3 resolved or having it be stayed. You say there is going to be
4 another Detroit-Indiana game on Saturday, on Christmas Day.
5 But there is always going to be another Detroit-Indiana game.
6 That is not the only Detroit-Indiana game.
7 And this issue that you think you want to avoid on
8 Christmas is an issue that the league and the players and
9 everyone else and the fans are going to have to appropriately
10 address sometime in the future, maybe even sometime in the near
11 future. I have the schedule. I could look and see when their
12 next game is, but I don't think it is that far off either.
13 Also, you made arguments in the papers that putting
14 him back in the game at this point even affects the balance of
15 teams and the circumstances that currently exist.
16 MR. MISHKIN: Sure.
17 THE COURT: That is going to be true no matter when he
18 serves that suspension. There are games all the way through
19 the end of April. There are teams or games that he can not
20 play this season even if he plays games right up through the
21 end of March. I know those are the dates, because I have
22 counted them. There are at least 10 games in April.
23 So aren't you really just talking about the timing of
24 when these suspensions are going to be served rather than
25 arguing that there is going to be some real hardship? If he is
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1 going to have to be suspended, quite frankly, I am not sure
2 that the player would rather be suspended at the end of the
3 season than take his 10 games now.
4 Honestly, I understand the argument that you are
5 making with regard to their burden with regard to irreparable
6 injury. But in terms of the balance of hardships, we are not
7 talking about ultimately making a decision as to whether or not
8 he is going to ever serve the suspension. We are talking about

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9 the player saying, I think that ultimately I am not going to
10 have to serve these further 10 games, and if I have to serve
11 them, you can't give me that play back. But if I ultimately
12 have to serve them, then it can happen in January, when that
13 decision is made, it can happen in February, it can happen in
14 March, it can happen in April. I may even have to sit out the
15 playoffs if the team is in the playoffs, or even I may have to
16 not play next season or at some other time.
17 Why is the balance of hardships in the league's favor?
18 What does the league lose other than its argument that this is
19 the commissioner's decision, he has a right to make that
20 decision, he has made the decision, we want it done now?
21 MR. MISHKIN: Your Honor, there are a number of cases
22 that we have cited that say that a party who is forced to
23 arbitrate or is affected by an arbitration that it turns out
24 they did not agree to, they have been irreparably harmed. The
25 NBA operates in a very public way. We are trying very hard to
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1 attract fans, sponsors, attention in the press. How we
2 operate, how we conduct ourselves, the confidence people can
3 have in the NBA is very important.
4 This area of conduct on the playing court, which,
5 again, I haven't gotten to the merits of, the reason for that
6 going only to the commissioner is because that is the public
7 presentation of our product, our core product. What happens at
8 a game that people see, that the television audience sees, that
9 affects the NBA and its business in a huge, in a huge way.
10 Part of the confidence we have to impart to the world
11 to be a successful competitor with all that is out there is
12 that we have our house in order that we try very hard to make
13 coming to a game a good experience and we want you to come

14 back. If things happen during that presentation, that question
15 whether or not this is a good experience or if anybody wants to
16 be connected with this organization, that is serious to us.
17 So it is not a minor matter, serve the 10 here, serve
18 the 10 there. The NBA commissioner, who is given sole
19 responsibility to decide when misconduct occurs in that public
20 presentation, has decided that Mr. O'Neal should serve 25
21 games.
22 If someone else says, as an arbitrator already has,
23 no, no, my judgment is that is too long, 15, and a court says,
24 oh, I don't know, I haven't decided yet whether that
25 arbitration even had jurisdiction but I'm going to go with it
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1 and put him back, well, the NBA then has had its disciplinary
2 structure pretty well undermined before anybody has decided
3 that it ought to be undermined.
4 THE COURT: But somebody has already decided that it
5 ought to be undermined.
6 MR. MISHKIN: Right. And I am here asking you to
7 correct that.
8 THE COURT: In essence, the arbitrator has already
9 made that determination. So the question is not whether or not
10 there is some question about the commissioner's decision.
11 There is some question about the commissioner's decision.
12 There is an arbitrator who disagrees with it. Whether the
13 arbitrator has the authority to disagree with it is another
14 question. But clearly that is an issue.
15 Obviously, his decision to suspend was appropriate,
16 and in most respects the arbitrator agreed that it was
17 appropriate, in all respects as to three individuals and in one
18 respect as to the fact that the commissioner took discipline.
19 But the arbitrator disagreed as to the amount of discipline.

20 If you are right, I have a good idea what the
21 commissioner did, how to follow through on that discipline. If
22 you are right, then there are 10 games that this player is not
23 going to be able to play, period. That is that is the crux of
24 this. That is not all of it, you're right, because it has to
25 do with the commissioner's authority, it has to do with the
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1 timing. The commissioner makes the decision as to the timing.
2 But the reality is I know that if you are right, this player
3 will be further punished, this player will have to sit out 10
4 games.
5 But if you are wrong and I make the player sit out the
6 10 games even though an arbitrator says that we don't think
7 that he has to, and it is ultimately decided that the
8 arbitrator was right, then he sat out 10 games that even the
9 league would say that no player should have to sit out games
10 that he shouldn't have to, and that it even adversely affects
11 the league when a player is not playing when that player should
12 be playing.
13 MR. MISHKIN: Your Honor, I understand that instinct
14 very, very well and the logic of what you have just said. I
15 think it is affected, which you haven't heard yet, by the
16 likelihood that there is any chance, any chance in the world,
17 let alone the heightened standard they have to meet, that Mr.
18 O'Neal's conduct did not occur literally on the playing floor.
19 But we will come back to that. I understand the dilemma.
20 Again, the NBA has dealt with that. They want it a
21 certain way. Again, I don't want to repeat. Read 14(d). Read
22 Dean Feerick on Isaiah Rider.
23 One more point before I go quickly to the merits.
24 This question of de novo review doesn't depend on whether it is

25 de novo or deferential, because I think the issue here is so

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1 clear. But the points you were making before, I have an
2 arbitrator who has said something already. He has found
3 something in Katz v. Feinberg. This is the case that is not
4 cited by the players.
5 This is the case by the Second Circuit two years ago
6 that tells us as clearly as we can be told that Arbitrator
7 Kaplan made a serious mistake by deciding his own authority
8 here. He never should have decided that.
9 The reason is, under the Katz case, if you have an
10 agreement -- collective bargaining agreement in our case,
11 purchase and sale agreement in that case -- where there is a
12 broad arbitration clause and then there is also in that
13 agreement another dispute resolution mechanism, you have two of
14 them, just like we have here, and it is not clear, it could go
15 to one, it could go to the other, the Second Circuit said as a
16 matter of law neither one of them gets to decide who it is.
17 You are not going to have dueling. The commissioner,
18 just as well as Mr. Kaplan, could have said, I don't know what
19 he is talking about, I have jurisdiction. That doesn't happen.
20 The Second Circuit says when you have the situation we have
21 here, as a matter of law it is for the court to decide.
22 You don't have to even consider whether it is
23 procedural or substantive. Obviously, substantive
24 arbitrability means who gets to decide the substance of the
25 arbitration. So where deciding between two possible

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1 arbitrators, you are inevitably deciding substantive
2 arbitrability.
3 It is a short case and I commend it to you. Katz v.
4 Feinberg is just so clear here that this is for the court de

5 novo.
6 THE COURT: The issue, then, for me now is not whether
7 or not the arbitrator should have decided it; the question for
8 me now is, de novo, did the arbitrator properly decide it?
9 MR. MISHKIN: No. De novo means you have to take the
10 arbitrator's decision, put it under the -- it didn't happen.
11 The cases say, and we have cited them to you, if we are right
12 about Katz v. Feinberg, and we are, you cannot say, well,
13 arbitrator, huh-uh. It is de novo. They have to come in here
14 from the ground up and prove to you, with this heightened
15 standard of a mandatory injunction, that they will clearly,
16 clearly succeed on the merits. They cannot bootstrap.
17 THE COURT: Let me ask you this. That is why I had
18 part of that discussion with Mr. Kessler. Is your position
19 anything more than the arbitrator should not have decided it?
20 If I determine de novo that this is a case for the arbitrator,
21 what is it that you say the arbitrator -- how did the
22 arbitrator err? Is there any other review that you have? Do
23 you have any other attack on the process that was decided?
24 MR. MISHKIN: Your Honor, whether it is de novo or
25 deferential, you have the problem. You have to decide whether

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1 or not this was on-the-court behavior and therefore arbitrable
2 before the commissioner or not.
3 THE COURT: Right. But if I decide that this was not
4 on-the-court behavior, doesn't that resolve the issue?
5 MR. MISHKIN: Yes.
6 THE COURT: Isn't it clear that --
7 MR. MISHKIN: Yes.
8 THE COURT: -- the substance of the arbitrator's
9 decision is appropriate? You are not saying that there is any

10 other analysis or any other review that I have? Obviously,
11 once the arbitrator gets it, there is great deference that I
12 should give to the arbitrator's decision.
13 MR. MISHKIN: Right.
14 THE COURT: So you are not attacking the decision,
15 saying, Judge, even if the arbitrator had the right to decide
16 it, the commissioner said it should be 25, the arbitrator said
17 it should be 15, I disagree with the arbitrator so I think it
18 should be 17? You are not saying that?
19 MR. MISHKIN: Absolutely not.
20 THE COURT: You are saying if I find de novo that this
21 is an issue that should be arbitrated by the arbitrator, then
22 you are just going to have to live with the arbitrator's
23 decision pretty much?
24 MR. MISHKIN: That's right, your Honor.
25 THE COURT: OK.

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1 MR. MISHKIN: But in deciding whether or not there is
2 a likelihood of your finding that, under Katz v. Feinberg you
3 have to approach that de novo, which means you can't give any
4 weight or deference to what the arbitrator did. That is my
5 point.
6 Judge, a quick few points on the --
7 THE COURT: Don't rush it. You say you want to call
8 Mr. Buchanan, but I'm not sure I need to hear from Mr.
9 Buchanan. I have an affidavit from him. Is there anything
10 further that he needs to say that isn't in his affidavit? I
11 have read his affidavit thoroughly.
12 MR. MISHKIN: I don't want to impose if your Honor
13 doesn't need it. But I would like to at least show the clips
14 of Mr. O'Neal.
15 THE COURT: That's fine, because I think there is a

16 factual dispute with regard to my recollection of what the clip
17 has and Mr. Kessler's recollection and what you say you have in
18 the tapes.
19 MR. MISHKIN: We will look at the tape and all make
20 our own conclusions.
21 As to the question of the meaning of the phrase
22 "conduct on the playing court," the players and the arbitrator
23 now said that that means literally, literally, on the playing
24 floor and in this concept flow of the game. We have never
25 heard that before, never. It does not appear in any NBA rules,
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1 not in the collective bargaining agreement, not in the player
2 contract, not in any publications the NBA ever issues. It is
3 not a phrase that is used in any way in the NBA.
4 But as we understand their use of it, that can't be
5 the meaning of what these parties have intended for more than
6 30 years. The phrase "conduct on the playing court" within
7 section 8 giving the commissioner exclusive appeal authority
8 has been there since 1972, and that has been unchanged.
9 There are two cases that if you have the time I do
10 want you to look at. The decision by Arbitrator Collins in
11 Barclay said on the playing court. There was no dispute that
12 what Barclay did was on the playing court. What did Mr.
13 Barclay do?
14 THE COURT: When you say there is no dispute, that is
15 accurate. But you can't say that the parties, both sides,
16 affirmatively said that this is the definition. They didn't
17 dispute it.
18 MR. MISHKIN: Yes, you're right.
19 THE COURT: It went through its course, but no one in
20 that case defined or acknowledged one way or the other any

21 parameters with regard to that.
22 MR. MISHKIN: Right. But the point I am making, and
23 that is absolutely correct, is that the test they have given
24 now could well have been used there to bring it to the
25 grievance arbitrator. But the grievance arbitrator said this

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1 is conduct on the playing court, I find the issue to be can I
2 hear this conduct on the playing court case, and the answer is
3 I can't.
4 Again, Barclay -- and if you know the facts, I am not
5 going to trouble you with them -- walks out of bounds, play has
6 stopped, he has a bump with his teammate, he walks right to the
7 first row, the game is stopped, he is not in the game, he is
8 off the playing floor, and he spits. That is not on the
9 playing floor. That is not the flow of the game.
10 Yet those facts have led to a crystal clear
11 arbitration decision that that is on-the-court conduct and it
12 only goes to the commissioner. For whatever weight you want to
13 give it, it does seem to me very, very telling.
14 THE COURT: What definition do you say I am supposed
15 to use? I can very clearly see the distinction that everyone
16 has drawn and agreed upon between what happens in the stands
17 and what happens on the floor. That is not the whole
18 definition, but certain things happen in the stands, certain
19 things happen on the floor. We draw that line. Certain things
20 happen on the floor, certain things happen in bounds, certain
21 things happen out of bounds.
22 I am not quite sure in terms of at least the two
23 elements the way they articulate it. They say it has to be on
24 the floor and it has to be during the course of the game. Do
25 you disagree that it has to be on the floor?

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1 MR. MISHKIN: Yes, I disagree that it has to be on the
2 floor. Again, I distinguish the phrase "playing floor," which
3 we understand to mean the 94-by-50-foot rectangle in-bounds
4 playing surface. That is the floor. We can quibble about
5 whether the apron is part of the floor, because parts of the
6 game do occur on the apron and out of bounds.
7 THE COURT: What do you say "on the floor" means?
8 MR. MISHKIN: On the court. On the floor. This is a
9 very important question, and we have an answer.
10 Could you put up, please, Article XXXV(d) of the
11 constitution.
12 XXXV(d) of the constitution has been there forever in
13 the NBA and it is, under the collective bargaining agreement,
14 made part of every player's contract. So every player has
15 agreed to this.
16 It says, "If in the opinion of the commissioner any
17 other act or conduct of a player at or during" that is the
18 critical language, "at or during an exhibition, regular season
19 or playoff game has been prejudicial to or against the best
20 interests of the association." So it doesn't have to be the
21 integrity of the game at all, but this is the authority given
22 to the commissioner to issue fines and suspensions for conduct
23 at or during an NBA game.
24 Now, section 8 is not a grant of authority. Section
25 8, as we have all understood it, means this. If the
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1 commissioner has issued discipline under XXXV(d) at or during a
2 game, that discipline is not reviewable under 8. We have
3 always equated, we have equated, at or during the game with
4 conduct on the basketball court.
5 Judge, I don't want you to take it just from me. In

6 other moments Mr. Kessler and all of us in the NBA have made
7 the point that XXXV means on the court. I would like to put up
8 two statements that Mr. Kessler has made in prior proceedings
9 where he will agree with me entirely on this point.
10 I believe this is in the Sprewell opening statement.
11 It doesn't really matter. I refer you to page A19 to give you
12 an example from the NBA constitution excerpt which is attached
13 to the player contract.
14 "If you would look, for example, in XXXV(d), the
15 section we just looked at, when they are talking about this is
16 the commissioner's ability to discipline for conduct of a
17 player at or during," at or during, "an exhibition, regular
18 season, or playoff game. So this is on-court behavior as we
19 colloquially use that phrase. It is more colloquial. But we
20 all equate conduct on the playing court at or during an NBA
21 game."
22 That is not the only time Mr. Kessler has agreed with
23 us on that. May I have the second. Mr. Kessler also said,
24 "Because if you look at Article XXXV of the NBA constitution,
25 which both parties cite, which is attached to the uniform

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1 player contract, it goes through different reasons for
2 suspending. You could be suspended for drugs and you could be
3 suspended for gambling and you could be suspended for crimes,
4 and in a separate section, Article XXXV, you can be suspended
5 for on-court behavior."
6 These were not a coincidence. This is how we have
7 always understood it, and it makes perfect sense, because the
8 purpose of section 8 is to give the commissioner authority when
9 we are presenting our game. It is irrelevant whether your toe
10 is over the in-bounds line or not or you are two feet in the
11 stands or you are in the exit tunnel or you are even in the

12 locker room.
13 I am not going to go through all those examples, but
14 you have all those examples, where the players even in the
15 locker room have appealed only to the commissioner, having
16 nothing to do with the flow of the game. You have examples of
17 Shaquille O'Neal cursing after a game is over appealed to the
18 commissioner. That is not in the flow of the game. It has
19 nothing to do with the game.
20 We have Tim Hardaway, after being ejected, walk over
21 to the scorer's table minutes after he has been ejected,
22 complete separation from the court, picking up a television
23 monitor, throwing it on the court. It has nothing to do with
24 the flow of the game. It has nothing to do with literally on
25 the playing floor. Appealed to the commissioner. After 1995.
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1 Cost him much more than $25,000. Over and over again this is
2 how we have all understood it.
3 Now, we offer those examples to you not because the
4 Players Association has never said, well, maybe we are going to
5 argue -- they have on a couple of occasions: Barclay for one,
6 Ewing for another. Those are the only two they actually
7 pursued, and they lost. Both Judge Rakoff and Arbitrator
8 Collins said this is for the commissioner, only for the
9 commissioner.
10 The other times they have raised the issue: Dennis
11 Rodman, when he kicked the cameraman just a few feet off the
12 court; Rashid Wallace confronted a referee right outside the
13 arena after a game; and Mr. Artest, I think he threw a camera
14 in the exit tunnel. In those three cases they filed
15 grievances. We said, you've got to be kidding that this is
16 only on-the-court behavior, it happened during the game. And

17 all of them went away. They did not press any of them, not any
18 of them.
19 Judge, perhaps the most telling point on the merits
20 here that I can give you as to the meaning of on-the-court
21 conduct is there has never in the history of the NBA ever been
22 an arbitrator who reviewed the merits of an Article XXXV(d)
23 suspension, never, never, ever until Roger Kaplan did it
24 yesterday. Never.
25 Why is that? Because we have all understood up till
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1 this point that an Article XXXV suspension for conduct at or
2 during a game is the same thing as conduct on the playing court
3 and therefore solely within the commissioner's authority under
4 8. It has been a totally consistent practice.
5 That is not quite all. At the beginning of each
6 season the NBA distributes memoranda to each player and to the
7 Players Association explaining our conduct, rulings and our
8 procedures about conduct. I would like to put one of them up
9 for you now. This is the most recent conduct memo. These go
10 at the beginning of every year. They are very similar, been
11 there for the last six, seven years. Quite verbatim they have
12 gone out to all the players and the Players Association.
13 Let's focus on this one. Under the heading "Violence
14 on the Court," we tell the players, "any player who
15 deliberately enters the spectator stands during a game will be
16 automatically ejected and subject to a fine and/or a
17 suspension." That is the type of violence on the court that
18 the NBA will not tolerate.
19 Now, that is our position. That is what we have said.
20 But we have given this memo to the Players Association every
21 year since 1999. Year after year after year they have said
22 precisely nothing. They haven't said, what do you mean on the

23 court? That is not on the court, that's in the stands, that is
24 not in the flow of the game. Nothing. We have never heard
25 anything like that from them.

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1 And we have been on record for years telling them that
2 is what we believed, that on-the-court conduct included going
3 into the spectator stands. Silence. You will see the cases
4 that say when a party to a contract, at least one of them,
5 makes it clear how they view a particular provision and the
6 other party remains silent, you can draw at least some
7 inference that both parties agree that that is the right way to
8 interpret the contract.
9 THE COURT: That is not determinative, that language.
10 MR. MISHKIN: No.
11 THE COURT: Is your argument that the language
12 highlighted is violence or is it on the court?
13 MR. MISHKIN: I believe it would be violence on the
14 court, entering the spectator stands.
15 THE COURT: Are you saying that because that is under
16 the heading of "Violence on the Court," it necessarily means
17 that it is on the court. Well, it doesn't necessarily mean it
18 is violence.
19 MR. MISHKIN: You're right, Judge.
20 THE COURT: That doesn't necessarily follow. A person
21 could be disciplined for going in the stands even if he commits
22 no violence. So the fact that it is entitled "Violence on the
23 Court" is not as strong an argument as you want to present.
24 MR. MISHKIN: Some of my arguments are stronger than
25 others. This one only goes to the point, Judge, that we have

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1 equated the words "on the court" with going into the stands.

2 And the arbitrator, without citing this --
3 THE COURT: You have equated the word "violence" with
4 going in the stands.
5 MR. MISHKIN: Yes. The next sentence suggests that we
6 were distinguishing and that the first sentence, we would
7 really view that as violence. The second sentence says if you
8 just go in there chasing a ball, that is OK. So I do think
9 that we are certainly warning players that what we would regard
10 as on-the-court behavior that we will not tolerate is going
11 into the stands.
12 I don't see how you read that without at least
13 concluding that that is what the NBA is trying to convey, that
14 somehow it is on the court, going into the stands. That is
15 part of our presentation of the game. That is part of
16 on-the-court conduct within the meaning of section 8.
17 Judge, we have given you lots of paper, and I should
18 have at the very outset made an application to file an
19 oversized brief. I do apologize.
20 THE COURT: That's all right.
21 MR. MISHKIN: I think now I would like to get Mr.
22 Buchanan to take us through the very short videos of Mr. O'Neal
23 so we can all resolve this disagreement about exactly where it
24 happened.
25 MR. KESSLER: Your Honor, if there is going to be an

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1 evidentiary presentation with a witness, I would like to first
2 reply to the argument. I think that would be the appropriate
3 order.
4 THE COURT: Quite frankly, I am only interested in
5 seeing the video. If you want to comment on the video --
6 MR. KESSLER: If he just wants to show the video, that
7 is fine. I don't think we need Mr. Buchanan on and then I have

8 to cross-examine him.
9 THE COURT: I have seen portions if not all of the
10 video. But if you want to show me the video and tell me what
11 portion you believe is at issue and how it is determinative of
12 that fact, then I will hear from both sides as to whether or
13 not your arguments are consistent with what I see.
14 MR. MISHKIN: Your Honor, we will show you just the
15 clips of Mr. O'Neal. I do want to say, though, that our
16 objection to the award, and of course we will be cross-moving
17 to vacate the award, goes beyond simply -- the ultimate results
18 we may not quibble with, but the two steps that got the
19 arbitrator there with respect to the other three are something
20 that we very much oppose and will continue to contest. For
21 today's purposes, because we are only talking about likelihood
22 of success with respect to Mr. O'Neal, we will limit it to Mr.
23 O'Neal, but we would at a broader proceeding say more.
24 THE COURT: Surely.
25 MR. MISHKIN: With that, let's play the O'Neal clips.
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1 THE COURT: Before you play that, I am going to give
2 you a laser pointer, so if you wish to point something out
3 while it is playing --
4 MR. MISHKIN: You are not giving it to the precisely
5 right person. We have a monitor here that would be of even
6 higher resolution.
7 THE COURT: It is up to you. I am not sure how clear
8 your pictures are.
9 MR. KESSLER: Your Honor, you are a model for the
10 associates I work with that you had the laser pointer. I
11 commend you for that.
12 (Videotape shown)

13 MR. MISHKIN: We have Mr. O'Neal with the arrow there.
14 He was standing right on the apron. This is security personnel
15 that pushes over the apron, the scorer's table. That is the
16 first clip. The punch is coming. Do you want to see that
17 again, Judge?
18 THE COURT: No. That's fine.
19 MR. MISHKIN: You will see there. Stop it. Mr.
20 O'Neal has come from 10 or 15 feet away, on the court, on the
21 playing floor, on the playing floor, has run across and punched
22 that fan. They were both clearly, clearly within the confines
23 of the playing floor. There is just no definition of playing
24 floor, playing court, any definition that would describe where
25 basketball is played that would not fit where he was.
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1 Can we see the next one. That's it for O'Neal? OK.
2 Just that one once more. You see him, he is on the wood, on
3 the white wood. Comes running over, still on the floor. OK.
4 THE COURT: What is your position as to what the
5 status of the game was at that point in time?
6 MR. MISHKIN: The game was still in progress. The
7 officials did not call it. They didn't call it until well
8 after that occurred, your Honor. We have a clip which we can
9 show you that it was not called. The officials were debating
10 what to do, but well after that they called the game. The game
11 was still in progress when Mr. O'Neal committed this
12 misconduct.
13 THE COURT: Is it your position that the clock had
14 stopped at this point?
15 MR. MISHKIN: Definitely.
16 THE COURT: The clock was still running? How much
17 time?
18 MR. MISHKIN: There was I think 45.9 seconds when the

19 foul was committed by Artest on Wallace.
20 THE COURT: And the clock was stopped at that point?
21 MR. MISHKIN: It was stopped at that point, but there
22 were still 45.9 seconds left in the game. So the game was
23 continuing until the referees decided that they would call the
24 game, which they did after the events you have just seen
25 regarding Mr. O'Neal.

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1 THE COURT: How much longer after this event was the
2 game called?
3 MR. MISHKIN: Probably a matter of minutes. Yes, a
4 matter of minutes, Judge.
5 THE COURT: Thank you.
6 MR. MISHKIN: Thank you very much.
7 THE COURT: Mr. Kessler.
8 MR. KESSLER: Thank you, your Honor. Your Honor, the
9 first and most important point I want to make, which is very
10 clear here, shows you life isn't very simple. Neither side is
11 saying to you that the test is to literally read "on the
12 playing court," those words, to mean simply look at if you are
13 on the end line or not.
14 THE COURT: I assume in light of that video it is not
15 your position that he wasn't physically on the playing floor.
16 MR. KESSLER: Actually, your Honor, in the first
17 incident --
18 THE COURT: No. I am saying he struck the player,
19 which seems to be what primarily the discipline was for.
20 MR. KESSLER: No, your Honor. The discipline by the
21 commissioner, by Mr. Jackson's letter, which is Exhibit 5 to
22 Mr. Klepman's affidavit, makes it clear that he was suspended
23 for 25 games for both incidents. They talk about it included

24 striking a spectator and an arena employee.

25 The first one was the pushing of the arena employee,

1 which was clearly off the court. The second one was the punch

2 which physically this shows you why that can't be the test.

3 In fact, it is interesting that what the arbitrator

4 did here, if you look at his ruling, he primarily reduced Mr.

5 O'Neal's discipline because he found the first off-the-court

6 incident, with the pushing of the employee, the first one they

7 showed you, was not disciplinable at all because he was grabbed

8 behind the neck by someone who was unidentified and he said it

9 was reasonable to push someone off from your neck and the guy

10 happened to go there. That was all clearly off the playing

11 court even by a strict physical definition. That was almost at

12 the table right by the stands.

13 But this just goes to show, your Honor, if it were a

14 strict physical test, the arbitrator reviewed that one and that

15 is why he overturned the discipline, primarily for that first

16 incident. It was both.

17 THE COURT: The argument that I would have to accept,

18 then, is that if there was on-the-court activity and

19 off-the-court activity, the commissioner didn't have the

20 authority to discipline him for the on-the-court activity and

21 not make that --

22 MR. KESSLER: Your Honor, he has the authority to

23 discipline him. But there is an appeal. I want to make that

24 distinction. XXXV(d) --

25 THE COURT: I understand that.

1 MR. KESSLER: -- which they show --

2 THE COURT: But the appeal is that if he is

3 disciplined for on-the-court activity, the appeal goes to the

4 commissioner.
5 MR. KESSLER: If it is on the playing court as that
6 term is used there. But the point I am making to you, and this
7 goes to why we defer to arbitrators in collective bargaining,
8 neither party in this agreement, who have been there for 30
9 years, agreed to the physical distinction that you are talking
10 about between the stands or the line or that. They want to
11 argue, they showed you that memo --
12 THE COURT: What are you arguing is the distinction?
13 MR. KESSLER: I am arguing the distinction is that "on
14 the playing court" has to do with conduct in the context of the
15 flow of the game.
16 THE COURT: That is not my question. My question is
17 where do you say physically is on the court?
18 MR. KESSLER: Physically on the court ends with the
19 end line, it would be my view. When it is out of bounds, it is
20 off the court. But I don't think that is the test. What I am
21 saying is that both of us are saying that is not the test.
22 THE COURT: I agree with that. Both of you still
23 disagree as to whether or not that part of the test which is
24 supposed to be physically defined as whether or not it is on
25 the court or off the court --

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1 MR. KESSLER: Both of us agree that is not part of the
2 test, because Mr. Mishkin argues going into the stands. That
3 is what he was alluding to when he said he is actually going to
4 move, to make this very clear, to upset the arbitration
5 decisions regarding Mr. Artest and the others even though they
6 have been sustained, because he thinks going into the stands is
7 on the playing court. He can say that.
8 I am saying that it doesn't make sense to say Mr.

9 Jackson, who was in the stands, and Mr. Artest were subject to
10 independent arbitrator review and the person on the floor, Mr.
11 Johnson, for example, who was sliding on the floor, is subject
12 to appeal to the commissioner.
13 What the parties understood by these phrases and by
14 using the different language was that this is something where
15 you have to look at all the facts together, make a decision
16 what the parties meant for the kind of things that had to do
17 with the commissioner having this authority.
18 And it doesn't have to do with integrity of the game.
19 Mr. Mishkin said, well, because the commissioner has such a
20 desire for the integrity of the game, it is the product. We
21 went through the fact he ignores that in 1995 integrity of the
22 game was specifically given to the grievance arbitrator if it
23 is more than 25,000. The very thing that is dearest and
24 closest to the commissioner's heart, that is the unequivocal
25 language of the CBA in section 5, in section 13, in section
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1 14(c).
2 THE COURT: But the integrity of the game is supposed
3 to mean something different than on-the-court violence. It
4 means something different. I am not sure I can accept your
5 argument that because everything goes to the integrity of the
6 game, on-the-court violence always goes to the integrity of the
7 game.
8 MR. KESSLER: I agree.
9 THE COURT: So it cannot be that simply because you
10 can define it as if there is a riot on the court, that goes to
11 the integrity of the game.
12 MR. KESSLER: I agree, your Honor.
13 THE COURT: I want to make sure I understand your
14 argument. Are you arguing that even though that falls within

15 your definition of being on-the-court activity, simply because
16 it is characterized as going to the integrity of the game makes
17 the appeal arbitrable by an arbitrator?
18 MR. KESSLER: The way I believe --
19 THE COURT: Is that yes or no?
20 MR. KESSLER: No. The reason is because the way we
21 interpret "on the playing court," they are two different
22 things. Even though you could argue that "on the playing
23 court" is something that has to do, as I said -- well, I will
24 say it is the operation of the game itself. Regulating player
25 and referee behavior is part of the game.

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1 Integrity of the game generally in XXXV(d) is Mr.
2 Sprewell attacking his coach, it is Mr. O'Neal getting into it
3 with a fan in the middle of a riot, it is Mr. Artest and
4 Jackson getting into the fans in a riot. That is integrity of
5 the game. It has nothing to do with the game.
6 You have to ask yourself if this behavior could take
7 place anywhere. It could happen any time, before the game even
8 started. Both of us agree to this, and this is why we look at
9 arbitrators. Both parties would agree. They argue in the
10 stands it is still commissioner exclusive arbitration even
11 though it is physically clearly off the court. We argue even
12 though in that second incident Mr. O'Neal slid across into the
13 playing surface, there is no game going on there.
14 By the way, we said the clock stopped. It is over 7
15 minutes since the clock stopped.
16 THE COURT: That doesn't matter. If the game had
17 continued, it doesn't matter how long the clock had stopped,
18 whether it is a 20-second timeout or 7 minutes.
19 MR. KESSLER: It doesn't matter whether the game

20 continues or not, that is my point.

21 THE COURT: It matters whether the game has ended.

22 MR. KESSLER: I don't think so, your Honor, not for

23 this purpose. Think of the following. Let's say there were

24 two results. Let's say that a moment before Mr. O'Neal's

25 slide, a moment before that, the referees in the corner had

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1 said they are calling the game. They are not looking at Mr.

2 O'Neal. A moment before it. Or they do it afterwards. Could

3 that possibly make a difference as to who gets the discipline?

4 No. In other words, the whole point is you can't have these

5 rigid tests. That is why the arbitrator has to looked these

6 and decide these things.

7 THE COURT: You have to have some test, because there

8 is a test that must be applied before the arbitrator looks at

9 it, and that test is whether or not this falls within the

10 definition of on-the-court activity or whether it falls outside

11 the definition of on-the-court activity. That is a decision

12 that has to be made.

13 If it falls, as you acknowledge, within the

14 definition, your definition, of on-the-court activity, the

15 arbitrator has no role. You agree with that, don't you? If it

16 is determined that it falls within your definition of on-the-

17 court activity, the arbitrator has no role?

18 MR. KESSLER: Yes. But the way it works is first the

19 CBA gives the arbitrator broad jurisdiction over integrity of

20 the game, and then it takes away and gives to the commissioner

21 the right to be the arbitrator if it fits in on the playing

22 court as the parties meant those terms to be understood, which

23 neither one intends it to be literally understood.

24 Both of us look at a set of factors. No one has a

25 bright line. It is just like other areas of things. There are

1 a lot of laws, as you know, the antitrust laws and others,
2 where you look at a whole variety of factors to make a
3 decision. This is what we do here. No one wants a bright
4 line.
5 THE COURT: It is not determinative, but I am still
6 not sure what you claim are the physical confines of
7 on-the-court activity. Are you saying it has to be in the
8 stadium? I still don't understand.
9 MR. KESSLER: If you ask me how to physically define
10 the court, it is the out-of-bounds lines. But I don't believe
11 that is the test of what the parties meant. I don't think they
12 meant it to be a physical test.
13 THE COURT: So you believe that on-the-court activity
14 can be in-the-stands activity?
15 MR. KESSLER: That's right. In the stands is clearly
16 not on the playing court. That is correct. They are clearly
17 wrong about that anyway.
18 THE COURT: That is what I am saying. You do put that
19 limitation on it. You say on-the-court activity physically
20 cannot occur off the hardwood, is that what you are saying?
21 I'm asking. They say it can occur in the locker room. Are you
22 saying it cannot occur in the locker room?
23 MR. KESSLER: It can put occur in the locker room
24 having nothing to do with the game. To me, the words "playing
25 court," "playing," to me the playing part had to do with the

1 conduct of the game. That is what made sense. It is the
2 playing part of it. If there is no playing, if it is not part
3 of what is going on with referees, that wasn't meant.
4 That is why it makes no sense in this situation for

5 you to rule that Mr. Jackson's and Mr. Artest's discipline was
6 subject to arbitrable review because that was all in the stands
7 and to argue that Mr. O'Neal, that part of his discipline is
8 subject to arbitrable review, the first part of it, but the
9 second part is not arbitrable because he physically slid on the
10 court. That can't be it. It was all part of one riot incident
11 that was not part of the game. It was part of the playing.
12 If you were going to come at it a different way, my
13 argument would be that the arbitrator's decision has to be
14 sustained, because the first incident, the one that the
15 arbitrator reversed on -- if you read his opinion, he reversed
16 clearly on the first incident, and he imposed 25 games for
17 both -- the first incident clearly was physically outside of
18 the playing court. It was almost on the scorer's table.
19 What was happening there was Mr. O'Neal was going
20 towards the stands and an arena employee grabbed him around the
21 neck and he didn't know who it was and he pushed him away.
22 That was the first incident he disciplined him for. That was
23 clearly outside of the physical defines. That is what this
24 arbitrator reversed. If you are going to make that physical
25 distinction, which am not asking you to do, then you still have

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1 to sustain the arbitrator's jurisdiction.
2 THE COURT: Ultimately, the question is what is
3 intended here? What is it intended that the commissioner
4 should have sole authority and responsibility over? They say
5 what is practical in the sense that it is intended that if they
6 misbehave in the stadium when they show up for a game, that is
7 within the commissioner's sole authority to discipline and
8 review. You say that that is not the test.
9 MR. KESSLER: That can't be the test.
10 THE COURT: What do you say is the test?

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11 MR. KESSLER: The test is that if, after consideration
12 of all facts and evidence by the arbitrator, he finds --
13 THE COURT: That is kind of fluid, isn't it?
14 MR. KESSLER: Well, I will come to an end point.
15 -- that the conduct involved was something that was in
16 the context of the regulation of the game by the participants,
17 such as, to use the arbitrator's language, flagrant fouls,
18 fight between players, hard picks, elbows, confronting
19 referees, that is how he was talking about it. That clearly
20 makes the most sense.
21 THE COURT: But not striking fans who run out on the
22 court in the middle of a game?
23 MR. KESSLER: As I said, if it was regulating the
24 behavior while the game is going on, yes, maybe. In other
25 words, what I am trying to do is say you have to look -- these
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1 are not easy issues.
2 THE COURT: They say they are very easy issues. There
3 is something that the parties meant by this collective
4 bargaining agreement and they meant something reasonable. They
5 didn't mean something depending on the circumstances. They
6 meant that there is a test that we both understand here.
7 I am just trying to figure out the limits of your
8 argument. Are you saying if this happened, I am asking, during
9 a 20-second timeout, that is on the court?
10 MR. KESSLER: It could be. It depends what happens.
11 THE COURT: What does it depend on? That is what I am
12 trying to understand.
13 MR. KESSLER: What the conduct is.
14 THE COURT: If a fan runs out during a 20-second
15 timeout, I'm getting ready to walk off the court and I strike

16 the fan in the middle of the court?

17 MR. KESSLER: If those are the only facts, that might

18 be part of the game at that point.

19 THE COURT: What is the distinction? That is what I

20 am trying to understand.

21 MR. KESSLER: Because, Judge, for the same reason the

22 DA did not file charges against Ben Wallace.

23 THE COURT: The DA had no consideration of whether

24 this was on the court or off the court.

25 MR. KESSLER: Yes, he did.

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1 THE COURT: That is not the definition of the criminal

2 offense with which these individuals were charged.

3 MR. KESSLER: What I am saying is that the distinction

4 that is recognized in the criminal law in many states,

5 including Michigan, between, for example, conduct that comes up

6 in the context of a violent activity sport --

7 THE COURT: This wasn't a prize fight, if that is what

8 you are talking about.

9 MR. KESSLER: I would say the fan running onto the

10 court and the player reacting may or may not be there. You

11 would have to look at the other facts and the context of the

12 game.

13 THE COURT: What other facts determine it? That is

14 what I am asking.

15 MR. KESSLER: Did it go off into the stands or stay on

16 the court? Did the game immediately continue or in effect did

17 the game end? Was it the type of behavior that was sort of

18 ancillary to the game, the participation in it? Again, it is

19 hard, without looking, to say that. That might be on the

20 playing court, what you stated. In other words, I can't give

21 you that.

22 What they say the test is, they say everything at an
23 arena basically. They say look at XXXV, it says during or at a
24 game. If we wanted to say during or at a game, which is what
25 XXXV(d) says, we would have written "during or at a game." If
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1 we wanted to say adjacent to the court or in the arena, which
2 is what paragraph 19 of the uniform players contract says for
3 something else, we would have said "adjacent to the Court or
4 there."
5 What is troubling us all here -- and this is just a
6 reality, it doesn't make it easy -- is that until 1995 this
7 issue was irrelevant. From 1972, when this language found its
8 way into the CBA, until 1995, it goes on for decades, the
9 Players Association can't appeal anything on the court, off the
10 court, $25,000, above, below. If it involves the integrity of
11 the game, which all these suspensions do, you couldn't appeal,
12 period.
13 By the way, that is why it is ridiculous when he said
14 look at Barclay. We couldn't appeal Barclay. That couldn't
15 have any relevance, whether it was on the court. It wasn't the
16 issue. We had nothing to do with Barclay. It was before we
17 had a right to appeal.
18 Since '95, for better or worse, this ambiguous term
19 that was there for two decades has only come up in the context
20 of Mr. Sprewell's arbitration and three arbitrations where the
21 parties disagreed: Rodman, Wallace, Isaiah Rider, and Artest,
22 the previous one with Artest. By the way, they go, well, we
23 didn't press it. We settled them, excuse me.
24 We wrote, and it is in the record, four letters saying
25 it goes to the grievance arbitrator. They said in each case,
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1 by the way, it was reduced and settled. We can put that in. I
2 don't know shat kind of inference he is trying to draw that
3 somehow we didn't follow up that. That happens to most
4 grievances, by the way, your Honor. They get settled, just
5 like many cases get settled.
6 Let me go to something else, the other thing he
7 mentioned, because I want to address this. He went through my
8 previous statements. He should be my biographer. He did a
9 great job going through these things. Thank you, Jeffrey, I'm
10 glad the associates spent all night looking for those comments.
11 MR. MISHKIN: And found them.
12 MR. KESSLER: If your Honor were interested in those,
13 neither one had anything to do with arguing this issue. They
14 were in the context. For example, one was Sprewell where they
15 did not contest jurisdiction, and the Sprewell arbitration went
16 on for 14 days or something like that, until 11 o'clock at
17 night. The idea that I was somehow opining on making an
18 argument for an issue that wasn't before the arbitrator there.
19 It is nice work for an associate, but it means nothing.
20 The other one was the argument before Judge Rakoff
21 where the issue was collusion. So, please, reading Judge
22 Rakoff's transcript, there was no argument there. We didn't
23 argue on the court or off the court. In that case, by the way,
24 it would have been on the court. It was players in the middle
25 of the game running out on the court and a fight broke out
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1 between players.
2 Actually, that was I think Jeff Van Gundy on that and
3 somebody's leg, if I remember correctly as well. That was
4 something we don't contest is the kind of things that are there
5 for this.
6 I want to come back and end with the following, unless

7 you have further questions.

8 THE COURT: I have one further question. Is it
9 accurate to say that your argument is that this is not on-the-
10 court activity despite the fact that the game had yet to be
11 called and despite the fact that O'Neal clearly punched this
12 fan on the playing floor, for two reasons: One, because it
13 wasn't during the course of playing the game, and, two, because
14 part of his activity began off the court? Is that an accurate
15 or inaccurate characterization?

16 MR. KESSLER: It is accurate. And I would add three
17 and four. Three, because the first incident wasn't physically
18 on the court at all, which is part of the discipline for which
19 he is punished, so it didn't begin on the court and never got
20 onto the court. It was by the scorer's table, and that was in
21 fact what was reversed here.

22 And four, because the entire incident had to do with a
23 riot that emanated from the stands, which makes it a very
24 different kind of incident. Looking at the difference between
25 what was supposed to be integrity of the game to the grievance

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1 arbitrator and what was supposed to be the types of things,
2 flagrant fouls, other things, that would go to the
3 commissioner. it is not a fine, rigid line. No one argues
4 that.

5 THE COURT: I assume the arbitrator makes the
6 distinction between Mr. O'Neal's activity and the activity of
7 the other three.

8 MR. KESSLER: On reversing the suspensions, he did.
9 Otherwise, he does not.

10 THE COURT: He does more than just a reversal of the
11 suspension. One of the reasons, if not the primary reason, he

12 gives is because of the nature of the activity and where that
13 activity did take place as opposed to the other.
14 MR. KESSLER: That is only one of the factors in
15 reducing the suspension. He also ruled, as I indicated, on
16 page 18 he clearly said all the players were not on the playing
17 court as he interprets those terms, including Mr. O'Neal.
18 The last point I wanted to make, your Honor, because I
19 think it is important -- well, two points. One is it is very,
20 very clear if you look at Judge Jones's decision, which I think
21 is relevant here, and if you look at the Supreme Court in AT&T
22 Technologies. If there is any possible rational way of looking
23 at this, it is that if this goes to arbitration, even if it is
24 de novo review, you are supposed to apply that presumption. In
25 fact, this is important.

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1 They say de novo is throwing away the arbitration
2 decision. No. Your Honor, you know what de novo review is. I
3 assume you have decisions that go up to the Court of Appeals
4 and they get to de novo review your legal decision. They don't
5 throw it away.
6 They look at it and they say, even under de novo, does
7 that make sense to me. They may be influenced. They do not
8 burn it up. So I know you understand what de novo means. It
9 does not mean you thrown it away, it is over. It means you can
10 defer.
11 We think you do have to defer to it because, for all
12 of these things that we have been going through, this is again
13 procedural arbitrability. The Supreme Court has said these are
14 the kinds of predicate authorities, on and off the playing
15 court, that are predicates to arbitrability.
16 The Supreme Court says arbitrators know best. Why?
17 Because these things are messy. These things depend on the law

18 of the shop. He will listen to Mr. Mishkin's argument someday
19 about in the stands or not and he will listen to mine and he
20 will make case-by-case decisions that become precedent and law
21 of the shop. That is why we defer to this.
22 If all we mean to do now is to show you substantial
23 questions on the merits -- Mr. Mishkin is wrong, by the way.
24 He says there is some higher standard for reinstating
25 employees. When you have an arbitration decision, which are
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1 not those cases that are already in effect -- your Honor drew
2 the right distinction -- it is a very different decision than
3 whether or not you are just seeking to reinstate someone
4 pending those issues.
5 Second of all, it does make a difference here that
6 they are athletes, as your Honor pointed out. If Mr. O'Neal
7 doesn't win a championship this year or even make the playoffs,
8 he will get the nice letter, but the nice letter is not going
9 to help him. It is not going to make him whole.
10 The making-whole language, this is my final point, on
11 14(d) that they cite, they said after a final disposition under
12 Article XXXI. Section 5 of XXXI says what final disposition
13 is. Final disposition is the grievance arbitrator's ruling.
14 So after final disposition, XXXI, which is the grievance
15 arbitrator's ruling, not the court's ruling, he shall promptly,
16 in the CBA, be made whole.
17 What happens is two things. You get reinstated for
18 whatever games are left and you can't do anything more than
19 money, as they pointed out, so you do that. That is not an
20 admission you don't do that here. You do the best you can
21 here.
22 I would also point out that the choice is not between

23 court and arbitrator here, it is just between which arbitrator.
24 The case they cited is not on point in that. I am very happy
25 for you to read a decision they cite, the Feinberg case. That
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1 was a case of whether the arbitrator had the ability to decide
2 jurisdiction at all. You have correctly noted that is not even
3 a relevant issue for you anymore.
4 Number two, as Judge Jones found in this case, still
5 applicable, these CBA provisions do let the arbitrator decide,
6 that is what she ruled here, decide jurisdiction. That is
7 exactly the point before Judge Jones, and those broad
8 arbitration clauses have not changed with respect to the broad
9 arbitration clauses for the arbitrator to decide. So those in
10 fact are exactly the same.
11 Finally, your Honor, and again they do not have any
12 answer, there is no harm to the NBA, you are quite right. If
13 you grant this relief today and we think it is right, that we
14 think we have substantial questions, you will prevent grave
15 irreparable harm, there will be a fair hearing.
16 It won't be just Commissioner Stern saying because
17 that is what I decided, no one can question it. That is not
18 what the CBA provides for. It is the just cause standard that
19 is there. This is an issue of fairness and integrity of the
20 process, not the result.
21 In the end, if they convince you of something else and
22 we are wrong, then Mr. O'Neal will serve those games later. If
23 it is during the playoffs, it may be worse for him. But he is
24 willing to take that risk because we believe so strongly that
25 we have a basis where the arbitrator's decision is going to be
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1 enforced and will not be set aside under the strict standards.
2 So we are asking you please to consider that request for

3 relief.
4 If you have any other questions, I will answer them.
5 Once you decide that is, by the way, a procedural
6 arbitrability question where there is deference, if you do
7 that, that should be the end of it. If it is substantive
8 arbitrability and it is de novo, you still should find that
9 based on this record and these facts there are at least
10 substantial questions going to the merits and the balance of
11 hardships in our favor.
12 Thank you, your Honor.
13 THE COURT: I want to look back at a couple of the
14 cases that you have cited today over lunch. I want to give you
15 a decision about 3 o'clock. So I am going to ask the parties
16 to take some lunch. We will reconvene here at 3 o'clock, and
17 then I will be prepared to give you a decision.
18 (Recess)
19 (3:00 p.m.)
20 I am ready to render a decision. The decision is as
21 follows.
22 On November 21, 2004, NBA commissioner David Stern
23 announced the suspensions of several NBA players, including Ron
24 Artest, Stephen Jackson, Anthony Johnson, and Jermaine O'Neal,
25 for their actions during the Indianapolis Pacers-Detroit

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1 Pistons basketball game on November 19, 2004.
2 On November 22, 2004, the National Basketball Players
3 Association filed a grievance on behalf of those players,
4 claiming that the discipline imposed by Commissioner Stern was
5 inconsistent with the terms of the collective bargaining
6 agreement and applicable law and without just cause. The union
7 requested a hearing before the grievance arbitrator. The NBA

8 responded by asserting that only Commissioner Stern had
9 authority to review the suspensions issued by him.
10 The grievance arbitrator went on to determine that he
11 had jurisdiction to decide the arbitrability issue presented in
12 this dispute, and he further determined that he had authority
13 to review the decision of Commissioner David Stern in
14 suspending those four NBA players. A hearing was scheduled in
15 which the NBA decided not to participate in order to preserve
16 their position that the grievance arbitrator had no such
17 authority.
18 On December 22, 2004, grievance arbitrator Roger P.
19 Kaplan issued an opinion and award concluding that the
20 suspensions by Commissioner Stern of NBA players Ron Artest,
21 that suspension being for the remainder of the season; Stephen
22 Jackson, a 30-game suspension; and Anthony Johnson, a 25-game
23 suspension -- that all three of those suspensions were
24 reasonable and for just cause.
25 With respect to Jermaine O'Neal, the grievance

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1 arbitrator found that his suspension for 25 games was excessive
2 and not in accordance with the fundamental tenets of just
3 cause. He thereby reduced O'Neal's suspension to 15 games.
4 That reduction in penalty, if proper, would mean that O'Neal
5 had served his period of suspension and would be eligible to
6 play the next scheduled NBA game, which was again between the
7 Indiana Pacers and the Detroit Pistons, on Saturday, December
8 25, 2004, Christmas Day.
9 The ultimate decision to be determined by this Court
10 is basically twofold: Whether the grievance arbitrator had
11 jurisdiction to decide the arbitrability of this issue in
12 dispute and, two, did the grievance arbitrator have the
13 authority to review the suspension of the four players?

14 Today the union seeks injunctive relief in the form of
15 a temporary restraining order preventing the NBA and
16 Commissioner Stern from enforcing any further period of
17 suspension of Jermaine O'Neal until it is determined if the
18 decision of the grievance arbitrator was properly decided and
19 should be confirmed.
20 A temporary restraining order, like a preliminary
21 injunction, is an extraordinary remedy that would not be
22 granted lightly. In the Second Circuit the standard for a
23 temporary restraining order is the same for a preliminary
24 injunction.
25 A preliminary injunction may be granted only upon the
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1 demonstration of irreparable harm and either a likelihood of
2 success on the merits of the case or sufficiently serious
3 questions going to the merits to make them a fair ground for
4 litigation, and a balance of hardships tipping decidedly in
5 favor of the moving party.
6 When there is a mandatory injunction, which plaintiffs
7 in this case argue that the request here is, there is a higher
8 standard required of the movant where an injunction would alter
9 rather than maintain the status quo or an injunction would
10 provide the movant with substantially all of the relief sought
11 and that relief cannot be undone even if the other party
12 prevails at the trial of the merits.
13 The typical preliminary injunction is prohibitory and
14 generally seeks only to maintain the status quo pending a trial
15 on the merits. A mandatory injunction, in contrast, is said to
16 alter the status quo by commanding this positive act. A
17 mandatory injunction should issue only upon a clear showing
18 that the moving party is entitled to the relief requested or

19 where extreme, very serious damage will result from a denial of
20 preliminary relief.
21 In this case the question of whether the parties have
22 submitted a particular dispute to arbitration, i.e., the
23 question of arbitrability, is a question for judicial
24 determination unless the parties clearly and unmistakably
25 provide otherwise. In the Gateway dispute about whether the

1 parties are bound by a given arbitration clause raises the
2 question of arbitrability for the Court to decide.
3 Similarly, a disagreement about whether an arbitration
4 clause in a concededly binding contract applies to a particular
5 type of controversy is for the Court. Procedural questions
6 which grow out of the dispute on its final disposition are
7 presumptively not for the judge but for an arbitrator to
8 decide. The presumption is that the arbitrator decides such
9 issues of allegations of waiver, of delay, or like defenses to
10 arbitrability.
11 In reviewing an arbitrator's decision, with regard to
12 factual findings there shall be a presumption, rebuttable only
13 by a clear preponderance of the evidence, that the findings of
14 fact made by the arbitrator are correct when ultimately
15 deciding whether to confirm an arbitration award. District
16 courts are not authorized to second-guess arbitrators'
17 decisions if those decisions are properly within the
18 arbitrator's jurisdiction and within their power and authority.
19 One basis for setting aside an arbitrator's award is
20 the nonstatutory ground of manifest disregard of the law. This
21 ground presupposes something beyond and different from a mere
22 error in the law or failure on the part of the arbitrator to
23 understand or apply the law.
24 In this case it has not been argued at this stage of

25 the proceedings that if the arbitrator had the authority to
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1 decide this case, the arbitrator committed any error or
2 disregard of the applicable law other than its initial findings
3 that the arbitrator had the authority to determine
4 arbitrability and that the arbitrator had authority over this
5 issue.
6 I find that a temporary restraining order, at least
7 for some period of time so that this case can be resolved, is
8 appropriate. I am going to grant the relief requested by the
9 Players Association.
10 In this case I believe that the Players Association
11 has raised sufficiently serious questions going to the merits
12 to make them a fair ground for litigation and the balance of
13 hardships tip in favor of the movants in this case.
14 As to whether irreparable harm or injury is likely to
15 occur if Jermaine O'Neal is forced to continue a period of
16 suspension, and I believe that sufficient evidence has put in
17 serious question going to the merits of the case that may make
18 it possible and likely that if the decision of the arbitrator
19 that the arbitrator had authority to arbitrate this dispute is
20 upheld, having the player serve a 10-game suspension in and of
21 itself under these circumstances -- and I want to emphasize I
22 am limiting it to these circumstances, because these are unique
23 circumstances, other than the standard case, and circumstances
24 that neither the league nor the players have confronted in the
25 past, different from any circumstance that they have confronted
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1 in the past -- having him serve a 10-game period of suspension
2 in light of what we have now as an outstanding decision by the
3 arbitrator that he should not serve such a period demonstrates

4 irreparable harm which cannot be undone.
5 More specifically, although, as the parties have
6 argued, this is a collective bargaining case, not a basketball
7 case, both sides recognize that the nature of this business
8 involves other factors not involved in cases outside of the
9 area in which this business is conducted.
10 With regard to O'Neal personally, he was drafted in
11 the 1996 draft by the Portland Trail Blazers and has played in
12 the NBA for approximately 7 years. Jermaine O'Neal is
13 co-captain of the Indiana Pacers. He has made the NBA All-Star
14 Team, as indicated in the arbitrator's decision and, relevant
15 to the arbitrator's decision, has made the NBA All-Star Team in
16 the last three years as well as being named All-NBA in the last
17 three years. Last year he was voted to the Second Team All
18 NBA.
19 I find, as I indicated, that irreparable injury is
20 foreseeable if he is required to continue his period of
21 suspension and if it is later determined that the arbitrator's
22 decision reducing that suspension must be upheld. I do not
23 find compelling the NBA's argument that under such
24 circumstances, if he serves further suspension that is not
25 required, he can later be made whole by monetary compensation.
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1 In this unique set of circumstances, not playing the
2 next 10 games may have irreversible consequences for the
3 player, the team, the player's future, and the league itself
4 beyond those consequences contemplated by the ordinary
5 suspension of a player in having that suspension go forward
6 while awaiting an appeal.
7 This case is in a different posture. This case has
8 already been appealed. The only question is the validity of
9 that decision and whether it will be confirmed. As I said,

10 furthermore, the balance of hardships decidedly tip in the
11 player's favor. If the arbitration award is set aside, he must
12 still serve the balance of his suspension. If it is confirmed
13 and he has already served an additional 10-game suspension,
14 cash cannot make a player whole for the games lost under these
15 circumstances.
16 I find that there are sufficiently serious questions
17 going to the merits. As I said, it may be fair ground for
18 litigation. This situation is unique. I emphasize it is
19 limited to the particular facts and circumstances of this case.
20 What is solely determinative of this case is whether
21 the grievance arbitrability is appropriate or whether the
22 appeal lies solely to the commissioner. That issue is
23 significantly tied to the question of whether Jermaine O'Neal's
24 actions involved conduct on the playing court. That issue is
25 in significant dispute and merits both further argument and
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1 probably further discovery.
2 With regard to a mandatory injunction, it is debatable
3 whether the status quo is being changed. The status quo is no
4 longer that there is an order of suspension which is merely
5 continuing. The status quo is now there is an order of
6 suspension which has been reduced by an arbitrator's decision.
7 Applying either standard, I find that the appropriate thing is
8 to not have the player serve any further period of suspension
9 which might possibly be determined to have not been a valid
10 period of suspension.
11 This temporary order, I want to make clear, is not
12 intended to nor does it undermine the commissioner's authority
13 to discipline and sanction players for their misconduct. There
14 is no dispute that, pursuant to the collective bargaining

15 agreement, that is a primary function and role and the primary
16 authority is in the commissioner, and that authority should not
17 be undermined.
18 I do not feel that a temporary stay of any further
19 suspension, given the orders in this case and particularly only
20 then to Jermaine O'Neal, will in any way undermine that
21 authority. However, I do find that it would be simply unfair
22 to continue the suspension once it has been modified on appeal
23 to simply await a judicial determination as to its validity or
24 as to whether or not that decision should, once again, be
25 overturned.

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1 That being the status of this case, I believe, as I
2 indicated, it is appropriate and the balance of hardships in
3 this case tip clearly in favor of the player, given the serious
4 issues raised by this case and given the fact that a suspension
5 of this player every game he is suspended beyond which he
6 should be suspended will have consequences that cannot be
7 compensated in dollars and may have other consequences that
8 cannot be articulated or anticipated at this time.
9 Based on those reasons and the applicable law that I
10 have reviewed with regard to the standards and with regard to
11 other situations of discipline as handled and how the parties
12 have dealt with the issue of discipline on the court, I find
13 that it is appropriate to issue such a temporary restraining
14 order.
15 I will keep that order only in place as long as it is
16 necessary for the parties to feel that they wish to put this
17 issue before the Court fully with regard to whether or not this
18 arbitration award should be confirmed or set aside. I will
19 move on a schedule that is as quick as the parties feel that
20 they are in a position to be heard on that issue and have the

21 Court decide that issue or, if necessary, if there is a longer
22 period of time that the parties want than that to consider
23 whether or not this restraining order should simply be
24 converted to a preliminary injunction until this issue is
25 decided.

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1 That is the decision of the Court.
2 I turn to the plaintiffs. Mr. Mishkin, how do you
3 want to proceed at this point in terms of moving forward with
4 the case?
5 MR. MISHKIN: We are prepared to proceed, your Honor,
6 immediately, and I think we should. We will bring on our
7 motion to vacate. We can proceed next week at the earliest
8 date you have.
9 THE COURT: What do you anticipate you will want to do
10 in preparation for that, and how soon do you want to be heard
11 and be back before the Court to resolve that issue?
12 MR. MISHKIN: I don't think we need any discovery. I
13 think we are ready to proceed on the merits literally
14 immediately.
15 THE COURT: How quickly do you think you can file your
16 papers?
17 MR. MISHKIN: We have filed a substantial amount of
18 them. I think we need to file a motion to vacate. I haven't
19 seen it yet, but there was a counterclaim filed today to
20 confirm. So we will immediately file our motion to vacate. I
21 think it is just a matter of when your Honor can hear us.
22 THE COURT: Let me turn to Mr. Kessler. What is your
23 schedule?
24 MR. KESSLER: Your Honor, I think we probably should
25 agree on a briefing schedule to make parallel motions. We will

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1 make a motion to confirm, they will make a motion to vacate,
2 then we can be on a similar briefing schedule for that.
3 THE COURT: How much time do you want to do that?
4 MR. KESSLER: What I would like, if possible, is to
5 have some very limited discovery concerning some of the points
6 that are in the Buchanan affidavit which they intend apparently
7 to rely upon that are creating some factual issues about all of
8 this. What I was going to suggest is that we file cross-
9 motions, if you will, maybe at the end of the third week in
10 January, something like that, and between now and then we do
11 some document discovery.
12 I don't know if it will be necessary to do
13 depositions. I think there will be some documents we are going
14 to want to get, possibly some depositions. This will be a
15 final decision on the merits, so I think we are entitled to
16 something here.
17 We could have cross-motions filed near the end of
18 January, a few weeks for opposition briefs, and then have a
19 hearing, your Honor, sometime in February to finally decide
20 this. That will be an awfully rapid pace to get to the final
21 decision, but we have no problem in trying to meet that kind of
22 schedule.
23 THE COURT: Mr. Mishkin?
24 MR. MISHKIN: Your Honor, Mr. Kessler has already
25 tried this case fully on the merits. I have no idea what he
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1 needs to do in addition to the trial he has already conducted.
2 We would like to proceed next week.
3 THE COURT: This is what I am going to do. File your
4 papers by the end of the day on the 28th. I don't see any
5 reason you can't file your papers by then. I think any

6 response to those papers at this point should come in no later
7 than the 31st, Friday.
8 If you believe that there is discovery that should be
9 taken, then you should notify the other side as to discovery
10 that you think is appropriate by Monday the 27th. Unless the
11 extent of the discovery or the nature of the discovery is an
12 unreasonable request, you should be prepared -- and I think you
13 can sort of anticipate at this point that you should speak with
14 each other as soon as you leave court today -- you should be
15 prepared to make that discovery available or make parties
16 available for depositions next week.
17 I am not sure that any extensive depositions or
18 extensive document production is necessary, since you basically
19 know who the relevant parties are that you are relying upon and
20 the other side is relying upon, and most of the documents are
21 in the possession of both parties.
22 If there are specific documents that you think you
23 need that you believe that you are not currently in possession
24 of that you think are relevant, ask for those specific
25 documents. But a general, broad sweeping document request is
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1 not what is going to be appropriate.
2 I am not going to delay this schedule for that kind of
3 discovery unless the parties tell me that they both agree that
4 more discovery or the time period needs to be pushed back or
5 that one side can justify the need to have further discovery
6 and that it is going to take longer than being produced next
7 week, given a request by Monday.
8 If that is all done, I am going to put this down for
9 January 3rd, Monday.
10 MR. KESSLER: Could I raise a point about that?

11 THE COURT: Yes.
12 MR. KESSLER: I rarely do this, your Honor.
13 Unfortunately, I have planned for the 3rd to the 10th to be out
14 of the country on one of these things where I have all the
15 members of my family planned for six months and locked in. I
16 really hesitate to mention that, but I'm afraid -- if you order
17 me, it is going to cause some irreparable harm with many
18 members of my family, if we have to do it that way. I can do
19 it the day we get back, the 11th, or any date thereafter. But
20 if there is any way we could avoid that one week, your Honor, I
21 would be most grateful as a personal matter about that.
22 THE COURT: Mr. Mishkin?
23 MR. MISHKIN: I hesitate to cause any irreparable harm
24 to Mr. Kessler's family.
25 MR. KESSLER: Again, I am sort of throwing myself on

1 the mercy of the Court. I think at this point, frankly, given
2 the TRO, the difference to any interest the NBA has, your
3 Honor, between having it decided shortly after the 3rd or
4 shortly after the 11th is not going to be material.
5 As we said, if the player has to serve those games, he
6 can serve those games later. If we are right, then it doesn't
7 matter, and I can't imagine that it makes any material
8 difference at this point. Again, I am at the Court's mercy on
9 this issue.
10 THE COURT: I am going to put this on as quick a
11 schedule as the NBA wants and can accommodate. If it has to go
12 beyond that, I am going to consider whether or not I am going
13 to keep the temporary restraining order in place. I think
14 that that is the only appropriate way to approach it.
15 MR. KESSLER: I understand, your Honor.
16 THE COURT: This is equitable relief. This is very

17 serious equitable relief. I think that the NBA is entitled to
18 a very swift resolution of this issue. If you and Mr. Mishkin
19 can agree to some other appropriate schedule, I will
20 accommodate that. Otherwise --
21 MR. KESSLER: Your Honor, let me make the following
22 suggestion. This might accommodate Mr. Mishkin as well.
23 Instead of filing our papers on the 31st, why don't we file
24 them on the 30th and then have the argument on the 31st, in
25 other words, the next day, and do it then. That way Mr.

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1 Mishkin gets a little bit more speed and I get relief on my
2 end. I'm certainly willing to do that if that would suit the
3 Court, since we are moving so quickly anyway.
4 THE COURT: Unfortunately, the court is closed on the
5 31st.
6 MR. KESSLER: Oh, I'm sorry, your Honor.
7 THE COURT: I can accommodate you on the 30th late in
8 the day if you want to work on that schedule.
9 MR. KESSLER: That would be fine. We can get our
10 papers in first thing in the morning. As your Honor has
11 probably deduced, Mr. Mishkin and I are relatively familiar
12 with these arguments. Whether Mr. Buchanan testifies or
13 someone else, I don't think we are looking at, even on the
14 merits, a great deal of factual development beyond what your
15 Honor already understands. So the ultimate merits will be very
16 close to the issues we have already presented.
17 THE COURT: That is what I am assuming. I am
18 preparing myself in anticipation of the fact that there is
19 probably not a lot more that you haven't already given me or I
20 haven't already looked at beyond that that I would anticipate
21 on these issues.

22 MR. KESSLER: If he would agree, we could turn in our
23 papers first thing in the morning on the 30th and then have the
24 hearing in the afternoon, at your Honor's convenience, and then
25 have this decided.

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1 THE COURT: I am willing to accommodate you.
2 MR. MISHKIN: I am willing to do that, your Honor.
3 THE COURT: What I will do is schedule it for 2
4 o'clock.
5 MR. MISHKIN: 2 o'clock on Friday the 30th?
6 THE COURT: Thursday the 30th, 2 o'clock. I will
7 inspect the papers. The earlier you can get them to me the
8 better. I will expect the papers no later than 9:00 a.m. that
9 morning. If you can get it at some time between 8:00 and 9:00
10 to me, that would be helpful.
11 MR. MISHKIN: The first brief is due the 28th?
12 THE COURT: Yes.
13 MR. KESSLER: What time on the 28th do you want to
14 exchange?
15 MR. MISHKIN: The 28th is Tuesday.
16 MR. KESSLER: 12 o'clock? Earlier?
17 MR. MISHKIN: 5 o'clock.
18 MR. KESSLER: 5 o'clock the 28th, that's fine.
19 THE COURT: I will start preparing myself now for
20 that. I will see all the parties at 2 o'clock. I will issue a
21 written order staying the further suspension. If anything
22 changes, notify me right away and we will make an adjustment.
23 I will be prepared to hear you on the 30th and try and resolve
24 this issue on that day.
25 MR. KESSLER: I will assume, just so we don't confuse

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1 you about this issue, that we will both stick to the normal

2 page limits on this.
3 THE COURT: At this point I don't see any need to go
4 beyond the normal page limits.
5 MR. KESSLER: That will prevent mutually assured
6 destruction by both sides. I think that is a good policy.
7 THE COURT: Also meaning I can concentrate on the
8 issues, I don't have to wade through the papers.
9 MR. KESSLER: Your Honor, I think on behalf of both
10 sides we really do appreciate on this holiday schedule your
11 devoting this time to this case. It is obviously very
12 important to both sides. We really do appreciate that.
13 MR. MISHKIN: Your Honor, we will get in our motion to
14 vacate. I assume that the hearing that we are having at 2
15 o'clock on the 30th is a hearing on the merits of the cross-
16 motions.
17 THE COURT: Yes. I will make it a full hearing on the
18 merits. Thank you.
19 (Adjourned)
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