHETHER IT'S CONSOLIDATED

OR SEPARATE, BUT WE THINK THAT THE CASE MANAGEMENT SHOULD WAIT UNTIL WE SEE ALL THAT.

THE COURT: OKAY.

MR. HAUSFELD: YOUR HONOR, IF WE MAY, ON THAT POINT, IT DOESN'T SEEM TO MAKE SENSE IF THERE IS GUIDANCE THAT YOUR HONOR IS GOING TO PROVIDE IN TERMS OF WHAT THE COURT FEELS SHOULD FURTHER BE PLED WITH RESPECT TO CERTAIN DEFICIENCIES PRESENTLY ALLEGED, WE WILL RESPOND TO THOSE. IT DOESN'T MAKE SENSE THEN TO PERMIT ANOTHER ROUND OF MOTIONS TO DISMISS THAT ESSENTIALLY CONFORM THE PLEADINGS TO A LEVEL THAT IS NOT SUSTAINABLE ON A MOTION TO DISMISS.

THE COURT: I'VE NEVER HAD ANY SUCCESS IN PREVENTING DEFENDANTS FROM FILING MOTIONS TO DISMISS.

MR. HAUSFELD: WELL, JUDGE SCHIDLIN, IN A MATTER THAT WE HAD IN WHICH THE DEFENDANTS MOVED TO DISMISS, THE COURT INDICATED WHAT AREAS IT WOULD APPRECIATE FURTHER ELUCIDATION ON, THAT WAS DONE, THE DEFENDANTS MOVED TO DISMISS BUT THE COURT TOLD THEM IF THEY WERE, THEY WERE JUST GOING TO GET DENIED AGAIN.

THE COURT: I DON'T THINK THAT'S NECESSARY. IF SOMETHING IS UPHELD AND NOT DISMISSED, THEN I WON'T BE WANTING TO SEE THE SAME ARGUMENTS AGAIN. I WOULD SEE ONLY NEW ARGUMENTS BASED ON NEW CHANGES. I WOULD ASSUME THAT'S WHAT I WOULD SEE.

MR. VAN NEST: THAT'S RIGHT. PARTICULARLY FOR EA,

WE HAVEN'T BEEN A DEFENDANT IN THE O'BANNON CASE. SO WE'LL CERTAINLY DEAL WITH THAT ALSO.

THE COURT: DON'T MAKE ARGUMENTS THAT OTHER PEOPLE HAVE MADE THAT ARE THE SAME --

MR. VAN NEST: OF COURSE NOT.

THE COURT: -- AND HAVE BEEN REJECTED. YOU CAN ASSERT THEM FOR PURPOSES OF PRESERVING THEM FOR APPEAL, BUT YOU DON'T NEED TO REBRIEF THEM.

MR. VAN NEST: ABSOLUTELY.

MR. CURTNER: WE UNDERSTAND THAT, YOUR HONOR.

THE COURT: OKAY.

MR. HAUSFELD: THANK YOU, YOUR HONOR.

THE COURT: WAIT. I DO NEED A DATE.

SHEILAH, GIVE ME A DATE IN APRIL. IF WE CAN MAKE IT, WE MAY HAVE ANOTHER ROUND OF MOTIONS BEFORE THIS CASE MANAGEMENT DATE, BUT JUST TO HAVE A CONTROL DATE, I WILL GIVE YOU A DATE IN APRIL FOR A FURTHER CASE MANAGEMENT CONFERENCE.

THE CLERK: APRIL 27TH.

THE COURT: THAT'S AT 2:00 O'CLOCK FOR ALL OF THE CASES.

NOW, YOU SAY YOU ARE HAPPY LITIGATING IN TENNESSEE. ARE YOU HAPPY LITIGATING IN TWO DIFFERENT PLACES AT THE SAME TIME?

MR. CURTNER: IT WOULDN'T BE THE FIRST TIME, BUT I HAVE TO SAY, I PROBABLY THINK THAT SOME FORM OF COORDINATION IS

APPROPRIATE. AND WE HAVE BEEN INVOLVED IN SOME PRIOR CASES WHERE WE HAVE DONE THAT WITH CASES INVOLVED IN MULTIPLE PLACES, INCLUDING WITH HAGENS BERMAN. SO I THINK WE CAN WORK OUT SOMETHING. I AM NOT QUITE SURE WHAT IS THE BEST COURSE WITH THE TENNESSEE CASES AT THIS POINT, WHETHER TO SEEK A VOLUNTARY TRANSFER, WHETHER TO MDL IT, OR WHETHER TO TRY AND WORK SOMETHING OUT WITH COUNSEL. I REALLY KIND OF WOULD LIKE TO SEE WHERE WE ARE GOING ON THE AMENDMENTS BEFORE I DO TOO MUCH ON THOSE. I THINK SOME OF THESE BASIC STANDING AND PLEADING PROBLEMS CANNOT BE CURED BY AMENDMENT, SO WE PROBABLY WILL BE BACK. OF COURSE, WE WILL AWAIT YOUR OPINION.

THE COURT: HOW FAR ALONG ARE THE TENNESSEE CASES?

MR. CURTNER: NOTHING HAS HAPPENED OTHER THAN REMOVAL. THEY ARE MORE RECENT THAN MOST, MOST OF MAYBE ALL OF THESE CASES.

I MAY HAVE MISSPOKEN EARLIER. I AM NOT SURE THAT EA, ELECTRONICS ARTS TENNESSEE CASE IS BEFORE THE SAME JUDGE AS THE NCAA ONE. I WILL HAVE TO CHECK THAT. IT MAY BE A DIFFERENT JUDGE. IT WOULD CERTAINLY MAKE SENSE TO COORDINATE THESE IN SOME FORM.

THE COURT: I WOULD ENCOURAGE ALL OF YOU TO TALK AMONGST YOUR OWN SIDES AND ALSO TO TALK WITH EACH OTHER AND ALSO TO TALK WITH WHOEVER IS ON THE TENNESSEE CASES AND THE NEW JERSEY CASE AND SEE IF YOU CAN'T COME UP WITH SOME WAY OF AT LEAST COORDINATING THEM, BUT I WOULD SAY TRY TO GET THEM ALL IN

ONE JURISDICTION.

MR. HAUSFELD: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

MR. CURTNER: THANK YOU.

MR. VAN NEST: THANK YOU.

(PROCEEDINGS CONCLUDED AT 4:50 P.M.)

CERTIFICATE OF REPORTER

I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN KELLER VERSUS ELECTRONIC ARTS, C-09-1967 CW, O'BANNON VERSUS NCAA, C-09-3329 CW, BISHOP VERSUS ELECTRONIC ARTS, C-09-4128 CW, NEWSOME VERSUS NCAA, C-09-4882 CW, ANDERSON VERSUS NCAA, C-09-5100 CW, WIMPRINE VERSUS NCAA, C-09-5134 CW, JACOBSON VERSUS NCAA, C-09-5372 CW, AND RHODES VERSUS NCAA, C-09-5378 CW, PAGES NUMBERED 1 THROUGH 75, 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 INTEGRITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON REMOVAL FROM THE COURT FILE.

/S/ DIANE E. SKILLMAN

DIANE E. SKILLMAN, CSR 4909, RPR, FCRR