

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Contents

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Preface

Preface

This update, like most CEB publications, was produced by and for members of the California Bar. Members of the Bar wrote and edited it, and the problems were discussed with California lawyers.

We consider this update part of a dialogue with our readers. Another update next year, cumulative of this one, will give us an opportunity to make corrections and additions you suggest. If you know something we did not include, or if we erred, share your knowledge with other California lawyers. Send your comments to:

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The project manager for this update was Norma Piatt. The legal editor was Ken Scudder. Legal research was performed by Ken Scudder and Andy Rosner. The index was updated by Robert W. Burke. David Rosenberg was the copy and production editor. Composition was performed by CEB's Electronic Publishing staff.

Pamela J. Jester

Director

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Selected Developments

Selected Developments

Since Last Update: A prosecutor's references to the Bible during closing argument did not constitute reversible error. *People v Hughes* (2002) 27 C4th 287, 390, 116 CR2d 401. See Update §3.2.

Crime-scene and autopsy photographs may be used in a prosecutor's closing argument in a criminal penalty phase proceeding under certain circumstances. *People v Anderson* (2001) 25 C4th 543, 593, 106 CR2d 575. See Update §3.3.

A prosecutor's argument, inviting the jury to reflect on all that the victim had lost through her death, was an appeal for sympathy for the victim, and therefore was improper at the guilt phase of a capital trial. *People v Kipp* (2001) 26 C4th 1100, 1130, 113 CR2d 27. See Update §3.7.

Additionally, a prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand. *People v Hughes* (2002) 27 C4th 287, 371, 116 CR2d 401. See Update §3.8.

A prosecutor's introduction as evidence during trial of defendant's incriminating, postarrest, unMirandized statement to police was reversible error. *People v Cleland* (2003) 109 CA4th 121, 134 CR2d 479. See Update §3.8. A trial court committed error when it allowed the prosecutor to reopen and offer rebuttal evidence in the middle of closing argument without giving defendant an opportunity to offer surrebuttal. *People v Cuccia* (2002) 97 CA4th 785, 792, 118 CR2d 668. See Update §3.9.

A prosecutor's remarks during closing argument would be understood by the jury as an admonition not to be misled by the defense interpretation of the evidence, rather than as a personal attack on defense counsel; thus, there is no reasonable likelihood that the jury was improperly influenced by the prosecutor's remarks. *People v Cunningham* (2001) 25 C4th 926, 108 CR2d 291. See Update §3.11.

In a New York decision, defendant's conviction was reversed for prejudicial error after the prosecutor repeatedly told the jury in closing argument that defendant had lied. *People v Goldstein* (2003) 2003 NYS Misc Lexis 980. See Update §3.11.

Several defendants in criminal trials have argued unsuccessfully that the brevity of their counsel's closing argument consisted of inadequate representation. See *People v Lewis* (2001) 25 C4th 610, 674, 106 CR2d 629; *People v Weaver* (2001) 26 C4th 876, 979, 111 CR2d 2, discussed in Update §3.13A.

Another prosecutor arguably misstated the law during closing argument, but the error amounted to prosecutorial misconduct during argument, rather than trial and resolution of the case on an improper legal basis. *People v Morales* (2001) 25 C4th 34, 43, 104 CR2d 582. See Update §3.15.

In 2002, we added the opening statement of Dennis Cunningham in *Judi Bari v FBI*, a lawsuit in the Northern District of California that alleged that the FBI had violated plaintiffs' constitutional rights. See Appendix, Part IX.

Since the Book's Publication. We conduct thorough reviews of the relevant law each year. With the exceptions noted in this update, there have been no significant developments in that law since the book was published.

For a case in which a nonsuit after the opening statement was reversed on appeal, see *Galanek v Wismar* (1999) 68 CA4th 1417, 81 CR2d 236. See Update §2.4.

For an example of a nonsuit after the opening statement that was upheld by the California Supreme Court, see *Hoff v Vacaville Unified Sch. Dist.* (1998) 19 C4th 925, 80 CR2d 811; Update §2.4. There is new discussion of focus groups and mock trials in Update §§2.6A-2.6C. We have also added discussion of the use of computers in keeping the judge and jury interested in your opening statement and closing argument. See Update §§2.17A-2.17H.

A prosecutor does not commit misconduct in an opening statement by offering a "social history" of the victim. *People v Millwee* (1998) 18 C4th 96, 74 CR2d 418. See Update §3.7.

An otherwise proper opening statement does not become objectionable because it is delivered with dramatic language in a manner meant to hold the jurors' attention. *People v Dennis* (1998) 17 C4th 468, 71 CR2d 680. See Update §3.7.

Brief comments by the prosecutor during closing argument noting the absence of evidence contradicting prosecution evidence on several points do not constitute misconduct when the comments could not fairly be interpreted as referring to the defendant's failure to testify. *People v Bradford* (1997) 15 C4th 1229, 65 CR2d 145. See Update §3.8.

Commenting on a criminal defendant's invoking his or her right not to testify is misconduct that, along with the commenter's other misconduct, justifies a new trial for that defendant, even though the offending party is the attorney for a codefendant and not the prosecutor. *People v Estrada* (1998) 63 CA4th 1090, 75 CR2d 17. See Update §3.8.

A prosecutor's continually emphasizing in closing argument that another party has cooperated with police and has testified but the defendant has not cooperated is improper and requires reversal. *People v Guzman* (2000) 80 CA4th 1282, 96 CR2d 87. See Update §3.8.

A prosecutor does not engage in misconduct in an opening statement by characterizing as obsessive the defendant's interest in using a plastic tie as a method of killing when the prosecutor simply overstates the extent of that interest as described by subsequent testimony. *People v Coddington* (2000) 23 C4th 529, 587, 97 CR2d 528. See Update §3.9.

A prosecutor engages in misconduct in a closing statement when he or she implies that the uncalled witness (a police officer) would have corroborated another police officer's testimony on the defendant's alleged possession of a controlled substance. *People v Hall* (2000) 82 CA4th 813, 817, 98 CR2d 527. See Update §3.9.

When the trial court does not admit evidence for a limited purpose, the prosecutor may use the evidence in her or his closing argument for any legally permissible purpose. *People v Lucero* (2000) 23 C4th 692, 719, 97 CR2d 871. See Update §3.12.

When defense counsel does not object to any of the prosecutorial comments that purportedly constitutes prejudicial misconduct, the defendant's claim for prosecutorial misconduct is waived. *People v Frye* (1998) 18 C4th 894, 77 CR2d 25; see *People v Lewis* (2001) 25 C4th 610, 669, 106 CR2d 629. See Update §3.15.

When, in an opening statement, a prosecutor wrongly attributes a motive to a defendant's change in appearance, the conduct is not prejudicial if the jury was admonished that the opening statement was not evidence and if the defendant had an opportunity to confront all witnesses and to challenge and rebut the evidence. *People v Cunningham* (2001) 25 C4th 926, 108 CR2d 291. See Update §3.15.

Since publication, we have added several opening statements and closing arguments to the Appendix. In 1990, we presented the winning closing argument made by Joseph W. Cotchett, one of the authors of the book, in the liability phase of a multimillion-dollar securities fraud case. Added in 1991 was his argument for punitive damages in the penalty phase of that same trial.

In 1992, we arranged to publish the winning closing argument of Frank Rothman, the coauthor of the book, in the liability phase of a multimillion-dollar case involving claims under an alleged oral law partnership agreement. In the 1993 update, we published his closing argument to the court in a major antitrust case. In 1994 we published the winning opening statement made by Joseph W. Cotchett in a multimillion-dollar fraud class action against a failed savings and loan association and its professional advisers. In 1996, we published an opening statement by Frank Rothman in a multimillion-dollar antitrust case that settled following a mistrial. In 1997, we presented his closing argument in that same case.

In 2001, we added the opening statement of David Boies, arguing for the Department of Justice, in the government's antitrust case against Microsoft. See Appendix, Part VIII.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Cutoff Dates

Cutoff Dates

We completed legal editing on this update at the end of July 2003.

We reviewed case citations through these cutoffs:

- Shepard's California Citations at 30 C4th 29, 107 CA4th 878, 155 L Ed 2d 883, 324 F3d 1322, 245 F Supp 2d 1136
- Shepard's United States Citations at 155 L Ed 2d 701, 324 F3d 1322, 247 F Supp 2d 486
- Shepard's Federal Citations at 155 L Ed 2d 534, 322 F3d 301, 244 F Supp 2d 1323

We have reviewed California and federal statutes for amendments and repeals through these cutoffs:

- Stats 2003, ch 137
- 117 Stat 710

We try to add significant statutory and judicial developments, subsequent histories of cases, and other matters such as new forms and regulations after legal editing is done, but you should not assume that all developments after the listed cutoff dates have been included.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/1 Functions of Statement and Argument/Chapter Outline

1

Functions of Statement and Argument

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/1 Functions of Statement and Argument/§1.1 Persuasive Information

[§1.1] Persuasive Information



Effective opening statements and closing arguments make use of strong language. The choice of words and phrases should be made carefully, so that the jurors are left with the most favorable impression of the client and the case. Direct, unqualified language helps to convey the sense of a strong case and a sympathetic client.

Aron, Fast & Klein, Trial Communication Skills §§33.06-33.09 (1986) has been replaced by Aron, Fast & Klein, Trial Communication Skills §§22.01-21.17, 23.01-23.20 (1996).

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/1 Functions of Statement and Argument/§1.2 Persuasive Reasons

[§1.2] Persuasive Reasons



Aron, Fast & Klein, Trial Communication Skills, chap 27 (1986) has been replaced by Aron, Fast & Klein, Trial Communication Skills, chaps 16-17 (1996).

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/1 Functions of Statement and Argument/§1.3 Opening: Narrative

[§1.3] Opening: Narrative



The opening statement presents an opportunity to introduce the jury to the theme of the case, providing jurors with a conceptual overview of the case so that they will begin to view evidence presented through subsequent examination from the perspective of one side or the other. Coming up with an effective theme provides a framework for the jury to understand the factual and emotional bases of a party's case.

1 California Civil Procedure During Trial, chap 8 (Cal CEB 1984) has been replaced by 1 California Trial Practice: Civil Procedure During Trial, chap 9 (3d ed Cal CEB 1995).

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/1 Functions of Statement and Argument/§1.4 Closing: Explicit Argument

[§1.4] Closing: Explicit Argument



1 California Civil Procedure During Trial, chap 16 (Cal CEB 1984) has been replaced by 2 California Trial Practice: Civil Procedure During Trial, chap 19 (3d ed Cal CEB 1995).

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/1 Functions of Statement and Argument/§1.5 Effect of Jury's First Impression

[§1.5] Effect of Jury's First Impression

 [To Main Book](#)

Jurors' attention levels wax and wane during the trial. The opening statement is made at a time when jurors are most attentive. An effective opening statement, making use of a clear theme and reinforced with strong language chosen to produce a specific perception in the minds of jurors, can assist in persuading jurors even before presentation of the evidence.

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Developing and Presenting Statements and Arguments

Preparation

[§2.1] Planning: Complaint and Discovery Stages

[§2.2] Organization and Language

[§2.4] Nonsuit or Directed Verdict After Opening Statement

[§2.5] Anticipating and Defusing Problem Areas

[§2.6] Discussions of Damages During Opening and Closing

[§2.6A] Focus Groups and Mock Trials

[§2.6B] Focus Groups

[§2.6C] Mock Trials

Legal Requirements

[§2.7] Order of Presentation

[§2.8] Allotted Time

[§2.9] Use of Documentary and Demonstrative Material in Opening Statements and Closing Arguments

[§2.11] Photographs, X Rays, and Models

[§2.13] Disclosure of Demonstrative Material or Evidence Before Opening Statements

Use of Depositions During Opening Statement

[§2.15] Transcribed Depositions

[§2.16] Videotaped Depositions

[§2.17A] Using Computers to Keep a Judge and Jury Interested

[§2.17B] What Is Trial Presentation Technology?

[§2.17C] Hardware

[§2.17D] Software

[§2.17E] Presentation Software

[§2.17F] Trial Display Software

[§2.17G] Advice for Practitioners

[§2.17H] The Courtroom of the Future

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/2 Developing and Presenting Statements and Arguments/PREPARATION/§2.1 Planning: Complaint and Discovery Stages

PREPARATION

[§2.1] Planning: Complaint and Discovery Stages



Former Los Angeles Superior Court Civil Trials Manual §§37, 56, 57, and 102, cited in Book §2.1, are now found in Los Angeles Super Ct R 8.40 (use of graphic devices in opening statements), 8.16 (familiarity with jurors to be avoided), 8.49 (final arguments), and 8.12 (counsel's use of blackboard and paper during presentation of evidence), respectively. Other provisions governing opening statements and closing arguments include LA Sup Ct R 8.11 (stand to object and argue), 8.14 (argument addressed to court), 8.50 (objections to final argument), and 8.74 (graphic devices used in argument).

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/2 Developing and Presenting Statements and Arguments/§2.2 Organization and Language

[§2.2] Organization and Language



The use of repetition can be an extremely effective way to reinforce a party's perspective with the jurors, especially when the same theories, facts, and phrases are used in the opening statement and closing argument. As noted in Book §2.2, jurors tend to remember and believe that which they hear most often. Thus, the use of strong, confident language selected for its most favorable emotional appeal in the opening and closing will reinforce with the jury a party's perspective of the facts and the evidence.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/2 Developing and Presenting Statements and Arguments/§2.4 Nonsuit or Directed Verdict After Opening Statement

[§2.4] Nonsuit or Directed Verdict After Opening Statement



1 California Civil Procedure During Trial §8.33 (Cal CEB 1984) has been replaced by 1 California Trial Practice: Civil Procedure During Trial §§9.40-9.41 (3d ed Cal CEB 1995).

For an example of a nonsuit after the opening statement that was upheld by the California Supreme Court, see Hoff v Vacaville Unified Sch. Dist. (1998) 19 CA4th 925, 80 CR2d 811 (facts asserted in opening statement insufficient to establish duty to plaintiff accident victim on part of defendants).

For a case in which a nonsuit after the opening statement was reversed on appeal, see Galanek v Wismar (1999) 68 CA4th 1417, 81 CR2d 236 (error to base nonsuit on plaintiff's inability to prove causation when plaintiff alleged sufficient facts in opening statement to state prima facie case of causation so as to shift burden of proof to defendants to establish that attorney's negligence did not cause plaintiff to lose meritorious claim).

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/2 Developing and Presenting Statements and Arguments/§2.5 Anticipating and Defusing Problem Areas

[§2.5] Anticipating and Defusing Problem Areas



The opening statement is an excellent opportunity to present the jury with a party's perspective on evidence or facts that are problems for the party. Weak or damaging evidence can be put in the best light possible by the party with the most to lose. Raising these issues before the jury first defuses some of the damage that may arise when the other side talks about them, and reinforces the credibility of the party that is making the disclosure.

1 California Civil Procedure During Trial §8.24 (Cal CEB 1984) has been replaced by 1 California Trial Practice: Civil Procedure During Trial §9.30 (3d ed Cal CEB 1995).

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/2 Developing and Presenting Statements and Arguments/§2.6 Discussions of Damages During Opening and Closing

[§2.6] Discussions of Damages During Opening and Closing

 To Main Book

1 California Civil Procedure During Trial §8.28 (Cal CEB 1984) has been replaced by 1 California Trial Practice: Civil Procedure During Trial §9.33 (3d ed Cal CEB 1995).

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/2 Developing and Presenting Statements and Arguments/§2.6A Focus Groups and Mock Trials

[§2.6A] Focus Groups and Mock Trials



There are many techniques implemented by trial consultants in order to expose juror proclivities and prejudices and select the jurors most inclined to vote for that side's client. These techniques are used to guide attorneys in analyzing juror attitudes, identifying strengths and weaknesses of the case, and predicting the outcome of the case. Aside from case analysis and stratagem (the psychological effects of the attorney's chosen words on the juror), the trial consultant also conducts witness preparation (how to answer questions, eye contact, body language, etc.), focus groups, mock trials, and voir dire research. There are many techniques implemented by trial consultants to assist counsel in preparing and developing his or her case. Two techniques in particular, the focus group and mock trial, may be helpful in preparing the opening statement and closing argument.

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[§2.6B] Focus Groups



In a focus group, mock jurors hear abbreviated arguments presented by the trial team and are given actual jury instructions. They are carefully observed and evaluated during deliberation to pinpoint problem areas that may require more explanation. The main goal of the focus group is to analyze issues in a case in order to shape or refine the case. A focus group consists of from six to 12 individuals who are a representative sample of the possible jury pool within the particular venue. These "jurors" believe that they are participating in an arbitration, with the head arbitrator being the trial consultant, and the attorneys for each side being the actual plaintiff and defendant in the case. By informing the jurors that their input will help resolve the disagreement in a peaceful manner, the jurors will feel as if they have a stake in the outcome, and therefore, will be more likely to concentrate and take their role seriously. It is the role of the arbitrator to skew the decision against our client deliberately, in an effort to determine what issues are important to the jurors and how to strengthen our case.

Each "party" will have approximately five minutes to impart their "side of the story" to the jurors in a friendly, informal manner. The jurors are then allowed to openly ask questions, which allows the consultant to take note as to what issues are important to the jurors and/or what issues need to be clarified. Following the question and answer period, the "arbitrator" will hand out a copy of the jury instructions and verdict form to each juror, the "parties" will leave the room, and the consultant will instruct the jurors to deliberate on the issues and reach a verdict. During this phase, the consultant carefully observes the jurors in order to pinpoint possible problem areas that require either further explanation, expansion, or both. Usually, the issue of liability is deliberated first, and then, after a second session of questions and answers with the "parties," the jury will decide the extent of damages to be awarded. The reason for this bifurcation is that, in the likely event that the liability issue is determined against our client, the trial consultant can then say, "If we told you A, B, and/or C, would that change your mind? ... Is X, Y, and/or Z important to you? ... If you were told all of those things right now, would that change your answer?" The consultant then asks the jurors to assume those things to be true, and determine the amount of damages awarded in that event; thus, separating the issues of liability and damages in the juror's mind.



A mock trial is a more in-depth, formal, and extensive focus group, which also tests the effect of opening and closing statements on the jury. In a mock trial, jurors will be exposed to opening statements, closing arguments, crucial witness testimony, and any evidence or demonstrative evidence which is important to the case. During mock trials, however, the attorneys play themselves, with one attorney from the firm playing the opponent and advocating accordingly. Should the attorney wish for the client or key witness to be examined in front of the jurors, then the actual client or witness must be present.

Jurors fill out questionnaires before, during, and after the evidence is presented. The questionnaires before the trial begins seek background information on the jurors as well as their views on the particular facts and law in the case. The questionnaires during and after the trial enactment ask, among other things, what issues the jury believes to be the most important, why they voted a certain way, and what could have been said that would have changed their minds. After comparing the questionnaires, it becomes possible to determine what type of person would likely be pro-plaintiff and what type would be pro-defendant. Lawyers are sometimes so involved with the case that they think they are explaining all the pertinent information in an understandable manner. However, a pretrial test of juror reactions to the facts of the case and arguments that both sides are expected to make can provide a crucial warning that the theme initially selected is not plausible, that the message is unclear, that jurors will be unconvinced by the message, that jurors are troubled by missing information, or that emphasis should be placed on an issue that the attorney deemed minor.

Key witnesses may be directly examined or cross-examined either in person or by allowing the jurors to view portions of a videotaped deposition. This allows the consultant to test the effect of the witness's testimony and demeanor on the jury, and determine which areas of testimony/demeanor need to be strengthened and/or corrected during witness preparation. In the event that the attorney wishes to test his key witness in this manner, the jury will be given another questionnaire concerning the likeability and believability of the witness. Obviously, this exercise is especially appropriate if the client is taking the stand, and for any expert witnesses who may be crucial to the case. Then, as in focus groups, the issues of liability and extent of damages are bifurcated, and jurors are given verdict forms and jury instructions and are told to deliberate and reach a verdict.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/2 Developing and Presenting Statements and Arguments/LEGAL REQUIREMENTS/§2.7 Order of Presentation

LEGAL REQUIREMENTS

[§2.7] Order of Presentation



Ridgeway v Montana High School Ass'n was affirmed in *Ridgeway v Montana High Sch. Ass'n* (9th Cir 1988) 858 F2d 579.

The correct citation for *Martin v Chesebrough-Pond's, Inc.*, cited in Book §2.7, is *Martin v Chesebrough-Pond's, Inc.* (5th Cir 1980) 614 F2d 498.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/2 Developing and Presenting Statements and Arguments/§2.8 Allotted Time

[§2.8] Allotted Time



In a case cited in Book §2.8 on page 30, the name of the appellant is misspelled; the correct citation is *Ackerman v Griggs* (1930) 109 CA 365, 293 P 115. The correct citation for a case in Book §2.8 is *Shippy v Peninsula Rapid Transit* (1925) 197 C 290, 240 P 785.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/2 Developing and Presenting Statements and Arguments/§2.9 Use of Documentary and Demonstrative Material in Opening Statements and Closing Arguments

[§2.9] Use of Documentary and Demonstrative Material in Opening Statements and Closing Arguments

 [To Main Book](#)

1 California Civil Procedure During Trial §8.10 (Cal CEB 1984) has been replaced by 1 California Trial Practice: Civil Procedure During Trial §9.11 (3d ed Cal CEB 1995).

The correct citation for *People v Green*, cited in Book §2.9, is *People v Green* (1956) 47 C2d 209, 302 P2d 307.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/2 Developing and Presenting Statements and Arguments/§2.11 Photographs, X Rays, and Models

[§2.11] Photographs, X Rays, and Models



California Judges Benchbook: Civil Trials was last revised in 1997.

The correct citation for *People v Green*, cited in Book §2.9, is *People v Green* (1956) 47 C2d 209, 302 P2d 307.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/2 Developing and Presenting Statements and Arguments/§2.13 Disclosure of Demonstrative Material or Evidence Before Opening Statements

[§2.13] Disclosure of Demonstrative Material or Evidence Before Opening Statements



Former Los Angeles Superior Court Civil Trials Manual Rule 37.1, cited in Book §2.13, is now found in Los Angeles Super Ct R 8.40 (use of graphic devices in opening statements). For other Los Angeles Superior Court Rules on opening statements and closing arguments, see Update §2.1.

The correct citation for *City of Long Beach v Superior Court*, cited in Book §2.13, is *City of Long Beach v Superior Court* (1976) 64 CA3d 65, 134 CR 468.

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Use of Depositions During Opening Statement

[§2.15] Transcribed Depositions

 **To Main Book**

Regarding the warning at the end of Book §2.15, CCP §2025(u)(5) permits a party against whom any portion of a deposition is used, or any other party, to offer any other parts of the deposition that are *relevant to the parts introduced* in evidence.

Civil Discovery Practice in California §§3.15-3.18 (Cal CEB 1988) is now California Civil Discovery Practice §§5.108-5.110 (3d ed Cal CEB 1998). Civ Discovery Prac §3.64 is now Civil Discovery §5.108.

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[§2.16] Videotaped Depositions



Civil Discovery Practice in California §§3.15-3.18 (Cal CEB 1988) is now California Civil Discovery Practice §§5.108-5.110 (3d ed Cal CEB 1998).

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[§2.17A] Using Computers to Keep a Judge and Jury Interested



Computers continue to march from the law office into the courtroom and are often used in opening statements and closing arguments. Currently available technology and techniques make it possible for any attorney in almost any courtroom to streamline case presentation and enhance the impact of a case on judges and jurors. Most important, these new tools are transparent enough to allow jurors to focus on the main points of your case and not on the "gee whiz" aspects of the technology.

Art Smith, of Husch & Eppenger (over 150 attorneys), and Alan Steinberg, of Steinberg & Steinberg (two attorneys), both of St. Louis, recently completed cases in which they took advantage of technology in the courtroom. When their cases were over, they were so impressed with the technology that they wanted to share their experiences with other lawyers in the community. As Steinberg said, "This is technology that will make you money."

Smith has four important conclusions about using presentation technology in the courtroom:

1. Computer display makes it easier for jurors to see and study exhibits.
2. Presentation technology allows an attorney to focus the attention of the judge and jury on the relevant language of any exhibit.
3. Presentation software specifically designed for trials speeds the presentation of evidence.
4. You can greatly enhance the impact of your documentary evidence.

Sections 2.17A-2.17H are reprinted by permission from the Legal Technology Primer by Dennis M. Kennedy. Copyright 1995, 1996, 1997, 1998, 1999, 2000 by Dennis M. Kennedy. All rights reserved. Mr. Kennedy graduated magna cum laude from Wabash College in 1980 and cum laude from the Georgetown University Law Center in 1983. He practices law in the Intellectual Property and Information Technology Group at Thompson Coburn LLP in St. Louis, Missouri. Mr. Kennedy received the 2001 TechnoLawyer of the Year Award for his use of technology in the practice of law and his efforts in writing and speaking about technology. He has collected versions of many of his published articles into an online book entitled the Legal Technology Primer at <http://www.denniskennedy.com>.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/2 Developing and Presenting Statements and Arguments/§2.17B What Is Trial Presentation Technology?

[§2.17B] What Is Trial Presentation Technology?

 [To Main Book](#)

Trial presentation technology is simply the use of computer equipment to display presentation slides and scanned digital images of exhibits. For example, if your case involves a letter that contains incriminating evidence, you might use a scanner to create a graphic image of that letter that could then be identified, labeled and stored in a database. When it is introduced into evidence, the graphic image would be retrieved and displayed to the jury. Each juror can view it simultaneously without the need for you to pass the letter to each juror.

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[§2.17C] Hardware



Presentation hardware can be as simple as a notebook computer running into a switch-box which displays information on separate monitors for the jury, the judge, and the attorney. Other hardware items can include a VCR for playback of video depositions and an overhead digital camera (such as the Elmo) which will allow you to display documents and even three-dimensional objects on a monitor for the judge and jury. An overhead projector might also be appropriate. Other useful hardware might include a remote control or wireless mouse, if you like to move around, and a laser pointer.

Smith's trial was a large and lengthy one and required a fairly elaborate hardware setup. It included two 35" monitors for the jury and separate monitors for the judge, witness box and counsel. He also used a VCR for video depositions, a sound system, an Elmo overhead digital camera for displaying exhibits that were not scanned as digital images, a connection box and an uninterrupted power source. The Elmo camera has become very popular among trial lawyers since you can show documents and three-dimensional exhibits using the camera.

This setup cost \$1,500 to install and remove, \$300 per trial day for hardware rental, and \$500 per day for a technician to monitor the hardware setup. Because you can use different aspects of presentation technology, you can pick and choose software or hardware that will give you the most advantage for your case at a price you can afford. In some cases, as Smith found, your opponent may be willing to share the costs of the courtroom setup because of the advantage to both sides.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/2 Developing and Presenting Statements and Arguments/§2.17D Software

[§2.17D] Software



There are two types of software you might use in the courtroom: (1) Microsoft's PowerPoint (www.microsoft.com/powerpoint/), or a similar presentation program, for your opening and closing arguments, and (2) trial display packages such as Trial-Link (<http://www.invzn.com/products.htm>) or TrialDirector (<http://www.indatacorp.com>), to display your exhibits and highlight or annotate important parts of those exhibits.

The trial display packages integrate well with litigation management programs like Summation (www.summationtechnology.com) or Concordance (www.rjcw.freemove.co.uk) and can also be used in connection with real-time transcription software. A combination of all these packages can turn you into a techno-lawyer with your case completely digitized and at your fingertips.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/2 Developing and Presenting Statements and Arguments/§2.17E Presentation Software

[§2.17E] Presentation Software



You can use a presentation program, such as Powerpoint, Freelance Graphics (ibmdirect@vnet.ibm.com), or Corel's Presentation (www.gtslearning.com), for their opening and closing arguments. Presentation software allows you to prepare a set of slides which will display your main points. Graphics, sound, video clips and animation can be added to each slide. The slides can be sequenced as you wish and controlled manually or automatically by a timer. The slides can be displayed from your notebook computer onto a screen or monitor or even printed out and used as handouts or transparencies.

These programs allow you to reinforce your main points by displaying them at the same time you are talking about them. You can organize, illustrate and focus your talks in a manner that is entertaining and keeps the attention of your audience. Your opening and closing can be much more effective than what you can do by reading from your notes scrawled on a legal pad. Steinberg commented that he would prefer never to do an opening or closing argument without PowerPoint again.

As an example of how you can use these slides, Smith created a slide that contained a picture of a witness along with a quote from his testimony during the trial that Smith wanted to emphasize. This slide could be used to remind the jury who the person was as well as to emphasize the remark itself.

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[§2.17F] Trial Display Software



Trial display software allows you to display images of documents and other exhibits onto a screen or monitor. The programs have a simple, uncluttered interface and tools that allow you to highlight phrases or areas of the image. For example, you might electronically draw a red circle around an important part of a photographic image, use an electronic yellow "highlighter" to mark important phrases, annotate documents, add arrows or use other effects, such as enlarging key language, to emphasize your points. The electronic marking appears only on the display of the document, not on the underlying document or file.

Two of the leading programs in this genre are Trial-Link (<http://www.invzn.com/products.html>) and TrialDirector (<http://www.indatacorp.com>). Both are very impressive programs which can integrate well with other programs you might be using for trial management. You will want to look into the features of both to see which program will work best for you.

A large part of the effectiveness of this software is due to its apparent simplicity. Jurors simply see an image of an exhibit on a large monitor and then watch you emphasize phrases, enlarge key parts of exhibits or photos, and even use video and animation. This approach seems to be very effective for jurors used to getting a large portion of their information from television.



1. As Steinberg says, the most important advice is simply to "**practice, practice, practice.**" You want to make your presentation more focused, more organized and more effective. You cannot do this if you cannot run the equipment properly or you struggle with the software. Practice until you are able to run the equipment and software smoothly. If you cannot become comfortable using equipment and software, have an assistant who runs the equipment while you do the talking.

2. **Take advantage of advanced features of programs but take care not to let the features get in the way of your story.** PowerPoint has a many impressive effects and graphics built into the program. Focus the jury on your case, not your visual effects and animations. Stick with fairly simple and straightforward backgrounds and effects until you are comfortable using the programs and are sure that the effects increase the impact of your presentation.

3. **Back up your work.** Trial presentation technology does not save paper. To prevent mishaps, you definitely will want to take a print out of all of your exhibits, presentation slides, and other documents that you might use in the courtroom. You might even prepare transparencies. You will also want to have multiple backups of your data.

4. **Have the same setup in your office, or "war room," as you have in the courtroom.** If you set up a configuration identical to what you are using in the courtroom back in your office, you can practice under the same conditions. You will also be able to substitute an identical component from your office over a lunch break.

5. **Prepare for the unexpected.** When speaking, any additional element that you put into your presentation increases the opportunity for something to go wrong. If you write out your speech, you might lose the paper on which it is written. If you use transparencies, the overhead projector light bulb might burn out. If you use elaborate presentation technology, any aspect of the equipment may go wrong or you may experience one quirk or another which can throw off the pace and style of your presentation. Take extra projector bulbs, cords, batteries, transparencies, and tools.

6. **The client makes the call.** Although you can fall in love with courtroom presentation technology, it probably makes the most sense in document-intensive cases or cases where charts and graphics will help reduce complexity. The technology probably makes more sense in longer trials than in shorter trials, although the use of PowerPoint or a similar program in openings and closings could be used in any trial. Your client, however, may be more willing to use this technology in a jury trial as opposed to a judge-tried case or may deem the cost to be prohibitive in any case. It will become a matter of educating your client and showing your client the benefits of this approach.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/2 Developing and Presenting Statements and Arguments/§2.17H The Courtroom of the Future

[§2.17H] The Courtroom of the Future



More and more judges are become receptive to the use of technology in the courtroom and a good number of courthouses are planning to at least have one courtroom that is designed as a "courtroom of the future." Because this technology can benefit jurors in understanding cases, I expect to see more receptivity on the part of judges. There was no area hotter in legal technology than courtroom presentation technology.

Smith and Steinberg both agree that the main benefit of presentation technology is that it allows you to organize your case and control the flow of the case. By moving your case along in a steady, organized fashion, you keep the attention of the jury and present information to them in an educational and entertaining manner. Jurors seem to respond to this technology. Courtroom presentation technology can dramatically enhance the impact of your arguments, your exhibits, and your case. As a result, it can give jurors a better experience with the legal system, something which will benefit all lawyers.

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Scope of Statements and Arguments

Permissible and Impermissible Matters

Broad Range of Expression Permitted

[§3.1] Matters of Historical Fact, Common Experience, General Knowledge

[§3.2] Analogies, Literary Quotations, Biblical References

[§3.3] Use of Physical Props

Common Areas of Possible Misconduct and Error

[§3.6] "Golden Rule" Arguments; Personal Address or Appeal to Jurors

[§3.7] Appeals to Passion, Prejudice, or Sympathy of Jury

[§3.8] Comment on Opponent's Failure To Provide Testimony or Evidence

[§3.9] Reference to Matters Not in Evidence

[§3.11] Characterization of Parties, Counsel, or Evidence

[§3.12] Inferences From the Evidence

[§3.13A] Length of Argument

[§3.15] **Objection, Waiver, Cure, and Prejudicial Error**

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/3 Scope of Statements and Arguments/PERMISSIBLE AND IMPERMISSIBLE MATTERS/Broad Range of Expression Permitted/§3.1 Matters of Historical Fact, Common Experience, General Knowledge

PERMISSIBLE AND IMPERMISSIBLE MATTERS

Broad Range of Expression Permitted

[§3.1] Matters of Historical Fact, Common Experience, General Knowledge



2 California Civil Procedure During Trial §§16.7-16.21 (Cal CEB 1984) have been replaced by 2 California Trial Practice: Civil Procedure During Trial §§19.23-19.33 (3d ed Cal CEB 1995).

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In one criminal case, the prosecutor, during closing argument, referred to and quoted from the Bible. The Supreme Court has explained that the primary vice in referring to the Bible and other religious authority is that the argument may diminish the jury's sense of responsibility for its verdict and imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions. However, in this case, the court found that the prosecutor's references were part of a straightforward argument that jurors should not be persuaded either way by biblical and religious teachings, and that the ultimate penalty decision was an individual determination. The prosecutor did not imply or suggest that another, higher law should be applied instead of the court's instructions, and he stressed that even if the jury found that the aggravating circumstances were so substantial in comparison with the mitigating circumstances, the jury still need not automatically find in favor of the death penalty. *People v Hughes* (2002) 27 C4th 287, 390, 116 CR2d 401.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/3 Scope of Statements and Arguments/§3.3 Use of Physical Props

[§3.3] Use of Physical Props



The Supreme Court has allowed the use of crime-scene and autopsy photographs in a prosecutor's closing argument in a criminal penalty phase proceeding. The prosecution has wider latitude at the penalty phase to introduce illustrative evidence of the capital crime, because such evidence comes too late to prejudice the determination of guilt, and the brutal circumstances are relevant to the penalty determination. *People v Anderson* (2001) 25 C4th 543, 593, 106 CR2d 575.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/3 Scope of Statements and Arguments/Common Areas of Possible Misconduct and Error/§3.6 'Golden Rule' Arguments; Personal Address or Appeal to Jurors

Common Areas of Possible Misconduct and Error

[§3.6] "Golden Rule" Arguments; Personal Address or Appeal to Jurors



It is improper for counsel to quote individual jurors in argument to the entire jury; however, such conduct will not necessarily be prejudicial in a particular case. *People v Freeman* (1994) 8 C4th 450, 34 CR2d 558.

Woods v Burlington Northern R. R. Co. (11th Cir 1985) 768 F2d 1287, cited in Book §3.6, was reversed on other grounds. *Burlington Northern R. R. Co. v Woods* (1987) 480 US 1, 94 L Ed 2d 1, 107 S Ct 967.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/3 Scope of Statements and Arguments/§3.7 Appeals to Passion, Prejudice, or Sympathy of Jury

[§3.7] Appeals to Passion, Prejudice, or Sympathy of Jury



Jeans, Trial Advocacy, p 380 (1975) has been replaced by Jeans, Trial Advocacy, p 493 (2d ed 1993).

A prosecutor did not commit misconduct in his opening statement by offering a "social history" of the victim when the description of the victim was not an untethered and inflammatory plea for sympathy but was logically connected to the prosecution's theory of the case and accurately forecast evidence subsequently admitted without objection. People v Millwee (1998) 18 C4th 96, 137, 74 CR2d 418.

An otherwise proper opening statement does not become objectionable because it is delivered with dramatic language in a manner meant to hold the jurors' attention. People v Dennis (1998) 17 C4th 468, 518, 71 CR2d 680.

A prosecutor's argument, inviting the jury to reflect on all that the victim had lost through her death, was an appeal for sympathy for the victim, and therefore was improper at the guilt phase of a capital trial. People v Kipp (2001) 26 C4th 1100, 1130, 113 CR2d 27.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/3 Scope of Statements and Arguments/§3.8 Comment on Opponent's Failure to Provide Testimony or Evidence

[§3.8] Comment on Opponent's Failure to Provide Testimony or Evidence



In a case cited in [Book §3.8](#) on page 95, the name of the respondent is misspelled; the correct citation is *Baxter v Palmigiano* (1976) 425 US 308, 47 L Ed 2d 810, 96 S Ct 1551.

Although a prosecutor may not comment on a witness's failure to take the stand in a criminal case, the prosecutor may comment on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [People v Fierro](#) (1991) 1 C4th 173, 213, 3 CR2d 426 (statement held not to be prosecutorial misconduct in rebuttal argument that defense had given jury no evidence on which to find that prosecution failed to prove beyond reasonable doubt a special-circumstance allegation in capital prosecution for robbery). See *U.S. v Mares* (9th Cir 1991) 940 F2d 455, 461 (prosecutor's comments on defense's failure to present exculpatory evidence, as opposed to defendant's failure to testify, and on failure of defense, as opposed to defendant, to counter or explain testimony or evidence not infringement of defendant's Fifth Amendment privilege); [People v Frye](#) (1998) 18 C4th 894, 973, 77 CR2d 25 (followed *Mares* in approving prosecutor's reference to defense's failure to call witness that defense had said it would call).

The prosecutor may not comment on a witness's failure to take the stand. *Griffin v California* (1965) 380 US 609, 14 L Ed 2d 106, 85 S Ct 1229. Additionally, a prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand. [People v Hughes](#) (2002) 27 C4th 287, 371, 116 CR2d 401.

Griffin v California, *supra*, is cited incompletely in the Book. The full citation above is correct.

California Criminal Law Procedure and Practice §29.29 (Cal CEB 1986) has been replaced by California Criminal Law Procedure and Practice §30.33 (6th ed Cal CEB 2002).

California Trial Objections, chaps 34-50 (2d ed Cal CEB 1984) have been replaced by California Trial Objections, chaps 33-51 (9th ed Cal CEB 2002).

It was reversible error for a prosecutor to suggest to the jury during the case-in-chief that defendants' postarrest silence was evidence of guilt. [People v Cleland](#) (2003) 109 CA4th 121, 134 CR2d 479. However, brief comments by the prosecutor during closing argument noting the absence of evidence contradicting prosecution evidence on several points and the failure of the defense to introduce material evidence or any alibi witnesses did not constitute misconduct when the comments could not fairly be interpreted as referring to the defendant's failure to testify. [People v Bradford](#) (1997) 15 C4th 1229, 1339, 65 CR2d 145.

Comment on a criminal defendant's invoking his right not to testify was misconduct that, along with the commenter's other misconduct, justified a new trial for that defendant, even though the offending party was the attorney for a codefendant and not the prosecutor. [People v Estrada](#) (1998) 63 CA4th 1090, 75 CR2d 17.

A prosecutor's continually emphasizing in closing argument that another party had cooperated with the police and had testified but that the defendant had not cooperated, thereby impliedly inviting the jury to consider the defendant's failure to testify as evidence of his guilt, was improper and required reversal, even though the prosecutor had not expressly commented on the defendant's failure to testify. [People v Guzman](#) (2000) 80 CA4th 1282, 96 CR2d 87.

A case was incorrectly cited in [Book §3.8](#). The correct citation is [Nelson v Southern Pac. Co.](#) (1937) 8 C2d 648, 67 P2d 682.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/3 Scope of Statements and Arguments/§3.9 Reference to Matters Not in Evidence

[§3.9] Reference to Matters Not in Evidence



In *People v Hill* (1998) 17 C4th 800, 822, 72 CR2d 656, the California Supreme Court noted that its rule, set down in *People v Bolton* (1979) 23 C3d 208, 152 CR 141, cited in Book §3.9, that prosecutorial misconduct does not have to be intentional to constitute reversible error had remained the law since then, and expressly reaffirmed it.

A prosecutor did not engage in misconduct in his opening statement by characterizing the defendant's interest in using a plastic tie as a method of killing as obsessive even though he overstated the extent of that interest as described by subsequent testimony. *People v Coddington* (2000) 23 C4th 529, 587, 97 CR2d 528.

A prosecutor did engage in misconduct requiring reversal when, during closing argument, he told the jury what the testimony of an uncalled witness would have been. The prosecutor implied that the uncalled witness (a police officer) would have corroborated another police officer's testimony on the defendant's alleged possession of a controlled substance. The prosecutor's tactic denied the defendant his Sixth Amendment right to confront and cross-examine a prosecution witness. *People v Hall* (2000) 82 CA4th 813, 817, 98 CR2d 527.

One appellate court found prejudicial error when the trial court allowed the prosecutor to reopen and offer rebuttal evidence in the middle of closing argument without giving defendant an opportunity to offer surrebuttal. *People v Cuccia* (2002) 97 CA4th 785, 792, 118 CR2d 668.

A prosecutor's introduction as evidence during trial of defendant's incriminating, postarrest, unMirandized statement to police was reversible error. *People v Cleland* (2003) 109 CA4th 121, 134 CR2d 479.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/3 Scope of Statements and Arguments/§3.11 Characterization of Parties, Counsel, or Evidence

[§3.11] Characterization of Parties, Counsel, or Evidence



The complete citation for *People v Thornton*, cited in Book §3.11, is *People v Thornton* (1974) 11 C3d 738, 762, 114 CR 467, disapproved on other grounds in 25 C3d at 684 n12.

In *People v Cunningham* (2001) 25 C4th 926, 1002, 108 CR2d 291, during the prosecutor's closing argument at the guilt phase, she stated that it had been a pleasure to work with defense counsel, then added: "They are extremely fine. And what is their job? Their job is to create straw men. Their job is to put up smoke, red herrings. And they have done a heck of a good job. And my job is to straighten that out and show you where the truth lies. So let's do that." Defense counsel failed to object, and therefore the supreme court held that the claim was waived. However, even if the court were to examine it on the merits, it stated that there is no reasonable likelihood that the jury improperly was influenced by the prosecutor's remarks. The prosecutor's remarks in the present case similarly would be understood by the jury as an admonition not to be misled by the defense interpretation of the evidence, rather than as a personal attack on defense counsel.

The prosecutor's repeated statements to the jury in closing argument that defendant had lied was prejudicial error and required reversal of his conviction. *People v Goldstein* (2003) 2003 NYS Misc Lexis 980.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/3 Scope of Statements and Arguments/§3.12 Inferences From the Evidence

[§3.12] Inferences From the Evidence

 [To Main Book](#)

When the trial court does not admit evidence for a limited purpose, the prosecutor may use the evidence in his or her closing argument for any legally permissible purpose. *People v Lucero* (2000) 23 C4th 692, 719, 97 CR2d 871.

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Some defendants in criminal trials have argued that the brevity of their counsel's closing argument consisted of inadequate representation. In one case, defendant faulted counsel for failing to present any evidence of his good character, his history of mental illness, or his past difficulties, or to otherwise portray him as a "human being with positive qualities." But the supreme court stated that the appellate record did not disclose the existence, availability, or relative weight of such evidence. Nor did it suggest the reasons counsel may have had for declining to present such evidence. On the record, the court held that defendant could not establish either incompetence of counsel or prejudice. Even though counsel's argument was admittedly brief, comprising only two pages of transcript, the effectiveness of an advocate's oral presentation is difficult to judge accurately from a written transcript, and the length of an argument is not a sound measure of its quality. People v Lewis (2001) 25 C4th 610, 674, 106 CR2d 629.

Likewise, in another case, defendant argued that his counsel presented an inadequate, "minimalist" closing argument in which she "dehumanized" him rather than portraying him as a person with love for his mother and as a person who had "endured a life marked by intense pain and suffering." The supreme court stated that the effectiveness of an advocate's oral presentation is difficult to judge accurately from a written transcript, and the length of an argument is not a sound measure of its quality. Although defense counsel's argument appeared to have been lacking in clarity, not to mention eloquence, the court was not persuaded that it fell below the standard of reasonably competent representation or that there was a reasonable probability that a better presentation would have resulted in a more favorable penalty verdict. People v Weaver (2001) 26 C4th 876, 979, 111 CR2d 2.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/3 Scope of Statements and Arguments/§3.15 OBJECTION, WAIVER, CURE, AND PREJUDICIAL ERROR

[§3.15] OBJECTION, WAIVER, CURE, AND PREJUDICIAL ERROR



The complete citation for *People v Green*, cited in Book §3.15, is *People v Green* (1980) 27 C3d 1, 164 CR 1, overruled on other grounds in 20 C4th at 241.

2 California Civil Procedure During Trial §16.57 (Cal CEB 1984) has been replaced by 2 California Trial Practice: Civil Procedure During Trial §19.54 (3d ed Cal CEB 1995).

When defense counsel did not object to any of the prosecutorial comments during opening statement and closing argument that purportedly constituted prejudicial misconduct, the defendant's multiple-part claim of prosecutorial misconduct was barred in its entirety. *People v Frye* (1998) 18 C4th 894, 969, 77 CR2d 25; see *People v Lewis* (2001) 25 C4th 610, 669, 106 CR2d 629.

A prosecutor who wished to convey in his opening statement that the defendant's appearance had changed from the time of the murder to the time of trial was not guilty of misconduct, even though he suggested that the defendant's dental work was done to accomplish that end, when in fact it was a medical necessity. The conduct was harmless because the jury was instructed that the opening statement was not evidence, and the defendant had an opportunity to confront all witnesses and to challenge and rebut all evidence against him. *People v Cunningham* (2001) 25 C4th 926, 1000, 108 CR2d 291.

In one case, the prosecutor arguably misstated the law during closing argument, but the error amounted to prosecutorial misconduct during argument, rather than trial and resolution of the case on an improper legal basis. When a defendant believes the prosecutor has made remarks constituting misconduct during an argument, he or she is obliged to call them to the court's attention. In this case, defendant made no objection to the prosecutor's remarks and thus waived his claim. *People v Morales* (2001) 25 C4th 34, 43, 104 CR2d 582.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/8 Arguing for Punitive Damages/Chapter Outline

8

Arguing for Punitive Damages

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/8 Arguing for Punitive Damages/BASIC GUIDELINES/§8.1 1987 Tort Reform Act

BASIC GUIDELINES

[§8.1] 1987 Tort Reform Act



1 Witkin, California Evidence §§160-161 (3d ed 1986) is now 1 Witkin, California Evidence, *Burden of Proof and Presumptions* §§38-39 (4th ed 2000).

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments

Appendix

Sample Statements and Arguments

ABOUT THE SAMPLE OPENINGS AND CLOSINGS

Except for fictionalizing most of the names of persons and places, the editors have made every effort to render the samples as closely as possible to the actual spoken courtroom opening statements and closing arguments. Obvious transcription errors have been corrected, but in general care has been taken not to overwhelm natural speech with written conventions.

Some of the language in the samples appearing in this Appendix may appear to violate the limits of permissible statement and argument as set forth in Book chap 3. Most experienced litigators, however, do not bombard jurors' ears with the words "objection" and "misconduct" unless opposing counsel's behavior is egregious. Moreover, what may look improper in cold print may not sound objectionable in the heat of courtroom battle.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/I. Closing Argument on Liability; Rebuttal--Securities Fraud Case/Chapter Outline

I.

Closing Argument on Liability; Rebuttal—Securities Fraud Case

Lilienthal et al. v Dynamic Capital et al.

CASE SUMMARY: *Plaintiffs suffered financial and emotional injury after investment, induced by fraudulent and negligent representations, in defendant company.*

I. CLOSING ARGUMENT

A. General Comment [§I.1](#)

B. Beginning: Priming the Jury [§I.2](#)

C. Reestablishing Plaintiff's Favorable Image; Case Theme [§I.3](#)

D. Arguing Evidence of Liability

1. Creating a Framework for the Jury by Asking Questions That Organize the Evidence [§I.4](#)

2. Explaining Burden of Proof [§I.5](#)

3. Presenting Evidence Within the Framework of Questions

a. When Did the Scheme Begin? [§I.6](#)

b. What Went Wrong? [§I.7](#)

c. Where Did the Money Go? [§I.8](#)

d. Who Got the Money? [§I.9](#)

E. Linking Liability and Damages

1. Using Jury Instructions as Framework of Argument [§I.10](#)

2. Factoring Plaintiffs' Emotional Distress [§I.11](#)

II. REBUTTAL

A. Explaining Purpose of Rebuttal; Summarizing Court Procedure [§I.12](#)

B. Recounting Evidence of Liability; Jury Verdict Forms [§I.13](#)

C. Illustrating Measures of Damages [§I.14](#)

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/I. Closing Argument on Liability; Rebuttal--Securities Fraud Case/ I. CLOSING ARGUMENT/§I.1 A. General Comment

I. CLOSING ARGUMENT

§I.1 A. General Comment

This long closing argument effectively interprets the evidence so as to develop a story of fraud and chicanery—from the use of slick video promotions to paper transactions and the hiding of information from accountants. In §§I.6-I.9, the use of four questions to be answered as a framing device for the evidence of tort and liability is a much more effective way to incline the jurors toward plaintiffs than a straight linear argument would be. Compare this approach with the argument in Book §§4.20-4.26. The enormity of what was done by defendants is evoked by the repetition of a phrase used by a witness regarding the fate of the money received from investors—"down a Black Hole," which counsel plays on to catch the attention of the jurors, all the while relating over and over the plight of the plaintiff investors.

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§I.2 B. Beginning: Priming the Jury

MR. COTCHETT: Ladies and gentlemen, first let me tell you what I am doing standing here. It is now my opportunity to sum up the evidence for you as we now see it—materially different from when I last spoke to you, which was in what we call an "opening statement." In the opening statement I told you what I thought the evidence would show based on depositions that were taken, on interrogatories, and on talking to literally hundreds of people. After we had synthesized all that, we brought it to this courtroom.

You have now heard the evidence, and it is my opportunity to argue to you what I believe that evidence showed. I counted up this morning with counsel how many witnesses appeared in this courtroom. If you guess there were 51, you'd be close. Including the depositions, there are five or six more witnesses that came to you by depositions; some of them came to you on a videotape. The bottom line is over fifty people came to this courtroom to tell you their story from their own mouths.

I also counted some of the documents you have seen since you have been here. In pure numbers of pages it runs into the hundreds. The reason I tell you this is because I want to focus in on what we do now with this courtroom institution.

Before I do this, I know I can speak for every lawyer in this room when I tell you this is not idle talk. You have been here since, I think, April 15th, 16th, 17th, somewhere in there. We have been here since March 31st. That was the date we started this trial without the jury. We had motions, as His Honor has told you, all types of matters to decide beforehand, what can go into evidence or can't go into evidence, and what have you. So we are starting on our third month, and you have heard, I think, 27 volumes of testimony taken down by our court reporters, 27 volumes. So you have got to assimilate close to two full months of evidence.

When I say I know I can speak for all attorneys, I know I can thank all of you for the incredible patience you have demonstrated.

I don't want to get maudlin when I talk about the institution of the courtroom, but I am going to.

Let me give you an idea of how much time we are talking about when we talk about closing arguments. Given the fact that we are now in our third month, coming up on two months of testimony, it is going to take me a good day or so to summarize to you what I think the evidence has shown.

I am going to go into some detail on certain matters. Some I don't think need a lot of detail.

I can tell you, as His Honor told you the other day, that you are going to hear from my fellow lawyers, whom I will talk about in more detail in a moment. You will hear from them Monday, for sure, on the plaintiffs' side—perhaps going into Tuesday. Then, I am sure you can count on two days from the defense lawyers. There will be some small rebuttal after that. So the test of your patience is not complete yet. You have now got to bear with the lawyers talking. You haven't heard enough of them in the past two months.

Now you have got to bear with it. You have got to grin and bear it as they say, and listen to us argue the evidence. You are going to hear how we remember it and how we think the witness said it. And, do you know, I have given closing arguments where I said, "You remember witness such and such said such and such" and have had jurors look at me and shake their heads, so I knew at that point I was on the wrong track. I am perceptive; well, I thought he said that, but the juror shook her head. I hope you don't shake your head at me.

There are going to be times, I am confident, when I will say, "Wait a minute, did he really say that or didn't he?" And I only wish we could, in fact, supply our jurors robes for this portion of the trial. Before I thank Judge Abel on behalf of all lawyers, I'd like him to take his robe off and make not 12, but 15 robes, and put them on you because now—this may come as a shock to you; you may not know this—at this point in the trial *you* are the one who says, "Wait a minute, I now decide this case. I now want a break. We will go to such and such a time." At this point in the trial Judge Abel has completed his task. He now shifts the robe to you. You now are the final and exclusive arbiter, if you will, the decider of fact.

So although it may be air conditioned in this courtroom, you are sitting there with black robes on, and you are going to listen to my words. You are going to agree with me or disagree with me, but the bottom line is this part of the trial now is yours.

Now, I mentioned Judge Abel and, again, I know I can say this for every lawyer, you couldn't have sat in a finer courtroom. "Patience." You see, after you go home we sometimes stay until 6:00 o'clock and yell and scream at each other. Judge Abel has to say, "Stop." Sometimes he says, "Get out of the sandbox." He didn't really say that, but he admonishes us to talk like lawyers and gentlemen.

Judge Abel could not do his job without people like Dick, whom we are going to miss for three weeks on vacation. We hope you decide this case before he comes back. We don't want Dick to miss the ending, but we hope he does miss the ending. We will call him and tell him how it came out.

You don't see the other people that are involved in this trial. You don't see some of the people who are back in the back room here to whom our court reporter hands those little folios, I guess they call them. Each of them sits in the back room with a typewriter and computes it into a book.

You don't see Jerry, for example, who sits in the clerk's room around the corner here because she has been busy in there. Sometimes you will hear a little bump, bump, bump. She is filing documents.

So this is really, when we talk about Judge Abel and his court, we are talking about Judge Abel and his total court. The staff on behalf of all the lawyers, we thank them. We thank them, because let me tell you, clerks sometimes are tough to deal with. They get that bureaucratic feeling that if it is 4:30, we are sorry, you can't file it. And I personally know. I don't want to belabor this.

I have never dealt with a nicer staff of people, and I think you are very fortunate to have those people here as well.

Now, the lawyers. You see us over a period of time where we appear hostile to each other. That is not a fact at all.

The defense lawyers in this case on the other side are some of the finest lawyers you will see trying cases in California. I think they have a difficult task, but because of those flags over there, they are entitled to be here and argue the case on behalf of their clients. You are looking at some of the best lawyers who try cases. You are looking at people, believe it or not, regardless of how the case comes out, that will walk up to us and shake our hands because that is the level of this case.

This is a very important case, a significant case. It is being watched not just in Santa Inez County, not just in the State of California. And I can tell you that those lawyers did a very credible job. And I would like to thank my co-plaintiff attorneys, Tom Anderson and Allen Ruby, the people with me. The fact is, as I told you, Judge Abel could not do his job without these people.

Who do you think, ladies and gentlemen, put together all of this last night until 1:00 in the morning? I was there. I helped, but I was one of only five people. I had to tell Marie Weiner at midnight last night to go home.

I had no doubt that Don MacChesney had to tell his associate and secretary to go home last night late, too. So it is just not the lawyer who stands in front of you. It is really all of the faces you see out there.

COMMENT

After a long trial as in this case, it is essential for counsel to try to spark the jurors' interest once again. At the outset of this closing argument, counsel lets the jurors know that many people are dependent upon them and that they are now about to become judges of fact. He outlines for the jury the course of the remainder of the trial and compliments the jurors on their patience. This approach can help to induce the jurors to devote their full attention to the remainder of a long argument.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/I. Closing Argument on Liability; Rebuttal--Securities Fraud Case/§I.3 C. Reestablishing Plaintiffs' Favorable Image; Case Theme

§I.3 C. Reestablishing Plaintiffs' Favorable Image; Case Theme

This case is not just about Mrs. Lilienthal, whom I will tell you about, and some of the other plaintiffs. It is about a lot of people in this courtroom. And, again, when you go in to decide this case, you decide it not on the personality or the presentation of the lawyers. You decide this case on the presentation of the *evidence*. So if I may seem like I can quickly get a piece of evidence up on that screen but Tom Anderson drops it three times on the way up there, that is simply because he is clumsy, always has been clumsy, always will be clumsy—one of the great trial lawyers in California. When I seem a little feisty with Scott Pendelton, it is only because I am an old Marine and he is an old Marine, and there is nothing I love better than taking on a former fellow Marine. I will tell you why later. The bottom line is this: Personalities are wonderful, but we are down now to what the evidence is all about.

Now, in this courtroom this morning are some of the people whom you heard testify. And later I will introduce them in the sense that I will be talking about them.

I am sorry, as I look out here this morning, that I don't see some of the *defendants* present.

Having said how I feel about this case, the participants, the court staff, let me discuss with you how I see the case itself. I want to talk about the structure of this courtroom.

I want to comment on the courtroom because I think it is significant. This courtroom was specially built for this case, as you know, but it is more important than that. You see, this courtroom has essentially four walls within which under our system of justice the case is to be judged by you. When I was a young boy, I had a favorite, Rocky Marciano, and he had a saying: "You can run but you can't hide." If any of you know anything about boxing, it means you can run in the ring but you can't hide. And in a courtroom the defendants can run but they can't hide. They can't hide because our system of justice tells us that whether they like it or not, you, the jury, are going to be sitting in that box come Monday morning to hear the other arguments. Just as you hear this morning, you are going to hear Monday, and you are going to hear Tuesday. They can run but they can't hide. They can't hide from those notebooks that you have on your lap.

It is a truth in life that there comes a time when you have to face your fellow man and woman. And we have arrived at that time.

Now, who are the plaintiffs in the case?

You heard His Honor talk about, he read off early on in the instructions, a number of names that probably seemed a little foreign to you, and you heard him read numbers into the file for the court record, and he read some names that you couldn't recall, and said, "Now, wait a minute, who is that?" Let me tell you who that is; okay?

Mrs. Lilienthal is sitting right over there, and you heard His Honor describe the case as Arnold and Lila Lilienthal, and Arnold and Lila Lilienthal revocable trust, et cetera, et cetera, versus trust portions. When they went into Dynamic Capital as she testified, she was sent either upstairs or downstairs—I can never get my floors straight—somewhere in the building, one of the lawyers made a trust for her. It is a document that is put together and the money is invested through the trust, and I think I heard Mr. O'Driscoll, as Mr. Ruby will tell you, had an IRA. IRA stands for, I think, Individual Retirement Account. We see them advertised toward the end of the year. You put your money in "x" savings and loan, go into an IRA. So that is what that is.

The point I am making is this: the plaintiffs in this case are not names. They are people. Mrs. Lilienthal, sitting over there, whose husband can't be with us as she told us because of his illness, is a person. She is not a trust. Mrs. Lilienthal couldn't explain to you on the stand what a trust is. I am not sure I can.

The bottom line of it—if I use that phrase too often, I apologize. I have habit of doing that. My wife keeps scolding me for it, but I can't break it.

So I will start out again, the bottom line is they are people who come to you and say, "Here is my problem." And it is really as simple as all that. "Here is my problem," and they would like an answer from you. Other people would like an answer from you. And, in my opinion, the community wants an answer from you because, you see, not only are you judges, but you become the conscience of the community. Not just for the plaintiffs, but for the defendants, too, because whatever way you decide under that flag, you make a tough decision. Even if we didn't prove our case, we are proud of you. That is what decisions are all about.

A very tough decision was made last week in Santa Inez County. Jurors just like yourselves made a very tough decision. Jurors

in this country every day make tough decisions because they are the conscience, the conscience of the community, and this community is now focused on you. This community now is watching, what are you people going to do with the facts?

Who are the defendants? They are people just like the plaintiffs—nothing more, nothing less.

In the eyes of the law, we have an anomaly here in that Mr. MacChesney represents a partnership called Clifford Management Associates, but that is nothing different from a person because that partnership operates through Mr. Clifford and Mr. Orloff, the other partner. So we are really just talking about people, and that is all a courtroom comes down to, is people; it is all a boxing ring as when Marciano says, "You can run but you can't hide." It is people.

Now, I am sorry that the defendants themselves didn't see fit to come here today and hear me argue the evidence to you because I was hoping I would get an opportunity to tell them where I think they violated the laws we live under. I was hoping I would have an opportunity to tell them that they can't do this and get away with it in this court. I was hoping I could turn around and look at those people and say, "Hey, look over at the people in the box because they are going to decide your fate." They chose not to come here.

Now, how did this fiasco start? There are some really very simple questions here. What went wrong? Where did the money go, and who took it?

It is not complex. There are four very simple questions. How did it start? What went wrong? Where did the money go? Who took it?

I am going to show you excerpts up on the board of our opening statement. We are all going to laugh at what we said in our opening statement because some of us were right. Some of us were wrong. Some of us thought just what the evidence would show. Some of us weren't sure what the evidence would show.

As a matter of fact, Mr. MacChesney is very candid with you. By the way, I want to make one comment about defense counsel. I believe truly every defense counsel that came before you was as honest as any lawyer I have ever seen. I am going to show you excerpts of what they said in their opening statement. They were honest and forthright in their presentation, and I will adopt the language that they used in their opening statement. I will add to it and I hope you will add to it, especially when Mr. MacChesney told you in his opening after about a month of testimony or somewhere in there, he stood before you and said—I will give you the exact language in a moment—he said Mr. Clifford was the cause of this but that he acted alone. But he acted alone. He really didn't mean any harm. He didn't commit fraud. And I believe what Mr. MacChesney said is in his heart: He wants to believe that Mr. Clifford didn't take the money.

We are going to prove to you, we are going to show you by the evidence that, along with others, he did. We are going to show you the documents. But he spoke the truth when he said Mr. Clifford is sorry. You betcha, he's sorry. You can bet that every single one of the defendants—who aren't here today—are sitting at home saying, "Boy, am I sorry. Why did I ever get into that?"

"You know when Orloff went up to Mr. Saul and said, "You had the guts to do something that I couldn't do for 20 years," Mr. Orloff, wherever he may be today, is saying, "Boy, by gosh, this is coming to an end."

COMMENT

The opening phase of a closing argument, especially after a long trial, should include language that reestablishes with the jurors a favorable impression of counsel and the plaintiffs. In [§1.2](#) counsel did this by indicating his sympathy for jurors who have had to sit through a very long trial and who now have to "assimilate close to two full months of evidence." In [§1.3](#) counsel gains credibility by complimenting all those participating in the trial—court personnel, co-counsel for the plaintiffs, one of whom he jokingly chides for his clumsiness with the exhibits, and even the defense lawyers. But he also subtly warns the jurors against being influenced by defendants' lawyers rather than by the evidence. Finally, the jurors are made aware that key defendants are not in court but that most of the plaintiffs are—a sign of defendant's bad conscience.

The case theme, "You can run, but you can't hide" is raised, indicating that defendants have been avoiding the consequences (witness their absence), but they cannot escape from a courtroom—which counsel likens throughout this argument to a boxing ring.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/I. Closing Argument on Liability; Rebuttal--Securities Fraud Case/ D. Arguing Evidence of Liability/§I.4 1. Creating a Framework for the Jury by Asking Questions That Organize the Evidence

D. Arguing Evidence of Liability

§I.4 1. Creating a Framework for the Jury by Asking Questions That Organize the Evidence

Ladies and gentlemen, just before we broke for the luncheon recess I was talking about basically four questions that we want to answer in the case: How did Dynamic Capital as a company start? What went wrong? Where did the money go? Who took it? Those are my four basic questions.

We were talking about the opening statements and in essence the comments, if you will, of defense counsel and plaintiffs' counsel and that I felt all defense counsel spoke the truth when they came before you and told you what they believed the evidence would show. Well, now we know what the evidence is. Now we can all take a look at some of the statements we made at the outset, analyze them, and talk about them.

I also said this morning that we are dealing with people. That's a fact. We are not dealing with exotic legal theories. We are not dealing with anything except the real life of real people. For example (I didn't mention it this morning), one of the plaintiffs, Strauss Finance, is represented by Alex Vladek and Joseph Nielsen, who were here. They are people too. They represent a company. You will hear from them.

They lent money to Dynamic Capital, and you will hear their story. But their company is operated by people. So everything comes down to the conduct of people and, as we allege in this case, the improper conduct of people.

So when we look back at the opening statements or when we look at closing arguments, you understand that each one of these lawyers is going to speak to you as a person, as I am. For example, in the opening statements, I said every time they bought a company it was a bankrupt company. In fact they bankrupted it after they bought it. And I will talk about that. And I will talk about every company that they managed to pillage by taking their money—as I call it looting that money—and using it in their central bank. We will talk about that.

Now, though, I want to review just a couple of things that were said six weeks ago, whatever the time frame was, so that we put it in context, so that we understand what in fact we are dealing with here. Let me show you, if I can, a statement made by the defendants in opening, and before I flash it up on the board, I want to tell you that in my opinion every word spoken here is the truth.

This is what was said by Mr. Penn in his opening. He said Mr. Orloff was officially "second in command" of this company. Truth. A fact. But in Dynamic Capital things were not as they appeared to be. A fact: He wasn't second in command; he was the chief financial officer. But in Dynamic Capital that didn't mean much. A fact. What it really means is that he moved cash around. A fact. A true fact. You see what Mr. Penn told you six weeks ago is exactly what the evidence showed. Things weren't as they appeared to be at Dynamic Capital, and what Mr. Orloff really did was move cash around.

Having said that, as a fact, because I know that Mr. Penn being the lawyer he is would not stand before you and he meant that from his heart, because his plea to you is that Mr. Orloff didn't do this. Yes, he moved cash around but things weren't as they seemed. The fact that he had a title didn't mean anything. And he is right. Because not much of what was said at Dynamic Capital meant what it appeared to say.

So here six weeks ago a lawyer of Mr. Penn's ability stood before you and told you those facts. That Mr. Orloff just moved cash around. You are going to hear his argument, which is going to be that he moved cash around at the direction of Mr. Clifford.

We feel the evidence showed otherwise. We will argue that later.

Now, Mr. Pendelton stood up and told you that on December 10th Mr. Chan tendered his resignation. An absolute fact. He stood up, and he told you that Mr. Chan, too, didn't know much of what was going on. An absolute fact.

Mr. Rose stood up a couple of days ago—he represents Miss Bond and I read his material yesterday—and he told you about her promotions and said she had very few direct contacts with the plaintiffs. A fact. An absolute fact.

Mr. Saddler's attorney did not give an opening, but, then, we had Mr. York: Mr. York came before you in opening and candidly, as candidly as he could, told you that in April of 1985 his client, Mr. Beaumont, wrote a memo that said, "Where are all the funds going?"

That was an absolute fact.

And the reason he said it is because everyone in this courtroom had seen the memo. And his client had asked in April of '85—I am sorry that isn't blown up for you—but he sent a memo to Sam Clifford, to Sid Orloff, to Emil Saddler—"Cash, no real estate property." And putting one, two, three, four, five question marks after the sentence, he said to them, "Where are the funds going? The negative cash flow for the year is only \$222,000. Why do we have a negative cash flow of \$750,000 per month?" That isn't per year, ladies and gentlemen, that is per month. Once again a defense lawyer stood up here and told you a truth, a fact that \$750,000 a month was going out of that company.

Now what did Mr. York say? He said as soon as his client found out about it in any detail he quit the company as well.

Then, about four weeks later, we got to hear from Mr. MacChesney. And Mr. MacChesney in my opinion in a very candid, humble, and forthright way stood before you and said some words that I am sure surprised you because in fact they surprised a lot of people in this courtroom. Let's go back and look at what Mr. MacChesney said after about four to six weeks of hearing evidence.

He said, "Now I don't mean to suggest for a minute that Sam Clifford is seeking sympathy." That's a fact. Mr. Clifford is not here to seek sympathy. He is not here today. He is not. He will be the first to say he deserves no sympathy. Dynamic Capital failed because of Sam Clifford. Sam Clifford is responsible for the fall of Dynamic Capital. That, ladies and gentlemen, is a fact. That is a truth. That is a statement out of the words of his attorney. He is responsible for the loss, the losses, that these good people, the plaintiffs, suffered.

That is a fact. That is the truth.

And Mr. MacChesney went on to say, "And when I say he is responsible, I mean he is the only one responsible." And, ladies and gentlemen, in there is a touchstone to the evidence that you will hear over the next couple of days. It all hinges on that last sentence. Because that last sentence was calculated, deliberate. He attempts in that statement to say that Sam Clifford was the only one who caused this.

Now in Mr. MacChesney's mind that's the truth. He believes that. I think the evidence in this case will show far otherwise because there is not a single person who could alone do what was done to Dynamic Capital.

We will find this out later in the argument, when we hear from Mr. MacChesney again; we will be able to ask him. Tell us what you mean, Mr. MacChesney, when you say he is responsible to these good people but he is the only one responsible? Your eyes can give him that message when he stands here in front of you because he alone should know.

So these were some of the things that were said in our opening. They all have meanings. Certainly the words in there have meanings. Certainly when a lawyer of his ability and his stature comes before this jury and says someone is responsible for the loss, he means it. And when he says the losses that these good people suffered, he means it.

Now we will hear the argument in later days as to how the evidence shows that he was the only one responsible. Now mixed among the facts are the instructions that His Honor just told you about. I am not going to go over the instructions; you heard them. As a matter of fact I think His Honor told you—if he didn't, he will—that a set will be made available to you to take into the jury deliberation room.

COMMENT

The effective arguing of evidence of liability in a complex case requires counsel to simplify and organize for the jury. Here counsel used the device of questions to be answered: When did the scheme begin? What went wrong? Where did the money go? Who took it? This rhetorical device is made concrete when it is linked with the question of who among the defendants is liable.

§I.5 2. Explaining Burden of Proof

I want to talk about the law as you were instructed. You were told this morning that you will follow as you hear the evidence unfold before you, you will follow the law of the State of California—how it applies to a factual situation like this. And His Honor told you about the burden of proof, which I just want to touch on ever so briefly; then I will come back later to some specific instructions. But I think we should all understand what we are talking about when we talk about the burden of proof.

The best way one can understand the words "preponderance of evidence" other than the way His Honor explained it is to visualize the Scales of Justice. But before you visualize them, understand that I, on behalf of my client and the other plaintiffs' counsel, have the burden of proving to you the facts as they will fit into the law as told to you by Judge Abel. Visualize, if you will, the Scales of Justice. My wife always reminds me that there is a woman standing there who holds those scales. And she is blindfolded. The "preponderance" means that when you place a grain of sand or a rock or a boulder on one side and you place a grain of sand or rock or boulder on the other side, if those scales tip ever so slightly, justice is decided. That is a "preponderance of evidence." And Justice is blindfolded so that she doesn't see who places the sand on those scales.

So there is no bias; it is a simple weighing process of however those scales tip ever so slightly. That's what we mean when we are talking about a preponderance. And the reason I tell you that is because when we talk about facts that have to be proved, you go through a visual scale in your own mind and you will put the testimony, for example, of Daniel Marx on this scale and of Mr. Kinsey, if it is an accounting issue; and over on this side you will place the rock, the boulder, the grain of sand, or nothing, that was offered by the defendants. You will weigh that and see how it tips. And the key here, the "preponderance," means that if the Scales of Justice tip in one way—tip one way or the other—that is the way His Honor has said you must decide that issue.

It is critical to understand that while we produced witness after witness after witness, there must be balance, if you will, as to what was offered against it. I dare say, the Lady of Justice in this case has very little weighing to do because when you hear all the evidence and you hear and recall the facts that came from that witness stand, there is not so much as a grain of sand to place on the other side of the scale to rebut the facts as alleged here before you people as trier of facts.

Now I call your attention to that last sentence by Mr. MacChesney, where he magnanimously after six weeks stands here and tells you that his client alone is responsible, but that it was because of "politics"—you heard that word. It was because of some administration that got elected somewhere—I wasn't sure where—and had something to do with a real estate market—I wasn't sure what real estate market. It had something to do with politics, and the economy went bad, and that's why Dynamic Capital went bad. I sat and I listened to that statement. And I believe that Mr. MacChesney believes it. I don't really believe that he expects you to believe it, but that is the excuse of Mr. Clifford.

And when we talk about the Scales of Justice, and we talk about what we are alleging and we look at that last sentence, which says, "He alone did it," our charge is very simple. Our charge is that Mr. Orloff did it, Mr. Saddler did it—and by "did it," I mean were involved. Mr. Chan was involved. Mr. Beaumont was involved and Miss Bond was involved.

And they were involved in many different ways, as I am going to point out in a moment. But involved they were. And now after this period of time we hear from Mr. MacChesney that Dynamic Capital was the American dream. And if I see any fault in Mr. MacChesney at all he confused the word "dream." Dynamic Capital was the great American "scheme." He got confused with those two words. He did not do it intentionally. He believes in his heart, as I believe Mr. Clifford does, that it was the great American dream. Whereas it was the great American dream for Mr. Clifford and his cohorts, but to Mrs. Lilienthal, the Ames, people sitting out there, this young lady whose father died—and at 18 they took her money—it was the great American *scheme*.

Now I apologize if my voice rises. I will try to do what Mr. Ruby does, drop his voice down low. But frankly I sat and I couldn't help but think about that great American dream that we heard about. And, yes, being right here in the Utopia of the electronics industry. What do they use? They use videos. They use slick brochures. They use little information mailings called "comm-lines." They use every communication device known here to perpetrate the great American scheme. That is why this is such an important case—because we are going to ask you at the conclusion of it to rewrite the phrase, and substitute the word; we are going to ask you, as the conscience of the community, to tell those people out there—Sam—excuse me—Mr. Clifford, Mr. Orloff, and others—"You are not going to do this."

Now in the opening statement I showed you the tape, the videotape that they made and showed to many of these people. And, to be honest with you, the first time I saw it I looked at it and I thought, "Gee, that's a nice tape." That's a terrific tape; boy, look at it—the music is marvelous: the "synergism." I learned a new word. It's got photographs of people running. I love to run: It is a healthy, wholesome film. I thought, "My gosh, this is the American dream." And I showed it to you. And you saw it again come

into evidence. And when you looked at it, you saw things like Sam Clifford describing how he represents and brings in wealthy people, and that therefore you should put your money in there because if wealthy people come in, you should too. Right? Tell Katherine Baker about wealthy, when she goes to a hotel room to clean it, not to stay there.

I'd like you to look at this film again. It is very short: it lasts ten minutes. And now that you have heard the evidence, look at Sam Clifford—look at his eyes. Look at his eyes when he talks to these people. And look at names like the Multi-Maison, and Armco, and all these incredible companies that Mr. Ames, who is 93 years old, thought was a safe investment.

And where are they all today? We have heard, unfortunately, where those companies are today. As a matter of fact, I am going to later show you, out of Mr. Penn's own mouth, what he told us happened to those companies.

What I'd like to show you in the film now and ask you to pay just particular attention to are the words that are spoken, and to the names that are flashed up there, because frankly it wasn't until I saw all the evidence myself that I realized the depth, the magnitude of this scheme—the psychology that went into it. The psychology that is used today to sell a product: you heard that word used in testimony. They call it "selling a product"—any investment scam they can sell you. You heard in memos and you heard in testimony from that witness stand, "How do we peddle the product?" Not the limited partnership, not the real estate venture—it was called "the product." They are selling widgets. And if they can sell widgets faster and faster, that's what it is all about and that was the circle that got bigger and bigger. We had a woman sit on that witness stand, Peggy Scheer, who all of a sudden, when we asked her about the money, went like this [indicating] involuntarily. I said, "Ms. Scheer, you are making a circle with your arm." She said, "Yes, that's the way the money went—it went in circles."

Well, I have talked a little too much about the film. Look at it now. Look at those whom the plaintiffs saw. Look at the message that is conveyed and—through no fault of these lawyers who speak the truth—at their clients who speak falsely. Let's see if Mr. Clifford and others, and the people with them, were telling the truth—because now we have the ability to play it again, knowing what companies are in bankruptcy, what fraud has been committed, how the money got funneled here and funneled there. And now you are going to hear why you all made a mistake and didn't put your money in too. Let's take a look.

[*The videotape is played.*]

At the time that film was made, ladies and gentlemen, defendants couldn't pay their bills, they couldn't pay their taxes, there was looting going on. At the time that film was made they were out grabbing any money they could from anybody that walked.

Everyone was their prey. I just mentioned Katherine Baker to you, who is here in the courtroom. You heard her from that witness stand. Her father died. At 18, she had money to go to college. She walked into Dynamic Capital with the insurance proceeds from her father's death. She was told that she would be investing in Dynamic Capital. She was 18 at the time. Two weeks later she received in the mail a note from Clifford Management Associates.

She was 18. You heard counsel argue that this case is about old people, but it is not only about old people. It covers a wide spectrum. Mr. Ames over there is 93 years old. He had a birthday during this trial. In 1985, the fall of 1985, when everybody was grabbing money, when Ms. Scheer took her money out—you recall her statement that she didn't want to tell us who told her to get it out—defendants went to Mr. Ames and asked him, "Mr. Ames, you are only 90, why don't you sell your house, move into a condominium or apartment with your wife, who is 86, and let us invest your money?"

The most insulting testimony I heard—maybe "insulting" isn't the proper word for the testimony that I think bothered me most in this trial—was the testimony from Harry Rafael. Harry Rafael worked all his life for his daughters, put them through school, and defendants went down and told Harry Rafael he ought to "upgrade" himself. He ought to "upgrade himself" and sell his house, give his daughters a portion of the money to invest in Dynamic Capital, and go move out to the country club. What an insulting statement. But it was that statement and those like it that brought us to this courtroom today. The only thing Mr. Rafael is sad about today is the money he lost. Thank heavens Mr. Rafael didn't listen to that nonsense, "upgrade yourself." Who are they that could tell someone to upgrade themselves? Who are they who could tell Mr. Ames at 90 years old to sell his house?

Olivia Johnson, in her middle 30s, whose husband had worked for the post office, served in Vietnam, and then was killed: She received a check for his death, and without ever really asking her what her goals or desires were or what have you, defendants grabbed that check and threw it into a note. And Olivia Johnson today still works, Tom Anderson's client still works, cleaning houses, with two kids to put through school.

I am surprised they didn't tell Ms. Johnson to "upgrade herself." Of course, I guess they told her that by investing in Dynamic Capital she was "upgrading" herself.

We brought you Bart Starback. Truth of the matter, the reason I brought you Bart Starback is because I wanted to meet him and be around him. One of the all-time great NFL players, he was their prey just like Katherine was, just like Mr. Ames, just like other people.

We brought him here from Florida. He wanted to know when the closing arguments were; he'd try to be here. You heard the story of how he got involved. So we are talking about people, we are talking about people—anyone who had a dollar bill that could be grabbed would be grabbed. It was called, you have heard it from the stand, "fresh cash."

They don't tell you that in that exotic tape. As a matter of fact in that exotic tape they tell you of the eliteness, if you will, of Dynamic Capital.

And the argument has been made to you by innuendo that the people who come before you knew what they were getting into, they invested money "they probably didn't need," like Katherine, like others, and that they should have read the material. You are going to hear that a hundred times. You are going to have documents shown to you that say this is high risk.

Can they be serious in making that argument? That Katherine said "Remember, this is high risk—gee, I better not go into it." Or that any of these other people would read it and say, "Boy, this is high risk, I better not go into it."

Did you hear "high risk" on that tape? Did you hear a word that said, "Be careful?" That tape said, "Give me your money." And if you watched Sam's eyes looking down to the left—that's fascinating: in looking to the left he was reading from a script. And that tape said "Ask not what you can get from me, ask what you can give to me." A little twist on what a great President said about our country. Sam is ever so careful about that little twist. It is like the "American dream" to the "American scheme." But that was the theme, if you will, to ask not what DC can do for you, ask what can you do for DC.

Now Jack Penn again stood before you, and in his truthfulness told you the type of majority of people that bring their action here. I am not going to tell you that Strauss Finance is destitute. They are far from destitute. They are a company like any one else, a very legitimate company that loaned this money.

And defendants will say to you, "My gosh, how come Mrs. Victor didn't know this was high risk? Strauss Finance, who has accountants, put in \$2 million. So Mrs. Victor and Mrs. Lilienthal, a social worker, a social worker who tries to help other people, are supposed to know about high risk?"

Let me show you what Mr. Penn said about the people that are before you in this courtroom; I want you to keep it in mind: That the people who are before you today "are destitute, deserve your sympathy. They certainly have mine. But the investors in Dynamic Capital covered a wide range of professions. A wide range of ages."

Every single sentence there is true except for one thing: He didn't mean to say it, but he said it from his heart. They *do* deserve your sympathy.

Ladies and gentlemen, I want to make one thing clear, one thing absolutely clear. Mrs. Lilienthal and her husband Arnold, who can't be here, and the Victors, and the Williamses, who couldn't be here, but came to you by videotape, really don't want your sympathy. They thank Mr. Penn for his sympathy; they asked me to convey that to him. Thank you, Mr. Penn, for your sympathy. But those people are not in court for sympathy. His Honor instructed you that sympathy will play no part in this. That's a buzz word, you see. That's a buzz word by a very astute lawyer who tells you they deserve your sympathy. Sympathy has no place in this courtroom. Sympathy will not return the money that was taken from these people. But he is accurate when he says they have his sympathy. Yes, I am sure they do. And he is accurate when he says it covered a wide range of ages.

It covered everyone from 18 to 90. It covered everybody from Olivia Johnson to Mr. O'Driscoll and others. You saw Mr. Flood here. You saw some astute business people, all of whom were defrauded. It covered every age and every profession. We saw lawyers, we saw bankers, we saw social workers, all of whom took their little pennies and put them in. Mr. Penn says they are destitute. Don't believe that for a moment. None of these people is destitute. None of my clients are destitute, and they won't be destitute. These people lost in many cases their life savings, but that doesn't make them destitute. Because they have this courtroom. You see he forgot about the boxing ring and about what Rocky Marciano said: "You can run but you can't hide." Destitute is a state of mind. His clients can't hide, you see. These people are hopeful. They have hope. They are not destitute, like he says. I don't mean to say this about Jack Penn, but it is wrong to call them destitute because they might not have money, but they have Tom Anderson and Allen Ruby, and a lot of other people out here. And they have this courtroom, and they have you.

So we look up there, yes, some of those words are true, some of those words are correct. I thank Mr. Penn on behalf of my clients for his sympathy. If he's passing it on through Mr. Orloff, I say thanks to Mr. Orloff, too. I am sorry he couldn't be here today, so I could tell him that personally—thanks for his sympathy. But instead of thanking him for his sympathy, if you would, Mr. Penn, simply convey that our clients would like their money back. And I am hoping and praying that in this boxing square ring where you can run but not hide, they don't need sympathy and they are not destitute. And I hope Mr. Penn and other counsel will convince—not convince—will *convey* my thanking you for their sympathies.

COMMENT

Counsel uses the acts of defendants and the losses of plaintiffs as a conclusion to his discussion of proof, thereby effectively linking the case narrative to the abstract concept of burden of proof. In their deliberations, the jurors will find it difficult to think of burden of proof in a context other than the one plaintiffs' counsel has laid out for them here.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/I. Closing Argument on Liability; Rebuttal--Securities Fraud Case/ 3. Presenting Evidence Within the Framework of Questions/§I.6 a. When Did the Scheme Begin?

3. Presenting Evidence Within the Framework of Questions

§I.6 a. When Did the Scheme Begin?

MR. COTCHETT: Ladies and gentlemen, I want to just pick up where we left off before the recess. We are now past the sympathy. We want to talk about when did all this start, if you will.

You have heard now the evidence from the accountants, and their opinions on the annual reports. You have heard statements as to the falsity of these reports. You have heard—in our opinion—from those experts when it started.

We believe it started in 1969 with the very first formation of Dynamic Capital by Sam Clifford, Orloff, and a few others. We believe it started right then, the scheme to get rich. But not for investors—for Clifford and his cohorts.

And, in all fairness, some of the defendants were not around at that time. Certainly Mr. Saddler was not there. Miss Bond was there, but it is clear in my mind at least that Miss Bond was a secretary. Mr. Beaumont was not there. There were two people there, Mr. Clifford and Mr. Orloff for sure. And then others. And I want to see if we can just thread through the evidence—as if we were standing up there as the scales of justice—whether we could determine, for you as the jury, when it started.

Now we heard the experts, who, by the way, were not opposed. By that I mean they brought on no contrary evidence. You heard Mr. Kinsey say that he had reviewed all the annual reports—starting back in 1969 and based upon the fact that he now knew they were false. You see in 1969, '70, and up through the '70s, you didn't know what was false because no one knew the real facts except just a handful. Now Sam Clifford, as I am going to point out, will tell you later—you know, in his magnanimous way—tell you "everyone knew." You will recall he told Ms. Fox that. And I will come back to that later. But who knew back in 1969 when a lot of these little people started putting in truly nickels and dimes, ten dollars and a hundred dollars, a thousand dollars?

Who knew what the facts were? But, you know, there was a piece of evidence in this case that told us when it started. And you didn't have to listen to the accountants. You didn't have to listen to any of the other people who testified. You had to hear one statement from one individual, and the statement comes out of the mouth of Mr. Orloff.

And we called Peter Saul, one of the early lawyers, to the stand. As a matter of fact Mr. MacChesney and Mr. Penn called him back to make sure he said what he said the first time they called him. And one has only to look at a statement from that witness stand by Mr. Saul and he will tell you when the Dynamic Capital fraud started—one statement.

After being asked a question about when Mr. Orloff came to his office, Mr. Saul said, "He came down to see me because I guess Clifford had just told him that he had been down to see him." You will recall this was in January of '86. Now the key question here is:

Question: What did he say to you, sir?

Answer: Well, he put his arm around me and said, "Don't feel bad, Pete. You had the guts to do something that I didn't have for twenty years."

Ladies and gentlemen, you can really disregard what the accountants said in their opinions, if you choose to. I hope you don't, but you could put it all aside on the scales of justice and just put that statement on. There is the candid truth in this instance from Mr. Orloff. He said to Mr. Saul, "You had the guts to do something that I didn't have for twenty years." He told him this in 1986. January of 1986, and twenty years prior to that, in January of 1966, Mr. Orloff and Mr. Clifford formed partnerships, which had to do with selling pizzas. Everybody's dream. The dream to own a pizza store.

They formed these partnerships, and for twenty years Mr. Clifford went down the road and Mr. Orloff didn't have the guts to tell him "Hey, wait, stop. This can't go on." But Peter did because Peter Saul came to that stand and said, "I blew the whistle." And Mr. Orloff thanked him for doing that. And I thank Mr. Orloff for telling us when it started. We also know when it started from the accountants.

I am going to show you in two minutes or in a second or two where it started in the very first annual report. We know what Mr. Saul told us about that annual report. We know that it was not truthful. And that, ladies and gentlemen, is all you really have to look at.

Let's take a look at the annual report for 1969. This is the cover sheet. Even then they didn't fool around with a typewriter. It was a first class operation. It was a printed gloss annual report. And in the letter to the shareholders, stockholders, on Dynamic Capital's stationery, signed by Mr. Moll, the shareholders were told early on how well the company was doing. He told them how well it was doing. He told them that they had an electronics distribution business, that they had, in March, acquired the S. Jacobs chain—told them what he believed to be the truth. He told them that Mr. Orloff is a partner in Clifford's management with twenty years' experience in finance and corporate management, who just joined the firm.

What he told them in paragraph two of the report was that during the month of October of '69, "your corporation," not "theirs," *your* corporation purchased a pizza restaurant and cocktail lounge in Monterey, California, as part of the overall objective to enter into the fast food sales. But let me tell you what he didn't tell them in that report: We now know what they didn't tell the shareholders. What they didn't tell the shareholders was that Mr. Clifford and Mr. Orloff sold them the restaurant.

And, well, Mr. Saul was asked, "Sir, did they own Pizza Palaces and the restaurants that were sold?" He said he didn't know what amount of interest they had, but, yes, they had an interest in it. And I will show you that in the transcript. And from the very first annual reports the scam was on. Because from the very first annual report to shareholders—the few of them that there were—they failed to point out that the company was buying restaurants from Sam that were losing money and being sold at inflated prices.

Now I asked Mr. Saul why Mr. Clifford, who was the majority shareholder who owned most of the stock of Dynamic Capital, wasn't on the board of directors. By the way, if he wanted to be president he could have made himself president; he could have elected himself president. Do you remember his response? His response was that he didn't want to be on the board of directors if he was selling them this business. And this was the opening shot.

This was the opening day, if you will, of the great American scheme. And it didn't stop. It went right into the next year because what they did—and I will show you other evidence to this—is they not only sold them the pizza restaurant once or twice, they sold it three or four times.

And, you will note, the following year at the beginning of fiscal 1970, Dynamic Capital's only operation comprised a wholesale prerecorded tape business—VHR—a pizza restaurant, and cocktail lounges. By the close of '70, DC had acquired or was operating four pizza restaurants in northern California.

Now I don't want to turn this case into a fast food case, I really don't want to dwell on pizza, although I love it; I want to tell you that was the beginning of the scam because where in there do they tell you that Sam Clifford and Sid Orloff were selling them these bankrupt pizza companies? Where in that report do they tell these people? Well, I guess you will hear from counsel, well, that really didn't mean much. Eventually they disclosed it. I think Mr. Saul testified; I was just reading his testimony last night, and he said, "Well, eventually they said that they were the owners of Pizza Palace."

I showed him a lease showing them that they were owners. It was called Pizza Palace and Dough Boy, Inc.—traded back and forth because, you see, that's really all Dynamic Capital had at the time. All they had was a little tape business which sold little small tapes. And they had a pizza restaurant and cocktail lounge. And we put into evidence the leases showing Mr. Orloff and Mr. Clifford as the owners. So from the very first genesis of Clifford Management you had the fraud beginning.

Let me show you what Mr. Saul said in testimony:

Question: What role did Mr. Clifford play in the corporation in its first year?

Answer: During the first year he was not an officer or a director, but he was the largest single shareholder, if I recall correctly. He was not officer or a director but he was the largest single shareholder.

Later he was asked:

Question: Do you recall, if you know, why he was not on the board the previous year?

Answer: My recollection is that Clifford Management Associates, where Clifford owned an interest in the company called Pizza Palace, which was purchased by Dynamic Capital, and until that purchase was completed he did not want to be on the board.

Why? Because it was in essence a bankrupt company and he was selling it to these people. And that's why he didn't go on the board. And that's the genesis. And when Mr. Orloff says to you through Mr. Saul, "Peter, you did what I should have done twenty years ago," that's what he was talking about.

I asked him about Pizza Palace because there was some question as to whether or not he, Mr. Clifford, owned the restaurant in Monterey that was bought. By the way, the record shows it subsequently sold at a great loss to Dynamic Capital. Here is what Mr. Saul said:

Question: When you mentioned Pizza Palace to him, you said he didn't want to go on the board; why? What was the reason he gave?

Answer: Because it was anticipated that the restaurant in Monterey would be acquired by Dynamic Capital.

Question: And would you be so kind as to tell the jury who owned the restaurant in Monterey?

Answer: I am not sure who owned it but I know that Clifford had an interest in it.

Dough Boy was a company that owned the other restaurants that they bought. Other losers. And even back in 1969 when they were buying these loser restaurants and not telling these people, who was Sam C. Clifford in 1969? He was the president of Dough Boy.

Would you tell the jury who was the president at Pizza Palace, Inc., in November of 1969? Parker E. Moll. Do you recognize that name? He was the then president of the company, who signed Dynamic's annual report. Do you think Mr. Moll, other than saying "Cordially, P. E. Moll," told the people that he was the president of these companies that he was buying?

Ladies and gentlemen, if you just look at the testimony of the accountants—they walked us through what was in fact their review—you will recall that Mr. Kinsey and Mr. Marx told us that based upon all the studies they had now done, those reports were false from the very first one issued.

Now a question was asked again by Mr. Penn, in the opening statement, that I think sets the tone of our inquiry here. Mr. Penn in his opening statement asked us two questions, which I think are very legitimate, and again I commend him for asking these questions. He first made the statement that the auditors looked at the financial sheets. True? Absolutely. They said there is nothing wrong with them. True. Absolutely. Every auditor that looked at these sheets said they were fine. We will give you an unqualified opinion that these sheets fairly reflect the condition of the company. Absolutely true. The auditors starting way back with Prime Accounting up on through to 1986 all said these records are fine. And then Mr. Penn posed to us the two key questions, because, you see, his claim is that his client, Mr. Orloff, relied totally on those auditors.

He said, "My gosh, yes, well, if this massive fraud, a simple case of theft so readily apparent, I have two questions about it, and here is the first question: Why were these major institutions deceived?" That's one. Who was he talking about, the accountants? Why were these institutions deceived?

And two, he goes on to say, "And secondly why were the plaintiffs deceived?" So two questions are, why were the accountants deceived and why were the plaintiffs deceived. Very legitimate questions. As a matter of fact, they simplify the case—better than I could have or any plaintiff on the plaintiffs' side or lawyer on the plaintiffs' side—because what Mr. Penn did was to say wait a minute, stop all this nonsense. If this was such a massive fraud, a simple case of theft, and so readily apparent, how about these institutions—meaning the accountants, big accountant firms. Did you hear the prices they charged? Hundreds of thousands of dollars they testified to, 5,000 hours spent in one year. Did you ever divide out 5,000 hours? 5,000 hours looking at the books and records. How come they couldn't find this? And secondly, if the accountants couldn't find it how were the plaintiffs deceived in any way?

Well, he asked that question six weeks ago, and he has told us again, candidly: "Mr. Cotchett, Mr. Alex Vladek, Mr. Ruby, Mr. Anderson: Prove it." Prove it. And prove it we did.

Let's start with the accountants. Let's start with how the accountants were deceived, and from that stand what Mrs. Fox—Anabel Fox—said happened. You will recall that she was asked what Mr. Orloff said to her in a restaurant when he met her. And you will recall that she said, "You ought to be sorry," after he had said, "I am sorry." Or she said something to the effect, "You should be sorry."

I asked her, "When you said 'you should be,' what was in your mind?" And this, ladies and gentlemen, is the answer she gave under oath before you in this courtroom: That Mr. Orloff and others at Dynamic Capital had "deliberately deceived me when I was conducting the audit of Dynamic Capital."

Who called that witness? The defense. They called her under subpoena, and she testified that Mr. Orloff and others at Dynamic Capital deliberately deceived her.

To answer Mr. Penn's first question, "How were the auditors deceived?" the answer, Mr. Penn, is they were lied to deliberately. And how were they lied to deliberately? We brought to this courtroom a lovely woman who worked there who told us how they were lied to.

Mrs. Scheer, she came over here from Modesto, and then she came back again on another subpoena. Mrs. Scheer talked about the

fact that she was asked to hide information. And she was asked what or who told her to hide information? Remember that colloquy? She got a little reticent to use the word "hide." I asked, "Did anyone ask you to hide information?" Answer: "No." She had previously testified that Mr. Cutter and others told her not to not show things to the auditors. And then I picked up because I detected in her voice that she did not want to say, "I was told to hide information."

She didn't want to get those words out on that stand because it is a tough thing to do. Because Mrs. Scheer in her own way knew that in some small way she was involved. She didn't realize how involved she was, and no one would ever accuse Mrs. Scheer of being part of this fraud. Why? Because she was an innocent person used in the fraud.

She was used by Mr. Clifford, by Mr. Orloff and everyone else above her and under Mr. Orloff, the chief financial officer. And I asked her, you see, I think I see where you are going. I detect it. They didn't use the word "hide," did they?

And then she answered "Just," and, terribly, I interrupted her, and said, "just kind of close to hide?" What I was trying to get out of her was what they told her and then out of the blue came this response: "Well, I kept information in a drawer, locked in my desk, that I was not to show the auditors unless I was told to."

You will recall she thought she had told us that before. She didn't tell us that before because I went back and read the transcript. And I next said—really I was stunned by that—I said, "Locked in a drawer?" She said, "Uh-huh."

Question: So that was your dilemma? In other words you weren't told to hide it, but it was locked up in a drawer, that's the dilemma. Okay who had, I guess you know what is coming, who had the key to that drawer?

Answer: Me, me.

Question: Would anyone else have it?

Answer: I don't think so.

Question: Who knew you had the key to that drawer?

Answer: Paul and Bill. Paul Casper, and Bill Cutter, who were told by Mr. Chan, and they had that information in that locked....

And then we go on, "drawer."

Let me get you the next page. I guess everybody was a little afraid—I was—to ask what was in that drawer. But this is a prize fighting ring, if you will, this is a courtroom where the truth comes out. And the truth did come out.

Because in my stunned way I started to laugh for a moment. I said, "My God, a locked drawer?" I started to giggle or laugh, whatever it was. I turned around and looked at Mr. Ruby, Mr. Anderson. Locked drawer. We had never heard of this. I then caught myself and I thought wait a minute—this is serious. And I said, and I was afraid to ask this question but I did. What was in the locked drawer? And Mrs. Scheer came here and told us what was in that locked drawer—notes between Clifford Management Associates and Dynamic Capital. The notes that the auditors were not shown, the quote "notes," and we will get into that later, of all the money that went from DC, their money, to Clifford Management Associates. The notes were in a locked drawer.

Going on:

Question: That's what was locked up, and is that what they didn't want the auditors to see?

Answer: Right.

Question: You are shaking your head.

Answer: Right.

Question: So it was the two people that were under Sidney?

She kept using the name "Sidney"—for the record that's Mr. Orloff unless you know him well—they knew what was in that locked drawer not to tell the accountant about, right?

Answer: Right. And then she went on to say...

Question: Remember the last time you were here you went like this with your hands, did some circles?

Answer: Right.

Question: When you did some circles before I said the money kept getting bigger and bigger going round and rounder in circles?

Answer: That's true.

Question: When you said today that the money was going back and forth, did the money accelerate going back and forth over the years? By that I mean did it get bigger and bigger and bigger? Like you did with the circles?

Answer: Yes. At times it did.

Ladies and gentlemen, you really don't need all the accountants to figure out what happened here because from that stand, that woman came here and told the truth, knowing that she was one of the parties who had the key to that locked drawer.

Now to Mr. Penn's question, which he asked before, "How were the auditors deceived?" I say to you, Mr. Penn, and to the other defendants, "That's how they were deceived." They were deceived by being lied to, and by keeping information hidden in a locked drawer. And I believe we will prove to you—later we will show you documents—that there weren't only notes in a locked drawer and that there were not thousands of dollars stolen—that it was not thousands, but it was hundreds of thousands of dollars—and I am sure right now they all wrote down that word, "stolen," and I am going to prove to you that it was s-t-o-l-e-n. I am sure they are underlining that right now. Boy, they are excited about that one. That's what I am going to show you from the documents.

Now it was a two-part question he asked, a very legitimate two-part question. He asked, "How were the auditors deceived?—and we answered—and "Well, how were the plaintiffs deceived?" How were they deceived? Well, let me show you how the plaintiffs were deceived. Let me show you what Mrs. Williams testified to:

Question: You considered it to be one of the same? You considered it to be as conservative an investment as an A-rated stock?

Answer: Yes.

Question: And what is your factual basis for that?

And here is her answer; read what she was told:

Answer: It was simply because at the time I had complete trust in Mr. Clifford and the Dynamic Capital setup. One of the big things he stressed was the fact that they were so ethical and so conservative. And I feel perhaps he tailored his responses to what we were, what we wanted.

What Erica Williams, like any other investor, wanted was a safer investment. You remember Erica Williams, she is in her 80s, she couldn't be here. We had to bring her here by tape, videotape. Her husband couldn't be here because he is too sick. We had to bring him here by videotape. She wanted a simple conservative investment; that's what she was told it was. And so to you, Mr. Penn, I say that is how the people were defrauded. I say that not only to Mr. Penn but, with all due respect, I say it to all of the lawyers here—unfortunately their clients could not be with us today, but I am sure that some time, somehow they will communicate to them—that that's how they were defrauded: because they were told falsehoods. And again I want to emphasize that's absolutely no slight on these very fine gentlemen here.

The people were defrauded—in a worse way than the auditors. Because the auditors were paid hundreds of thousands of dollars to find that locked drawer. They couldn't find it. Katherine didn't know anything about a locked drawer, nor did Mrs. Lilienthal, nor did the Ames. They didn't know about a locked drawer. They didn't know about these checks of hundreds of thousands of dollars going to Clifford Management Associates.

The only thing this young woman knew about Clifford Management Associates is when in the mail one day she got a promissory note saying, guess what, you just gave your money to Clifford Management Associates.

She was a little confused because she walked in a building that had Dynamic Capital written on it. She didn't quite understand that. She didn't quite understand it when she went there in January of 1986 and she met a Mr. Saddler and Mr. Saddler looked at her note and said, "Wait a minute, Clifford Management Associates—we have nothing to do with that."

And if I recall correctly what he did, and I am sure his very fine lawyer, Miss Polk, will pull out the transcript and correct me on this, but if I am not mistaken he did this: Get out. She will get me on that one, but that's what I remember the evidence saying—he threw the papers on the floor and said in substance or in effect, "We have nothing to do with Clifford Management Associates."

When they took her father's money, insurance money—he is dead—did they throw the money on the floor? You better believe

they didn't. They put that money in their pockets and they put it in a CMA note—I apologize for throwing this on the floor, but that describes their attitude, if you will, what this case is all about.

So to Mr. MacChesney, to Mr. Penn, and the others, that is how those two questions are answered.

They were lied to, and deceived. And I don't know where you get stronger language than that used by Mrs. Fox. Boy, you had to pull it out of her. I mean this is a typical accountant who won't give you an answer unless she sees it right in front of her five times, and you had to pull every word out. Plus she had some Jesuit training, just as I did, that always taught us to think before you answer. And she thought and she said—as the Jesuits will teach you—don't say someone lied unless they lied. And don't tell an untruth. And when you look up defendants' answer, it says because they were so "ethical." What does the word "ethical" mean? What does the word ethical mean to these defendants? Ethical. What does that word mean? Perhaps Mr. Penn and others will tell us.

I wanted to talk to you just briefly about some of the things they said in the annual reports, but I think I would belabor the point if I were to actually argue further that these annual reports were false. I do want to point out very briefly what the experts said about these annual reports. And first starting, just a few key words here that we are going to start with. We all recall Mr. Kinsey, a former Marine, who Mr. Pendelton told us is in his opinion an *outstanding* accountant. On page 2284 of the transcript, I asked him:

Question: Are the financial statements in each report true or false? Your answer would be what?

Answer: False.

Question: If I were to ask you the same question as to the language contained in the message to shareholders would it be true or false?

Answer: False.

Question: Lastly, sir, and just to the court and jury and to you, if I were to ask you if the charts and graphs in these documents were true or false as they represent the financial condition, what would your answer be?

Answer: False.

Now, the argument will be, of course, what Mr. Kinsey did know.

It was interesting when he was asked how much money he charged these plaintiffs to go through all these documents. I don't remember the exact figure. You have the figure in mind better than I do, but somewhere in the neighborhood of \$75,000 to \$100,000 to look at something.

He spent hours upon hours upon hours. And His Honor will tell you, I believe he may have already told you, about the experts. And you can consider what he was paid and the work he did in analyzing his responses. He didn't just run in and spend two hours looking at them and say they were false. He testified that he had reviewed thousands of documents and these were his conclusions. That summarizes many hours of Mr. Kinsey's testimony.

We then called Mr. Marx. Mr. Marx, I think, testified that he had spent several hundred hours, had charged these people somewhere up to \$100,000 or more to review these reports and to go back and ferret out the fraud. And the funny thing is, all it took was Mrs. Scheer and a subpoena to find out what went on. But so that there was no stone unturned, not only was Mr. Kinsey called, but Mr. Marx was called. Mr. Marx was called and asked about specific paragraphs in the financial statements. And reading along there:

Question: Was that a true or false statement?

Answer: Completely false. Yes, sir, I see those charts.

Question: Do those charts reflect true or false information.

Answer: False information.

I asked him down below—walk through the charts—"Is it a true or false statement as reported?" This is the year '83, '84:

Answer: False.

He went on and reviewed the annual reports from '79 through '80, and in each and every case he said they were false. The annual

reports were false.

In each and every case these people received false statements. Why?

Because of the locked drawer, and because of the lies that were told to Anabel Fox—when she was told that she was given all the financial reports—which in fact she wasn't given—nor told who were the members of the board of directors.

Mr. Marx was asked about the little chart, remember the charts; the charts are fabulous. You want to rush out. I was fearful that some jurors might invest in Dynamic Capital after seeing that film. But if you see the charts—I had never seen charts go up like this, very few people in the business ever have—but they were shown that, and are told at the same time, "Mrs. Lilienthal, don't worry about it; those charts only go up. Look at the years."

You look at that and a reasonable person says, "My gosh, that's quite a history." And you look at the videotape you think, "My gosh, that is quite a history. Dear shareholder, love Sam." You can't beat that.

When asked about those charts, Mr. Marx said they are as false as false can be, because the only way they showed earnings—the only way they showed earnings was to falsify the reports. And to falsify monies put into DC.

[*Brief recess*]

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/I. Closing Argument on Liability; Rebuttal--Securities Fraud Case/§1.7 b. What Went Wrong?

§1.7 b. What Went Wrong?

MR. COTCHETT: Now, ladies and gentlemen, I want to talk just for a few moments about why this happened. I can't get into the minds of the defendants. I can't go into their minds and figure out what would cause them to do what they did. Maybe it is immaterial; maybe it is irrelevant. That's really not before us, but there is an issue of "Why?" before us today. Because, you see, one of the questions of "why" is "Why did the company fail?"

You see, when Mr. MacChesney got up in his opening statement and told you that it was all Sam Clifford's fault, that he was responsible, that it was solely him, he then went on to say why the company failed. And what Mr. MacChesney told you was, yes, it was Sam's fault, but it wasn't *his* fault. Yes, it was all also his decision, but there were reasons outside of his decision or things outside of his decision that caused the failure of the company.

So the issue of "Why?" becomes very important. Because you are going to hear on Monday or Tuesday, or when the defense speaks to you, you are going to hear why this company failed because we all know one thing: We know that as we stand here today—all of these people have lost their money because on February, February of 1986, DC filed what we call a bankruptcy, to the shock of the people on that film, and lots of other people who didn't know about that locked drawer. They are now in bankruptcy.

When I say in bankruptcy, you heard Mr. Saul and others say they are deadlier than dead in essence. They are bankrupt for all purposes.

Now the defense is going to argue that, you know, that it is a tragedy. We offer them sympathy. We assure them that we are sorry. We will hear that though they caused it, the reason was because of a downturn in the economy; that there was some administration back in Washington that gave us a recession—or whatever. I don't hear that coming from Washington. But it was forces outside of the control of these individuals that caused the company to fail.

So, when each of them gets up, they will tell you why the company failed. And you shouldn't punish them, if you will, or find them liable, because they are sorry, they are sympathetic. It was bad judgment on their part. How did they know that the real estate market was going to turn down. The semiconductor industry was going to go bad. That all of these little companies were going to just go bang.

They just didn't know when they took all their money out of these companies, they just didn't know they would go boom, whatever the word means. They didn't know that these companies would fail.

Yet, Mr. MacChesney candidly said yes, that Mr. Clifford didn't use good judgment. Yes, that other people out here—Mr. Chan—didn't know. He found out about it and resigned. Mr. Beaumont found out about the commingling of money. He asked the question, "Where is all the money going?" Found out it was being "commingled"—that's the highfalutin word for *embezzlement*—so he tendered his resignation.

And by the way, I think you have a very tough choice on some of these defendants. I think you have a very difficult decision to make. Because the decision you have to make is whether those people participated in the fraud, or were they negligent, or did they just breach fiduciary duties. I have some opinions on that, but I think you have a very difficult decision after you answer the question, "Why did the company fail?"

Now, you don't have to be a rocket scientist to figure out why this company failed. And, ladies and gentlemen, you don't have to know anything about real estate to know why this company failed and you don't know have to know anything about accounting.

Do you remember those FASBs and GAASes and GAAPs—GAAP 6, GAAP 7? Only thing I know about "gaps" is when my kids come home after the orthodontist and the orthodontist says they have gaps that have to be filled—that's what I know about gaps. I don't want to tell you what I know about gas.

But I heard those GAAS principles, GAAS 57, GAAS 66—did that have anything to do with why this company failed? We spent a week talking about GAAS. We spent a week talking about FASBs.

Tom Anderson loves talking about related parties. I heard more about related parties than I ever care to hear. I really don't want to hear about GAAPs and GAASes. Those are terms that these highfalutin accountants use when they come in and spend 5000 hours so they can give you one of these. I am looking for that beautiful big brochure. They do GAAPs and GAASes, then they print it up in a book like this. Yes, everything is okay, GAAPed and GAASed and FASBed. And never by any other method.

They come up with nothing that's not GAAPs and GAASes.

Let me tell you in a very respectful way why I think this company failed. And I am not being facetious; I tell you, I am just a country lawyer and I figured it out a long time ago. Because I deal in simple proverbs. And I know a simple proverb when I see it. God is not to be deceived. A man shall reap what he sows. That comes from a book I read. That's a very simple proverb that tells me that this company failed because of lying. I apologize for the use of these words—Father Reilly would be upset with me—stealing, cheating, and fraud.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/I. Closing Argument on Liability; Rebuttal--Securities Fraud Case/§1.8 c. Where Did the Money Go?

§1.8 c. Where Did the Money Go?

Why this company failed wasn't because there is a Reagan administration in Washington. It didn't fail because the real estate markets went down. It didn't fail because GAAPs and GAASes didn't jibe. It failed because somebody reached in the pot and put the money in his pocket.

They took the Ames's money and put it in their pockets. And Mrs. Victor's; she can't be here today, but they took her money and put it in their pockets. And I am going to show you how they did it.

They went to a store and they bought a little stamp. You can buy one; they cost about two bucks. You buy a little stamp, and it says "Pay to the order of, deposit only." It's a great little device. Let me show you this device. That's Rose Victor's signature, for a whole bunch of money— \$2820—January 6, 1985.

She can't apologize to you for her handwriting. I will. She has a palsy. But she could make out that check, and she made out that check to Dynamic Capital because she thought she was giving them \$2820—not a lot of money, but a lot of money to Mrs. Victor. She thought she was giving it to Dynamic Capital. Because, you see, Mrs. Victor is an honest person; she doesn't look at the backside of checks when she gets them back. But if you go to the store, buy a little \$2 stamp that says "Deposit to the account of," you can do the same thing. Watch this: Somebody wrote in there Dynamic Capital. And then somebody got one of those \$1.98 stamps and said "Pay to the order of Sam C. Clifford, trustee." And if there is one thing we learned over six weeks of trial, we all know who Sam C. Clifford, trustee is now. That is Clifford Management Associates, folks.

You see, they didn't even have the class to put it into Dynamic Capital and then steal it out of Dynamic Capital. They didn't have the guts to run it through a fake account.

They said, "Give me your check," bumped it with the stamp—bam, bump, gone—\$2800. Not a lot of money, but boy, that was easy whipping, that one—little old Rose; she is only 80. Here is a check for \$32,750, 1982—8-8-82; that should be 1982. That's \$32,000. You know what they did? Got out their trusty little stamp. If they got \$2800 from her, you can sure get \$32,000.

Yes, right there folks, the old \$1.98 stamp, that's the cheapest way to steal you will ever find. Go to a little stationery store and buy a stamp that says "Pay to the order of, deposit only, Sam C. Clifford, trustee"—that's \$32,000. Again, they didn't have the class to even put on the stamp of Dynamic Capital. Somebody wrote on there "Dynamic Capital" and then endorsed over it.

Now, folks, that isn't a lot of money, but to Mrs. Victor it is, that \$32,000. That's a lot of money where I come from. And I don't know of any administration in Washington, D.C., that has anything to do with the economy that tells us about buying stamps to steal money. And I don't know anything about the real estate market that has anything to do with putting a lock on a drawer. And I don't know anything about Silicon Valley's having a bad financial situation having to do with a little rubber stamp that cost a \$1.98 in the local store.

The reason why this company failed was because they were stealing—and fraud. Stealing to the tune of hundreds of thousands of dollars.

And I am going to show you not only that there was stealing—I hope everybody writes this down—because I am going to show you where the money went.

Because, folks, we got the records that show where it went. And I am telling you right now these defense lawyers are having a field day—boy, oh boy, here it comes, are we going to have a laugh on this one. There is no way he is going to be able to show where that money went. Well, I have got a surprise for them. You will see, ladies and gentlemen, what it went into—let me first show you the words of a witness that just truly one would almost think if you sat and listened to this testimony somebody would almost think this testimony was put up—I mean it makes for such a coincidence. This is extraordinary. Because Mr. Kinsey five weeks ago was on that stand and was asked this question in reference to Dynamic Capital:

Is it true that DC always made sure that the money always returned to DC?

Answer: Yes.

Question: Did you see in your study of Dynamic Capital that principle being carried out?

Answer: DC appeared to me, as far as cash was concerned, to be similar to a black hole in astronomy. That is, that once cash got

into the gravitational field, I don't mean to laugh, it never escaped from the field.

Let's think about that Black Hole.

That Black Hole in astronomy has to go to the gravitational field. A very smart man, Mr. Kinsey, no wonder he was in the Marine Corps. He figured out that somehow some way money was going into what he called the Black Hole.

And you know I scribbled that down. And the other night when I was sitting there talking to my son and somehow he started talking about a book that is out on astronomy right now. I don't want to get into that. That will be raised as a defense to why the company failed.

But needless to say we started talking about astronomy and I saw this Black Hole in astronomy. And again I don't want to be facetious, I was getting ready to pick up the phone, call San Francisco. I didn't, I looked at the transcript and I wondered whether Mr. Kinsey had said that? He did. At page 1974. And it leaped out at me that Mr. Saul had a conversation with Sid Orloff, the chief financial officer of Dynamic Capital, in January of 1986 when he confronted Mr. Orloff with where the money went.

And let me show you that testimony. At page 4393 of Mr. Saul's testimony:

Question: Did you confront him, Mr. Saul, with the fact that you had knowledge of these allegations?

Previously he had been talking about the fact there was money being transferred around.

Answer: No. He knew what I had knowledge of when he came in the room.

Referring to Mr. Orloff.

Question: Did you ask him how the money was going to be replaced?

Answer: Well, I said, "Look, why don't you pay that money back out of Clifford Management and, you know, maybe things will be back where they were".

Question: What was his response? Wait a minute. Are you telling me you discussed Clifford Management Associates with him?

Answer: Well, it was my assumption that there was all kinds of money in Clifford Management.

Question: Over and above your assumption did you discuss it with him?

Answer: No. That's just about all I said.

Question: What specifically did you say to him?

Answer: Can't you pay it back out of Clifford Management whatever is owed in the trust funds and everything will be all right.

Question: What did he say, if anything, to you? Did he respond to that?

Answer: Yes.

Question: What did he say, sir?

Answer: He said that's impossible to do, that there is no money in Clifford Management.

Question: Did he say anything else, sir?

Answer: Well, I questioned him about Clifford Management being no money there. He says that's a black hole, there is \$50 million that went down in.

Now, ladies and gentlemen, that's a lot of gravitational pull for a black hole. But for three weeks after Mr. Kinsey said in his opinion it was a black hole, like in astronomy, Mr. Saul takes the stand and tells us that Mr. Orloff admits that \$50 million, that is five with a lot of zeroes, went into the black hole.

Now, I don't mean to be facetious, but I say to my fellow lawyers out there, might they answer the question of what happened to the money in the black hole. Where is it? Where did it go? How big was the black hole?

He admitted to \$50 million there. I will show you that \$300 million went into the black hole. I will show you records that 300 million plus dollars, the exact figures \$302 million some odd cents, went into the black hole of a partnership owned by Mr. Saul's client and Mr. Penn's client, Mr. Clifford and Mr. Orloff.

And, with all due respect, does anything in the real estate market, in Silicon Valley—whatever—have anything to do with the black hole?

So this we ask ourselves and those counsel, when those counsel stand in front of you and they explain to you why this company failed. It is unfortunate we don't have a system where jurors can ask questions. But you can, you *can* ask—yes, just look them right in the eye just like you look at me, saying "Prove it, Mr. Cotchett." Look them right in the eye: You tell them with your eyes—how much money went in the black hole and what did the black hole have to do with the real estate market and with Washington, D.C. or any of those other nonsensical, I apologize for using that word; that's not proper—but those statements they made as to why this company failed.

And the reason it failed was so basic, so simple. And it didn't involve FASBs, GAAPs, or GAASes. It didn't involve big accounting principles. It involved theft, stealing, and embezzlement. It involved fraud and false reporting of profits.

And why did little Mrs. Victor send those two checks to Dynamic Capital? She sent them because of the videos, because of the high pressure. But don't worry about it; we are an ethical company—an ethical company that turned out to have on the fourth floor—we believe it was on the fourth floor—there has been some discussion about it—a little company called CMA. Sometimes now known jokingly as the "Black Hole." That's why this company failed.

Now when you asked Mr. Marx, Mr. Kinsey, and others if it failed because of the black hole, they don't use terms like black hole, they are accountants—except Mr. Kinsey guessed that they use formal language because they are formal-type guys. They got paid a lot of money to use formal language. They come in here, they take that stand, they raise their hand, they take the oath, and I say Mr. Kinsey, Mr. Marx, tell me from your review of all the documents, why did the company fail? And they told us why the company went under.

It had nothing to do with the real estate market, had nothing to do with Washington, D.C., and the current administration. Had nothing to do with the semiconductor industry in Silicon Valley, had nothing to do with the bad real estate market:

Question: And you understood enough about this company to put together this graph and see it in this form? Were you then able to form an opinion to why Dynamic Capital failed?

Answer: Yes.

Question: What was your opinion?

Answer: The opinion was, my opinion was that the company was showing artificial profits based upon sales to related parties. And that the only true cash coming into the company was cash from investors who were being brought into these daily. The rest of the sales primarily consisted of notes which were of questionable collectibility.

Question: Mr. Kinsey, is there a characteristic way Dynamic Capital did business in terms of its cash needs?

Answer: Well, cash really is at the heart of the entire thing.

Ladies and gentlemen, this was a classic case of nothing more, nothing less than artificial profits being shown to the little Mrs. Victors of the world so that they could send their checks in and so that defendants could take a rubber stamp for a \$1.98 and put it into a different bank account.

There are some that refer to this as a "Ponzi Scheme." There are others like Mr. Saul who finally admitted, yes, that you don't have to go to law school to know that this is embezzlement.

There are those like Mrs. Fox who said they lied to her. There are those who said there was stealing. The bottom line is, when the question is asked of counsel, who will stand before you as to why the company failed. I am waiting with baited breath after hearing the evidence to hear now why the company failed.

You know who was involved in why the company failed. We know that two people, Sam Clifford and Mr. Orloff, controlled Clifford Management Associates. We know, and I say this with no hesitation, that money went into their pockets.

We know from the testimony, which I will show you later, where the money went. I am prepared to show you that too. By the way, I have a check showing where it went. It is a fascinating huge circle.

Sometimes—we thought the other day that Peninsula Venture was over in Merced, little did we know that they had a phony bank account right in San Jose. Little did we know that all these companies all over the West Coast had little bank accounts in the same bank.

We now know that. But who besides Mr. Clifford and Mr. Orloff participated, if you will, in the false profits? Because—let me be candid with you and tell you—I have not seen evidence in this case that others stole money. I have not seen it. I would like to tell you if I could. It is not that I would like to—I wouldn't like to; to be honest with you, I have not seen evidence that other defendants stole money.

I have seen lots of evidence about CMA.

The Lady of Justice and her scales would respond very quickly if she could tell you that yes, there was stealing by Clifford, Orloff, and CMA. I have not seen evidence that the others stole. As a matter of fact, Mary Bond who is the secretary of CMA, and I want to tell you I have looked at lot a of documents in the case as have all of these lawyers here, I can honestly tell you I don't think they stole any.

Two people clearly stole, no question about it. My youngest child could figure that out real quick.

But what did the others do to participate in this fraud? What caused Mrs. Victor to send them those two checks? I just use those as an example—there were hundreds of checks like that.

That little stamp was working overtime, folks. Think how many checks you would have to write to get up to \$302 million. You've got to write a whole lot of checks. Somebody's hand got sore stamping that stamp on this thing, somebody's hand got sore just endorsing Dynamic Capital.

Now what did these people do? They participated, if you will, in the false profits. Because what they saw and what they knew was that, hey, something is wrong here.

Charles Beaumont, quote "Sam Clifford's favorite guy"—Sam Clifford blames him for the option. If you believe that, so be it. I don't. Sam Clifford had a difficult time telling the truth. But we will leave that to Mr. York to argue.

What did they do that helped Sam Clifford? Let me tell you what they did. Do you think Mrs. Victor, Mr. Ames and all these other people, do you think they sent their checks in just because they loved Sam? Do you think that is what it was all about? Do you think it was the bottle of wine we heard about? Do you really think they wanted the bottles of wine? Do you really think Mrs. Victor is interested in a bottle of wine?

They sent their checks in because of the facade. And you see what Sam did. He was a master—he was a master at building this glossy annual-report-type mentality with graphs only going up.

What amazes me I must tell you is that some of these people are bright. Let me tell you I have a personal opinion about Mary Bond. I think she went along with it out of loyalty. I will show you some checks Mary Bond wrote to Sam Clifford for \$525,000 on one day, \$500,000 on the same day. But she didn't stop to ask, wait a minute, why is Sam running off with this money? I am convinced it was out of loyalty, folks. Did any of that go in her pocket? No, I can't tell you it did; I haven't seen that. But I can tell you this: If you are signing checks like that, something is wrong.

And I am telling you that though Mr. Beaumont may have resigned in October of '85, what did he do to the clients he was representing? He bailed out. Yes, he did. I give him credit for that.

But it was all part of this facade.

As a matter of fact, when you get in the jury room you will have these things with you. Take a look at that fabulous picture. There is a lot more than \$1.98 for the stamp; those are professional photographs in there. These photographs, folks, are rockets going to the moon. These photographs cost a lot of money. This is a Cecil B. DeMille production here. This is a production number that these people participated in. Even Miss Bond and Mr. Beaumont and Mr. Chan and Mr. Saddler—they participated in the Great American Scheme.

Because they were part of Dynamic Capital, part of the corporate family. And some of them had the guts to stand up and say, "Wait, stop—I am out of here."

As a matter of fact some of them, like Ms. Scheer said, got their money out in 1985. Why, Mrs. Scheer? Because somebody told her to get it out. Who, I can't tell you.

Couldn't be more honest than that: "I got my money out." Some of them had the guts to stand up, but poor Sid Orloff didn't. He

commended Mr. Saul. He commended Mr. Saul by saying, "Pete, you are doing something I should have done twenty years ago."

Now, who were the key people that participated in this scam?

What the auditors did was have the key management at Dynamic Capital sign a letter to them because there may have been some concern in 1985. Remember Mrs. Fox testified that for the first time in 1985 she asked for the Clifford Management Associates books.

By the way she also testified she was told by Sam Clifford that it was defunct. Years before defunct. \$117 million went into the black hole in 1985 alone. \$84 million into the black hole in '84.

So, good auditor that she was, she said to him, "Sam, can I see the books?" Sam said, "Nope. Can't see the books." Why? Because we have nothing to do with Dynamic Capital. What they did was they had a number of people sign a letter, and I want to show you that letter. This is the Dynamic Capital Corporation letter, June 28, 1985. "To: ABC Consultants—Gentlemen"—instead of gentle persons. Then goes on to list what they have done: "Number 2, we have made available to you all financial records and related data." True? False. A lie.

They knew about the locked drawer, and they wrote a letter saying they have made available all financial records and related data. False, a lie, a fraud. And when asked—I think it may have been Mr. Ruby and Mr. Anderson asked—who signed the letter and why was the letter written, Mrs. Scheer responded—and I have her testimony here as found at page 5637 because I am sure counsel will want to go back and look at this one tonight—that they were the key people who would know about the finances. She had those people sign the letter: Mr. Clifford, Mr. Orloff, Mr. Casper, Page, Clay, Saddler and Cutter.

Now I asked her at some point did those people lie to you? She said, "I believe they did." And you will recall, there was an objection by counsel that I asked all those people and I shouldn't have done it because technically you are supposed to break it up.

I said, I think I asked the first one, "Did Mr. Saddler lie to you?" And let's see what she said; don't believe me—I want you to hear it with your own ears:

Question: Thank you. So these are the key people who you believed would have known what was going on, is that what you were saying?

Answer: Yes.

Question: Okay. Let's start with the person making the objection. Counsel for them, did Mr. Saddler, who has been sitting right next to Miss Polk here, lie to you? Did he lie to you, ma'am?

Answer: I believe he did.

Question: Thank you. Now, let me try this. Did everyone else on this page lie to you?

Answer: I believe they did.

Question: Okay. When you say you believe they did, what does that mean, you "believe?"

She is so careful with her words; she is an accountant:

Answer: I have heard about the locked drawer.

Question: When did you first hear about it?

Answer: From my attorneys.

Question: I don't want to hear it from your attorneys; when did you first hear about it?

Answer: Tuesday of this week.

Question: Tuesday? Were you shocked?

Answer: Yes.

Now, when we ask who was responsible on the second prong of why the company failed, the answer to why it failed: It failed because of the fraud in getting the people in the door, and then it failed because of the stealing.

We asked the question, and you decide the answer, which is who. We know you know the answer to why; when you answer the question who, you are going to have a long checksheet.

I say to you respectfully—that the evidence will show that some of these people participated in why the company failed. And I challenge them to come before you and tell you otherwise.

And I also say to you that they didn't steal money. But they all misled under the case upon which these plaintiffs come to you. And under the instructions His Honor gave you, you can find these people were liable.

And I want to hear the response from Mr. Beaumont's attorney when he comes before you and says that his client was not negligent in any way. I want to hear that. Because I will show you memos that I have which show that at the time he knew what was going on. And I commend him for leaving in 1985. But to commend him for leaving doesn't do anything for these people out here and my clients. It is like the sympathy they don't need. And I am prepared to show you that the key people in this organization knew or should have known or were negligent or stole. And I will walk through that person by person.

[Trial breaks for the weekend.]

MR. COTCHETT: Good morning, ladies and gentlemen. Good morning, counsel.

We finished up Friday evening with a series of questions I was asking and putting to you. I will see if I can just summarize in a very short manner what I said on Friday to you: I was answering a series of four, f-o-u-r questions—I don't want to say "simple" questions—but *the* four questions that we are dealing with in this case.

It's been a long trial, a couple of months, but I think it really all comes down to the simple story of Dynamic Capital: How and when did the scheme start and how was it committed? Just to quickly summarize, I think it is very clear from all the evidence that it started back in 1969 right from the formation of Dynamic Capital.

I think it is very clear from the testimony of Mr. Saul and from the documents themselves that you will have available to you how the simple little pizza parlors were maneuvered back and forth, how they were sold—in my opinion several times—to DC.

Who owned them when they were sold to DC? What was their economic value? I repeat, so that there is no question about it, that in my opinion these pizza parlors were all losers because they had the cash drained out of them, taken from them, and had been sold to DC.

Who owned that? Mr. Clifford, Mr. Orloff and cohorts.

That is how and when it all started.

How was it done? You will recall it was done by these very flashy reports, which are pure rubbish. They are not worth the paper they are printed on. They are false and fraudulent. You heard experts testify to that, and you heard lay people—meaning people who are not experts—look at them now and say, "By gosh, that is all false."

You heard Mr. Jewell, you heard Mrs. Fox from the auditors—all say these were false.

It was done by showing false profits so that someone young or elderly, whoever was brought to DC, would be told this is the place to put your money. It didn't matter whether it was your dead father's insurance money, your retirement plan that you worked for all your life. It didn't matter as long as the color of your money was green or it was a check. It didn't matter who they took from, how they took it, as long as they could negotiate that dollar bill and as long as their little rubber stamp would sit on the back of that check. They grabbed the money.

They did it not only with the flashy reports. As I also pointed out, they did it with hyping a stock.

Isn't it interesting that the phone calls would come in at three o'clock in the afternoon just before the market closes, and somebody would place an order for 100 shares, 200 shares, or whatever, for the stock.

And you will recall Mr. Fawcett—I believe he too was a former Marine—testified that from all his years with the NASD as an investigator of fraud, it was absolutely clear to him how the stock was manipulated. Very simple: The last trade at the end of the day.

Remember who used to take the calls? The calls would come from Dynamic Capital to Clifford's office and they would place the order, and that was that, essentially. It was not difficult. They would do it in other ways, which I am going to point out in just a moment when I get to who participated in it. They did it in real estate. They, "these asset-managed companies," did it; these we

are going to talk about when we talk about who participated in it. So it was not a complicated scheme.

As a matter of fact, it was rather simple because it is unfortunately very simple for people to prey upon others and steal money. It is a sad commentary on our times that if you walk into a Safeway store and you steal a loaf of bread because you are hungry, you will go to jail, but if you buy a two-dollar stamp in a stationery store and you put it on the back of the check and deposit it, you don't.

We are here because we are seeking to bring some justice to these plaintiffs.

Now, how big was the scam, who took part in it, and who participated in it?

You will recall that Mr. Marx, one of the accountants we hired, took a look at some of the recent annual reports to see what was reported in the annual reports, and then went back and spent many hours, exploring multiple sources. He also used Mr. Hale's and Mr. Kinsey's work. You will recall Mr. Marx's expenses alone were around \$150,000 to do this work. You can imagine how much effort went into this analysis, and this is the product: When you get it all boiled down, what they reported on the top lines in '79 through '85 is a total of \$32 million in profits.

Ladies and gentlemen, if you saw a company with \$32 million in profits you'd be impressed too. The real facts, sometimes known as the true losses, are shown below.

In fact, from '79 to '85, they never had a single year where they made money. In fact, \$13 million was lost.

Now, what is interesting about that is where the money went. In fact, the company at times made money, but it couldn't make money with the presence of the Black Hole. You see, no way could Dynamic Capital make money when the money was being stolen from it, when it was being siphoned off and put in that Black Hole. So the true profits and the true losses are those as shown just from the operating companies.

By the way, an interesting chart that Mr. Fawcett had on the stock price shows you how much of that was actually bought by the public. In May of '79 to January of '86, the month before the company went bankrupt, 92 percent of the shares were all bought by the little Mrs. Victors of the world, by the people who went in with an investment and walked out where they had no idea what they were walking out with, but in some cases they walked out with the shares of stock. Ninety-two percent of the stocks were purchased by the small investors of the world. Eight percent were brought by broker dealers and public customers. That is where we were on Friday. That is how the scam was done.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/I. Closing Argument on Liability; Rebuttal--Securities Fraud Case/§1.9 d. Who Got the Money?

§1.9 d. Who Got the Money?

I want to talk very briefly this morning about who participated. I had started to talk about that Friday before we ended.

Who participated in the scheme, sometimes known as the Great American Dream? Who participated in it? Well, to answer that question we first must ask ourselves, "Who knew what was going on?" And I guess the best place to start would be with Sam Clifford.

Now, Mrs. Fox came to this courtroom. You will recall that Mrs. Fox was the chief or head auditor for ABC Financial Analysts, the company that was hired and that spent almost—you remember the testimony—5000 hours in the year 1985 alone reviewing the books. Unfortunately, she was never allowed to be shown the Clifford Management books, and she was never allowed to look in that little locked drawer that we have now heard so much about. But she asked Mr. Clifford who knew about this, after he confessed to her. And you will recall he did confess to her, when finally she confronted him on January 22, 1986, the date of the interesting Board meeting. We'll talk about that in a moment. She confronted him. She confronted him and asked him who knew about this. There is no doubt about what he said to her on that day; she came to this courtroom and testified under oath: "I asked him who knew. He said everyone. By the way, I might add, I went to them, but they would not implicate anyone. And he said the option transaction was Henry Beaumont's idea."

Ladies and gentlemen, Mr. York is certainly capable of arguing on behalf of his client, Mr. Beaumont, but I would suggest to you that was the last ditch sentence of the last breath to lay the blame on someone else.

Interestingly enough when Mr. MacChesney stood here and gave you an opening statement he said it was all Sam's fault, that no one else knew about it. Well, this is what Sam Clifford said: "I asked him who knew and he said everyone." Just before asking Mr. Clifford who knew about it, Mrs. Fox asked him about these so-called option transactions, and he responded. You remember the colloquy—she didn't understand it, and he tried to explain it to her. And she responded by saying, "all right." After, I asked if anything else occurred in this conversation with Mr. Clifford, she answered, "I still didn't understand it." He explained to her that if he told the truth it wouldn't allow us to have continued the involvement with real estate transactions.

You asked Mr. Clifford as to what could happen to him?

Answer: Yes.

And what did Mr. Clifford respond?

Answer: He said, quote, "He said he could go to jail."

Is Mr. Clifford in jail today? No. Yet he said specifically that for the acts he committed that is where he could go.

I suggest to you that the jury can do something other than that. You, the jury, in this case, can tell him, "Mr. Clifford, you are going to pay this money back, and you are going to pay back damages. And when the appropriate time comes, Mr. Clifford, you are going to pay additional money back." We will get to that later in the argument when we show you the jury form.

That, ladies and gentlemen, is the only punishment people like this understand, and you are the only people that can impose it in this courtroom.

Now, who knew what was going on? Let's quickly run through and take a look at some of the names. Here is a document that Pam Bradley wrote to Sid Orloff—the "party's over" memo. Mr. Orloff was told back in 1983 that the party's over with the bank. If there is any doubt about Mr. Orloff's knowing, all one has to do is read a memo from Jane O'Connor to Sid and Pam, to which Sid "O." writes back, following up with this: "I understand we won't be out the money, but only the time necessary for them to run the checks through their checking accounts." Sid knew all about the checking accounts. There is little question about Sid.

Now, what about the other people in this audience? I mean the other defendants. I have no proof they stole money, but I have this proof: I have proof that every single one of the defendants here on trial was intimately involved at some point with what was going on.

Here is a memo dated April 27, 1983, to Mr. Henry Beaumont and Mr. Dick Chan, carbon copy to Chan. When you read this memo you will see how the sale of partnership's money was being run around in a circle; there is no doubt Mr. Beaumont and Mr. Chan, from that memo, knew what was going on with the partnership monies, just as, with the memo from Pilar Rios to Patty

Scheer, the person who kept the locked drawer, there is little doubt that Mary Bond, unfortunately, knew what was going on. There is little doubt that Mary Bond knew how monies were being transferred around, for your information, regarding the \$900,000 from DC Corp. account number 24313, which was transferred to Sam C. Clifford, trustee, on that date.

You do not have to be a genius to figure out what money was being transferred around there.

Now, what should Mary have done about that? What should Ms. Bond have done when she received this memo back in 1982? One thing is for sure — If you receive that memo in 1982, that \$900,000 has just been transferred to Sam Clifford's account, you don't wait until 1986 when the company goes bankrupt because he finally stole enough money to cause it to go bankrupt, to say "I am sorry." You don't wait until 1986 to now come and say, "I couldn't do anything about it because I was just a secretary."

Mary Bond was more than a secretary. Mary Bond was the assistant secretary of the corporation, not just the secretary.

By the way, even if she was a secretary, a very honorable profession, if you work for someone who is stealing money, what is your obligation if you are talking to the public? Was your obligation to pick up that phone and make that call at three o'clock to the stockbroker? Was your obligation to pick up that phone and call the bank and tell the bank to transfer funds back and forth? What is your obligation? At the very least, at the very least, Mary Bond participated in the misrepresentation to these people. At the very least she participated in that.

Let's take a look at this memorandum. There is a memorandum in January of 1984 from Henry Beaumont to Sam C. Clifford, Sid Orloff, Miss Bond, and a chap by the name of Al, cash advantages at year end.

One has only to read that memo to understand what was going on with money being moved around. It lays the entire thing out:

"Peninsula Venture will turn around and place the funds received from the option in short-term notes with CMA until May or we want them to turn the situation around."

"Sid will go through this with James C.," identified as James Casper. "This memo will only go to the four above. I think this will leave us still about two million short of year-end switch needs."

Isn't that interesting — "switch needs." They know what "switch" means there. I have a pretty good idea of what "switch" means — switching money from account to account.

Now Mr. Beaumont, to his credit and his defense, wrote the other memo I showed you. "Where is all the money going?" Mr. Beaumont believed, as I see the evidence, that he was dealing with moving money around but, certainly, not the theft of it. That is your tough job. By tough job, I mean you are the persons who have to decide what he knew, what was in his mind.

Now, these are the people that participated:

I talked about Mr. Saddler on Friday with the management letter. I have talked about Mr. Chan. You have heard about Mr. Beaumont. You have heard about Ms. Bond.

All the time that this was going on notes like these were being written — let me show you one example of what I'm talking about — notes like this were being written, notes like this by Sam Clifford, which is a classic example of the stealing of \$1,899,000. Here is an example of money that had previously gone to Case Development Company with that "phony bank account" in San Gabriel. Case Development, you will recall, was over in Merced, but it just very conveniently had a bank account right where Sam banks: \$1,899,000. In the month of March alone, signed by Sam Clifford, partner, Clifford Management Associates, there are fourteen notes that I have in my hand here — for the month of January alone. And, you will recall, these fourteen totaled over \$25 million.

This, ladies and gentlemen, is nothing more than as Mr. Saul said, basic embezzlement of the money.

Now, let's talk about where the money is. Where is the money now? Everyone wants to know.

I used the phrase "rocket scientist" the other day. I certainly didn't mean to offend anyone, but I want to use it again so it is absolutely clear: You do not have to be a rocket scientist to figure out where the money went in this case. You do not have to be an accountant. You don't have to know FASBs, GAASes, or poopers, or whatever those things are called. All you need to know is how checks get stamped, endorsed on the back. If you can endorse a check you can figure out the theft in this case. You can figure out the embezzlement. It is so simple.

But, you know, people kept asking, "Where is the money? Where did it go, and how much money went? How much money was stolen?"

Well, let's start with the very basic individual level. Let's start with Anabel Fox. We know who she was. I asked her, I tried to get

out of her as she sat there on that stand, whether she knows how much money was taken? And let me show you what she said: "There is money missing from Dynamic Capital." That was her answer. "Based upon the information from the meeting of January 22nd, the various accounts in the newspapers, there appears to be a lot of money possibly missing from Dynamic Capital."

Now, here is the person whose company was paid hundreds of thousands of dollars to review the books and tell us in this courtroom that there was "a lot of money." Let's see if we can figure out—and I think the evidence tells us—how much money is missing. What amazes me is that when confronted directly with how much money he and Orloff took, Mr. Clifford responded to Mr. Jewell in essence that he didn't know.

And let's look at what Mr. Jewell said when he asked, "Where is the money?" Mr. Jewell, the director, one of the directors who blew the whistle on Mr. Clifford, was on the stand, and was asked—page 2449 of the transcript—to explain his conversation with Mr. Clifford and how the money shown on a blackboard drawing was going in circles. He then was asked what his reaction was to the explanation. The description and the drawing of the circles was intended to show where the money had gone. But after Mr. Clifford drew the circles, did he explain the flow of money? After all these circles are drawn and all the explanations given, Mr. Jewell wanted the answer to a very basic question, "Where is the money?" And all the directors confronted him with that, but didn't get an answer. Any answer? No answer at all.

When I asked Mr. Jewell if he had talked to Mrs. Fox about it, he said he had done so because she came to that meeting. He asked Mrs. Fox whether the explanation that Sam Clifford gave of the money was correct, and she looked at the Board and said, "Absolutely not. He was lying again." What was the reaction of the Board and Mr. Jewell? "Well, I was shocked, of course. I had no idea what was being done to the company."

This was the opening shock on January 22nd as to what happened to the money. It wasn't until some months later that we were able to find out.

You heard testimony that, until some of these Board members like Mr. Flood and Mr. Jewell came into this courtroom, this ring, that they had never seen the documents that we came up with; it wasn't until Mr. Peter Saul, the attorney, came into this courtroom and saw these documents that he answered Mr. Penn in this way.

This had nothing to do with the administration in Washington or the real estate market. When he was asked, "Can't you see the difference between Mr. Orloff taking the money out of the trust fund and using it for his own benefit or the corporation itself using it for another purpose?" he answered, "As they taught us in law school, Mr. Penn, in both instances it fits into the definition of embezzlement."

Ladies and gentlemen, I don't think you have to be a lawyer to know what embezzlement is. I don't think you have to be a lawyer or judge of anyone to understand what stealing is. And this page of this document shows stealing. Here is a note, a document we found and showed him dated June 21, 1985, between Dynamic Capital and Sam Clifford and Sid Orloff right here. Sam Clifford and Sid Orloff, Dynamic Capital, and Peninsula Venture. All one has to do is to be able to read a simple sentence and you know it is stealing and embezzlement because paragraph "c" that says Dynamic pays them 25 million, and paragraph "d" says they give it right back to Sam Clifford—and before coming into this courtroom not a single director had seen these documents. But Mr. Penn tries to say that taking the money out of a trust fund is different from stealing. You see the difference here, ladies and gentlemen. It is very simple. Their argument to you is they simply took it out of one trust fund and put it into their trust fund for just a short time, just for a short loan. That, ladies and gentlemen, is stealing. That is theft. In the exotic words of lawyers it is called embezzlement. I call it reaching into a pocket or a purse of Mrs. Victor. When they take her check and they endorse the back of it, "Pay to Sam Clifford, CMA," that is stealing.

If you wrote a check to PG&E for your bill and PG&E said pay the check over to some employee, that is stealing. And if you wrote a check to Safeway and handed it to the checker, and at the end of the day the checker took the check and wrote, "Pay to John Jones" on the check, that is stealing. And if enough checkers did that, Safeway would go bankrupt. And if enough people at PG&E did that with the checks that you write, PG&E would go bankrupt.

It is so simple because that is what happened to Dynamic Capital. There is absolutely nothing exotic here.

Now, how much money was stolen? How much money was taken in all of those little checks? In evidence there are hundreds of pieces of paper. There are literally hundreds of documents in evidence.

Into the bank accounts of Clifford Management Associates from the years 1982 to 1986 went \$302 million.

Now, the defense is going to be that a lot of that money got paid back to Dynamic Capital. A lot of that money got paid to limited partners to make their payments. I want to see Mr. Penn and Mr. MacChesney, two honorable lawyers, two outstanding lawyers, I want to see them stand in front of you with a straight face and pull out documents and show you in evidence where the money went back. I want them to tell you if they will how the money got back, when it went back, and where is it because the

uncontradicted evidence in this case is as follows:

Mr. Daniel Marx on the stand, "Can you tell the jury how much money went into the Clifford Management Associates account?"

Answer: "\$303 million." \$303 million went into the Black Hole, as Mr. Kinsey called it. Mr. Orloff apologizes for this. There is contradictory evidence. Mr. Orloff contradicted that in his statement to Mr. Saul. He said only 50 million went in.

You will recall Mr. Saul said, "Yes, he told me it was a black hole that 50 went in."

The only evidence against what the accountants both came up with is Mr. Orloff's statement to Mr. Saul who repeated it to you, that, no, it really wasn't 300. It was really only 50. I guess the defense in this case is that they didn't steal 300 million, they really paid off some notes, they really put it back into DC—and, by the way, it was really only 50 million. And, you know, it was really the economy that went bad, and that terrible administration and all that—and that is why the company went bad.

The exact figures that were testified to—and it is interesting because, as the hand of the law got closer, as people started asking more and more questions, as Mr. Beaumont wrote the memo asking where the money was going and then resigned, as Mr. Chan resigned, as people start jumping off the ship—the stealing increased. And the testimony in the case is that there was 302 million in that four-year period; and in 1985, the year when everybody was jumping off the ship because quote, "everyone knew what was going on," \$117 million was endorsed over with a little stamp to Sam Clifford. In 1984 it had been 85 million. But do you think it stopped? There was stealing right up to the very last day. Let me show you some checks that are in evidence to show you the blatant stealing that was going on:

This is a little Twin Peaks apartment house account. \$525,000 in checks are written on one day, and on the very same day another \$500,000 in a check to Sam Clifford—\$1,025,000. And, ladies and gentlemen, that was not to pay for a mortgage. That was not to pay for the gas and electric bill at the apartment house. That would be one heck of a gas and electric bill. That was to go into the account of Sam C. Clifford, trustee. On the last day of the year 1985, Beaumont quit, Chan quit, people were running out everywhere; they want off the ship. They don't want to go to jail.

Did the pillage stop on the last day of the year? Oh, no. In the month of January, as everybody is getting ready to put this poor sinking ship into bankruptcy, it continues. You will recall a series of checks that were written to Provincial Design. Do you remember that famous account? Typical of Clifford Management Associates, nobody knows what it is for. It was just so a series of checks could be written through an account called Provincial Design. I will show you who was on the checking account of Provincial. Our favorite players.

What did they do? They wrote checks from Dynamic Capital to Provincial. Then, what Provincial would do is the very same day they would write a check to Provincial, somebody would write a check to Sam. That was January 14th, 1986. Sam wasn't happy with a hundred that day. Three hundred went to him the following day, and I could show you other checks that I have here. He started out the month in a big way. It just went on and on in the month of January, virtually every day, a hundred thousand dollars here, three hundred thousand the following day.

On January 8th they were able to put \$425,000 into Provincial. Then they turn around and write Sam a check for \$425,000.

The final crux, ladies and gentlemen, were the numbers as testified to you by Daniel Marx, over \$170 million of the investors went into that account.

You heard testimony about the documents that Sam Clifford removed. His explanation or the explanation from some witnesses was, well, they were CMA documents.

I think it was Mr. Flood that went to Ms. Bond and asked her the week after the Board meeting if he could see the documents. And shortly thereafter the documents were removed at some time by Mr. Clifford. Mr. Flood said that Mr. Jewell said that. Mr. Saul said that.

Well, His Honor is going to give you an instruction in this case. It has to do with willful suppression of evidence.

If I can just show you what those words, "willful suppression of evidence," mean in this arena, this boxing ring where, in the words of Marciano, you can run, but you can't hide because this is the law.

If you find that a party willfully suppressed evidence in order to prevent it from being presented in this trial, you may consider that fact in considering what inference is to be drawn from that evidence.

Now, ladies and gentlemen, I anticipate through Mr. Clifford's able counsel and through Mr. Orloff's counsel, that they will say there was no willful suppression of evidence, and that will be a fact that you will have to decide in your wisdom, in your judgment, when you go into that room.

When we look at that instruction we must consider where all the checks are that go with this account.

You see this card? It is called a new account card, which you open up when you go to the bank. You will notice that for Clifford Management Associates, it names Sam Clifford, Sid Orloff, Mary Bond. Notice the day it was canceled. The Board meeting, when Sam was confronted with the question of tell us where the money went, was on the 22nd day of January, 1986; the account was canceled on 2-18-86. The bankruptcy in this case was filed the first part of February, the second month of 1986. Shortly after the bankruptcy this account, for Clifford Management Associates, was canceled. And here is when that account was opened: that account, ladies and gentlemen, was opened on March 26th, 1982; and from March 26, 1982, to the date it was canceled, \$302 million went in.

Where are all of the checks? Where are all of the items you get on a monthly basis from the bank?

Based upon our review by the accountants we have calculated the amount of monies went in. We didn't know where it all went out to. We offered in evidence here the other day a series of checks totaling several million dollars to show that, well, some of this went out to Elmwood District Cable TV. Some of it went to Knight Technology. Then I guess before that was offered in evidence nobody looked at the back of the checks because when you looked at the back of the checks, what did you find? You found just what you would expect based upon the other evidence in this case. You found, as pointed out by Mr. Anderson when he put the checks up on the board, you found that the handwriting as to the pay to the order of is almost identical. And when the bank gentleman was asked what bank it went into—whether it went over to Merced—the answer was that it was deposited right in our account here in our own branch.

Okay. When you look at the next check, to Elmwood District Cable TV, what branch did that go to, what bank? It went right downtown here in this city. You look at every single check: They went right here to downtown.

Ladies and gentlemen, if they have any doubts where the money went, they have only to look at the records of CMA. Listen to the testimony of the accountants and think about the questions that Mr. Jewell and Mrs. Fox proposed to Sam Clifford when they asked him, "Where did the money go?"

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/I. Closing Argument on Liability; Rebuttal--Securities Fraud Case/ E. Linking Liability and Damages/ §I.10 1. Using Jury Instructions as Framework of Argument

E. Linking Liability and Damages

§I.10 1. Using Jury Instructions as Framework of Argument

Now, you are going to be instructed in this case as to certain elements of law, and though I won't belabor all of the instructions, there are certain instructions I want to tell you about very briefly. They have to do with the fraud and deceit as well as the damages. Let's just quickly look at what we must prove before you check the box. We must find that the defendants made a misrepresentation as to a past or existing fact. No doubt about that. The representation must be false. You could put that in spades—in spades.

The defendants must have known that the representations were false. There is absolutely no question about that. They must have made the representation with the intent to defraud, but their defense, you see, is where they say, "Wait, we took the money but we were really going to pay it back."

When is the last time someone walked into Safeway and shoplifted and said, "Look, we will give the eggs back." That poor person, who is hungry and probably needs the eggs, goes to jail. That poor person who walks into J.C. Penney and takes a pair of socks goes to jail. But you are going to hear the argument here that, ladies and gentlemen, you can't find against our clients, all of them, because they didn't intend to hurt Mrs. Victor. They really were going to pay it back, but that terrible administration in Washington and the downturn in the real estate market and all of that prevented this.

So, that, ladies and gentlemen, when you've cut all through it, that is basically why you spent two months here: to figure out whether they intended to steal the money.

The plaintiff must have been unaware. Do you think Mrs. Victor was aware of what was happening to her money? Do you think the investors—the young lady who turned over her father's insurance check—knew that it was going to be stolen? This is what it is all about: with intent to defraud. And I suggest in a very humble way to you, ladies and gentlemen of this jury, when you get in there you are the judges. I suggest there is no doubt about the fact that they intended to defraud. Also, having been read the instruction on breach of fiduciary duty, you will see that they broke or breached that duty—each and every one of them, including Ms. Bond, including Mr. Beaumont. Although they didn't take money and put it in their pocket, they participated, if you will.

Finally, you are going to come to an instruction under which we are asking that you find that at least some of these people acted with malice and oppression and fraud. And just quickly I want to show you what His Honor instructed you on.

We talked about malice. Understand where these concepts come from. This is the law as determined by His Honor.

As I said at the outset of my argument on Friday, His Honor essentially has completed his job in this case. He has seen to it that only the proper evidence gets to you. He has seen to it that the case comes to you in a fashion that is legal. He now takes his robe and he gives it to you. And when he does that, when he hands you his robe, he tells you what the law is as he determined it to be. This is what he determined it to be.

And by "he" you understand that Judge Abel represents that body of law by which all of us in this courtroom live. It is not a law from Mrs. Victor. It is not a law for Sam Clifford or the others. It is a law for you, for me, for the judge and everyone, and this is what that law means: Malice means conduct that is intended by the defendant to cause injury. Stop right there. Let's break that sentence down.

Is there any doubt that when you stamp the back of a check and steal it, that is conduct intended to cause Mrs. Victor or Mrs. Lilienthal injury? There can be no doubt. Is that the despicable conduct or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or the safety of others?

Now, I am confident that there will be individuals who will argue that is not despicable, that all they did was slip and couldn't pay the loans back.

Let me talk to you about damages now, if I can. You are going to be given three different forms to fill out, of several pages, and I'm going to show you some of the overheads. I want to show you what the evidence showed. I want to tell you what the evidence showed as to the damages which you can award in this case.

Let's take, for example, Mrs. Lilienthal who testified on behalf of herself and her husband about the money they put in. You recall there were several trusts. What happened was that she went in and they told her to go down to the lawyer and set up a trust. So there is Arnie Lilienthal and Mrs. Lilienthal in the trusts they set up. I can't remember the name of them. I think one trust was set up in her maiden name, and what have you. The form of the verdict, you see, is going to look like this.

The first thing you will see is the jury verdict. Remember, in this case we are dealing with the plaintiffs over here. Those are the people you will assess damages for, and the second sheet you will come to is this.

This is the form that His Honor has approved for you to use, and I just want to walk through the first one so we all understand it, and they will all be identical thereafter.

And I would say there are about fourteen pages that you go through, and the first sheet has to do with liability, and then the next sheet that you get to right behind that sheet will be this sheet, and it will deal with damages.

Now, I want to go back and explain to you the first sheet. His Honor will give you the concluding instructions as to how you will pick a form and you will deliberate, and that is solely your prerogative and you will then read with respect to plaintiffs Arnie and Lila Lilienthal and Lila—that is Stone-Lilienthal trust on the first cause of action for fraud—"We find as follows:" then it says mark an "x" beside the name of each defendant you find to be liable or not liable on this cause of action.

What you will do there, ladies and gentlemen, is you will take a vote, and His Honor will explain to you how to do that. Then you will just check these boxes however you find. One will be for fraud, one for negligent misrepresentation, and one for breach of fiduciary duty.

If you believe that Sam Clifford committed fraud, you would take a pen and you would mark that box right there—liable. If Sam Clifford committed fraud, certainly Clifford Management did, and you would check that box.

If Sid Orloff was liable for fraud under the instructions you would check that box. The same thing with Mr. Saddler and so on down.

Now, let's take an example of where you might change a box. Let's pick Mary Bond, if you will. If you believed that Mary Bond did not commit fraud as His Honor has instructed, you would then move over to this box and check "not liable." If you believed that Mr. Beaumont did not intend to defraud the plaintiffs, you would check that box, and so forth, with Mr. Chan, Mr. Saddler, or any of them.

I say to you that you have a tough decision to make here in regard to Saddler, Bond, Beaumont and Chan because I am the first one to tell you that I think I have seen every document in this case and I have not seen money go into their pocket. But it is clear to me that the fact that money wasn't put into their pocket doesn't mean they are not liable for at least some injury to these plaintiffs.

Now, the next cause of action that we allege is clear as to all defendants. There is not a person in this case who is not liable for negligent misrepresentation—all of them. And we would ask that you check the box on behalf of all of them.

As to breach of fiduciary duty, it is clear as well that each and every one of them had a fiduciary duty to these plaintiffs that they breached. They were all officers of the corporation, and they all acted accordingly.

And that, ladies and gentlemen, is what we call the liability page for the Lilienthal case.

And as you flip through it, you will then get to the O'Driscoll case, the Rafael case, Williams case, and you will do the same. And I would say to you that I don't know of any distinction in the evidence as to these individuals and to what they told all of those plaintiffs, and I think once you get past this hurdle of the fraud to who is liable and who isn't liable for fraud, this, I think you will find simple. They will be the same as to each plaintiff.

Now, let me move on to the damage page, which will be the page following each plaintiff.

His Honor now asks you if you do find liability for the Lilienthals, to fill in the damage page. And the first box you will check is damages for money first for the Lilienthals and their trust. It is all the Lilienthals. And in that box the evidence from the stand gave us the total sum of \$349,342 which was the evidence that came to us from Ms. Ray when she did up all of the total losses.

Let me see if I can—see if this works. That is the number. That is that "figure 3." That is a number which is the combined number of their losses.

And you will recall Mr. Lilienthal put some money in. Mrs. Lilienthal put some money in. They put some money into the trust, and that is the money that Ms. Ray testified to. And, by the way, that number is uncontradicted.

There is no evidence in this case that tells us that isn't what was put in. That is an easy number to deal with.

Now, we get to the very tough numbers.

[Recess.]

MR. COTCHETT: Ladies and gentlemen, let me see if I can wind this down now and tell you in summary fashion what I think the evidence showed in terms of damages.

We were talking about the Lilienthals. You will recall that they testified how they had come by their money and how they had put it in bits and pieces, mostly in bits and pieces.

The figure Mrs. Lilienthal testified to, and Mrs. Ray also, was \$349,342. I am going to come back later to these figures here.

I want to talk to you just very briefly about the special way, about those two figures because those two figures, whether they are one dollar, ten dollars, or a million dollars or whatever, to me are the most important figures you have to write down. These two, and I want to come back to them, that clearly there is testimony on. This is not an issue, but I will come back to that and the other figures that they testified to.

Remember, these are elderly people.

The Williamses, you will recall, had sold a house in Foster City, I believe, and then part of his medical practice when he retired, and you will have for the Williamses the same liability sheet, and you will have the second sheet that follows them as you will for each and every plaintiff.

You will have the second sheet for the Williams' damages, and their total number for Mr. and Mrs. Williams, plus the interest of their son. If you will recall that a plaintiff here, as instructed to you by His Honor is, the estate of Jonathan Williams, the parents; and you will see testimony of this, which suggested to their son that he invest. And on behalf of all three of them, the Williamses were \$900,000 and the estate of the then young doctor was \$141,000 that was lost, and that total number, according to Ms. Ray, was \$1,070,745, and that was for Mr. Williams, Mrs. Williams, and the estate of Jonathan Williams. I think the testimony was that he was roughly fifty or something when he died.

Again, I will come back to these numbers because those numbers are directly from the evidence of the Williamses and from Ms. Ray.

Remember Mrs. Victor and Dr. Victor, and I guess it would be the brother-in-law of Mrs. Victor, Martin, and Richard who had sold their home in Pacifica and moved down to the south. And, again, their first sheet will be exactly like the others. And then you will get the second sheet and that will be for the Victors—for Rose, Martin, and Richard Victor, and you will recall that the testimony for all of them, all three combined where they put their money in, both Richard and Martin, and you will remember Richard because the testimony about Richard was all of these people are in their eighties with the exception of Rose. I think she may be in her middle seventies.

You will remember testimony about Richard was that Rose would pin a little note on him or put in his pocket his address. When he would go out he would occasionally get lost and they would find him. This is the type of plaintiffs that defendants will argue should have known better. They knew this was a high risk company. They shouldn't put their money in there. And reminded of their little note that Mrs. Victor said she had to put in her brother-in-law's pocket so he wouldn't get lost because he is eighty-five years old. I hope I am breathing at age eighty-five, let alone this poor individual who goes out and gets lost. And these, of course, are the three people along with all other plaintiffs that, well, didn't you read it when it said high risk? And their total loss was for all of them \$641,857, according to Mrs. Ray. That was the number for the Victor family. And, again, you will recall that money was acquired by selling a home, a practice and what have you.

Before we get into the emotional distress damages, you will get two other forms from His Honor. I know it sounds like a paper war, but these are necessary for you to fill out in the form that you will get on liability, which will be called interrogatories. An interrogatory is nothing more than a question that His Honor will put to you, in the form of a written document, and whoever your jury foreperson may be will take that document and fill it in for you—"We, the jury"—and you will answer some very basic questions, which I don't think are hard at all; like this: Did the financial statements in the annual reports of Dynamic Capital for the following years contain misleading statements of material facts? And one of the interesting aspects of this form is that this is solely within your province. This is not a test. This is what the evidence showed. That is question number one, and I don't think you will spend more than two minutes checking off that "yes" line.

The second question is, "Was the message to the shareholders in the annual reports false"—the same annual report, but this is now the message to the shareholders—and from the very first year, 1969, it is clear that it was false.

Then question number three, "Was the price of Dynamic Capital common stock trading on the over-the-counter market manipulated," and there is absolutely in my opinion no contrary evidence to this.

It is clear that Mr. Fawcett, the expert, said it was clearly manipulated.

Number four, "Were the debentures that were sold in 1985 materially misleading?" I think the answer to that is, "Yes"—in both instances.

Three is yes. Four is yes.

If you find that any of the defendants conspired to disseminate false and misleading information, I think it is clear from the evidence that Mr. Clifford, CMA, and Orloff conspired. Your choice will be to decide whether Mr. Saddler, Ms. Bond, Mr. Beaumont, and Mr. Chan conspired.

And, finally, number six, "Do you find that any defendant made negligent misrepresentations to the general investing public?" In other words, as the evidence has shown to the public at large who were investing in Dynamic Capital, did they make negligent misrepresentations? And there is absolutely no question but that each and every one of them, on documents that you will go through ad nauseum, that every one made negligent misrepresentations. As a matter of fact, it will be interesting to see what the defendants say when they stand before you in that regard.

Question number seven, "Do you find that any defendant made negligent misrepresentations to investors or potential investors?" I think the same is true, that they made negligent misrepresentations. And those, ladies and gentlemen, are the special interrogatories that you will answer.

And then you will have a third document to respond to, and His Honor will pass that out. Is the jury going to receive twelve of these, Your Honor, or just one to fill out?

THE COURT: They will receive twelve that will have a mark across it that says "Just for your note use," and then will receive one which will be an original.

MR. COTCHETT: Thank you, Your Honor.

His Honor will then, through his bailiff, give you a special jury verdict.

Now, you will have a general verdict form, which I have shown you. You will check the boxes as to who is liable and put in damages, and then you will answer what is known as a "special verdict" on the complaint.

On the special verdict there are two questions to each plaintiff. The two questions are with respect to the claims of Arnold Lilienthal, Lila Lilienthal, et cetera: Do you find that the defendant is liable for fraud, conspiracy to commit fraud or aiding and abetting a fraud? Did he act with "malice, oppression or fraud?" And it is absolutely clear here that the first three so acted.

And you will receive one of these forms for each plaintiff in this case, and you will see it marked up at the top, and that will be a decision for you—a tough decision on these defendants. And I'd like to stand before you and tell you for sure, each and every one of you should find that they were guilty for fraud. In my heart I cannot do that, because I think in the evidence there is some reasonable doubt, for example, as to Ms. Bond, Mr. Beaumont, though it is clear to me that they participated. That is a decision that you as the conscience of your community will make.

COMMENT

The explanation of the law of liability and damages by way of how the jurors are to mark their jury verdict forms is an effective device for guiding their beliefs in the direction of the story counsel has told.

§I.11 2. Factoring Plaintiffs' Emotional Distress

Now, I want to come back to what I believe will be the most difficult task you will face, not only in this courtroom, but as many people who have sat on the jury have said, it is probably one of the most difficult tasks they will ever make, because they are now being asked to assess an item of damages, which His Honor has referred to as "emotional distress." It will probably be the last item you will come to when you do your deliberations because I think the other forms will be easy to fill out. But I think here we must look at what we are talking about when we say emotional distress with these people: What do those two words mean, "emotional distress"?

I want to go back to the words of Mr. Penn in his opening statement and see what he said about the plaintiffs in this case—and I believe these words as stated by him to be very true, as I said to you on Friday—and I will want to remind all of us of what was said by him; this is what Mr. Penn said two months ago—two months ago he said, "I see in all of these retired people, the elderly ... who, because of circumstances that I believe were beyond the control of my client, have lost their savings. I don't know whether these particular individuals lost all of their savings or only a portion of their savings. I don't know how they live from day to day, but they have my sympathy."

I don't want to talk about their savings that they lost. I want to talk about the last sentence: "I don't know how they live from day to day, but they have my sympathy." I don't want to belabor this, ladies and gentlemen, because I covered it on Friday. We are not here for sympathy. There is no sympathy in this courtroom. We can all have sympathy, but under the law that is not why we are here.

Now, when Mr. Penn asked that question, "I don't know how they live from day to day," I want to see if I can answer on behalf of the three families I represent, and many others. I want to see if we can look inside from the testimony—and only from the testimony—and view all the facts surrounding this case and see how to arrive at a figure—because, you see, you can't write down, "We give them sympathy." How do you substantiate that? And, by the way, I might add this is the toughest single job I think a juror has, once they find that the people are liable. I said to you before, and I will repeat, I don't care if you put in one dollar. It is not, to me, the fact of one dollar, ten dollars, a hundred dollars or a million dollars. It is a recognition by you that sends a message out that says, "Defendants, we are not going to let you go as if you had gone into a J.C. Penney's to steal a pair of socks, get caught, and give the socks back—because in this case you are dealing with people. You are dealing with people whose lives you have played with for two and a half or three years since the beginning of this suit. You are dealing with people who first invested—like Mr. Ruby's clients—ten to fifteen years ago. You are dealing with people told they could trust you. Defendants, you are dealing with people who thought you were honest, and, defendants, you didn't tell them the truth."

You have heard joking about being in the Marine Corps, being here, being there. You know, you don't have to be a doctor to understand what some of these people went through. But if you take just the written words of their testimony, and if you just think for a moment what happened to these people, you know, one can argue and I truly believe in it, Katherine Baker is a better person today because she is working at a Marriott hotel and going to school—at San Diego State. That is an argument one could make. But isn't it a tragedy that one has to make that foolish argument?

The fact of the matter is, as I have already pointed out to you, and as Mr. Penn said in another passage I read—these people are not destitute. They have hope. They are waiting for your verdict. They are here in most instances today and Friday and the rest of the week they will be here. They want to hear what you say. And, I repeat to you, it is not the figure. If it is one dollar for this element, it is a message from you that says, "They did wrong by you people and you people suffered."

I want to just look at the evidence and see what was an example of what we are talking about. A question was asked of Mrs. Lilienthal, and you could imagine how tough this is to describe to fifteen people, twelve people on the jury, three alternates, people they never met in their lives. They are asked this embarrassing question, and that is an embarrassing question, and that was the response. There is no way to put that into words. There is no way to describe the feeling of finding out that your money is gone.

But I am going to close. I have talked too long.

As I said to myself, as I said to my wife, I probably harangued the jury too long.

I am going to close by giving you a letter to read that was written by Mr. Lilienthal to Mr. Clifford.

COMMENT

A conclusion to this long argument that attempted a brief summary of the evidence and arguments is probably impossible, and, if tried, probably would be ineffective. However, concluding the argument with an explanation of emotional distress exemplified by the condition of the plaintiffs creates lasting sympathy for them and enhances the effect of counsel's subsequent closing argument for damages.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/I. Closing Argument on Liability; Rebuttal--Securities Fraud Case/ II. REBUTTAL/§I.12 A. Explaining Purpose of Rebuttal; Summarizing Court Procedure

II. REBUTTAL

§I.12 A. Explaining Purpose of Rebuttal; Summarizing Court Procedure

MR. COTCHETT: The first thing you are doing is looking at me saying, "Oh, my god, look at all those notes." And you are wondering what am I doing here because you have already heard from me.

Let me just quickly explain why I am here —because in a case of this nature, a civil case, the plaintiff lawyers have what is known as the burden of proof, because we represent all those people out there. We have to prove to you what the facts are, and the law says that because we have the burden of proof, we have the right and the duty to argue first, and then the defendants argue, and afterward we are allowed to "rebut" what they said, if there is anything to be rebutted.

That is unlike an opening statement. In the opening statement we simply make a statement as to what we believe the evidence will show.

The defense does the same thing. And, now, we are at the crucial point of argument. You have heard from all counsel and, now, it is my opportunity on behalf of the people I represent in this case to rebut, to comment upon, where we are all going.

The case is coming to an end. You will have this case today. No question. As a matter of fact, you will get to sit in a new jury room, I am told, right back there where all the computers have been going, where our court reporter goes to put the proceedings on to a computer so we can get a daily printout. If some of you have been wondering how each and every lawyer — Mr. Rose, for example — could just quote, it is because every single day we get a printout, called a "transcript" of the trial. That is done by our court reporter staff. They go into the back and type all of this up so every word in this trial is down on a transcript. You will deliberate in there. You have now thrown the court reporters out of their room, and you will take over for your deliberations.

So the case is drawing to a close. Not only that, they are happy to be out of that room. It is a terrible room; it is stuffy, I have been told. But that terrible, stuffy room, let me tell you, takes on a serious note because, as Mr. MacChesney just said, this is a serious matter. It is the culmination of a very long trial.

I want to tell you in just a few brief words why it had to be such a long trial, but before I do that, I want to comment on the process itself, and what you have heard from the individuals who have just spoken. You have just sat through — I don't want to get patriotic about this — but you have sat through the most democratic process we have in the world, not the country, the world.

One of the lawyers pointed out that only two countries in the world allow this system, our country and England. We adopted the jury system from England. I will tell you something interesting. In England, today, you can get a jury trial only in just a very few types of civil cases. And in England, today, under English law, they allow a jury to decide as the conscience of the community only in cases of, for example, libel or slander. So if you sue someone for libel or slander — a newspaper, or what have you — in England you can have a jury of your neighbors decide whether or not you were slandered. If this case were being tried in England, only His Honor would be able to decide the guilt or innocence or the liability or nonliability of these defendants. I say that not to waste your time or to give you a historical lesson in law, but to point out what you are doing, and I am sure you have gone home and your spouses have said to you as my wife has said to me, "When is that case going to end?" I am sure your spouses or your friends or relatives have said to you, "When are you going to get done with that trial?" I can tell you I know, I can speak for all of these people, the service you have performed is monumental, and I don't know what they pay you. I know what it used to be when I started trying cases. They used to pay jurors one dollar a day or two dollars a day. I think it is up to the grand sum of ten or eleven — whatever. It is still six, five? Okay. You are making progress. You went from a dollar to five dollars a day, and that is certainly no measure of what we think of what you have done here.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/I. Closing Argument on Liability; Rebuttal--Securities Fraud Case/§I.13 B. Recounting Evidence of Liability; Jury Verdict Forms

§I.13 B. Recounting Evidence of Liability; Jury Verdict Forms

Now, I want to talk about the process because you have just witnessed in the past two days the most extraordinary workings of this process. What Mr. MacChesney says is absolutely correct. I want to commend him. I will take him on some things he said, but I want to commend him for standing here and saying what he said to you about this being a truth-telling process. That is exactly what it is. It parrots, if you will, the truth, and what you saw over the past two days, in my opinion, was the extraordinary aspect of this case. When you are all done and you read the newspapers, you will never pick up this aspect—someone of the quality of a Mr. York, of a Mrs. Polk, coming before you and saying, "Hey, guess what, I heard the facts, too." The first one who stood up here was Mr. York, and that truth-working process, you see, works not only on you, the people that will decide, but works on the lawyers, too; and sometimes it works in different ways because Mr. York stood up here and said, "Look, my man is liable. Mr. Beaumont is liable for negligent misrepresentation."

And I commend him for that. He is an experienced, wise attorney. That is the first rule that you learn in a jury trial. It is so basic. It is so simple. Unfortunately, they don't teach it in law schools. You learn it after trying a number of cases, and the rule is so simply stated: "Never try and fool the jury." A lawyer who doesn't know that rule shouldn't be standing here as an advocate because if you try and fool a jury, you are going to put your head up against a wall because, when you come in this room, this is an arena in which, as I said it before and I will say it again, you can run, but you can't hide.

When you come in here, you bring with you—and this is not patriotic talk—you bring with you your common sense, and you bring with you all of your experiences of life. When you come in here and you bring your common sense, you may wonder how you got selected for this jury. You may have wondered what happened when we put our heads down, the defendants put their heads down, and they are whispering and looking over. Some of the things they are saying is what you do in life, how old you are, what experiences you have had, where you have been and what you have seen, because what we lawyers are looking for, a lawyer that knows how to try a jury trial or knows how to present evidence, we are looking for people who have had every—or the cross-section of—experience you can face. And by the time twelve people sit in a box and three or four alternates sit there, you have truly the conscience of the community.

Let me give you the classic example of what I am talking about. A lawyer stood before you and criticized Mrs. Ray, who stood up here and told you what she found to be the damages of these people. She also told you that some damages she would not verify because they were not proved.

Now, let me give you an example of common sense. The lawyers stood before you and said that Mrs. Ray was not correct in her damage analysis. Why? Because she said, in some instances, she didn't have canceled checks, and that lawyer then said to you, "Of course, ladies and gentlemen, you know that when you return a toaster over to Macy's, you can't just do it with a receipt or a bill."

You know what the lawyer forgot about: common sense. Is there a single person not on this jury, but in this courtroom, who has ever returned an item to Macy's and brought with them the canceled check?

It is preposterous. You bring with you the receipt for which you purchased the toaster oven at Macy's. And if you didn't purchase it at Macy's, you bring the receipt to where you bought it.

I won't embarrass anyone in this courtroom because I can't ask you this question, but I could ask my fellow lawyers, all of those people out there, if they ever went to Macy's and brought with them the canceled check, and you say, "You see, Mr. Macy, you canceled the check."

People don't operate that way.

Now, what is that an example of? That is an example of common sense.

Now, I am absolutely positive that when that lawyer went home that night he said, "Why did I say that," just as I am absolutely sure there's some things I will say, I will say, "Gee, I didn't have to say that."

But one thing is a fact, and I will repeat it just so that we are clear. You can't fool you people with that.

I have seen a lot of witnesses testify and, you know, the difference between reading out of the deposition and seeing a witness up there is so clear. It is why His Honor told you that you can consider the demeanor of a witness. And you don't get any demeanor

out of a deposition. You get the demeanor from that stand because you can tell when someone is telling the truth and not telling the truth.

I know you all watched Mrs. Ray and Mrs. Fox. Mrs. Fox wouldn't give you an answer unless she had run that through her head fourteen times. We made jokes about it as lawyers out in the hall. I mean, she was so deliberate in process. Having had that kind of training at a school like Santa Clara, you can tell that mentality: You don't say anything unless it is true.

I want to talk about some of the defendants, and I have written it down so I will save a lot of time. It looks like a lot. It is not. And I want to compare this with the statement of Mr. York. Mr. York stood before you and talked about damages. He said, in substance or effect, they are fair and reasonable. He heard the same evidence we all heard. Nobody is trying to fool anybody on the damages here.

You have some tough issues to decide on damages, and that is one of them, and I want to publicly commend those defense lawyers through the process involved. And when you see someone like Mrs. Polk, Mr. York, and Mr. Pendelton stand up here and say "Hey, I heard the evidence, and the client I represent is liable of 'x' or 'y,'"—whatever they said.

When you hear Mrs. Polk, a young lawyer who is going to be a great trial lawyer, stand before you and say, "I went and checked with my client," that is more commendable. She said she was authorized by her client to say that he was liable.

I am sorry that the process in which we operate doesn't work quicker. I am sorry that it took so long for some of these people to say, "Yes, I am liable." I am sorry, Mr. MacChesney, that it took so long for Mr. Clifford to say, "I am liable," but that is the nature of the process. It was a story that had to be told.

I am sorry that our process takes so long, but, you know, in the end it always works. And as I pointed out earlier, isn't it a shame there are no other countries in which you get to sit as a jury? No other country in this world with all its Gorbachevs has twelve people in a box, especially in a civil case like this.

Now, let me talk about the confessions that have been made.

Let's start, first, with Mr. Beaumont. Mr. Beaumont said that he was liable for negligent misrepresentation.

Is he liable for fraud? I have heard the evidence, too. I don't think so.

Did Mr. Beaumont steal any money? I have heard the evidence. I know he didn't. I have seen the bank accounts. You will see them in that little room.

Did he do wrong by these people? Yes, he was negligent. He misrepresented things. He forthrightly tells you that he was wrong, and in my humble way, I will say to you, no, he is not liable for fraud, because, remember we go through a learning process, too. We go through a big learning process, and I learned just like they learned. Because at the outset of this case I would have wagered—not wagered—I would have said I think Mr. Beaumont might be liable for fraud, but I see the evidence unfold just as I did, just as you do.

Mrs. Polk stood up and said on behalf of Emil Saddler that he was liable. He spoke to people as Mr. Beaumont did. They knew at times things were wrong. They should have done more. They didn't.

That is the sad part of the story, but that certainly isn't Mr. York's fault or Mrs. Polk's fault. They are here as lawyers to represent them. They did the most forthright thing.

I have seen it in the courtroom, I have seen it done in other cases—that is the beauty of our process. I can't tell you how proud I am to be a lawyer when I see people stand up there and do that to you because they know something. They can't fool you.

Then we get to Mr. Pendelton, and Mr. Pendelton told you, quote, his client was "gullible, foolish, and downright stupid."

I am sorry Mr. Pendelton didn't say that two years ago, but he was forthright, and he came before you and he said, "Now, he may have been careless." And I will show you those words. Sometimes it takes a little longer to convince a Marine than others, but Mr. Pendelton stood here very candidly and said to you Saddler did not, in his opinion, steal. That is a fact.

Did he lose money? Yes, he lost some money, but not all that Mr. Pendelton says he lost. Be not deceived. Those flaky—I am going to use the word "flaky" very loosely—don't be deceived on those flaky promissory notes. If you think Mr. Chan lost all that money—well, if you think, you know, he didn't lose all that money, they paid him \$500,000 for an accounting practice which in essence was selling the names of his clients to Mr. Clifford, you see that is what he did. He sold the names of his clients to Mr. Clifford so that Mr. Clifford could prey upon them. He got a \$500,000 note and he gave it back.

He certainly wouldn't have gotten \$500,000 for the names of the clients if the money was going to go into his pocket. It did not. It went back to CMA and, clearly, Mr. Chan did not know what CMA was at the time. He sadly knows now, but he just said, "Look, Sam, don't give me 500,000; just give me 50,000. I will be very happy." That is what he would have said. We all know that.

When Mr. Pendelton stands here and tells you he lost all of that money, that is called "functional overlay." Let me explain a "functional overlay" to you. You know what happens to the lawyers—two things happen in this process, which cause them to tell the truth, or to develop a functional overlay. And a functional overlay happens when your mind becomes so biased in what you are saying you can't look at things objectively. The overlay is in our thinking process and it becomes a function of it because you can't think properly, because you are so ingrained in representing a client, and I know I have done that.

One truly believes the client, as one should, but one must be careful, you see, that in our profession we don't develop a functional overlay. Mr. York did not develop a functional overlay because although you didn't get an opportunity to hear much from him—someone stood up here and said Mr. Anderson and I were very fine trial lawyers—Mr. York is one of the finest lawyers I have had the opportunity of trying a case against; Mr. Rose is the same. You didn't hear much from them. They do not develop what we call functional overlays. They look at a fact and they say that it is true or not true.

Now, unfortunately, you sometimes forget about the fact of truth in front of a jury. Now, Mr. Pendelton forgot to take his uniform off at times and, unfortunately, truly believes that his client lost all that money. I don't believe it for a moment, but the bottom line is he stood before you and said Mr. Chan was careless.

You didn't hear him mention Galaxy Infometrics. You didn't hear him mention the Garbini option, little Mrs. Garbini. You didn't hear him mention the other options and how the money went around and how he was involved in the Galaxy sham. But, you know, I truly believe in my heart that Mr. Chan didn't intend to defraud anyone—because the fact of the matter is whether it was quote, "a million dollars" that he lost or whether it was ten dollars that he lost, I don't think he intended the result. And that is really what it is all about—did he intend or recklessly intend the result to these people?

Now, Mr. Pendelton made one other interesting observation. He corrected one of his fellow defense lawyers. He said that Mr. Penn had stood up here and told you that \$200,000 was spent on the experts—accounting experts. He said not to be fooled by that—or something to the effect. No, that isn't correct. It was actually written down, the figure—\$465,000 that was spent, by his calculation on the experts who testified.

But let me correct Mr. Pendelton. See, it wasn't \$465,000; it was hundreds of thousands of dollars more than that spent by all of these people to prove this case. You see, Mr. Marx and Mr. Kinsey came before you, having been paid hundreds of thousands of dollars for their work, and that is unfortunately the price of justice in this country.

Not only is there a delay, but there is that price that these people have all chipped in and paid. So when we talk about that \$465,000, yes, let me correct Mr. Pendelton. It is a lot more than that.

Now, he finished by saying in a very heartwarming way that Mr. Chan lost money for his children's education, just like Katherine Baker, for example he used that, lost her college education. I say the only difference is that Mr. Chan's children still have him. So when we listen to Mr. Pendelton say he was careless, yes, he was careless. And you will recall I questioned Mr. Chan on the stand, trying, if you will, to make the system work on Mr. Chan. When defendants come in and face you people, the system works, and that is why I am sorry that the defendants were not here for closing argument—so they could see you, see your faces. And I hope that when you return your verdict, when you speak from that box, when your foreman speaks, I hope they hear your verdict. It is going to be heard loud and clear throughout the state of California, throughout the country, but I hope they are here to get the message. But Mr. Chan came here and took the stand and the system worked on Mr. Chan. Remember, it was very tough cross-examining him.

By the way, yes, I do enjoy cross-examining people. It is something to see when you get someone to speak the truth. I do it on a daily basis with my children. Sometimes I do it with my wife. The bottom line is we do it every day, do it today in the grocery store. I should say we do it every day in life, and there is nothing more wrenching for an individual than to take that stand, put his or her hand up, swear to tell the truth and look over at those twenty-four eyeballs—with the eyes of the community on him. You see some people that sweat, twitch, move. Some people can look right at you and lie. But as far as that box goes, that is the truth-telling box as best we know in our society, and when I questioned Mr. Chan I almost pleaded with him.

I said:

Using hindsight, we will come back on some of the advice and some of the discussions you had with your clients, wouldn't you say—wouldn't you say, that maybe—

I didn't say just maybe—maybe you were was the right word. I was searching for the word.

Maybe you were careless in how you dealt with some of your clients in reference to some of those investment products?

Answer: At the time I felt everything was fine.

See where he is going with that? He was trying to tell me, "Cotchett, wait a minute, I didn't defraud anybody. I didn't intend to defraud anybody."

Now, looking back with hindsight wouldn't you say maybe you were careless in how you dealt with your clients?

Objection.

Overruled.

Witness: Yeah, I should have looked more into it. I should have asked a lot of questions.

Then he goes on:

But, unfortunately, I cannot turn the clock back.

That is his functional overlay. You see, Mr. Chan couldn't quite get to the point where he could leave the "but" off. The "but" is his functional overlay that says, "Yes, I was careless, but unfortunately, I couldn't turn the clock back."

It is kind of like Mr. Orloff's lawyer saying, "Yes, he may have been in the building, but he wasn't involved. It was the other people." It is that, but, you see, that functional overlay and what people forget, myself included, is that jurors understand the words that are said because the "but" means nothing after he said "I was careless."

Now, that is Mr. Chan. I could go on with Mr. Chan. I am sure others will have other things to say about him, but that is essentially what his case is.

Mary Bond, I concur in virtually everything that Mr. Rose said, a very fine human being, Mr. Rose, plus a skilled attorney—skilled meaning not skilled in the way of moving people, but skilled in the process and skilled in how the process works without the cap on his head, without the functional overlay. He really took the case against Mary Bond and dissected it very nicely. He did. And in my heart I had a lot of questions about Mary Bond. I want to show you why I had those questions, but in my heart I now believe having heard Mr. Rose that his analysis is correct.

Let me tell you why I had those questions. I had those questions because I saw checks like this one. I saw checks with Mary Bond's name on them made over to Sam Clifford in the sum of \$1,250,000, and I thought to myself, "What was going through her mind when she signed that check?" I wondered what went through her mind—those two checks on the same day as the ship is sinking, \$1,250,000 going to Sam Clifford.

And I wondered what was going through her mind when she received that memorandum to "Sam, Sid, and Mary," and I wondered what went through her mind when she went into the bank and some boss—I am going to call him "boss" because that is how he was referred to—said, "Mary, would you mind signing this check card?" And she signs her name right here, and she is now told on the accompanying card that one of those signatures, one alone, can remove not ten cents, not hundreds, but millions of dollars from an account.

I asked myself what went through her mind when she signed these documents or received these documents. Obviously, somebody came to her and said, "Make out two checks on the same day, one for \$525,000, one for \$500,000, to Sam Clifford."

I have now had the opportunity of looking at the evidence, as you have. I have now listened to Mr. Rose's position. I think now I understand. I think truly she was an individual who should have known. What Mr. Rose did was very, very skillful and articulate. What he said was that when you get down to negligence, there are two aspects of it—she either knew or should have known, and he ticked off that list of what she should have known.

And let me tell you, just as I am sure I have some functional overlay, Mr. Rose does, too: Mary Bond was calling in those names at 3:00 o'clock in the afternoon; Mary knew what was in that locked drawer; she knew the drawer was locked. No one is fooling anyone on that. But the issue is, did she intend to have all those people out there lose their money? Did she intend that? In my heart, let me tell you, I have concluded, no. Part of that conclusion is because Mr. Rose has stood here forthrightly and said she is liable for negligence. And if that will return the money to those people, so be it. This is not a criminal case where I am here to punish anyone on behalf of those people. We are here to seek the truth, the facts, and hopefully, to get them back some of the money. That is why we are here.

But one could look at those documents and say she knew. I believe in my heart she didn't, and I will leave Mr. Rose with these

words—simply, I am sorry, Mr. Rose, that your client didn't see fit to do this two years ago.

As I said to Mr. York and his client and Mrs. Polk and her client, I am sorry it took so long, but it has finally come—the truth has finally come. And for that I put aside my functional overlay, which is that she knew. When I hear those words come from him, in my heart I can tell you I don't know that she knew.

Now, I'd like to talk very quickly about Mr. Orloff and Mr. Clifford, and do so while Mr. MacChesney's words are still ringing throughout this hallowed hall that this is a serious case, that this is a sad case, the very words that he spoke to you this morning, which I believe to be the classic functional overlay—that Sam Clifford never stole a dime.

Before I talk about that, I want to thank Mr. MacChesney for the way he conducted himself in this trial, which was very honorable. I want to thank him for those words when he said for sixteen years his client devoted himself to DC—a fact. And then he let those people down. Yes, he did let them down, and I didn't hear him say what they deserve, except he said, "Yes, they do deserve to recover." Recover what? I assume he is talking about recover their losses.

I never heard him say that Mr. Clifford is liable for fraud. I never heard him say that Mr. Clifford is liable for negligent misrepresentation, nor did I ever hear him say this morning that he is liable for breach of a fiduciary duty.

There are two people in this case, two defendants about whose liability I have absolutely no problem, yea and nay, regardless of what a jury does. I will go to the big courthouse in the sky knowing that Mr. Clifford and Mr. Orloff stole money from this company, and I am going to show you from the evidence why, but I thank Mr. MacChesney for his concessions.

I am only sorry for two things: (a) He waited two years too long and he put us through this process, and (b) that he didn't stand before you and say his client was guilty of fraud. Ladies and gentlemen, I can understand him saying he didn't steal money. That is a tough thing for a lawyer to say, very tough, but I truly thought he would say, "He is guilty of fraud," because it was clear fraud.

You heard what Mr. Flood and Mr. Jewell said. He didn't tell anyone about those options. He didn't tell anyone about where the money was going. That was fraud. He intended to deceive the investors. That was fraud.

Negligent representation—I would have a tough time checking that box, although if you find him guilty of fraud, he is obviously guilty of negligent representation because somewhere along the line he had some pang of feeling bad where he said, "Yes, I really don't know. I will put it back someday." So that may have been negligence somewhere along the line.

Certainly, he breached his fiduciary duty. I am sorry, Mr. MacChesney, you didn't stand here and say, "Yes, I have heard the evidence just like Mr. York, just like Mrs. Polk, and Mr. Pendelton. I heard the same evidence. And I don't mean to be disrespectful to Mr. Clifford, but I must say what was in my heart and what was in my heart was that he is not a good man. He stole, and I am only sorry that he didn't come before you and say that he did."

Mr. MacChesney said that Mr. Kinsey, Mr. Marx and Mrs. Fox—not a single one of them—say there was any stealing or any money missing from DC. As a matter of fact, he picked up on a theme that Mr. Anderson said was that the money always returns to DC. Yes, Mr. Anderson was correct when he said it. And I am sure that he will stand up here and say it again. What Mr. MacChesney didn't say in that sentence was that the money always came back in a big circle—when it came back it went to the fourth floor. Mr. MacChesney said that no one, not even little Mrs. Fox said that there was money missing from DC. And unfortunately in the heat and the passion and the sincerity of his presenting his case on behalf of Mr. Clifford, he failed to read or listen to what Mrs. Fox said: "There appears to be a lot of money possibly missing from Dynamic Capital." And he forgot that when Mr. Saul was on the stand Mr. Saul said he asked, "Where is all the money?" and Mr. Orloff had said, "\$50,000,000 went into a black hole." That is stealing.

And when Mr. Penn pressed him on this point—we didn't press him on the point two weeks ago—whether that wasn't embezzlement, Mr. Saul said in both instances it fits the definition of embezzlement.

When Mrs. Fox and Mr. Saul said it was stealing, Mr. Clifford knew it was stealing because he said this: He said he could go to jail. And, ladies and gentlemen, you don't go to jail for violating GAASes, FASBs, and zappos or whatever they call those things. You go to jail for one thing only. You go to jail for stealing, for theft, and for putting \$300 million into your account.

Ladies and gentlemen, I will finish with Mr. Clifford simply by saying this: I hope and pray he comes to this courtroom to see you when you deliver that verdict. Of course, you are going to stand forthrightly and say, this is what the community finds, Mr. Clifford.

Thank you, Your Honor.

[Recess.]

MR. COTCHETT: Thank you, Your Honor. Ladies and gentlemen, just before we took our break I was going down the defendants, and I think I have covered Mr. Clifford. I want to talk now about Mr. Orloff just very briefly and, again, I want to commend Mr. Penn. I think he did a very fine job, though I was disappointed that he didn't say he was liable for anything.

I talked about the scales of justice in my opening argument to you, and Mr. Penn said I was correct, except that he said he didn't have to call any witnesses to put any documents on the scales. He maybe is correct in the abstract because, you see, once the lady of justice with her blindfold on feels the scales tilting and once they tilt with the preponderance, for the other side to prevail before this jury, they had better start putting some boulders. And if you can't find the boulder, you put a rock. If you can't put a rock, you look for a pebble. You put anything on the other side to balance it.

Mr. Penn really didn't see fit to tell you that his client did anything wrong—he really wasn't involved in anything. He said essentially a couple of things. One, that CMA really wasn't Sam C. Clifford, trustee, that his client really didn't do anything, and two, that his client, although it said in the books—and we are talking about books like this—the annual reports, although it said in there he was the chief financial officer, quote, "things were not as they appeared at Dynamic Capital," and he is right. Things were not as they appeared in this book. Things were not as they appeared in any of the annual reports, but with all due respect, Mr. Penn was wrong in that his clients knew from the 1960's that Sam Clifford was taking money.

And he argued, you see, ladies and gentlemen, the CMA account was just a small, little account, and all the money went into the Sam C. Clifford account. Well, you see, they were the same account. That was the account the experts poured through. That was the account they looked at all the checks on. This was the account that they worked on. That was the account into which \$300 million went, and I asked Mr. Marx, "What account did you look at?" and he said, "the Clifford Management Account." and I asked him in a series of questions how much money went into the Clifford Management account.

Just so that we are absolutely clear and perhaps Mr. Penn can refresh us and now realize what he said. It was as follows:

Question: Can you tell the jury how much went into the CMA account, the Clifford Management Associates account?

Answer: \$303 million.

Question: And that was over a period of what, four years?

Answer: Approximately, yes.

Question: How much went into that account?

Answer: Almost the entire amount, as I recall, of approximately \$300 million.

And when asked:

CMA, Clifford Management Associates, host, Sam C. Clifford, trustee, is the same, isn't it? Isn't CMA the same as Sam C. Clifford, trustee?

Answer: I have seen both designations. I am not a hundred percent sure if they are the same.

By the way, this is Mr. Chan:

I suspect they were.

Question: You believe they are the same, right? You have no reason to believe they are not exactly the same?

Answer: That's correct.

So said Mr. Chan at page 3696 of the transcript.

Ladies and gentlemen, there was never any dispute about where any of the money went.

What Mr. Penn is saying to you—and I understand and I respect what he is saying to you—he is saying to you that he represents a man who just followed along, and I believe that.

I believe that what happened was that Mr. Orloff told the truth when he walked into Mr. Saul's office and said, "Peter, you have the guts to do something I haven't done for twenty years." And I am only sorry that Mr. Saul didn't approach it in the way that other defendants did in terms of saying to you, you know most of the facts. You don't know all of the facts until you get into the jury room. There wasn't time to give them to you. I will give an example in a minute.

What bothered me, and I do not in any way criticize counsel against whom I am trying a case, but I do want to point out one thing that did disturb me—not disturb me, disappointed me—is something Mr. Penn said to you. It disappointed me when he started talking about damages. He said, "You see, ladies and gentlemen, you are going to be confused on this because there are two rules." He said you must try to determine, quote, "what rule applies on the measurement of damages." He then went on to explain to you what the judge had told you about the benefit of the bargain and the out-of-pocket—there are two different standards, and all of that. And he told you in essence that it is very difficult to understand and perhaps you will be confused on this.

To Mr. Penn I say the following: There are two rules—he is correct—but he has the two rules confused.

The two rules that he should understand are, one, don't try and fool the jury and don't ever—number two—don't ever tell the jury they are confused. Those are the two rules that he should have understood, not the two rules of damages because, ladies and gentlemen, you are not going to be fooled and you are not going to be confused.

Tell me what, if anything, was confusing about the testimony of Ms. Ray? What, if anything, was confusing about the testimony of the plaintiffs who took the stand either by deposition or on the stand said, "This is what we invested"? There is nothing confusing, and Mr. Orloff, through his counsel, should be the last person to tell you people that you are going to be confused.

Now, lastly, Mr. Penn attempted to say that it was really the fault of other people. He singled out Mr. Saul, and I would be remiss if I didn't speak for Mr. Saul here just for a moment. He has no one to speak for him. He is not here. Mr. Penn said, "The money went to him," meaning that he was paid lawyer's fees for representing the corporation. At no time did you ever hear him say that his entire law firm was working for Dynamic Capital, many partners, many associates. And he implies that the money that may be missing really went to Mr. Saul, and that is why he said what he said.

And the second person he attempted to take on individually was Ms. Fox, when he said that Ms. Fox was in trouble for the work that she did.

Ms. Fox is not in any trouble. Ms. Fox is not to be disgraced. Ms. Fox came here and told you exactly what she did and exactly what she found. And, by the way, he said she never said there was anything wrong with the financials. He was wrong. She said in light of what she now knew the financials over the past years—and you have a document on which her senior partner wrote this to Mr. Hill—it appears now the financials are wrong and cannot be relied upon. But then he said in terms of the financials—and I want to hone in on the financials—this would be the only area where he could be liable because he never spoke to the plaintiffs.

I think that is a fair reading of the evidence. He had very little contact with the plaintiffs. He never represented anything—I think that is false. He represented *everything* in these books. And he really never had anything to do with the financials, and he said, "There is no evidence that he read the letter that he sent to the auditors." I have no one in my mind that I can recall who came to that stand and said, "I saw Mr. Orloff read the letter before he signed it." But he was the chief financial officer.

Does anyone doubt for a moment? Do you think he can fool this jury that he didn't know what he was signing on that issue? He said that he was the chief financial officer in name only. He never had anything to do with the financials.

And, finally, Mr. Orloff seeks to blame the, quote, "computer staff," and he talked about the keypunch operators. Then he said, "You see what happened here was that it was the keypunch operators who put all the numbers into the thing that comes out like this thing," the keypunch operators, the little ladies who sweat and toil over those silly little machines all day.

Do you really expect us to believe, Mr. Orloff, that they just made up the numbers? That they just sat there and let their fingers run wild and put numbers into the machine? That was the last prong of the attack by Mr. Orloff. He said it was the keypunch operators, the staff, that put the numbers in.

Well, we know for a fact that it was Mr. Orloff himself who did all the financials. We know from this evidence that it was Mr. Orloff who put together all of the management financials, and right now Mr. Penn is saying to himself, "What did I forget?" He forgot the testimony of Mr. Hill, who not only sat as a member of the Board of Directors, but who became president of Dynamic Capital after Mr. Clifford left.

Let's just read together. Perhaps Mr. Penn was out of the room when he said this. Perhaps he didn't hear. Perhaps he was doing something else, but it was absolutely clear to everyone in this court as to who assembled all of the financial statements, who put them all together—Mr. Orloff, an accountant, put these together.

Let's look and see what Mr. Hill said about the man who never had anything to do with the financials, as stated by his lawyer.

And this is in quotes:

Question: At any of the board meetings that you attended, Mr. Hill, did Mr. Orloff ever make any representations with respect to financial statements of the company?

Not maybe, not possibly, but

Answer: Yes.

Question: Did he do that more than once?

Answer: My recollection is that he did it every year at least when the financial statements were being readied for issuance.

Question: Would he explain to the Board assembled what the financial statements reflected?"

Not maybe, not possibly, but an unequivocal "yes."

Question: Do you recall him ever using any overheads to show the Board members the financial statements for any particular period?

Answer: Yes. He often used a projector slide presentation.

And to Mr. Orloff I say, ladies and gentlemen, what I said at the outset of my argument, that in the words of Rocky Marciano, "You can run, but you can't hide." You can run, but you can't hide from the spoken word under oath from that witness stand.

And when Mr. Orloff tells us he wasn't involved, we know better. And why? Why did this case take so long to try? Because the full story had to come out, and when someone said this is not a message to corporate America, they are wrong because it is. It is a message to all of those people that are entrusted with others' money so that our children can know a better opportunity than a Dynamic Capital was.

We had to present to you the full story as best we could, and unfortunately, ladies and gentlemen, if we told you every single detail of what went on, we would have been here for six months.

Let me give you but one example of what you could find if you spent six months going through the documents: You will recall that this glossy company started with a pizza parlor. You never heard the story of the Tonic Room. You never heard except for when Mr. Saul said, "Yes, I remember Sid used to be the bartender there." You never heard from testimony what happened to those pizza parlors. But if you look at the documents, if you want to take the time, you could spend six months, fascinated, looking at some of the documents in this case. One example—I asked Mr. Saul if it wasn't a fact that he put together the articles of incorporation for Dough Boy. Dough Boy was the pizza company, one of the pizza companies. And he said, "Yes, I put that together." And I said, "My gosh, that is back in 1960." In 1960, he put together that little company and, now, what happened to that little company? Dynamic Capital bought it. They bought it in 1969, and you recall and you will read in the annual report where they say they bought it.

But you know what, folks, it doesn't say who they bought it from, and you heard from Mr. Saul who said they didn't want to list Sam Clifford until they had already sold it. Well, you know what, folks? They didn't sell it to him once. They sold it to him twice, because all you have to do is go to the exhibit and you will see where they sold it to him the first time. They sold it to him, and that is a certificate of election to wind up and dissolve Dough Boy after selling the assets to Dynamic Capital, and that is dated November of 1971.

And, ladies and gentlemen, they didn't dissolve the corporation on that date, because in 1972 they dissolved it again, and you can't dissolve something twice unless you take its assets and you sell them to Dynamic Capital, and you sell them to those people. And if you got away with it once, you get away with it twice, and unfortunately, Mr. Orloff put his signature on that document. And I will bet his hands shook because he knew that in 1971 he put his signature on a legal document that said they wound up and dissolved the corporation in 1971.

If you look at the annual reports, you will see, and when you look at the documents that are attached to this you will see how this scam started.

Now, if we were to spend the next six months going through each and every transaction, that is exactly what you'd find.

So I say to Mr. Orloff, it is a tragedy that you didn't have the backbone to stand up to Mr. Clifford. It is a tragedy that you chose instead to drive the getaway car and not go into the bank, but Mr. Orloff, you are no less liable. You are no less liable, Mr. Orloff. When you put your signature on a document that said \$26 million will go into CMA, that is the secret agreement that Mr. Clifford and you co-partners doing business as Clifford Management Associates, entered into in June of '85.

And, ladies and gentlemen, there is one thing I didn't hear in the evidence here, and I didn't hear anyone say that wasn't Sid Orloff's signature, and I didn't hear any evidence in this courtroom or this arena that Sid Orloff didn't sign any of the documents that you will see in that room back there. So, Mr. Orloff, I say to you I feel sorry for you.

I don't feel as sorry for Mr. Orloff as I do for all of these investors because he had a choice to make. You see, he could have said no a lot longer than twenty years ago. But when Mrs. Victor sent in her check and it arrived at DC and they turned it over and stamped, "deposit it to CMA or Sam Clifford," she didn't have a choice to say no.

When those people put their money into an investment that they believed in—in some cases for their children—they didn't have a choice. But Mr. Orloff did. And I am disappointed because when Mr. Penn had the opportunity to stand before you this morning or yesterday, he didn't do what Mrs. Polk did. He didn't do what Mr. York said or Mr. Rose or the others. He didn't even do what Mr. MacChesney did who on behalf of his client said, "I caused this." He didn't say how, but he took that first step.

I anticipate in future years Mr. MacChesney is going to learn how to put the right foot in front of the left foot and move forward and tell the full story. But he started. He started down that road. That is why I am disappointed—because I didn't see anybody walk up to this podium and say, "My client is liable for 'x' and not liable for 'y.'"

Mr. Penn—he is a fine lawyer, as all the lawyers are—but if I could give any message to Mr. Orloff, it would be, Mr. Orloff, don't just say it in the coffee shop, "I'm sorry." Stand up, be a man and say what you did wrong.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/I. Closing Argument on Liability; Rebuttal--Securities Fraud Case/§I.14 C. Illustrating Measures of Damages

§I.14 C. Illustrating Measures of Damages

Now, ladies and gentlemen, some have said what they have done wrong. Some haven't. And I want to discuss with you the form of verdict, and I want to talk lastly about a subject which is how do you decide damages in this case?

I am not talking about the ones that Mrs. Ray testified to. You have heard lawyers say in this court they are fair, they are reasonable, what the out-of-pockets are.

I want to talk just for a moment about the difficult process you have of going into that room and talking about emotional distress.

Now, the other day I said to you I don't really care whether it is a dollar, ten dollars, a hundred dollars, or a million dollars. Somehow, some way, when that message goes out you are going to say, "No, you cannot just take the ten dollars that Mrs. Victor put in with her whole family and give it back. You see, Mr. Clifford? You see, Mr. Orloff? There is something else that accompanied that loss, and you know how tough it was for you to walk in there and tell Mr. Saul that he had the guts to do something you didn't."

Well, it was tough on you, Mr. Orloff, to do that. I bet you even cried at one point. Well, you know, I don't know how many of these people cried, but I do know from common sense, because I didn't leave mine outside, I do know from common sense what they have been through. And we all know. If there was a magic way in our society that we could measure that pain, His Honor would be the first one to tell you about it because he represents the law of this state, and he has told you—in so many words—you will use your common sense, your wisdom, and you will look at the condition of the Lilienthals and the Victors. Let me ask you one question: What does an old man like Richard Victor do? They pin little notes on his lapel so he doesn't get lost. In case he does get lost, people know where to bring him back. He has never been told about the losses.

Let me tell you something. I am positive that some people are going to come up and say, "Joe, why did you say that?" I am not sure he suffered any emotional distress. He has never been told about the losses. He can't be. It is pretty obvious why they can't tell him. He has never been told, you see; that was in the evidence—so I can't tell you what Richard Victor should be given for emotional distress. He walks around, 84 years old, and he still thinks his money is there. I know how his brother, the husband of Mrs. Victor, felt. I know how Mrs. Victor felt because we have heard that, and I won't put up further things to show you how they measure it.

What are the guidelines in our society that we look at to measure emotional distress? Let me just throw out for you some of the things we do to eliminate pain. We know that pain can be physical or mental, and we know there are times when you would rather have a broken finger than find out something tragic about a family member. We can substitute physical pain for emotional pain because we know that emotional pain can be as debilitating as physical pain. There are boxes that you are going to check for emotional distress. Every lawyer wants you to be calm and deliberate, and I am not going to have the audacity to stand here and say you put in "x" amount of dollars. That is not how this process works. This process works by your saying, "Here is what I believe it should be, but what do I measure it by?"

Say I went to the dentist and the dentist said, "Joe, you have got a cavity, and I am going to fill it," and I say, "Great, doc, how much does it cost?" He says, "Well, there's two ways we can do it. I can do it without the novocaine or with the novocaine—it is twenty bucks without, forty bucks with. What do you want, Joe?" When is the last time somebody said, "I will tell you what, doc, I will take it without the novocaine and save the twenty dollars." That situation illustrates what is called a measurement of pain, so I get a little shot, get my tooth drilled and, boy, let me tell you, I pay \$30 sometimes to get that shot of novocaine.

Say my son broke his arm—as any teenage boy might—right up at the shoulder, and they took him to the hospital. I went to the hospital with him. The doctor said, "Joe, we are going to have to operate on the shoulder." I said, "Wait a minute, doctor, what is the cost of that?" He said, "Well, the operation will be \$400, and the anesthesia will be about \$150." What if I said, "Wait a minute, how long will he be out?" The doctor said, "Well, he will be out an hour," and I said, "To heck with the anesthesia, if he is only going to be out an hour; the kid is a big kid—he is six-foot-five. He can endure the pain, so I am going to save the hundred dollars." You can believe that I said that, right? Sure.

This is what we call a measurement of pain. I am not telling you to go back in and say, "Two years: forty dollars every twenty minutes." That is not another way to do it either, but that is a guideline, something, something reasonable. There is something that says, "Mr. Clifford, Mr. Orloff, you put those people through a lot." That is what such a number is all about.

Now, I will tell you this: It is a sum that is neither large nor small, but is an important sum, which differs as to different people. Richard Victor, as I said to you before, has suffered no emotional distress. He doesn't know that we are in the courtroom right now as we stand here. He does not know that a jury is deciding his case because we have chosen not to tell him for obvious reasons, so this may come as a shock to you: You can put a zero right there, and that will not offend the conscience of anyone.

But if you look at Mr. Lilienthal, whom you couldn't see, but if you look at the notes that he wrote to Sam, you *know* what he was going through in the two years he has put in, and a zero would be a hurtful thing. One dollar would be more important to Mr. Lilienthal.

Well, let me go on quickly. Time is growing short. Let me quickly run through these verdict forms: The first verdict you are going to get—and His Honor is going to hand these out to you—is the verdict itself, and that will look like this; this is the jury form.

Then, as I pointed out to you the other day, the first sheet you will find is for the Lilienthals and it looks like this. All of these are working copies, and the foreperson will have the original. His Honor is going to explain to you in his closing instructions how to decide the case, how many numbers, what number is required, and what have you.

I think the evidence is clear that when we talk about fraud we are talking about Sam Clifford, Clifford Management Associates, and Mr. Orloff.

I think the evidence—at least in my mind on behalf of my client—is such that, the story now having been told, you can mark a "not liable" for the other four people. That is how in my heart I see it. I think His Honor would instruct you on some of these boxes to be checked, that there is no doubt about the evidence, that each and every person you heard out of the mouths of their own lawyers, as to the cause of action on breach of fiduciary duty. It is absolutely clear to me that Mr. Saddler, Mr. Beaumont and Mr. Chan had special relationships with the plaintiffs.

Did Mary Bond? I don't know. If I could look at the scales of justice and *see* a preponderance of the evidence, I could say yes, and I do believe the evidence shows this result, but again, I want to make sure you understand this is not for me to say. This is for you to say.

And, now, the second sheet on each one and on the Lilienthals, the money lost, will be as testified by Mrs. Ray—\$349,342. That will be on the first line. And then, as I just pointed out, you have the very difficult task of filling in these two figures for Mrs. Lilienthal and for Mr. Lilienthal. You will note that only individuals can collect damages for emotional distress. Hence, not for their trust or, as Mr. Vladek will tell you, not for Strauss Financial. Only individuals suffer emotional distress.

As you walk your way through those damage instructions, for the Lilienthals, the same will apply for the other individuals. And as to my clients, the Williamses, including their deceased son, was \$1,070,745, and the Victor family, including Richard and Martin, was \$641,857, as testified to by Mrs. Ray.

When you get to the Victor family, there will be a third line here. It will be for Mrs. Victor, Mr. Victor, and his brother—three individuals here—and it will be solely within your province to decide what they ought to receive.

The next form, this is about—I counted it up—about fourteen pages because there is one and then a damage page for each plaintiff.

Following these, you will receive from His Honor the special verdict. The special verdict form is very small. It will look like this. So that you understand the necessity for a special verdict, it is because we are asking you, the conscience of the community, to decide whether or not these individuals have acted with malice, oppression, or fraud against the plaintiffs. That is the purpose of this special form; on the general verdict you find them liable, while it is on this verdict that you will answer these special questions. Let me show you what they are. They read as follows: "With respect to Arnold Lilienthal, Lila Lilienthal, and the Lilienthal trust, do you find that any defendant is liable for fraud, conspiracy to commit fraud, or aiding and abetting the fraud?" I have just told you that in my opinion there are only three boxes to check there; with respect to the Lilienthals, were they treated with malice, oppression or fraud? In my opinion, clearly there are three boxes to be checked there. My fellow lawyers may argue that there are others. In my heart I do not believe that the evidence showed that the four defendants other than Clifford and Orloff acted with fraud.

The last form that you are going to receive from His Honor is the special interrogatories. These are questions that you are going to be asked, and they look like this. "Special interrogatories" means special questions put to the jury and what His Honor is going to ask you to do is to decide the following questions:

Question number 1 has to do with the annual reports, the financial statements, and the annual reports. With all humbleness in my heart, I do not think you will have a problem with that question. It is clear from the evidence and from the testimony that the financial statements in the annual reports right from the beginning were false and misleading.

The same thing is true with question 2, but it talks about the message to the shareholders. This is where Mr. Mott and the very first annual report failed to tell the shareholders—the few that there were at the time—that they were buying Mr. Clifford's pizza parlor. And in the next year, 1970, they failed to tell them they were buying two failing pizza parlors at exorbitant prices.

The third question that you will be asked to answer is: Was the price of Dynamic Capital common stock traded over-the-counter manipulated during the time '79 through '86? I don't think there is any question about that, and I would ask that you check that box "Yes."

You will have no problem with question 4: Regarding the debentures of Dynamic Capital sold in 1985—was the debenture prospectus materially misleading? Well, in 1985, ladies and gentlemen, everybody was jumping off ship, but the debenture that is in evidence tells you it was the greatest thing since sliced bread, and that you all ought to buy into Dynamic Capital.

Question 5—do you find that any defendant conspired to disseminate false and misleading financial information to the general investing public and to plaintiffs in this matter? It is absolutely clear to me that three people did. As to the others—Saddler, Bond, Beaumont, and Chan—I don't believe they conspired. Their names appears in the annual reports, but did they intend to conspire? My gut feeling is that they did not, but *you* are the jury.

As to question 6—do you find that any defendant made negligent misrepresentations to the general investing public? There is not a single doubt about that. That is all "Yes." Half who were in this courtroom have admitted that.

Number 7—do you find that any defendant made negligent misrepresentations to investors or potential investors in Dynamic Capital? There is a little question about that. It follows; it tracks on number 6.

Lastly, ladies and gentlemen, you will be asked the eighth question—do you find that any defendant entered into a conspiracy with any of the defendants in this case to commit fraud, as previously defined for you? There are only three, Clifford, Clifford Management Associates, and Orloff. Why do I check the form to indicate that Clifford Management Associates conspired? Because even though CMA is a piece of paper, a bank account, it operates through its two general partners, the two general partners being Mr. Orloff and Mr. Clifford.

I think that is all of the questions you will be asked to return. That is all of the verdicts you will be asked to fill out.

I want to close by simply telling you something I told you in my earlier argument, when I mentioned that there is a proverb that I live by. I want to repeat it because I think it really hits home in this case. And if I offend any of you by saying it, I apologize. If for whatever reason you don't believe the words I am about to say, I apologize. But I think we can look into our hearts—and regardless of what you believe in as God—the words "be not deceived, God is not mocked, for whatever a man soweth, he shall reap"—tells the message of this case. That comes from the Book of Galatians.

I'd like to tell you I read that. I didn't. I know it. It tells us that what these people did, what they planted, grew, and it has come back now, and it is time to pay for what they sowed in those fields. Now, Senator Sam Ervin—a great United States Senator—said those words in the Watergate hearings. I was so taken with those words, and I think about how far we have come and about the lessons of society that we have learned since Sam Ervin repeated those ancient words. As we know, they come out of the Bible. Think about how those words apply to this case because Mr. Orloff and Mr. Clifford had to know that someday they were going to stand in front of—or their lawyers were going to stand in front of—a jury like you, and they were going to have to live to reap what they sowed.

I believe strongly in those words. That is what our system is all about.

And, now, those words are transferred to you because you now become the individuals that tell us regardless of who you believe, and what you believe in, they tell you, and you tell us, how our society is going to be conducted. And don't think for one moment that your verdict isn't going to be heard loud and clear. It is going to be heard not only in this state but far and wide. You carry a tremendous mantle.

I want to thank you all and I want to tell you that we will be waiting. All of our clients will be waiting for your verdict in this case, to share with you the joy of neighbors.

Thank you, Your Honor.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/II. Argument for Punitive Damages--Securities Fraud Case, Continued/Chapter Outline

II.

Argument for Punitive Damages—Securities Fraud Case, Continued

Lilienthal et al. v Dynamic Capital et al.

CASE SUMMARY: *Plaintiffs have prevailed in proving that defendant company caused them financial and emotional injury and have obtained a jury verdict therefor.*

I. PENALTY PHASE OF TRIAL

A. Linking Guilt With Damages

1. Thanking Jury for Liability Phase Verdict §II.1
2. Explaining Purpose of Punitive Damages: "To Make an Example of Wrongdoers" §II.2
3. Sending the Appropriate Message: "The Sting of the Shilling" §II.3

B. Recalling Specifics of Case

1. Explaining the Concept of Reprehensible Conduct §II.4
2. Reintroducing Case Theme: "Where Did the Money Go? Down a Black Hole" §II.5
3. Applying Standards of Reprehensibility to Defendants' Acts §II.6

C. Quantifying Punitive Damages

1. Describing Jury's Task as Conscience of the Community §II.7
2. Assigning Dollar Amounts §II.8

II. REBUTTAL

A. Debunking Defendants' Excuses §II.9

B. Exhorting Jury To "Send the Message" §II.10

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/II. Argument for Punitive Damages--Securities Fraud Case, Continued/ I. PENALTY PHASE OF TRIAL/ A. Linking Guilt With Damages/§II.1 1. Thanking Jury for Liability Phase Verdict

I. PENALTY PHASE OF TRIAL

A. Linking Guilt With Damages

§II.1 1. Thanking Jury for Liability Phase Verdict

MR. COTCHETT: I was just told, ladies and gentlemen, that if I take more than a minute and 31 seconds for this, I am in trouble. It is going to be a little bit longer than a minute and 31 seconds. I can assure you I talked to all counsel who had been here. Especially now we are going to try and be brief.

I thanked you before, but I am going to impose on your time to thank you once again. This has been a long period, a long trial, and on behalf of the Victors, Lilienthals, and the Williamses, I want to thank you very much for your verdict in the first phase.

I am sure some people in the room disagree, but I think it was an outstanding verdict. I think you did justice, and I think truly, as the conscience of the community, you can be proud.

What are you doing here today now? You did all that nice work before. Why are we wasting your time in this phase? This is called the second phase of this type of trial. By the way, this doesn't happen in every civil case. This is unique; everything about this case is unique. In this special case where we were seeking a fraud judgment, the law says that the jury, as the conscience of the community, after deciding that there is fraud, can impose a penalty. I will be talking to you about that in a moment.

After viewing all the evidence, what you did (and what I thank you for) was to say that some people are liable for fraud, and other people are not liable for fraud, but they are liable for something else. And we wondered what you were doing for several days.

Let me say to you, we wondered about you. What are you looking at? Of course, that is what we spent our seven days thinking. What is the jury looking at? What type of material? And it is clear to us from your verdict that you went through everything methodically. It is clear to me, as it is to others, that your award for emotional distress was right on the dollar; it was right on the money because what you did was to recognize that these people have undergone an emotional strain. And as I said to you at the time I didn't care whether it was one dollar, ten dollars or a million dollars. The recognition factor that you did as the conscience of the community, to me it was overwhelming.

While some of you differed—somebody wanted \$15,000, somebody wanted one dollar—the point is even the person who wanted to give one dollar recognized the fact of what these people went through. For that, I am thankful.

COMMENT

From the outset counsel reinforces the jury's authority every step of the way, thereby inclining that authority to the very remedy he is seeking for his clients—an award of punitive damages. He begins by thanking the jury for their sense of responsibility and civic mindedness in finding defendants liable for his clients' losses and emotional injuries. Congratulating them on their "outstanding verdict" (see [§II.1](#)), he goes on to forge a logical link that will justify awarding exemplary damages. That is, as the "conscience of the community," the jury has a duty to "make an example of wrongdoing," by "sending a message" (see [§II.2](#)) that will be a forceful deterrent, namely, the payment of money to the ones wronged (see [§II.3](#)).

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/II. Argument for Punitive Damages--Securities Fraud Case, Continued/§II.2 2. Explaining Purpose of Punitive Damages: 'To Make an Example of Wrongdoers'

§II.2 2. Explaining Purpose of Punitive Damages: "To Make an Example of Wrongdoers"

Now, let me tell you very succinctly why you are here now. You are here to assess what the law calls "punitive damages." Assessing punitive damages is totally within your province just as the finding that you made earlier was totally within your province. You are now filling another unique slot because what the law says now is that you can actually function as a sentencer. To do this is unique because in your standard civil case, such as an automobile accident case, or a contract dispute, or the like, you decide on the fact of the matter of who breached the contract, who went through the red light, who did this, who did that.

But, now, you are sitting in that unique position as His Honor has instructed, you have now become not only the conscience of the community, but now you decide what will stop the conduct that occurred, at least as you found it.

What is the purpose of your role now? And let me tell you it is as tough a job as you had before. It is even tougher because now you are in a position where you have to reach down and search your soul and say, "How do I stop this conduct from occurring?"

Let me show you, very quickly, what the law is as His Honor explained to you earlier, that is, what exemplary damages are all about. In your instructions we call them "exemplary damages." That is the same as punitive damages, which are assessed for the purpose of *punishing a defendant for reprehensible conduct* and for the purpose of *making an example of wrongdoers*.

Let me give you an analogy: Someone goes through a red light and gets a ticket. First, what does the law do to that individual? It usually fines someone who goes through a red light \$50 to \$60. A fine, then, is a "punitive" measure that society places on an individual who disobeys the laws, and in our society no person is above the law—man, woman or child. We have rules that we live by, and the only way we can punish someone for breaking those rules is either to put him or her in prison, incarcerate them, or take away something from them, a freedom. The freedom to be taken away in this type of civil case is an economic freedom.

Now, when you go through that red light, you get a \$50 fine, something like that.

Then, let's say you went through the red light innocently. You still pay a \$50 fine. We all complain about it. You say, "Officer, it was really orange." The officer says, "Sorry, pal, it was red."

You pay the \$50. Then you have to argue with a judge, like Judge Abel here, who usually says, "Pay the \$50."

Now, what happens if you are coming up on that orange light and you say, "Gee, I can make that light. You know, it is orange."

So what you do is, probably—there's not a person in this courtroom who hasn't done it—you hit the gas a little harder and you go through that light. How many times, innocently, have you done that, and you kind of look around to see if anyone saw you do it.

The second thing you say is, "Boy, I'm glad I made that light."

The third thing you usually say, "Boy, what would happen if someone was coming the other way?"

Now, God forbid, you go through that orange light after stepping on the gas a little hard, and unfortunately there is a car pulling out a little fast from the lane and that car taps you. You tap the car. What happens there is you now have running a red light and striking another vehicle. You pull over. No one is injured. You exchange license cards. You get ticketed. You go into court, but now you have two violations.

Now you have the violation of running a red light and striking the other vehicle. The fine is now \$50 plus \$250 for striking another vehicle, and they send a notation to the Department of Motor Vehicles saying you have struck another vehicle. Okay. Remember, you were driving down the road innocently. That is the fine they give you.

Now, let's say you are going through that same light. You now step on the gas a little harder, but guess what? You had just come from a friend's house. Unfortunately, you had something to drink. So that made you a little loose about going through that orange light. So now, you go through the orange light, you strike a vehicle. Now, you have three crimes. Now, you have running a red light, striking a vehicle, and being intoxicated when you are driving.

Then, when you come before His Honor, either in this court—usually would be in the municipal court—you would be fined \$50 for the light, \$250 for striking a vehicle, and, then the judge would do something else. The judge would say, "Here you were drinking when you were driving; that is a serious crime. As a matter of fact, that is reprehensible in our society. We just can't

have that because, you see, you could have killed someone and only by grace of God, you didn't. You simply hit the car and luckily both of you walked away."

What the judge usually does at this point, is give you a three-day vacation, if you will, in the local jail. I don't mean to say "vacation" so flippantly; I mean to say that *he will incarcerate you for three days in the county jail*.

You see, the conduct was reprehensible, so jail is how our society imposes a punishment on someone on the criminal side. And I could go on. What would happen, for example, if he was not only drinking, but this is the third time that person who had been drinking had struck someone. The sentence would be, and should be, six months to a year in jail. So you see, the court—on the criminal side—has available to it a jail cell.

Now let me tell you what a civil jury, like yourself, has in a case of this nature. Our constitution says (a) you can't prescribe the sentences, and (b) believe it or not, in the civil law, you cannot impose a *jail* sentence.

But our forefathers said something very interesting: The people who drew up our constitution said that under the common law you people who sit in that box *can* impose what is called "punitive damages." They didn't write that right into the constitution; what they said was that a civil jury "will impose liability and fines where applicable, et cetera, et cetera." Now, that has been construed by our Supreme Court to mean that you can impose punitive damages. So what they have allowed you to do in cases of reprehensible conduct is to impose not a jail cell on Mr. Orloff and Mr. Clifford, but they have allowed you, as the conscience of the community, to say, "Hey, wait a minute, Mr. Clifford, hey, wait a minute, Mr. Orloff, you can't do that to other people." And so that the message goes out, as His Honor explained to you, for the purpose of making an example of wrongdoers, damages are imposed.

So what you are doing now, as jurors, under the solemn oath you have taken to follow the law, is to decide how, now that I have decided that "X" is liable for fraud, to make an example out of "X."

Every day we hear our legislature debate this very law that you are now dealing with. They just passed a law which I believe in wholeheartedly—this may offend some of you—our legislature just passed a law imposing the death sentence for anyone who kills a child under, I believe, the age of 12. If that offends you, I apologize, but I believe in that.

Every day the legislature struggles with how to make an example of wrongdoers.

They passed a law to deter people from taking advantage of others by allowing money damages to be imposed. Also, to deter taking the life of children under 12, they passed a law imposing the sentence of death to make an example of those who would do this horrible act. Now, you can be opposed to the death penalty. I am just using it as an example of what lawmakers deal with every day, and of the laws the legislature has passed.

Many, many, many years ago, lawmakers codified the common law, allowing you to make an example of people who are involved in frauds in our community. By the way, I might add that this case is one of the first being tried under a new law, effective January 1st, that allows the jury in a bifurcated trial first to decide the liability and then to decide the punitive damages.

Deterrence is what I am talking about when I talk about "for the sake of example." In other words, when you go into that deliberation room this time—for the last time, hopefully—and you come out, your message will really not be going to only Mr. Clifford and Mr. Orloff. It will be directed not only to those two individuals and their partnership, but also to society at large and it will be a reasonable verdict.

It is not going to be any runaway trillion-dollar, billion-dollar verdict. It will be a reasonable message that says to people out there who believe they can prey upon the Katherine Bakers and the Frank Rafaels before they go tell Mr. Rafael to upgrade himself and move to a country club—think about your conduct. Before you take a young lady's insurance check from her deceased father, as was done to Katherine Baker, think about your conduct. That message is what, at least, the people in this state are watching for. What you are going to do in terms of making an example of these defendants.

If it is your decision to award one dollar, so be it. If it is your decision to award ten dollars, so be it. That is a message. But let me tell you what would happen and how the system works. As I told you before, having tried many cases, I have the highest respect for jurors, and anybody who thinks you can fool the jury doesn't try cases, because juries bring to this courtroom 12 and two, 14 collective life histories that are far beyond the life history of me or any individual.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/II. Argument for Punitive Damages--Securities Fraud Case, Continued/§II.3 3. Sending the Appropriate Message: 'The Sting of the Shilling'

§II.3 3. Sending the Appropriate Message: "The Sting of the Shilling"

Now, let me tell you what the message means and how it works. It works something like this. It will start with a simple phone call and probably come from Sam Clifford, and it will go something like this:

"Hi, is Sid there?"

"Sam, how are you doing?"

"Hey, Sid, what did that jury do?"

"Don't worry about it, Sam. They whopped us \$10,000 punitive damage."

Do you remember when a witness, I think it was Dr. Bland, testified? Two things I remember about Dr. Bland was the person that thought general partnerships were something like General Eisenhower. The other is that Clifford came up to him and said to him, "Doctor, what are you going to do now?" and he said, "Gee, I don't know." He said, "Have you considered filing bankruptcy?" The doctor said, "No." And the doctor asked Sam Clifford, "Are *you* going to file bankruptcy, Sam?" And Sam just laughed.

So you see, when the phone call comes to Sid and Sid says, "Hey, Sam, what did this jury do? By the way, I haven't seen it in the papers yet."

What will be the response, and that is really the key. What will be the response when Sid—and I don't mean to use that lightly—when Mr. Orloff says to Sam Clifford, "Sam, don't worry about it. They hit us for \$10,000, big deal."

You see, the issue is the level at which the person at the other end of the phone drops it. The level when the person who gets the words through the telephone wire says, "Oh, my gosh, what are we going to do now?"

Remember, I told you about jurors and the jury system, and how it came from England, where unfortunately it has now died away. Curiously, somebody asked me in the audience, why did the jury system die away in England? It died away as a result of World War II. Not many people know that. But during World War II, because of air raids and manpower problems, they had to stop that incredible system, the jury system. Several years ago, in England, I was talking to some barristers, who told me a very sad story. A Lord High Justice told me a very sad story of how the jury system stopped, and he said, "you know, we used to have a marvelous jury system. Now, of course, we use it only in libel suits" and he said, "You know, Mr. Cotchett, there was nothing like the sting of a shilling, *the sting of a shilling*."

Do you know what that phrase means? It means the person on the other end of the line gets stung by money. He said people understand that kind of sting.

So when Sam calls Sid on the phone, the issue is, what punishment will cause Mr. Orloff to drop the phone and say, "Oh, my gosh."

I am sure that if you awarded one dollar, Mr. Clifford would say, "Well, I guess they got us, but that is not too bad." I am sure if you award ten dollars, the response would be the same. I am sure if you awarded, to each one of these people, a million dollars or whatever the figure is you come up with, at some point, Mr. Clifford is going to say, "What do we do now, Sid? What do we do now? Where do we go from here, Sid?"

It is kind of like a case I remember being tried several years ago in California that involved a large corporation, and they had a big board room. The board room was half the size of this courtroom. And someone sitting at the end of the table asked the general counsel, who was 30 feet away, "Hey, Max, whatever happened to that case that we had going up in Eureka?" Max told him, "Sir, I don't know how to tell you this, but the jury brought in an award last night of \$14 million." The president of the corporation, as reported in the newspapers, stopped the practice of which they were accused immediately, stopped the board meeting and revised their entire program of marketing up in Eureka. Had the lawyers said, "Don't worry about it, Mr. Chairman; it is only a \$10,000 verdict," they would have gone on with business as usual.

So that is what we are talking about when we talk about "the message," and it is not a message only to corporate America, which, in my opinion, does right most of the time, but especially to individuals. That is, do you think our whole defense department is

wrong because one individual or two individuals fixed the bids? I am not here to condemn corporate America. I am not really even here to condemn. What I am here to say to you is that there is a level of effectiveness to be accomplished by your message. And as His Honor explained earlier, I want to make it absolutely clear that you are not to be concerned how these damages are paid. That is not your province. Your province is simply to send the message in proportion to the conduct—I will come back to that—in light of the defendants' conduct and in light of the money they took out of society. They took out of society over 150 million dollars. They took from these people \$6.3 million. In line with His Honor's instructions, consider your role in terms of getting that message out.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/II. Argument for Punitive Damages--Securities Fraud Case, Continued/ B. Recalling Specifics of Case/ §II.4 1. Explaining the Concept of Reprehensible Conduct

B. Recalling Specifics of Case

§II.4 1. Explaining the Concept of Reprehensible Conduct

Now, very briefly, I want to talk about Clifford Management Associates, not to belabor the point. As instructed to you by His Honor, CMA is under the law the same as an individual for purposes of your award. CMA is the same to you as is dealing with Sam Clifford or Sid Orloff or John Smith or anyone else. It is a partnership, a corporation, which is an individual, in the eyes of the law. Nothing is different.

There are three entities here from which we ask that you award punitive damages—Mr. Clifford, Mr. Orloff and CMA, because, you see, an award against Mr. Clifford is in a vacuum if it isn't against his entity CMA.

You heard yesterday, from the stand, when I asked a witness, "Mrs. Arnold, where are all those accounts now?" She said, "I don't know. They have been closed and moved." So you see, a verdict only against Mr. Clifford and Mr. Orloff is useless because it is their partnership, quote, the "Black Hole," into which the \$50 million went. It is the partnership account, you see, that you may assess damages against.

Now, I'd like to just mention one other thing, by way of a very fast review of the reprehensibleness of this conduct here. I went back and I went through the record. I tried to pick up what is the *essence* of defendants' conduct here. How does this word "reprehensible" apply to it? So that when the telephone rings after the person says, "Oh, my gosh, what are we going to do now, Sid?", the next thing that is said is, "You know, Sid, I don't think we should have lied to those people."

And this is what was said by Anabel Fox:

Question: "Did he lie to you, ma'am?"

Answer: "I believe he did."

Question: "Did the other party also lie to you?"

Answer: "Oh, I believe he did."

So, do we have here a reprehensible conduct? We had lying. You have all heard of black lies, white lies, big lies, little lies. What is this thing called lying? In my opinion, this was the most reprehensible type of lie because of its degree. It wasn't just me saying to you, or me saying to my friend, "John, I don't have your fountain pen," when I have it right here. This lie was saying to those people out there—to people like Mr. Brown, who is sitting over there with a cane, in a slick brochure and a videotape, "I will take care of you, Mike. I will take care of your money, Mr. And Mrs. Brown. All is well. I will take care of it. We have got it. It is right in the bank. I have got it in the paperwork, Mrs. Brown. I have got it right here."

That is a more insidious lie than the fountain pen example because John isn't going to be hurt by the loss of his pen. I should never steal his pen, but he isn't going to be hurt if I do, is he?

But let me tell you what Dynamic Capital's lie does to these people. It steals from them their security because whether you like money or not, you have got to buy the groceries. You have got to pay the rent, and you have got to put it somewhere. And it steals from them the future. John can go and replace his pen. The plaintiffs cannot replace the trust that the defendants stole from them. The defendants stole a trust, and that is what this case is about. This case is not about stealing money. This case is about stealing a person's mind and trust. Do you really think Mr. And Mrs. O'Driscoll are going to feel good about putting their money anywhere again? My grandfather put his money under the bed like most old people did after they went through the Great Depression. Why? Why wouldn't he put it in the bank? Would that bank be there tomorrow? He doesn't know. I said, "Grandpa, what are you doing with this money in the can under the bed?"

He said, "I don't trust the bank. The bank will tell you anything to get you to deposit your money."

It took twenty years to convince my grandfather that banks are not bad.

But, you see, the depression (and if you lived through that, which I didn't—I was fortunate—I trust banks, he didn't) it had stolen from him. I don't want to use the word "stolen." He had his money in the bank. He lost it all.

And you see what these people did is they lost that trust. So this is not a case of stealing money. It is a case of stealing an old person's mind.

What do you think of the young lady who now makes beds in a Marriott in San Diego? What does she have to show for the rest of her life for trusting CMA? When she raises her children, what is she going to tell them about honest people handling their money?

This case is about lying in a particular form. It is about stealing in a particular form. And where did such conduct lead? Not only to these people's problems. You will recall that we had Mr. Jewell on the stand, one of the members of the board of directors, a person who was put into a corporation just like you, me, or anyone out there who may be put on a corporate board to watch over the corporation, to enhance the trust of the corporation. And he was asked, "Did you know what was going on?" And he told us, "No, things were hidden from us." And he told us that he had no idea what was being done with that company. And yet, I said to him, you heard evidence when counsel said that their clients, Mr. Orloff and Mr. Clifford, simply experienced a downturn in economy and that they told everyone everything, that they told the board of directors everything. That was the testimony. The testimony was quite clear. "Well, I was shocked, of course. I had no idea that was being done with the company." Now, that is what Mr. Jewell said. Mr. Jewell was shocked because he had a sense of conscience. He knew about the O'Driscolls and went on to ask Mr. Clifford, "What happened to the money?" I told him, "I would still like to know where the money is?" But when asked where the money is, I didn't get an answer, no answer at all, no answer at all. No, he had explained it. He said, "I have already explained it," just like the letter that Mr. Orloff wrote to him, that he never got an answer to. He never explained to those people.

And here is the insidiousness of the lying. You will recall we showed you some checks, for example, a check made out to Dynamic Capital by Mrs. Victor for \$2000. Look at the date, look when the lie started. Remember what happened to that check? We turned that check over as one example, endorsed in that very familiar handwriting that we have all come to now recognize, and paid to the order of Samuel C. Clifford, Trustee. Now, ladies and gentlemen, that is simple stealing of money, but it is more than stealing from Mrs. Victor, because, you see, when she wrote that check she truly believed that it was going into a bank account for her. She truly believed that it would be what she had to live on when she makes it to 85, which I hope she does.

It wasn't just one check. It was a series. Here is another example: a check she wrote for \$2828. This is \$2800 to Dynamic Capital dated January 6th, 1985. I could go on with more examples, hundreds of these checks. Where did they go? Endorsed in the old familiar handwriting, to Dynamic, and then pay to Sam Clifford, Trustee.

Now, this is simple stealing. But, something else is worse than that. All these people out there had one thing in common: the belief that when they put money into the bank, into Dynamic Capital, it was being reviewed by accountants, by lawyers and that everything was done responsibly. These are, by and large, elderly people who put their trust in Dynamic Capital.

Most insidious of all, they lied to their own accountants. They signed a letter that says, "We have made available to you all financial records and related data of" year after year after year. So when the phone call comes to Mr. Orloff, and the question is asked, "Did they really do that? Gee, I guess we shouldn't have signed that letter." And I envision that there might be an argument over who stamped the back of Mrs. Victor's or Mrs. Johnson's checks, or any of these checks, but the message has to be that whoever did, DC is responsible.

Now, what is the degree of reprehensibleness of this conduct? There is not a single dollar you award in punishment that is ever going to help the O'Driscolls or Lilienthals or the other plaintiffs or any of those people. Instead, the statement you make is for society.

His Honor instructed you to be reasonable in your award in the light of what the defendants stole. The question is what *is* a reasonable figure?

COMMENT

Having established that the force of the message to be sent to wrongdoers should be measured by the "reprehensibleness of their conduct" (see [§II.4](#)), counsel has erected a platform from which to launch into a reprise of the shocking facts showing the reckless abandon with which defendants dealt with plaintiffs' investments. Counsel reintroduces the compelling metaphor of the "Black Hole" into which his clients' money vanished to gauge the enormity of defendants' self-serving actions (see [§II.5](#)). Just as this narrative of deceit and chicanery served to establish defendants' liability (see [§I.8](#)), so now it is used as a measure of their reprehensible conduct calling for a judgment against them for punitive damages (see [§II.6](#)).

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/II. Argument for Punitive Damages--Securities Fraud Case, Continued/§II.5 2. Reintroducing Case Theme: 'Where Did the Money Go? Down a Black Hole'

§II.5 2. Reintroducing Case Theme: "Where Did the Money Go? Down a Black Hole"

Let's look at what was stolen. You are going to hear from defendants' attorneys that they didn't steal anything. You are going to hear that nothing is missing. But here on the record is the auditor who finally found out what was going on at the time that Ms. Fox testified that a lot of money is missing. She doesn't know how much. Well, let's go back and see how much.

You will recall that day when Mr. Saul was on the stand, and he said Mr. Orloff came to him and said, "Peter, you have done something I didn't have the guts to do for 20 years." Peter Saul then confronted him and said, "Look, Sid, we can solve this whole mess. Just take the money out of Clifford Management Associates put it back, and we will pay all these debts. We will pay all these mortgages. We will get the company back on firm footing." How did Mr. Orloff respond to this? Here is Mr. Saul's statement:

Well, when I questioned him about there being no money left in CMA, he said that it's a "black hole." There's \$50 million that went down it.

That is almost word for word what he said: "It is a black hole, 50 million went down it."

So now you start with the fact that \$50 million went into Clifford Management Associates.

We had our accountants, who, you will recall, charged maybe hundreds of thousands of dollars. I can't remember the exact figure, but \$200,000, \$300,000 maybe, to review where all these monies went. And you will recall the accountants' figure as to how much money actually went into CMA. That figure, from all their review of all the records we have was \$303 million. And you will recall Mrs. Arnold from the bank, who came to the stand, whom we asked how much money went through that account. At our request she checked it and she said it was \$300 million.

There, ladies and gentlemen, we have the dollar figures. Once it was \$50 million. Later someone says it was \$303 million.

Let me ask, whatever happened to that money? Do you remember this secret agreement that they had, the two of them, Clifford and Orloff, that is the Venture-Tech? Do you remember the figure on page two of their agreement? or what happened to the \$25 million that, quote, "Venture loaned to Clifford"? Where did that \$25,600,000 go? Dynamic Capital Corporation paid Venture that amount and immediately turned around and gave it right back to Sam Clifford.

What happened to the money? Where did that go? Well, we know it was part of the \$303 million, but was it also part of what Mr. Orloff was talking about when he said \$50 million went into the black hole?

These are the figures you have to work with in terms of the degree of defendants' reprehensibleness when you go into the jury room to try to arrive at your reasonable damages figure.

Mr. Orloff himself said \$50 million went in to CMA, the "black hole." He should know. He was the chief financial officer. He was a partner. But also, we have the accountants' figures, which say \$303,000,000 went in to DC. Therefore, I am going to talk now about a little passbook we have found that went into evidence yesterday, a, quote, "savings account in the name of Sam C. Clifford, Trustee."

When you look at this passbook in that little deliberations room back there, you will see the hundreds of thousands of dollars that went into that account.

You will recall that, as testified to by Mrs. Arnold yesterday, we have only found the company's second and third book going up to 1985. "Where are the rest of the books," I asked Mrs. Arnold. She said she didn't know. All we have is the passbook for a savings account, and we don't know what this money was for that was in the Sam C. Clifford, Trustee, account.

They had the Clifford Management account, but then the gall, the temerity, if you will—they weren't happy just letting the money they took sit in a checking account, they actually went to the bank and set up a passbook savings account.

There is a word I have heard used that is called "chutzpah." It applies here. I mean, I am amazed to think that they would go to a bank and not only run \$303 million out of DC into another account, but then they would get a passbook. I don't mean to be funny about this. I don't mean to be humorous about this at all, but I'm reminded of the lawyer joke about a person who kills his mother, then appears before the judge and asks for leniency because he is an orphan. That is what we have here. We have

someone who now says, "Gee, we really didn't take that much, and you know we are sorry about it."

I am going to talk about being sorry about it. How does being sorry excuse Mr. Clifford, who said he could go to jail for what he did? Maybe he didn't realize that some day he would have to answer to *your* penalty.

You know, there was something very interesting about Mr. Blake's testimony yesterday. He was asked, "When did Mr. Orloff have this downturn in attitude? When did he start becoming 'despondent'?" It was curious because that was back in 1967. He wasn't despondent when Dynamic Capital went bankrupt. He wasn't despondent or forgetful when he put the little stamps on the back of the investor's checks.

Nor was Mr. Clifford remorseful when he knew he could go to jail. But he has to answer to you now, and although he isn't in jail, you are going to say to Mr. Clifford: "This is what you are going to pay in penalty in lieu of jail." Consider what he did when the company was going under very fast, when Peter Saul went to him and said, "Sam, we have got a problem—this commingling of funds in November and December of 1985." What did Sam Clifford do? Look at this passbook, ladies and gentlemen. That is what he did. *This* is what he did.

Peter Saul had come to Clifford and said, "Sam, we have got troubles, this commingling. I am going to call a special board meeting." "Don't do that, Peter. Let me call the board meeting. Let me explain it."

That was in November of 1985. And Sam has found out that Peter Saul knows, that he is on to him. Can't you picture the telephone call at that time? "Well, I told Peter today that 50 million went into the black hole." "What did you tell him that for, Sid?" You can imagine that conversation because here is what actually happened; here is the "remorsefulness" that went through these individuals' minds: On the last day of 1985, the company is sinking. It is under. It is in the pooper, as they say. Does he take just \$500,000 on that day for spending money for his art and wine collection? He gets a little happy and takes \$1,025,000. \$1,025,000 he takes in this "remorseful" period and tells Peter Saul, "Peter, don't worry about it. I am going to take care of everything."

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/II. Argument for Punitive Damages--Securities Fraud Case, Continued/§II.6 3. Applying Standards of Reprehensibility to Defendants' Acts

§II.6 3. Applying Standards of Reprehensibility to Defendants' Acts

Remember December 1985 when you talk about the reprehensibility of conduct. What happened then, ladies and gentlemen, is what is reprehensible.

I will tell you whom else it is reprehensible to: the two people that you very rightly found not liable for fraud, very rightly; because these two people, Mr. Beaumont and Miss Bond, were used, were duped. You know, I can understand using Mr. Beaumont, an MBA, but the defendant involved Miss Bond, his secretary, who had trust in him for twenty years. And this is the remorsefulness that the gentleman had.

The two defendants who now tell you how sorry they are. They certainly didn't tell you how sorry they were in the first phase of this trial some eight or ten days ago. They told you he was a "bonehead." He was referred to by his attorney as a "bonehead." He didn't commit fraud. He wasn't negligent. Not even negligent.

But, such conduct surely is reprehensible.

When the going gets tough, it reveals the character of individuals, and what went on in January shows the characters of these defendants. I just showed you an example of what happened in December. Then they started the big score, when they began writing these checks.

These here are the checks from Milestone Company which show payment of \$300,000 on the 15th, which in turn goes in a check to Samuel C. Clifford to Milestone of \$300,000. I have in my hands here checks totaling almost two-and-a-half million dollars, funds they ran through Milestone to Samuel C. Clifford. Remember these checks. Here is another one on the eighth of January for \$425,000.

So in terms of character, and by character, I mean, the mental attitude of the two people we are dealing with here, which was this: One said to the other, "Sid/Sam, the ship is sinking. What do we do?"

The response on that question went something like this check: It went something like where the little widow Johnson's money, the Lilienthal's money and William's money, and many other people's money went. That was what we call reprehensible conduct. That is the stealing that I hold in my hand here in overheads. These are the checks that go on and on.

I have a list of the checks that I can show you if I wanted to spend three days here like this. This is just out of Milestone.

Ladies and gentlemen, the reprehensibleness of the conduct is not tough to figure out here.

One of the other factors you are going to have to look at is whether or not the people now come before you and say, "Look, we did wrong. We shouldn't have done what we did. You are the conscience of the community, and so we would ask that in light of everything that has gone on, in light of the present condition of Mr. Clifford and Mr. Orloff, no damages should be awarded against them for punitive damages: you can't punish them at this point."

That is wrong.

Let's analyze who the defense brought to the stand yesterday. They brought a very fine man, James Blake, who in my opinion, told the absolute truth. They brought an individual who took Sid Orloff into his home. He is a very nice man who came here and told you candidly that he was a little surprised when I put some evidence up on the board—when I showed him Mr. Orloff's divorce settlement and the community property agreement—and I asked him if he knew what happened to these assets. Did he know what happened to this one here—the CMA note—specifically, where are the interests. This agreement, by the way, is in evidence. Take a look at what Mrs. Orloff got. Take a look at what Mrs. Orloff ended up with in this divorce. I wouldn't want to be her lawyer representing her after this trial. But look at what she got compared to what he got.

When I said to Mr. Blake, did he know about where any of this went beside the Dodge, he really didn't. And he was candid. I guess he could have said, "Oh, that is gone. He doesn't have that anymore. That is gone. This is gone." He was under oath. He spoke from his heart. He spoke truthfully. He said, "I don't know." He said, "I have no idea of that." He said, "I have no idea where this is today."

Where is the Clifford Management note? Where is the bank account here? Well, it is in his Wells Fargo account. How do you

know that? Because it is what he pays the rent from. They bring in an individual who tells you Mr. Orloff has holes in his shoes. And if you believe that Mr. Orloff has holes in his shoes, I would be surprised; I would be shocked.

But is that really what we are here to hear about, about holes in his shoes? Or are we here to hear about where did the \$303 million go? Where did the money from the savings account go? Where did the \$50 million down the black hole go, and where did the \$26 million go.

And they bring before you Mrs. Arnold. They served her from the bank, as we did yesterday, to bring in that savings account passbook that we just found out about. And Mrs. Arnold comes in and candidly tells us about a letter from Sam Clifford giving Mr. Orloff authority to sign to make investments. Then, most startling of all is the document that she couldn't, or she didn't know anything about except that it was a Security Pacific document. If you will look at no other documents when you go in to deliberate, look at number 1723 because it is fascinating. It says up at the top, "Customer Buying and Selling Order." To me this is the most fascinating document because there is a signature on it that is of some significance: "Samuel C. Clifford, Trustee Account," signed for by *Sidney Orloff*.

Now, why is that significant to me? Because the argument was made in the first phase of this trial that Mr. Orloff had absolutely nothing to do with the Samuel C. Clifford, trustee account, that if \$303 million went through it, Orloff had nothing to do with it.

Ladies and gentlemen, just look at document 1723. His signature is found not once, but on several of these pages where the trustee account is signed for on buying and selling thousands of dollars. I am looking at one here — \$500,000 worth of stock for the Samuel C. Clifford trustee account. By whom? Sid Orloff. Here is another one, \$400,000 worth of Ford Motor credit stock. For whom? The Samuel C. Clifford trustee account, Clifford Management Associates.

Talk about trying to fool the jury.

On the other hand, I saw four very outstanding attorneys come before you and say that their clients were wrong. For example, Miss Bond came before you through her lawyer and said, "Hey, I was wrong." I thought to myself when I was sitting there that this is a very courageous act. The lawyer couldn't have done that without her approval. No lawyer can stand here and make representations without their client's approval. Here is a person who clearly worked as a secretary for all of those years, starting as a typist, and she came before you and said, "I was negligent. I should have known." But Mr. Penn and Mr. MacChesney, two very fine lawyers—this is absolutely no slight on them—can't say the same for their clients. They can only say that which their clients want them to say, but I think I know in my heart what they would like to say if they could. They would say, "You now have the passbook, ladies and gentlemen. I'd like it if you'd been told that they are sorry about this passbook, that Sam Clifford really didn't put that money in, but you weren't because my client would like to tell you, yes, he took that money and he is sorry about it."

This is the second book of the passbook, and I just picked this page out. You go through it page by page and you look at this, as Mr. Anderson started to do yesterday. These are deposits: \$195,000, \$5,000, \$5,500, \$50,000, \$100,000, \$35,000, \$100,000, and I could go down the list, and these are withdrawals and these are more deposits. This activity is just for the months of October, November, December of 1980. And then from October through March of '81, go through that passbook.

And where is any attitude of remorse? Where is any sorrow on behalf of those two gentlemen? Their lawyers can't tell you of any, although I hope before the noon hour we will get to hear how much they *can* tell you.

C. Quantifying Punitive Damages

§II.7 1. Describing Jury's Task as Conscience of the Community

COMMENT

As noted in Book §8.2, counsel must take care that the jury does not perceive an award of punitive damages as a windfall for the plaintiff. Here, counsel heeds this admonishment well as he stresses that punitive damages are "not to make anyone rich," that this phase of the trial is "society's phase. This phase is the community's phase. This phase is for the public...."

In attempting in §II.8 to translate defendants' misconduct into a dollar figure with a sufficient deterrent effect, counsel relies in part on one of the established standards for punitive damages awards: the relationship between actual and exemplary damages ("We know \$300 million was taken"). Counsel also alludes skeptically to defendants' current financial condition and their lack of remorse, a subject he elaborates on in the rebuttal (see §II.9). Finally, he relies on the jury instructions themselves, which he quoted in §II.7 as containing the words "for the sake of example and by way of punishment," as he exhorts the jury to fill them in "on behalf of society."

Now, ladies and gentlemen, after making your determination of the reprehensibility of defendants' conduct, the question then comes down to deciding how bad their conduct was, because the message that goes out depends on that. And be sure you understand that this is not to make anyone rich. It is not to make the Amesese or the Lilienthals or the Victors rich. There is not a single dime or dollar you could trade them for going through this experience again. Not a million dollars they would accept for going through the pain and agony that they went through. This is not to make them rich, and not this phase of the trial. You have answered that phase of the trial and very properly so. You have given each one of them an award for emotional distress, a proper figure, right on the money, a well thought-out figure. That is not this phase. That phase is over.

This phase is society's phase. This phase is the community's phase. This phase is for the public, for my children and your children in the sense that this is the phase where you register a vote on the reprehensibility of the conduct. This is the phase now where you put them out of your mind and you say, "Wait a minute, Mr. Clifford, Mr. Orloff"—and I refer to them as that, not as Sid and Sam. I do that only in a colloquial phrase. I have respect for them as individuals. I have no respect for what they did. They stole from old people, young people, across the board. I wouldn't care if it was a million dollars they stole. I have a different philosophy.

I think the principle of the law under which you measure damage by how much they stole is wrong, but I am not here to tell you that. I can't tell you that. Only that gentlemen up there, the very distinguished gentleman with the robe on tells you what the law is, and he tells you that you can measure reprehensible conduct only by defendants' conduct, *i.e.*, what they took, what they are worth, et cetera, et cetera. If I could rely on the law, I think that someone who steals a dollar from Mr. Garcia after telling him to raise himself up could do far worse than pay punitive damages. If I could rely on the law, I would say someone that goes to a young 18-year-old and takes her father's insurance money should do more than pay punitive damages.

You are going to be given a special verdict form. It looks lengthy. It is not. It is a simple form, but you do not have a simple task. It is just a simple form to fill out. It is not like the others. The others, some said you have to be a rocket scientist to figure out. You did it. This one you will figure out, too. After you flip that page there are simply seven pages that go thereafter, and they look like that. They are about as simple as you can imagine:

"What punitive damages, if any, do you award for the following defendants, et cetera, et cetera, et cetera, for the sake of example, and by way of punishment, for the sake of example and by way of punishment." Those are the key words: punitive damages against Clifford, Orloff and associates. You write in three figures there.

Now, I have told you that the credit of putting all this evidence together does not lie only with me, does not lie with Mr. Ruby or with Mr. Anderson. It lies with all of the attorneys representing these many plaintiffs, who unfortunately couldn't speak to you because only one lawyer per side is allowed to talk. I would like to have you hear from all of these attorneys, but, unfortunately, I must speak for them.

§II.8 2. Assigning Dollar Amounts

Now I am given the toughest job of all because now I have to look at you and I have to say to you what I believe to be a punitive damage figure that will make the person drop the phone the next time he calls for news about how this trial is going. I suspect there will be a couple of phone calls starting late this afternoon. They may run every half hour, on the hour. "What happened? What did they do? Have you any word?"

The issue now is to cause that caller to drop the phone and then say, "What do we do now?"

Now, unlike the first trial phase in the area of emotional damages, I said to you candidly from my heart that if you award one dollar that will be a recognizable message to people.

I don't feel that way in this case because in this case, and I speak also for my co-counsel, I tell you that I believe there is a number that must ring out so that society hears a bell rung that can't be unring. So that when the bell rings, not only Mr. Clifford and Mr. Orloff but lots of other people who think, "Hey, they got away with it. Well, it cost them \$10,000 punitive damages, so what? Hey, what is that in today's fast world? I have got four BMWs." That is the message to society that is going out. I hope none of you own BMW's, but it is kind of that mentality where we are today, what society is all about. And you are given an opportunity which I would love to trade places with, but I can't, because you are given an opportunity to ring a bell to let society know.

And, now, the question is what is that dollar amount and how do you arrive at it? For sake of example, the evidence that we know of and that the community knows of is that \$300 million was taken. The community knows by Mr. Orloff's own words that \$50 million went into a black hole. The community knows that \$26 million disappeared in one month in a turnaround transaction in March of 1985. Yet, if I were to stand here and tell you, "Ladies and gentlemen, assess \$300 million," I would be a fool. But, you want to know something, that wouldn't be unreasonable because that is what causes them to drop the phone. Anything less than that and they might say, "Well, that leaves us with \$10 million." I think it wouldn't be unreasonable that if Mr. Orloff's admission were used and you said, "Mr. Orloff, you put \$50 million in the black hole. Guess what, you are getting it out of the black hole. You are taking it out of the banks and you are putting it back." And, by the way, while I am on that subject, four documents went into evidence yesterday by Mr. MacChesney there, for foreclosure notices on four pieces of property. You see in the foreclosure notices on the four pieces of property to make you think Mr. Orloff doesn't have any money. I would say to Mr. MacChesney "You can't fool this jury."

Now, if I were to say to you, "Mr. Orloff and Mr. Clifford, reach into that black hole and take the \$50 million out and put it back," would that be unreasonable? I don't personally think so, but far be it for me to say that to you.

What about the \$26 million that disappeared in March of 1985? Where is that, Mr. Clifford? Where is that, Mr. Orloff? If I were to say to you ring out to society just that \$26 million number, would that be unreasonable? I am not sure that it would be unreasonable.

It is clear to me that in your wisdom you were so wise in having awarded the same amounts for emotional distress. You were so wise because what you are able to do there was to make a statement that, "Hey, when you steal from a person there is emotional suffering." And we can't say that Mr. Lilienthal, who has cancer, as you saw, suffered any more than anyone else because you can't speak those words. And I would ask that you do the same on punitive damages because especially in this case it is by way of example and for the sake of punishment for wrongdoers, that the message needs to be sent out to each one of these people that defendants stole from, that defendants committed fraud upon. We are not going to send you to jail, Mr. Clifford or Mr. Orloff. We cannot do that, but we are going to tell society out there that you are going to be punished by reaching down into those bank accounts and taking out that ill-gotten gain.

By the way, if you don't have it any more in Security Pacific, go to the other banks and take that money out and pay it to society. Pay it back in the form of punitive damages, which Judge Abel told us we can have. And if you let them off with anything that allows them to keep a penny, would society understand that? If you let them off and say, well, you know, Sid really just went along with Sam and Sam really did it; it wasn't really Sid's fault. And, you know, I in a way feel sorry for Mr. Orloff in a sense that I think he was very honest the day he walked into Mr. Saul's office and said, "Peter, you did something that I didn't have the guts for 20 years to do." I feel sorry for him. I hope he has the guts now through his attorney to stand here and say, "Hey, what I said to Mr. Saul was right." He made that statement, "I didn't have the guts to do it for 20 years. We put 50 million in the black hole."

Ladies and gentlemen, on each one of those forms there are three lines, and I would ask that you make an award of punitive damages against each one of those lines, that is to say, Mr. Clifford, Mr. Orloff and Clifford Management Associates in the same amounts. There are seven pages you must fill in.

And I would simply say to you in closing that not only these plaintiffs will await your word. They are so happy. I just can't tell you. You see, you gave them your word last Thursday and now *society* and corporate America waits for your word. Yes, corporate America, the honest corporate America waits for your word, too. And they wait to see now what you do with this very important point, probably more important than the first phase. And, remember, simply because it only took a day to put on the evidence has no bearing. This is the single most important part of this case. You see, it took three months to bring you the evidence of the reprehensible acts, and that is why His Honor instructed you to consider *all* of the evidence. This is a three-month trial that you are now deciding on behalf of society.

When you fill in those three lines if in your conscience you decide to leave them a dollar in the bank, you will live with that. Society will live with that. It is your job to figure out what happens in that phone call between the two of them. It is your job to figure out what Mr. Clifford will say to Sid Orloff, that he says, "Oh, my gosh, what do we do now?" It is your job to figure out whether it is \$26 million they pay back, \$50 million out of the black hole, or whatever the sum will be. But my statement to you is this: Whatever that dollar amount may be—and I think it would be wrong if it be less than \$26 million divided among all these people—this is the day of reckoning. This is the day defendants can run, but can't hide. This is the day when we tell the world out there they can't do these things. That is the wonderful part of our country, that twelve of you citizens and neighbors get to say that.

Ladies and gentlemen, I know I went on too long. I apologize to you. It is a lot longer than a minute and thirty-one seconds as last night's fight was, but, again, I want to tell you from the bottom of my heart how much I thank you. The role you play in society is more important than anything we have. No institution in this country comes close to the role you play.

Whatever your verdict is, *whatever* it is, the love that we have for you is a whole lot.

Thank you.

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II. REBUTTAL

§II.9 A. Debunking Defendants' Excuses

MR. COTCHETT: Ladies and gentlemen, it is now my opportunity to rebut what was said by defense counsel. It is late in the day so I will try to be brief, but there are certainly some things I do want to rebut.

I listened to the words of Mr. MacChesney and Mr. Penn very carefully. I was listening to those magic words, to those words that said to you why defendants shouldn't be punished. I am reminded of the story from the Bible about the Tower of Babel. You have all heard that story about people who wanted to be as big or bigger than the gods and built a tower to the sky. That's what the word "babble" comes from. And I won't belabor that except to say it reminded me.

Then I was reminded of something from Greek mythology. Mr. Kaman told you stories about a Greek god, but I am reminded of the story of Icarus, that as a boy I learned. Icarus, as we all remember, was the individual who wanted to prove to the gods that he could do everything they could do. Well, in Mr. Orloff's case he could do everything that Mr. Clifford could do. Unfortunately, as the story goes, we all know what happened to Icarus, who tried to fly close to the sun. We know full well what happened. Icarus forgot that his wings were made of wax.

As I sat here listening to Mr. Penn I heard him talking about the evidence, and I heard him talking about the man who is now 58, I didn't hear that in the evidence, but I will accept that as a fact. I heard him talking about this, quote, "poverty." I didn't hear *that* in the evidence, but I will accept that as fact at least coming from him. And I heard a lot of things that I don't think are really relevant to this portion of the case, because I think that both he and Mr. MacChesney are handicapped on behalf of their clients to the extent that they could only say what their clients want them to say. Again I want to reiterate both are fine lawyers.

And as to Mr. MacChesney, I heard him say the following: I heard him say just 45 minutes ago, quote, "All the money is there; nothing is missing." It is a preposterous statement: "All the money is there, nothing is missing." It is preposterous in that His Honor has instructed you that the testimony of one witness is sufficient evidence on which to base liability. One witness alone. For example, if a defendant in any criminal case takes the stand and says, "I did the crime," that is sufficient. You need hear nothing further, normally. The law is quite clear that all you need is one witness. Now in this case when Mr. MacChesney stood before you and said, "Nothing is missing," he did that obviously at the direction of his client. He knows he stares in the face of a witness — Anabel Fox who testified, "There is a lot of money missing." And they were dealing in the *millions* of dollars. He knows that he stares in the face of Mr. Marx, the accountant, whose testimony I have right here in front of me —and I don't think we have to belabor this point. I have Mr. Marx's testimony and I have Mr. Kinsey's testimony, both of whom said approximately \$300 million went out of Dynamic Capital and into the personal account of Clifford Management Associates.

I don't know how Mr. MacChesney defines "missing." But when \$300 million is taken out of a company that is publicly owned by many people, that is missing money. As Mr. Kinsey, the accountant, said in his testimony here, \$300 million went out of DC over the years during which he analyzed it.

And interestingly enough, when Ms. Fox said that there was a lot of money missing, I didn't hear either Mr. MacChesney or Mr. Penn say, "Ms. Fox, how much is missing?" They dropped it like a hot potato.

When Mr. MacChesney just stands before you and says that nothing is missing, I guess what he is saying is that Sid Orloff isn't telling the truth. I guess now it's become finger-pointing time. I will show you that in a minute. I guess he now stands before you and retracts what he said earlier in these proceedings when he said it was all Mr. Orloff's fault. He now stands before you and says that what Mr. Orloff said about \$50 million going into CMA wasn't true. I am sure Mr. MacChesney wishes that Mr. Orloff hadn't said that.

But now you have not only one witness' testimony—and His Honor has instructed you that one is sufficient—now you have not only two, adding Ms. Fox, now you have not only three, adding Mr. Marx. Now you have not only four, adding Mr. Kinsey. That is, you have not only four independent people; you can add to them the defendant Orloff himself.

And standing in front of you, Mr. MacChesney uttered the words that say there is nothing missing.

Now, curiously, I heard nothing from Mr. MacChesney about the net worth of Mr. Orloff, or of Mr. Clifford. Perhaps, he wasn't listening to the evidence the way you heard it and you decided, the same evidence I have heard over the past two or three months—that money went into accounts under the control of those two men. We presented evidence of checks going directly to them.

This morning I showed you \$125 million on one day going to them. Yesterday Mr. Ruby presented similar evidence. Counted up, \$10 million in checks went to them directly. In addition, when you consider all the checks presented in evidence, over \$150 million went directly to an entity controlled by them, with \$25 million going directly to Mr. Clifford according to a document I showed you this morning. And by Mr. Orloff's own claim, 50 million into Clifford Management Associates.

So Mr. MacChesney—it's a tough job that he has—stands before you and says it didn't prove they took anything. Mr. Clifford, I say you did take something. The evidence shows you moved over \$300 million out of DC. Your codefendant says you put \$50 million of it into CMA. The evidence in front of you shows that checks of over \$150 million went places directly related to your own pockets. Where, sir, is that \$25 million. Or, Mr. CMA, where is that \$25 million? And lastly, ladies and gentlemen, when defense counsel talk about the evidence, where are the CMA books?

Mr. Clifford, we are told, is "out of the community." You heard Mr. Penn say that: "Have pity on my client because he left the community, he went to Fremont." Whatever that may mean. But Mr. Clifford is still out there. He is still doing business as usual. Mr. Clifford is the individual who laughed when Dr. Bland asked him, "Gee, you want *me* to file bankruptcy? What about *you*?" Sam Clifford laughed. There is the evidence—doing business as usual.

I didn't hear a single statement from Mr. MacChesney on the state of the evidence regarding Mr. Clifford's net worth. I asked Mrs. Arnold yesterday where those monies are now. She said she doesn't know. All the accounts have been closed and moved elsewhere. They are gone. The evidence before us suggests that Mr. Clifford put it somewhere else, and we want to be honest with you, we don't know in what bank it is. You can run but you can't hide. And Mr. MacChesney closes with these eloquent words, "enough is enough." In other words, he is saying to you to take a pencil and draw a little zero for damages in because people got all their money back. But, you see, that isn't how the law works.

You can't go in and steal a pair of socks from J.C. Penney, walk out the door, get caught, and hand back the socks. Do you know what happens to the poor soul, who is cold, who steals a pair of socks from J.C. Penney? Do you know what happens to the poor mother who steals food from Safeway to feed her child? She sometimes does thirty days in jail. An 82-year-old woman was arrested and tried for taking a chicken from Lucky store because she was hungry. She couldn't give the chicken back, she broke the law.

But Mr. MacChesney says, "Gee, the people got what they deserve; they got all their money back." That's not the only thing the law is for, Mr. Clifford. The law now before this court and these jurors is designed to make Mr. Clifford an example: To ring that bell and put that bell around his neck, as my co-counsel, Mr. Ruby, puts it.

Now Mr. Penn, speaking to both these defendants, said, "You didn't have to confess." He is absolutely right. Mr. Orloff did not have to confess to anything. Mr. Penn said that Mr. Orloff had no obligation to stand here and say anything about how sorry he was and that he was going to defend him in all 643 suits. I will come back to that. He didn't have to; that is absolutely right. But I am sorry he didn't. I was hoping that maybe on behalf of these little people here he would just say, "Hey, I am sorry," not say "I am sorry I did it, but you know what, I am 58 and I really don't have much"—which I don't believe. "Enough is enough," he repeated. Right?

Mr. Orloff was asked if the Venture options caused damage to these people, and he told you there that he didn't think it did. Did the false financials cause the damage to these older people? I don't think so, he said, because they didn't read the financials. He's right; these poor little people don't sit down and read financials like these accountants do. It is the investment company's integrity they buy. It is the integrity they put their money into. It is the trust they have in the system. Mr. Orloff never answered Mr. Ruby's question as to what happened to the \$6 million in stock. Instead, let me show you what we got in response.

We got two things. First, we got a statement that really Mr. Orloff had nothing to do with the financials, that he just did some color charts. Well, that's not what the evidence shows because I have it right here in front of me. It says—I'm not going to bore you and waste a lot of time—but the testimony of a witness says, "My recollection is that he did it every year. He presented the financials to the board of directors every year."

Second, instead of Mr. Penn telling us what happened to the stock, we got a flow chart very nicely done. And I copied down that flow chart. And instead of saying to the jury in these precious few moments we have before you, instead of asking you to make a nominal award of punitive damages and pledging to you that Mr. Orloff will not engage in this kind of conduct again, once again, as he was directed, Mr. Penn put the blame elsewhere. He gave you a flow chart. I wrote it down quickly, and this is what is shown by the flow chart: The architect of the scheme was Mr. Clifford. So hit *him* heavy with punitive damages. The sale of the investments was by Mr. Beaumont. The conscious disregard of investor rights, by Mr. Saddler. He threw that paper on the ground. Support activity? Everybody was supporting it, and Mr. Penn candidly said so and even that Mr. Orloff supported it. But, you see, Orloff is way down on Mr. Penn's blame list. I see it otherwise; he's got it sideways.

Failure to turn in friends? Mr. Saul. He stated "People try to cover up." I don't think people should try to cover up. If they do, they should be held accountable to a jury.

People who worked on the staff? He said he really didn't mean to implicate the staff people, the key punch operators, that they didn't know what was going on. Mr. Casper was in charge.

So, ladies and gentlemen, of all of the items he put on the blackboard there, who was at fault? Not Mr. Orloff. Mr. Clifford, Mr. Beaumont, Mr. Saddler, and all of *those* People were the ones. Instead of coming forth and saying to you that he believes the plaintiffs should accept a nominal sum, he chose to say instead: "Give them nothing. Enough is enough. Give them nothing. Write a zero there for damages." That's what Mr. MacChesney would have you do.

Now, I am tragically sorry for Mr. Orloff. He is 58 years old, so I am more sorry. If he works for Fremont Ford at \$13.50 an hour, that's \$30,000 a year. I think he should be very happy that he has a good job. When Mr. Penn said it was not easy for Mr. Orloff to sit here for two days, I wondered what he thinks of the plaintiffs who have seen fit to sit here for two and three months. I wonder what he thinks of the plaintiffs who have sat for the past two years waiting for this case to come to trial. If it wasn't easy for Mr. Orloff, let me tell you it hasn't been easy for these people in their 80s and 90s—or even 18—to sit here.

Mr. Orloff has "few friends," we are told. Well, I'll concede that there is nothing more precious in this world than friends. It is a sad fact—I didn't hear that from the evidence, but it is a sad fact—if he has no friends. I don't want to belabor Mr. Orloff but is that really an issue at this point? If a person is found liable for doing wrong, is the fact of no friends an issue to be considered by you? Mr. Orloff was an accountant who held a public trust. Mr. Clifford was an accountant and a lawyer who went out and preyed upon people. You heard him described as a very talented man who has been punished enough and something was said to the effect nothing further should be awarded.

I am reminded of what I said in my closing argument. Unfortunately Mr. Orloff wasn't here to hear it, so I will repeat it for his benefit: "Be not deceived; God is not mocked. For what a man sows he shall also reap." I don't know anything in that text that distinguishes between a 58-year-old man and an 18-year-old man or an 18-year-old lady. Those words make no distinction. And we have no separate laws for age groups when they do a wrong. Except for juveniles, and defendants are not juveniles.

So when Mr. Penn stands before you and tells you that his client is 58 years old, I say, "Mr. Orloff, unfortunately I had a client in court this morning aged 85, who is partially deaf. She was trying to lean over to another plaintiff, Mr. Ames, interrupting matters a couple of times, to try to find out what was being said. That may sound humorous to some people out there, it is not. A sad thing to be partially deaf. She is one of the plaintiffs. She is 85, Mr. Orloff. She is not 58. Her husband is 93, and he testified here. So when we talk about age, the law is equal under that seal. There is no distinction between a 58-year-old or an 18-year-old." I don't know how old Mr. Clifford is. I would guess he is 55. He has his health. Mr. Orloff seems to have his health.

The issue here is what message you are going to send. And the law is all we deal with. Although I told you I don't agree with this law and that if I had my way I'd do otherwise, this is the law we live by. This is the law that His Honor read to you. This is the law by which we govern these proceedings.

Does anyone read an age in this law? Does anyone read in it anything about a person with few friends? Does anyone read in it how much a person's presently is making? I don't see those things covered.

Ladies and gentlemen, the law today is that we ought to set examples so wrongdoing won't be repeated. I don't see anything in there that anyone who has a hole in his shoes should be treated differently from someone who may not have shoes because they have been taken away. And I don't see anything in there that says that you can victimize people and walk free.

Yet from the defendant's counsel I heard the most extraordinary argument I have ever heard in my lifetime of practicing law in front of many juries this afternoon at a quarter to 4:00. I heard that there are 650 other plaintiffs who are going to continue to plague Mr. Orloff, and for that reason "enough is enough." It is an extraordinary argument.

First of all, counsel is wrong. There are far more than 650 people. Fifteen hundred people or more lost their jobs. How many other people in the little companies that they pillaged lost their jobs? How many people in these companies, the myriads of companies, went in the pooper? They, for lack of a better word, are out of jobs. Don't be foxed. Don't be misled.

Far more than 650 people out there are the victims of defendants' conduct. But, yes, he is right about there being approximately 650 who have lawsuits pending against the defendant. And he would say to you because of that: "Do not ring the bell." But I say to you that if you ring that bell, you send that message out.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/II. Argument for Punitive Damages--Securities Fraud Case, Continued/§II.10 B. Exhorting Jury to 'Send the Message'

§II.10 B. Exhorting Jury to "Send the Message"

If you, ladies and gentlemen, send the proper message you will give hope to not only those people who do file a lawsuit, you will give hope to someone tomorrow night at the dinner table that says "Uh-huh, I may have lost my job, but justice was done." And that's what we are asking you to do. We are asking you to do justice. It is very simple whether you believe in me or Mr. Ruby or Mr. Anderson or anybody, but if you believe in the *system*. The system is on trial here. It is the American way of life to put people like you in a box and try the system.

And if you believe the evidence, which is uncontroverted, I ask you to make an example and ring that bell so loud and clear that more than just a few birds will hear the cat. Ring that bell so loud and clear so that other individuals, as Mr. Janssen so eloquently described, will not do the same thing.

I told you this morning that I thought you should assess or figure out and ask them to reach in their bank accounts and pay back \$50 million and make sure that they aren't left with a dollar of profit.

When you go into that jury room ask yourself what should be said on the other end of that phone. Will they be left with a bank account with dollars in it? Or will you say to them that you are going to return that \$50 million. To do that, if you are to divide that money out, and to ring that bell, if you were to add, were to award but \$1 million in punitive damages to each individual to say this is the bell we are going to ring, that would barely cover the option money that they put into their pocket.

If you were to believe Mr. Orloff's words that \$50 million went in, you would award each person \$6.5 million and that would ring the bell. And, ladies and gentlemen, there are 650 people out there who have filed suits and many more than that, probably thousands more that would hear your message.

And I guess the real proof of the pudding is this: If they have nothing, why are they so concerned about your awarding a dollar? You see, if they have no bank accounts, why do they care if you award a billion dollars? That's the fallacy, that's the Tower of Babel. Think about that for a moment. If they *have* nothing, they would do what they told Dr. Bland to do, just go file bankruptcy. But they would like you to award nothing. So it really shouldn't matter to Mr. Penn and Mr. MacChesney if you put down one *billion* dollars. If they have nothing, they can't pay it. That's the hocus pocus. That's why we are here, ladies and gentlemen.

I want to thank you for your deliberations, your time. It is late in the day; my clients—and I can tell you more than just my clients—are going to be waiting for your word, for your voice. A lot of people are going to listen to what you say. I think you are going to put a lot of confidence back in the system when you speak. Thank you, ladies and gentlemen.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/III. Plaintiff's Closing Argument to Jury--Contract Case/Chapter Outline

III.

Plaintiff's Closing Argument to Jury—Contract Case

Lallo et al. v Roberts et al.

CASE SUMMARY: *Members of law firm (Lallo, Eyre & Mann) assert existence of oral partnership agreement to share in distributions from profits earned through efforts of former partner (Roberts), including stock deals entered into with major client.*

I. INTRODUCTION TO CLOSING ARGUMENT

A. General Comment [§III.1](#)

B. Appealing to Jury To Understand Style and Perspective of Earlier Argument [§III.2](#)

II. DEFINING THE ISSUE THAT THE JURY IS TO DECIDE

A. Arguing That Defense Has Raised Irrelevant Issues as a Smokescreen To Divert Jury's Attention [§III.3](#)

B. Restating Plaintiff's Account of the True History of the Partners' Contractual Relationship To Show the Real Issue in the Case [§III.4](#)

C. Selecting Particulars of Evidence To Bolster Theme of Argument: "Agreement Was a Contract, Not 'Guidelines'" [§III.5](#)

III. USING JURY INSTRUCTIONS AS FRAMEWORK OF CLOSING ARGUMENT

A. Explaining "Consideration" as Contract Element [§III.6](#)

B. Explaining Discrepancies in Accounting Records of Disputed Financial Assets [§III.7](#)

1. Arguing Credibility [§III.8](#)

2. Arguing Fairness [§III.9](#)

C. Rearguing the Case in Terms of Answers to Interrogatories and Special Verdicts

1. Witnesses and Evidence [§III.10](#)

2. Statutes of Limitations Issues [§III.11](#)

3. Summarizing Plaintiffs' Justifications for Claims Asserted

a. Tying up Loose Ends in Argument [§III.12](#)

b. Using Plaintiff's Evidence To Infer Correct Answers to Special Interrogatories [§III.13](#)

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/III. Plaintiff's Closing Argument to Jury--Contract Case/ I. INTRODUCTION TO CLOSING ARGUMENT/ §III.1 A. General Comment

I. INTRODUCTION TO CLOSING ARGUMENT

§III.1 A. General Comment

In this well-constructed closing argument, plaintiff's counsel makes strategic selections from the complex and convoluted facts of the case, and from the evidence that has been presented, to define as the simple issues before the jury: (1) the incontrovertible existence of a contract, (2) when that contract was in effect, and (3) what income and services were subject to that contract. In §§III.3-III.5, counsel sets out to accomplish this distillation of the issues through the inverse logic of building up around the defense's claims the negating construct of "a false issue." Characterizing the defense as a "shotgun approach using every conceivable theory in the hope that something will stick," he promotes the inference that plaintiffs' version of the contractual relationship among the law partners is indeed the true legal history of that partnership. Thus emerges the theme of this closing argument: that the agreement under which the partnership operated from its outset was a bona fide contract, not, as defendants claim, loose "guidelines" for participation in the law firm.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/III. Plaintiff's Closing Argument to Jury--Contract Case/§III.2 B. Appealing to Jury to Understand Style and Perspective of Earlier Argument

§III.2 B. Appealing to Jury to Understand Style and Perspective of Earlier Argument

MR. ROTHMAN: Thank you. With Your Honor's permission. ... Ladies and gentlemen, it was about this time yesterday late in the afternoon when I had my first chance to talk to you, and I said maybe I will get lucky and be able to continue during some part of the morning when we are not all so tired. But as chance would have it, here I am back at the same time today as yesterday, and I would ask you as sincerely as I can to try to keep your minds alert for just about another hour or 45 minutes. Then you won't have to listen to us lawyers anymore, and you can go and do what you have to do and what I know you are going to.

I am also very sorry that opposing counsel, Mr. Self, saw fit to personalize this case by suggesting that I had waltzed around and misquoted the evidence; I think he also said that I "rolled my eyes." I sincerely hope that I have not done anything to offend this jury. It was certainly not my intent to. We have been together here for a long time, and I think by now you know Mr. Self and I think you know me. Also I think you know the witnesses. You certainly know the judge. So I am confident that when you go into your deliberations you are going to be able to set aside Mr. Self's nonsensical statements that don't have anything to do with the case that you are going to decide. I already told you in my opening comments that a lot was being thrown at you. If I used pejorative terms, I apologize; but I think you understand what I meant when I said that another law firm had told Mr. Self's client to get lost. The actual testimony of the witnesses was that their partners had rejected his case.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/III. Plaintiff's Closing Argument to Jury--Contract Case/ II. DEFINING THE ISSUE THAT THE JURY IS TO DECIDE/§III.3 A. Arguing That Defense Has Raised Irrelevant Issues as a Smokescreen to Divert Jury's Attention

II. DEFINING THE ISSUE THAT THE JURY IS TO DECIDE

§III.3 A. Arguing That Defense Has Raised Irrelevant Issues as a Smokescreen to Divert Jury's Attention

When as an attorney I say to you that defense counsel's presentation has been a shotgun proceeding, I mean that they have thrown everything up against the wall, every single conceivable theory, with the hope that maybe something will stick. So, for example, instead of taking the direct position that there is no contract, which is their contention, they say no, there is no contract, but if there were a contract it doesn't have the "essential elements." For what essential elements are, counsel thinks up about 10 or 15 different things. And then he talks about the statute of limitations, trying to shift to another subject to get you away from what was the simple issue of this case. That simple issue is what you saw on Exhibit 12: Whether the parties agreed to do something and whether that agreement has been kept. And alternatively, irrespective of any such agreement, whether there are obligations because they are partners. We will talk about this in a little bit; that's the issue in this case.

Now, let me explain what I mean by giving you a false issue, and I will try to make this as simple as I possibly can.

For 30 minutes yesterday, from four o'clock to four-thirty, Mr. Self argued the following: That his client, Mr. Roberts, has to put up 40, 50 million dollars. And those people, the plaintiffs, they have to put up nothing. And Mr. Roberts has to pay expenses, and he has to take out loans, and he has to run the risk of bankruptcy, and he has to run the risk of tenants leaving; and Mr. Self went on and on and on. And now I ask you, what have those claims got to do with this case? Let me explain.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/III. Plaintiff's Closing Argument to Jury--Contract Case/§III.4 B. Restating Plaintiff's Account of the True History of the Partners' Contractual Relationship to Show the Real Issue in the Case

§III.4 B. Restating Plaintiff's Account of the True History of the Partners' Contractual Relationship to Show the Real Issue in the Case

The parties entered into a contract, as we view the case, when they formed the law firm in February 1976. In February of 1976 there were no obligations. There were no loans. There were no expenses. You will remember Mr. Houghton's testimony: "Roberts told me it was a carried interest," meaning there were no obligations. And at that point, Mr. Roberts was to share in the first million dollars of the Miramar Group. He wasn't to pay anything. Now, that was the situation in 1976 when the deal was struck. It was really no more than that in 1976. Mr. O'Gara, the developer, had just come out of a bankruptcy, and he was so happy that Mr. Roberts had helped him with it even though Roberts' law firm didn't know whether or not they would ever see any fees from this client O'Gara. They took a chance.

And then, ladies and gentlemen, as counsel really was saying, the agreement turned out to be a pretty good deal as things developed and the years went on. And Mr. Roberts got very rich. And maybe Mr. Roberts put money in. But, ladies and gentlemen, that's not the issue in this case. It's beside the point whether later on he got comfortable or had obligations. The issue is what the agreement was in 1976 and what the situation was that prevailed in 1976 when they sat down to make the agreement. At that time there were no millions of dollars being put in by Mr. Roberts. There were no expenses going out for Mr. Roberts. It was a free ride, and it was that free ride that he was going to share.

Now, Mr. Roberts' counsel cannot come in front of you and say, as, I think, he has implied, that, well, the deal turned out real good, and my client had to put a lot of money in and now sharing's not fair. That is precisely the reason—and please understand this—that is precisely the reason you are not being asked to fix money damages. Those are issues that will be dealt with by the court at a later time. They are not before you; so, for example, if later we go back to the years after the contract was agreed to when Mr. Roberts had to put a million dollars in, the *court* will decide whether or not we get any part of that first million dollars. And the court may very well say he gets....

THE COURT: Come to the bench.

[The following bench conference was held out of the jury's hearing:]

THE COURT: I think the objection is well founded if I understand where Mr. Self is going with it. Whether he paid money or is obliged to pay does not have a place in this litigation in matters before the jury. Other than indicating to the jury that damages is not before them, it's not appropriate to indicate how I might allocate credit in the future. Now that you have introduced it, something has to be done to cure it. What do you propose?

MR. ROTHMAN: Well, I don't know what to propose. I legitimately felt that was proper argument.

THE COURT: I disagree with you. It is not. Going from there, do you have something that you propose to do? Otherwise, I will do something.

MR. ROTHMAN: What would Your Honor suggest?

THE COURT: I am asking you if you have anything that you propose to do. Otherwise I will tell the jury that was an improper comment and strike it.

MR. ROTHMAN: I will tell the jury that the issue as to whether or not Mr. Roberts pays any money is not before them.

THE COURT: Well, you already told them that.

MR. ROTHMAN: That is, that the issue of whether Mr. Roberts has paid any money is an issue that they can consider in determining whether or not there was a contract.

THE COURT: Mr. Self?

MR. SELF: Your Honor, I don't think that satisfies it, and I also have an additional objection. And that is, Mr. Rothman is telling this jury that the contract that was entered...

THE COURT: That the what?

MR. SELF: That the alleged contract that was entered into at the outset was it, and whatever happened thereafter was just controlled by it. And that's totally contrary to the court's ruling.

THE COURT: I don't believe he said that.

MR. SELF: I think the court should rule from the bench on it and instruct the jury to disregard it.

THE COURT: I think what I should do is inform the jury that the instructions have framed the issues before them, and they are not to speculate on anything that might occur with respect to any other proceeding, or what the issues may be or may not be in any other proceeding. They are to decide this matter solely on the evidence presented here and in light of the instructions that I have given them. All right?

MR. SELF: Very well, Your Honor.

[The following proceedings were held in open court in the presence and hearing of the jury:]

THE COURT: Ladies and gentlemen, there has been a reference just now in summation to matters that might be decided at some other time. I want to tell you that the issues before you are those issues that are framed in the instructions that I have given you, and are to be determined in light of those instructions and a few instructions that I will give you shortly and in light of the evidence in the case.

And you are not to speculate or even consider what other issues might exist, or what might be decided by who or anytime in the future. That is not a matter of your concern. The only matters that are of your concern are the issues that are framed in the instructions that I have given you, which you are to determine in light of the evidence presented in this case.

Continue now, Mr. Rothman.

COMMENT

The above interruption in the proceedings illustrates clearly the subtle distinctions between permissible and impermissible argument. Here the court has sustained the defense's objection to counsel's reference to an aspect of the case not before the jury—money damages. Although the court concedes that it was proper for counsel to "indicate to the jury that damages is not before them," to speculate on how they might be awarded is not. To the judge's directive that counsel cure the error, counsel proposes to restate his speculative words on what the court might do with words directly within the context of the present trial, *i.e.*, that the issue of whether defendant has paid any money "is an issue [the jury] can consider in determining the issue of whether or not there was a contract." This proposal does not satisfy opposing counsel, and the court itself admonishes the jury "not to speculate or even consider what other issues might exist, or what might be decided by whom any time in the future." On this subject generally, and on the cure for impermissible argument, see Book chap 3.

MR. ROTHMAN: And so now to conclude with the point that I was making: That these issues of Mr. Roberts' obligations to put in money came about at a later time and do not change the facts that existed there at the time the contract was entered into, nor do they change the original arrangement, which started back at the time the law firm was created. Rather, to go into those issues would divert your attention into conjecturing whether, perhaps, well, gee whiz, he had to put in some money later on, so maybe it was too good a deal ... or maybe too bad a deal.

Just think for a moment, if you will, how it would have turned out after they made the agreement they said they made when the law firm started, if Mr. O'Gara had continued to have reversals and had run up legal services and perhaps had again gone into bankruptcy; then Mr. Roberts would have gotten nothing, the law firm would have had to eat the expenses, and the deal would have been a bad one. That scenario could have as easily been the situation that existed when this deal started.

Now, counsel has spent a considerable amount of time talking to you about the fact that attorneys can't gouge clients. That's not a real issue in this case. Nobody in this case is contending that Mr. O'Gara owes a penny. Nobody in this case is asking Mr. O'Gara to pay anything.

What *we* are saying in this case is that to the extent distributions come to Mr. Roberts, then they have to be shared pursuant to these various agreements. So what has our contention got to do with either high fees, or, in the alternative, what Mr. O'Gara may or may not want? It has nothing to do with Mr. O'Gara himself, who had his own reasons for making something available to a member of the law firm for services rendered or pursuant to another agreement between the lawyers in the law firm; that is no reason for Mr. Self to go off on still another tangent. But so he does go off.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/III. Plaintiff's Closing Argument to Jury--Contract Case/§III.5 C. Selecting Particulars of Evidence to Bolster Theme of Argument: 'Agreement Was a Contract, Not Guidelines'

§III.5 C. Selecting Particulars of Evidence to Bolster Theme of Argument: "Agreement Was a Contract, Not 'Guidelines'"

Defense counsel also goes on, if I may say so, to talk endlessly about what are the numbers, although as I pointed out to you earlier, leaving aside whether these numbers are "guidelines," as he contends, or contracts, there is no disagreement to speak of with respect to them. Now, why are we talking about that? Why are we arguing about that? Nobody is saying that the numbers are different. What they are saying is that the numbers have a different meaning, which is the wrong issue. And so all of that discussion about not knowing what they wanted or what they expected is exactly consistent with what Mr. Roberts has said were the guidelines to begin with. And, you will remember, when I asked Mr. Roberts whether these were the guidelines after Mr. Mann came in and worked the matter out with him, Mr. Roberts said that's right. Then he wrote on some of these charts what the guidelines were—his own writing. And they are the same numbers that we are working with. So they are not a real issue. But I do want now to come to what I believe is a significant issue.

Ladies and gentlemen, there comes a time in a trial where something happens, some exhibit comes into evidence, something develops that kind of brings everything into a focus. And you will remember my saying to you in my opening statement very early when we were first starting out—which seems like many months ago—that Mr. Roberts and Mr. O'Gara entered into an agreement in 1985, but that they back-dated that agreement to a different date. And the date they picked out was a date right after the law firm terminated.

Now, let's examine that set of facts in light of the testimony, and then let's see what that leads us to. We know now from the testimony that in 1982—and I hope you will remember this as I lay it out for you—that in 1982 while the law firm was going along and in existence, Mr. Roberts changed his relationship with Mr. O'Gara, and at that time they became 50-50 partners and each were to own stock. And Mr. Roberts testified that he got his stock in 1982 while the firm was in existence.

And then Mr. O'Gara testified that after that was done in 1982, Roberts wanted something formal because their relationship had been informal. And so it came now to 1985 and to the exhibit I know you will want to look at—it is Exhibit 493 in evidence—when they finally got this agreement that now sets forth the formal relationship between Mr. O'Gara and Mr. Roberts pursuant to this 1982 stock agreement. And they dated the agreement as of April 1983.

Now, why did they date it back to that date? When I asked Mr. Roberts that question on the witness stand, he said, "Well, that was the date when our new relationship was created."

But we know that isn't true. We know the relationship was created back in 1982. So there was no logical reason to make the agreement effective two years backwards except to make it effective after Mr. Roberts left the law firm.

Why? Why make it effective after he left the law firm? Because Mr. Roberts recognized that if it were effective any time before the law firm was closed or before he left the firm, rights could be asserted against him as now they are being asserted.

Now, if there was one logical reason for picking out that March 19, 1983, date or the April 1983 date to date the agreement back to, I ask you—rhetorically—what was that reason and whether Mr. Roberts told us the truth when he said that was the time at which their relationship developed, because earlier he said their relationship had developed in 1982.

Please, ladies and gentlemen, when you go to the jury room think about that discrepancy and ask yourself why, and remember that for fifteen minutes this morning Mr. Self discussed with each of you something that he called "essential terms." Because, ladies and gentlemen, there comes a time, it seems to me, when you are going to have to ask yourself, are these lawyers really telling it to me as it is, or is this lawyer talk. And that's why it is sometimes difficult to submit civil matters to juries. Juries are very adept at finding who is guilty and who is innocent, who is responsible for this kind of problem and that kind, but when we get into civil litigation it's a little tougher.

Let's suppose—please suppose with me for a moment—that there was a written agreement, a written agreement between Mr. Roberts and Mr. Lallo and Mr. Eyre, and it said, "I, Mr. Roberts, agree to give you, Mr. Lallo, and you, Mr. Eyre, a percentage of the following projects." Everybody signed it. And they got a notary and the notary sealed it. Yet, Mr. Self would stand up and say, "No contract. No contract." Because, says he, there are all kinds of elements that are missing. What happens if the law firm closes? What happens if somebody has to put some money into it? What happens if a nuclear bomb drops? All kinds of things. If that were the situation, there would never be any contracts. Nobody is bright enough to think of every contingency and every possibility. So the law recognizes that if I say to you I will sell you my car for \$10 and you say I will buy the car for \$10, and we shake hands on it, that's a contract. And that's a binding and enforceable contract. We haven't provided for what happens if you

get four flat tires before you sell it to me, and we haven't provided for what happens if you get into an accident; those are matters that the law will take care of. But we DO have a contract. And as the court has instructed you, a contract can be oral or written. Both kinds are equally valid.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/III. Plaintiff's Closing Argument to Jury--Contract Case/ III. USING JURY INSTRUCTIONS AS FRAMEWORK OF CLOSING ARGUMENT/§III.6 A. Explaining 'Consideration' as Contract Element

III. USING JURY INSTRUCTIONS AS FRAMEWORK OF CLOSING ARGUMENT

§III.6 A. Explaining "Consideration" as Contract Element

Mr. Robert's attorney proceeds to, I think, take you again down a garden path when he tells you that, however the agreement may appear, there was no "consideration." He says nobody gave any value for this contract.

Now, I sure assure you that I am not going to involve this jury in a law school examination. Still, I do want to just read one part of the judge's instructions, which you will have in your packet, where the court is defining for you what "consideration" is.

And may I in fairness to everybody say that when I read from an instruction, all of these instructions are equally important. None is more important than another. What I am trying to highlight, as did Mr. Self, is a particular portion. So I have to read from it. I can't read the whole instruction over again, but here is what the court says to you and has instructed you with respect to consideration:

A promise is not enforceable as a contract unless something of value is given or agreed to be given in exchange for the promise.

That's why Mr. Self thought he could stand up here and ask, what did they give of value? They didn't *pay* anything for it.

But the court then goes on to say, and here is the critical language:

In law we call that "consideration" for the promise. The thing of value that is given in exchange for the promise may itself be a promise.

What that means is I promise to sell you my car; you promise to buy it. Promise for promise. Contract. The parties promised to form this law firm. We promised to do our thing in the law firm; we promised to do our thing and bring O'Gara deals in. Promise for promise.

Later on—later on we have a one-third interest because they want to renegotiate; they want us to enter into a new agreement. They want the lion's share; they want more money. Okay. We will give up our interest of a third and we will take less, and that will keep the law firm together and we can continue working, and they can keep working for us. Promise for promise. That's all the law requires. That's the consideration.

And if you read that court's instruction, promise for promise is exactly all it is talking about. Why is it that way? Well, it's that way because when the parties got together originally, who knew what the future held? This could have been the greatest deal or the worst deal. It could have been good; it could have been disastrous. And so the only promise that could have been made was the promise to form this law firm; later on, when the agreement was modified and there was a new agreement, the promises were we will take less.

Now, Mr. Self is quite right. I want to concede right wherever it is. If there was no right of any kind to get anything, then there is nothing.

But I submit to you that it takes a little bit of exercise to think that these parties formed this law firm without some understanding about what they were doing.

Now, remember, oral understandings are every bit as good as written understandings, and equally valuable and equally enforceable and equally legal. And, having said that, I want very much to explain to you as clearly as I can, as simply as I can, the loose use of language that you heard in defendant's argument a little while ago.

You will remember we talked about the second theory: the obligations of a partner to a partner, and when Mr. Self talked to you I wrote the words down, meticulously, about how legal services had to be rendered by Mr. Roberts before the law firm was entitled to anything—*legal* service. But, ladies and gentlemen, that is absolutely wrong, and you have been instructed on this issue; so I urge, along with the other instructions, that you carefully read this instruction. This theory—the obligation of one partner to another—is, again, the part of the case that doesn't require any contract. This is vitally important here, and I want to read it to you.

The court's instruction says:

In addition to plaintiffs' claim that the defendant has breached an oral contract (a matter which has been the subject of the preceding instructions), plaintiffs [that is, our side] also contend that defendant has breached a duty to share with them certain benefits which he received from O'Gara partnerships. This claim...

Hear me now:

This claim is not based upon, nor does it require the existence of, the oral contract about which I have just instructed you.

Now, here is the court's language that is going to control your deliberation on this instruction:

Payments to a lawyer by a client for services rendered to such a client on behalf of a law corporation are assets of the law corporation.

Now, hear what this does *not* say here: It does not say payments to a lawyer by a client for *legal services*; I repeat, it does not say *legal services*. It says payments to a lawyer by a client for *services rendered*.

Let's now examine what that means in light of the evidence. Why did Mr. Roberts get these interests in O'Gara Developers? O'Gara has told us the answer to that question. He said that he gave them to Mr. Roberts to give him an incentive to work substantially only for O'Gara interests and to give O'Gara all of his time and his efforts. That's why O'Gara gave them to Mr. Roberts. Mr. O'Gara says to you, if I may paraphrase his words: "I am buying—through the ruse of giving him some interest in these partnerships—I am buying his time. I am buying his services." Not his legal services, mind you, his *services*.

And, ladies and gentlemen of the jury, his having done that means it falls directly within the confines of this instruction by the court. And so now with that little preface let me read you again what the instruction says:

Payments to a lawyer by a client for services rendered to such a client on behalf of a law corporation are assets of the law corporation. In order to prove this claim, plaintiffs must establish that the defendant failed or refused to share with plaintiffs benefits which he received from a client for services...

not "legal services," but for services

rendered to such client on behalf of the law corporation.

Ladies and gentlemen, in my judgment, and I hope in yours, when you read that instruction and just simply put with it Mr. O'Gara's testimony, you will come to the conclusion that Roberts got paid these extra goodies, which turned out to be very substantial goodies, for services that he was rendering to a client during law firm time and efforts that belonged to the law corporation. He was doing it during the day. He was doing it from the law office. He was doing it with the law furniture, the law secretary, and the law mail.

And I don't have to respond to what I think is just nonsense about whether or not it's like "washing the car." Lawyers, I suppose, can reduce anything to absolute stupidity. What Mr. Roberts was doing for Mr. O'Gara was not washing cars. He was getting an incentive to give him substantially all of his services, and he was doing it on law firm time during the day. And the law firm was agreeing to let him do it.

Why did the other lawyers in the law firm, Mr. Eyre, Mr. Lallo, and Mr. Mann, agree to let Roberts set any retainer he wanted with Mr. O'Gara, saying in effect, "Whatever you want as a retainer, Bill Roberts, is okay with us"? Because they knew his services belonged to that firm; and, as that instruction tells you, they didn't have to be legal services.

COMMENT

By incorporating the exact language of the jury instructions into his final argument, counsel alerts the members of the jury to what the judge soon will read them, and, in so doing, creates a sense of alliance between his argument and the court itself. Beyond that, counsel seizes the opportunity to reargue the specifics of plaintiffs' claims in the very language of the instructions themselves. For example, as illustrated above, he was given the opportunity to "translate" the jury instruction that "consideration for a promise may itself be a promise" as "defendant promised to do his thing and bring developer deals in. Promise for promise." This technique is replicated in §§III.10-III.13, where he walks the jury through the language of the special verdicts and interrogatories and in doing so recapitulates the history, personnel, geography, and economics of his legal contentions. On the role of jury instructions in concluding argument generally, see [Book §§2.14, 2.22](#). See also [Book §2.2](#).

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/III. Plaintiff's Closing Argument to Jury--Contract Case/§III.7 B. Explaining Discrepancies in Accounting Records of Disputed Financial Assets

§III.7 B. Explaining Discrepancies in Accounting Records of Disputed Financial Assets

Now, we have heard a tremendous amount about why these assets were not put on the firm's financials, why they don't show on the firm's financial obligation forms. We heard that again this morning, over and over again, as though that's an issue in this case. Let's examine that contention. And I will be brief.

Number one, you will remember their testimony about how they decided for their own reasons—tax reasons—to take the money outside of the partnership. And so the checks for Miramar Group were not written from the partnerships but were written from personal checks. They felt it was a tax gain advantage. And that was something that they had all agreed to. But more importantly than the tax "explanation," Mr. Self said Tom Daniels, the accountant, who, you will recall, has explained all of this, makes it clear that this should have been on the books and records of the firm.

That is, ladies and gentlemen, absolute folly. And let me explain why it is folly. And I will try to see if there is any way that I can be mistaken on this, but I know that I am not. Remember this: Mr. Daniels came forward and said if it was a law firm asset, it had to be on the books and records of the law firm. You will all remember that. And then I said to him, well, how about Mr. Naragan's association, why isn't that on the books and records of the law firm?

He said—"Well," he said, "I think the reason that wasn't there is that this wasn't a law firm asset. This was a private interest between the individuals."

And then lo and behold in argument today, within the last 30 minutes, Mr. Self puts up on the board an exhibit that shows Mr. Mann what his interest is going to be in the firm. And right up there on the firm's exhibit is Naragan. And Mr. Self himself actually said to you that Mr. Naragan *is* a firm asset, and there it is. And he pointed it out only 30 minutes ago.

Now, Mr. Daniels can't have it both ways. He can't say he didn't include Naragan's association on the financials because it is not a firm asset, and then let it be included on their exhibit as a firm asset when they are speaking to Mr. Mann. It can't be that way. And the reason it wasn't included in those firm financial statements or firm forms is because it doesn't belong there. When these associations were formed nobody knew what the Miramar Group was worth. What were you going to put on the forms for the firm? What were you going to put on the tax forms?

When the money started to come out they agreed to take it outside of the firm for their own purposes, just as they did in their dealings with Naragan. There was nothing to put there. There was nothing to put on the income tax returns. So what they are giving you now is a series of false issues, issues that really don't fit in this case. For example, how do they explain the receipt of the \$275,000? You remember seeing the checks. That amount didn't appear on the firm's financials, but they got it. Nobody is denying that. So there must have been an agreement to take that amount as their private moneys given outside the firm; there is nothing wrong with that, and that's why it isn't on the firm's financials. But we sat here for literally dozens and dozens of moments discussing that issue, which is really not an issue.

§III.8 1. Arguing Credibility

To continue, we have talked here about credibility. I hope that I can impose upon you the request to listen to what I have to say now with a little bit of care. We talked about credibility, about who is telling the truth. And, ladies and gentlemen, let's assume for the purposes of one second only that these numbers were guidelines, though I don't believe that for a moment. When Mr. Roberts got the third million, remember there was a third million on Miramar, he never told Mr. O'Gara about it. He never said a word. That information was withheld from us. And from the witness stand for the very first time we heard the comment and testimony that there was a distribution on the Union Bank building project. And, incidentally, we have to be sure everybody understands we are using the name Union Bank downtown and Citicorp as all meaning the same thing. I think when you get your jury instructions and special verdicts they will say "on the Union Bank project," but you all know I am talking about the same thing as that.

Well, defendants got a distribution on Union Bank and didn't tell us about that. So, ladies and gentlemen, when you evaluate credibility, you will also remember when you evaluate credibility, I asked Mr. Roberts:

Question: "How much did you get by way of distribution from Union Bank?"

Answer: "I can't remember."

Question: "Was it \$50 million?"

Answer: "I can't remember."

Ladies and gentlemen, I know you think differently about that. And finally when Mr. O'Gara came on, and he is reasonably more direct, and he conceded that it was somewhere in the vicinity of \$30 million for half of the building. We never knew about that.

Now, let's assume for the purposes of discussion, let's just assume for purposes of discussion, that there were no contracts. Wasn't there a reason, a logical reason for Mr. Roberts to tell us about that? If his theory of the case is right, he could have said, "Fellows, I made another million on Miramar. You can't have any of it. And I got another 5 million, 4 million"—whatever the number may be—"on the downtown project, but you have no right to it." But he said nothing; he withheld that information from us.

Why? Why? I hope that you will ask that question when you try to determine whether or not we are getting a fair shake.

Next, we talked about—we talked about W.D.W. Corporation. Now, I got charged with using a bad word when I said that Lallo and Eyre told them to get lost. I know that's not a serious problem, but Mr. Self suggested that I suggested that Ms. Strathmore's testimony was a red herring. I don't think I said that. I am sure I didn't. That's an expression I wouldn't use. But the fact of the matter is, what *does* her testimony have to do with this case? What does Ms. Strathmore have to do with this case? W.D.W. Corporation was not the result of anything from a client. W.D.W. were lawyers who themselves were investing with their own money into a house, a car, a condominium, whatever the case may be.

Mr. Roberts was investing in Kampy Kabins and whatever else he was investing in, and the parties all agreed that they wouldn't share these investments with one another. Roberts didn't want any part of that. But forget all this; what does it have to do with this case? We are not talking about rights that come within your own corporation. We are talking about rights that come from a client. Mr. O'Gara was a client. And so why we heard from Ms. Strathmore, or why we heard laboriously about what she did, is beyond me. It doesn't bring anything to light in this case.

§III.9 2. Arguing Fairness

I also want to make another very quick point, one that doesn't create any issues of magnitude that will help you decide or not decide the case, but one that speaks to the issue of fairness. You know, there has to be a bit of fairness when you comment on what somebody has done or not done. And Mr. Lallo took a pretty substantial beating from Mr. Self about what he was doing in the law firm. Now, let's examine how fair that was.

Number one, that chart you saw was supposed to show "billable hours." What billable hours means is hours that they can charge clients money for. But if you are the partner in the law firm who is responsible for the administration of that law firm, you are charged with the duty of hiring secretaries and employees and running the firm. All of the hours that you are spending are called "nonbillable" hours, but you can be working around the clock doing those things. And many law firms have lawyers who work all their full workdays on nonbillable matters. For example, when you go to interview a law student at some far away law school as a potential employee and you spend all day at the universities talking with those people, those are nonbillable hours. And when you administer the law firm you are working. Now, it was conceded in this case that Mr. Roberts was too busy working out there with Mr. O'Gara, giving him substantially all his time, and Eyre was in the courtroom doing his trial work, and it was Lallo who was running the law firm, Lallo who was putting in all the nonbillable hours. And it's unfair—it's unfair to put up a chart that doesn't reflect that and to chastise me.

And isn't it a fact that these people were partners for seven years? Did you hear one person testify, Mr. Roberts or anybody else, testify that they had any objection to anything that either Eyre was doing, Mann was doing, or Lallo was doing? Not one word of complaint about their activities, but when they get in the courtroom they give us a distorted chart of those activities. And that's unfair; as a lawyer I feel that I would be doing less than what my job is if I didn't comment on that.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/III. Plaintiff's Closing Argument to Jury--Contract Case/ C. Rearguing the Case in Terms of Answers to Interrogatories and Special Verdicts/§III.10 1. Witnesses and Evidence

C. Rearguing the Case in Terms of Answers to Interrogatories and Special Verdicts

§III.10 1. Witnesses and Evidence

Now, I am "accused" of not calling "all" the witnesses. But, seriously, ladies and gentlemen, there can't be any secrets in a lawsuit about who the witnesses are going to be. Lawyers exchange lists of witnesses. We knew that Tom Daniels was going to be a witness. We knew that O'Gara was going to be a witness. And we waited for them to get their story. We cross-examined them. We told the defendants; we withheld nothing. That is another matter that is—I want to use the word "phony," but I won't—another issue that really isn't before us.

Instead, let's talk about Mr. Mann for half a minute or two. Defendant's counsel tells you that Mann "didn't care." Those are the exact words that he used. That isn't what Mr. Mann testified to. Mr. Mann testified that he cared about getting the same interests, the same exact interest that Lallo and Eyre had. He wanted to be equal with them. He said, "That's all I cared about." He fully recognized that he wasn't going to be equal with Roberts; that was made clear to him. Now, let me tell you what Mr. Mann did. Mr. Mann was with a very fine law firm. You heard about that. He was a partner there. Then he was *recruited* by Mr. Roberts to leave that firm—because Roberts felt that he needed somebody to replace him, because he wasn't doing his share as a lawyer, because he was spending all his time with O'Gara. Consequently, Roberts' firm had to get another tax lawyer in there; so Roberts went out and got Mann.

Mr. Mann tells us that when they determined there was a mistake made about how much his percentage was to be, he negotiated for almost two years with Mr. Roberts. Two years, on and on for two years.

Now, ladies and gentlemen, what were they doing in those two years? Were they just "talking" about "guidelines"? Does that make any degree of common sense? Would Mann have made such a fuss over this if his percentage was something completely at the discretion of Mr. Roberts? Would they have gotten to the point where they were negotiating fractions? I ask you that because I cannot conceive how common sense would conclude that that's what they were doing, talking about "guidelines" or "discretion."

And when they say "guidelines," guidelines for what? "I am going to give you anything I want to," said Roberts allegedly. What do the guidelines do? Why even worry about them? But "guidelines" was the subject of discussion not for five minutes as defendants' counsel said, but for years. And they are serious discussions; they were serious, serious conversations.

Now, I hope—I hope that you will not be annoyed; I don't like having to keep drawing out that Exhibit 12 over and over again. But that's an exhibit that you are going to have to deal with when you get back in the jury room and ponder the interrogatory forms according to the court's instructions to you. I did not ever say that this document was the agreement. Let there be no misunderstanding about this point: *The agreement that we are talking about was the agreement the partners made orally.* What this document, Exhibit 12, is *is a document that reflects the fact that that agreement has been made.*

Now at this time I want to spend a moment or two with this document in a little different vein than heretofore. The only person who ever told us that this document was within that package of pretrip documents for Mr. Roberts was Mr. Roberts himself. Nobody ever saw that document inside that package. Nobody ever saw inside that package, and I am troubled by the fact that it is titled as a "memo to the files." Any secretary knows what a memo to the files means, and it does not mean, as counsel has contended, a memo to defendant's daughter, as Roberts claims, or a memo to his lawyer, and it does not mean a memo to take effect in case of his death. This is a memo to his files. And anybody who has ever been a secretary, or anybody who has ever worked with a secretary, knows that a memo to the files is a memo that you write as a lawyer, not as a nonlawyer, and you put it in the files as a business record for the files. You do not send off, as counsel has contended, a letter of instruction to your daughter by saying here is a memo to the files. So I think you might ask yourselves whether or not this document, Exhibit 12, was ever in that package. But even if it was—and I am not sure one way or the other; I don't know—I still have some very serious doubts about this document. I have doubts for the reason that it's not enough to say that this document was to take effect on occasion of someone's death because the document expresses what it expresses. This is what I thought while I listened to Mr. Self, thinking that at last he would explain this document, tell this jury whether it means something or doesn't mean something.

But, ladies and gentlemen, there was not one single word of explanation. Not a word by Mr. Self, silence. All he said about this document was "Mr. Rothman contends this is the contract." No, what he claims it is may be something Mr. Self himself may fully understand, but I certainly don't. Instead, don't we have to have some kind of reasonable explanation as to what that is? I keep you awake that way. Have you heard the question? Have you understood what it means to have a deal? What it means to have an agreement?

And you know—let me address this subject if I may, respectfully: Counsel says to you, that, you know, Lallo was a very sophisticated lawyer. Eyre was a very sophisticated lawyer. They were very sophisticated men. They should have known how to do these things. Well, Mr. Roberts was a very sophisticated lawyer, too. A very, very sophisticated lawyer. If you believe him, he saved Mr. O'Gara, the biggest developer in this county.

Is this what a sophisticated lawyer would have written if he had intended to create "guidelines"? Is this what he would have written if what he intended was that this agreement was to take effect only if he died?

And then we get this incredible story, this incredible story from Mr. O'Gara, who says that in his interpretation he doesn't think that Roberts could have even made this deal shown in the document. So are they going to argue that even if Roberts died, we couldn't even get what was in there because O'Gara says we can't have it? That's not what happened.

Now, if Mr. O'Gara says this deal could not have been made without his permission, then certainly Mr. Roberts would have known that. And if he knew that, why did he say otherwise in the document?

It becomes very, very clear Mr. Roberts was playing a very, very cagey game. But, says he, who is to say that he is not telling the truth when he says he put this document in the package, and it was the only document that found its way out of the package during the course of this trial.

I have trouble with that. I want you to ask each of your fellow jurors, if you would be so kind, when you go into the jury room, why didn't he say in there "guideline level of expectation with Lallo and Eyre"? Why did he say "deals" with Lallo and Eyre? Why does he not say "I have no obligation to anybody else, but if I die I would appreciate your giving the following interest as my representative if I die," as distinguished from saying, "I agree to give these interests"?

Ladies and gentlemen, I don't know if you are ever going to get a case in your experience as jurors where you find anything more clear. And not only do you find it clear, you don't have an answer from counsel except to say it went into a "death file."

§III.11 2. Statutes of Limitations Issues

Now, ladies and gentlemen, I want to talk to you for a moment about the statute of limitations. What troubles me is that that argument is again part of the shotgun approach, which first says "no contract." That's their argument, but then all kinds of theories about things plaintiff has already explained are brought forth to the effect that even if you do find a contract on 470 West Palm, the statute of limitations is a bar.

Now, first of all, let's be sure we all understand what we are talking about. The statute of limitations does not apply to a theory involving the obligations to share the benefits that belong to the law corporation.

That's the second theory. No statute of limitations is involved, and you get no instruction on that. You get no special verdict forms on that.

With respect to 470 West Palm, when you read the special verdict that you are going to be asked to sign—and it is Special Verdicts Nos. 10 and 11, and 11 is the critical one. And 11 says—I am giving you only a portion of it:

Was this action brought within two years of the last disbursement of money to the defendant from 470 West Palm?

Now, the key word there on Interrogatory No. 11 is "last":

Was this action brought within two years of the last disbursement of money to the defendant from the 470 West Palm project?

So the question is when the last disbursement was. When was the last disbursement? And in that connection, ladies and gentlemen, if you will examine—excuse me for just a minute—if you will examine Exhibit 240, which is in evidence. Exhibit 240 is a letter from Roberts to O'Gara, which says on December the 29th of 1981, December 29, 1981:

We further agree...

that is, Roberts and O'Gara further agree

that I [Roberts] am entitled to the following sums from you.

And then item a:

Roberts' share of interest in 470 West Palm...

Now, that is on Exhibit 240. The date of that letter is December 29, 1981.

This lawsuit was brought in February of 1983. So it was brought within two years of the last disbursement, and therefore you should answer this question, in my judgment, that the statute of limitations even as to the 470 West Palm deal does not apply.

So I ask you to examine, please, if you will, Exhibit 240 when you get to Interrogatory No. 11.

Now, I want to spend just a few minutes talking to you about the special verdicts.

[Short break in court proceedings.]

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/III. Plaintiff's Closing Argument to Jury--Contract Case/ 3. Summarizing Plaintiffs' Justifications for Claims Asserted/§III.12 a. Tying up Loose Ends in Argument

3. Summarizing Plaintiffs' Justifications for Claims Asserted

§III.12 a. Tying up Loose Ends in Argument

You have been a very patient group. I can't tell you how much we appreciate that. I know how hard it is to just sit there and listen to lawyers going over and over this material.

THE COURT: Mr. Rothman, will you speed it up a little bit?

MR. ROTHMAN: Yes, yes. I know how hard it is for you to sit here and listen to this, but I promise you now that I am very close to the conclusion.

Before I get to the special verdicts, there are some loose ends I would like to discuss with you because they came up earlier in various phases of the trial and you may have forgotten about them.

You will recall that when we were talking about the distribution from Miramar Group's first million dollars, Mr. Self attempted to show that my clients didn't get all the money we said we got from that distribution; but our witnesses' testimony was that we got everything that we were entitled to. But still counsel indeed went to the blackboard and had Mr. Roberts put out the numbers to show how much came in and how much went out. And ultimately Mr. Roberts' numbers showed that there was some money short of what should have been paid out. And consistent with that "shortage," Mr. Lallo and Mr. Eyre continued to say that they were paid everything they had coming from that distribution.

Now, you are also going to remember, though I'm sure it's a long time ago, but I hope you do remember that when Mr. Roberts wanted to show that he had paid \$175,000 to the law firm, he brought in one of these sheets. It looks like what I am holding up in front you, which is Exhibit 762 in evidence. Roberts' sheet came right in and showed that that \$175,000 had been paid, but a little later when I tried to get sheets in like that one into evidence, Mr. Roberts said he didn't know if they are the law firm records or not. Even though they were exactly the same kind of sheets as the one he used as evidence. But after a laborious exercise we finally got it in, which leads me now to say about our Exhibit 762 that it shows you that there was another \$52,000 that came in on Miramar that they never accounted for when they put their numbers on the board. Never accounted for.

They wanted you to believe that all that came into the firm was that first million and, therefore, Lallo and Eyre didn't get enough. But when you look at 762, and you will look at it, I hope you will find that there was another \$50,000 plus in there that for one reason or another Mr. Roberts didn't want to admit to, and would not have admitted but for the fact that we finally were able to get this document in evidence. 762.

Also, ladies and gentlemen, another loose point that came up during the course of the argument was this: Well, if Barnes and Houghton were going to be members of the firm, why didn't they know that they were to have an interest?

Well, first of all, you all recognize—and there is no quarrel about this—that the first partner to come in after Roberts, Lallo, and Eyre was Mr. Mann. And Mr. Mann was to be a full 25-percent partner. But they made certain agreements with him and they told him he was a "late partner"; so (a) he will not participate in Miramar Group deals and (b), with respect to the Union Bank building project, he is going to get a lesser share. And you ultimately saw how he did get that lesser share.

So they are now beginning as a matter of conduct of the firm to make distinctions among partners as they came in at different times. And there was nothing inconsistent with the position they were taking, having established that position with Mr. Mann, that they were not going to cut Mr. Houghton into Miramar's investments. They didn't give Mann any part of the Miramar Group. And there was no further cut-up to be made on the Union Bank project. That's not inconsistent. Corporations do that all the time. Senior partners have more than less. Mr. Houghton didn't stay around long enough to get his feet wet. He was gone.

There is a problem with Mr. Houghton, though, that I think has to be addressed. You will remember that Mr. Lallo or Mr. Eyre, I don't remember exactly which one, said, "We settled our differences with Mr. Houghton when he left. We came to a settlement." But, Houghton said, that's not correct. As a matter of fact, he said, "I was owed \$50,000, and I wrote them a letter, I told them to pay me the \$50,000. And when I didn't hear from them I thought I would forget about it, go on with my life." That is what he said. That's Houghton's testimony.

Now, ladies and gentlemen of this jury, one thing is clear. Mr. Self and Mr. Conrad were not reluctant to put documents in evidence. They were not reluctant to fill this record with every conceivable thing they wanted in this record that the court would

permit in. And they chose to put in some Houghton letters arguing over fees. But did you see any letter that said, "I want \$50,000"? Did they offer any such letter?

And don't you think for one moment that defendants' counsel, Mr. Self and Mr. Conrad, would let that pass if they knew that such a letter existed. There would have been Mr. Houghton sitting up here on the stand reading from that letter and showing it to each of us. Nor can they say that Houghton didn't turn over his correspondence. We had some Houghton correspondence in the record.

How interesting it is, and I say this kindly, that Mr. Houghton knows where his interests as a partner lie. But the absence of that letter tells me a great deal and, I hope it tells you a great deal.

Now, there has also been discussion in one of the special interrogatories that you will get asking you whether or not the agreements that we were referring to in earlier interrogatories apply to the first and second Union Bank deals or whether they apply only to the first deal.

Now, what's the state of the record? The state of the record is that nobody but Mr. Roberts on the witness stand ever made a distinction. Everybody says we talked about Union as one project. All the documents show Union as one project. And then we have a very interesting thing—and please hear me out on this—we have a very interesting fact because now they say that, well, maybe Exhibit No. 12 should have limited purposes, that they don't think it means what it says, although when it says this applies only to the first Union Bank deal, that's what controls.

Now, you can't have it both ways.

MR. SELF: Your Honor, I am going to object to that. I made no such comments.

THE COURT: Overruled.

MR. ROTHMAN: You cannot say that a document is wrong, that it doesn't reflect what you meant it to reflect, but also say that in the parts that are good for you, you accept it as valid. Now, ladies and gentlemen, other than that phrase and some testimony that came out unilaterally from Mr. Roberts, we never heard of any distinctions.

Can you conceive of the parties sitting down and saying, look, we will have guidelines. There will be levels of expectation. They are not binding and they only apply to the first Union Bank deal. Now, as somebody once said in some place, that's a conversation that never took place.

I also think it's important to discuss with you for just a moment or two these special verdict forms.

Oh, incidentally, before I do that—that will be the end of my presentation—I just want to make a little comment. I don't think these two points are terribly important, but they might—they might—hit a chord.

There is another very beautiful chart that you saw in argument today. Now, I could be nasty and say that when you hit it big and own buildings you can spend money on charts, but I don't think that will really advance the cause very much. But what is important about the chart is that they are trying to show you all the written agreements, for whatever value that has, and here is Exhibit 208. This is one of the exhibits in evidence. This is one of the exhibits on the chart, and this is what they call a written agreement.

This has some—did counsel say "hen pecks" or "hen scratchings" or whatever—but that really is what we are up against in trying to make sense of it, and I think that's unfair. I think that's unfair.

Secondly, when I asked the questions at the deposition about what was in these folders prior to the trip, and he gave me the fact that it was an April 1980 document, Exhibit 17-B. Now Mr. Self suggests, well, he confused that with Exhibit 16. 17-B is a signed document. They didn't show you that signature page on the blackboard and Exhibit 16-B is just a draft. It has no signatures on it.

So when we said at the deposition to Mr. O'Gara, or Mr. Roberts, you check those documents—I am paraphrasing now—and tell us which ones went into that folder, he looked closely and he came up with 17-B, the signed one.

And then the story fell apart because that couldn't have possibly been the document, which makes me wonder a great deal about that story. I thought you ought to have the benefit of knowing that.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/III. Plaintiff's Closing Argument to Jury--Contract Case/§III.13 b. Using Plaintiffs' Evidence to Infer Correct Answers to Special Interrogatories

§III.13 b. Using Plaintiffs' Evidence to Infer Correct Answers to Special Interrogatories

Now, on these special interrogatories. These are the questions that you will be asked to answer. And as I explained to you, you are not confronted with anything—and as the court explained to you, nothing other than what's in these documents and what you have heard by instructions.

I want to go through them very, very quickly and I won't read them all. I just want to be sure you understand where we are.

The first one—and I am paraphrasing—the first one asks if there was an oral contract that they would share one-third, one-third, one-third when they formed the law partnership.

MR. SELF: Your Honor, I object to that paraphrase. That's not an accurate paraphrase.

MR. ROTHMAN: I will redo it, Judge.

THE COURT: Sustained.

MR. ROTHMAN: The first question, "Did Mr. Lallo enter into an oral contract with defendant Roberts to share in distributions Roberts might receive from O'Gara real estate developments?" I think the answer is clearly that they did.

The second question deals with whether or not they entered into a contract with respect to the distribution of Miramar Group income. We think the answer to that is "yes." And, again, when you look at those numbers you will see that those numbers are not in dispute, as I believe the evidence indicates. So specifically the second question is "Did the parties enter into a contract at the time of the inception of the law firm to share equally." I think the answer clearly to that would be "yes."

And then the third question is whether they "made the agreement on Miramar," which we call "the Miramar modification" or "the new contract," where they made the different division.

And then the fourth question—the fourth question is that they ask you to decide "whether there was an agreement with respect to the Union Bank deal." And it spells out what that agreement is. I hope the answer that you find will be "yes" to that.

Then you are asked question 5, "Did the contract on Union Bank apply only to phase I of the project?" I have discussed that with you now, and I trust and hope that you say "no."

Then the next question, which is 6, "Was there a point in time when Roberts had an interest in the 470 West Palm project?"—the realization of which did not require that he make substantial cash contributions or assume the liability of a general partner. Now, that requires just a moment's discussion.

You will remember in this case that Mr. Roberts went into the Miramar group very early. And when you examine the evidence you will recollect that there was no obligation on his part until he became a paying partner of that, until sometime about a year later.

And to amplify on that so you will be able to zero in, plaintiffs' Exhibit 27—27, which is in evidence—is dated June 1, 1977. Now June 1, 1977, is well over a year after the law firm was formed. The law firm was formed, as you will recall, in February of 1976. And what this agreement is that was entered into in 1977 is the limited partnership on 470 West Palm. And it forms that partnership on June 1, 1977. It's Exhibit 27. And what it says is as follows: "The general partner"—excuse me; I am advised by Mr. Judson, Your Honor, and ladies and gentlemen of the jury, that the Exhibit is not 27. It's 476. So please make a mental note that it's 476. Exhibit 476.

And so in 1977 when the formal partnership was entered into it provides in paragraph 5 that Mr. Roberts "shall not be personally liable for the debts and obligations of the partnership."

Therefore, I think in answer to the question—and you can use this in responding to question 6—there was a point in time prior to the entry of this agreement in which Roberts had an interest in 470, and it really says of that interest that it did not require that he make any substantial payments. The fact that he ultimately made them is not the relevant point here, as you will see.

And now we go to question 7, "During a time when Roberts had such an interest in 470 did Lallo and Eyre agree to give up their

interest in connection with that project based upon a representation by Roberts that the 470 project would bring only tax benefits?" You remember that testimony. And I don't think there is any need to go over that. That testimony was clear. They gave up the interest because Roberts made a representation to them. It turned out later that Roberts got a million eighty, or something in excess of a million dollars, and the problems began then to develop.

Now, in connection with the balance of the questions, which I will not read to you, I just want to come to the very last one, which is question number 12. And this is the critical one. This is the theory that we talked about: "Did Roberts fail or refuse to share with the plaintiffs benefits which he, Roberts, received from a client for services rendered to such client on behalf of the law corporation?"

I cannot conceive of how that can be answered anything but "yes," especially in light of the instruction.

Now, ladies and gentlemen, I am through. I know you are happy to hear that.

I hope that when you go into the jury room you will ask yourselves a series of basic questions. You will ask yourselves what does Exhibit 12 mean. You will ask yourselves why on the back-dating of that key document that we talked about. Why did they do that? Why did Mann leave his former law firm if he wasn't given some promises other than pie in the sky or "guidelines"?

What were Lallo and Eyre and Mann talking about for all of these years? What do all of these documents mean? And by all of these documents I am talking about Exhibits No. 10, No. 13, No. 40, and No. 11, Those are all the notes that were prepared by the various individuals.

I am asking you to consider the fact when you really want to think about state of mind in the letter that Mr. Lallo wrote in which he said, "I will pay you this loan money that I am borrowing from you out of my proceeds from Miramar." Wasn't he acting as though something would be forthcoming?

I will ask you to consider all of those things. And when you do that I will feel that we have received from this jury all that we are entitled to—fairness, consideration, and thoughtfulness. And in that connection, ladies and gentlemen, I urge that you answer "yes" to those questions that I have indicated.

Again, my sincerest and deepest thanks.

THE COURT: Thank you, Mr. Rothman.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IV. Defendant's Closing Argument to the Court--Antitrust Case/Chapter Outline

IV.

Defendant's Closing Argument to the Court—Antitrust Case

U.S. v Magnalab, Inc., et al.

CASE SUMMARY: *In this suit, brought by the government to prevent a merger, the government has asserted that film processor Magnalab's acquisition of Apex, another processor, will have unlawful anticompetitive effects under §7 of the Clayton Act.*

I. INTRODUCTION TO CLOSING ARGUMENT

A. Establishing Proper Standard §IV.1

B. Arguing That Prosecution's Charges—Evaluated on Proper Criteria—Unsupported by Evidence §IV.2

II. ATTACKING PROSECUTION'S CASE

A. Attacking Factual Basis §IV.3

B. Refuting Suggested Alternative Ways for Defendant To Enter Market §IV.4

III. USING RECORD TO SUPPORT DEFENSE

A. Restating Favorable Testimony of Customers Regarding Potential Benefits §IV.5

B. Suggesting Unreliability of Prosecution Witnesses §IV.6

C. Refuting Argument That Existing Competitor Truly Competitive §IV.7

D. Quoting Court's Own Restatement of Issue To Support Defense §IV.8

E. Illustrating Inconsistency of Prosecution's Case Using Prosecution's Own Statements §IV.9

F. Contrasting Present Case With "True" Instance of Predatory Practice §IV.10

IV. SUMMING UP

A. Restating Prosecution's Burden of Proof and Prosecution's Failure To Meet Burden §IV.11

B. Thanking the Court; Requesting Speedy Decision §IV.12

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I. INTRODUCTION TO CLOSING ARGUMENT

§IV.1 A. Establishing Proper Standard

MR. ROTHMAN: With the Court's permission, Your Honor, in commencing my comments to the Court, I would like to present a few passages from the most recent expression of the law, which comes from our circuit, the Ninth Circuit. Because I think that with those passages—and specifically I am referring to the case of *Syufy* [*U.S. v Syufy Enters.* (9th Cir 1990) 903 F2d 659] decided in the circuit—the Court will begin to understand, I hope, the idea of what I am attempting to convey.

In *Syufy* the Court said, and I am quoting:

"Suspecting that giant film distribution companies, like Columbia, Paramount, and 20th Century Fox, had fallen prey to the defendant, the operator of a chain of motion picture theaters, the United States Department of Justice brought a civil action to force the defendant to disgorge the theaters he had purchased."

"The case is unusual," says the Court, "in a number of respects. The record in the case does not reflect complaints from the defendant's competitors, and the supposedly oppressed movie companies have all weighed in on the defendant's side. However, the Justice Department nevertheless remains intent on rescuing this platoon of Goliaths from the single David."

The Court then says, "Ultimately, the trial courts must resolve a practical question. Is this the type of situation where market forces are likely to cure the perceived problem? A court ought to exercise extreme caution because," the Ninth Circuit says, "judicial intervention in a competitive situation can itself upset the balance of market forces, bringing about the very ills that the antitrust laws were meant to prevent."

The Ninth Circuit then cautions in *Syufy*. It says, "The answers to these questions are significant because, like all antitrust cases, this one must make economic sense. Blind reliance upon market share divorced from commercial reality can only give a misleading picture of a firm's actual ability to control prices or exclude competition. There is nothing magic about this proposition," says the Ninth Circuit, "it is simple common sense."

Now, Your Honor, having taken those words from the Ninth Circuit, I'd like to move to the most recent decision in the District of Columbia in the *Baker Hughes* case [*U.S. v Baker Hughes, Inc.* (D DC 1990) 731 F Supp 3], where the Court says two things. First, it says—and this case is also cited in our brief—"When you have sophisticated consumers, pay special attention to what those sophisticated consumers say and feel. Because that will give us the sense of the real market reality."

And then the Court in *Baker Hughes* says, "In this field"—and in that case they were referring to purchases of oil rigs—"high concentration has long been the norm in this market. Nor is concentration surprising whereas here a product is esoteric and its market small. Indeed, the trial judge found that concentration has existed for some time. But in the case there is no proof—no proof of overpricing, there is no proof of excessive profit, and there is no proof of any decline in quality, servicing or diminishing innovation. And accordingly," the Court concludes that, "the concentration ratios are not important."

Now, those are the two most recent expressions of the antitrust laws from both the Ninth Circuit and from the District.

COMMENT

In this case, the defense must reestablish credibility and rapport with a judge instead of with a jury. See [Book §2.30](#). Defense counsel does this by focusing on the legal standard to be applied and quoting from recent relevant opinions. See also [Book §3.4](#).

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IV. Defendant's Closing Argument to the Court--Antitrust Case/§IV.2 B. Arguing That Prosecution's Charges--Evaluated on Proper Criteria--Unsupported by Evidence

§IV.2 B. Arguing That Prosecution's Charges—Evaluated on Proper Criteria—Unsupported by Evidence

Now here perhaps, Your Honor, a word of personal observation. We have all seen, and this Court certainly has seen, antitrust cases brought. I venture to say that the Court will never see again and has never seen in the past a case which is as devoid of evidence and as weak in content as the one that has been presented to you. Where is the testimony of consumers who are hurt? Where is the testimony of the ability to raise prices?

Mr. Polya in his comments to the Court for 55 minutes not once mentioned the facts indicating that there was a likelihood that prices would be raised. Instead, Your Honor—as kindly as I can say it—the government's case is predicated almost on a robotic approach to the facts. And by "robotic," I refer to the testimony of Dr. Boole, who simply said, if the numbers reach a certain point, quote, "We challenge."

And Mr. Sylvester asked perhaps a critical question when he said to Dr. Boole—and he was referring to the transaction where Magnalab was used by Kelvin Studios to boost up some prices to Paragon—and Mr. Sylvester said, "Sir, wouldn't that single real-world episode tell you more about how competition works in this market than any guideline analysis?"

And Dr. Boole said, "It would be a factual indication of how competition exists in the marketplace." And of course, that's the right answer. But he made no such consideration. He took simple numbers.

Now, Your Honor, we've all been reading in the newspaper about the effect of the criminal guidelines and what judges think about that, judges commenting in the southern part of our state to the effect that the discretion of the Court has been removed. And that is precisely—precisely—what the Justice Department has said to you in this case. And that is precisely what Dr. Boole has said: "If the numbers say this, that's it." And to my utter surprise, Mr. Polya repeated the same thing in his argument and said, "The numbers show that there has been a *Herfindahl* violation and that, sir, is it."

And I respectfully submit that the courts of this land are telling us differently. And what they are saying is: "Let's look at market realities and let's see what's going on in the marketplace."

II. ATTACKING PROSECUTION'S CASE

§IV.3 A. Attacking Factual Basis

Now, in opening statement, Your Honor, Mr. Polya made a set of representations to you. He said firstly that "The evidence will show that release prints are offered, priced, and frequently sold separately from other film laboratory services." Your Honor, the facts from the witness stand ... the real testimony is that everybody who is in the marketplace today is buying, not separately, but as an all-service contract. With one exception, which we'll talk about in a moment: Global. And so, while it is true that there is evidence that it is priced separately by the lab, the reality of the marketplace is quite different.

Secondly, he said ... the government bases its entire factual case—and I'm going to try to put that to bed once and for all—on two basic situations: Global, and, to my surprise, Cygnus.

Now, Your Honor, in his opening statement counsel said, "The United States will show that Global's decision to go to a contract was a reflection of its satisfaction with Reelworld." Your Honor, that is a distortion of great magnitude. Mr. Fourier, the government's witness, testified that, but for the corporate relationship and the insistence of Magnalab when they bought the interest of that film lab, there would be no contract with Reelworld. And Mr. Fourier made that as clear as he could make it. He told us that he got instructions. He understood what he had to do: He had to make that contract.

That, Your Honor, is not competitive forces working in the marketplace. That's a special relationship that existed at a corporate level. Existed because Magnalab was doing something that helped Cellutech, was buying out their 51-percent interest and was insisting on a contract. And for the government to argue that that is a reward or a reflection of satisfaction is a gross distortion of this record.

Now, Your Honor, with respect to Cygnus, we, unfortunately, under the pressure of time did not present the testimony except by way of deposition, which you have not yet had an opportunity to read. But let me give you what those depositions say about Cygnus.

Firstly, Your Honor, Cygnus has never used Reelworld. And for the government to suggest that Cygnus is now somehow inclined to use Reelworld distorts what Mr. Kronecker said. And let me quickly tell you what he said.

Mr. Kronecker testified that he was solicited by Pam Dirac—Pam Dirac was the head of Cellutech—regarding laboratory work that Reelworld might do for Cygnus. Mr. Kronecker said that he discussed a proposal with Ms. Dirac by which Cellutech, Ms. Dirac's company, would invest \$50 million in Cygnus—Mr. Kronecker is a cagey man and he wanted \$50 million—and that would be a purchase of preferred stock. If that was done, Mr. Kronecker said, he would consider giving Reelworld some of his laboratory work.

The negotiations on the equity investment broke down and the film processing discussions, which were contingent upon that, did not continue. Mr. Kronecker noted in his deposition that he never got to the point of checking to see whether Reelworld had the quality that was necessary, to see if Reelworld's commitments to Global would interfere, to see if Reelworld could increase its capacity. He made none of those examinations. As Mr. Kronecker said in his deposition, he "never got to the small strokes with Ms. Dirac," because Ms. Dirac never was able to come up with the \$50 million.

And then, Your Honor, please, we took the deposition of Ms. Dirac. And here is what she said about it: She said, "My meetings and negotiations were"—quote—"a fleeting"—a fleeting—"consideration" and obviously broke down over the financing and the equity investment. Now, Your Honor, for the government ... for the government to seek to establish that that creates some kind of evidence of a market is almost ... almost ludicrous.

The government also said in its opening statement, if Your Honor please, that it would set forth evidence that certain studio personnel preferred Apex and Paragon for various reasons. And those reasons vary from person to person. The facts are that nobody has testified—including Mr. Fourier—that they had any preference of any kind for Reelworld. And so how it can be argued that Reelworld is somehow a laboratory of preference based upon Global, which had a corporate relationship, and Cygnus, where it never got off the ground, coupled with the fact that all of the consumers say things to the contrary, ... leaves me in some doubt as to the sincerity of the government's presentation.

COMMENT

It is important for defense counsel to stress and restress the theory of the case when a "different story" defense is used (that is, one that relies on a story different from the plaintiff's, or on rival facts). See Book §2.30. This argument illustrates how experienced counsel stresses the client's version of the facts, throughout the argument. See §§IV.4-IV.5, IV.8.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IV. Defendant's Closing Argument to the Court--Antitrust Case/§IV.4 B. Refuting Suggested Alternative Ways for Defendant to Enter Market

§IV.4 B. Refuting Suggested Alternative Ways for Defendant to Enter Market

The government goes on to suggest in its brief—and I want to discuss it only because the Court raised the question—that somehow the Court ought to consider the fact that maybe Magnalab would come into this marketplace *de novo*, or alternatively maybe Magnalab could buy Filmcorp and that would create another laboratory. Now, let's first examine what we're dealing with: evidence. What is the evidence? And bear in mind—I shouldn't say "bear in mind," the Court always bears in mind, and I apologize for that—the facts are obviously that the government has its burden here. The evidence is clear: Mr. Greene testified that he would not authorize Magnalab to come into this market on a *de novo* basis. Mr. Cauchy testified that this was the last opportunity, because one of the critical criteria is that they must have a new contract. All of the evidence shows the continuing efforts of Magnalab to acquire contracts. There's not a word in this record to contradict that.

With respect to Filmcorp, Mr. Polya doesn't even raise that in his argument, but here the evidence is that Magnalab would not consider Filmcorp as a viable alternative, because it had no contract. And there had been some preliminary objections that had been rejected both by Magnalab and Filmcorp for that very reason.

Your Honor, I say kindly that it is not our role in this courtroom to restructure the world, it is our role to examine the evidence as it is presented and to inquire as to whether the government has made a case. In our briefing to the Court we suggested a passage which I'd like to quickly read to the Court: "The antitrust division has emphasized repeatedly that in considering entry, the test is whether new entrants likely *would* come into the market." Not ... not whether they *could* come into the market. And that is the statement of the assistant attorney general of the United States. The evidence in this case shows that there is absolutely no likelihood of their coming into the marketplace. And I submit, Your Honor, I don't think the government is even seriously contending that they will.

Now, Your Honor, I hope ... I hope that the Court will note one point further about that testimony. When Mr. Cauchy testified that they would not come into this market *de novo* and that they had no interest in Filmcorp without a contract, the government chose not to cross-examine Mr. Cauchy on that point, or on any point. And so the record is totally devoid of any evidence to the contrary. And I respectfully submit to this Court that we have not only refuted any contentions that have not been made by the government, but we've overwhelmingly carried the burden.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IV. Defendant's Closing Argument to the Court--Antitrust Case/ III. USING RECORD TO SUPPORT DEFENSE/§IV.5 A. Restating Favorable Testimony of Customers Regarding Potential Benefits

III. USING RECORD TO SUPPORT DEFENSE

§IV.5 A. Restating Favorable Testimony of Customers Regarding Potential Benefits

I now want to spend a moment or two, and not too long, on the studio testimony. Your Honor, I have been around the studios a little bit and I can hardly think of a time when one was able to get unanimous views from that group of maverick people. But, because this is such an obvious procompetitive state—the state of Apex being taken over by Magnalab—it became clear as to what they were saying and why they were saying it. It is interesting that the Court is being asked by the government to reject the testimony given in this courtroom under oath by the executives of the various studios, whose job it was to evaluate and purchase lab services, because, the government says, "the studio personnel might change."

Your Honor, in this type of merger analysis the Supreme Court of the United States has consistently held that the legal standard in a merger case is that the government must show probabilities, not possibilities. And this Court has observed throughout the case that anything is possible. And so to suggest that the testimony under oath of these executives, many of whom have been there for years and years, should be rejected because they might change, flies into the face of many clear points. All through the past years they have been buying their contracts in the way that they have testified to here. There's been no change over the years; Southern California has been the place of preference. Indeed, we had one executive who had been there for 40 years—or whose company had been there for 40 or 50 years without change—I assume through many, many different levels. But to suggest that the testimony does not carry great weight because there may be changes is to deal in the field of possibilities, not probabilities.

Now, Your Honor, again I want to point out to the Court that I am not going to spend many, many moments talking to you about the relevant market. You heard the testimony. The purpose of dealing with a question of the relevant market—whether it be Toronto, whether it be release prints, whether it be LSAs—is really to come to one final answer, and that is: What is the effect of this merger on prices and competition? Will it raise prices? Will it be anticompetitive? That's what we're talking about. And now let's look at what the studios said. And—in the very guidelines that the government relies upon—the merger guidelines provide that one of the relevant considerations that the Court must take into consideration is the evidence of the buyers' perceptions. What do the buyers think about this?

Your Honor, we all agree, the government and the defense, that the buyers in this case are the majors. Majors whom we have talked about for four or five or six nights. John Fourier, Global, government witness, says, "I believe that Magnalab may well keep this lab more up to date, more state-of-the-art, because they are in the lab business in a substantial way in the United Kingdom. And, as opposed to an adjunct of another motion picture satellite company"—which is where Apex is—"I favor"—I favor—"the transaction." Now, that's from Global.

Kelvin Studios. Mr. Kepler: "It doesn't seem to change the landscape. It's a two-lab market now and it will be a two-lab market when Magnalab comes in, and Magnalab knows how to run a lab." He's happy.

Lyon Studios. John Napier: "I think what the acquisition of Apex by Magnalab will do for me in the industry is a guarantee that we will at least have two major laboratories. We will still be able to select and have competitive bidding. My concern is that if Millenium is not interested in owning a processing plant ..." and he goes on to support wholeheartedly this transaction.

Summit Studios, I shall not read. The same.

Albion Studios. The same.

Trinity Studios, who have been with Paragon for 50 years—and, Your Honor, who had no reason to be involved in this discussion at all; they're where they are and they're happy—and they say—Mr. Hamilton does—"I think that the Magnalab acquisition of Apex would be healthy for the motion picture industry. It helps Trinity by giving them an alternative to Paragon in terms of its capacity and its knowledge and the quality of products. And the end result of all of that," says Mr. Hamilton, "is lower costs." Question was then put to him, "Sir, would you expect better prices to come?" And he says, "That's exactly what I would expect." Now, that's a man who really doesn't have any interest in this except that he wants that company out there strong and healthy if he ever needs it against Paragon.

Even Cygnus Studios, Your Honor, even Cygnus—and the government, with all of its powers, could not change that fact—even Cygnus did not come forward and oppose this transaction. No testimony from Mr. Kronecker to that effect. Or even from Mr. Lagrange.

Your Honor, that's quite unusual. Quite unusual.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IV. Defendant's Closing Argument to the Court--Antitrust Case/§IV.6 B. Suggesting Unreliability of Prosecution Witnesses

§IV.6 B. Suggesting Unreliability of Prosecution Witnesses

In examining what there is on the other side of the coin, we heard from Dr. Boole, and I discussed how he approached the subject. And I also want to say, just in passing, if Your Honor please, that I alluded in my opening argument to the fact—and there is evidence in the record now presented by Mr. Sylvester—about Dr. Boole's declaration in the *Paragon* case. And there, Your Honor will recall that Paragon was attempting to acquire Centracolor, and the government wouldn't permit that to happen. It was in Mr. Boole's interest then to downgrade the importance of Reelworld, and he did just that. And he explained in page after page of his declaration why Reelworld was not a truly competitive operation. That suited his purposes at that time. And now, because their position is different, the government's position has changed.

Further, Your Honor, you will recall very well that we also mentioned in opening statement the fact that they came before you—the government did—to ask you to relieve Filmcorp of certain of its obligations under a consent decree, told you that this market was working competitively and it was working well. Now it doesn't suit their purpose to say that anymore; and that troubles me.

And then, Your Honor, to rely ... to rely upon Mr. Russell requires a moment's thought. Your Honor, Mr. Russell was less than totally honest with the Court. In answer to a question, he said, "We at Paragon have no objection to Magnalab coming into Southern California in some fashion that's acceptable to the government." Now, that's not a fair answer. What he means is, "Government, please, keep them out. They're hurting us. And we'd like to own this world." And in a moment or two I'm going to explain to the Court how it is that they are going to own the world if this merger is rejected.

COMMENT

It can be risky to characterize parties, counsel, or evidence (see [Book §3.11](#)), a risk that defense counsel takes when he observes that a witness has been "less than totally honest with the Court." Here, however, defense counsel has preceded the characterizing comment by showing how the opinions of the witness may have changed with changes in the nature of his interest, before making the characterization.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IV. Defendant's Closing Argument to the Court--Antitrust Case/§IV.7 C. Refuting Argument That Existing Competitor Truly Competitive

§IV.7 C. Refuting Argument That Existing Competitor Truly Competitive

Now, Your Honor, we also attempted to show you that there are serious capacity problems at Reelworld. And I'm not sure how the government has responded to that. We know ... we know that Mr. Taylor has testified as clearly as he could that he could not handle a second studio. As a matter of fact, as he put it quite clearly, he can't even handle the one he's got. And so the question, I suppose, might be asked, "Well, why don't they just expand it?" And that was one of the questions I think counsel was trying to develop on cross-examination.

We have given Your Honor two depositions, one is from a gentleman named Bernoulli, who is the contractor in Canada who has been involved in the building of Reelworld, of the facility. And he says, "There is no way to expand the square footage of Reelworld's present premises. These premises will only accommodate one more printer ... one more processor, and that is all we can put in there." And then we gave you the deposition of Mr. Newton, who is a general ... who is the vice president of Reelworld, and he and Mr. Bernoulli made a study as to how long it would take them to put up a different lab at a different location and get it operational. And their testimony is in the record: It will take them somewhere from 36 to 38 months. Your Honor, even under the government's theory, under the government's guidelines, a period of 36 to 38 months is too long a period in which to gain any benefits competitively.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IV. Defendant's Closing Argument to the Court--Antitrust Case/§IV.8 D. Quoting Court's Own Restatement of Issue to Support Defense

§IV.8 D. Quoting Court's Own Restatement of Issue to Support Defense

Now, Your Honor, I want to ... I want to take a question that the Court put during the course of the trial which I really think puts this into its proper perspective. The Court said, "What would be the major threat that these two giants remaining would determine the prices?" And then the Court says, "I suppose I really don't see, so far, that what the three have been able to do would be really changed that much by what two can do." And what the Court, I think, is saying—if I'm not being presumptuous—is: "Will prices change?" That's what we want to know. Now, I was impressed by Mr. Russell's testimony when he said, "If you let Magnalab in, it's going to cost me millions of dollars." Well, that's what competition is supposed to do. And Your Honor will perhaps remember the dialogue between the Court and Mr. Russell when Mr. Russell said, "Even though I have a contract"—even though I have a contract—"I suppose if Magnalab comes in and undercuts me by 20 percent, I'll have to meet that. And I don't want to do that."

Well, I would think that the government would stand up and applaud and say, "That's what we want to happen. We want the consumer to get the benefits of this competitive marketplace." Instead, what the government says is, "Let's"—and I mean this as kindly as I can say it—"Let's let Paragon have the field." They have now, in the last year, taken Kelvin and they've taken Albion and they're gobbling up everything that there is. And they're doing it with big multimultimillion-dollar payments. Art Cayley says, "I can't meet that." Fred Stokes is crying because he can't compete. And Paragon gets bigger and bigger and bigger and Russell stands on the witness stand and tries to protect that position. And, unfortunately, the United States of America is helping.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IV. Defendant's Closing Argument to the Court--Antitrust Case/§IV.9 E. Illustrating Inconsistency of Prosecution's Case Using Prosecution's Own Statements

§IV.9 E. Illustrating Inconsistency of Prosecution's Case Using Prosecution's Own Statements

Now, Your Honor, I believe we have to spend a moment in discussing what Dr. Schwarz said when he spoke about the 1989 situation. Your Honor will remember the 1989 situation, in which Magnalab was trying to buy the Centracolor lab and was talking to Kelvin Studios about buying it, and ultimately to Trinity about buying it, and Kelvin took the offer and sat down with Paragon and used that offer for the purposes of negotiating a better deal for itself. And ultimately there was a better deal for Trinity and then ultimately a better deal for all of the customers of Paragon.

Now, the government says in its opening statement to you, Your Honor, "That competitive rivalry between Magnalab and Paragon had probably the single most dramatic effect on prices for release prints in recent years." That's what the government says. And I said, "You're dead right." That's exactly what it did. That's exactly what we're trying to tell you. It is that competition, the competition of having Magnalab in the Southern California market, which in the language of the government has "the single most dramatic effect on prices for release printing in recent years." And that's what we've been saying.

Your Honor, there's more evidence than that. Let's see what Magnalab has said they would do. They already have told us that they are prepared to give Mr. Pascal, who is the new potential owner, hopefully, of Lyon Studios, \$60 million for his lab business. Art Cayley and Fred Stokes aren't going to be able to do that. They aren't going to be able to come within one-tenth of that number. And Paragon is going to have to compete for that. And that's going to have a healthy effect on consumers. The testimony is that Magnalab is prepared to spend \$25 million to acquire the business of Albion and/or Summit. Art Cayley won't authorize that. And Fred Stokes cries because he can't have it. That's healthy. The testimony is that Magnalab is supposedly prepared to put fourteen and a half million dollars into new equipment and to expand the facility.

I probably say somewhat facetiously, I understand from that bit of litany why Mr. Russell doesn't want Mr. Greene breathing down his neck: He is afraid of that competition. But, Your Honor, if that competition doesn't take place, what we have seen is really an erosion of the marketplace, with Paragon grabbing it all up. Isn't it healthy ... isn't it healthy to see a worldwide lab in Southern California meeting head on with Paragon, which has no worldwide competition? Why would the government want to stop that? I'd like, hopefully, in the five minutes allotted the government to understand that. Can anybody who has listened to six nights of testimony come away with the conclusion that it would not be good to get a strong Magnalab into this marketplace?

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IV. Defendant's Closing Argument to the Court--Antitrust Case/§IV.10 F. Contrasting Present Case With 'True' Instance of Predatory Practice

§IV.10 F. Contrasting Present Case With "True" Instance of Predatory Practice

Now, Your Honor, I do want to say one thing also about Centralab, a lab that I have a little understanding of. Paragon could not acquire Centralab through traditional merger ways. So what they did was, they went out and purchased the contracts that Centralab had. And when Paragon made that end run and got the contracts, they didn't have to buy the lab any more; and today there is no Centralab. It is that kind of terrible predatory practice which healthy competition will stop. And so, to argue in this case that this is an anticompetitive transaction when there is no evidence to support such a proposition is disturbing.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IV. Defendant's Closing Argument to the Court--Antitrust Case/ IV. SUMMING UP/§IV.11 A. Restating Prosecution's Burden of Proof and Prosecution's Failure to Meet Burden

IV. SUMMING UP

§IV.11 A. Restating Prosecution's Burden of Proof and Prosecution's Failure to Meet Burden

Now, I'd like to close on this note, if Your Honor will permit me, and I think I'll do it well within my time. I agree ... I agree with Mr. Polya that under Section 7 his obligation is to show that there is a reasonable probability—a reasonable probability—of a lessening of competition. And since we now know that lessening of competition means harm to the consumer, I ask this Court rhetorically, "What evidence is there that there is a reasonable probability that there will be injury to the consumer, when every single consumer says that is not the case?"

COMMENT

Perhaps the single most important point for the defense attorney to stress is the burden of proof. Here, the defense attorney focuses on the burden of proof at the end of the argument to the Court, ensuring that it will receive the emphasis it deserves. See Book §2.22.

This is Big Brother saying, "I know better what is good for you, Mr. Consumer, than you know what's good for you." And it troubles me that Mr. Boole—that Dr. Boole—would say to Your Honor, "Well, I didn't go out and poll the consumers." And I would respond by saying, "This is not a case where we're talking about a population of consumers that totals 10 million, we're talking about eight. Why wouldn't you poll eight?"

And as Your Honor once commented in this case, "There are customers and there are customers, and there are consumers and there are consumers." And here we have sophistry.

I would urge this Court to permit this merger to proceed and I am confident that, by doing so, we will have a healthy competitive marketplace, we will keep Paragon in check, and we will not see the diminution of the entire lab industry for the benefit of one company.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IV. Defendant's Closing Argument to the Court--Antitrust Case/§IV.12 B. Thanking the Court; Requesting Speedy Decision

§IV.12 B. Thanking the Court; Requesting Speedy Decision

I want a personal note here, Your Honor. I have learned as a lawyer that it is inappropriate to say to a Court "thank you" when a Court does its job and is supposed to be doing what it's doing. I will violate that rule tonight because this Court is doing far more than what its job calls for. I am confident that I speak for certainly every lawyer on my side of the table—and I'm sure I speak for every lawyer on the government's side of the table—to thank this Honorable Court for the incredible effort that you have displayed in making this evening session available to us. We know what you've been through during the day and we hope we haven't made it too much more difficult at night. And so we thank you and we thank you most sincerely.

I would also like to indicate to the Court—and this is difficult for me to say—we tried to explain to the Court when we got this evening session at your great courtesy that we had certain restraints in our contract that required that we move quickly to trial. And would I hope—and please do not consider this to be presumptuous—I would hope that the Court could render its decision as quickly as it is capable of doing at its convenience.

Thank you, Your Honor.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/Chapter Outline

V.

Plaintiff's Opening Statement to Jury—Fraud Class Action Case

Mason et al. v Burton et al.

CASE SUMMARY: *This class action was brought by small investors who were sold risky junk bonds. The bondholders claim that they were defrauded by phony sales pitches that misled them about the risks of the securities and targeted older, unsophisticated investors. Plaintiffs also alleged that phony land sales were set up to create sham profits that resulted in false financial statements that were used to sell the bonds to investors, and that the fraud could not have been accomplished without the help of lawyers, accountants, appraisers, and investment bankers who enabled Burton to falsely claim that McKinley Savings and Loan and its parent corporation, CFC, were financially sound, while trying to prevent federal regulators from seizing it.*

I. PLAINTIFF'S INTRODUCTORY REMARKS TO JURY: TRIAL PARTICIPANTS AND COURTROOM PROCEDURE

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III. CONCLUSION

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C. Concluding Remarks; Final Videos of Defendants Asserting Fifth Amendment Privileges [§V.28](#)

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/ I. PLAINTIFF'S INTRODUCTORY REMARKS TO JURY: TRIAL PARTICIPANTS AND COURTROOM PROCEDURE/§V.1 A. Establishing Credibility

I. PLAINTIFF'S INTRODUCTORY REMARKS TO JURY: TRIAL PARTICIPANTS AND COURTROOM PROCEDURE

§V.1 A. Establishing Credibility

MR. COTCHETT: Let me, before starting out, tell you it was a long night, as you can well imagine. You see all these papers spread out in front of you. The reason for that is, I'm going to try and make this as short and concise as possible. It was a long night for everyone last night, including the University of Arizona basketball team. We were watching that and trying to put this together.

With that, we hope that here this morning we will present to you what we believe—over the next several weeks or months, or whatever it may be—the evidence is going to show. And as His Honor pointed out, nothing I say is evidence, but what we're going to do is simply to give you an overview, and I'll tell you about that in a moment.

First of all, let me put on the record, so that—and I know I can speak for every counsel here—a note of thank you, because it is not generals that win battles; it is the infantrymen or the guy in the trench or the woman in the trench. And while I stand up here and I speak, just because you hear me speaking and I was introduced as the lead counsel, and I know you'll hear from other lead counsel here, there were multitudes and many people who put this whole case together. I would be remiss if I didn't tell you that the fact of the matter is none of us would be here today but for many, many lawyers and paralegals and legal assistants who so ably put all this evidence together.

And you'll see how that works. You'll see faces on these screens up here of many young lawyers, young men, young women, who traveled all over this country, both on the defense side and the plaintiffs' side, who took these depositions. I analogize the general statement to the fact that it is not His Honor and not the lawyers that make the system of justice work; it is the Georgias, it is Harry Flanders, is it the clerks, it is the people in the trenches that make this system work.

The Judge presides, we talk, but the fact of the matter is that nothing could be done without the staff. We sometimes forget that, and it's important that we remember that the people, the marshals, the people who screen us downstairs, they're the people who make the system a great system.

COMMENT

The introductory remarks of an opening statement should include language that will give jurors a favorable impression of counsel and the plaintiffs. In §§V.1-V.4, counsel gains credibility by recognizing the many people who helped to put the case together and acknowledging the court staff who make the system of justice work.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.2 1. Introduction of Plaintiffs and Co-Counsel; Nature of Class Action

§V.2 1. Introduction of Plaintiffs and Co-Counsel; Nature of Class Action

I'm honored to represent several plaintiffs, but, as you know or you will find out, there are many cases being tried before you. They have all been consolidated and brought to Judge Graham by a judicial panel who assigned this case to him. Cases were filed in various different districts, and they were brought here to all be tried in front of you. I'm honored to represent several of the named plaintiffs, as other counsel here represent other plaintiffs, and you'll hear them through this.

As His Honor told you in the voir dire, this is a class action, and in a nutshell, what that means is that there are a few people here who have come forward and are the representative class members. For example, Mary Mason, sitting right over here behind Miss Jager, whom I'll introduce in a moment, is one of the plaintiffs, and she is from Southern California. Sitting next to her is Allan Lucca, another representative plaintiff. And Miss Mason, Mr. Lucca, if you would just stand up for one moment. Thank you very much.

So they are representatives of what we call "the class."

Now, I've told you about the lawyers working with us—you'll be introduced to many of them—but my co-counsel in the case who represent other cases.... For example, you will hear a witness who will come to this stand who is the Secretary of the Baptist Church; that's my client. You will hear plaintiffs come to the stand who are represented by Mr. Simpson here, and his very fine law firm. Mr. Hayes is a co-lead counsel. Ms. Jager, Leslie Jager, who represents plaintiffs in this case.

So what you're going to see are many faces: many faces of lawyers on the plaintiffs' side, many faces of lawyers on the defense side, and you're going to see many plaintiffs.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.3 2. Jurors' Role in Evaluating Evidence; Types of Evidence to Be Presented

§V.3 2. Jurors' Role in Evaluating Evidence; Types of Evidence to Be Presented

I want to say one thing about jury duty, because it is not only an honor to speak to you, I feel so strongly about it. His Honor told you the other day in voir dire this is an important case. It's an important case to all of the people who are represented here; and you will hear testimony by Ms. Mason, Mary Mason, Allan Lucca, and others representing approximately 17,000 people. There's a number of people who are here before you, and although you can't see those people, you'll hear from many of them.

When I talked about jury duty and His Honor talked about jury duty the other day being so important—and I'm not wasting time when I tell you this—I used to remember that you could get out of juries ... you could get out of the armed services, you could get out of military service by having flat feet. You cannot get out of military service by having flat feet. Jury duty is, in fact, the most important service you do in this country. I can't emphasize enough how important you are to this process, how important your feelings are to this process.

And in that sense, I want to just make this statement and get it out of the way: The fact that you're in the box brings to this process an extraordinary cross-section of human nature. And when you come through those doors, or when you come through the side door, you're going to hear a lot of testimony; you're going to see more documents than you ever cared to see; you're going to hear about GAAPs and GAASs and RAPs and things of that nature. I don't want to tell you what I used to think GAAPs and GAASes used to be. I always thought gaps were things my kids had between their teeth when the orthodontist sent home a big bill; and I don't want to tell you what I thought gas was.

But you do not, when you come through that door, leave your common sense on a coat hook in the jury room. And the single most important thing you bring to that jury box is common sense, because that's what this case is all about.

And I sat and I listened to Judge Graham describe to you circumstantial evidence, the issue of the water on the street. And I listened to him emphasize—and I hope I underscore that by saying this—I listened to him emphasize how important it is that you watch the witnesses when they're on the stand—and that will be the witness stand right there—because the demeanor of someone is critically important.

And we're living now in a very high-tech world, and, by the way, I want to talk about that now, just for a moment. This entire courtroom was put together by an outfit called Legal Video Services. It is probably the highest tech in the country for trying a lawsuit. It is awesome, and I, unfortunately, get the first chance to try it. You're going to see flubs beyond flubs. You're going to see the wrong video. When I am here telling you about what *X* is saying, you may be watching a movie. We joked about that this morning, which one they might put in.

The high-tech nature of trying a case now has taken a little piece of the process away. A little piece of the process that is taken away is that you can't see the emotion, or when you see a picture on the screen, you can't get the feel of it like you can when the person is sitting right there in the box. And as His Honor talked about the cookie: Can you imagine having to look over a television set and ask your son and your daughter if he or she ate the cookies? You don't watch the little twitching; you can't see it on the screen. So that's one of the handicaps we're working under.

The other handicap we're working under is that we're going to deal a lot with circumstantial evidence. Because we can't necessarily—and you will hear in a moment—get all the witnesses to you. And you can't always ... because time goes on—many of the events took place in '84, '85, '86, '87—some people can't recall what was said in specific meetings. So you're going to have to rely upon circumstantial evidence. You're going to have to look at something and ask yourself whether, gee, that person should have remembered that or should not have remembered that, and that's what we're talking about.

Now, up in Alaska, they have a little statement they tell the jurors up there about the difference between direct evidence and circumstantial evidence. It's about a moose. You're out in the woods, you see the moose go by: That's the moose; that's direct evidence. Or, if you're out in the woods in Alaska and you walk along and you step on moose droppings, you know the moose has been there; that's called circumstantial evidence.

You didn't see the moose, but you know that moose has been there.

Now, in a way, we are going to present to you a lot of direct and circumstantial evidence. And the unfortunate problem here, as you will see both on the screen and over there, is that many people raised their hand, were sworn, and then they responded by invoking the Fifth Amendment and refused to testify. So, once again, you will have to get that demeanor from them.

§V.4 3. Introduction of Defense Counsel

Now, you well know, and His Honor has told you, about the significance of this case. You have heard His Honor talk about the world-class nature of lawyers. I think that's a little bit of hyperbole; I think he's trying to be very nice to us. The fact of the matter is, we do have some outstanding lawyers on the defense side—not that we don't on the plaintiffs' side; I don't think we're in the world-class league yet—but I would like to tell you that you are going to see people like Albert Horn, representing Adams Accounting. See that sign there, "Adams Accounting"? I'll introduce you, through video, to some of the other people sitting behind it, but you're going to see lawyers like that. These are truly world-class lawyers, and it's an honor for myself and everyone who's sitting here with us to be trying a case against them.

You're going to see a person like Robert McBride, who represents Charles Merlin, Richard MacBeth, and others, John Behrendt in the back, with R & T Accountants, scootching down in his chair, hoping I don't say anything more about him. Max Bradshaw over in the corner; Joe Franklin; Bill Wakefield you had introduced to you as a former U.S. Attorney from Chicago; Stephen Carsgrove; Tom Pettit in the back.

You truly have an outstanding group of attorneys; and they're representing clients who we make some very serious charges against. At the end of the case, the Judge will instruct you on the law, and he is the only one who tells you what the law is. But in a nutshell, what we're claiming is that a conspiracy took place, and that the people sitting out here, the clients, if you will, all participated to one extent or another in the losses.

We filed these cases back in April of 1989—excuse me, April-May of 1989—just after what you will hear was the key date in this case, April 13, 1989, the bankruptcy of CFC and the takeover of McKinley.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.5 B. Purpose of Opening Statement

§V.5 B. Purpose of Opening Statement

Now, I'm going to get into some evidence, and I want to tell you what my role is this morning. My job for you this morning, as His Honor pointed out, is to give you a road map. Because what you now have in that little binder is really nothing. You've got the statement of the Court; Wednesday you'll have the glossary; and you really have ... a whole bunch of pieces of a puzzle, and that's what you're going to have in this case.

You see, unlike a play ... when you go to a play, there may be three, four, five different people on the stage; in a movie you may have many different people on the stage. But unlike that setting, what we have to do is we have to bring to this stand one person at a time, one document at a time. So you're going to hear testimony a piece at a time. And I guarantee you—because I know, I do—you will wonder, "What does that mean? Why is he or she saying that, and what's the relevance of that?" And what you do is you hang in there, just like I do, and later it comes to you: "Now I understand why *X* said such-and-such." And that's how this case will unfold.

We're going to try and bring it to you in some logical sequence, because, while you've heard it's a complex case—there are many parties—my personal opinion is it's a simple case; but there are complex ... it's a complex case only because of the transactions involved, the numerous transactions and the numerous parties. When you boil it all down, it will be just like walking into the toy store and you buy your son or daughter a puzzle. You know what they always have on the top of the box? A picture of the puzzle, so you can put the picture right next to the puzzle and you work off that.

Well, what I'm going to try and do this morning for you in my little inept way is tell you how the puzzle all goes together.

So I'm going to draw you, if I can, and I'm not sure I can completely, a little road map. You're going to hear testimony out of mouths of witnesses; you're going to see it from charts, graphs, and—of course, nothing I say is evidence—but you're going to see evidence coming to you in all forms. And I hope when you're done with this case you will be able to say that you understood the case and it is not—not to be humorous—it is not just moose droppings. It is in fact a case which has a great deal of significance. It is a case that will come together, and you will follow it as it goes through to a conclusion.

COMMENT

In a case with many transactions and parties, it is particularly important for the opening statement to provide the jury with a road map of the evidence that will be presented. This statement prepares the jury for the fragmentary way in which the evidence must be presented to them by contrasting the process to a play or a movie, where more than one "witness" can take the "stand" at the same time. The analogy to a child's puzzle lets the jury know that they will have to work to put the evidentiary pieces together, while allaying fears about the case's complexity by providing a picture of the completed puzzle to work from.

II. STATEMENT OF FACTS AND IMPLIED ARGUMENTS

§V.6 A. Identifying Principal Defendant and Alleged Co-Conspirators

Now, let me tell you quickly who the defendants are in the case. You're going to hear many people come to the stand who were defendants; they are no longer defendants. What you have heard are allegations. When Judge Graham told you a little bit about the case and what we were charging, he was very careful to say the defendants sitting up where you are sitting now all deny those charges, and they do.

These are the defendants that have come into court now, and you can't see all the signs, but there's Adams Accounting; there's Johnson, Madison; there's EconoMetric; Charles Merlin hasn't put their sign up yet; Carraway & Company; and you'll see other signs ... can't see Societe Richlieu, but Societe Richlieu is over there. I don't see Mr. Burton here this morning, but he'll be here.

The defendants remaining are Walter Burton; Adams Accounting, an accounting firm; Charles Merlin, an accounting firm; and Richard MacBeth; R & T Accountants; Johnson, Madison & Tyler, a very distinguished law firm; EconoMetric in the back; Meyer Goldman ... I don't see him here this morning but he will be here. He will be here either via a video or he'll be here in person. Franco-Assyrian Investment Corporation, that is, Societe Richlieu, as it's now known; Southern Financial, Inc.; and Mountain West.

So you can see by looking at this chart of defendants ... for example, Adams Accounting has its main office in Chicago; Charles Merlin, I believe, New York; Johnson, Madison, Cleveland. So you're going to see why it was necessary to travel all over this great country to take these depositions.

I truly believe no stone was left unturned on either side, and you will get a full and complete picture of what we're charging. And what this case is all about, is that we allege that 1 through 11—those people right there—either individually or as a company, or as a partnership, participated with this gentleman and his company in taking from our clients over \$250 million. And I will get into that in detail when I tell you about the evidence as to what the damage shows.

So those are the defendants we're charging, and I guarantee you they are hotly contesting it. His Honor will tell you at any given time that they are by no means saying they're liable here. You're going to hear different forms of it and what the evidence is going to show.

For example, you're going to hear testimony from people at Societe Richlieu, or the French bank, as we call them. You're going to hear some testimony from their people that they didn't approve and they didn't authorize what was done. Their evidence will be that, "Gee, we didn't know what was going on, but these people were doing it." You're going to hear a whole wide spectrum, as the evidence will show, as to what was done.

Now let me get in and tell you very quickly about what we believe to be the facts of the case. This case revolves around a gentleman by the name of Walter Burton. Some of you said and told the Court that you had heard or read of Walter Burton. Put that all out of your head.

As His Honor told you—with no slight to the press—the press really doesn't have any idea of the whole big picture, and it will only be you people, people in this box, other than the lawyers, His Honor, and his staff, who know some of the evidence now. Not all of the evidence, nobody could pretend to know all of the evidence; but it is you people who at the end of this case could in fact write a book, and you could tell the press something, because you're going to hear the evidence about Walter Burton never read or never printed in a paper.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.7 1. Characterization of Principal Defendant; Video Images Used for Emphasis

§V.7 1. Characterization of Principal Defendant; Video Images Used for Emphasis

Walter Burton is a very interesting man. He exercised total control over something called the Columbia Financial Corp. I'll give you a little more of his history later, but, in essence, he was a lawyer, came from Ohio, came out here with something called Alchemical Financial Corp., in the Phoenix area. Professes, you will hear, to be a strong family man; as a matter of fact, so strong he put his entire family on the payroll. He put sons-in-law, sons, daughters, everyone on the payroll, including their baby-sitters, and charged that to the corporation. You'll hear names like George Halsey, Louis Brandon, Dave Haydon, Mike MacAlister, Ben Wickham. These are all sons-in-law who were given jobs. We're going to tell you what they were paid; we're going to present evidence of how he ran CFC, which, by the way, so you understand, was a public company. Later in the morning I'm going to tell you about the stock they sold to the public, and the bonds they sold to Mrs. Mason, and Allan Lucca. I'll tell you more about those individuals in a minute.

But there's absolutely no doubt that it was in fact Walter Burton who exercised total control here beyond anything you have ever witnessed. And perhaps the best way to show you that would be to play a video clip of a young lawyer who worked for CFC.

Now let's hope we got that great tape in there.

[*Videotape played as follows.*]

Question: (BY MR. HARVEY) How would you generally describe the structure at CFC?

Answer: If I were picking one word: Monarchy.

Question: And by calling it a monarchy, what are you suggesting?

Answer: That Walter Burton, Jr., was the final decision maker on anything of major import, and his word was law.

[*Videotape concluded.*]

MR. COTCHETT: Now, I just showed you—and I held my fingers there for a moment, thank God it worked—I just showed you a, quote, "insider," a lawyer who worked at CFC.

Sitting right over here behind the Adams Accounting sign is Mr. Hersh. You'll hear that we took his deposition. And a deposition, so that you understand, is where we go into a room, usually a big room with lots of lawyers in it, and Harry Flanders will sit there with his court reporting machine, and we ask Mr. Hersh, for example, questions. And that's called *pretrial discovery*, and you'll hear that term time and time again. It's called *depositions*. And we take down words, and Mr. Hersh, for example, a partner at Adams Accounting, was asked:

"Have you ever personally been involved in an audit of any publicly held corporation where as much real power resided in one man as resided in Wally Burton in this instance?

"Answer: No, I haven't."

So I don't think there's any dispute—and everyone who comes to that stand will tell you—that he was a one-man show, a domineering person. And you will hear testimony that it was, in fact, a public corporation, allegedly run by a board of directors; you will hear about regulators and how they control that; but no one will dispute the fact that this was a one-man operation.

Now, here's what the evidence is going to show about Wally Burton. It's going to show that he took millions of dollars out of that corporation and put it right there, right in his pocket.

Let me show you very quickly ... and I only have snippets of this, because ... for example, his home in the Bahamas—you can't get to it except by boat. We didn't have a boat so we did a fly-by. Let me show you what that looks like. Let us show you a quick snippet of his Florida house. That we were actually able to get—so you know where some of this comes from—from video news film. We were able to take some pictures of his Serenity Valley home. Again, it's a compound, so we had to fly over it ... but let's just start and find out where Wally Burton lives, if we can.

[*Videotape played.*]

MR. COTCHETT: This is his island in the Bahamas. This is coming in over the house right there. If we could freeze-frame it, I would, but we can't. This is Green Creek, Florida. Was Green Creek. There it is. That's the front entrance door. The rear patio. That's Green Creek.

This is the compound up in Phoenix, or just outside of Phoenix. It's not too shabby.

[*Videotape concluded.*]

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.8 2. Defendant's Extravagant Personal and Business Practices; Complicity of Co-Defendants and Victimization of Plaintiffs

§V.8 2. Defendant's Extravagant Personal and Business Practices; Complicity of Co-Defendants and Victimization of Plaintiffs

MR. COTCHETT: Now, what is the reason for showing you this? The reason for showing you this is what our case is going to ... that we are going to put forth in evidence is the following: We're going to put forth that Wally Burton attempted to buy anything he wanted, including the people in the courtroom. And we're going to offer evidence that he would pay for the best accountants, the best lawyers, and everybody he could buy and everything he could do to continue to put money in his pocket. How did he do this?

And, by the way, many of the people you're going to hear from the stand visited those spots, and I'll show you now how they visited them, if you would.

[*Videotape played.*]

MR. COTCHETT: This was to get around Phoenix. This is his own movie that he would show his friends of how he could run them around the country.

[*Videotape concluded.*]

MR. COTCHETT: He took these trips all over the world; in many instances, accountants, lawyers joined him—the evidence will show—for fun and folly. In June of 1988, he took a trip to Europe: to Rome, Switzerland, Yugoslavia, Germany. He took members of his family on two planes, I believe; he took the baby-sitters with him. Now, the significance of June of 1988 is important, ladies and gentlemen, because what the evidence is going to show is that, in June of 1988, the only money he had coming in was coming from Mrs. Mason, Allan Lucca, and the others who were lending him money. And they were lending him money through something called a debenture; and you're going to hear a lot more of that. Because you see, in many instances, they saw the glossy photos of things like this.

This, ladies and gentlemen, is the Firebird Hotel. We were going to bring it to you on a video clip and we freeze-framed one frame for you. That's the Firebird. You may have heard of it; it's built up outside of Phoenix. So that when the individuals—and we'll get into this in detail—were, quote, "investing in corporate America" by buying a debenture, they were shown these flashes that they were buying into things like the Firebird.

I think you're going to hear testimony that runs something like this: You would have to rent every room in the place every night for the next umpty-ump years at \$500 a night to make it pay for itself.

Needless to say, right now, ladies and gentlemen, I believe you own it. Or the government may have just sold it to someone, but, believe it or not, at one point in time, not too long ago, you owned that place. That was yours, the American citizenry.

Let me tell you about the jets you just saw up there. Those jets cost \$12 million; they cost \$18.8 million to operate over four years: \$31 million spent for jet travel. And I'm going to show you agendas and flight logs, which are required by the FAA, showing you running these accountants and these lawyers all over the United States. Yes, running to Chicago and picking up Mr. Wakefield's important clients, and running them to New York for big meetings.

And the significance of this—and the evidence is going to show—that they had knowledge. The evidence will show, and we will put people on the stand: "Did you go here, go there? Did you know this was being spent?"

Somebody yesterday handed me this. You can't see it from where you are; I'll read it to you. It's a button. It says, "I like Wally Burton." So do I. That button, folks, cost Columbia Financial Corp. and Mrs. Mason and Allan Lucca \$1700. They wore them all over CFC. Because what you will hear from that stand is that Mr. Burton wanted everyone to like him. So he spent that kind of money.

When his two daughters wanted to go over and see a picture called *Life as a Dog* in Beverly Hills, they got in the corporate jet and flew over there.

What's the significance of all of this? The significance of all of this is that we will present evidence through expert witnesses—we're going to call accountants, and I'm going to tell you who they are—who will tell you that these people sitting out here would look at a flight log and see "*Life as a Dog*; visit to Beverly Hills"; or—let me see if I have this other one here—a visit to Lou's

Restaurant in Beverly Hills for the wife and two daughters: \$500 for lunch with a tip. Now, you will hear testimony from our experts who will tell you that these accountants, when they saw the little purpose—and I'm going to show you up on the screen, it says "Business Purpose: Viewing film in Beverly Hills"—they just wrote it off as a business expense.

And if I get Mrs. Mason on the stand, I'll ask her if she ever saw the film, or did she ever realize that that's where her money was going.

Just before bankruptcy, on March 29, 1989—March 29, if you can focus on that date, that was about two weeks before bankruptcy—while Mr. Bascomb clients, R & T Accountants, were the auditors, Mr. Burton jumped in an airplane and flew to Mirabela, Spain; Dusseldorf, Germany; Nice, France; and Shannon, Ireland. Took baby-sitters with him, of course.

In the three months prior to his filing bankruptcy, he wrote no less—when I say "he," he and his cohorts—wrote no less than roughly \$2 million in notes to themselves, because they knew they were going to file bankruptcy. Just a day before they went bankrupt, they wrote a little check for \$1.1 million to a law firm to represent them in what they anticipated to be—might be—a bankruptcy. They spread money around—and you'll hear testimony from qualified experts who will say there is a duty, when you have a public company of accountants, to watch this.

And let me show you the kind of salaries he paid and what he did, if I could run that tape real quick. You're going to see Elaine Wilson. This is when Elaine Wilson was ...

[Videotape played as follows.]

MR. BURTON: Let's approximately show as public information.

MS. WILSON: I made around \$800,000 last year. And if you put stock options on top of that, it goes up from there.

[Videotape concluded.]

MR. COTCHETT: This is the secretary he's bringing into his office.

[Videotape played as follows.]

MR. BURTON: Have you ever asked me for a raise? Okay. Turn around.

SECRETARY: No.

MR. BURTON: Have you ever asked me for a raise?

SECRETARY: No.

MR. BURTON: How old are you?

SECRETARY: Thirty-one.

MR. BURTON: Thirty-one. Okay. You're going to be the first girl to start off as a secretary to make \$100,000.

SECRETARY: In what year? 1990?

MR. BURTON: Right now. \$100,000.

SECRETARY: Get Jeff in here, president of the commercial department. I'm not sure.

MR. BURTON: But you know I'm serious, right?

SECRETARY: Yes, that's the way things happen around here, on the spur of the moment, and our employees are so well taken care of.

[Videotape concluded.]

MR. COTCHETT: Here is an example of the flight logs, ladies and gentlemen. This just shows you a form of one. See "Flight Operations Report," up on the top? On that date they're going to Los Angeles, and it lists the passengers—Helen Brandon, Cathy Kelleher, his secretary—and they're going over to look at—Brandon and Kelleher ... "to L.A., *My Life as a Dog*, see film, per Dennis Smith's request. He has English dubbing, et cetera, et cetera." That's an example of what the flight logs will show you.

Let me show you the type of memos of how they would give bonuses—all with the knowledge of these accountants. And by the way, just so we're clear, if you want to hear the figures that you'll hear from that stand, Mr. Burton and his family took out of this public company \$89.7 million in five years. And that's where their money went.

One day a young man walked in with a great appraisal. It was high. They could trade property with high appraisals. He bought him a Porsche.

One day he walked in and said to some of his executives, "Have you been to Alaska to go fishing?" He took the plane and sent them to Alaska for the weekend at a cost of \$30,000 to Mrs. Mason and Mr. Lucca.

He spent, in the four years, over \$500,000 on parties, to which many of these accountants right here were invited.

He would fly out Peter Duchin and his orchestra to the compound you saw. They would get through the gate; some people wouldn't.

He had a swim team up at the Firebird; he spent \$300,000 for his swim team, paid the coach \$150,000, all with money like that.

COMMENT

Throughout the opening statement, counsel reduces complex issues to simple emotional terms, effectively using videotape footage to dramatically portray Burton's extravagance in spending the money invested by his unsuspecting, elderly clients.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.9 3. Samples of Proposed Documentary Evidence Implicating Defendant

§V.9 3. Samples of Proposed Documentary Evidence Implicating Defendant

Did he give political contributions? You bet he did. I'm going to show you evidence—when I say I'm going to show you evidence, it's what I believe the evidence will show—but I'm going to show you some documents when he told Mr. Bradshaw's clients, "Bill me liberally." And you'll understand what that meant, because I'm going to show you with your own eyes that they billed him liberally;—in other words, wrote down those hours that maybe didn't exist, in return for which they could give political contributions, and they did.

I'm going to present evidence where he just, unsolicited, gave them a \$250,000 check, and I'm going to tell you that there's a person in this courtroom who, I believe, was handed a \$2 million check, unsolicited.

We are going to present—and it's certainly not part of this case, but it's an indication of what went on—because we are going to offer evidence that accountants sitting right here today with you in this courtroom participated in attempting to block the regulators from closing him down.

Was Wally Burton proud of what he did? Let me show you what he said about his political contributions; did they affect politicians? ... No. We knew that would happen. We don't have it? Okay.... What he said, folks, was, quote—you've probably seen this or heard it—when asked did he think that his contributions affected politicians, his quote was, "I certainly hope so."

Now, how was this money spread around? It was spread around very simply. Let me tell you, you're also going to hear about a depository called a *document depository* up in Phoenix. I don't know what the number is—it's mind-boggling to me. I don't know how all these young lawyers read through them; I know Laurel spent many nights reading through them; there are millions—they found documents that we will present to you, and what we did is we went out and hired Pete Hoenthal. And who is Pete Hoenthal? He's a Tucson Police Department officer. You will hear his qualifications, you will hear people talk about him. He was trained at the FBI Academy in Quantico; he's director of the Southwest Association of Document Examiners; he's written reports for the Secret Service, for the DEA, Drug Enforcement Administration, probably the most qualified man here in Arizona, and here's what he did for us:

He took the documents that Miss Jager—even David Hayes, everyone—would find, and he told us who signed these or who wrote them; because he would compare, you see. See, many times these documents were not signed. Mr. Hoenthal will come to this courtroom and tell you that that was written by Elaine Wilson. Well, let me be candid with you. We had a little clue, because it says "JW" down at the bottom.

But that's an example, ladies and gentlemen, of how moneys were handed out: "And suggested a \$465,000 bonus to WJB." You'll come to learn that's Wally Burton. "Why not take 750?" Why not? "Have 465 or 500 withheld and you will net 285 to 250. That will cover all 1986 remaining cash needs." Well, his cash needs were big. "Nineteen eighty-six compensation would be \$1.77 million versus last year. I think it looks better not to have the entire bonus withheld."

Mr. Hoenthal—Officer Hoenthal—will tell you that's Elaine Wilson. How does he know that? He compares it with things like this. That's 1986, probably before Mrs. Mason and Mr. Lucca have started buying.

Here's one from Elaine Wilson to Cindy Russell; but because ... you see, we don't have Elaine Wilson here to talk to us—you saw her up there on the screen. That was courtesy, I believe, of CBS. See, she now takes the fifth, so we have to have someone say whose document that is. Officer Hoenthal will come to that stand and tell you that's another one she wrote.

"Please raise Wally to \$2 million beginning 5/9/88. Board of directors has approved same." Evidence will show the board of directors never approved anything. Evidence will show that they never approved that. Evidence will show the most startling fact is that, in May of 1988, the company was basically bankrupt, and they raise him to \$2 million. These are just an example of the little memos: "Please raise Tony Liebert to 385 effective Monday, 3/8."

We will show through witnesses that, whenever one of these memos was written, it was usually because Tony Liebert probably did something. He probably approved something or wrote up something or wrote an appraisal; and usually when you did a good appraisal you got a bonus, because Mr. Burton was famous for giving, quote, "cash bonuses."

Now, that's the Mr. Burton that you will not see described in the brochures. You will not see any of the fancy brochures telling you these facts; nor will you see anything anywhere in any public document about the background of Mr. Burton.

Nor will you see what should have been disclosed in the public filings: the fact that in 1979, the SEC sued Mr. Burton and others to stop them from violating securities laws in the future—no loans to friends; no inflated business transactions—and, yes, you heard me correctly, the evidence will show that was 1979, not '89. Twelve years ago, Mr. Burton, operating through a company called Orion Savings and Loan, with Todd Lucas and Alchemical Financial Corp., were sued by the SEC. We will let the evidence show exactly what they were sued for.

The fact of the matter is, we are going to present experts who will tell you that these accountants all knew about it and none of them put in the disclosure documents—which you'll hear described in detail—any of these facts.

Art Stein knew about it at Johnson, Madison; Paul Hersh sitting in the front row knew about it; Mike Burrows from CM knew about it; Frank Lowe from R & T Accountants knew about it; Wally Burton knew about it. Everyone knew that he had signed the consent decree and promised never to do it again over ten years ago. If there's any doubt about his signature, there's his signature on the consent decree. "Burton states that he enters this consent and undertakes voluntarily that no tender, offer, or threat of any kind has been made by the Commission to enter into it. He waives the imposition of a fine."

And there's the case, ladies and gentlemen, in public records, and that's his signature.

Our experts will testify that they knew this; they should have flagged this as a warning. Mr. Stein, for example, testified:

"Did you know of the SEC proceedings against the law firm of Mr. Burton's?"

"I generally knew there was a proceeding against the firm."

He describes in some detail about how he knew about it: "I don't remember the name of the corporation," he said, "but I knew about it."

Mr. Hersh, sitting here in the front row, let me tell you what he said:

"Were you aware that Mr. Burton had any difficulties during the time of your engagement, Mr. Burton had any difficulties with the SEC?"

Answer: "I was aware very early on, and I forgot what kind of agreement he had reached with the SEC in the late 1970s but there had been some kind of agreement reached between him and the SEC regarding some of the transactions."

I could go on and read you each and every one of them.

The evidence will show that in 1979 he did the very thing he did in 1986, '87, '88, and '89. And did he have a plan to do that? You bet he had a plan to do that, because Officer Hoenthal is also going to tell you this is his writing.

Now, you can't see the date up there very well yet. You will have an opportunity to look up closely at that document. But that document is dated January 5, 1984; and the significance of that, as you will hear from the stand, is that he hadn't even bought McKinley yet. This document was written a month and a half before he bought McKinley. And he's writing a letter to his chief financial officer, Ralph Moran, who now, unfortunately, takes—not unfortunately—now takes the fifth: "Talk to Richard Frary to proceed to raise subordinated debt in McKinley." And then he goes on. Somebody writes a note, and you'll be told who: "I assume that you wanted to pursue the prospect of selling or raising subordinated debt out of the McKinley branches just as Citroen Savings in Miami did. Is this correct?" You know how he answers? "Yea and verily." Wally Burton. That's his announcement; that's his signature. So before he even bought McKinley, ladies and gentlemen, this was put in ... put in motion. Let me tell you quickly about McKinley, about the history of McKinley and what it was.

B. Background of Defendant's Business Enterprise

§V.10 1. History of McKinley Savings

I'm going to tell you about the old McKinley Savings. It was established in 1926; it's an old company, over in California. It didn't burgeon until after the war. Southern California really didn't take off until after the war.

San Diego County grew because of Convair and defense plants and what have you, veterans returning. They were building homes. Built homes all over to Orange County. If you haven't been to Orange County recently, it is one big little home. Same thing with San Diego: one big little home. And those little homes, believe it or not, were built by savings and loan institutions. You're going to hear an expert come to the stand, tell you ... You probably saw a film, I'm going to guess at Cary Grant; I'm not sure who was in it ... but the savings and loan industry, of which McKinley was a part, did very simple things. They took Mrs. Mason's deposit of \$10 in her savings account and they loaned it to David Hayes, a World War II veteran who was returning to build his home. That's how the system worked.

And you knew the teller. Some of the tellers at McKinley had been there, I think there will be testimony that there was one there 30 or more years. And in 1984 there were 29 branches that had been built up all over southern California.

Now, in 1984, Wally Burton—I'm not sure who at Drexel he went to, whether it was Michael Milken or who—he went to one of them and he borrowed \$50 million. With \$50 million he walked into McKinley Savings and Loan and bought McKinley Savings and Loan. What the evidence is going to show is that what he bought was assets and deposits, and they were all insured. And you're going to hear a lot about that.

He bought McKinley Savings on February 22, 1984. And next Wednesday—I believe that will be the first day you will hear this person—you're going to hear, from that stand, that within 60 days, every single loan officer was fired. Within 60 days.

Were there loans made after that? You bet. Who was the loan committee? Wally Burton. So we're going to bring you a person to the stand, next week hopefully, who is going to tell you about how the loans worked after they fired all the loan officers. We're going to bring someone to the stand that's going to tell you that he was paid thousands of dollars to help Wally, filling out loan work to his friends. And I trust he will tell you on the stand what he told our investigator last week. He was asked ... By the way, this individual was with Plainfield Life Insurance for 27 years. After 27 years—a man in his middle fifties, worked his way up to \$57,000 a year, a very good salary, doing very well—Wally hired him at \$175,000 a year, and asked him to do certain things.... And just a week or two ago, one of the investigators, or maybe one of our lawyers, went out and talked to him, and he will testify so on this stand. He was asked, "Sir, after doing all of these things, did you feel bad about what you did?" We're going to ask him that question. And his answer, folks, was, "Not on payday."

Now, that was McKinley in the old days, and, unfortunately, when Mrs. Mason and Allan Lucca and others got into it, this is the new McKinley.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.11 2. Defendant's Business Strategies and Questionable Practices

§V.11 2. Defendant's Business Strategies and Questionable Practices

How did they do business? All of their dealings—and I'm going to use "deals," quote, because they use it; I don't like that, but that's the testimony you'll hear—they involve basically three things. And that's why I say it's not a complex case. They would purchase raw land, or junk bonds, get appraisals and somehow hype the value of this, write it down onto a piece of paper, and tell you they were really the company that Mrs. Mason thought they bought.

They always had a need to book a profit. You see, you had to show a profit. And we're going to present you testimony—and, by the way, there will be testimony from all of these gentlemen sitting here—that they operated according to accounting standards, and they did everything that was right.

And our experts are going to tell you they did nothing right. Because all they did for Wally Burton was book profit. Because as long as he booked the profit—and this is a very important part of the evidence that you will hear—as long as he booked the profit, he could continue to sell to these people.

Were they real cash profits? They were not real cash profits. How did they operate? They operated with friends, and you'll hear this word, "straw buyers." They would get people to come in and pretend to be buying a piece of property, and sign documents that they never knew they were signing; and I think I'm going to show you that on a video clip in a moment. And let me give you an example of one.

A young man, Tony Hernandez. A very talented young man; evidence will show a star tennis player, up-and-coming career. Unfortunately, there will be testimony that he got on the fast track with Wally Burton, and you'll hear in a moment that he just went over and pled guilty to bank fraud.

But let me tell you about what Tony Hernandez did, to give you one example. You're going to hear about Sunset Ranch in Daly. We'll show you later a bank statement from Sunset that at the time they bought Sunset property, ladies and gentlemen, Sunset, the people who bought it, the people all had \$30,000 in the bank.

Mr. Hernandez rigged the deal where three of his friends got it. By borrowing \$14 million from McKinley, he, Tony Hernandez, loaned three-and-a-half million for a total price of \$14 million for desert land. Do you know where Tony got the money? Evidence is going to show he got \$25 million from Wally Burton. He was just helping his friend.

Now, let me show you, for an example, one quick owner of Sunset; and this is an example of how he was given the documents to review, and he had no idea what was going on. Here's a good example. Would you play that, please?

[Videotape played as follows.]

Question: Then you saw Mr. Hernandez?

Answer: Yes, and then he came out, and he told me, "We'll be right out." He says, you know, "We'll have you sign the documents in a few minutes." I said, "Okay." So I sat there a little bit, and then he said, "Well, why don't you come inside instead of sitting out here." I said, "Okay." So I went inside, I sat down at the end of the table like in here, I waited approximately, oh, 20 minutes, 25 minutes. And this gentleman came by, dropped a stack of documents with ... indicating with these yellow stick-ums where I would be signing my name. And he asked me if I was the buyer. I said, "Well, I'm not the buyer, but I'm the one that's going to sign the document."

Question: Had you ever seen these documents prior to signing them?

Answer: No.

Question: Did you review any of those documents prior to signing them?

Answer: Never.

[Videotape concluded.]

MR. COTCHETT: That's the usual way that business was done at CFC. That's just one example.

Let me show you a situation called Valley Homes. In December of 1987, one of the profits booked by Charles Merlin, sitting here in this courtroom, was for the sale of 425 acres up in Mesa Rojas. You're going to hear a lot about Mesa Rojas. You're going to find out ... well, you're going to hear testimony from some real estate people here in Arizona that it was all, to use the phrase of one, "a pipe dream."

They sold 425 acres out in some valley for \$6.8 million to a man by the name of Ian Cameron. Let me tell you who helped engineer this deal. We have documents that show that Mr. Franklin sitting in the back there, his client, the French Bank, who worked with the Franco-Assyrian Investment Corporation...

THE COURT: You misspoke. You said Mr. Franklin's client. You meant Mr. Pettit.

MR. COTCHETT: Thank you very much. Mr. Pettit's clients. They gave them the money for the down payment; they gave Mr. Cameron the money. They loaned him the money so Mr. Cameron could walk in and buy this property. Well, let me show you, when we took Mr. Cameron's deposition, what he said about paying \$6.8 million for this acreage in some place called Mesa Rojas.

Would you show that, please?

[Videotape played as follows.]

Question: Isn't it true that Valley Homes purchased 425 acres at Mesa Rojas on December 29th, 1987, so that CFC could record profit on its 1987 fourth quarter financial statements?

Answer: I decline to answer based on the fifth.

[Videotape concluded.]

MR. COTCHETT: That is an example of some of the handicaps we were under: Declined to answer. But that's what the records will show and the evidence will show.

Garnett Estates, one more example: They borrowed \$25 million, and in return for borrowing \$25 million, they went out and bought more property, desert property, for \$73 million. And let me show you what Mr. Banes, when we sat him down, had him sworn as a witness, said to us about his involvement in that property. Please.

[Videotape played as follows.]

Question: Did you learn that they, in late summer of 1987, had spoken with Walter Burton about a series of transactions whereby McKinley would loan \$25 million to Garnett Estates, and in return, Garnett Estates would purchase certain properties from a subsidiary of McKinley?

Answer: Refused.

[Videotape concluded.]

MR. COTCHETT: Refused to answer. Our accountants will tell you that, on the three transactions I just showed you, on just those three, McKinley Savings and Loan booked—meaning wrote down on paper—after Charles Merlin looked at all the paperwork, they booked \$20 million in profits.

Their total profits for the year were \$27 million. Of the \$27 million, you will hear that—from that stand—that \$20 million was bogus, was phony. And those were the words; these are not my words, those are the words you will hear to describe, by competent experts—the experts—the transactions.

Let's talk very quickly about Mesa Rojas. It's 18,000 acres. It's an interesting piece of property. It's 18,000 acres west of Phoenix. McKinley bought the property in 1985 for \$3000 an acre. And what they did was, they were going to build units on it. And they were going to build a town out there, on the theory that the population of Phoenix basically was going to move from Phoenix to Estrella. Not all of Phoenix, but a portion of Phoenix.

You're going to hear what our real estate experts say about that theory. And in fact, the evidence will show that it was all bogus, and what they did was simply put in some streets, and some lights, and, yes, build a yacht club. Could you run that tape, please?

[Videotape played.]

MR. COTCHETT: There's a fire hydrant, lights, streets—don't go anywhere. Eighteen-hole champion golf course. There's the yacht club. That's just a sign, mind you; you can see behind it. That's Estrella, Arizona. That's the power lines going through.

[Videotape concluded.]

MR. COTCHETT: And that, ladies and gentlemen, was all put into beautiful brochures. Those are the streets where all the homes were going to be built. If you were to go out there today that's what you'd find. The yacht club sign is still up; no yachts, no boats, just that. And they started selling that land to straw buyers, among others, for \$23,000 an acre in phony deals, so that these accountants could, quote, "book profits." The straw buyers, if they are within subpoena power, we're going to call them.

One is going to come: Tony Hernandez. On October 28, 1990, he was charged with bank fraud. On October 30, 1990, he pled guilty to bank fraud. He admitted that, as a quid pro quo for the transaction—in exchange for the purchase from an CFC subsidiary of 1000 acres in Mesa Rojas for a total sales price of \$14 million—certain officers and directors and others were engaged, and in return for which he would provide ... CFC would provide Hernandez with a \$30 million line of credit. We will bring him to this courtroom. We will ask him some of those questions. Let me show you how they managed, in many instances, to do this.

[Videotape played as follows.]

Question: (MR. BRIAN BEALS) Did you say anything at the meeting?

Answer: No. I specifically remember just sitting there and not saying a word.

MR. COTCHETT: This is a young appraiser.

Question: Is there a reason for that, why you didn't pipe in?

Answer: Because I ... it was just all so ... well, I mean, as you know, my feelings at the time were that these sales were not arm's length, and to try to convince Gilbert that they were—especially Jarvis trying to convince Gilbert that they were—I just thought violated every ethical standard that there was.

Question: Why do you say "especially Jarvis was trying to do that?"

Answer: Well, because Jarvis is ... he has a designation. He's a professional, and he knows what the standards of professional practice are, and—referring to my cheat sheet ... but I've lost it somewhere; you know, I just made a couple notes because I couldn't recall them today—but, you know, you don't perform an appraisal with advocacy, and you refrain from conduct that is deceptive, misleading, or otherwise contrary to public interest. And I felt that's exactly what Jarvis was doing.

Question: What happened after the meeting?

Answer: I remember pretty specifically what happened. I walked into my office; Jarvis came in. I had a copy of the standards of professional practice, and I threw it at him and said that he had violated every one of the canons. And that, you know, I wasn't going to have anything to do with him anymore, and that was it. I went up that afternoon to Elaine and asked that I be transferred.

[Videotape concluded.]

MR. COTCHETT: That's essentially how everything worked. They worked with phony appraisals; they worked with phony documents. Many of these people—you'll hear about more of them—now pled guilty. That was in essence the business of CFC.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.12 3. Alleged Attempts to Deceive Bank Regulators; Video Depositions Implicating Co-Defendant Firms

§V.12 3. Alleged Attempts to Deceive Bank Regulators; Video Depositions Implicating Co-Defendant Firms

Now, you're going to hear a lot about regulators. McKinley Savings and Loan was a regulated industry, just like our banks are. So the regulators got involved in the process when Mr. Burton bought this. He went and he told—and by the way, we have something called a *change of ownership application* that you'll hear about—he told, of course, the regulators—our government—that he was going to run CFC—excuse me, McKinley—just as McKinley had been since 1926. I've already told you what happened within 60 days: Within 60 days that stopped. And the regulators quickly started taking a look at what was going on at McKinley Savings and Loan.

The change of control went smoothly, because he had lawyers—high-paid lawyers, and my "high pay" is not an argument to you; it is what will be described to you by their hourly wages of from \$200 to \$400 an hour—who would go to the regulators and talk to them in suits about what a good guy Wally was; why he was going to run McKinley in a proper way; and, of course, what they never told them was that, as soon as Wally got his hands on McKinley, this is what he was going to do.

This is the approval from the Federal Home Loan Bank Board August 2, 1984. He had McKinley now in his pocket. A couple of months, John Morse writes him a letter, says their application to sell certain debentures is okay. Handwritten note to Ivey, Officer Hoenthal will tell you; Hoenthal will tell you that's Wally's signature: "We've got to get the subordinated debentures."

I don't think there's any doubt in the evidence—the only evidence I know from the case—that that was his approach from the very outset.

Now, there were some problems, because the regulators wanted to be assured that everything was going to be done properly. And this is an example of the type of letters we found, in the depository up in Phoenix, that were written. And let me just show you one.

This is to Mr. Calvin Yamamoto, Department of Savings and Loan in Los Angeles, in which he tells Mr. Yamamoto that everything will be done pursuant to law, everything will be done properly. And he goes on to assure the Department of Savings and Loan that they're going to comply with the law; and he states in no uncertain terms, describing the sales program: "We wish at the outset to emphasize that every step in the process of structuring the sales program was reviewed by Klein & Dante, of New York"—who, by the way, you will hear testimony that they were a defendant in this case at one time—"and Johnson, Madison & Tyler, of Los Angeles," quote, "to assure compliance not only with securities laws and regulations, but also with the applicable banking and federal savings and loan and loan insurance corporation laws and regulations."

That was signed by Donald Thornton, the general counsel, or assistant general counsel, or person who at that time was operating to get the debenture program through. And just so there is no question about who we're talking about, the law firm described there, Johnson, Madison & Tyler—quote, "to assure the compliance not only with securities laws and regulations,"—are right in this courtroom this morning, sitting right back there.

Now, there were times when letters would go back and forth to the Federal Home Loan Bank Board, many of which were reviewed—and we're going to tell you about that in detail—were reviewed by the law firms and the accountants. In many instances they would approve them and sign off on them. Because to get necessary approvals they have to have had the professionals working with them. Let me tell you how they worked with them.

It's an hour and 15, Your Honor; would this be a good time to take a break?

THE COURT: All right. We'll take a 15-minute recess, ladies and gentlemen. Remember what I told you. You go back there and you talk about anything but the case. Okay.

[*Recess taken.*]

THE COURT: Be seated, please. All right, proceed Mr. Horn. Excuse me—Mr. Cotchett.

MR. COTCHETT: Thank you. That's an honor, Your Honor.

We took a break just when I was talking about the regulators. Let me now tell you about ... what I primarily told you about were the federal regulators. Now, because McKinley Savings and Loan ... the branches were over in California and, as I just showed you on an overhead, the California Department of Savings and Loan and California Department of Corporations were also

involved. Those were the two agencies that had authority and/or—as we call it in the law—*jurisdiction* to regulate, or not necessarily regulate, and you're going to hear some interesting testimony on this.

Just what authority they did have, it's going to be conflicting. You're going to hear testimony to the effect that they had a lot of authority. There's going to be some testimony that you'll hear that they had little or no authority and there was nothing they could do once they received audited financials, because once the audited opinions came from then a Big Eight accounting firm, now a Big Six accounting firm, you'll hear that they were basically hands-tied as to what they could do.

Let me show you some examples of some depositions we took on video camera over in California of some of these regulators. And what ... the first one I want to tell you about, who we're going to bring live, if we can, is a Harold Chavez. He was a chairman of the Department of Savings and Loan, or perhaps the title is "director"; whatever it was, he was the Chief Kahuna, I believe appointed during the '80s. I think he was a George Deukmejian—Governor George Deukmejian—appointee. And you'll hear his qualifications, having been in the savings and loan industry for many years. And he wrote memos, wrote reports; he would get information from, for example, Calvin Yamamoto—the individual you just saw referred to in that letter—and he wrote a report to another agency, and we asked him about that report. We took a video clip of it, and I'd like to show you and introduce to you a person who we hope will come to this courtroom, Harold Chavez.

[Videotape played as follows.]

MR. CHAVEZ (reading): "The modus operandi of this company has been for Walter Burton, the principal stockholder of Columbia Financial, with the support of his immediate family and friends, to call all the shots. We believe that the veil between the corporations hardly exists, that minutes are merely prepared to support the transactions that Walter Burton has entered into or was proposing. There is no independence in any corporation from the control and the whims of Walter Burton.

"The board of directors, officers, and employees are extremely high-paid puppets. Compensation is so generous that it borders on payola. This company has more highly paid executives than any that I know in the industry. All are either relatives, long-time employees, or new employees possessing an expert skill that is needed by Walter Burton to advance his initiative or hold off the regulators.

"An example of this is Richard MacBeth, the CPA, who represented Charles Merlin, the third CPA firm employed by Columbia Financial since 1982. The first CPA firm was Gordon Paine, the second was Adams Accounting, and the third CPA firm was Charles Merlin, and the fourth and present CPA firm is R & T Accountants, since September 1988."

Question: Do you believe that the contents of that paragraph are true?

Answer: I believe it.

Question: In fact, those are your conclusions, having been the principal regulator in the State of California overseeing this institution for a period of years, isn't that correct?

Answer: That is correct.

[Videotape concluded.]

MR. COTCHETT: Not only did Mr. Chavez write a report like that, but we took the depositions of other regulators. One of the individuals we took a deposition of was a senior financial analyst at the Department of Corporations. Because, while the Department of Savings and Loan over here would have authority over the savings and loan, when it came time to sell the notes to Mrs. ... Miss Mason and Allan Lucca, and others—and 17,000 others—they had to go to another department. They had to go to the Department of Corporations. Just as here in Arizona, or in any other state, they generally have these departments that oversee the corporations and/or the savings and loans in their states. We asked Mr. Mayeda—a Thomas Mayeda—some questions under oath, and specifically we asked him whether or not they relied upon the accountants in giving authorization to approve these bonds. And if you would, could you show us what Mr. Mayeda said?

[Videotape played as follows.]

Question: Did you rely on the Charles Merlin financial statements?

Answer: Yes.

Question: To what extent did you rely on the Charles Merlin financial statement?

Answer: Very heavily.

[*Videotape concluded.*]

MR. COTCHETT: That's an example of just one regulator of many more to bring you.

Patrick Saunter, another individual, was the chief deputy commissioner of the Department of Corporations, and he was the number two in command. We took his deposition, and he said:

[*Videotape played as follows.*]

Question: To your knowledge, Mr. Saunter, did the audited financial statements referred to in this memo play a significant role in the DOC's ultimate conclusion that CFC could service the principal and interest payments due on the debt?

Answer: Yes.

[*Videotape concluded.*]

MR. COTCHETT: You see, the whole issue, when they wanted to go sell these notes of the Luccas, the Masons, and all the other people we're going to bring to you — Oscar Mendoza, who will be here next week, a former bracero who came to Arizona and put his life savings into it — they had to get permission from the Department of Corporations. And they had to make that decision based upon whether or not they could be paid back, and the only way they could make the decision on whether or not they could be paid back was by looking at what we call financial statements prepared by the very people in this courtroom. And that's how the decision was made to allow these notes to be sold.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.13 4. Role of Defendant Law and Accounting Firms in Alleged Falsification of Documents

§V.13 4. Role of Defendant Law and Accounting Firms in Alleged Falsification of Documents

The financials were about as important as any part—and you will hear this from that stand—as any part of the operation that he ran, with one exception: the role of the lawyers. You've heard about the straw buyers, but it was the lawyers who allowed him "to head off the regulators," as the phrase goes, "at the pass." And you'll even hear that expression used from this stand. And let me tell you what happened in March of 1986.

In March of 1986, the program is getting going. More and more people are starting to walk into McKinley; because, as I'm going to show you in a short moment, they would advertise heavily. And what they did was this—and you're going to hear more about it in the bond program—but just for a quick overview, they would run ads in newspapers and on television all over—even here in Arizona, by the way—and they would offer interest rates just above the going deposit rate, certificate of deposit.

And you will even hear—and I don't want to get into this now—but you will hear that they would even find out when the certificates of the Miss Masons of the world were coming due; someone would call her on the phone, or Mr. Lucca, and say, "By the way, Mr. Lucca, on Friday your CD is coming due. If you come in, we have a wonderful opportunity for you to make more money." And you're going to hear that in detail: how they would sell it in the ... in the branches.

Now, what happened in March of '86 is very significant. You're going to hear a lot of testimony about this. You're going to hear testimony about an exam that took place. Let me explain to you what I mean by an exam.

The regulators have the right, if not the duty, on behalf of all of us as citizens, to go into a savings and loan and review the books and to review the records, and make sure that all the books and records are done right. And what do they look for? If they go into a bank they look at the loan application: Is the loan application correct? And they'll even do this on consumer loans in banks: They'll go in and see if your application to buy this car is sufficient or who is this loan to? Is this the bank president's brother, or is this a member of the board of directors son? And you'll see instances of that. We've all heard of that; that's common knowledge. So what they do is they come in and they make these periodic examinations. And, as some bankers have told me, that's the terror point of their life, once a year, annually, when the examiners come in.

It shouldn't be, but it was for Mr. Burton, because in February of 1986, Mr. Burton heard that he was going to be examined. And what he did was he looked around for the best and brightest people he could get to head off these examiners. And I'm going to tell you more about Johnson, Madison & Tyler later. But in a ... as an example, he went out and hired them. Why did he hire them? Because Mr. Stone had just left, and others had just left, the Federal Home Loan Bank Board and/or other government agencies, and why not hire government agency people to work for you, and they would know how to head it off. And there will be an issue, as a matter of fact, concerning that, which I'll come to later.

But in March of 1986, the regulators had a very serious job to do. They had to go over to Irvine, California, and they had to make sure that McKinley Savings and Loan was being run like a legitimate, proper, ethical savings and loan. They would send in young people, young bank examiners, young auditors, some with bank training, some with law training; they would go through the files.

What they did was, Walter Burton went out and hired those law firms, those accounting firms, to run interference for him. They would in fact run interference. And Elaine Wilson, whom you saw up on that screen—and if you couldn't hear it properly, or clearly, it isn't very clear—was making \$800,000 a year plus stock options. Elaine Wilson put together something you will come to hear as Elaine's SWAT team. And Elaine's team went in before the examiners, went through all the loan files, and in the testimony of one, went in there and worked round the clock, quote, "to fix them up." They went so far as to pull the shades; they went so far as to put lawyers on a floor either downstairs or upstairs, and accountants, to watch what the regulators were doing, and pulled shades and went behind closed doors so that the regulators couldn't see them, quote, "fixing the files."

We took the deposition of a secretary, and we asked her—because she didn't take the Fifth—we asked her to describe it for us. Now I'd like to show you what Rosemarie Fielding told us.

[Videotape played as follows.]

Question: Did anyone ... were the underwriting people working in offices where they would keep the doors closed?

Answer: They had the doors closed and the drapes pulled.

Question: Were those drapes normally pulled or were they only pulled while the regulators were here?

Answer: Only while the regulators were there.

Question: Did anybody give you instructions to try to make sure that the regulators didn't go into that back area or that side area where the people were working on the underwriting?

Answer: Yes, Elaine Wilson asked that I try to keep the examiners up on the eleventh floor as much as possible. When they had any requests I was to tell them, "I'll bring them to you. I'll be right up."

Question: Did you have an understanding as to why they didn't want to know ... the examiners to know what was going on the tenth floor?

Answer: My understanding was that the underwriting should have been done prior to loan approval, and that they weren't done, and so that they were trying to catch up doing it before the examiners had a chance to look at the loan files.

[Videotape concluded.]

MR. COTCHETT: This was in March of 1986. I will tell you in detail later how much the lawyers were paid for that. It ran into the millions of dollars to operate on the swat team. But you know what their duties were? Their duties were to, quote, "destroy documents." And right from Miss Wilson's mouth came instructions to remove any documents that would be difficult for CFC: take them out of the file, put them right in your pocket.

We took the deposition of a young woman, Jennifer Morreau. We'd like you to see what she said about what her instructions were.

[Videotape played as follows.]

Question: Did you observe dates being changed on any documents?

Answer: Yes.

Question: On what documents were dates changed?

Answer: My recollection is that the documents that were changed were in some—and this was not across the board, only in certain files—the appraiser's review letter, sometimes the appraisal. If those days were identified in the loan summary, then the loan summary was changed. If there was something that changed they had to reflect in the table of contents, then the table of contents was changed.

Question: And you testified a minute ago, I think, that when Elaine came out there she instructed that certain documents be removed from files, documents that perhaps were extraneous to the loan itself, is that correct?

Answer: That's my recollection ... is that Elaine instructed, gave us instruction as to ... no, I'm going to strike that. I do think we knew that; we were given that instruction previous to that.

Question: Okay. Tell me what instruction you were given previous to that.

Answer: I believe we were given instructions to take all documentation that related to the negotiation of the loan transaction; anything that had Wally Burton's handwriting on it; any memo to Wally Burton regarding that loan; any kind of derogatory information about the borrower or about the economy or area in which the loan—the land—was in, that vicinity; anything about the pricing that was negotiated in Wally Burton's handwriting was to be removed.

[Videotape concluded.]

MR. COTCHETT: Not only did they remove documents, not only did they redate documents, they went so far as to backdate documents. They would forge documents. They would have young secretaries sign names. If the document couldn't be removed, it would be forged, blotted out, backdated, whited out.

Let me show you another example of what one of their paralegals was told to do.

[Videotape played as follows.]

Question: When you were signing for someone else, physically did you do it? I assume you took a pen and ... what would you write?

Answer: I would sign their name, whoever the director was.

Question: Okay. Did you try to make your signature look like their name? Did you try to make your signing their name look like their signature?

Answer: I did.

[Videotape concluded.]

MR. COTCHETT: I will tell you in a moment how the lawyers got involved. The accountants were involved. As a matter of fact, back in the summer of '85, prior to this exam, Adams Accounting loaned people to CFC so that they could stuff files. Let me explain that to you.

Wally Burton would run around making million-dollar deals with the Tony Hernandezees of the world on a napkin. Banking regulations provide that you have to have appraisals, so he went out and got phony appraisals. Banking regulations provided that you have to have a loan application, a simple loan application, so that somebody actually qualified to borrow money, so that they could see if Sunset really did have \$30,000 in the bank, which I'll show you in a moment, and they found out that none of these documents were in the files.

So Adams Accounting assisted by lending them some people—for which they billed them, of course—so that they could go in and put files or make files a little fatter than they were, so that the documents would be there. So that, for example, they bought junk bonds. You've heard, and you will hear, from Milken. At one time they bought \$100 million worth of some partnerships from Mr. Boesky. And in the files you had to have documentation that told them why. And in the summer of 1985 they put together a team, with the help of Adams Accounting, and filled up all those files. Everybody helped.

As a matter of fact, you will hear, very tragically, that one young man who helped in that operation, by the name of Craig Seller whom we will try to bring to this courtroom, was charged with a conspiracy on March 22, 1991, over in the Central District of California, in a federal courthouse just like this. Three days later he pled guilty to a conspiracy because he said he knew certain officers and directors of CFC/McKinley and others created documents for insertion in the McKinley loan files. Seller admitted that he, quote, "deliberately concealed the origin of the loan underwriting documents," the deceptive nature, and the fact that the loan files had been stuffed to appear that McKinley complied with the regulatory requirements.

Now, in March of 1986 there was pandemonium, because regulators were coming on very short notice. And hopefully we're going to have a man in this courtroom by the name of Art Stein, a partner at the distinguished law firm of Johnson, Madison. And Art Stein got that call—by the way, he also got a \$250,000 check, as I hear, that he didn't ask for—he got that call and he put, not one, but tens of lawyers on to this program immediately. They would work all night long doing a, quote, "regulatory review."

You're going to hear testimony about a regulatory review, whatever that means. You're going to hear other people describe it as "sanitizing the files." They were put on different floors so that they wouldn't know that the lawyers were downstairs or upstairs. They were even told to work in a whisper on the chance that a regulator might be walking by and hear them talking about a file. They were to whisper. They were told not to put anything in writing—this coming from my profession.

Could we see what Fred Santore, a young lawyer, candidly told us?

[Videotape played as follows.]

Question: You were instructed to whisper?

Answer: Yes.

Question: Who instructed you to whisper?

Answer: I don't remember exactly. That was another sort of general instruction, not to carry on conversations in a tone that could be overheard or potentially recorded.

Question: What did Mr. Stein say when you reported to him that minutes were apparently being added to the minute books?

Answer: He asked me if I had written a memo on the subject, and I said no, and he instructed me not to write a memo on the subject.

[Videotape concluded.]

MR. COTCHETT: Now, the question that will be presented to you is, Did Johnson, Madison and their lawyers know what was

going on? We subpoenaed records. And I want to show you, and I'm going to show you, a lot of documents, after the trial gets started, but I want to show you one such document as an example of what we found.

This is marked, appropriately, "attorney-client privilege, privileged and confidential attorney work product." This is to Maureen Follett and you will come to learn that she was the number two in command under Art Stein. This is a memo from a young lawyer by the name of Roger Parker. And that's to her, and that memo is ... and I don't have the date on that, but that's about April 6 of 1986.

Now, the regulators are there in March—I believe it's early April, although we'll rely on the testimony from the stand—it is right about that period that these lawyers were in working day and night billing at \$200-to-some-other-number an hour, and you will hear in detail, because I'm going to play you a clip in a moment from a young woman lawyer as to exactly what she did. But let me show you the next page from Roger Parker's memo to Maureen Follett. "Resolution backdating problem. On March 11, 1986, Johnson, Madison lawyers advised Mr. Ivey that board resolutions of CFC, McKinley, et cetera, et cetera, should no longer be backdated nor forged."

Who was Mr. Ivey? He was the chief counsel for CFC, Wally's right-hand man. I'll show you a picture of him later.

"On April 3, 1986, in connection with my conversation with Joan Volstedt, a member of LANCOR land acquisition"—Let me tell you who that was. That was a subsidiary of McKinley; they formed all these subsidiaries, you see. She was part of a, quote, "land acquisition team"; those are the persons that were supposed to go out and find the desert lands and Tony Hernandezes and buy them at many thousands of dollars an acre—"Regarding the lack of certain board resolutions inside the land acquisition files, I became aware of the fact that backdating of the resolutions was still taking place. Still takes place. I reported this fact to Mr. Wright"—another young lawyer—"who stated this was not to happen, and let him know if I discovered any further instances of resolution backdating. I then talked to Susan Borodino"—whom you just saw, a paralegal—"about responsibility." And this is what Miss Borodino told Mr. Parker, one of the lawyers assigned to this project: "Miss Borodino stated that resolution backdating was a longstanding practice and that she had not been informed that the practice was to cease. As an example, she produced documentation relating to the opening of several bank accounts in December of '84, which she had been given approximately 30 minutes earlier"—this memo is written in 1986—"with a note she claimed was from Mr. Seller, asking her to prepare backdated resolutions granting authority to open the bank accounts."

Young lawyers were put in the position of having to, quote, "fib,"—you'll see it in one second—backdate, and keep files clean. You will hear testimony from a University of Arizona law professor and a former judge in this community who will tell you that is not what lawyers are to do.

[Videotape played as follows.]

Question: Do you have a recollection of your reaction to these problems being taken care of at the time?

Answer: (VICTORIA BAYLOR) Well, it was sort of a little bit scary, actually.

Question: Why was it scary to you?

Answer: Well, I remember having conversations with other associates and with Lucy and Howard Rhodes about ... because I had an IRA at this bank, McKinley Savings and Loan Association. I remember being concerned about sort of the file corrections being done, because it made me feel like things were not being done on the up-and-up.

Question: I'm just asking you for your best recollection as to what gave you this impression?

Answer: Let me think about this a second.

Question: All right.

Answer: I guess my concern was basically I was going through these things finding all these things cured. And it seems to me that some of them could not be cured without being, basically, drawn up and backdated, and put in the files. There was no way to come up with them.

Question: Were you worried about specific types of documents?

Answer: I think the appraisals concerned me. I remember some of the applications concerned me. And I have this recollection about partnership borrowing authorizations or corporate resolutions being backdated.

Question: Corporate resolutions being backdated?

Answer: Yes. That isn't that unusual either, but not in a regulatory context.

Question: What do you mean by "Not in a regulatory context"?

Answer: Well, I don't know, it just made me uncomfortable that this kind of thing was being done. This is not a business deal between two private parties. This is a deal which, obviously, you have to comply with certain federal law to protect people like depositors, and it just seems to me that in that kind of context you can't do the kinds of things all the time that you do in private deals, where you have all the consent of all the parties involved. In other words, you can't fib when you're regulated.

Question: Did you have the impression that there were fibs that were being manufactured in these files?

Answer: Yes, that was definitely my impression.

Question: Did you have an impression as to why these fibs were being created?

Answer: Sure. So the loan files were clean.

[*Videotape concluded.*]

MR. COTCHETT: We will bring you testimony of other lawyers who tell basically the same story as Victoria Baylor; young, honest lawyers who told us under oath what they did.

Wally couldn't get his way with the regulators. They wouldn't take no for an answer, because they wanted to see files. They kept asking: "Bring us those files."

And what you'll hear is that the San Francisco—I don't want to call it "division," or what have you—but the Federal Home Loan Bank Board in San Francisco took up the cause of the American public and started to look very carefully at Wally Burton; because they, too, will testify that they suspected that this was going on. They knew one thing for sure: that the Allan Luccas of the world were not getting loans any more, but the loans were going to Garnett Estates and straw buyers left and right.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.14 5. Alleged Attempts to Influence Political Benefactors

§V.14 5. Alleged Attempts to Influence Political Benefactors

Wally, as you saw—actually, you didn't see, because I missed that little clip of him; I wanted you to see him saying it—gave thousands of dollars, if not millions of dollars—and we'll show that from his books and records—to politicians. So what did he do? He figured the best place to start was in the U.S. Senate; and he went to the Senate, and he took with him the audit partner at Charles Merlin, Richard MacBeth. Richard MacBeth wrote letters to U.S. senators, saying that they had reviewed the books, everything was fine; so that there is no doubt about whether or not they went. They wrote the letters, and I'll show you that more in detail later.

We went back and took the deposition of Senator Ron Britt. We will bring him to the courtroom here via a video deposition; but let me show you one little clip of the astronaut who circled the world, who is now a very fine U.S. Senator, and show you what he said.

[Videotape played as follows.]

Question: Did you understand at the time of the meeting that Mr. MacBeth was a partner at the accounting firm of Charles Merlin?

Answer: Yes, he was a senior partner, it was my understanding.

Question: Had you ever had occasion previously in your 12 years in the Senate—that is, before that date—when a senior partner from a Big Eight accounting firm had come to see you?

Answer: No.

Question: And, in fact, when Mr. MacBeth expressed his views to you, you understood those views to be his, isn't that correct?

Answer: I thought those views to be his, but I looked at his views as representing the official view of Charles Merlin also. Because Charles Merlin had conducted the audit, and as I was ... I don't know where I ... I was led to believe later, or wherever, this was a certified audit; which, having been in business at one time myself, meant a lot to me—it being a certified audit. So I thought he spoke on behalf of the Charles Merlin organization at that time.

[Videotape concluded.]

MR. COTCHETT: Ladies and gentlemen, it didn't stop with just U.S. senators. You'll hear testimony how they went to, not only U.S. senators, they went to their aides. We're going to try and bring to this courtroom Senator McDermott, himself, and his aide, to testify what they said to him. And their response to the 1986 exam that didn't come out favorably, as you could well imagine, was to go to Washington with a team of lawyers, accountants.

You're going to hear about Smith & Houston, another very distinguished law firm, who is no longer a party to this action. They gathered up all of their accountants and lawyers, they got on their big jets—and we'll show you the travel vouchers—and they go to Washington, D.C., and they talk about how they were going to make a fortune in Mesa Rojas. And they shot back with a seven-volume response, done and paid for by Allan Lucca and Mrs. Mason, done and paid for with the corporation's money to the lawyers and the accountants.

And in 1987, in July, they got their way. Shelby White, the former chairman of the Federal Home Loan Bank Board, appointed by President Reagan, will come to this courtroom, sit in that stand, and tell you how they tried to buy him off. They finally got him removed, and you will hear evidence of how they got him removed; he will tell you. They filed Freedom of Information requests, which is a document you send in to the government and you get back public documents, of how he spent money for sandwiches to eat that were \$2.50 off, or something like that. He'll tell you the whole story.

And when this very fine gentleman, Shelby White, was removed, he was replaced with another fine gentleman, Mr. Bernard Webster, whom you may have heard of and read about. And he will come to this courtroom also, as a witness, via the electronic media that are here today.

And you will hear from a number of federal regulators about exactly what the accountants did, because at this point Wally had out in front of him accountants and lawyers, and you will hear, for example, from some lawyers who had been in government at

the highest levels.

I took the deposition—and I will introduce in evidence time sheets—of one lawyer who spent hours on the phone with the White House. When I asked who she spoke to at the White House, she couldn't remember, but it had been billed out for hours.

The deposition clips I'm going to show you now are a representative example of what the evidence is going to show Wally Burton attempted to do in Washington. But more important, it will show you—and we took these clips out to give you a flavor of—the role of the accountants and how they were relied upon. Can we see Mr. Deutsch?

[Videotape played as follows.]

Question: Sir, let me ask you to take a look at Exhibit 2038, and then I'll ask you some questions about it....

Let me ask you to stop reading for a moment on Page 17, where the minutes for the March 25, '88, meeting end. I think this might be more efficient if we try and go meeting by meeting.

Now, you testified a few moments ago that Mr. Richard MacBeth spoke on behalf of McKinley Savings, and I believe you also said that he made some presentation concerning an audit. Do you recall which audit that was?

Answer: My recollection is that Mr. MacBeth spoke in detail about the most recent audit, which was 1987.

Question: Do you recall any specifics about what he said about the 1987 audit?

Answer: My recollection is he discussed the findings, and it's ... basically that the institution was highly profitable; that they had adequate reserves taken; that his work had been reviewed by national headquarters by several of the most senior partners; that the firm was prepared to stand up behind this audit. I have a faint recollection of even a statement being made that they would be willing to litigate in support of their findings. That he personally had his work reviewed by another ... by another partner in addition to the national review. That would be the normal practice. He was a very strong advocate over the current financial condition of McKinley being sound.

[Videotape concluded.]

MR. COTCHETT: Ladies and gentlemen, the reason he was a very strong advocate is because one day Wally Burton said to him, "Richard, why don't you come to work for McKinley?" He said, "I can't, Mr. Burton. I'm right in the middle of your audit." He said, "Son, when you're done with your audit, come see me." He said, "How much you make?" The testimony will be that Mr. MacBeth was making—but we're not sure—somewhere like \$175,000; a lot of money. Records will show that within three weeks of going to work for Mr. Burton, his salary was \$760,000 a year, and I will get into that in detail later.

They went and talked to everybody. They went and talked to Heidi Spaulding, who was very high up in the Federal Home Loan Bank. They went and talked to Bernard Webster himself, to tell them that they were the auditors, that everything was fine, they had looked at everything. They told them that the 1986 exam done by the people in San Francisco was terrible, they didn't know what they were doing, they sent in a whole bunch of kids and thought they saw backdated documents.

So they went to Washington and they talked to people like Heidi Spaulding, Bernard Webster, Mr. Deutsch, and others. And these are just two short clips of what Miss Spaulding was told and what Mr. Webster was told.

[Videotape played as follows.]

Question: Did you agree with Mr. Webster that you were misled by the accounting firm of Charles Merlin & Company?

Answer: To the extent that Charles Merlin had advised the agency that McKinley was meeting its net worth requirements in the spring of 1987, and one year later the agency concluded that the institution was near insolvency and placed it in conservatorship, to that extent, I agree, we were misled.

I need to correct that. It was the spring of 1988, and I am referring to the meeting that Mr. MacBeth had with the ERC that I described earlier.

Question: Did it make an impression on you that McKinley was able to bring its outside auditor to a meeting such as was occurring in fall or winter of '87 to make statements about the financial condition of McKinley as to what was happening at that time?

Answer: Yes.

Question: Did it seem to you that in some sense, the auditor—the outside auditor—was staking his reputation on McKinley?

Answer: Yes.

Question: And did that make an impression on you?

Answer: Yes, it did.

Question: Can you tell us what that impression was?

Answer: In my own experience, it was unusual for a large accounting firm partner to come to a meeting and to advocate. I think that fact alone impressed me. I also found Mr. MacBeth to be both factual and persuasive in the comments that he made.

[Videotape concluded.]

MR. COTCHETT: Could we see a short piece of Mr. Webster, please? Bernard Webster is the individual who replaced Shelby White.

[Videotape played as follows.]

Question: And it was your belief that that unqualified opinion was in fact misleading as not being a true representation of the financial condition of McKinley Savings and Loan?

Answer: At that point in time—which was November of 1989, the time this statement was made by myself—we had information that we believed contradicted and in fact rendered erroneous the information that had been attested to by the Charles Merlin firm.

Question: Was it a factor in your vote that Charles Merlin had represented that McKinley was fully reserved for all losses?

Answer: It was a factor in my vote that Charles Merlin had made various representations that had been presented, either to the ERC and/or to the Board, by virtue of Mr. Deutsch's or others' comments.

[Videotape concluded.]

MR. COTCHETT: Ladies and gentlemen, those representations in Washington allowed the sale of the notes to go ahead and continue.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.15 6. Promotion and Sales of Bonds to Credulous Buyers

§V.15 6. Promotion and Sales of Bonds to Credulous Buyers

Now, let me tell you about the sale of the notes. I have a chart here that we will put into evidence, showing the amount of sales of the notes; but you will see how it progressed from 1987 through 1988 ... through 1989. You will see the millions of dollars; at one point in time it hit \$250 million.

We will show you another chart that will show you the assets of McKinley or CFC going in the exact opposite direction, and in fact, later when I talk about the accountants and what they specifically did wrong in writing up the financials, we will show you that during this entire period of time while they were selling \$250 million worth of bonds, that, in fact, CFC was bankrupt. In fact, it had no assets other than the money that Mrs. Mason and Allan Lucca would hand to bond reps, as they called them, over at all the McKinley branches.

Now, you're going to hear about Carraway & Company—not a lot—that's a company back in the Midwest. It helped Wally Burton sell his bonds. The big program, though, was over in the lobbies of McKinley Savings and Loan, and they were sold in very small denominations. They were sold in \$2000 denominations.

People will come in and testify that, in fact, these were basically junk bonds. They would come in, and they would be shown beautiful brochures—of course, the brochures always had pictures like that in it—they would be given cover brochures of Estrella, of Mesa Rojas; they would be given all kinds of documents.

You're going to hear what kind of sales promotion was given. They were sold in very small denominations; as a matter of fact, the testimony will be that the average loss of these people was under \$20,000, because you're going to hear the types of people who went in. You're going to hear it from the words and lips, because we're going to bring over here to testify some of the people who sold the bonds. They're going to tell you what they were told about selling the bonds. And they were regulated—or, that is to say, they were guided—by Jeffrey Sinclair and Barry Guevara, two of Wally Burton's top people over there, and his vice-president.

And they were given very nice-looking bonds.

And here's an example of some of them. That one, by the way, is to the church I represent; that one is to a church in San Clemente. That was \$57,000 out of their church fund that they took out of a certificate of deposit. Here's Mr. and Mrs. Mendoza's bond. They will come over next week and tell you how they were talked into buying those bonds.

Now, did they have a sales program? You bet they had a sales program. And who did they sell to? They sold to the elderly. They even had a memo that was sent out of things to capitalize on. And here's the memo: "Capitalize on this: Don't put your money in the stock market. Remind them of Black Monday, October 19. Stocks, bonds, mutual funds, gold, all fluctuating. CDs are number one right now. Put your money in CDs."

Of course, they gave them a sheet and they would work with them, and we're going to show you them in a minute. We're going to show you video clips of some of the bond reps. And then they gave them a checkoff list, which was Page 2 there. If I can just get someone to hold that right there, okay?

And some of the things they did was look at Forbes magazine, and point out that McKinley—or, excuse me, CFC—was twenty-eighth in profitability. We, of course, now know what the profitability is in hindsight; they were never anything near that. They were phony profits.

They compared to tax free: "Use interest calculations on your computer. Always compare to a CD." In other words, tell Mr. Lucca that this is just as good as a CD.

And, of course, the last one is the most interesting: "And always remember the weak, the meek, and the ignorant are always good targets." Is that just a slip of somebody's pen? That was not a slip of the pen, ladies and gentlemen.

Here is an example, on Columbia Financial Corporation letterhead, of their true intent. CFC, February 11, 1987, "Hi again," from Aurora. "See, ya, Aurora." This describes how, when a person comes in, you transfer their money from another organization—like Rushmore Savings and Loan, whatever it may be—you transfer their money directly over to McKinley, and then you put it into a debenture.

And this young lady typed up a little memo for all the representatives to read and see. And, of course, she wanted to know daily

how many were being sold, because you're going to hear about the bonus; the more you sold, you got bonuses. By the way, you know how you got your bonuses? Usually in cash, and sometimes Wally Burton would throw it at you. I know that's hard to believe, but I'll show you a clip in a minute of him throwing the money.

And this is how you were told, as the seller, to type it up. And she gave you a format to use. For example, if a person came in, you filled out their name, like Edna Gert Snidlip, who might live at 1 Geriatric Way, Retiredsville, California. That was a form, and it would be to Rushmore Savings and Loan, where Miss Edna Snidlip had her \$20,000. And Miss Snidlip, who lived in Retiredsville, would sign it, over in the corner. That money would go directly to a debenture at CFC.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.16 a. Personalization of Plaintiff Victims

§V.16 a. Personalization of Plaintiff Victims

Now, who were the people who bought them? You'll see plenty of them. We're going to bring as many as possible and is reasonable for you to get an idea who we're talking about. But let me show you just quickly some of the people. Two hundred million dollars or more was sold. There was some cashing in early on. These people, when they went up to the teller's window, or when they were brought around the corner from the representatives' windows, never heard or never were told of Adams Accounting; they never heard of Johnson, Madison; they never heard of R & T Accountants; they never heard of Societe Richlieu; they never heard of Franco-Assyrian Investment Corp.; they never heard of Mr. Bascomb's client, Charles Merlin ... excuse me, R & T Accountants; they never heard of the law firm of Johnson, Madison. They never heard of these people. When they walked up, however they physically got there, and were sold the bonds, they were told, essentially, that this was a safe, good investment for them.

And let me see if I can tell you, or just show you, perhaps, some of the people we're going to call. There were some people we can't call because they can't physically get here, but we'll bring them via video clip. Perhaps we could show Mr. Jim Neimann.

[Videotape played as follows.]

Question: Okay. What I want to know is, what was it that led you to invest in what you later found out to be the CFC bond? What were the different reasons that led you to put your money there?

Answer: I kept thinking back to how safe ... these people told me if I'd stay with McKinley Savings Association, that there's nothing to worry about McKinley Savings Association.

[Videotape concluded.]

MR. COTCHETT: We're going to bring you Charles Martel. By the way, that gentleman you just saw lost his life savings.

We're going to bring you Charles Martel, who lives up here in Mesa. He went over to California, and he took \$21,000 that his mother had left him and put it into a CD. Do you have Mr. Martel? Mr. Martel lives in Mesa.

[Videotape played as follows.]

Question: Had the people selling the bonds known about uncertainties or risks in McKinley's or CFC's real estate holdings at the time they sold you the bonds, is that information which, in your opinion, should have been disclosed to you?

Answer: Well, I guess I'd have to say, yes, again. Another thing that they had told us in the conversations—and I think particularly the last one with the lady that had all the answers—that Columbia Financial had ... had two or three accounting firms, two or three of the big accounting firms that were auditing them for, you know, for our safety.

In other words, not only did they have all the assets, but they also were being audited by reputable accounting firms, and there were reports available on that. She had never told me or showed me any reports.

[Videotape concluded.]

MR. COTCHETT: Mrs. Mason, who's here in court today, is 75 years old. She's a retired secretary. She bought on three different occasions because she had been banking at McKinley since 1959. It was like a second home to her.

Mr. Lucca, sitting next to her, is 77. He and his wife put \$100,000 into it. You'll hear him from the stand next week, same story. You will hear that he was in the Battle of the Bulge with the Third Infantry; you will hear the trust he put in people.

You will hear from all these people that we will bring, and, by the way, they're not just elderly; young people were sold, too. It just so happens that on the geographic chart or societal chart of life, it was the elderly who walked in. That's who they targeted, but anybody who walked in, from 18 years old, was sold these bonds.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.17 b. Sales Incentives and Duplicitous Sales Techniques

§V.17 b. Sales Incentives and Duplicitous Sales Techniques

And they were sold on a quota system. And the young people, the young tellers, they hired them out of colleges; clean, fresh-faced young people, to sell these bonds. And they would meet every morning, and they'd set a goal, and they'd talk about how many bonds they could sell that day. Perhaps, quickly, we could look at some of the people who sold the bonds. Perhaps Mrs. Barkley.

[Videotape played as follows.]

Question: When you were a customer service representative, how did the bond rep motivate the tellers?

Answer: They would tell us every morning how we are doing with the bonds, like how our sales are. And since they are giving us, like, goals to reach, they would tell us, like, okay, we are, like ... let's say, like, this far from the goals. And we ... there are, like, how many days left to reach our goals.

Question: You had those meetings every morning while you were a customer service representative?

Answer: Every morning, yes.

Question: Now you mentioned goals for the bond sales, and you mentioned that this morning also. How did the goals work?

Answer: They would give us a dollar amount every month and we should reach that goal. And they give us an amount for savings, for the bonds. And they would also assess our customer service.

[Videotape concluded.]

MR. COTCHETT: Okay. I'll show you one more bond rep and then I'll show you Mr. Burton when he went over to help them sell the bonds.

[Videotape played as follows.]

Question: Did he ever pay you in person, give you cash in person?

Answer: There was a managers meeting when he did give cash to all the employees through the managers, yes.

Question: How did he do that?

Answer: How did he do it?

Question: Yes.

Answer: Threw it in the air at a meeting.

Question: How much money did he throw in the air, if you know?

Answer: Well, however many employees there were in the branches, it was \$100 per employee.

Question: Did he throw \$100 bills in the air?

Answer: Hundreds and fifties.

[Videotape concluded.]

MR. COTCHETT: Could we now show Mr. Burton? This, ladies and gentlemen, is a clip from a promotional film that he did. We will have a witness here who will tell you that Mr. Burton felt it was very important to him to be shown throwing the money.

[Videotape played as follows.]

MR. Burton: It's good to say we aren't at \$30 million. We have the packet and I get a big salary and all that sort of thing and it

ought to be shared. I'm saying these things because I want you to know that I know it; and I also know that guys like Guevara and Sinclair, they run around a lot, and they talk, talk, talk; they tell you how to give customer service, they act like big shots, they sit in big offices and everything else, right? There's some things they don't do. Don't even talk. They're all full of bull. They tell you you're good.

I came here this morning to do something else. I'm going to show you something. I'm going to, I'm going to ... dinner, ladies, dinner ... dinner is on us. Every person working in every branch. Wrap it up, give it to you. Dinner with the group. You can't take the \$100 and get drunk on your own. Only one guy I know here would probably do that.

[Videotape concluded.]

MR. COTCHETT: Ladies and gentlemen, you heard Mr. Burton talk about Barry Guevara and Jeffrey Sinclair. All they do is sit in big offices. You heard him make light of it and joke. Let me tell you about Barry Guevara. On March 9, 1991, Barry Guevara was charged with securities fraud. Three days later he pled guilty to securities fraud, and said that he participated in selling the subordinated debentures by telling victim purchasers that the subordinated debentures were a safe, conservative investment; that CFC was a financially sound and secure company. Got that from the transcript of his plea to a United States Federal District Court judge.

Three months later, Jeffrey Sinclair, who we're going to bring to this courtroom, was charged with securities fraud on July 19, 1991. He pled guilty three days later. He admitted that he and others participated in the offer and sale of subordinated debentures by leading victim purchasers to believe that CFC was a sound and reliable and trustworthy company. We will present, indeed, a lot more as to what they said.

Your Honor, would this be an appropriate place for a second break?

THE COURT: How much longer do you have?

MR. COTCHETT: Well, I'm now going to go into the ... I believe into 2 hours and 15 minutes. I'm going to go into the individual defendants.

THE COURT: Well, if we just take one more break, then, you're going solid until you finish.

MR. COTCHETT: Whatever the Court would desire.

THE COURT: You're the one talking.

MR. COTCHETT: Okay, I'll continue.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/ C. ROLES OF INDIVIDUAL CO-DEFENDANTS/§V.18 1. Adams Accounting; Alleged Improper Auditing Procedures

C. ROLES OF INDIVIDUAL CO-DEFENDANTS

§V.18 1. Adams Accounting; Alleged Improper Auditing Procedures

Ladies and gentlemen, that's the Burton picture. Now I'm going to tell you about the defendants themselves, and specifically what they did wrong. When I say the defendants themselves, I'm talking about those individuals here in this courtroom.

The first one I want to talk about is Adams Accounting. Let me quickly tell you about their role, as we believe the evidence will show.

Again, I want to say for the benefit of all counsel and everybody present, nothing I say is evidence until you hear it from that stand, but this is what we believe the evidence will show. Adams Accounting—I'm sure you people are familiar with it—is a worldwide international accounting firm. They have offices all over the globe, all over the world. What they did was that, for two years, they did the audits for CFC, and McKinley. You will recall that I told you Mr. Burton bought McKinley February 22, 1984. For the next two years, Adams Accounting, represented by people sitting right over here at this table, were the people that wrote the reports that—as we will present as evidence—allowed the bonds to be sold.

Now, at some point in time, Adams Accounting got nervous. And I don't mean to characterize their testimony that way, but I think that's what the evidence will show. I think the evidence will show that, after they had made \$3,760,000 in fees for two years, Paul Hersh, in the courtroom, billing at \$255 an hour in 1985 and 1986, after billing almost \$4 million, resigned on October 1, 1986. And as the saying goes, Wally Burton got as mad as a javelina and said to him, "You can't quit. Because if you quit, I go bankrupt."

See, what they had done for two years is they had given them what you'll hear referred to as a clean audit opinion. "Clean audit opinion" simply means, in lay terms, pieces of paper by which Wally Burton could run around and say, "I made millions of dollars of profit."

You're going to hear evidence from them that they didn't know about the Tony Hernandezes of the world; they didn't know about Mr. Cameron; they didn't know what was going on. And you will hear testimony from our experts, many from right here in Tucson, who said all they had to do was look. All you had to do was look at the books. All you had to do was call Tony Hernandez.

I'm going to show you some testimony in a moment, where one of the buyers—I think his name is Michael Chaney, a local developer—somebody loaned him \$5 million, so he bought a piece of property. "The auditors ever call you about it?" He said, "No, I could never figure out why." There's something to that and I'll let you hear about it with your own ears. He never got called. He was a local chap.

Now, this is what the audit would look like. It would be done beautifully up on a big poster for 1985, and this is—we'll show you the actual audits—this is what Mr. Burton would run around showing everybody. And, of course, this was the most important page, because that would be sent out to the shareholders and sent out to the whole world, the whole investing world, Forbes magazine—that he was very concerned about—and others. And it looks like this: It's a beautifully printed-up document, and it has numbers to beat numbers in there. It's got photographs to beat photographs. It's got the family pictures of Wally Burton's family. Of course, it's got the numbers, and they're all signed off on by saying, "We have examined the consolidated balance sheets." And it goes on to say it's all in conformity with generally accepted principles. Our experts, accounting professors and accountants in the field, will tell you that nothing was done properly, or, in fact, very little.

Now, do you have the large Adams Accounting graph, graph number one? Let me show you what the testimony is going to be in terms of conflict. In terms of a conflict, we have now their testimony. And here, you see, is their testimony. Their testimony is all written up in a beautiful little book. And, in fact, we're going to show you that the years they were in, 1984 and 1985, and partially through 1986, are all documented in this book. This is the annual report for '85. Then they had an annual report for '86.

Now, here, the evidence will show, first, what was the motive: The motive was huge fees. Here are the facts: CFC was the highest-paying client to Mr. Hersh and his crew up in Phoenix. It was 20 percent of Adams Accounting's total income in the Phoenix office. Later it became fear, because they were told, in no uncertain terms, that they had to reissue their opinions to keep the bond sales.

Now, you're going to hear a lot of testimony about this. Draw a line right down here, 10/1/86, and Adams Accounting says, "We

quit." In the vernacular, "We're out of here."

But what they allowed to happen, ladies and gentlemen, our experts will testify, was wrong in the accounting world. They allowed their opinions written in this book to be used and submitted to the regulators for the next two years to reissue, because somebody said, "The numbers are out of whack, and we have to have some opinion that will tell us that the numbers were real."

Well, Charles Merlin was in a box, because Charles Merlin, which took over during this period of time, couldn't go back and look at the books. I mean, they could look at the books, but they couldn't go back and understand what happened, so they had a meeting with Adams Accounting. And you'll hear testimony about that meeting. It will range from some people who have a detailed knowledge to some people who can't remember the meeting at all. But they were told they had to reissue, you see, and they did. So, in fact, Adams Accounting never quit. They stayed with the whole program right up through the end. And, by the way, I might add, for reissuing the opinion they picked up \$113,000 in 1987 and \$75,000 in 1988, and, of course, \$2 million in 1986, and so forth and so on.

In 1985, they sat and reviewed with the executives of CFC the loan files. They knew the loan files were inaccurate and misleading. They participated, the evidence will show, in the destruction of documents. Could you please play an appraiser by the name of Leonard Allen?

[Videotape played as follows.]

Question: Did you destroy any documents in response to Miss Varnes's request?

Answer: Yes.

Question: Which documents did you destroy?

Answer: I believe there was a memo and a ... in this format, which was destroyed.

Question: Referring now to Exhibit No. 2500?

Answer: That's correct.

Question: And did you ask Miss Varnes why she wanted that document destroyed?

Answer: We did not discuss her reasoning.

Question: What did you discuss?

Answer: We discussed destroying or modifying the document.

Question: And instead of modifying it, you destroyed it?

Answer: That's correct.

Question: Had anyone ever asked you to destroy a document before?

Answer: No.

Question: Did you think there was anything unethical about destroying that document?

Answer: Would you like to rephrase?

Question: No, I was waiting for an answer.

Answer: I'm sorry. The question?

Question: Did you think there was anything unethical about destroying the document?

Answer: I did not believe or challenge a violation of Adams Accounting's ethics procedures in the destruction of the document. I discussed the destruction of the document with the partner involved. That discussion was an ongoing discussion which took place over an extended period. And I expressed some discontent over the issue.

[Videotape concluded.]

MR. COTCHETT: Now, what happened in 1986? In 1986, Adams Accounting started to worry. They called back to their New York office—I think it was their New York office, maybe it was the Boston office; they got a guy on the phone by the name of Russell Marino, and if I remember correctly, Mr. Marino was the top man in the company, or partnership, I should call it, on S&Ls, savings and loans.

And what they essentially did over the next several weeks is, they had Mr. Marino look at this whole situation and advise them on what they should do. And it didn't take Mr. Marino very long to figure out what to do. And we were able to subpoena and get our hands on Mr. Marino's report. We have here an inter-office communication. Mr. Marino wrote this to the files. Russell Marino, on June 30: "Subject: Meeting with Columbia Financial Corp. Inter-office Communication. Memorandum to the files." What this means is that he was going to put it in as, quote—whatever you want to call it—an "official record" of what he found. And he made some overall observations, which is self-explanatory there.

And then he drops down to the risk assessment: "The underlying business strategy of CFC involves a significant degree of risk since, with the exception of deposit-gathering, CFC does not follow a traditional savings and loan strategy. The following factors serve to demonstrate this."

Then ladies and gentlemen—in the interest of time, I won't read you the whole thing—but he goes on to document the asset liability position. And if you read just the present ... the first sentence alone says it all: "At the present time, interest-bearing liabilities exceed interest-earning assets by approximately \$800 million."

This is in 1986. They have close to a billion dollars in moneys they're supposed to be paying out to these people over the assets. Loan concentrations. "The association has sold all of its single-family mortgage loans"—those are the loans to the little people in the houses; they're all gone. They're now into real estate investments and the risk goes on.

They talked about the regulatory risks? He talked about the projects. He goes on at length and he gets very specific.

Now he talks about a man by the name of Goldman, and you'll hear a lot about Mr. Goldman, because he'll be in this courtroom. He's a defendant. And Mr. Goldman, at the time Mr. Marino reviewed the books, had approximately \$125 million in loans outstanding. And you will hear ... we're going to bring into court Mr. Goldman's president—president of his company called GMF—and he's going to tell you about how they were phony loans, and how they were straw buyers.

And in 1986, you bet, Adams Accounting knew about it. And what did they do about it? They made a very wise decision: They said, "We quit." And they left Mr. Burton and told him they were gone.

Now, something you have to do when you change accountants and you're a public corporation is you have to go back to Washington, D.C., either by mail, phone, or whatever, and you have to tell the SEC—if you're selling stocks and bonds—you have to tell them why you're changing accountants.

This is what the form looks like, and actually, to be candid with you, it is not AA who does this, it is the company, CFC, Columbia Financial Corp. They filed the 8-K, I believe, and now they filed this form, and here is what CFC, with the agreement of AA, writes as to the reason for the certifying accountant. And that's a little difficult to read, but it says up top: "Changes in registrant's certifying accountant." In the middle it says: "AA confirmed to the Registrant that AA's resignation was not the result of any concern by AA with the Registrant's operations, recordkeeping, books and records, management cooperation, or asset/liability management; AA expressed full confidence in the Registrant's financial disclosure."

The evidence will show, ladies and gentlemen, that Mr. Marino did not write that. Mr. Marino's records or file or memorandum didn't go back to the Securities and Exchange Commission. Mr. Marino didn't feel that way. Mr. Marino put in his report exactly what the problems were. The Securities and Exchange Commission in Washington, D.C., was not told the truth.

And when you have testimony from AA, they will tell you that they quit for two reasons: They wanted to get out of the savings and loan business, and there were too many disagreements with the Federal Home Loan Bank Board. As a matter of fact, they not only are different than Marino's report, they failed to tell the SEC that as well.

Instead of a \$27 million profit, in fact, they had a \$1.3 million loss. In 1985, instead of a \$66 million profit that they told the world—AA told the world—they had, they had a \$2.5 million loss. They let Columbia Financial book a \$9 million profit. When Wally Burton got together with a friend at Saguaro Savings and swapped some loans, they allowed them to bill a \$9 million profit. They allowed a sale to Meyer Goldman to bill a profit. And they knew that there was no loan to Goldman on Rancho Sonora, which, by the way, is right up north of here. They billed it as a loan. And if you make a loan to someone, you can book it as a profit.

But, tragically, Mr. Hersh and friends never read what Mr. Burton called it. And all they had to do to find out what Mr. Burton called it—their client—was what Mr. Burton said in his annual report.

For those of you that cannot see it, that's CMCC—Columbia Financial Corp., that's the other abbreviation for it other than CFC

—committed approximately \$75 million during 1985 to a joint venture to acquire Rancho Sonora. It was no loan; but they allowed them to book millions and millions of dollars of profit on an alleged loan, and all they had to do was see what was written in the other part of the report. Because, you see, the report all comes in one book. It's all there. Their numbers are in the back, and this is in the front of the same book.

Now, why did they allow their audits to be used in subsequent years? Because here's what happened: On February 6th, 1987, the Federal Home Loan Bank Board wrote a letter to the board of directors and told them, Guess what, folks? You've got a big problem. Our regulators, or our examiners, went in and looked at your books, and you, right now, are \$36 million in the hole. What they had to do, folks, was get AA to say, no, they were wrong, and for that they billed them \$75,000 or \$100,000 to go back and allow those reports to be reissued.

Now, what did they know? They knew that, in 1984 alone, they billed over \$8.7 million in profit for insider deals, and we'll present those to you. They knew that they had to get out from under Wally. Marino said there were significant risks, that if one or two Goldman loans went bad, they were bankrupt. As a matter of fact, if Meyer Goldman would come here—he unfortunately takes the fifth—but his president will come here and tell you that they had no money to repay those loans.

Now, the role of AA is all through this case, and all they had to do was talk to the people who were actually out on the site of Rancho Sonora, which is just ten miles north of you.

Let me see if I can find Mr. Elliot's tape. Do you have Mr. Elliot's tape? He was asked who was in charge of Rancho Sonora. The normal answer should have been that he was, because he bought the property, right?

[Videotape played as follows.]

Question: Who was in charge of development activities on the Rancho Sonora project?

Answer: You mean beyond the management of the development?

Question: Okay, well tell me.

Answer: CFC.

[Videotape concluded.]

MR. COTCHETT: That's all they had to do: just ask Mr. Elliot and he would have told them who it was. It wasn't him, it was CFC that was in charge.

And we found a man by the name of Doug Hughes. Doug Hughes used to be an accountant at Adams Accounting. And we took the deposition of Doug Hughes, and I want to show you what Mr. Hughes said about why they resigned, and about his work there.

[Videotape played as follows.]

Question: What was your understanding as of that time, as ... as to the reasons for the resignation?

Answer: In a nutshell, that it was a high-risk client whose risk could no longer be managed by the firm.

Question: Okay. So that this was ... there were ... the firm didn't want to have this specific client because of the high risks, some of which were set forth by Mr. Marino, correct?

Answer: I would agree with that.

Question: Okay. Now ...

Answer: That was my understanding, yes.

Question: Okay. And you got that from Mr. Hersh and/or Mr. Oppenheimer?

Answer: From Mr. Hersh, yes.

Question: Okay.

[Videotape concluded.]

MR. COTCHETT: Do you have another of Mr. Hughes there? Would you play that, please? The question was asked of Mr. Hughes, a very candid and honest person, whether or not AA should have reissued those opinions to allow them to sell the bonds. We have Mr. Hughes under subpoena, and we hope to bring him to you live.

[Videotape played as follows.]

Question: And it was your view at that time that Adams Accounting should have ... should not have reissued its unqualified opinion, wasn't it?

Answer: My view was that, based on the data that I had been furnished, inadequate disclosure appeared in the financial statements, and that we could not reissue a clean opinion knowing that there was inadequate disclosure in the financial statements.

[Videotape concluded.]

MR. COTCHETT: To make sure Mr. Hayes, who's sitting right there, heard what he heard, he asked the question and answer to be read back, and it was, by the court reporter, who took it down:

Question: And it was your view at the time that Adams Accounting should not have reissued its unqualified opinion, wasn't it?

Answer: My view was that, based upon the data that I had been furnished, inadequate disclosure appeared in the financial statements, and that we could not reissue a clean opinion knowing that there is inadequate disclosure in the financial statements.

We hope to have Mr. Hughes right here in front of you. He was the chief auditor for Adams Accounting on the case. He now resides with his family in Phoenix. That is what he said, and those are the pages that were taken down, under oath, by a court reporter.

Your Honor, I would think that this would be an appropriate place to break.

THE COURT: All right. Remember my admonition, ladies and gentlemen. We will be at recess for 15 minutes.

[Recess taken.]

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§V.19 2. Johnson, Madison

THE COURT: Be seated, please. Mr. Cotchett, you've got one hour and 20 minutes.

MR. COTCHETT: Thank you, Your Honor. Ladies and gentlemen I'm going to restart now. If I trip, it's because they have wired me up; they said someone can't hear me, so I'm now going to wear this.

I've now told you about Adams Accounting, the defendant sitting right there with the sign on the back rail. Now let me tell you about the law firm of Johnson, Madison, who are they, and what they're doing here. Johnson, Madison is one of the most prestigious law firms in the world. Where will you hear this? Right from that stand from their own partners.

We are honored today by having in this courtroom Mr. Tyler, Johnson, Madison & Tyler. Mr. Tyler has come out here from Cleveland, obviously to see us. They have 1150 lawyers, give or take some numbers one way or the other. They're one of the largest law firms in the world. They have offices in Cleveland, New York, Los Angeles, Dallas, Washington, D.C., Tokyo, Hong Kong, Switzerland, London, Paris, Saudi Arabia. They are in fact very fine lawyers and in fact a very prestigious firm. They hire the best lawyers in America to work for them and they're hired by some of the best clients.

It is for everything I have said up to now why Wally Burton wanted them. They wanted Wally Burton. As a matter of fact, you will see a memo in this case that says, quote, "they tried hard to catch Wally Burton." The reason they wanted Wally Burton, and why they say he was "meant for us and we for him," is because Wally Burton was a big payer of attorneys' fees. And they had some key people to offer Wally Burton.

They had a gentleman by the name of Gerald Stone, who I hope will come to this courtroom. They will bring Mr. Stone to this courtroom, and you will hear that Mr. Stone used to work for the Federal Home Loan Bank Board.

As a matter of fact, you're going to hear some interesting testimony, if you will, which is contrasting, and you, being the trier of fact, will decide who's telling the truth. Mr. Stone, when he was at the Bank Board, signed some documents which had to do with McKinley, and then when he went over with Johnson, Madison, he said he had already left the Bank Board. So you're going to see some contrasting evidence as to the role that Mr. Stone played, but I don't think there will be any contrasting evidence on the role that Mr. Stein played, Mr. Knowles played, and how they all got started.

They got started in Phoenix, they met in 1966, and you'll hear this phrase: Mr. Knowles called it a "beauty contest"—beauty contest of these big law firms, as to who gets hired. What they do is they put their best face on, their best clothes, their best suit, and they'll tell them what they can offer the client, and they go get hired.

And Johnson, Madison went to Phoenix and convinced Wally Burton that they were the people that could best represent them.

And CFC was a very unusual client. CFC, quote, "did not care how much it paid its lawyers." And CFC told them that. Let me show you the form in which that might be told on one or more occasions. Could I have Johnson, Madison, No. 1?

Let me show you, for example, first a handwritten memorandum that we found in Johnson, Madison's files. The handwriting is a little tough to read, so what we did was we had someone at a deposition read the handwriting for us, and then we had it typed out for you to read and follow along. And this is in June of 1986—now, remember, they had been on board for a while. And this is a handwritten note, and it says, "Bill Krassner: In the past, firm has given dollar amounts to PAC, has premium billed, and PAC has contributed to candidate."

Now, follow that for a moment. We believe the evidence is very clear. We believe it shows exactly what it says. It says "has premium billed and PAC contributes to candidate." In other words, they bill a premium, they turn around and they write a check to a candidate, a political candidate. "Concern that we're an out-of-state law firm." Yes, they're from Cleveland, Ohio; and that dollar amount in excess of \$5000 would look like an unusual move. "Bolger plus Krassner have done before"—two partners in their, I believe, Dallas office. I'm not sure of that ... I stand corrected.

"Question: Whether or how we can get some business from the governor or government." And I plead ignorant. I don't know whether that's the governor or government, for this. Same day, two hours later, Steve Gibson calls—and you'll hear who he is. We'll bring Steve Gibson to this Court live—we have him under subpoena—and he'll tell you he called and asked them if they'd buy ten tickets.

A gentleman by the name of Benwick, whom you may be familiar with, wants a limit of \$5000 contribution. He was running for

governor. Mr. Gibson said, or the interpretation in the handwriting is, "agreed that we could bill liberally in future with recognition of this."

So this, you see, is how Johnson, Madison started out, at least on the right foot, with CFC, and they were told they could bill liberally.

Now, what did Johnson, Madison do for its money? Did a couple of things. On March 10, 1986, over 20 Johnson, Madison lawyers descended upon the McKinley site—I think it was in Irvine, California. It was at Orange County corporate headquarters.

For the next two or three weeks, Johnson, Madison lawyers spent hundreds of hours helping McKinley get ready for the March 1986 examination. And you've already seen what some of the young lawyers have said and candidly admitted to us as to what they did.

It was absolutely clear to the Johnson, Madison lawyers that there was noncompliance with the regulations. It was clear to them. As a matter of fact, we have a sheaf of handwritten notes in which one of the lawyers—and I'll show you just one or two of them—in which one of the lawyers—and I've already shown you some from Mr. Parker—acknowledges that they were backdating, destroying, whiting out, doing everything imaginable at CFC, and they had full and complete knowledge. In fact, you are going to hear Mr. Parker testify that he was instructed—he, a lawyer—not to complete appraisals if the numbers were too low.

We're going to have testimony that lawyers don't do appraisals. But at Johnson, Madison, evidently they did.

Let me see if I can just show you a small piece of what Mr. Stone said was one of the problems, and he refers to a "six-gun"; he talks about what happens if you fire a six-shooter and only two of the bullets run true.

[Videotape played as follows.]

Question: And it was resolved between Johnson, Madison and the McKinley representatives as a result of those conversations that no written report would be made by Johnson, Madison?

Answer: Not ... well, partially because of those discussions, that's correct.

Question: All right. And the basis of that rationale was that, if you made a written report to McKinley, the examiners would have access to that report, and that was something that neither you nor the McKinley representatives wanted?

Answer: Well, that was the consideration of ... whether they would have access to it or not was a consideration, yes.

Question: And that consideration weighed in favor of not making a written report?

Answer: That was the decision, that's correct. And the analogy I use is, it is like being shot at with a six-gun. It doesn't matter if there are four duds in the chamber. If two bullets run true, you know, you're just as dead. I mean, the fact was they had compliance problems. It didn't matter that the examiners might be wrong on this specific loan or that specific loan. If they had loan file deficiencies or underwriting deficiencies, they still had a regulatory compliance problem; and that was the other time I talked to him, to Mr. Burton.

[Videotape concluded.]

MR. COTCHETT: Let me show you a clip of what Mr. Parker said to us about his knowledge of the appraisals and what he was told about the appraisals.

[Videotape played as follows.]

Question: What did Mr. Mullen tell you about why there were not appraisals in certain files?

Answer: As I recall, he indicated that he had been instructed not to complete an appraisal if the verbal report on a number did not meet with the executives' view of what it should be.

Question: If the verbal report wasn't a high enough value, he was instructed to not complete an appraisal—is that what he was telling you?

Answer: Yes, essentially.

[Videotape concluded.]

MR. COTCHETT: In April of 1986, just a few weeks after they go in to work with the shades drawn on the next floor, they found the following, and we will present evidence of this from written documents: They found forged signatures; they found backdating of documents; they found a general covering up of a sorry state of affairs, it comes right out of a document.

And, in fact, on April 23, 1986, Mr. Frazier, a partner at Johnson, Madison, wrote this memo. He wrote this memo to Mr. Stein and Mr. Charbonneau, and you will note that it is on a white sheet of paper. It is marked personal and confidential and the single most important aspect of that memo is twofold: It is very brief, it is dated April 3, 1986, and it says, quote, "As we all know, we now possess information that could affect the way we write our opinion letters, and our actual ability to give a particular opinion may be severely restricted."

You see, ladies and gentlemen, what they were also being asked to do was write a clean opinion, because lawyers give opinions that everything they were doing was in compliance with Federal Home Loan Bank regulations.

They were also asked to write an opinion for a bond offering that they were getting ready to make, so that they could sell bonds to Miss Mason and Allan Lucca over there. But on April 23, 1986, long before they bought the bonds, and long before they were authorized to sell them, this gentleman, in a very honest memo, said they now possess information which would not allow them to write that opinion.

That's what lawyers do. And we're going to call experts who are going to tell you: a lawyer with 16 years with the Securities and Exchange Commission, a professor at the University of Colorado, a professor at the University of Arizona Law School, less than a mile and a half from this courtroom, are going to come here and tell you that Johnson, Madison—and this will be their opinion—violated their professional ethics.

They cannot testify that they acted in concert; that is for you to decide. But they will give you their legal opinions as to what lawyers do and what they shouldn't do, and then you will decide that, but this is what the evidence will show: The evidence will show that Johnson, Madison had knowledge—that one memo is an example—of massive violations at McKinley; they were told by the client to put nothing in writing; they knew that the files were being altered and stuffed. I showed you that earlier.

They knew that documents were being forged. They were told, as you've seen from Fred Santore, that they were to whisper, as one small example. And let me show you what Mr. Parker himself said when we took his deposition about destruction of to-do lists, because even when they sent the to-do lists over—what to stuff a file with—those notes were to be destroyed.

[Videotape played as follows.]

Question: The language that the handwritten summary was given to Mr. Wright—quote, "with the express understanding that he would only give a copy to the lawyers responsible for rectifying deficiencies, and that they would be instructed to destroy their copy of the summary upon completion of the rectification of file deficiencies"—that was your language at the time you wrote this memorandum, is that right?

Answer: Right.

Question: And your intent in writing this memorandum was to reflect accurately what had happened, is that right?

Answer: Right.

[Videotape concluded.]

MR. COTCHETT: What else did they do? They told them how to formulate the sales of the bonds in the lobby. They gave them advice.

Art Stein traveled to New York, and by his own testimony, met with a New York lawyer who was working on the problem with them. He will testify—because we have his deposition—that he spent one ...

THE COURT: We have a juror that ... would you like a break? I'm asking.

JUROR NO. 6: I apologize, Your Honor. I didn't mean to ...

[Juror No. 6 exits and reenters the courtroom.]

THE COURT: Proceed.

MR. COTCHETT: Thank you, Your Honor.

Ladies and gentlemen, notwithstanding all the knowledge they acquired, they wrote a memo that was good news to Wally Burton; the good news was that they could sell CFC bonds in the lobbies of McKinley Savings and Loan—written June 18, 1986, three months after Mr. Frazier writes his memo that says they now have information that says they can't render an opinion.

Did they have just the information that Mr. Frazier referred to? Ladies and gentlemen, on April 13, 1986, they were sent this package. This package includes (1) an Adams Accounting opinion letter; (2) a draft of a proposed Adams Accounting letter; (3) an underwriting analysis of each of the Goldman loans.

And what we know about this package is that, in April of 1986, when they receive the Goldman loans, we know that there were problems with the underwriting analysis, because many of them were undated. And they were meant to be reviewed by Johnson, Madison. We don't know why—for their correctness or what—but we do know that the person who prepared the loans that were undated was Gerald Duval, a vice-president of CFC, who worked with the lawyers in preparing the paperwork.

On December 6, 1981, Gerald Duval was charged with bank fraud. He pled guilty to bank fraud on December 9, three days later. He said to a United States federal judge that he knowingly created, with others, fraudulent documentation, underwriting loans and investments in a manner that concealed the true nature and purpose of the loans and investments, their degree of risk, and the true reasons why they were approved.

We will offer evidence that will show that the true reason why Johnson, Madison stayed with CFC and didn't quit like Adams Accounting did, was for this statement found in an innocuous memorandum that reads as follows: "Bruce Knowles reports that Columbia Financial is very explicit that it does not care how much its legal services cost, as long as it gets the best. He states that Burton gave him an unsolicited \$250,000 retainer to start the thrift work, and sent another similar check, also unsolicited, in two weeks. It appears to Bruce and to me that Columbia Financial is made for us and we for them."

Ladies and gentlemen, we believe the evidence will show that the reason why they disregarded their reports of their own people was because they were able to bill out hundreds of thousands of dollars and even receive unsolicited checks of \$250,000.

§V.20 3. Carraway & Company

Now, let me tell you very quickly, if I can, about Carraway & Company. Carraway is represented by Mr. Joe Franklin, who's here in the courtroom today, a truly outstanding lawyer. And this case is a very simple case. We're going to present evidence on this very quickly.

We believe that you will be able to look at one or two or three or four documents and decide this case, and it involves \$1 million. It involves a payoff, in two checks, one of \$600,000, and one of \$400,000, to Mr. Carraway, who, on videotape, will tell you that he took the money because he put Wally Burton together with some other individual and called it a finder's fee. We will show you that he received \$1 million in two checks. P.S., with one, he bought a house up in Phoenix so he could be close to Wally.

We will show you that his lawyer at Carraway & Company knew the problems. And just so we understand who Carraway & Company is, that was an underwriter who did—before the big bond sales to Mrs. Mason and Allan Lucca—who did three underwritings of \$25 million apiece. In Wally's mind they were very small; that's why Mr. Carraway only got \$1 million. Three underwritings, in April of '86, June of '86, and May of '87.

Now, what did they know before they did the underwriting? And just so you understand what I'm talking about—if I have it here ... and I see I don't—an underwriting is just a prospectus, if you will. They're underwriting the nature of the sale, "underwriting" meaning they're standing behind it.

And let me show you a document that they were given in January of 1987 before they did the '87 underwriting. That's a memo from the Federal Home Loan Bank Board to Jeff Sinclair, Chief Managing Officer. Subject: meeting agenda. And the testimony will be that those were telephone notes taken by his lawyer. And I don't have to repeat or point out anything more than the handwritten notes that say: "Found serious deficiencies and regulatory violations. Recall. Determination of financial evaluation. Substantial deficiencies."

Ladies and gentlemen, it was well known to Carraway that, in fact, there were major problems.

And then, of course, this handwritten note: "We must at least wait until the government agencies negotiate the proposed dramatic reductions in earnings." Let me tell you what was going on there. What was going on there was very simple. The government was coming in and saying, "You don't have those earnings. We don't care what Adams Accounting says, or CM at this time." They were negotiating as to what earnings they actually had. Carraway knew it. They went ahead with their offering and sold \$25 million worth of notes.

§V.21 4. Franco-Assyrian Bank

Who else did Mr. Burton use? Mr. Burton used Franco-Assyrian Bank—or you'll hear it referred to as Richlieu, Franco-Assyrian Investment Corp.—and Richard Finnes. Let me tell you a little about who they were and what they did and how they operated with Mr. Burton, very quickly.

Richlieu is a new name for a bank that was formerly known as Franco-Assyrian Bank. And Wally Burton, being an international traveler, traveled all around the world and met some very interesting people. As a matter of fact, at Franco-Assyrian Bank, many of the individuals' names will become familiar to you. And I'm told that when Mr. Pettit addresses you, he will tell you about who some of those people were, and I'll be very brief.

They are some of the richest people in the world. You'll be shown this. And Mr. Burton put up some money, because he wanted to travel in those circles, and bought a share of FAIC, which then bought up a subsidiary, called ... a bank called Franco-Assyrian Bank. And I have a little chart here, if you want to follow along. I don't speak French—I have a tough time in English—but that's the derivation of what took place over three or four years.

FAIC became Franco-Assyrian Bank, sold to Richlieu, then Maison Brueghel. What did they do? It's very simple. The evidence will show that they would act as straw buyers, as straw lenders. They would cover for Wally whenever they needed it. They liked it so much they wrote them letters telling them, "Give us more." They loved the deal—the deals—until all of a sudden, Wally started having problems. And then many people we deposed started saying, "We don't know anything about that."

The relationship began in 1984. They had secret deals. In many instances they never put their name on the loan papers. In many instances they never let people know who the lending party was. In many instances they cut secret deals with Wally as to guarantees. As a matter of fact, if we have handy the clip, I'd like quickly to show a clip of a very fine gentleman who we were able to depose in Los Angeles; and I have a difficult time pronouncing his name, but he's a Vietnamese chap, a very fine banker ... and if we could run this gentleman.

This had to do with—I think you pronounce his name Trung Pham-Quang, who was one of the managers at the bank.

[Videotape played as follows.]

Question: What was your understanding of the verbal guarantee?

Answer: I have no understanding. It was quite unusual for me.

Question: Do you recall what the view was of the Paris credit committee regarding the list of the Atlanta transaction?

Answer: We agreed that the risk was high, but again, you know, the verbal guarantee came into play.

Question: Had it not been for the verbal guarantee, would you have approved the transaction?

Answer: No way.

[Videotape concluded.]

MR. COTCHETT: Now, that's one—but one—example, of how these people conducted their affairs. The evidence put before you will be that they didn't act on behalf of the bank; that they were doing so many secret deals for Walter Burton that the bank can't possibly be responsible. We have letter after letter after letter—perhaps if I were more organized I could find them and show them to you quickly.

The fact of the matter is they acted as a straw buyer on a number of projects, and Wally would simply pick up the phone and have Keith Finnes or Mr. Rose, whom I believe you will see on video deposition ... the whole purpose was to put them outside the mainstream of U.S. regulation.

While they may have thought ... they are here in this courtroom today because the evidence we will show—specifically documents of this nature, internal documents—show that almost each and every one of these deals was a secretly structured arrangement where they could make personal profit.

The best letter in the files is found on Franco-Assyrian Bank stationery, and it's to "Dear Wally" from Keith Finnes. And he concludes, and I'll be very brief on this since time is running short, he concludes by saying to Dear Wally: "With the finalization of these three loans, as well as the direct loan to CFC, we do not currently have any loan proposals pending." As Oliver said to Mr. Bumble, 'Please, sir, I want some more.' Kindest Regards, Keith Finnes."

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§V.22 5. EconoMetric

That's Mr. Finnes's letter. Let me talk if I can, now, about EconoMetric, very quickly. I introduced the very famous Mr. Bill Wakefield representing them, a very fine lawyer, a former U.S. Attorney from Chicago. Sitting next to him is EconoMetric's other attorney, Mr. Robert Harrison, very fine former U.S. Attorney from Arizona here, also representing EconoMetric.

Now, who was EconoMetric? Let me tell you very quickly. EconoMetric is a group, some will call it a think tank, some will call it economists; they'll have all sorts of names for them. You'll hear them referred to and you'll read them in documents; they are people who hire themselves out as specialists in the field of economics. And for a fee, they will in fact come, not to your home or to my home, but to a business and give you an economic forecast, or something of that nature. They have some professors with them; I think you'll hear some evidence that they've got some Nobel Prize laureates with them. And Wally, being the person he was, of course wanted EconoMetric to do some work for him.

In a nutshell, the evidence that we are going to present to you is that Wally Burton hired EconoMetric to get the regulators out of his hair. Because when all else failed, Wally got on the phone or went to Chicago and he asked them to do him a favor. And they did a small favor. They wrote four reports. You will see all of those reports, and in each and every one of those reports, they said McKinley is fabulous; it is on sound economic footing, and there is not a single problem. In return for which Wally paid them about \$1 million, to type up those four reports.

Now, why did they pay them the million dollars and why was it so critical that they have EconoMetric on board in the fall of 1988? Because in the fall of 1988, ladies and gentlemen, Charles Merlin also decided to quit.

Now, I don't have the chart here in front of me, but if I can just piece it out for you. For two years, '84 and '85, Adams Accounting was their auditor. They quit; in came Charles Merlin. Charles Merlin lasted for two years and they quit, and I'll tell you why they quit. And then came R & T Accountants, and I'll get to them in a minute. But let me tell you why they needed EconoMetric.

They needed EconoMetric to say, in the fall of 1988, that everything was okay at Columbia Financial. And the reason it had to be okay is because they had to book some profit because they were just about bankrupt.

You see, in the fall of '88, reports were starting to leak out that this may be a big house of cards. And they needed somebody with EconoMetric's credibility to do that job; so they went. And I have here a flight log, I believe, which I think you'll find fascinating, but first let me show you their report.

In the fall of '88 they wrote ... there was a NEIL transaction, and let me tell you what that stands for. The NEIL transaction—and you'll hear testimony to this effect—Near East Investment Limited—you will hear that—I think it's Henry Gerhard—you will hear some individuals put together some very esoteric financial deals. You'll hear it explained by accountants. But in essence, what happened in the fall of '88 was this: Wally Burton came up with an ingenious way to—what the experts will tell you—trade trees for trees.

He took stock in return for some limited partnership. It all centered around some Consolidated Paper land with trees. As everybody laughs about it, and will laugh on the stand, it was trading trees for trees. And finally, CM, Mr. McBride's client sitting in the back, said, "Enough is enough. We cannot, Wally, book \$55 million worth of profits. We are finished, out of here."

So they got EconoMetric, by paying them \$1 million, to write this simple little report: We have been asked to examine the exchanged tracts between CFC and N-E-I-L, NEIL, and they said that the transaction should result in recognition of income during the current period. So, for that, ladies and gentlemen, they were paid \$1 million: they wrote that report. That report was false, it was incorrect, and it was basically written on an airplane.

This is the agenda, Tuesday, August 4. You see, Mr. Burton was very particular about making sure he had agendas of where he was going; that's one of the reasons why the evidence allows us to bring these people to court. Because we find that on one day he picked up Ted Stoker and professor Samuel Thompson to quickly fly to New York; testimony is going to be: called him on the phone or something, quickly, we'll send the jet, it will pick you up, boom at O'Hare, boom to New York, and talk to Mr. Griffen.

Who was Mr. Griffen? Mr. Griffen was a senior official, partner at CM. They were going to try and convince him why CM should stay on board, and why CM shouldn't abandon the ship. Well, they didn't have much success, because, as we know, CM wouldn't go along with it and bowed out.

Now, who was present at that meeting? They would always list the attendees. They would even put the business purpose there. "Business purpose: Discussions with Charles Merlin regarding the Gerhard/NEIL transaction—realizing profit on our books." They had to realize profit on our books.

Now, if you see the names down the side, you'll see who was present: Richard MacBeth—and let me tell you about Richard ... I'm going to tell you in a minute; he has yet to tell us his side of the story. Tony Liebert takes the fifth, Jim Ivey takes the fifth, David Haydon takes the fifth, Mike MacAlister takes the fifth. Cathy Kelleher, Walter Jr., they all take the fifth. They can do that under our Constitution.

The evidence is going to show who was there and what report was written. I will show you the report they did on hotels ... and let me show you ... They wrote four reports, and, of course, this one, which has a similar conclusion to the others, which reads something like this: The conclusion: McKinley is much safer today than when it was acquired by Columbia Financial, and that it is safer than comparable thrifts.

And that, ladies and gentlemen, you will find in documents that we'll introduce in evidence, that have reports on them that look like this, prepared by EconoMetric; and then they prepare a cash-flow analysis that all look like that.

EconoMetric, Chicago, Illinois, July 20, 1987, and that is the role of EconoMetric in this case. Our charge: that they assisted Mr. Burton in perpetrating the fraud.

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§V.23 6. Charles Merlin Accountants

Now I want to talk about the third accounting firm, Charles Merlin, and I'll be very quick on them, since I've talked about them to date.

Charles Merlin now is the accounting firm that comes in for the two years, '86, '87. What do I have to tell you about them? They were a large accounting firm, international in size. I could give you the cities, but they're the same cities as all the other cities. They're in Hong Kong, London, everywhere. They resigned on October 13, 1988. Why are they here? Because we allege the evidence will show that for two years they participated, just as AA did, in the false booking of profits.

Did they know about the Hernandezes and everybody? They claim not to. Their fees, what did they make in two years? Well, maybe I can have the chart up there, please. And let me show you what they billed for two years, and what they did.

First, of course, first and foremost, is the audit opinion. And it would look just like this, in these brochures. So when the brochures were handed out in '86 and '87—'87 and '88, excuse me—instead of being Adams Accounting, it would now say "Charles Merlin & Company," and all it would do, basically the same language, would say this.

Now, this is Charles Merlin's history. And, by the way, before 1986 here ... CM becomes CFC's accountant on October 3, 1986. They issue a clean opinion in 1987 and a clean opinion in 1988.

In that period of time, ladies and gentlemen, for the two opinions, they bill \$7,005,000. And their testimony will be that they never looked and they never saw anything. And the partner in charge of that account was a person by the name of Richard MacBeth.

And the single most important aspect of accounting has to do with independence. You're going to hear that from accounting professors: The role of an independent accountant is to be exactly what that means, independent. And you cannot let your client tell you how you want to book profit.

Now, in their Phoenix office, you heard about AA. Let me tell you about what Wally Burton meant to the Phoenix office of CM: They were 40 percent of the entire revenue dollar, Walter Burton and Company. It was two times more than the next largest client. The staff increased by 50 percent. Yes, they brought employment to Phoenix. They put people on to work on Wally's audits, so much so that they billed \$7 million.

They are supposed to be, the testimony will tell you, a public watchdog, because without independence, they cannot adequately protect these people. Let me show you what one of their senior partners says about independence. Will you play that, please?

[Videotape played as follows.]

Question: In any event, let's go ... Mr. Morris, let's go to the auditing standards, if you don't mind. At first I want to ask you just two or three general concepts. First, the concept of independence. An auditor is supposed to be independent, is it not?

Answer: Absolutely.

Question: Isn't that one of the most fundamental concepts of the accounting profession?

Answer: A very important concept.

[Videotape concluded.]

MR. COTCHETT: Now, were they independent? We will put on evidence that Richard MacBeth was taken in by Wally Burton to the tune of \$1 million a year when he was promised, accepted, and hired as an auditor for Wally working on the staff of CFC.

You heard Senator Britt say, never in his life as a senator did he receive—or, that is to say, did he ever receive—a visit like this. The film speaks for itself; but what Charles Merlin did was intentionally interfere with the process of regulation by going to U.S. senators to interfere.

And these are the types of letters that were written. They were not written on personal stationery, ladies and gentlemen; they were written on Charles Merlin stationery. This one happens to be from the chairman of the Senate Banking Committee, the Honorable Daniel Sheppard: "During a meeting with you on February 28, 1987, you raised certain questions with regard to

McKinley Savings." And this is what Richard MacBeth wrote him back, which is very simple: My firm, Charles Merlin & Company, examined the financial statements and issued an unqualified opinion. And my firm went on to do this and to do that.

And then under paragraph 2: "In determining its earnings and stockholder equity, did McKinley Savings make provisions for potential losses?" Answer, "yes." That was the opinion of Richard MacBeth. That was what he was telling the senators. That's what he was telling everybody, signed by Richard MacBeth.

Now, was it proper for him to write those letters? The answer is, no. Is that going to come from our experts? Yes. You know who else it's going to come from? Senior partners at CM. Would you please play Mr. Peter Morris?

[Videotape played as follows.]

Question: Have you ever heard of another situation in which there was a meeting between a member of your firm and United States senators over potential regulatory problems involving a client of CM's?

Answer: I'm not aware of any.

[Videotape concluded.]

MR. COTCHETT: Now, did it stop with senators? No. We're trying to get here to this courtroom Senator McDermott's aide. You will hear that a person from CM went to the aide and tried to lobby on behalf of McKinley for the aide to get the Senator to do something. In fact, was the letter proper?

Could we play the senior vice-chairman? I think his name is Phillip Manville—about as forthright a man as you will find at Charles Merlin.

[Videotape played as follows.]

Question: Okay. In your opinion is it ... was it appropriate for Mr. MacBeth to write this type of letter?

Answer: In my opinion, no, not without clearance or an agreement with another partner.

[Videotape concluded.]

MR. COTCHETT: That comes from the words of Charles Merlin, not from our experts.

Now, did he stop writing? Did he write just to Sheppard? Of course not. He wrote to many members. There's one to Jon McDermott saying, pursuant to his meeting. He went on a personal adversarial binge to help them. He went so far that in February of 1988, Burton offered him a job. Told him he wanted him to work at CFC. February of 1988; one month later, CM issues a clean opinion under the tutelage of Richard MacBeth.

One month—or, actually, I'm too long in that—three weeks later, Richard MacBeth announces his resignation from CM to join CFC. His salary? As I told you earlier—but to give you the precise figure—\$60,000 a month. Times 12? \$720,000 a year. Signing bonus—he had a good fast ball—\$100,000 signing bonus.

Now, who replaces Richard MacBeth? And, by the way, he writes a resignation letter to the chairman of the board, to the chairman, Howard Griffen, and you'll get to read this; doesn't really set forth all of the details of why he's going with Mr. Burton. So he really doesn't tell the New York office too much. As a matter of fact, you heard from Mr. Phillip Manville, and you'll hear more from him what he thinks of Mr. MacBeth.

Comes on the scene a new replacement for Richard MacBeth, a Marsha Wallace. And she takes a look at this, and she starts thinking about the problems. If I could have the CM chart.

This is what will be testified to by accountants who have now gone back and reviewed all the books. This is what we believe the evidence will be when the real figures come out. In fact, ladies and gentlemen—and we believe Ms. Wallace found this, because Ms. Wallace immediately said: "We have got to get out of here"—in fact, in 1987, when she came on board—that is to say, for the '87 audit, now, done in 1988—the real figures were that there was a loss of about—and I'm reading off the chart here—of about \$320 million.

Now, let me tell you about some of the problems. Someone found these sheets; and what I'm holding in my hand here are bond-trading sheets. You see, they had bought millions of dollars in bonds from Mr. Pope and others. And as of December 31, 1987, they were down \$120 million in their bonds. And the issue, you see, was whether—and I don't want to get into these technical terms with you of market to market—the issue was, if you were trading, you had to reduce the value of the bonds if they lost

money.

In other words, if you went out and bought a bond five years ago and you paid \$1000 for it, and it was now only worth—if you picked up the paper and read it—\$500, the value of the bond is \$500. But what they would do is they would carry it at the purchase price. And you will hear an analogy to an automobile: It's like going into a new car showroom, buying a new car, driving it out on the street—you'll hear this example used—and then thinking five years later that, because you paid \$15,000 for an automobile, it's still worth \$15,000.

Well, the fact of the matter is, it isn't. And the issue that Marsha Wallace looked at, when someone evidently found these, was, have they been trading? Have they been trading these or holding them for long-term investment? And let me show you, if I can, what Mr. Burrows from Charles Merlin says about this. Would you play Mr. Burrows, please?

[Videotape played as follows.]

Question: Okay. If you look at the purchase date and then look at the sale date, if you go down those columns, is it fair to state that McKinley was buying and selling these bonds over a very short period of time?

Answer: You mean, McKinley or other entities who may be listed here?

Question: Yes, McKinley or its subsidiaries.

Answer: Yes, there were a number of transactions listed here where the company appears to have bought and sold securities within a relatively short period of time.

Question: Was that evidence of the fact that McKinley was trading these particular bonds?

Answer: Certainly with respect to these particular bonds it indicates that they bought them and sold them within a relatively short period of time and would have been reporting the profit or loss that's recognized here.

Question: And would you agree that this is evidence indicating that McKinley was engaged in trading these bonds?

Answer: At least these specific securities were bought and sold in a relatively short period of time, yes.

Question: And that indicates trading activity, correct?

Answer: It indicates they were traded, yes.

[Videotape concluded.]

MR. COTCHETT: Now, had Mr. MacBeth marked those bonds down properly, they would have lost \$100 million in 1987 alone.

Had Charles Merlin looked to see what was going on with the land sales ... you will recall I told you about Sunset—all they had to do was look at this in the files. This is the Sunset Mortgage financial statement for September 30th, 1986. Ladies and gentlemen, when they bought and borrowed \$14 million from McKinley, that's what they had in the bank: They had \$29,000 in the bank when they borrowed that much money.

Now, onto the scene comes a woman by the name of Caroline Mitchell. And Caroline Mitchell in the fall of 1988 writes a document very similar to the one that you saw from the AA partner from Boston when he said, "We quit." Because now Caroline Mitchell writes this article, this memo, in September of 1988. And let me show you first the cover sheet, the cover sheet which reads as follows: "Today Marsha Wallace and I met with Elaine Wilson and Tony Liebert to discuss transactions for the quarter—the prior quarter—and what was going on." The following is a summary, and then they go through them. You don't have to go past page 2 to get to her bottom line: "Currently CFC, consolidated, is incurring \$15 million in losses per month."

Ladies and gentlemen, this memo, in September of 1988, tells the story of what they were losing. And while they were incurring \$15 million a month in losses, they were continuing to sell bonds. And they were continuing to approve and, as they did all through '87-'88, they approved profit after profit after profit on bogus deals. Let me show you, if I can, a quick tape from Mr. Mike Chaney, the individual from Tucson here, as to what he said about his being talked to by Charles Merlin. Play Mike Chaney.

[Videotape played as follows.]

Question: And you've testified earlier that that financing was necessary for S.W. Development to agree to purchase the Southwestern Ranch property?

Answer: That's absolutely correct.

Question: You would not have purchased the Southwestern Ranch property had Mr. Burton not told you that \$5 million was to be extended through a loan to S.W. Development?

Answer: We would not have purchased the property if we didn't get the open line, \$5 million loan, absolutely not.

Question: Did S.W. Development in fact receive that \$5 million line of credit?

Answer: Yes.

Question: If an auditor from Charles Merlin had asked you in 1986 or 1987 whether the \$5 million operating line provided by LANCOR or McKinley was a necessary condition for R.A. to go forward with payment of the down payment in the Southwestern Ranch transaction, what would you have told them?

Answer: I'd say absolutely. It was an essential condition.

Question: Are you surprised, or were you surprised that you never heard personally from any auditor of Columbia Financial or LANCOR relating to the Southwestern Ranch transaction?

Answer: Absolutely.

Question: Why were you surprised?

Answer: It was a major transaction. It was a major project. I would imagine that the auditors, as they went through the books of LANCOR or Columbia Financial, would have closely scrutinized this project, because of the uniqueness of it; because of the magnitude of the project; because of the financing; because of the development; because of the profit participation.

Question: And no such inquiries were directed to you?

Answer: None whatsoever.

[*Videotape concluded.*]

MR. COTCHETT: Ladies and gentlemen, they not only knew, or should have known, about these transactions, Miss Mitchell knew all about Goldman, and knew, as CM knew, that there was no possible way that Mr. Goldman, who's a defendant in this court, could pay back the \$125 million that he loaned; and as to defendant Goldman, I have a number of charts I could show you about his straw-buyer deals, but it was absolutely clear, exclusively clear, as testified to by his president, that he could not pay back that money.

Mr. Goldman will come to this courtroom. He will assert his privilege under the Fifth.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.24 7. Summit Pacific Research

§V.24 7. Summit Pacific Research

We are suing Summit Pacific Research. Who were they? You've heard about Mr. Gilbert F. Browning. You've heard about the young boy throwing the book on ethics at him, on the tape. That was Mr. Gilbert Browning of Summitt Pacific Research. Who was he? He would come in, and for a dollar bill, or two, or three, he would give you an appraisal on a piece of property of anything you wanted.

Southern Financial, a defendant in this courtroom, was a group set up by Mr. Burton with a couple of friends, namely Don Caspar and some others, through Atlanta, Georgia. They would write checks, make loans, get them to participate, making phony loans. We have documents like this: You'll hear Mr. Caspar next week talk about ... if it all checks out with you, I favor this loan in Atlanta to our company. "Our company," of course, is Southern Financial. They would use them as straw buyers to make loans for themselves; and this little instance ... I believe about \$3.5 million went out to some of the principals.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/\$V.25 8. R & T Accountants

§V.25 8. R & T Accountants

Now, the last accounting company on the scene is R & T Accountants, represented in the back very ably by the Gregory, Davis & Crandall firm from ... represented by Mr. Bascomb. Let me tell you quickly about R & T Accountants: Did CM tell them why they were leaving? You bet they did. Did R & T Accountants want the business? You bet they did. So much so ... Are they a big firm, a big international accounting firm? You bet.

Now, Adams Accounting gets out. Charles Merlin leaves. They've all had enough. They've had it up to here. They will not book \$55 million in profit for the NEIL transaction. In comes R & T Accountants. What did they get? Here's what they got: For openers, they got \$2,755,000 for a six-month job they never completed.

You see, they knew that they could never give an audit, because they knew it was close to the end of the game. But they took this up-front fee knowing that CFC was insolvent, and knowing, if you will, in September of '86, that the bondholders were still shelling out the money in the branches to keep CFC alive, so that Wally Burton could take his trips with his family and baby-sitters on these jets all over the world. Not only did they take \$2,700,000, just a few months into the deal—we're going to have testimony on this—they took another \$2 million. Could you please play the tape?

[Videotape played as follows.]

Question: Why did R & T Accountants seek out a \$2 million retainer?

Answer: We did not seek out a \$2 million retainer.

Question: So you're saying that Mr. Burton wrote you a check for \$2 million that was not asked for?

Answer: I don't recall it being Mr. Burton; don't really recall who discussed it with us.

Question: Have you ever had a client just write you a check for \$2 million without being asked for it?

Answer: Not that I can recall.

Question: So this was an extraordinary circumstance?

Answer: In my experience, yes.

[Videotape concluded.]

MR. COTCHETT: It was so extraordinary, that Mr. Mercer wrote a letter to Mr. Keltner in New York, the managing partner of the firm, thanking him for all his effort and valuable time spent in getting Wally Burton as a client. And he closed with a very interesting salutation, or closing, just above the words, "Sincerely, Jerry": "Dear Ed," and if you can't read it, it says, quote, "Again, thanks a million, (or two, or three)."

On November 1, 1988, they had their retainer. CM's disagreement was significant, because when they backed down, and they said, "Look, Wally, you can't book \$55 million, that's it, we're finished," R & T walked in and took the job.

You're going to hear the name Crawford & Lyons, another accounting firm, who had been offered the job to come in. They said, "No thanks." R & T put a full-court press on Wally Burton to get this job. They knew that the fees were very good. R & T got the job. Wally Burton liked them. They became their accountants and continued the sales.

Now, an extraordinary thing happened between October 17th and November 1st, a period of approximately 13 days. When they first went in and talked to Wally, they said the fee would be \$1,075,000. On November 1st, 13 days later, they bumped it to \$2 million. R & T Accountants said it would be okay for CFC to book the \$55 million profit.

There was a series of private meetings with Wally Burton. As a matter of fact you're going to hear evidence that they ... Mr. Mercer even asked two of his partners to leave the room, or he stepped outside, or what have you, so he could be alone with Wally. Here's the testimony on that between Wally and Mr. Mercer: "Mr. Burton, what is your answer to what happened?"

Answer: "I assert the Fifth Amendment." Mr. Mercer: "What happened? I don't recall."

Could we play Mr. Mercer, please?

[Videotape played as follows.]

Question: And that same evening you had a private meeting with Mr. Burton where just the two of you ... discussed matters?

Answer: My recollection is that I did have a private meeting with Mr. Burton, and I really don't remember what we discussed.

Question: What is it that you and Mr. Burton talked about privately?

Answer: I ... I don't recall.

Question: You have no recollection of any of the subject matters that you and he spoke about?

Answer: No, I really don't.

[Videotape concluded.]

MR. COTCHETT: We asked him, why did the fees double? Why did it go from \$1 million to \$2 million and then another unsolicited \$2 million? Could we play Mr. Mercer on that?

[Videotape played as follows.]

Question: If I could direct your attention, now, to page 10, please, to the caption "Fees," the first sentence reads: "Audit fees for a complex company such as Columbia Financial are difficult to estimate." Next sentence: "However, because of our desire to be appointed as your accountants, we are willing to commit to the following fees for normal audit activity." And bottom-line fee estimate was \$1,075,000.

Now, what happened to that commitment between the time that you wrote this proposal and November 2nd to double the size of that commitment?

Answer: I don't recall.

Question: When you make a commitment to a client to audit a company for \$1 million, and within three weeks or thereabouts double the size of the audit fees, I take it that was a subject of serious consideration for the client. Was that a fact in this instance?

Answer: I don't recall fees being discussed.

[Videotape concluded.]

MR. COTCHETT: We asked Mr. Mercer if he even knew what he was paid: Mr. Mercer, do you know what you're paid? What were you paid? Can you play Mr. Mercer?

[Videotape played as follows.]

Question: Could you tell me what is your current compensation at R & T Accountants?

Answer: No, I couldn't tell you what my current compensation is.

Question: You don't know what it is?

Answer: That is correct.

[Videotape concluded.]

MR. COTCHETT: The entire case against R & T Accountants is summarized by their own partner, Mr. Frank Lowe, when we asked him about his role as a public watchdog.

[Videotape played as follows.]

Question: Isn't one purpose of an audit of a publicly traded corporation to protect the users of the financial statement as well as the client?

Answer: I don't know.

Question: Is an audit by a certified public accountant of a publicly traded company designed in whole or in part to protect the public as well as the client?

Answer: I believe that the audit is conducted to enable the auditor to express his opinion.

Question: Have you ever heard it said that the ... one of the functions of the independent certified public accountant in auditing a publicly trading company is to serve as the quote, "public watchdog," end quote?

Answer: Have I ever heard that?

Question: Yes, sir.

Answer: Yes, I've heard that.

Question: Okay. And does that describe the function as you understand it?

Answer: No.

[*Videotape concluded.*]

MR. COTCHETT: That sums up; so much for the public watchdog.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/ III. CONCLUSION/§V.26 A. Damages

III. CONCLUSION

§V.26 A. Damages

How were these people damaged? Let me tell you how they were damaged. This is what 17,000 or more people put—many of whom had their life savings involved—and this is the group of people: For example, Ms. Mason, Allan Lucca over there ... under the subordinated debentures, this is what they have put in. It does not include anything to do with interest on their money and what have you; this is what people put into the Walter Burton enterprise.

You were asked in voir dire examination a question by the Judge: "What do you think about millions?" I heard your answers and I understood them fully. One million dollars is a lot of money, to everyone.

We are going to ask you at the end of this case to find each and every one of these defendants liable. I will argue, when I have an opportunity to do so, as to why they are, but for purposes of this opening statement, we will ask you to take a pen in your hand—as some people did at CFC and wrote names—and we will ask you to write a number like that. We will not ask you to concern yourself as to who pays it.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.27 B. Proposed Witnesses for Plaintiffs

§V.27 B. Proposed Witnesses for Plaintiffs

We will call experts who will testify. One such expert will be Professor Descartes from the University of Arizona, a Ph.D. in economy—an economist, excuse me—who will go through these and point out to you how these numbers were arrived at.

We will call 20 of the foremost experts in the country. We will call Scott Weis, professor of economics at the University of Arizona, who will tell you that EconoMetric, in the back, used improper formulas to keep McKinley values high.

We will call Melissa Connors, an Arizona appraiser, who will tell you how the appraisals were all wrong. We will call Ernie Aguilar, a certified public accountant from USC, who will tell you why the profit accounting was wrong.

We will call expert after expert. George Riemann, a former partner with a Big Eight accounting firm, will tell you that Adams Accounting violated professional auditing rulings. Howard Cayley, professor of accounting from Arizona State University, will come here and testify as to what auditors should do.

We will bring Joseph Lagrange, who, interestingly enough, I believe carried the former title of professor at Ohio State; and I think, if I'm not mistaken—don't hold me to this—I think the title of the professorship was the Charles Merlin Professor of Accounting. He will tell you that they did not apply the proper accounting standards.

We will call Joyce Lanier; Tom Moore, a professor of law at the University of Arizona, who will explain to you the Johnson, Madison people: what they did wrong and what the partners did wrong.

We will call Frank Webber, a former FBI agent who went through every book and record of CFC and will tell you how \$80 million went out into the pocket of Walter Burton and his family. He will tell you and show you the corporate jet flights. He will show you the accountants that were on that flight, at least as shown by the logs.

We will call Warren Watson, a professor of accounting at the University of Michigan, who happens to be—and you will hear this—one of the foremost authorities in the country, and the witness for the United States government, in the major off-shore tax cases now, on tax-sharing agreements, which I didn't talk about today because I don't want to waste your time with all these exotic agreements that they had put together.

You will hear a Mr. Mazursky, 16 years with the Securities and Exchange Commission.

You will hear from expert after expert as to what these people did.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/V. Plaintiff's Opening Statement to Jury--Fraud Class Action Case/§V.28 C. Concluding Remarks; Final Videos of Defendants Asserting Fifth Amendment Privileges

§V.28 C. Concluding Remarks; Final Videos of Defendants Asserting Fifth Amendment Privileges

Ladies and gentlemen, now it's time for me to conclude. I want to thank you for your patience and diligence. I've been as long or longer than I should have been. I don't think this is a complicated case; I think it's a simple case when you cut through all the accountingistic and legalistic.

We will call people to the stand who will testify truthfully and honestly. We will call other people to the stand who will have a difficult time testifying. I can assure you that when we call at least two witnesses next week, and we ask them certain questions, they're going to have a very tough time, because they were right there. They were right there and they knew they were doing wrong, except on payday.

Now, I won't be allowed to talk to you again, except, as His Honor explained this morning, on a very limited basis when I can get up and give a mini-argument or whatever they call that. I don't want you to think—and I know I can say this for each attorney here in this room—that we're not appreciative of your efforts, if in the morning I don't say, "Hello, good morning," which I'd love to do and I know any of these other attorneys would, too. So if any of us just nod at you, without using those words, "Good morning," "Good afternoon," ... and that's how we'll all play the trial.

You saw Mr. Burton and you saw Miss Wilson. You saw Miss Wilson explain to you that she made \$800,000; saw Mr. Burton throwing money up in the air. You saw the main players. I want to close with a tape that will show you what the main players are now saying in regard to their role at CFC.

I want to close and thank you for your attention. This has been a long, difficult morning.

Sorry about UA last night, the basketball game.

[Videotape (Mr. Ivey) played as follows.]

Question: Mr. Ivey, are you an attorney?

Answer: Under the advice of counsel, I decline to answer the question under the provisions of the U.S. Constitution and similar provisions of the Arizona and California constitutions.

[Videotape (Mr. Liebert) played as follows.]

Question: At any point in time were you the chief financial officer of CFC?

Answer: I assert my constitutional right not to answer that question or any further questions.

[Videotape (Ms. Wilson) played as follows.]

Question: Were you at any point in time employed by McKinley Savings and Loan of Irvine, California, which I will hereafter refer to as "McKinley"?

Answer: Upon the advice of counsel, I'm asserting my constitutional privilege not to answer that question or any further questions.

[Videotape (Mr. Burton) played as follows.]

Question: Sir, if I were to ask you each and every question that is contained in those documents, what would your response be?

Answer: I will assert my right under the Fifth Amendment not to answer those questions.

[Videotape (Mr. Burton) played as follows.]

Question: The exhibits I've just read into the record are all of the written questions we've received from any party with respect to this deposition, Mr. Burton. Mr. Burton, if these questions were put to you today what would your response be?

Answer: On the advice of my attorney, I assert My Fifth Amendment right not to answer those questions.

[*Videotapes concluded.*]

MR. COTCHETT: Thank you, Your Honor, very much.

COMMENT

It would be difficult, if not impossible, to conclude this long opening statement with a summary of the all the evidence to which counsel has alluded. To leave the jury with a last impression, however, counsel asserts the willingness of the plaintiffs' witnesses to testify truthfully and honestly, and in contrast shows videotape footage of defendants invoking Fifth Amendment rights, some of whom have allegedly admitted that "except on paydays," they knew their actions were wrong. By this vivid suggestion that the defendants believed they might be incriminated if they answered candidly, the jury is primed to accept the plaintiffs' view of the case.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VI. Defendant's Opening Statement to Jury--Antitrust Case/Chapter Outline

VI.

Defendant's Opening Statement to Jury—Antitrust Case

Mulroney v International Football League

CASE SUMMARY: Plaintiff sued the League, claiming that its refusal to allow him to sell stock to the public forced him to sell the team at a low price. Defendant denied the allegations, claiming that plaintiff was unable to go public for reasons unconnected with the League's policy, because he had already granted an option to buy the team. Defendant also claimed that plaintiff was equally involved in the policy against public ownership and failed to follow League procedures and submit a proposal to a vote.

I. DEFENDANT'S OPENING REMARKS TO JURY §VI.1

II. STATEMENT OF FACTS AND IMPLIED ARGUMENT

A. Plaintiff's Failure To Adhere to IFL Rules and Procedures §VI.2

B. Background of Case

1. Characterizing Plaintiff; Lawsuits Over Plaintiff's Attempted Buyout of Public Shares §VI.3

2. Plaintiff's Current Attempt To Again Make Public Offering; Financial Difficulties of Team §VI.4

3. Attempts To Raise Money

a. Option To Buy Sold to Morris §VI.5

b. Discussions With Sterling Regarding Loan, Public Offering §VI.6

4. Meeting With Owners Regarding Public Offering; Commissioner's Support §VI.7

5. Proposed Sale to CMG; Reasonability of Compensation to Plaintiff §VI.8

III. CONCLUSION

A. IFL's Accommodation of Plaintiff §VI.9

B. Attacking Plaintiff's Opening §VI.10

C. Case Theme Summary §VI.11

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VI. Defendant's Opening Statement to Jury--Antitrust Case/§VI.1 I. DEFENDANT'S OPENING REMARKS TO JURY

§VI.1 I. DEFENDANT'S OPENING REMARKS TO JURY

MR. ROTHMAN: Thank you, Your Honor. With Your Honor's permission. Ladies and gentlemen, as you watch the clock and as the time goes on, I want to put your mind at ease early on: I will be the only speaker for the International Football League, so that when I sit down, despite the fact that my learned opponents have two speakers, you will know you can go home today. Secondly, I will try as best I can to conclude by the normal recess time, but because of the rules, which say that we go second, we get the matter a little bit late, and I hope that you will not feel offended if I keep you here five or six minutes or ten—hopefully not more—later.

May I also start out by saying that when I talk about rules—the court has advised you about how a trial proceeds, and that we go second in this opening statement—so, like the court has rules, so does the International Football League have rules. And so we live here by the court rules, and in the International Football League we live by rules. What I believe the evidence will disclose in this case—contrary to what you have been hearing—is that this is not a case about Mr. Mulroney being unable to sell 49 percent of the team to the public. It is not that case. But rather, rather it is a case, as the evidence will unfold, of poor business judgment by Mr. Mulroney, which led his company to disastrous financial condition.

It is about Mr. Mulroney changing the rules of the game for his own personal economic benefit. It is about—and the evidence will be clear on this—Mr. Mulroney participating in the policy that he is now complaining about, participating in it to his economic benefit, and then changing his position to further his economic benefit.

This case will be about Mr. Mulroney's inability to go to the public for reasons unconnected with the policy of the International Football League, but rather because of the fact that he had literally sold the team by way of an option before he went to the Sterling Company, and therefore was incapable of selling the team.

And this case will also be about—as the evidence will clearly show you—Mr. Mulroney's refusal to abide by the procedures of the League and failing to ever ask the League to vote on his proposal.

I want you to understand a moment, and I will be very brief, on what the IFL is. It is the number one sports league in the world, and it got that way because originally 28 owners, now 30 owners, came together using their best business judgment and said, these are the rules by which we want to live. That, they will tell you, is the American way. We are a business, we want to make our rules, and we will live by those rules.

And as a result of that, on Sunday, as some of you people well know, over 80 million people in the United States watched television and watched the IFL, 80 million people every Sunday. In the football stands, one million people come to see IFL games, and our Super Bowl, which is our premier program, is played to 125 million people in the United States to 750 million people around the world. Now, why? Because we have put together a package, a business, if you will, in which we say we will have rules, and we will hopefully, as a result of our rules, be successful. Now, others, the evidence will disclose, may disagree. Even members within their own organization might disagree, but, consistent with the way an American system works and this League works, the evidence will show that it's put to a vote.

COMMENT

The introductory remarks of the defendant's opening statement should give the jury a favorable view of counsel and the defendant. In [§VI.1](#) counsel does this by reassuring the jurors that, even though the defense was unable to address them until late in the day under the rule governing the order of presentation, his remarks will be relatively short compared with those of the two speakers for the plaintiff. After seeking to establish credibility with the jurors, defense counsel immediately controverts what plaintiff's counsel has just told the jury. Counsel reduces complex issues to simple terms that jurors can relate to by asserting that the case is fundamentally about the importance of rules and plaintiff's refusal to abide by the rules. Counsel draws an analogy between the rules of court that counsel must live by and the rules of the International Football League that the owners must live by under "the American way." See [Book §2.24](#) on how to use value judgments to heighten the style of the opening statement.

II. STATEMENT OF FACTS AND IMPLIED ARGUMENT

§VI.2 A. Plaintiff's Failure to Adhere to IFL Rules and Procedures

Now, let me put one thing to bed very quickly. There is no rule in the International Football League against public ownership. There is no rule in the IFL against public ownership. The only rule in the IFL is that any policy—and the word *policy* is critical—that is to be changed, or any procedure that is to be changed, must be changed by a three-quarter vote, and that three-quarter vote rule is not in dispute in this case. Mr. Mulroney takes no position that that is a bad rule. He supports the rule.

Now, we do have a *policy* that says we don't want there to be public ownership. But three-quarters of the owners considering a proposal put to them can say we will make an exception, and so it becomes critical, as the evidence will disclose, that a matter that is to change a policy be submitted for a vote, at which time you present your case, and you present your facts, and you present everything that is involved in what you are trying to do, and then the owners vote. I will talk more about that in a few minutes.

Now, why is it so important that we have these rules? Mr. Mancini says, well, you are going to hear a lot about revenue sharing, and I say to Mr. Mancini with a smile on my face, you bet you are, because what we do in the International Football League, and what our great success has been, is that we share revenues almost totally. Now, what does that mean? That means that while, for example, New York is a much better television market than perhaps Pittsburgh or San Diego, we want all of our teams to be able to compete equally, and so we make New York share its revenue with San Diego.

So every single city in the International Football League shares its revenue. The reason? We want every team to have a chance to win on Sunday, so that when you or your husbands or your children or your friends tune in, you are going to say either side has a chance to win this game, and that is the great beauty of the International Football League, the genius of it, if I may.

Well, now if you share revenues, then it is terribly important to you how every other team in the League operates. You want to be sure that the team in Buffalo is being properly run because you are dependent on Buffalo in this revenue-sharing scheme. And so it is not correct to say that we compete with one another. It is correct that we compete on the football field and like to knock each other's head off in a football game, but that is not what we are talking about.

The competition in the antitrust laws are Ford versus General Motors, where Ford is trying to drive General Motors out of the marketplace, and General Motors is trying to drive Ford out of the marketplace. That is the competition that the Sherman Act is worrying about. The evidence here will show that these clubs are working together; they all want each other to succeed. They all want each other to be the finest financial enterprises in the world. And that is the difference, and don't let a blackboard where he says we compete on the field confuse the competition we are talking about.

Now, there is ... there are in the International Football League procedures for changes in policies before it gets to a vote. And that procedure is that, if you want to change something, the first thing you do is you present your plan to a committee that is called the Finance Committee—you are all familiar with that kind of thing in business—and the Finance Committee will study it. The members of the finance committee have experts who help them, and they themselves are mostly financial experts; that is why they are on the committee. They then make the recommendation to the ownership and, pursuant to this three-quarter vote rule which is not in dispute, we then have a vote.

In this case, as you are soon going to hear, there was never a submission to the Finance Committee, ever. There was never a submission to the ownership, ever. And I will tell you in a few minutes why.

Now, the first, the first major question that the evidence is going to deal with—and you probably didn't quite get it when the Judge read to you what this case is about—is what we call the equal involvement defense. And let me simply say that it is quite clear that Judge Brooke tells you what the law is, not Mr. Rothman or Mr. Granger or Mr. Mancini. But the logic is that you can't take advantage of a rule. You can't take advantage of a rule, use it to your benefit, and then come complain about it. That is just that simple. And it is not relevant as to who made the rule or how it was initiated. The question—and the court will instruct you on this; I must not do that—is: was an advantage taken of that rule. Now let's talk about that.

COMMENT

At this early state, counsel, without direct reference, identifies the legal theory that most closely fits the facts in the case, and develops a factual theme that summarizes and supports this theory. This theme, about the importance of following rules, stated first in the introductory remarks and repeated here and several times again in the opening, will be the touchstone throughout the

presentation of evidence and will then be highlighted during the closing argument. Counsel is able effectively to introduce legal issues by referring to commonly shared experiences ("when you or your husbands or your children or your friends tune in").

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VI. Defendant's Opening Statement to Jury--Antitrust Case/ B. Background of Case/§VI.3 1. Characterizing Plaintiff; Lawsuits Over Plaintiff's Attempted Buyout of Public Shares

B. Background of Case

§VI.3 1. Characterizing Plaintiff; Lawsuits Over Plaintiff's Attempted Buyout of Public Shares

When Mr. Mulroney joined the International Football League, he had a team in the United Football League. I don't want you to be confused; that was a different league, different people, different ownership. And he had a team in that league. And it was decided that we were going to put the two leagues together, called *merger*.

Mr. Mulroney was placed on a three-man committee of the United Football League to be the committee that negotiated the merger. So he was on the merger committee. And he will tell you that for months and months and months his committee worked with the counter-committee on the International Football League side to work out the rules. And then when they got the rules all worked out, they went to Congress, and the Congress of the United States approved the merger. And within the terms of the merger that they approved were the rules, including the rule—the *policy* is a better word, not the rule—including the policy that we are now talking about. Part of the congressional approval.

Now, Mr. Mulroney said: Wait a minute, if you are going to have this policy in the International Football League against public ownership, my company is a public company. That was permitted in the old United Football League.

And so we said: Well, all right, Mr. Mulroney. We will do you a favor. We will do you a favor. We will let you be grandfathered, meaning: come on in with your public corporation, we will make an exception for you. And they did that. A fair thing to do.

And so Mr. Mulroney comes into the International Football League, having been a part of the committee and getting the special privilege. And then one day, in 1973, he decides that he wants to get rid of his partners, his partners who came into the ... into this business for just few dollars. And so he pays his partners—and this was his right—\$100 a share, and says, "Go. I am sick of it." A hundred dollars a share. And then he decides, I've got all of these public owners that the International Football League let me be grandfathered on, and I would like to get rid of them, too.

Now, let there be no misunderstanding, he didn't do that, the evidence will show, because anybody made him do that. He did that because he wanted ... he wanted to make a big financial killing. And so what did he do?

Well, in order to buy out your public shareholders under the law of the United States, you have to file a document with the Securities Exchange Commission. It's called a proxy statement, and you must tell the Federal Government in that proxy statement why you are buying out these public shareholders. Now, you must be truthful in that document or you've committed a federal crime.

Mr. Mulroney did not in that document say: "I am being forced to do this by the International Football League." He didn't say that. Here is what he said—and we are going to put this proxy up on the board so that you can see it and read it and understand it—he said, "Apart from the policies of the International Football League, in the judgment of the Whalers board of directors"—that is Mr. Mulroney—"it is becoming increasingly difficult for management to make decisions which will best serve the corporation's objectives if management must also attempt to satisfy the competing responsibilities to shareholders."

Now, what he meant by that was, what he said was: there is an internal conflict between public shareholders and owning a football team. In owning a football team, you want to win, you want to spend your money, but when you have public shareholders, you have got to take care of their interests, give them dividends, give them moneys for their holding of their stock, and he found that to be an irreconcilable conflict.

And that, ladies and gentlemen of the jury, is the reason for the rule. The owners in their business judgment understood that if you permit public owners to own stock, you create a conflict. The owners of the team have to say: I have got to protect those public shareholders, and I have got to do that even though it means that I may not be able to take care of my interest in a winning football team. And I will spend more time with that because it becomes even more relevant.

Well, when Mr. Mulroney filed this proxy with this language, in which he also said, I am doing this voluntarily—*voluntarily*, we will show you that language—he did something else. He decided that what he would pay his shareholders, the public shareholders, was \$15 a share; one-five dollars a share. You will recall a moment ago I told you that the evidence showed that he had paid his partners \$100 a share, but the public was to get \$15.

Well, the public got very upset about that, and they said that is not fair. You are trying to take money away from us that we have,

that we own, that we deserve. And so they filed lawsuits against Mr. Mulroney. The lawsuits said in effect, You are not treating us fairly.

And in those lawsuits Mr. Mulroney testified, and what did he say? He said in the lawsuits, under oath, sworn to tell the truth: "I feel," said Mr. Mulroney, "that there was a broad philosophical difference between the policy of management and the policy involving public ownership, particularly with reference to my long-held conviction that what was in the best interest of the League, what was in the best interest of the League, was more important than what was in the best interest of the stockholders. And that," said Mr. Mulroney, "put me in a constant conflict in my own mind, and that is why I want to get rid of the public. There is a constant conflict between being an owner of a football team and having to worry about shareholders."

That, ladies and gentlemen, is the precise reason for the policy. Don't accept our reasons for the policy. Accept Mr. Mulroney's, filed in the proxy statement as I have read to you and in his testimony in the court.

And then he goes on to say that he had concern that the 2400 members of the public who held shares in his company would cause him the same kind of difficulties that he had earlier faced with his other shareholders, that is, the people he bought out for \$100 a share. And so he tells the court under sworn testimony, he tells the SEC, he then tries to buy the shareholders out for a pittance: \$15.

And the court says, Mr. Mulroney, you have got to pay those shareholders \$80, not \$15.

And so what does that all lead to? It leads to his equal involvement in the rule. He was a part of the negotiating team that made it. He negotiated himself a special benefit, the grandfather clause. He then got tired of it and voluntarily bought out his shareholders, tried to take economic advantage of them, and got caught. As the court will, I believe, give you in the instructions, that is equal involvement and precludes recovery.

COMMENT

In providing background, counsel continues to develop the factual theme that supports his theory of the case. Giving appropriate background material can also help achieve order and promote clarity in the opening statement.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VI. Defendant's Opening Statement to Jury--Antitrust Case/§VI.4 2. Plaintiff's Current Attempt to Again Make Public Offering; Financial Difficulties of Team

§VI.4 2. Plaintiff's Current Attempt to Again Make Public Offering; Financial Difficulties of Team

Now, it's also interesting, and we will read to you from Mr. Chip Mulroney's depositions and testimony. He is the son of Mr. Bob Mulroney, who will explain to you in detail—and we will give it to you in word-for-word detail—why there is this terrible conflict between ownership of a team and public shareholders, and he will give you examples. Let me just read you one little part of his testimony, and this is only a small part. You will hear much more of it.

He is explaining why the rule is a good one, why you have to have this rule against public ownership, something that he apparently now has changed his mind about. He says, "If we want to maximize the return to the shareholders, we would have to sell off our best player contracts, we would go with rookies, and the shareholders would make a lot of money. But that wouldn't be good for the team." So he has the conflict. And that, ladies and gentlemen, if I may repeat myself, is the very reason, the very reason for the rule.

Now, to go on. Why now has Mr. Mulroney changed his colors, changed his tune, after what I have just told you about his involvement and his taking the benefits of the rule, in order to go to the public again? The answer is: Mr. Mulroney had gotten, through bad management, into a terrible financial mess. His team was a consistent money loser. In 1984 he lost over \$1 million. In 1985, he lost over three and a half million. His total losses amount mounted and mounted. And then, as you will hear from the evidence, his financial situation got so bad—in great part caused by his son, Chip—that by the time we got to November of 1987, he owed or guaranteed or was responsible for over \$104 million. One hundred four million dollars.

You will find that most of that money, or a good deal of that money, came from Chip's fiascoes. He sponsored a Michael Jackson Tour. He lost almost \$30 million ... *over* \$30 million in that tour, and his father was signing papers to be responsible for that and pledging the team as security for that.

And these financial problems will become very clear to you in a moment and very important to you in a moment, but the fact of the matter is, as a combination of Chip Mulroney's absolute business disasters, and Mr. Mulroney's equal business improprieties, they had \$104 million worth of debt and didn't know what to do about it.

COMMENT

One of the most effective ways of revealing the facts of your case during the opening statement is to weave in excerpts of deposition testimony of a party or witness. In §VI.4, counsel, uses the words of the plaintiff's son to describe the conflict between running a team and responsibility to shareholders.

3. Attempts to Raise Money

§VI.5 a. Option to Buy Sold to Morris

And so in 1985, their auditors, Arnold Adams, said: Gentlemen, you are in horrible condition, and there is no hope for you, no hope. And I will explain that in a moment for you. And so Mr. Mulroney in 1985 went to Hays Baldwin, investment bankers, and Hays Baldwin was asked to find a buyer. This becomes one of the single most important parts of what I am going to tell you now. I have told you about the equal involvement. Now, let me tell you about the Morris option. You will hear about the Morris option over and over again. Hays Baldwin said to Mr. Mulroney: You are in desperate trouble. Your finances are awful. You have done everything wrong with respect to your son's activities. There is a man named Mr. Morris, Fred Morris, who might be able to help you.

And so in April of 1986, long before there was any talk of going public, Mr. Morris bought an option to purchase the entire Whaler club from Mr. Mulroney, and he paid for that option. Now, let me, at the risk of being overly simplistic, explain to you what the evidence will disclose about what an option is. If I have an option to buy your house, I can at any time, pursuant to the terms of that option, come to you and say I exercise my option. Here is the option price that we have agreed upon, and I own your house.

And that is exactly what was done here. Mr. Morris paid for an option, which gave him the right to buy the team up to a certain date for \$63 million and to a date thereafter for \$65 million. Sixty-three and 65. Everybody in this case, on every side of the aisle, everybody agrees that if the option is valid, you can't have a public sale, and that is quite obvious. How can you possibly have? If Mr. Morris had the right to buy the team by exercising the option—and that is 100 percent of the team—how could Mr. Mulroney—and the evidence will show this—sell 49 percent of it to the public? He didn't own the 49 percent.

And so we then have to determine—and the evidence will help you with this—what was the state of that option? Well, number one, Mr. Mulroney had a knack for getting money, and so after he got Mr. Morris to buy the option, he went to him over the course of the year, and he said: Fred, I got money troubles. I have Chip's debt here, and I have all of these problems. How about helping me since you have an option here; you are probably going to take this team anyway. Why don't you loan me some money? So over the year, Mr. Morris loaned him almost \$20 million—almost \$20 million—and Mr. Mulroney took that \$20 million, gave most of it to Chip, didn't put it into the team, and now had Mr. Morris on the hook for \$20 million.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VI. Defendant's Opening Statement to Jury--Antitrust Case/\$VI.6 b. Discussions With Sterling Regarding Loan, Public Offering

§VI.6 b. Discussions With Sterling Regarding Loan, Public Offering

Then we come to this meeting, this meeting with Sterling Company. Now, many of you, ladies and gentlemen of the jury, are not totally familiar with investment banking, and so please forgive me if I appear to be overly simplistic about it.

When you hear the evidence in this case about public offerings, you are going to hear about the meticulous steps that the people have to take before they can sell to the public. Number one, you have to have audited financial statements from auditors so that the public won't get cheated. Two, in most every case you have to have a profitable company. You are going to the public to sell them securities; you can't sell them securities if you are in financial distress. That would be a fraud on the public. Thirdly, you must make available to your investment bankers every single thing that you know about your company, so they can put all of that material into the public filings, what we call the SEC filings.

And so Mr. Mulroney goes down on October the 20th to see the Sterling people in Little Rock. Point number one: he doesn't go to see the investment bankers who sell to the public. He doesn't go to see that group. He goes to the group that loans you money. It's part of the business we call the debt business, and that is different than the part of the business that goes to the public for equity. Those are two different sections. And so he goes to the debt people to borrow \$80 million, 40 for him and 40 for his son, who owns the stadium.

They never meet, ever, ever with the investment bankers ... never meet with the investment bankers. They have no audited financials because Arnold Adams won't give it to them. They have nothing, except a prospectus from the sellers. Indeed, listen carefully, when they went down to see Sterling, there was a court order which precluded them from selling the team—a court order—and they didn't even tell Sterling about that. They withheld that from Sterling. Misled them by not telling them that.

And so they get down to Sterling and Sterling says: Well, you know, this is preliminary, but we will give you a letter—a letter which you will all see—which will say that we are the agent for you to raise the debt money, the debt money, the \$80 million. That is all we are asking. That is all we are going to do now; that is all we are going to ask. And they give that to Mr. Mulroney to sign. He doesn't sign it. So at no time is there ever an agreement of any kind, at no time is there an agreement of any kind between the Sterling Company and Mr. Mulroney, not even an agreement to raise the debt money, none. But Sterling says, you know, let's look into this a little further, and they do look into it further, and then some very serious things begin to happen.

But before I tell you how serious things were when Sterling looked into it and what happened there, the question arises as to whether or not Mr. Mulroney was going to tell them about the Morris option, because obviously the Morris option was a critical problem. Somebody said earlier to me, you can't sell 49 percent if you don't own 49 percent.

And so before going down to see Sterling, Mr. Mulroney writes to Mr. Morris, and he says: I want to get rid of this option. Of course he wants to get rid of the option. And Morris responds and he says in effect, baloney. And he writes a letter to Mr. Mulroney, and he says in the letter, "After considering your offer"—that is the offer to buy out the option—"I have decided instead to obtain IFL approval for the transfer of the club to me pursuant to the option. I would expect that, in accordance with the option, you will cooperate in good faith and get the approval that I need for the exercise of it." And so that option is being exercised by Mr. Morris.

Now, despite the fact that Mr. Morris bailed out Mr. Mulroney, despite the fact that Mr. Mulroney went to them and borrowed \$20 million from them, now when Mr. Morris seeks to exercise the option, Mr. Mulroney refuses to cooperate with him, refuses to honor his obligation. And as the evidence will disclose, this isn't the first time Morris tried to exercise the option. He tried to exercise it several times before and got stonewalled, as the evidence will reflect. Mr. Mulroney would not help Mr. Morris, and so Mr. Morris went to court, and he said in his papers, I am being cheated, and I want an agreement that this team will not be sold without my being given warning in advance.

And Mr. Mulroney then goes down to meet and fails to tell Sterling about that.

Now, when Sterling looks into this a little more carefully ... you remember on October the 20th, they send out this detention letter which I have now gone over with you, and it's never been signed. They spend the next couple days looking into this more carefully, Sterling does, and they then write a famous letter on October the 30th. You will see that letter. It is a critical letter. And in the letter they say, and I am going to paraphrase it because it's very long, and I don't want to bore you with it, but here is what they say in the letter.

They say, we want to follow-up on our conversation. That is the conversation when they came down and asked for the \$80 million loan. They said there are some very important things that we have to talk about. Number one, we have to talk about IFL approval, but you have assured us, Mr. Mulroney, you have assured us that won't be a problem. So in the minds of Sterling, that is not a problem; Mulroney has put that to bed. Secondly, the option that the Fred Morris Group has, has got to be taken care of before you move into this debt offering—*debt offering*, not public offering, debt offering. Before we can get you any money for debt purposes, not from the public, you have got to get this Morris thing straightened out. The buyback of this option, this Morris option, has to be completed before we can help you with this offering. He doesn't even tell them that he is going to do some bad things to Mr. Morris by not honoring that obligation that he has.

Then they go on, they say: You also have an obligation to the Burns, B-U-R-N-S, Group. For the purposes of our discussion now, all that is is another \$15 or \$16 million worth of debt that they had. And the investment people down ... not the investment people, but the loan people at Sterling said: You have to take care of that. We can't go out here and give you any money or get money for you until you take care of Morris. We are not worried about the IFL because you told us that is okay, and you have to take care of Burns.

And then they say: You must have a definite agreement, Mr. Mulroney, with the Wells Fargo Bank. That is the bank that had been loaning money all along to the Whalers, and he said: Unless you work out your problems with Wells Fargo, we can't help you. And when you work it out with Wells Fargo, says Sterling, you shall do that on the worst-case scenario; that is, be very conservative. We don't want to cheat anybody by getting money from them and then have you not take care of all of these things.

Then, then you get the kicker. Sterling says, quote, "The most troublesome thing to Sterling that has arisen since we met with you is the headline article in our local paper Thursday regarding the federal court decision with former stockholders of the Whalers. This definitely clouds the issuance of debt at this time and eventually any public offering that may come down.

"Our attorneys feel that this is a critical point for the debt offering." Not the public offering, for the debt offering. "Without an absolute dollar figure as to liability, the lender does not have the necessary security to go forward."

What happened was the lawsuits filed by the unhappy shareholders that ended up in \$80 came down in the week between the first meeting and this letter. Then Mr. Sterling goes on, and he says: Bob, I don't like to sound negative, but I feel that I must be honest and up front for how I see the apparent problems. Frankly, when the news article made our local paper, our upper management did not really understand the debt problems that you are facing. I am skipping, but you will read all of this in its entirety. "With the problems that our management and counsel have with the offering at this time and with the many complex issues that I feel exist, you may want to go elsewhere."

To use the vernacular, please forgive me for doing it, that is a kiss off. Sterling had lost all interest. And so for the evidence ... for counsel to suggest in his opening statement, "I believe the evidence is to the contrary," there never was any possibility under the sun for a debt offering, or for a public offering.

COMMENT

Repetition is a great aid in persuading jurors. In [§VI.6](#), counsel uses the technique of immediate repetition of an important idea. "So at no time is there ever an agreement of any kind, at no time is there an agreement of any kind..."; "They never meet, ever, ever with the investment bankers ... never meet with the investment bankers." See [Book §2.2](#) on the value of repetition.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VI. Defendant's Opening Statement to Jury--Antitrust Case/§VI.7 4. Meeting With Owners Regarding Public Offering; Commissioner's Support

§VI.7 4. Meeting With Owners Regarding Public Offering; Commissioner's Support

Now, when Mr. Mulroney came to the meeting on October 27th—and let's get this, the dates, clear in your mind—he had received this retention letter which he did not sign, more material was being sent down to Sterling so that they could make some judgments, which ultimately lead to the October 30th letter.

He comes to the League, and he flashes the Gaels proposal. Just parenthetically. Nobody knows any of the details of the Gaels transaction. And indeed, the testimony from the plaintiff's experts will be that nobody could have made a decision on that day simply by waving a document without any study of it or any understanding of it.

Mulroney comes, Mr. Mulroney comes. He has no written proposal, none. He does not know what kind of stock he is going to sell or when he is going to sell it. He doesn't have a commitment from anybody. He has been in the most preliminary of discussions with Sterling; ultimately kissed off. He has got Morris saying the exercise ... I am exercising options. He has got all kinds of financial troubles.

And the horrible thing that the International Football League did at that point, the horrible thing was they said: Bob, make your proposal to the Finance Committee. Let them study it. Work with it. And then Mr. Russell says: And Bob, listen, whenever you are ready to make your proposal, I will call a vote, and if it's important to you because of timing, I will do it by telex, so we don't have to bring all the owners together, but Bob, you have got to have a program. To put it mildly he says: We cannot, we cannot change our rule for pie in the sky.

And you will hear from the Commissioner—then Commissioner Russell—that one of the terrible concerns he had was that, if you didn't have a plan as to how you were going to go to the public, a plan which was clear, with financial data and so forth, you might be cheating the public, and that that would have a terrible, negative influence on the International Football League. The public, as the evidence will disclose, is the heart and soul of our organization, and if you were to cheat the public without a plan, that would be a disaster.

But Mr. Russell, Commissioner Russell, did not turn them down. He said: Bob, get your house in order. And then we will call a vote.

Bob's response to that was a letter to the Commissioner thanking him profusely for giving him that consideration. The League then on its own starts to study the matter. Mr. Schiller contacts the investment bankers who did the Gaels transaction, Sidwell Bascomb—interestingly, Mr. Mulroney didn't go there—and Sidwell Bascomb says it's impossible, impossible. There is no chance of success. It can't be done.

Nonetheless, on November 5th, Mr. Russell again meets with Mr. Mulroney, and Mulroney tells him that he believes he has 18 votes in favor of the proposition, 17 plus himself, and that there are some undecided votes. But he, Mr. Mulroney, thinks that he can swing those votes so that he will get the necessary 21. Russell says: Fine. Get your plan together, present it for a vote. If you have got 18 votes and if you have got three undecided who you can move over as you say you can, you have got it, Bob, and I will be neutral. I will not hurt you.

What Mr. Mulroney lied about, lied about in that November meeting, was that he did not tell the Commissioner that he had received that kiss-off letter from Sterling and, indeed, had no program, had no chance, had nothing, but the Commissioner still was willing to give him a chance.

And the question then was why, Mr. Mulroney, if you had 18 votes, three undecided going your way, why, why didn't you put it to a vote? Well, I think you will find from the evidence that the reason he didn't do that is that he had no proposal from Sterling. He had the October 30th kiss-off letter. There was a threat to foreclose on the son's stadium—son owned the stadium that got Mr. Mulroney into so much trouble. Mr. Mulroney is going to tell you that one of his big troubles was he had a terrible deal on the stadium, the stadium deal was no good. That was a deal that his son made with him, and he will never tell you he went to his son and said: Help me out, Chip. I have trouble here. No, sir. So his own son was the cause of his problem in part. But at any rate, he didn't ask for the vote. What did he do?

What did he do? Mind you, this is a League that is trying to hurt Bob Mulroney, so they say. He went to the League in January, and he said: Look, he said, I got troubles. He doesn't ask to go public. He doesn't ask for any vote. He said: I have a deferred compensation account. Now, let me explain what that is. When you sign a football player to a contract, you may say: I will give a

million dollars a year, but I will pay you \$250,000 in that year, and the balance, 750, we will put into a deferred account and pay that out to you when you are 30 years old or 35 years old or so forth. The International Football League says, okay, if you are going to have deferred accounts, we want to be sure that the money is there to pay these players. We have an obligation to those players. So that deferred money has to be put into a special account, controlled by the League. Mr. Mulroney said, look, I have got \$4 million plus in my deferred account. Please let me take it out so I can keep operating, and the League said, okay. This is a League that is trying to hurt the man. They said, okay.

So in November, into the deferred compensation account Mr. Mulroney dips. And I think you are going to find it interesting what he did with that money. In January, still reporting that he thinks he has 18 votes and three undecided, and still not putting it up to a vote. And I say rhetorically, with all due respect, you will ask yourself why. He had nothing to put up to the votes.

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§VI.8 5. Proposed Sale to CMG; Reasonability of Compensation to Plaintiff

Now, the problem with Mr. Morris continues. Morris trying to get the option exercised. Morris complaining that I have loaned you money, and you are now giving me a bad time. Morris trying to get the IFL to approve and Mr. Mulroney doing everything in his power to do something to Mr. Morris, that it was unconscionable.

And so finally, Mr. Morris ... Mr. Mulroney decides to sell the ball club to a group headed up by a man named Frazier, F-R-A-Z-I-E-R, Mr. Frazier. Now, how do you sell to Mr. Frazier when Mr. Morris has an option? Obviously, you can't. So Mr. Morris sits down with Mr. Frazier and says: I tell you how we will solve this problem. I want 49 percent of the team for my option. And Frazier says, agreed. And so the deal is struck to purchase the team, with Mr. Frazier owning 51 percent and Mr. Morris owning 49 percent. This is allegedly a man who had no further interest in that option.

Well, the League then, to help Mr. Mulroney, approved the Frazier sale, but for reasons that are not terribly important it ultimately did not come to pass, because Mr. Frazier couldn't make a satisfactory deal with the stadium—not materially important—which then leads Mr. Mulroney—still no vote ever requested, nothing more said about the public offering; it's long gone—to go to a group called CMG. The C stands for Cain, the M stands for Morris. And he entered into a deal to sell his team to the CMG group.

Well, now, you might then ask how did you do that in face of the Morris option. Mr. Morris had an option to buy the whole team. Well, the way they did it was (1) they gave Mr. Morris \$11 million for his option, and (2) Mr. Morris got 49 percent of the team. And so to suggest that Mr. Morris's option was no good or that he wasn't interested in it, is dealt with as I just indicated in the evidence.

I believe that the number that you heard as to what the Morris ... about what the CMG deal was—\$83 million—is grossly understated. But what they are not telling you in evaluating the deal is the little extra perks that Mr. Mulroney took for himself as a part of the deal. It's interesting about Mr. Mulroney: He had no trouble cheating his minority shareholders. It's interesting he had no trouble, no trouble in taking money from Mr. Morris, and then refusing to recognize his option. It's interesting that he had no trouble in telling the SEC and testifying in court about the reasons he was doing these things, and now coming around and doing just the opposite. But some of the perks that he got ... deals with the issue of whether indeed it is true that it was \$83 million.

He got an additional \$2 million as a part of the Morris option, money in the Morris option agreement. There was a little provision that said that if Morris ever got paid any cash for his option, a portion of it would go to Mr. Mulroney. He got \$2 million.

He sold to the CMG Group, for \$400,000, some memorabilia that he had in his house, old Whaler material he got \$400,000 for, but never turned in the memorabilia. It's still in his house. He got a lifetime consulting contract to pay him for the rest of his life, and then, may the Good Lord forbid it, when he died, for the life of his wife. He got health benefits for the rest of his life; luxury box at the stadium for the rest of his life; Super Bowl tickets at face value. For the first five years he got 50 tickets, and for the balance of his life he gets 20 tickets. These are all dollar-value items that came to him as a result of his sale.

His insurance premiums were paid. He got a special tax law out of Congress so that he didn't have to pay taxes. His son Pete was given an employment contract to last even in the years where he was no longer working. Pete got a luxury box; Pete got health insurance; Pete got life insurance, on and on and on, and we will have a gentleman on the stand that will give you the dollar value for all of that, but it was ... it was gouging, gouging.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VI. Defendant's Opening Statement to Jury--Antitrust Case/ III. CONCLUSION/§VI.9 A. IFL's Accommodation of Plaintiff

III. CONCLUSION

§VI.9 A. IFL's Accommodation of Plaintiff

Now, you have heard it—and I am going to finish within my time so I don't want you to worry about it—you have heard it suggested that we were trying to hurt Mr. Mulroney; that in face of some of the following facts, many of which I have mentioned.

We grandfathered him when he came into the League, so he didn't have to change his status. He had trouble with his stadium; the IFL came to his assistance. You will hear about that. When he was fighting in 1975 with his partners, his partners, there was a hearing held at the IFL, and the IFL sided with Mr. Mulroney. When he wanted to go private—I talked to you about that—we agreed to send Mr. Russell, to have Mr. Russell write a letter that they can put into the proxy material so that it would help him. And then Mr. Russell went to testify on his behalf in these actions when the shareholders were suing, to help him, to help Mr. Mulroney.

We permitted the Morris option to come into existence, and we received thank-you letters from him. At the meeting of October the 27th, we didn't say to him: Get out of here. We said: We will have a telex vote. Get your house in order. That was to help Mr. Mulroney. In November, the 5th, when he came before us and he said: I have got 18 votes; I think I can swing the undecided, the Commissioner said: Fine, I will be neutral on this matter, but get your house in order. Well, I don't want to hurt the public.

When he came to us in January and said: I need deferred moneys, we let him take it out of the system. When he said: I need your immediate approval for the Frazier deal, we gave it to him. When he said I need your approval for the Cain deal, we gave it to him. We did everything in our power to help Mr. Mulroney. But what we could not do, what we could not do, is bail him out of a \$104 million of debt which was his and his son's responsibility.

COMMENT

Counsel reestablishes his credibility with the jury by reminding them that he is keeping his promise to finish on time.

§VI.10 B. Attacking Plaintiff's Opening

Now, might I say a word about the Gaels because you are going to hear it. It's going to be waved in front of you. The first point to make about the Gaels is that the very investment bankers who took it public, Sidwell Bascomb, said it could not be done for the Whalers. What was sold, what was sold in the Gaels deal was not stock, was not stock, but it was something that was referred to as a Master Limited Partnership, which had certain specific benefits which made it interesting to an investor. But right after the Gaels deal was made, the laws of the United States would change so that you could no longer have Master Limited Partnerships. So that was out.

Secondly ... thirdly, the Gaels were a consistently profitable operation. If somebody came to you and said: Ladies and gentlemen of the jury, buy a share of stock in the Gaels, what you would have done—as the evidence will disclose—is you would have said: Well, there is a good company. It's making money, it's profitable, and it's probably going to give me some dividends. And so, not only was the Gaels profitable, but it was intended by all means to continue to be profitable and to pay dividends and to pay moneys to the investors. That was a business investment.

On the other hand, the Whalers were a disaster financially, couldn't get their audited statements, and, it is absolutely clear, would never have been able to pay any dividends to the public. And so to compare the Gaels, with a nationwide following, to the ... to the Whalers—I believe the evidence will reflect—is to compare apples and oranges. And those of you in the jury, when you go to hear this testimony, who have some sophistication with the public marketplace will understand fully what I have just said.

Now, in connection with the antitrust issue of who is hurt by this policy, certainly it doesn't hurt the fans. It doesn't hurt the sport fans. It indeed protects the public against losing money, and it protects the International Football League against loss of its representation. And may I say that if there is no other testimony in this case for the reason for the rule, let us all accept the testimony of Mr. Mulroney when he pulls out his proxy statement, and when he went and testified in court, and accept the testimony of his son, who did likewise.

Now, on the issue of damages. Hopefully, you will never get to that issue in this case; but let me make just three to four very quick observations.

Observation number one. Never in the history of the world has an IFL franchise sold for \$250 million, ever. That is a figment of Mr. Mancini's imagination and the evidence will so disclose.

Secondly, Mr. Mancini suggests that our expert said there will be a premium, if you sold to the public, of 30 to 60 percent. Absolutely, unequivocally untrue, absolutely, unequivocally untrue. Rather, the expert states that, he, if allowed to, will testify that, because of the financial condition of the Gaels ... of the Whalers, they couldn't sell for a premium of anything, let alone sell, let alone sell.

Next, the comment that the IFL wants to sell only to rich people. Absolutely pejorative statement to arouse emotions. There will not be a word of evidence that that is the policy of the International Football League. The International Football League does not have such a policy.

To say, to say that what we were trying to do was to keep money away from Mr. Mulroney so that he wouldn't have a good team, in light of what I have discussed with you about revenue sharing, makes absolutely no sense. The evidence will disclose that the very best thing that could happen to the International Football League, the very best thing, is that in the Boston area, the New England Whalers are the finest team that it can be, and that the stadium is filled up every single Sunday and generally large television viewing, and everyone is thrilled. That is what we want to see happen. To suggest that the League wants to hurt that team is ludicrous.

COMMENT

Defense counsel usually will not mention damages in the opening statement unless plaintiff's counsel mentions a large dollar figure in his or her opening statement. In that case, defense counsel may want to counter plaintiff's statement and point out how ridiculous plaintiff's demands are. See [Book §2.6](#).

§VI.11 C. Case Theme Summary

Now, in closing. When all of the evidence has been submitted to you and you have heard it all, you will have heard the following:

First, Mr. Mulroney was equally involved in the rule in its implementation and took advantage of it; and then, when you hear that, you apply that to what the Judge will instruct you. Indeed, you will hear that there was never a time, never a time that Mr. Mulroney objected to this rule, never a time.

Secondly, you will hear that Mr. Mulroney did not avail himself of the League procedures: A vote. Prior to that, a submission to the Finance Committee. Now, what is the relevance of that? You cannot in law argue that you have been hurt by the policy and the rule which votes the policy until you submit the policy to a vote, and he never did that.

Third. You will hear that he could not have gone public under any circumstances, because of the Morris option. And, therefore, you will hear that the policy was not the cause of his problem. The cause of his problem was that he sold an option to Morris and borrowed money from him.

Next, you will hear that there never was a plan to go public, ever. And that indeed, the effort to go public was—to use the vulgar expression, but I don't mean to be vulgar—kissed off by Sterling.

And finally, you will hear that the finances of the club were so seriously bad that he could not have sustained any kind of sale to the public without defrauding the public.

Now, one last point about finances. The experts will also tell you that, even if Mr. Mulroney had been able to borrow \$40 million through Sterling—something that could never have happened, but even if he could have—in a period of three to four years he would have been in exactly the same spot he was before he borrowed the money. He was losing money so fast, and was operating in such a serious problem, that he would have gone bust again, and that is true even though there was increased television revenues, even though there was increased revenues. And when Mr. Mulroney bailed out, by getting the CMG Group to take him out of his troubles, he was very fortunate. Had that not happened, he would have been in bankruptcy in two or three years anyway.

Ladies and gentlemen, I am through now. Your attendance ... your attention has been almost more than any ... I, too, want you to know that we expect that we will prove every single statement I made today, and at the end of the trial, you can hold me responsible to whether I did or didn't.

Thank you very much. Thank you, Your Honor.

COMMENT

Counsel concludes his opening statement by repeating the factual theme that supports the defense's legal theory of the case. See [Book §2.2](#) on the use of repetition.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/Chapter Outline

VII.

Defendant's Closing Argument to Jury—Antitrust Case

Mulroney v International Football League

CASE SUMMARY: Plaintiff sued the League, claiming that its refusal to allow him to sell stock to the public forced him to sell the team at a low price. Defendant denied the allegations, claiming that plaintiff was unable to go public for reasons unconnected with the League's policy, because he had already granted an option to buy the team. Defendant also claimed that plaintiff was equally involved in the policy against public ownership and failed to follow League procedures and submit a proposal to a vote.

I. Introductory Remarks §VII.1

II. Credibility of Plaintiff's Witnesses §VII.2

A. Plaintiff's Character Attacked §VII.3

B. Plaintiff's Son's Contradictory Testimony §VII.4

III. Elements of Defendant's Case §VII.5

A. Plaintiff's Equal Involvement in League Policy §VII.6

1. Plaintiff's Participation in Creating and Supporting Policy §VII.7

2. Plaintiff's Voluntary Compliance With Policy §VII.8

B. Plaintiff's Failure To Show Policy Was Enforced Against Him §VII.9

C. Plaintiff's Failure To Show Policy Was Material or Substantial Cause of Injury §VII.10

1. Impossibility of Going Public; Questionable Authority of Plaintiff's Expert Financial Witnesses §VII.11

2. Defendant's Efforts To Accommodate Plaintiff §VII.12

3. Buyout Option Legally Precluded Plaintiff From Going Public §VII.13

D. Review: Verdict Form Questions §VII.14

E. Relevant Market §VII.15

IV. Inconsistencies in Plaintiff's Case

A. Plaintiff's Expert Witnesses Attacked

1. Credibility Undermined Regarding Marketability of Team §VII.16

2. Credibility Endorsed Regarding Justification of League's Ownership Rules §VII.17

B. Plaintiff's Attacks Countered on Issue of Monopoly Power §VII.18

C. Plaintiff's Inconsistency in Contesting Ownership Rule §VII.19

D. Inconsistency of Plaintiff's Arguments, Witnesses' Testimony §VII.20

V. Damages; Mitigating Factors §VII.21

VI. Summary

A. Final Review of Verdict Form §VII.22

B. Concluding Remarks §VII.23

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§VII.1 I. INTRODUCTORY REMARKS

MR. ROTHMAN: Counsel, ladies and gentlemen, it's been a long time. Thanksgiving, Christmas, New Year's, blizzards, snowstorms. I have even learned to watch television in the morning and see if school is closed, and that hasn't happened to me for a very long time.

But seriously, I think one of the lessons I learned—which is one of the best lessons—was the character and the strength of the people of New England as exemplified by this jury. You have been here every day despite all kinds of personal considerations and problems. I have not known a jury to have listened as attentively, and while I have the opportunity of going first and saying "Thank you," I am sure the other lawyers will express their feelings as well.

But I wanted you to know that we lawyers have to hope and pray that we will get jurors as seriously involved as you have been. The system won't work any other way. We have to feel that the jurors are going to listen, try to understand, follow the instructions of the law, and, most importantly of all, use their God-given common sense to determine whether or not this is really a case that warrants the kind of money that is being sought here or whether perhaps this is a case which is built on something other than what are the true facts.

And so I thank you in advance—I will thank you again, but I want you to know how seriously I take what I just said to you. You have been wonderful. Thank you.

COMMENT

Frequently, as in this case, there is a considerable lapse of time between opening statement and closing arguments. It is important to use the start of the closing argument to reestablish rapport with the jury. Counsel does this by thanking the jurors for their attention to the case and praising them for their character and strength. He also appeals to that character by asking them to use their "God-given common sense," a recurring theme throughout this closing argument.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.2 II. CREDIBILITY OF PLAINTIFF'S WITNESSES

§VII.2 II. CREDIBILITY OF PLAINTIFF'S WITNESSES

Now, in evaluating your common sense, using that common sense, one of the earliest things that you have to do is test the credibility of witnesses. Are they telling the truth? Are they making up their story? Does their story make any sense?

And in that connection, I would like to start by reminding you—and unfortunately, some of these things happened a long time ago—reminding you that we got to a very critical part of the testimony of Mr. Bob Mulroney, and I want you to remember this because he is the man I want you to now zero in on when we talk about credibility.

Mr. Mulroney suddenly came up with an answer out of nowhere as to why he did not sign the retention letter with Sterling, and I asked him: I said, "Well, now you seem to have found an answer. What is the answer?"

He said, "I went home over the weekend, and I checked my notes. And when I checked my notes, I recognized what the reason was that I didn't sign it. I was thinking about Armstrong & Company."

I said, "Produce your notes."

And he started to waffle on me, started to give me some excuses, but he said he would, and then he came back the next day or whenever we resumed, perhaps the next morning, and I asked for the notes, and he had no notes. And so the Judge then, in the middle of the trial, gave you a very special instruction, and what he said to you was the following. Judge Langtry said, "With regard to this testimony"—referring to the testimony of the plaintiff, Mulroney—"I instruct you that Mr. Mulroney has been unable to produce the requested notes, to produce any evidence to support his claim that he refreshed his recollection with any personal notes. You should keep this instruction in mind when you consider the weight and credibility, if any, you should assign to Mr. Mulroney's testimony."

And then the Court went on to say he would give you more instruction on credibility later; and when you get that instruction from the Court, among the things the Court will tell you about credibility is that, in weighing the effect of any inconsistency or any difference, consider whether it concerns a matter of importance or an unimportant detail and whether it results from innocent error or intentional falsehood. I submit to you that Mr. Mulroney's testimony on that issue was one of intentional falsehood, and you should consider that when you examine what this man has said to you.

I think also, in considering credibility, you ought to think about ... a little bit about the inconsistent statements that have been made by witnesses—and the Court will tell you about that—and those inconsistent statements from Mr. Bob Mulroney, Mr. Peter Mulroney, and Mr. Chip Mulroney, are absolutely incredible.

You might want to remember, in resolving the issue of credibility, what Mr. Mulroney will ... and what Mr. Mulroney—Chip—had to say when they were putting out proxy material to the SEC, and then try to compare that to what they are saying now in the courtroom; or what they said ... or what they said when they were testifying in the shareholder suits, and now what they are saying in this courtroom. We will talk about that in a few moments, but those are inconsistent positions which you may want to consider very seriously in judging the credibility.

COMMENT

In closing argument, it is crucial to incorporate the most favorable instructions and defuse the least favorable. By doing so, you will create a sense of alliance between yourself and the judge. Beyond that, counsel seizes the opportunity to argue plaintiff's lack of credibility in the language of the instructions themselves.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.3 A. Plaintiff's Character Attacked

§VII.3 A. Plaintiff's Character Attacked

In looking at Robert Mulroney, the man, you might want to ask yourself what kind of a man was it who bought out his partners for \$100 a share, the public for \$15 a share, and then in the lawsuits, which he defended so violently and so vigorously, he ultimately was ordered to pay \$80 a share, plus interest. Is that a man who is being fairly candid with the people with whom he is dealing?

You might ask yourself what kind of man was Mr. Mulroney, who went to Mr. Morris and borrowed over \$20 million from Mr. Morris, took it gladly with open hands, and then, when it came time to honor his agreement and Mr. Morris tried to exercise his option, Mr. Mulroney started to look for excuses and stonewalled and tried to avoid meeting his obligation. That is reprehensible.

Or what kind of a man is it who finds another potential purchaser with Mr. Morris, a man named Chambers, and grabs from Mr. Chambers over a million dollars, makes all of his books and records available for Mr. Chambers so Mr. Chambers could do some due diligence, and then comes forth and says: I am not going to honor this option because Mr. Chambers is one of the buyers. That seems to me evidence of some kind of a man who is not being totally candid and fair.

What kind of a man is it who decides that what he wants to do is take money out of the Whalers, funnel it through to his son, and do it in such a fashion that the books and records won't reflect it? That is a man ... that is a man—using the words of my friend, Mr. Fleming—who was truly "cooking the books." And ask yourself, what kind of person is that?

What kind of a man is it that takes \$750,000 a year from Mr. Keppler—and has also made arrangements for his wife to receive a pension from Mr. Keppler, after he passes on, for her life—and then turns around and sues Mr. Keppler? What kind of a man is that?

What kind of a man is it who goes to the League meeting on October 27th, and says to the League, "I have a commitment from Mr. _____ from the Sterling Company"? He had no commitment, and he knew it. He did not tell the League the truth.

What kind of man is it who fails to tell the League on November 5th that he has received this letter from Sterling on October 30th, which I have denominated a particular kind of letter which you can draw your own conclusions on.

What kind of a man is it who goes down to see Sterling and doesn't tell Sterling that he has shareholder suits, and Sterling has to read about it in the newspaper?

What kind of a man is it who goes down to see Sterling, doesn't tell him about the injunctions against him, injunctions that prohibit him from going down there, and what kind of a man is it who tells ... who doesn't tell Sterling that by going down there he is violating the Morris option agreement, which prohibits him from going down to sell the team?

What kind of a man is it who goes down to see Sterling and fails to tell Sterling about the multitude of judgments—the multitude of judgments—against Chip, which are choking the Whalers, or about the full debt of the companies. That is the man whom plaintiff's counsel is going to ask you to believe and to give credence to.

COMMENT

The repetition of rhetorical questions is a particularly effective technique to use in the closing argument. Asking over and over "what kind of man" would engage in a lengthy list of reprehensible actions elicits antipathy toward the plaintiff and the plaintiff's case.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.4 B. Plaintiff's Son's Contradictory Testimony

§VII.4 B. Plaintiff's Son's Contradictory Testimony

Now, Pete Mulroney was—if I can use this expression—a plaintiff's disaster. Your notes that you took will reflect the dozens of times that I asked him questions and impeached him with what he said in his deposition. Just some of the examples:

Pete Mulroney: "Morris never was approved by the IFL." Same day: "Morris was approved by the IFL."

Next: "The money that Morris gave to my father never went to Chip." The same day: "The Morris money went from my father to pay Chip's debts."

Pete again: "Morris never did try to exercise the option." The same day he testified, "Morris attempted to exercise the option."

"Morris never said," said Pete, "that he wanted a piece of the team." Same day Pete says, "Morris always wanted a piece of the team."

Pete told you that they had a deal with Sterling, and then, just two pages later in his testimony, there was no deal with Sterling.

Now, this goes on and on and on. Your notes will reflect, as well as I can put it, all of those inconsistencies. Pete Mulroney did not tell the truth, and Robert Mulroney did not tell the truth.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.5 III. ELEMENTS OF DEFENDANT'S CASE

§VII.5 III. ELEMENTS OF DEFENDANT'S CASE

Now, ladies and gentlemen, I am going to, in my next few minutes, stress to you some portions of what I think are the critical parts of the case, and will ultimately discuss this with you in conjunction with the verdict form that is going to be given to you. But I would like you to pay as close attention to these points as you can, because I think that they will make your life in the jury room much easier.

The first point which you will be asked to consider from ... by me, is the question of equal involvement. Equal involvement we will talk about at great length.

Next, did the International Football League and its policy stop Mr. Mulroney from going forward with the public offering? In connection, was the policy enforced against him? Would a vote by him have been—a vote request by him—been futile? Was he prepared to go forward?

Next, could he have gone forward? Was the Morris option a prohibition? Were his finances sufficient? Did he have a deal?

And if we can prove—as I am sure you will find in a moment we can—that there was equal involvement, or that we didn't stop him, or that he wouldn't have been able to go forward anyway, he is not, under the Court's instructions that you will get to, permitted to recover.

And those three points have nothing to do with the IFL policy—nothing.

COMMENT

The use of questions, introduced in the opening statement, is a more effective way to incline the jury toward the defendant's case than a straight linear argument would be.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.6 A. Plaintiff's Equal Involvement in League Policy

§VII.6 A. Plaintiff's Equal Involvement in League Policy

Let's see, now, if we can examine those points. First, equal involvement. The equal involvement defense, which is now on the board and which I am going to discuss with you....

And let me, before I discuss it with you, tell you that the Court graciously gave us, prior to the argument, his instruction that he is going to give to you. Now, what I tell you the instructions are is not the law; the instructions come from the Court, and if you think I have misstated anything in what I tell you, you ignore what I say. Obviously, take the Court's instructions; but I will do everything in my power not to misstate the law, and I also am not going to read in complete detail. So I am only giving you portions of the instructions.

But on the equal involvement, the Court will tell you substantially as follows: The defendants, International Football League, claim that Mr. Mulroney cannot prevail on his antitrust claims because he bears complete, voluntary, and substantially equal responsibility for the public policy—public ownership policy—in that he created, approved, maintained, continually and actively supported, relied upon, or otherwise utilized and implemented to his benefit, the rule. If you find that he did, then you will rule for the defendant.

Now, first let me clearly point out that all we have to show to establish this defense is one of the items in the red. Not all, not two, not three, but one, and I now will show you, I am convinced, that from Mr. Mulroney's testimony alone, we have established this defense—and probably by showing almost every one if not every one of them.

COMMENT

When arguing instructions, counsel must say at least once, literally or in substance, that "only the Judge instructs the jury on what the law is." Throughout this closing argument, counsel applies the actual language of the jury instructions to the facts of the case, effectively guiding the jury in how it should apply the law. As a practical matter, it is helpful to have the instruction displayed in a way that allows the jury to read along with counsel to enhance the jury's retention of the argument.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.7 1. Plaintiff's Participation in Creating and Supporting Policy

§VII.7 1. Plaintiff's Participation in Creating and Supporting Policy

Now, let's start out on the testimony that you have in this case about the creation of the policy—the creation of the policy.

First, let me make it absolutely clear to you that what you have heard from the plaintiff is that Mr. Mulroney didn't create the policy. He didn't create the policy, he just accepted it. It was thrust upon him. Well, first of all, the Judge will clearly tell you that, to establish this defense, it isn't necessary to create the policy. There is some evidence, but it's not necessary, and you listen carefully when the Court tells you that. But let's see what Mr. Mulroney said about creating the policy. He said: I was a member of the three-person committee; it was established to represent the UFL at the time of the merger, and one of the things we discussed in our committee was the ownership rules that were to prevail in the new merged corporations.

He was actively involved, he said, in those negotiations, and he had a proxy from two other owners so that he could vote them—vote their interest—and here is what he said exactly. My question to him was: "And I take it, Mr. Mulroney, that the three of you would then assemble with the three leaders of the committee, after you've met with your respective teams and say, okay, this is the UFL position on this point; is that right?"

Mr. Mulroney's answer: "That is a fairly accurate description, yes."

"And then somebody representing the UFL will carry that position to the IFL; is that what has happened?"

"Yes."

So what would happen, the UFL would sit down, with Mr. Mulroney being the leader—one of the leaders—formulate a position, and then meet with their counterparts at the IFL and deal with the subject.

"And together," I said in the question, "you would come to some kind of an agreement; is that what would happen?"

Answer: "That is right, Mr. Rothman."

And then my question: "And what was agreed upon was that there would be no public ownership, and that was agreed upon because you got special dispensation because of your status; isn't that correct?"

Answer: "I would say that is a fairly accurate statement."

Now, ladies and gentlemen, that is his participation in the creation of this policy.

Then the question goes on by me: "And the reason that you made no objection to this language—that is, the public policy, and the information being given to Congress—was because your problem had been solved by your being granted the right to come in as a public corporation; is that correct?"

Answer: "That's correct."

He then goes on to say he was the chief spokesman before the Congress of the United States to present the terms of the merger, which included ... which included the public ownership policy.

And I asked him, "Did you talk to your representatives from Massachusetts in connection with getting this merger bill done?"

Answer: "I did."

Question: "And did you say in any way, shape, or form that the representations made to Congress about agreements on ownership policy were something that you were not in agreement with?"

"No."

My question to him: "And you were in agreement with that representation to Congress?"

Answer: "I was in agreement with that."

That is the testimony from Mr. Mulroney on the issue of creating that policy. And, as I pointed out to you, under the Court's instructions I don't even have to show that he created it; so when they come to you and say, well, he didn't create it, he just accepted it—that is not alone the issue.

COMMENT

Throughout the argument, counsel reiterates that establishment of a single criterion is sufficient to refute the plaintiff's antitrust claims.

Now, did he continually approve the policy by supporting the policy—continually and actively supporting it? If I showed you just this one thing alone, we have established the defense.

He testified that he never openly objected to the policy. At no time did he openly object to the policy. What he carried in his mind is not relevant in this case; you don't object to a policy by something that you have in your mind and you never express.

Did he continually and actively support the policy? You remember—I know you remember—what he said when he went public—I am sorry—when he went private: He was supporting the policy.

He said in his proxy ... he said in his proxy, "In the judgment of the Whalers' board of directors, it has become increasingly difficult for management to make decisions which will best serve the corporation's objective if management must attempt to satisfy the often competing responsibilities which he has to the public shareholders on the one hand and to the League's other 27 member clubs on the other." And, therefore, he said: I want to go private.

Is that not continually and actively supporting the rule? He says: The rule is a good one and I want to go private—the testimony of Mr. Mulroney himself. And then in his shareholder litigation—do you remember what he said there?—and I won't put that on the board, but he told the shareholders: I am trying to voluntarily get back into compliance with the League rule; and in effect he says: I am actively supporting a return to the rule.

Now, that is as clear as a bell can be, but let's go on.

Let's go on. Did he rely upon the rule? Did he rely upon the rule and otherwise utilize it? Otherwise utilize and implement it? Listen to my question. I asked it as carefully as I could ask any question. I said, "And that is what I mean, Mr. Mulroney, when I say to you 'utilized': you utilized the rule against public ownership as one of your reasons for going private?"

Answer: "That is correct"—I am paraphrasing now—"That is correct, Mr. Rothman. I utilized the policy."

Question: "And when you ultimately bought out the public shareholders, you in effect then actually implemented the rule?" "Actually implemented the rule"—that is the question I asked him.

"Yes, Mr. Rothman, that is a correct statement."—I paraphrase—"Yes, Mr. Rothman, I implemented the rule."

So out of his own mouth, from his own lips, he has told us what he did to create, what he did to approve, what he did to actively support, to rely upon, and to utilize and implement.

I went on. I went on. I said to him, "Let's talk about your approving the rule."

Question: "Mr. Mulroney, when you were discussing with Mr. Russell the question of your option"—that is, the option with Morris—"and the application of the various procedures, you felt that the policy was a good rule which permitted the owner ... the IFL, to consider ownership—no matter how small ownership was, no question. Now, just about a year later, in October of 1987, you realized that you had gone public. There was no way you could check out those public shareholders; isn't that correct?"

Answer: "I would have to say, yes."

He is telling us that the ownership policy of the International Football League is one which he approves, from his own lips.

On the question of maintaining the policy, there can be no question, obviously, that he maintained it. Matter of fact, he was the only owner of the International Football League that went from public to private to maintain the integrity of the rule.

Ladies and gentlemen, you don't have to go any further than that. If you find that any one of these points has been established, this is a complete defense barring any recovery by the plaintiff. And you don't have to listen to the testimony of anybody in this case except Mr. Robert Mulroney. He himself establishes the rule.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.8 2. Plaintiff's Voluntary Compliance With Policy

§VII.8 2. Plaintiff's Voluntary Compliance With Policy

I am sometimes troubled by the question: This rule was implemented—the policy that existed in October of 1987—when Mr. Mulroney first brought the issue to the League. The lawsuit was filed on May 16 of 1991, three and a half years later—three and a half years later. We will talk about that in a minute, but you might ask yourself, why? Why?

And that takes me now to a very serious question on this issue of equal involvement. The plaintiffs knew full well how serious their problem was and is. So they had to come up with some explanation for this—and they must in their argument to you when they close today.

The first argument they had was: Well, we didn't create it. Not an answer. Because you have every one of these other points they have to deal with. So they then did something which was very, very tricky, and I want you to listen to it.

Mr. Mancini said in his opening statement that the International Football League pressured Bob Mulroney to come into compliance. And then Mr. Fleming asked Commissioner Tennyson, who is seated here today, whether he wrote the proxy material. The suggestion being that Bob Mulroney didn't do this; the League made him do it, and the League went so far as to write the proxy material. There is not one single piece of evidence to support that. Mr. Mancini's opening statement to you, some three months ago, was made out of whole cloth; because, let me tell you ... let me tell you what Bob Mulroney testified to on this issue.

I asked Mr. Mulroney, "When you said in your proxy material that this going into a private corporation will bring the Whalers on a voluntary basis into compliance with IFL policy, which is opposed to public ownership—do you see that, Mr. Mulroney?" I was pointing to the exhibit.

And he said, "Yes, sir, Mr. Rothman, I do."

Then I said, "Now, I want to ask you—and I emphasize the word 'voluntary'—that indicates to you, does it not, that you were making a voluntary decision?"

Answer: "Positively." Now, does that sound to you, ladies and gentlemen of the jury, as though we forced it on him? Positively was voluntary.

And then I said, "And, Mr. Mulroney, nobody—nobody—was forcing you to do that?"

Answer: "No, sir. No, sir."

Then I said, "All right, Mr. Mulroney. There is no legal obligation on the part of the Whalers to eliminate public ownership; is that correct?"

Answer: "Yes, that's correct."

"In other words, Mr. Mulroney, you were telling the public shareholders that you were going to buy out ... buy them out; that the League wasn't making you do this. It was something that you were voluntarily doing on your own?"

Answer: "That is correct."

Now, where in the world does Mr. Mancini have the right to say to you we forced them out, in light of the testimony of Mr. Mulroney?

Now, I said to Mr. Chip Mulroney, "Now, Mr. Chip Mulroney, you also agree with your father that the statement in the proxy material—that this was voluntary compliance with the League's policy—is accurate?"

Answer: "Yes."

"All right. Do you see the word 'voluntary' there, sir?"

Mr. Mulroney, Chip: "I agree with that."

And then you bring with that the idea, was it voluntary compliance with the IFL's policy? And Mr. Mulroney says: Yes, there is no issue on that. There is no issue on that.

And we are told that we forced it upon him. Mr. Chip Mulroney called the International Football League and said: Will you get Mr. Russell, the Commissioner, to write me a letter, so I can put it into this proxy material?

And then ... and then they suggest in the opening statement, and I suppose they might even say to you again, that we forced— unless I have dissuaded them in this argument—this upon him. That is what I mean when I say, use your common sense. That is what I mean when I say, are they really making something up here? What is the evidence?

COMMENT

Closing argument presents an opportunity to point out topics raised in the opening that are unsupported by the evidence. Once again, counsel asks the jury to use their common sense to reject this argument.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.9 B. Plaintiff's Failure to Show Policy Was Enforced Against Him

§VII.9 B. Plaintiff's Failure to Show Policy Was Enforced Against Him

Now, ladies and gentlemen, the next question ... the next question that you will be asked to deal with following this question of equal involvement is: Was the International League's rule—International Football League's rule—enforced? Listen to what the Court will tell you on this. This is point two. The Court will tell you that to establish the causal connection between the public ownership policy and any injury claimed by Mr. Mulroney, Mr. Mulroney must prove that we denied his request to waive or amend the policy.

In other words, he must prove that the public ownership policy was enforced against him. And in part the instruction goes on to say: In considering whether the ownership policy was a material cause of his alleged losses, you must consider whether Mulroney has in fact proven that a request for a vote would have been futile.

The number five ... here is question number five on the verdict form you will get—I will talk to you about that shortly—"Did the plaintiff prove by a preponderance of the evidence, that the IFL's policy against public ownership was enforced against him?"

I suggest to you that the answer is clearly no—clearly no. And the question is, why was it not enforced against him?

You will recall, Mr. Mulroney never requested a vote of the owners, despite numerous offers by Commissioner Russell to put his proposal to a vote. You remember Mr. Russell, the Commissioner, saying: Billy, put some meat on your proposal. Put some meat on your proposal. I stand neutral here. I will call a vote anytime you request it.

As I told you in the instruction, the only excuse Mr. Mulroney could have for not calling a vote was that he thought it was futile. Well, he made a count and reported that he had 18 votes in favor and six undecided, and he then went on to say of the six undecided, he thought he could have three going his way. That would be 21 votes in his favor, and the policy would have been amended, and he could have gone public if he had put it to that vote.

It was clear that one of the questions I wanted to ask was, "Why didn't you put it to a vote?" Pete Mulroney gave the answer. Pete Mulroney said: I didn't put it to a vote—or we didn't put it to a vote—because we didn't want to be embarrassed.

Ladies and gentlemen, that is not an explanation. That is not futility. The Court says to you, in considering whether the policy was a material cause, you must consider whether Mr. Mulroney has in fact proven that a request for a vote to waive or change the rule would have been futile. Let me tell you, if any of the presidential candidates had that kind of a vote in their calculation, they wouldn't be seek ... they wouldn't be saying that their efforts were futile.

The Commissioner ... the Commissioner was doing everything in his power to assist Mr. Mulroney. Urging him—urging him—to give us some facts: Show us how you are going to get this done. Mulroney never did that. Mulroney never, never did that. So I submit to you that the answer to this question is, clearly, no.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.10 C. Plaintiff's Failure to Show Policy Was Material or Substantial Cause of Injury

§VII.10 C. Plaintiff's Failure to Show Policy Was Material or Substantial Cause of Injury

Now, going to question number six on your verdict form: "Did the plaintiff prove that the policy against public ownership was a material or substantial cause of injury to his business or property?"

He has to show that what we did hurt him. And the answer to that is, clearly, no. Because the defendants ... our policy could not possibly have been the cause of his harm. Why could it not? Listen to the instruction: "You should consider ... you should consider," says the Court, "whether the policy against public ownership was a material cause of Mulroney's injury, whether Mr. Mulroney was ready to go forward with the transaction and make the public offering. In determining," says the Court, "whether Mulroney was prepared to go forward, you may consider the background and experience of the people involved in preparing the offering and any affirmative steps taken by Mr. Mulroney to make the offering. Finally, in considering whether the public ownership policy was a material cause of injury, you should consider whether, in the absence of the policy, the Whalers proposal would have been successful in light of his financial condition and other matters."

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.11 1. Impossibility of Going Public; Questionable Expertise of Plaintiff's Expert Financial Witnesses

§VII.11 1. Impossibility of Going Public; Questionable Expertise of Plaintiff's Expert Financial Witnesses

Now, let's talk first about ... could he have gone public? I ask you here—without repeating at length because time is so precious—to compare the evidence on whether he can go public. Mr. Benton—Mr. Benton, the plaintiff's expert—I suppose a kindly man, but no experience or competency in this field. Almost an embarrassment as an expert. Compare him with what you saw yesterday or Friday—Mr. Sinclair—a man of, I think, a great deal of wisdom, integrity. Use your common sense as to whether or not this could have been a successful public offering.

Remember the testimony of Mr. Benton—not Benton, Mr. Benson—the accountant. You have heard ... you have heard testimony beyond words on the financial condition of the Whalers, the future of the Whalers. Ask yourself—ask yourself—"Could this company possibly have gone public?" You know that it could not have.

And remember what the Commissioner said. He said: It just isn't right. It just isn't right to thrust the financial problems of a team onto the backs of the public. It was not the responsibility of the public of New England to bail out with their money Mr. Mulroney's indiscretions as an owner. That is not right if you want to support the team, says Commissioner Tennyson.

And I agree 100 percent. Buy season tickets. If you want to feel like a part of it, you can buy a jacket. But don't put hard-earned public money into this kind of a venture.

Mr. Benton gave you an opinion which almost defies rationality. He admitted—he admitted—that the team had no audited financials, and they had to have audited financials before they could go public.

I am only talking about Mr. Benton. Mr. Benton—the plaintiff's expert. He told you that he never saw a business plan. He never saw any pro forma projects. As a matter of fact, ladies and gentlemen of the jury, you saw an expert on the witness stand—Mr. Benton—who didn't see one single piece of paper. Did not have a piece of paper, did not have a proposal, nothing, and he is asking you to believe that they could have gone to the public marketplace and sold \$80 million to the public—I say, to have stolen \$80 million from the public.

Next, Mr. Benton said he had no knowledge—no knowledge—of the earnings history of the Whalers, yet he is telling you that they can go public. He had no knowledge of the debt of the Whalers. But he said: If the debt really was \$104 million, I would have had some problems with that. He said: Maybe we would have had to get rid of the Mulroney management, I don't know.

I don't mean to embarrass the gentleman, but for an expert to come forward and not know the difference between a clean financial and a qualified financial is shocking—is shocking. And I guess ... I guess I shouldn't say too much more about the fact that he had some trouble with the tests that were given to investment bankers, but, all in all, Mr. Benton was a plaintiff's disaster as an expert witness.

The only other testimony that you have in this record about the ability to go forward with a public offering was the testimony of Professor Nelson. I will have something to say about him in a few minutes, but let's just leave that for a minute because I have some questions as to whether you good folks are going to have very much sympathy for listening to Professor Nelson as an expert.

Now, whether or not he could have gone forward with the deal, remember if you will, that Bob Mulroney testified: Even if the IFL had given me an okay, I had no assurances I could have had a deal made. Sterling was never retained, ever.

And here I become just a little bit agitated—not too much so, but a little bit; I should know better than that. They are now trying to suggest to you that, well, we may not have had a deal with Sterling, but we certainly could have done one with Armstrong.

COMMENT

The appearance of spontaneity helps to establish credibility. Language expressing amazement at what the opposition has done or the fact that counsel is angry creates this effect.

What testimony do we have on that? To show you how counsel tries to cause jurors to lose their common sense, he supports his argument that they had a deal with Armstrong by handing up an article about Armstrong, and this is evidence to the fact they had a deal. That is mind boggling. It's interesting to Mr. Benton, who testified that he sat right at the seat of the powers, not even mentioned in this article. I wouldn't suspect that he would have been.

There is not a single piece of paper in this report—not a single piece of paper—to suggest even remotely—even remotely—that there was an Armstrong deal, not one single piece of paper. And may I smile a moment when I remind you of Mr. Pemberly's testimony—where we all broke up a little bit—from Armstrong & Company, and we put our ... one of our young associates up there to read testimony, and he broke up, and apologized to me later for breaking up. I said, "Bill, don't worry about it. I don't know how you could not have broken up." That is the ... that is the testimony from Armstrong & Company.

But Mr. Fleming might say to you, "Well, wait a minute—the deal, the deal." What deal? "It was with Chet Armstrong." Nonsense. You are not that foolish, and I know you are not. And I know your common sense is going to go in there; the first thing you are going to say is: Hey, wait a minute. Let's forget about Armstrong & Company; that is nonsense. And it is.

On whether or not they could have gone forward, I want to just say one word about the October 30th letter. I am getting some heat, I think, for calling that a kiss-off letter. But let me say this about it so you will know how I feel about it, and maybe you will agree with me. You decide what that letter was; but in the first paragraph of the letter, Sterling says—and I am paraphrasing now—"We understand that you will have no trouble with the IFL." That is critical, because the next part of the letter really presupposes that the IFL situation isn't the problem. And he goes on to say what the problems are, and he is very upset—Sterling, that is—the fact that they didn't tell him about the shareholder suits and they found out about it in the newspaper, and then he says in conclusion, "Maybe you ought to go somewhere else."

Now, you decide whether that is a kiss-off letter or not, and if it is not a kiss-off letter, why didn't there come forth some evidence that they went back to Sterling? It makes no sense.

And then Mr. Winters' testimony, clear and unequivocal: there was no deal made with respect to any equity transactions. As a matter of fact, he never got into any discussion. He was in the debt department, not the equity department. If a person can come forth and argue to a jury that he had a deal on the evidence that you have been presented, I don't know how a case can be more slim.

And so it seems to me that it is clear that Mulroney had no means to go public. He had no commitment from any investment banker; his financial condition precluded the possibility. He had no audited financials. He had qualified financials—losses and so forth.

This question has to be answered, no. But there was still another problem which was monumental; that was the Morris option. I am going to come to the Morris option in a minute. Before I get there, I want to ask you to ask yourself this question: At the meeting of October 27th, did the International Football League act unreasonably?

COMMENT

Counsel returns to his recurring theme, suggesting that plaintiff's assertion of a possible Armstrong deal or a Sterling deal is contrary to common sense.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.12 2. Defendant's Efforts to Accommodate Plaintiff

§VII.12 2. Defendant's Efforts to Accommodate Plaintiff

Now, remember what happened here. This was really ... this proposal was really thrust upon the ownership for the first time at this meeting. No prewarning. Mr. Westphall, the owner of Syracuse, testified; he said it came out of the blue. Mr. Bob Mulroney said this was the first time I presented it to him. There were no details.

And what did the Commissioner say? The Commissioner said: Bill, make your presentation. Tell us what you have in mind, and then come back to us on November 5, tell us how you have developed this program, and I will call for a vote any time you want it.

Because, said the Commissioner, I am worried. I am worried about you selling something to the public that doesn't work. I am worried about you doing something that will hurt the public. So come back and give us the plan.

Is that unreasonable?

And then on November 5 ... on November 5 the Commissioner met with Bob Mulroney and with now-Commissioner Tennyson, and at that meeting they said: Keep working, Bill. Try to develop something, and if you can, we will call a vote whenever you want it.

Was that unreasonable? Was that unfair? I think not.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.13 3. Buyout Option Legally Precluded Plaintiff From Going Public

§VII.13 3. Buyout Option Legally Precluded Plaintiff From Going Public

And now, going back to question number six: Was our policy a cause of the loss? We are going to talk about the Morris option.

The Court will tell you in the instructions, "In considering whether the public ownership policy was a material cause of injury to Mr. Mulroney, you must also determine whether or ... whether an option to buy the Whalers was held"—and I will paraphrase—"by Morris; and was that option an insurmountable obstacle to get public options of ownership in the club." And then the Court goes on to say—I am reading only part of the instruction now—"If the Morris option was still valid at the time Mulroney proposed to offer the stock to the public, then Mr. Mulroney had no legal right to sell Whalers stock to the public."

If the option was still valid, he had no right to sell it to the public, unless he can persuade Morris to surrender his rights under the option, or unless for some reason the Morris Group could not or would not have exercised the option.

Well, in light of that instruction ... in light of that instruction, the plaintiffs have to come up with some argument as to why they can get around the Morris option. And so what is the first thing they said to you? "We don't know how," says Peter Mulroney. "We don't know how," says Bob Mulroney. "We don't know how," says Chip Mulroney, "but somehow we will satisfy Morris." Pie in the sky. "Somehow we will satisfy Morris"—and that is evidence that the Morris option was not an impediment. But what is the evidence?

COMMENT

Use of repetition in short phrases is an effective rhetorical device.

Mr. Morris testified ... Mr. Morris testified, "I would not have let that public offering go forward"—and that testimony is unimpeached. "I would not have let that go forward." Everybody in this case—everybody—agrees that if the option was valid—and the Court's instructions tell you—if the option was valid, they could not go public.

But Mr. Winters tells us even more. Mr. Winters testified as follows, and I want to read this short testimony verbatim because it's vitally important.

Question: "Well, let me ask you this, sir. If Mr. Morris took the position that he had an option to buy the club, and threatened to go to court about it if necessary, would you, Mr. Winters, have considered that a bar to moving forward?"

"Yes," says he, "certainly."

So Mr. Winters says it's not even necessary that he have a valid option. All he has to do is threaten to go to court. And what did Morris do? He went to court. He didn't threaten; he went. Mr. Morris made every effort in the world to exercise that option. You remember his letter. I am not going to go through it now, but his letter said: How can you do this to me? I saved your family. I saved your team. I gave you \$20 million, and now you are backing off.

And so into this courtroom comes Mr. Mulroney, and in his unfair way is now going to give you some reasons why the option was no good. Made-up reason number one—made-up reason number one: There were some checks that bounced. What he forgot to tell you was that, after the checks bounced, because his projections were wrong, the checks were made good. They then went to Morris and asked for more money. Mr. Morris lent him more money, and then three or four months later, after the checks bounced, they reinstituted or reacknowledged the validity of the option. You remember the letter in April ... in April, in which the letter said: Thank you for lending us another \$3 million, and now we reacknowledge the validity of the option.

Incidentally, it's somewhat interesting to think about the fact that Mr. Mulroney would have the audacity to get on that witness stand and to say, I wanted to void this option because the checks bounced, when just a year or so later he wrote a series of checks that would bounce, and the only way he could save those checks from bouncing was going to the League and asking the League to go into the deferred compensation account to clear his checks. The man sees it two ways: only ways that help his cause. So his first argument was, the checks bounced; but he forgets about the April letter. Then his next argument is, certain people left the group, the Morris Group; but Mr. Peter Mulroney testified in no uncertain terms that people leaving the group was not a violation of the option. And so he had to find another reason, and the third reason they found was that new people were coming into the group. But Mr. Morris testified, uncontradicted, that there were no new people coming into the group. So there is no evidence of that.

As a matter of fact, the Commissioner testified—Commissioner Tennyson—that he advised Mr. Mulroney that ... his lawyer, Mr. Kronicker, felt that there was a very, very strong position that Mr. Morris had. And you remember after he wrote that letter—advised Mr. Kronicker of that—the IFL got a rather threatening letter from the lawyers, plaintiff Mulroney, warning him: "We will sue you." Modern 1996 America—"We will sue you."

Well, testimony goes on: "We could have gotten rid of Morris." Let's look at the facts. When Mr. Morris ... when Mr. Morris was a part of the Frazier deal, he got 49 percent of the team. He wasn't going away. When the transaction was ultimately made with Mr. Cain's group, Mr. Morris got 49 percent of the team. He wasn't going away.

What evidence in this record is there that Mr. Morris would have gone away? Only the wishful thinking—only the wishful thinking—of the plaintiffs. And you know, by Mr. Fleming's suggestion ... he—here I got troubled by Mr. Fleming—said to a witness, "Now, didn't Morris go away? Didn't the Morris option go away when they made the Cain deal?" That is beyond my ability to understand. Of course it went away. It went away because he took 49 percent of the team and got \$11 million. That is how it went away.

Is there evidence that Mr. Morris wasn't really serious about his option because he went to all of the meetings where the various groups were going to be bought out?

Well, the reason he went to those meetings was he had a court order, and the court order said: You can't sell this team without Morris being there to approve it; and so Mr. Morris went to the meetings to protect his interest, pursuant to the court order; and they argue that is evidence of the fact that Morris would have gone away.

You folks cannot be treated that way. That is just nonsense.

Now, you can do simple mathematics. If Mulroney was going to keep 51 percent, Morris was going to keep 49 percent, there could be no public sale. And, indeed, that is the testimony of Mr. Winters; that is the testimony even of the Mulroneys, who said: We always recognized that the Morris option had to be taken care of. And Mr. Morris says: You bet it had to be taken care of. And the way you are going to do it is you are going to give me at least 49 percent of the team.

And don't feel so ... feel Mr. Morris acted improperly, because what Mr. Morris did was, when this team was on its back, heading directly for the bankruptcy court, Mr. Morris saw to it that \$22 million was injected into that team. He had a right to be treated fairly, and he was treated with stonewalling and unfairness, requiring him to sue, requiring him to get injunctions, and requiring him to take the abuse that was heaped upon him in the courtroom by the Mulroneys, who were trying to stonewall and avoid a true and legitimate obligation.

And so I ask you—I ask you—was the Morris option, under the Court's instructions, an impediment, an insurmountable impediment? And the answer is, yes. The question, Could the defendant's policy have been a nearly or substantial cause of harm to the plaintiff? No.

§VII.14 D. Review: Verdict Form Questions

Now, ladies and gentlemen, there are some other areas that I want to discuss with you, but I've now covered with you some critical items, and I want to put this in a slightly different context. You will be given a verdict form, and the verdict form will contain a series of questions.

You are the sole determiners—you are the sole determiners—of where you start on that verdict form. You do not have to start with question one or question two. You start wherever you choose to start.

Question number four is the equal involvement question, and if you answer question number four that Mr. Mulroney was equally involved because he met any of those various red points that I pointed out, your verdict is for the defendant, and you can stop. You don't have to deliberate any further, and you don't have to answer any other questions on that verdict form.

And in my judgment, being a wishful thinker, perhaps, if you answer that fourth question the way I have suggested, your deliberations are over. But assume you wanted go further; my suggestion—you are the final decision-makers here—would then go to question number five, and the question number five is as I indicated. And if you answer this no, you can stop there, and you have nothing more to do with your jury verdict form; it's over.

And if you would ... then wanted to go further, if for any reason, you could go to question six, and if you answer question six no, that is the end of it. And so I would ask you to give consideration to starting your deliberations on question four, going to question five and going to question six.

But because lawyers have to be careful, I have to cover the balance of the questions that are on that questionnaire, because it is possible that you will decide that you want to go another way.

COMMENT

In this section of the argument, counsel attempts to lead the jury to consider the verdict forms in a way likely to result in a decision favorable to the defendant. He informs the jury that they don't have to follow the order of the form, but can perhaps shorten their deliberations if they consider first those questions that may result in a verdict for the defendant.

§VII.15 E. Relevant Market

The first questions you get deal with what we lawyers call the relevant market. I hope you don't get to this part of the discussion, but you may, and on the issue of the relevant market, I want you to understand clearly this very important instruction.

On relevant market, the Court says, "In this case the plaintiff Mulroney alleges and must prove that the relevant market is the nationwide market for the sale and purchase of ownership interest in IFL member clubs in general and/or in the Whalers in particular."

So what the plaintiffs are saying is, the relevant market here is sale of interest in the Whalers or in IFL clubs. We, the defendants, say that the relevant market is a much broader market, and that it is the nationwide sale of securities.

Now, you have to decide who is right there, and let me put it into simple terms, because you are obviously not antitrust lawyers. Even antitrust lawyers don't fully understand what they are talking about on these issues, but let me tell you simply where we are. The plaintiffs are suggesting ... the plaintiffs are suggesting that these stock interests would be sold to fans in the New England area, people who want a little piece of the rock, piece of the Whalers.

Well, if that is the case, who in the world is competing with that? The Chicago Flames or the Fort Worth Wranglers are not competing with New England ... for the sale with New Englanders, so that market makes no sense. There is no competition in that market. Plaintiffs are hoisted by their own argument.

Ask yourself: Is there a nationwide market for sale of Whalers stock to people who want a piece of the action? With all my new-found affection for New England and for the people of Boston as exemplified by this jury, I think you will recognize that, while the Whalers are a wonderful team—I am sorry to say this to Mr. Keppler, who is a dear owner and friend—there isn't going to be a great deal of interest in Whalers stock in Los Angeles. There is no competition for that stock.

On the other hand, Mr. Benton testified very clearly that, before he would ever go public, he would check all other stocks—he would check entertainment stocks. Mr. Sinclair said the same thing. Because if what you are doing is selling something for investment and that is the market, then it's a market for all investments; because then you, John Doe, who is about to invest your money, is going to say, "Well, I have got \$100 here. I am going to invest. Shall I put it into the Whalers stock or should I put it into some other stock?" That is your decision at this point. And so the market is a broad market, involving all investment securities.

As a matter of fact, the market had some other interesting facets to it. You remember Mr. Mancini's questions of Commissioner Tennyson when the Commissioner said: You know, the entertainment dollar is only the entertainment dollar, and it only goes so far, and we are competing with all forms of entertainment. And Stu asked him questions about the Muppets and asked him questions about opera, and the Commissioner was befuddled—and I can't help him, because I would be befuddled too—but what is interesting is this: Here is the great Gaels prospectus in evidence, which counsel makes so much of, and the Gaels are talking about who they compete with in their filing with the federal government, and they say: During parts of the basketball season, the Gaels experience competition from professional hockey, the Boston Bruins; professional football and the Whalers; professional baseball with the Boston Red Sox; in addition, the colleges and universities in the Boston area, as well as public and private schools, afford competition. And now let's listen to this: "The Gaels also compete for attendance with a wide range of other entertainment and recreational activities available in New England"—exactly what Commissioner Tennyson said.

But let's not look at the Gaels. Let's look at Exhibit 1503, which is the Form 10K which the Whalers had to file in Washington D.C. when they were a public company, and let's tell you what they told the federal government: "There is great competition for the entertainment dollar in the nation as a whole. Professional football competes financially with other sports such as baseball, hockey, and so forth, and with theaters, opera, and other forms of entertainment." That is what the Whalers—Mr. Mulroney—said.

And so to suggest that the relevant market here is this little limited sale of securities to New England, where nobody competes, is nonsense. And so I would hope that you would say on question number one on the verdict form that the plaintiffs have not established the relevant market that they have an obligation to establish.

IV. INCONSISTENCIES IN PLAINTIFF'S CASE

A. Plaintiff's Expert Witnesses Attacked

§VII.16 1. Credibility Undermined Regarding Marketability of Team

Now, what testimony is there in the record to establish what the plaintiffs say the relevant market is? Who tells you what it was? Not Mulroney, not Chip Mulroney, not Pete Mulroney, but Mr. Nelson—Professor Nelson. The only testimony in this record that the relevant market was its sale of Whalers stock was Professor Nelson.

I called Professor Nelson radical; I didn't mean by that—nor do I mean by that—a pejorative term. I mean somebody who is out of step with reality. I was very pleased that Mr. Keppler was able to come here today, because I am going to use him sort of as a sounding board in this argument on the issue of what Mr. Nelson's testimony is worth.

One, he says—his word, not mine—teams want to be "mediocre." I look to Mr. Keppler and say, sir, do you want the Whalers to be mediocre? And he would laugh at me, and Mr. Commissioner Tennyson said, "I never heard an owner say he wanted to be mediocre." "Mediocre" is a word that came from Professor Nelson, out of the ivy tower of Stanford University, with no—no—no—practical sense.

He says that teams would sell their players if they got too good. I could just see ... Mr. Keppler isn't selling Daryll Braddock because his team got too good.

—That in the course of a season ... I am sorry, in the course of a decade—a decade—an owner would never want to go to the Super Bowl. You ask yourself, ladies and gentlemen, if those two owners this Sunday playing in the Super Bowl want to be there or not, and what it took to get there, and ask Mr. Keppler what he would give to be in that Super Bowl on Sunday. And to suggest to you from the ivy tower in Stanford that an owner would not want to get to the Super Bowl insults your intelligence.

—That a team would go for a higher premium if it lost money than if it had a profit.

—That there should be no restrictions on franchises: if you had five in New York, it's okay; if you had none in Boston, it's okay. The IFL should have 50 teams.

But the greatest absurdity of all—and there is not one of you good people who can accept this absurdity—is, as Professor Nelson, I have determined the profits of the International Football League Whalers by using a formula that doesn't consider their costs. I would like you business people on the jury to tell me if you could do your business that way. And you, ladies and gentlemen who don't have businesses, who balance checking accounts and do all of these things, tell me how much money you have at the end of the month without knowing what your expenditures would be.

That is what that man wanted you to believe; and so the Court will instruct you on Professor Nelson and all experts as follows: The Court will tell you that, during the trial, you have heard witnesses who are often called experts, and then it is up to you as jurors to decide whether you believe, and choose to rely on, the testimony of an expert; that you may accept all of it, part of it, or none of it as you deem appropriate. I submit to you that, after listening to Professor Nelson, it is impossible—impossible—to accept one word of what that man said. He is a radical. He is out of touch with reality.

And he is not even a smart radical. For example, he testified over and over again to something which he called, quote, "the least restrictive alternative." And the Judge is going to tell you that the least restrictive alternative is a wrong test. You don't use that test—least restrictive—but you use in law something called a *less* restrictive alternative available to achieve the same benefits as the public policy rule. And what we say to you there is that I want you to first, before we talk about that, to consider the rule. Is the rule a legitimate one?

COMMENT

Counsel appeals again to the jury's common sense ("there is not one of you good people who can accept this absurdity"), characterizing the witness as an ivory tower radical, and "not even a smart" one.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.17 2. Credibility Endorsed Regarding Justification of League's Ownership Rules

§VII.17 2. Credibility Endorsed Regarding Justification of League's Ownership Rules

And you know—I am not going to stress now because you have heard this—what Mulroney said about the rule. Remember what he told his shareholders of the proxy statement, and what he said to the shareholders. You know that. You know how Mulroney embraced the rule. But these plaintiffs will tell you how great a man Professor Nelson was. Well, let's spend a few minutes on the validity of this rule, using, as our great expert witness, Professor Nelson. I almost have trouble saying that because I can't consider him for any purposes, but I will try.

Commissioner Tennyson says, first of all, that one of the reasons for the rule—one of the procompetitive reasons—is to prevent conflict between owners and public companies—to protect conflict. Protect conflict, Mulroney says, to protect conflict. Commissioner Tennyson says, to protect ... prevent conflict. And now let's see what Professor Nelson says.

Question by me: "Professor Nelson, would you agree with me that there is a conflict between the responsibility to the shareholders and to the responsibilities to members of the League?"

Professor Nelson has answered, "I think there can be circumstances when that is true."

Question: "Professor Nelson, you have said that you agree with the principle that there is a conflict between the shareholders on the one hand and the management of the team on the other hand; is that correct?"

Answer: "Yes."

All right. Mulroney agrees, Commissioner Tennyson agrees, Commissioner Russell and his letter agrees, their great expert agrees.

Well, the next thing we said as a justification for the rule was that it controls ownership. Mulroney testified, Commissioner Tennyson testified, and Russell testified. What is it ... what is it that Mr. Nelson said about that?

My question: "Professor Nelson, you agree, do you not, that the International Football League has every right to set qualifications for ownership?"

Answer: "Some of them, yes."

"Is that right?"

Professor Nelson answers, "Some qualifications, yes."

Question by me: "The market for teams is strongly influenced by the status of League policies regarding franchise transfers and membership. All leagues retain the right to approve new members—" I am sorry. There is Professor Nelson testifying. Let me try it again.

Professor Nelson is testifying. He says, "The market for teams is strongly influenced by the status of League policies regarding franchise transfer of membership. All leagues," says Professor Nelson, "retain the right to approve new members, a right which has been upheld in the courts in *Levin v National Basketball Ass'n* [(SD NY 1974) 385 F Supp 149]. When a team is sold, the other owners must agree to the transfer in ownership before the sale is final."

Professor Nelson goes on and says, "Owners ... owners have legitimate business reasons to control membership in the League. Because," says Professor Nelson, "revenues are shared, the success of one team affects the revenues of all other teams. Moreover, if one team is especially poorly managed, its games with other teams will be unpopular, affecting the financial status of all other teams."

Then Professor Nelson goes on to say, "Owners also have a legitimate interest in the integrity of the operation of member teams. Ownerships by gambling interests, for example, could weaken the entire sport by calling into question the honesty of play."

"You should believe—" and then I said, "You believe all of what you just said, Professor Nelson?"

And he says, "Yes, I believe it all." So he has testified—he has testified—as to the importance of controlling ownership and none went on."

Then Commissioner Tennyson said, "A third reason for the rule is that we want to protect the image of the IFL. If somebody goes public and fails and the poor public gets hung out to dry, it's the IFL that bears that responsibility. It's the one whose image is so severely tarnished."

And so I said that sounded reasonable to me. Let's see what Professor Nelson had to say about that.

I asked him, "You would agree with me, would you not, that one of the integral features of a security would be the good reputation built up by the International Football League."

Professor Nelson answers, "I believe the representation of the International Football League is significant and important to the International Football League, yes."

Question: "It would also be important to the consumer who was buying the securities; would it not?"

Answer: "In principle it could be, yes."

Mr. Rothman: "Of course it would be important. The International Football League has built up a reputation and an image, and if one were to sell stock in the team, that image and that reputation would in part be the selling of the security, would it not, one of the attractions of the security?"

Professor Nelson: "It could be, yes."

Then I said to him, "Sir, are you telling the jury that if a team goes public or sells the public shares of stock and that team fails, and the public loses their money, that will not hurt the image of the IFL? Is that what you are telling the jury?"

Answer by Professor Nelson: "I think some teams may feel it hurts their image, and I accept, Mr. Rothman, that as a fair statement, that it hurts their image."

And so, on the three major points that Commissioner Tennyson testified as the justification for the rule and which Mr. Mulroney supports in all of his testimony, filings, and shareholder suits, Professor Nelson supports our position 100 percent. And I have read to you his testimony verbatim because I didn't want to paraphrase it. I wanted you to have it word for word.

One other point about the reason for the rule: We talked about confidentiality; Commissioner Tennyson didn't stress that very much, but he said there were some problems of interest in that. I just sort of smile when I see us going through this rigorous act in this courtroom of marking documents confidential and of the Judge ordering them to be confidential, and then for somebody to suggest that there isn't any reason for confidentiality. It just makes no sense. So we have given you the reasons for the rule. We have given you the plaintiff's own testimony on that, and I would now like to move to one other subject.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.18 B. Plaintiff's Attacks Countered on Issue of Monopoly Power

§VII.18 B. Plaintiff's Attacks Countered on Issue of Monopoly Power

You remember Mr. Fleming standing up with his majestic voice—and it is a majestic voice—and talking about monopoly power as though that was one of the worst things in the history of the world—monopoly power.

Well, let me suggest to you what this Honorable Court is going to tell you about monopoly power. The Court's instructions: "Over the course of this trial, you have heard the IFL referred to as a monopoly or as possessing monopoly power. You should draw no adverse inferences merely from such references. I repeat: You should draw no adverse inferences merely from such references. The Sherman Act does not make the possession of a monopoly power in itself unlawful. Otherwise, the law would penalize a business because it was so successful that it wound up being the only one in the relevant market or because it produced a product that the consumers wanted. The mere possession of monopoly power, therefore, is not condemned. What is condemned is the willful use of monopoly power by anticompetitive means."

The IFL got its monopoly power in two ways, both legitimate, both hard-earned: first, by Congress; secondly, by giving to the American people a magnificent product so that on Sunday—most people, not all—and on Monday night, football dominates the American scene—and I hope in some cases not too much trouble to some members of some families.

But it's a superior product that we put out there for the public, one we are proud of, one we do not run away from, and one which counsel cannot, through the use of the word "monopoly power," turn the Court's instruction into something it is not.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.19 C. Plaintiff's Inconsistency in Contesting Ownership Rule

§VII.19 C. Plaintiff's Inconsistency in Contesting Ownership Rule

Ask yourselves, if this rule is such a bad rule, why didn't Mr. Mulroney, on October 27th of 1987, seek to enjoin its enforcement? Mr. Morris had no trouble running to court to protect his rights. Ask yourself; think back. Here is Mr. Mulroney allegedly saying, "I want to go public. You are not letting me go public. This rule is no good. I got ... I don't want to take a vote"—all of the nonsense that we heard so far. Why didn't he go to court and say to the Judge, "This is an invalid rule. I don't accept it. Enjoin the IFL from enforcing it, and I will then go public." Why didn't he do that?

What he did instead ... instead, what he did, he did nothing; he said nothing, he made no complaint to anybody. He waited three and a half years—and I will use the word very pejoratively—he sandbagged his powers and sued him. That is what he did. I know ... I am asking you, why? Why? At the same time he says in the back of his mind—in the back of his mind—he thought the rule was a bad one, he never expressed that to anybody. He was defending the rule and, in the shareholder suits, telling the court in that case that the rule was a good one. Now, how can he do that? How can he do that?

Ask yourself this question: If the rule is such a bad rule, why are all of the owners in support of it? Why would owners want a rule which is such a bad rule for them? Counsel will tell you ... counsel will tell you, I suppose, that they want the rule so they won't ... they won't have enough money to pay players. Made up out of whole cloth. Ladies and gentlemen, the Whalers were already the sixth highest-paying team in the International Football League as it related to players. They were not going to use one nickel—not one nickel—for players. They were going to use all the money that they extracted from the public to bail Chip Mulroney out of his debt, for his running around and putting on a Michael Jackson tour and running a racetrack that wasn't working and a stadium in which he was milking his father. That is what the money was going for. It was not going for players —"players" is made up.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.20 D. Inconsistency of Plaintiff's Arguments, Witnesses' Testimony

§VII.20 D. Inconsistency of Plaintiff's Arguments, Witnesses' Testimony

We heard a lot about ... we heard a lot about the three-quarters vote. I don't understand that. The three-quarters vote was not a part of this case. The Judge will instruct you that the three-quarters vote is not a part of this case. What in the world are they trying to do, other than to confuse? There is a word called "obscurious" but I can't pronounce it always. It's confusion. But when I say confusion, let me tell you the most egregious confusion in this case, that which counsel should be ashamed of.

Do you remember ... do you remember how many times Mr. Fleming went to the chalk board and the other board and asked: What was the Gaels' premium? How much did the Gaels pay ... get in premium? Wasn't their premium *X* and *Y* and *Z* and 35 and 50 and 100? Look at the premium. That is what you get when you go public.

Over and over again, I sat there, and I listened to the Gaels' premium, and now let me read to you verbatim—verbatim—what Professor Nelson said about the Gaels' premium; and how, in light of this testimony, they could talk about how the Gaels' premium I cannot answer, but listen to this:

Question: "Mr. Nelson, it's fair, is it not, to say that no real comparison can be made between the Gaels and the Whalers?"

Answer: "Not with respect to the stock prices and the premiums. I don't think a comparison can be made."

Question: "That's right. Not as they relate to the stock prices."

Mr. Nelson: "And the premiums, yes."

Question: "Sir?"

Answer: "The stock prices, and the premiums in particular. As I testified, even the premiums the Gaels got were significantly larger than anybody else."

Question by me: "But the point is that you are of the view, from an economic point of view, Professor Nelson, that one cannot use the Gaels as a basis for determining or comparing the value, if any, of the stock that would be sold by the Whalers?"

Answer: "Yes. I didn't use anything about the Gaels for looking at the value of the stock prices of the Whalers or any other football team."

Question: "And the reason for that, Professor Nelson, is that you believed that within each sport there are different considerations—there are different considerations—is that correct?"

Answer: "Yes, there are, but not only that, Mr. Rothman, but I think the Gaels' was a large premium even for the Gaels. That was an unusual event."

Question by me: "So, simply put, sir, the Gaels' expense and what happened to it, and what it sold for, in your economic judgment has no relevance to the Whalers?"

Answer: "It has no relevance with respect to calculating a premium, no."

Well, now, you ask yourself in light of that testimony, how does counsel in fairness take on Mr. Sinclair, take on Mr. Benson, and argue to you to consider the Gaels premium as some evidence of what the Whalers would get?

You cannot, ladies and gentlemen of the jury, have it both ways. You can't put on an expert, tell the jury to follow him, to believe him, to understand him, and then forget his testimony, even though it may have been given several days ago or weeks or months. That is unfair to you as the jury, and I will not let it pass without speaking to you about it.

It is also true that Professor Nelson said in his testimony that the Milwaukee Blizzards were not a fair comparison. Why? Because they were a nonprofit company. No dividends were to be paid to anybody; you couldn't sell your stock. It was owned by the Veterans of Foreign Wars. Commissioner Tennyson told you about it.

Nelson said you can't use it as an example. Yet Mr. Mancini and Mr. Fleming are standing up there arguing continually about this

nonprofit Milwaukee Blizzards, which came into the League a lot of years ago. But how silly it is to then put up on the board Exhibit 7—which you will recall was admitted on ... against Mr. Boswell—putting up on the board views expressed by some owners that were not the majority of the group or not the prevailing view.

It's like in law—some of you will understand this—quoting from a discretionary opinion and trying to get people to say this is the way it ought to be; it's the dissenting opinion. Professor ... Commissioner Tennyson was very straightforward with you when he said: We studied the proposal; we asked for views. Views, incidentally, which Mr. Mulroney never brought forth. But now to come forth and bring you some of those minority views and say, look, look at this document.... Without saying to you, look at this document, it is the view of somebody who doesn't agree with the owners.

I question that method and the fairness of it. It is like saying the rule in Congress ought to be *X* because those ten people who voted against the rule had this view, and forget about what the other 400 were saying. That is just absolutely defiant of your common sense.

This huge cry about Chapter 15 in the large book. Chapter 15 is a treatise and I read to you in the last moment an italicized form—italicized form. Italicized to us means emphasis: "*It is imperative that market evidence such as that presented in this chapter be marshaled and presented, including analysis that applies as specifically as possible to the individual set of acts and circumstances of each case.*"

What does that mean? Just what all of these witnesses on our side said: you have to consider each case, case by case.

I suppose you may hear a great deal about the fact that no owners came forth in the case. Well, of course that is not true. But you should also understand—those of you who are new to the law—that the plaintiff was entitled to take depositions of anybody he saw fit. If he wanted to take owners, 30 of them, he could have taken 30 owners. He took seven of them. He had them into this courtroom. He was denied no access to these witnesses; indeed, read to you some of their testimony. That is not an issue that really rises to the dignity of speaking to very much further.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.21 V. DAMAGES; MITIGATING FACTORS

§VII.21 V. DAMAGES; MITIGATING FACTORS

Now I am going to spend about five minutes on the issue of damages, and then I am going to spend another few minutes on the jury verdict and, hopefully, I will be within my time, which I am interpreting to be 11:10, Your Honor.

THE COURT: 11:10 is correct.

MR. ROTHMAN: Thank you, sir. On the issue of damages, the Court is going to instruct you that ... you will hear his instructions simply because it is his obligation to instruct you on everything. He doesn't know what you will need and what you don't need. Obviously, it's my hope that you never get to the issue of damages; but I also don't know what you are thinking, so I have to cover everything, and I am going to cover the issue of the damage as fast as I think it deserves to be covered.

The Court will tell you that Mr. Mulroney's burden in this case is to establish by a preponderance of the evidence that, if our policy had not been in place, his proposed public offering would have been successful. So he has to prove that he would have a successful public offering whether our policy was there or not; we talked about that.

The Court will also tell you that you may not calculate damages based on speculation or guesswork—you must not—and I am sure you will not.

Now, what are the problems ... what are the problems with the plaintiff's theory of damages?

Well, number one: Their theory comes from Professor Nelson, and Professor Nelson bases his essentially on Mr. Benton. We talked about that.

A second basis for Professor Nelson's testimony is the treatise, but he gives no consideration to the individual—to the individual—issues of the Whalers, and indeed said—said in his testimony, as we read it to you, and you will remember—"I relied primarily on Benton." And I submit to you that is preposterous.

He also said, "My analysis assumes that there would have been a public offering in 1988 and a secondary in '89." Well, there is no evidence that that would have happened. Even Mr. Winters says, "I don't know when it would have been. Two years, three years. Don't know." And obviously the numbers change radically if you move out the date. Mr. Nelson's numbers depend upon an assumption that there would be lost profits, and you have heard all you need here about that. I don't want to repeat that.

The plaintiffs' theory, I believe you will find, lacks any evidence of credibility. But on that issue, I also want to discuss one other thing. Do you remember yesterday ... Friday, Mr. Fleming went to the blackboard or to the easel, and he said: "Let's look at this. Mulroney paid \$25,000 for an initial investment in the team, and now he sold out for, let's say \$92 million. Isn't that a great appreciation?" And the witness said, "Well, you know, it depends on how much debt he has" and so forth.

But let's ask yourselves a different question: How did it get to be \$92 million? It sure wasn't Mr. Mulroney alone. It was the efforts of each and every owner of the International Football League applying its rules—applying the policy against public ownership—which made this League the success it was.

It wasn't Mr. Mulroney sitting in Foxboro alone. It was each of these owners, and the commissioners, and the staff, working together. And what they had a right to expect and demand was that Mr. Mulroney would exercise his fiduciary duties to them: that he would use the proceeds from the various gains made by the Whalers to make the Whalers stronger, because to make the Whalers stronger made the League stronger; not to take Whalers money, funnel it through a secret corporation, pay it to Chip, and then leave the International Football League with a sick and distressed franchise in this country. He used the IFL owners; that is how he got to \$92 million. And now his thank you for that—thank you—? Sue [as in litigation]. I just resent that a little bit. I resent that a little bit.

But on that issue ... on that issue of whether or not ... whether or not Mr. Mulroney's stock would have been a good investment for appreciation purposes, just remember, if you will, the testimony of Mr. Benson, who said in effect—and I am paraphrasing now—"There would have been no appreciation, because in four years this team would have been bankrupt, and all of the members of the public would have been holding a piece of paper"; which I guess you can put in the scrapbook, but your money would have been gone. So nobody who bought that stock would have seen any appreciation.

I am not going to take the time to put up our damage studies; you remember them, I know you do. But what I want you to

remember in our damage studies is that, when we put up the lawsuit, Mr. Nelson only put up lost profits. There were none. You recall we only put up the losses that involved paying interest; we didn't put up the real operational losses. But if you look at those schedules again carefully, instead of seeing \$13 million as the losses and instead of seeing \$11 million on another schedule as losses, you will note those losses were \$44 million. And Mr. Mulroney was lucky—should thank his lucky stars—Mr. Cain came along to bail him out, and that Mr. Keppler came along to take care of him and his wife for the rest of their lives.

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VI. SUMMARY

§VII.22 A. Final Review of Verdict Form

Ladies and gentlemen, I want to very, very quickly ... very quickly go over the verdict form with you. It will take me just a moment.

I repeat: I suggest you start with question four. Question four is read as follows: "Did the defendants prove by a preponderance of the evidence that the plaintiff bears complete, voluntary and substantially equal responsibility with the defendants for the policy against public ownership because he (1) created or (2) approved, or (3) maintained, or (4) continually and actively supported, relied on, or otherwise used the policy to his benefit?"

If you answer yes to number four, and if you start there, your deliberations are over.

I then ask you to go to question number five: "Did the plaintiff prove"—and notice "did the plaintiff prove": we didn't have to disprove; he had to prove—"by a preponderance of the evidence, that the IFL's policy against public ownership was enforced against him?"

That is this question here. If you answer this no, you are through. Verdict. Your deliberation is ended. And then I ask you to examine question number five, and let me again repeat ... question number six. Let me again repeat, you don't have to do it my way. You can do it any way you like. It's up to you. These are my suggestions to you.

"6. Did the plaintiff prove, by a preponderance of the evidence, that the IFL's policy against public ownership, as enforced against him, was a material or substantial cause of injury to this business or property?"

And then you have the problems of the Morris option and so forth that you have now all discussed. If you answer no to this, meaning that any one of these reasons would have stopped him—any one of them—you answer no, and the deliberations are over. And let me again repeat, this is a very important statement. In reading the Court's instructions, the IFL policy must be a material cause—a material or substantial cause—of Mr. Mulroney's inability to go forward. Assume that the policy let him go forward; he couldn't have done it because of Morris. He couldn't have done it because he couldn't have gone public. He didn't have the policy involved, because of the answers to this. And so I think on both 5 and 6, your answer has to be no.

Now, let's start at the beginning of the questions. First question on the questionnaire is, "Has the plaintiff proved, by a preponderance of the evidence, that the relevant market is a nationwide market for the purchase and sale of ownership interests in International Football League member clubs, in general, and/or in the Whalers, in particular?"

I have covered that. I told you he hasn't proven that market. I told you what the market really is. I have read to you what the prospects have said, and so forth.

Second part of that first verdict form question is, "If you answered no,"—that is, the plaintiff has not proven the market—"has the plaintiff proved that there is another relevant market?"

We proved another relevant market. The plaintiff did not, and so I assume that you will answer that question no as well.

Now, we go to question number two. Question number two asks, "Has the plaintiff proved, by a preponderance of the evidence, that there is actual or potential competition in the relevant market?"

Well, if he hasn't proved a relevant market previously, you never get to this question. But if, for some reason or other, one were to allow that there was a relevant market for sale and in Whalers stock—a fact I can't conceive you saying—then how can there be competition? I talked about that. Who is competing for that? And the answer is, no.

I am then going on to question number three and simply skipping some of the questions, because you will have trouble reading when you see them. Question number three says, "Did the plaintiff establish, by a preponderance of the evidence, that the substantially harmful effects on competition in the relevant market caused by the IFL's policy outweigh any beneficial effects?"

Remember I told you about the beneficial effects and I read to you Professor Nelson's reasons for them. I think the evidence is clear that we have proven four beneficial effects: conflict, control of ownership, image of the IFL, and, to some extent,

confidentiality. Those four reasons—those four reasons—are the reasons that the League has stated that would give you the product that we give you each week.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VII. Defendant's Closing Argument to Jury--Antitrust Case/§VII.23 B. Concluding Remarks

§VII.23 B. Concluding Remarks

Now, ladies and gentlemen, I have concluded, and I am again expressing to you my appreciation. I want to leave with you just this thought: Under the rules, Mr. Mancini and Mr. Fleming each have between them a total of two hours, probably. I will assume they will talk an hour apiece. I have no opportunity to answer them. They have every opportunity to answer me. That is the rules; we live by them. I am not going to file an antitrust suit because the rules don't suit my desires.

But I will ask you to do this. I will ask you to say, "Well, look, Frank Rothman didn't have a chance to answer this point. Let's see if we can discuss in the jury room how he would have answered it had he had the opportunity." That would be something that I have, I hope, a right to ask of you, and I hope you will consider doing.

Again, I want to express a heartfelt thank you. Your verdict, I know, will represent your best judgment, a good New England judgment. Thank you. God bless you.

COMMENT

In his concluding remarks, counsel emphasizes the general importance (in contrast to the plaintiff's alleged conduct) of playing by established rules—this is a theme introduced in the very beginning of his opening argument (see [§VI.1](#)). Defense counsel must anticipate rebuttal, but, because he has no opportunity to answer them, he asks the jury to ask themselves how defense counsel would have responded to the plaintiff's assertions.

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VIII.

Plaintiff's Opening Argument to Court—Microsoft Antitrust Case

U.S. v Microsoft Corp.

CASE SUMMARY: *In this case, the government asserted that Microsoft violated antitrust laws by leveraging its monopoly position in operating systems to capture the market for Web browsers. This is the opening statement of attorney David Boies for the Department of Justice. The suit was brought in United States District Court for the District of Columbia and the decision by the Hon. Thomas Penfield Jackson is U.S. v Microsoft Corp. (D DC 2000) 87 F Supp 2d 30 (rev'd in part, aff'd in part, vacated, and remanded by the D.C. Circuit in U.S. v Microsoft Corp. (DC Cir, June 29, 2001, No. 00-5212)).*

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§VIII.1 I. INTRODUCTION

MR. BOIES: Your Honor, just so the record is clear, all of the documents that I am using in the opening were on the exhibit list that was exchanged with counsel for Microsoft. Mr. Malone has been attempting to get Microsoft to exchange copies of the exhibits since that date, including leaving voice mail messages and I was present when he did it. So we're happy to exchange exhibits, all of them. We gave them a copy of this even though they have not given us a copy of any of theirs. Maybe they don't plan to use any exhibits in their opening statement.

But I don't think there is any doubt about where these documents have come from largely.

As Mr. Houck says, I am going to address the market practices side of our monopoly claim. But I want to begin by reminding the court that, as the court knows, we have three claims today. The first is the monopoly claim, and the monopoly claim has two elements to it. It has the monopoly power and it has monopoly practices.

In addition, we have claims for attempted monopolization and for violations of section 1 [15 USC §1]. And if I could get up on the screen the violations of section 1, which is the third claim, the court will see that there are four basic claims that we're making here. One is the tying claim. That has two parts, the tying of the browser to Windows 95 and the tying of the browser to Windows 98. Both of these, of course, play important roles in the section 2 [15 USC §2] claims, the monopolization and the attempted monopolization claims. But in addition to that role, we're alleging that those are, in and of themselves, such unreasonable restraints of trade that they violate section 1 as well.

What I need to do is I need to go to the next page that has the claims on it. And in addition, the three other claims are Microsoft's screen restrictions, the agreement restricting OEMs' [original equipment manufacturer] right to remove Internet Explorer [IE], and Microsoft's agreements with the Internet service providers [ISP] and Internet content providers [ICP].

Now, with respect to all of these claims, these are part of—not entirely all of—but they are part of the section 2 claims. But in addition, we believe that these are such unreasonable restraints of trade that they are illegal under section 1 in and of themselves.

Now, most of what I am going to be talking about today is going to relate to the section 2 claims. And I mention this because I just simply want the court to keep in mind that some of the practices that I am going to be addressing are alleged to be violations of section 1 as well.

Let me go back, if I can, to the section 2 claims, and in particular, to the threat. One of the things that happened in 1994—at the end of 1994 and early 1995—is that Microsoft recognized the widespread use of Netscape's Internet browser and Java threatened, over time, to erode the application's programming barrier to entry. Now, it was that application's programming barrier to entry that was an essential element of protecting its monopoly power.

You will find that is something that Microsoft documents agree to and documents from other companies agree to. The witnesses will be, I believe, in common agreement that, because of the enormous application's barrier programming entry, it is virtually impossible for there to be a successful challenge to the Microsoft operating system. But what Java and Internet Explorer, in the fight between Internet Explorer and Netscape Navigator, demonstrated was that Microsoft recognized that the browser, if it came from a company other than Microsoft, and Java, if it remained true to its cross-platform intention, could undermine that and could allow other companies to compete.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VIII. Plaintiff's Opening Argument to Court--Microsoft Antitrust Case/ II. STATEMENT OF FACTS AND ARGUMENT/§VIII.2 A. Microsoft's Attempts to Obtain Netscape's Agreement Not to Compete

II. STATEMENT OF FACTS AND ARGUMENT

§VIII.2 A. Microsoft's Attempts to Obtain Netscape's Agreement Not to Compete

Now, what was the first thing that Microsoft did? The first thing they tried to do was they had tried to obtain Netscape's agreement not to compete. They tried to go in and divide markets. And Mr. Houck said that—he asked the court to take into account the difference between what Microsoft says now and what Microsoft says then. And what I want to do is take this as an example of the kind of approach that Microsoft takes now and takes then.

And I have got a clip from a deposition of Mr. Gates that I would like to play where Mr. Gates is asked about this alleged market division meeting. And I want the court to listen to what he says.

[Videotape was played as follows:]

Question: You are aware that it has been asserted that at that meeting, there was an attempt to allocate markets between Netscape and Microsoft, correct, sir?

Answer: My only knowledge of that is that there was an article in the Wall Street Journal very recently that said something along those lines. Otherwise, no.

Question: Is it your testimony that the first time that you were aware that there was an assertion that there had been a market allocation meeting or an attempt to allocate markets at a meeting between representatives of Microsoft's and Netscape was a recent Wall Street Journal article?

The Witness: Well, I am not sure how to characterize it. The first thing—the first I heard anything about that meeting and somebody trying to characterize it in some negative way was an Andreessen quote that was in the Wall Street Journal very recently. And it surprised me.

Question: Are you aware of any instances in which representatives of Microsoft have met with competitors in an attempt to allocate markets?

Opposing counsel: Objection.

Answer: I am not aware of any such thing, and I know it's very much against the way we operate.

Question: It would be against company policy to do that?

Answer: That's right.

Question: Now, have you ever read the complaint in this case?

Answer: No.

Question: Have you ever received a summary of the complaint in this case?

Answer: I wouldn't say I haven't received a summary, no. I have talked to my lawyers about the case, but not really the complaint.

Question: Do you know whether in the complaint there is an assertion—I am not talking about the Wall Street Journal article. I am talking about the complaint that was filed last May. Do you know whether in that complaint there are allegations concerning a 1995 meeting between Netscape and Microsoft representatives relating to alleged market division discussions?

Answer: I haven't read the complaint, so I don't know for sure. But I think somebody said that that is in there.

Question: Did you find that out before or after the Wall Street Journal article?

Answer: The first time I knew about his allegations was the Wall Street Journal article.

Question: That is—that article preceded any knowledge that you had or didn't have related to the complaint?

Answer: That's right.

[End of playing of videotape.]

MR. BOIES: Now, Mr. Gates not only says that he didn't know that there was any allegations of Netscape and Microsoft meeting to discuss drawing a line between where one would compete and where the other would compete, he says he wasn't even aware of Netscape back at the time this meeting was going on. He didn't even know what Netscape was doing. He didn't have an understanding of what Netscape was doing. I think I have got a clip of that as well.

[Videotape played as follows:]

Question: In the portion of the e-mail denominated number 2, which is move Netscape out of Win 32/Win 95; avoid battling them in the next year, there appears the following statement in the second paragraph. Quote, they appear to be moving fast to establish themselves in the value-add app. business by leveraging Netscape itself as a platform.

Do you recall whether you agreed that that's what Netscape was doing back in June '95?

Answer: At this time, I had no sense of what Netscape was doing.

[End of playing of videotape.]

MR. BOIES: That assertion by Mr. Gates that in June of 1995 he had no sense of what Netscape was doing is a critical part of the defense that we have heard from Microsoft. They say they were going about their business developing Internet Explorer, designing their marketing and product plans and they were doing that because that's the way they thought the best browser ought to be made, not because of what Netscape was doing. Or, in Mr. Gates' words, at the time that these things were going on, he didn't have any understanding of what Netscape was doing.

Now, let's look at what the written record from Microsoft's files demonstrates. I think there is a May 20 or May 26 1995—May 26, 1995 memo. And this is a memo from Bill Gates. And it is five days before June of 1995. And this is about the Internet tidal wave. And Mr. Gates, and what the record will show and the evidence will show, Your Honor, is that this is a one of a series of documents at about this time from and to Mr. Gates in which Microsoft, and Mr. Gates personally, is directly concerned with a threat that Netscape poses.

And there is a quotation—on, I think about the fourth page of this document in which—and this is Mr. Gates writing: a new competitor born on the Internet is Netscape. Their browser is dominant with 70 percent usage share, allowing them to determine which network extensions will catch on. They are pursuing a multiplatform strategy where they move the key API [application programming interfaces] into the client to commoditize the underlying operating system.

And the threat that Netscape was going to, in Mr. Gates' words, commoditize the Windows operating system by moving the key APIs into a point where they could be written to on a cross-platform basis and erode the application's barrier to entry, was exactly what Netscape was doing and is exactly what Mr. Gates knew back in 1995 that they were doing and what concerned him so greatly.

Now, let me go to another clip from his deposition.

[Videotape played as follows:]

Question: As you sit here today, do you have any recollection as to what your understanding was back in June 1995 as to the principal purpose of the Microsoft employees' meeting with Netscape?

Answer: I wasn't involved in setting up the meeting, so I—I can see what Reardon said here. I can see what Rosen said here. You've read something that purports to be something that Jones said. I mean—

[End of videotape excerpt.]

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VIII. Plaintiff's Opening Argument to Court--Microsoft Antitrust Case/§VIII.3 1. Participation of Upper Management

§VIII.3 1. Participation of Upper Management

MR. BOIES: Now, one of the things that you will hear when we put in additional portions of Mr. Gates' testimony at trial is Mr. Gates says these people who went to this meeting weren't really executives. They were just employees. They had important titles, but they weren't really executives. And what he says is that he didn't even know that this was going on. He certainly wasn't involved in planning for it. The implication is that this was something that was going on without the top management's involvement or approval.

But let's look again at what the written documentation from that point says. May 31, 1995, five days after the Internet tidal wave memo, Mr. Gates writes to Paul Maritz, Brad Silverberg, Dan Rosen and others, subject, Netscape discussions. And he begins by saying, I think there is a very powerful deal of some kind we can do with Netscape. And he lays out what that is in summary form. The concept is that for 24 months, they agree to do certain things in the client and we agree to make their server business successful.

And what the court will see from later documents is that was ultimately the proposal that was made to Netscape. You get out of the client business. You get out of the browser business for Windows 95 and we'll help you in other areas. You will see documents about drawing a line between the Windows 95 client or browser and the server business.

Can I see the next page? This is the last line of that memorandum from Mr. Gates. "I would really like to see something like this happen," with two exclamation points. Now, testifying now in the context of this trial, he says he wasn't at all involved in setting up the meetings with Netscape. But looking back at the written record, it is absolutely clear that these meetings took place, not only with the approval and the encouragement, but at the explicit direction at the very top management of Microsoft.

Let me go to one more clip from Mr. Gates' deposition.

[Videotape excerpt played as follows:]

Question: Do you recall as you sit here today, apart from just reading these e-mails, anything that was reported back to you by any of the participants from Microsoft at this June 21st meeting?

Answer: I think somewhere about this time somebody said to me that—asked if it made sense for us to consider investing in Netscape. And I said that that didn't make sense to me. I didn't see that as something that made sense.

Question: Do you recall who said that to you?

Answer: It would have been probably suggested in a piece of e-mail from Dan, I think.

Question: Do you recall when you got that suggestion, whether it was before or after the meeting?

Answer: Oh, it would have been after the meeting.

[End of videotape excerpt.]

MR. BOIES: Mr. Gates here is again trying to distance himself from one of the proposals made at the meeting which was that Microsoft take an equity position in Netscape as part of the deal. And he says, it didn't come from me; when I heard about it, I thought it was a bad idea. And, in any event, nobody brought it up until after the meeting.

Let's go back to the exhibit we were just looking at. Remember, this is the May 31, 1995, memorandum from Mr. Gates himself. At the bottom of the page: of course, over time, we will compete on the servers, but we can help them a lot in the meantime. We could even pay them money as part of the deal, buying some piece of them or something.

Again—and this is not a central point to the analysis, Your Honor—but again, what it demonstrates is, even down to the details, the top management of Microsoft was directly involved in what was going on here. This is not something that they can distance themselves from. This is not something that they can say was merely being engaged in by employees, not executives.

This is something—and you're going to hear from some of these employees, Your Honor. You're going to hear from some of these people come and testify, and others you will hear their depositions. And you can see the central role they played at Microsoft. But

these documents demonstrate that this was not something that they went out and did on their own without authorization, without approval or, in Mr. Gates' words, against company policy. This is something that they are being directed by the very top management of Microsoft to do.

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§VIII.4 2. Moving Netscape Out of Windows-Based Browsers

Now, let's go to some additional documents that show exactly what happened. Now, this is a June 1 memorandum. This is the day after Mr. Gates' e-mail. And this is a reply by Paul Maritz to, among others, Bill Gates, dated June 1, 1995. And he begins by saying, Dan—and that's Dan Rosen—Bob and I—and I is Paul Maritz—met yesterday to review our recent discussions with Netscape and form our next few action items. Dan is meeting with Jim Barksdale, their C.E.O., shortly.

So what is happening here is Mr. Maritz, one of the very top executives of Microsoft, is keeping his boss, Bill Gates, directly informed. And what is stated to be the working goals of these meetings with Netscape? Number two, move Netscape out of the Win 32 Internet client arena. Number three, avoid cold or hot war with Netscape. And that is explained down here. Move Netscape out of Win 32/Win 95, avoid battling them in the next year.

Their goals going into that meeting were—and I emphasize, this comes from Microsoft's files; this is Microsoft's statement of their goals—was to stop the competition with Netscape in the Win 32/Win 95 environment for browsers. And that is exactly what they went to do. They had a meeting on June 2. The very next day, they have got a meeting. And in that meeting, Dan Rosen reports that Netscape is doing very well. They are selling browsers. They are selling servers. They are selling a lot of site licenses for browsers. He says they are going to continue to waive license fees for students and nonprofit organizations, but will charge others.

Now, this is something I am going to come back to, Your Honor, when we get into the pricing and predatory pricing area, because something that the court has heard from time to time from Microsoft is, well, everybody was giving this away free. They knew perfectly well that Netscape was charging, intending to charge and, like anybody producing a product, needed to charge for their browser in order to remain viable.

This is another—this is a June 9 message where Dan Rosen reports to his bosses, including Bill Gates, about the progress with Netscape discussions. Now, this again is illustrative of the fact that this was going on with the constant supervision of Bill Gates, who had started this by saying, I really want to see this happen.

We then have the June 21 meeting. And we have contemporaneous notes of that June 21 meeting from Mark Andreessen, and they are very detailed notes. And throughout the notes, it is clear that what Microsoft is saying is, let's draw a line between the areas where we're going to compete and the areas where we don't compete.

One particular telling portion is where Mr. Andreessen's notes read, would you be interested in having a partnership where Netscape gets all the non-Win 95 stuff, and Microsoft gets all the Win 95 stuff? Would you be interested in dividing the market where Netscape gets all of the non-Windows 95 stuff and Microsoft gets all of the Windows 95 stuff? They say, if Netscape doesn't want to, then that's one thing. If Netscape does want to, then we can have our special relationship. And there are a lot of offers here. Then—and the bold typing is Mr. Andreessen's—the threat that Microsoft will own the Windows 95 client market and that Netscape should stay away.

Before going on to the notes from Microsoft, there is a page in here in which Mr. Andreessen talks about some of the things they might be able to get. One of the things that Netscape, like other people in the industry, needed, was access and knowledge about certain APIs in Windows. And Microsoft, as the evidence will show, plays a lot of games with that. And they use the pressure of not getting access to that to get people to do what they want them to do in the industry.

And one of the things that Jim Barksdale—that's JB—from Netscape asks about, well, what about the RAS [remote access service] API. And he's told, well, with a special relationship with you, you will be the first to plug into it. Others will be in the future. That is, if you play ball with us, if you agree to divide the browser market, we'll give you a special relationship in which we discriminate in your favor in terms of making APIs available.

Dan Rosen goes on to say that there is internal stuff that implements internal APIs, and those APIs are only known inside Microsoft. They haven't decided how to distribute that, but JB, Jim Barksdale, can gain an advantage if they agree. Dan Rosen: if we had a special relationship, you wouldn't be in this position. J. Allard—also from Microsoft—depending on how we walk out of this room today, we have a solution for your problem, or else in three months.

§VIII.5 3. Corroborating Documents

Now, let me go to the Microsoft contemporaneous documents that describe this meeting, Your Honor. This actually isn't a Microsoft document, but it's a good document. And I would have gone here anyway, so this is a good time to get here. This is a document that comes from America Online's files. When we took discovery of America Online, one of the documents that we got was a June 22, 1995, memorandum prepared the day after the market division meeting between Microsoft and Netscape. And this is based on a report from Netscape to AOL. And in that sense, Your Honor, it is hearsay.

But one of the things that this shows is that the description of that meeting is not anything that has been developed, as Microsoft has from time to time suggested, after the fact by Netscape. This is not anything, like Microsoft has from time to time suggested, was something that Microsoft only came to see in a sinister light after Microsoft had begun to have problems in the marketplace. This was a situation the day after that meeting. And how was that described the day after the meeting? Microsoft went to Netscape and Microsoft wanted a board seat, Netscape to announce the network as a platform, Netscape to disclose all plans to Microsoft, Netscape to limit access to APIs.

And in return, Netscape would be Microsoft's special partner, get inside information, and if Netscape didn't do the deal, Microsoft would crush them. That was the contemporaneous recollection of the Netscape people of what they were being told. Now, let me see if I can go to what Microsoft says.

The thing that is remarkable, Your Honor, is that we have three contemporaneous documents, one from Netscape, one from AOL, one from Microsoft, and they all say essentially the same thing.

This is a memorandum on June 22, the day after the meeting, from Dan Rosen to Bill Gates and others. Seven of us met with Jim Barksdale, C.E.O., and other executives of Netscape for four hours. Our goals going into the meeting were, in priority order, one, establish Microsoft ownership of the Internet client platform for Windows 95. Later on, Mr. Rosen reports, Chris Joe, or Chris Jones, summed up the purpose nicely. Quote, we need to understand if you will adopt our platform and build on top of it or if you are going to compete with us on a platform level. That is exactly what they did, Your Honor. They went in and they said, we want to get you out of the Windows 95 area and browsers. If you do, we'll give you a special relationship. If you don't, we're going to crush you. And you have got to tell us. Are you going to compete with us or not?

Now, I think that this illustration is something that demonstrates two things. First, by itself, Your Honor, this makes out a violation of section 2, attempted monopolization of the browser market. There is no doubt that these were the two leading competitors and potential competitors in the browser market. If they had agreed to divide the market, that would have been far beyond a dangerous probability of success. What you have here is, in and of itself, an attempt at monopolization.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VIII. Plaintiff's Opening Argument to Court--Microsoft Antitrust Case/§VIII.6 B. Microsoft's Later Attempts to Crush Netscape

§VIII.6 B. Microsoft's Later Attempts to Crush Netscape

In addition, this shows what the motive was and what the context was for the actions that are going to follow. Because when Microsoft said no, or when Netscape said no to Microsoft, Microsoft set out to do exactly what they had told Netscape they would do, which is to crush them. And they started off with a predatory pricing campaign that was designed to deprive Netscape of the revenues that Microsoft knew Netscape needed to rely on.

You will recall the June 2 memorandum in which Dan Rosen reports that Netscape is doing very well at making money from browser licenses, and what the evidence is going to show is that at the specific direction of Mr. Gates, Microsoft began to study exactly where Netscape was going to get—was getting its money and how to turn that money off. And what they found out was that Netscape was making a critical part of its money from licensing browsers; that is, charging OEMs in particular, and Internet service providers to some extent, for the right to use the browser.

And in that connection, there is a chart, exhibit 9, that shows what Netscape was getting. This is Netscape's quarterly revenues from browser licenses. And it starts back in the first quarter of 1995. And you can see how rapidly it is increasing. By the second quarter of 1996—or third quarter of 1996, Netscape is making almost \$60 million a quarter. That's almost \$250 million a year, almost a quarter of a billion dollars a year, from licensing browsers.

Now, the court will also see what happened to those revenues as Microsoft's efforts to cut off Netscape's air supply began to have effect. But until that happened, Netscape had a very successful business and one, facing fair competition on the merits, could have continued to be successful.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VIII. Plaintiff's Opening Argument to Court--Microsoft Antitrust Case/§VIII.7 1. Microsoft's Predatory Pricing Practices

§VIII.7 1. Microsoft's Predatory Pricing Practices

Now, let's go to the documents that relate to the predatory pricing campaign that Microsoft introduced. First, there is a suggestion that Microsoft always intended to give the web browser away for free. And always, incidentally, intended to have it integrated into Windows and a part of Windows. This is a document from October of 1994. And it says O'Hare is the code name for the Internet client for Windows 95 project. That is, O'Hare ultimately became Internet Explorer.

And it says, our goal is to be in beta by February 1995 and ship no more than three months after Win 95 in a frosting version 2 package. Now, what does that mean, Your Honor? Well, first of all, it means that they were planning to ship it separate from and later than Windows 95.

Second, though, and very important from the question of pricing, they were planning to ship it in a package, that they internally referred to as frosting version 2, that they were going to charge for. That is, they were going to charge—they had a valuable product and, like anybody with a valuable product, they were going to charge for it.

In fact, they even tried to analyze how much they would get from it. This is January 31, 1995, three or four months later: based on quick and dirty analysis, frosting without O'Hare—that is, this upgrade package without the browser—represents a \$63 million opportunity, and with O'Hare, \$120 million opportunity. We're talking about \$57 million difference. It appears that as many as 1.5 million frosting customers will buy it for the Internet access.

In other words, what Microsoft is saying is, yes, web browsers are popular. They are valuable. We can sell them. And we can use them to help sell this frosting package. And in fact, they estimate that O'Hare, the browser, could mean as much as \$120 million in incremental revenue from frosting.

And this is the next month, February 1995. A recommendation: commit to O'Hare in the frosting box, period. The extensions and clients in themselves are compelling, even without one button sign-up. We shouldn't just give your stuff away. It's better than the free stuff, and it's the only 100 percent integrated into Windows 95 Internet clients out there. So as late as February 1995, people are still saying, you ought to charge for the browser. You can make money doing that.

Here is a July 17, 1995, memorandum from Chris Jones to a lot of people, including Thomas Redrawn and Dan Rosen and other people that you're going to hear testimony from. It's talking about Internet Explorer: figure out pricing and promote aggressively. We need someone who will go and sell this thing. We have no owner for this.

Now, contrast that with what happened over the next few months. After Microsoft received a blunt no from Netscape—this is January 21, 1996. This is a meeting that Mr. Gates had with America Online. And Mr. Gates was meeting with America Online and telling them that not only would they give the Microsoft browser away for free, they would actually pay AOL to take it. They would give AOL things to get AOL to take this free product. Or, as AOL described it in this contemporaneous memorandum, quote, Gates delivered a characteristically blunt query. How much we need to pay you to screw Netscape? This is your lucky day.

Let's see what else was going on about that time. This is an April 1996—two or three months later—planning memorandum from Brad Chase, and it went to all of the Microsoft executives at this planning conference. By this time, they had made a decision for some time now that they are not going to charge for browsers. And so he is addressing the issue of why should you care about browser market share. This is a no-revenue product, but you should worry about your browser share as much as Bill Gates, because we will lose the Internet platform battle if we do not have a significant user-installed base. The industry would simply ignore our standards. Few would write Windows APs without the Windows user base.

So they are going to give the browser away for free. And what does Microsoft say is the reason? This is a quote from Mr. Gates—what you're going to see is several quotes from Mr. Gates that were actually published in June and July of 1996, and the evidence will show, Your Honor, that not only did they make these decisions internally, but they went out and they broadcast them to the world so that the world would know that Netscape's business model was in trouble. Because they believed that by getting financial analysts to question Netscape's viability, they could undercut Netscape's lifeline. Quote: our business model works even if all Internet software is free, says Mr. Gates. We are still selling operating systems.

What does Netscape's business model look like if that happens? Not very good. Or, a few weeks later, quote: our business model works even if all Internet software is free, says Mr. Gates. We are still selling operating systems. Netscape in contrast, is

dependent on its Internet software for profits, he points out.

Later that month, quote: one thing to remember about Microsoft, says Chairman William H. Gates III, we don't need to make any revenue from Internet software. Which *Business Week* says, who could forget?

And Mr. Ballmer gets into the act as well a few months later. Quote: We're giving away a pretty good browser as part of the operating system. How long can they survive selling? Close quote.

Now, despite the decision to price the browser at zero, or indeed at a negative price, paying people to take it, there is inevitably some pressure within Microsoft to try to recover some amount of money for this enormous development effort that was going on. And here is Paul Maritz in July of 1997 responding to that. He says, he is not putting any such pressure on folks. There is talk about how we get more dollars from the thousand-plus people we have working on browser-related stuff. But then he adds, but I have not lost sight of the fact that browser share is still an overwhelming objective. You may notice that I have kept IE marketing spending at a very high level—and he underscores "very"—to fiscal year 98 and resisted pressure to reduce this or switch it to other products.

I have also said no on the proposal to charge separately for the shell. Now, we're going to come to that shell in a minute, but before we do, what Maritz is saying is that they are going to spend a very high level of money marketing this thing they don't get any money for. They are going to spend a hundred million dollars a year—that comes from their interrogatory answers—to develop this product. They are going to spend marketing. They are going to give it away free. And they are doing that because explicitly they know they can do that and Netscape, in their own words, can't survive.

Now, this is an interesting series of documents. Because you will remember in the previous exhibit, there was a—Maritz was saying, I said no to the proposal to charge for the shell. Now, here is a proposal to Mr. Gates, Mr. Maritz, and others in July of 1997 that it would be a really good idea to sell the shell with the browser separately. He says it would certainly increase significantly Win 98 upgrade sales.

He then goes on to say I know there is a browser share counter-argument, that is, obviously putting a charge on it would reduce the distribution, would reduce the share. But he says it's an intriguing thought. Now, the same day, later in the day, Paul Maritz writes back, it is tempting, but we have to remember that getting browser share up to 50 percent or more is still a major goal.

And later that year, Cameron Myhrvold writes to a number of people asking for some studies done. Number one, is, Netscape's client revenue, is it rising? Hope not. Falling, I think so. And do we think they are getting any money from ISPs NetOps for their browsers? If so, which NetOps are still paying them and construct a hunting list for us to go after?

So that not only were they trying to distribute this for free or at a negative price, but they were directly targeting Netscape and Netscape's revenues in an attempt to deprive Netscape of the revenues necessary to remain viable, even at the expense of very substantial short-term losses. And they were doing so because they knew that this was the way to preserve their monopoly over Windows, the profit-generating engine that gave them the enormous profitability that Mr. Houck talked about.

Now, there is a document—if I can find it in just a minute, Your Honor—I would like to show you, it's exhibit 332, because it shows the recognition of Microsoft that not only was it important to extend its monopoly control over the browsers to protect its existing monopoly, but that the browser represented, in Microsoft's words, the chokehold on the Internet platform. That is, that by gaining control of the browser, not only do they protect their existing monopoly, but they gain a chokehold on the Internet platform. And it is those dual consequences of Microsoft's conduct that make this such an important case. So one of the things they did—

THE COURT: Would this be an appropriate time to take a brief recess?

MR. BOIES: Yes, it would, Your Honor.

THE COURT: We'll take about a ten-minute recess.

MR. BOIES: Thank you very much.

[A recess was taken.]

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VIII. Plaintiff's Opening Argument to Court--Microsoft Antitrust Case/ 2. Microsoft's Attempt to Foreclose Channels of Distribution/§VIII.8 a. Original Equipment Manufacturers (OEMs)

2. Microsoft's Attempt to Foreclose Channels of Distribution

§VIII.8 a. Original Equipment Manufacturers (OEMs)

[After recess.]

MR. BOIES: Thank you, Your Honor.

Microsoft's efforts to defeat Netscape did not end with simply the predatory pricing campaign. What Microsoft set out to do was to foreclose the two primary channels of distribution that browsers had: OEMs and Internet service providers.

And let me go to the OEM channel first. And let me go to a document in which Bill Gates recognized in January of 1996 both the importance of the OEM channel to browsers and how it related to the overriding goal of winning Internet browser share.

This is Bill Gates to his top executives on January 5, 1996: "Winning Internet browser share is a very, very important goal for us," as if they didn't know it. "Apparently, a lot of OEMs are bundling non-Microsoft browsers and coming up with offerings together with Internet service providers that are getting displayed on their machines in a far more prominent way than MSN or our Internet browser."

What he is concerned about, Your Honor, is that OEMs, whether they be Compaq or IBM, who you're going to hear from, or Hewlett-Packard, or gateway or NEC, whose depositions you're going to hear, were able to take their machines that they built and configure them so they could include non-Microsoft browsers.

Now, in one of the more interesting portions of Mr. Gates' deposition that the court's is going to hear during the trial, you will hear him say he doesn't know what "non-Microsoft browsers" means, but he obviously knew it and his top executives obviously knew it in January of 1996. And what they were concerned about is that the OEMs could display non-Microsoft browsers and give them distribution.

And indeed, Chris Jones, who you have heard reference to before, wrote in July that some OEMs want to remove the icon from the desktop and the response should be that this is not allowed.

That is, as the court is aware, the browser came with a desktop icon and what some of the OEMs wanted to do was remove that icon so they could substitute a different browser. And Microsoft's response to its customers, the OEMs, is "You can't do that."

Now, Mr. Redrawn, who Microsoft put on its witness list, on September 6, 1996, begins to worry that Netscape may try to replace the Win 95 logo screen. That is, again, that this would be a way of using the OEM channel to distribute the Netscape browser. Mr. Redrawn wants to know whether Microsoft's OEM agreements require that this not be replaced.

"Might we think about changing the logo screen formats so that Windows checks for a signature on the logo file?" What he is saying is that Netscape, together with the OEMs, may try to replace the Windows 95 logo screen some way that features Netscape's browser.

A reply the same day. "I think it is technically possible for an app to replace the screen for later boots. John, do you think we should look at making this harder"? Response from Mr. Kempin, who the court is going to hear from. "I would love that, but I doubt you easily can." In other words, I would like to make it harder for the OEMs and for Netscape to put on another logo, but it's going to be hard to do this technically.

The final reply is "We'll do something to make this hard in Memphis." Windows 98. We're going to make it hard to do. We're going to manipulate the technology, not for innovation, not for consumer benefit, not for technological advances. We're going to manipulate the technology, and we're going to change the contracts to make it hard for the OEM to put what the OEM wants to put on the screen of the personal computer the OEM is selling.

That was in 1995 and 1996. And by September of 1996, Netscape was already reporting that Microsoft was adding restrictions—so-called screen restrictions.

This is the Netscape report. "Rod Smith from IBM indicated today that Microsoft has created new restrictions in the Windows 95 license agreement which prevent any OEM from modifying the default desktop or shell. This effectively locks OEMs into

Nashville and shuts out OEM specific shells, such as the Packard-Bell interface, the IBM Aptiva interface and, of course, project 197."

And what they are complaining or Netscape is complaining about is that these screen restrictions are going to prevent them from working with OEMs in order to effectively distribute the Netscape browser.

And one of the things that is going to be very interesting, Your Honor, is that, as the evidence comes in, you will see Microsoft relaxing the screen restrictions from time to time. If they can relax them in a way that doesn't allow the OEMs to distribute Netscape, they are willing to do it. You're going to hear a lot of talk about the so-called Windows experience and about how everybody has got to have the same Windows experience. What you're going to find is that Microsoft doesn't insist on a uniform Windows experience. It is willing to make exceptions when the OEMs push them, as long as the OEM is willing to cooperate and not distribute Netscape's browser. So what you have is a series of pretextual arguments: pretextual that technology drives us and pretextual that Windows experience drives us.

In fact, what is being in the driver's seat here is the desire to shut out the Netscape Navigator, and as the court will see when we talk about AOL, they were prepared to do that, even at the extent of disfavoring their own MSN network in competition with AOL, because winning the browser battle was of paramount importance and was of paramount importance, I will repeat, for two reasons.

One, it represented an ability to reerect the applications programming barrier to entry and, second, it allowed them to gain control of the browser, which was, as they have themselves recognized, the chokehold on the Internet.

Now, the OEMs responded to these new restrictions. This is a Hewlett-Packard response to Microsoft: "We're very disappointed in your response to our long and drawn-out request to modify the standard Microsoft Windows 95 boot-up sequence." It says that Microsoft's requirements result in significant and costly problems. It says, "From the consumer perspective, we are hurting our industry and our customers." And it says, "We strongly protested the changes last fall and were flatly refused any leeway."

This is not a better product consumer-driven approach, Your Honor. This is a monopolist, able to ignore the demands and the complaints and the protest of their customers because they don't have any place else to go, and to do it in a way so that they can stop this growing competitive threat represented by Netscape and Java.

Hewlett-Packard put it pretty well. "If we had a choice of another supplier, based on your actions in this area, I assure you, you would not be our supplier of choice." Unfortunately, as Hewlett-Packard recognized, they didn't have a choice and they had to continue to deal with Microsoft and they had to continue to deal with Microsoft on Microsoft's terms. And what those terms were was if you cooperate with us in the browser area—if you do what we want with respect to browsers, then, we will allow you some flexibility in other areas—flexibility that was very important to the OEMs. That was Hewlett-Packard.

This is Gateway—Gateway feedback on Windows 98. Discussions with Microsoft on April 7, 1998. Gateway asks, "Where can we offer a browser choice? This is something we can do technically, but it's not allowed in licensing terms." They want to do browser choice. Gateway believes they can do it technically, but it's not allowed in licensing terms.

They say, we want the potential to offer this choice before the welcome screen. We are concerned that the installation of full MS products, including channels, results in a much slower systems performance if the customer chooses an alternative browser after full installation on IE 4.

Again, a restriction on consumer choice, a restriction on the appropriate technical solution, and imposition on slower performance and additional costs, all in service of the overriding goal of wide distribution of this product for which they are getting no revenue.

Now, what is the significance of that OEM channel? Your honor, here is a document distributed in January of 1998, and it reflects data gathered in October and November of 1997, about a year ago. And it talks about where the people who used browsers got them and what you can see is two-thirds—slightly more than two-thirds of all of the people who got a browser, got it either through an ISP—25 percent—or through their own computer—20 percent—or got it at work or school, which in turn would largely have come through an ISP or with a computer that the school or work got.

Only 19 percent of them had downloaded. You're going to hear some talk, or you have already heard some talk from Microsoft that said, "Well, there really wasn't foreclosure. Sure we choked off the OEM channel, and we choked off the ISP channel, but they could still 'carpetbomb.' They could still mail it out." Well, 4 percent got it from the mail. Nineteen percent of it downloaded, and every year that goes on, as the browser gets larger and larger, downloading becomes more and more difficult.

So these channels, even back a year ago, were not effective channels. If you choke off two-thirds of the business by choking off ISPs and the OEM channel, you have choked off the lifeblood of any browser distribution.

In addition to the screen restrictions, they also, of course, tied the browser to the operating system. And the screen restrictions

and the tying are two of the approaches that they took to foreclosing the OEM channel, because they knew that if they tied the browser to the operating system, because the operating system was a monopoly, the OEMs had no choice. They had to take the operating system. And if they tied the browser to it, they necessarily had to take their browser. And once most OEMs had a functioning browser, they didn't want to have a second one. They didn't need to have a second one. A few might for particular purposes, but, by and large, they were going to foreclose 75 percent or more of the OEM channel, if they could simply succeed in tying a functioning browser to the operating system.

Now, back in April of 1994, when they were talking about Windows 95, they didn't expect to have a browser included. In fact, as they put it, "Cool apps, like Mosaic, are stuff you need to obtain from third parties."

Back in April of 1994, their contemplation was that browsers, which they already knew about back then—they knew about Mosaic. Netscape was in the process of being formed, but that was when they didn't recognize Netscape as a serious threat, and so it was perfectly fine to have them get the browser from somebody else.

And the court is going to hear, I think, because it's in their papers—maybe they will abandon it, but thus far in their papers, they argue that, well, the reason we wanted to do all of this to distribute the browser was not because we really cared about browser market share, but because we wanted to sell more Windows, and if more people had browsers, they would want more PCs.

The problem with that argument is, first, it's inconsistent with their documents. The second problem with it is that if the browser is simply a good complement to the operating system, then they ought to want to have Netscape out there as much as possible. They ought to want anybody who has a good browser to get out there and survive and sell more good browsers, because that is going to make operating systems more profitable, and they are going to sell more. But the fact of the matter is they weren't thinking of the browser as a complement, because if they had, they wouldn't be trying to squelch Netscape. They were thinking of a browser as a way of eroding applications programming barrier to entry.

In the beginning, when they thought of it as a complement, they weren't threatened by it. It was when they began to see it as a means of breaking down the applications programming "barrier to entry," that they began to perceive it as a threat.

This is June of 1994: "We do not currently plan on any other client software, especially something like Mosaic or Cello." This, again, is simply part of the record that demonstrates that back in this period of time, the imperative that you're going to hear from some of the Microsoft witnesses that they made a decision that long preceded Netscape's formation that they were going to do what they did, simply is not consistent with the written record.

In January of 1995, they are talking about a release—a press release in which they are going to announce that they're licensing Mosaic's code. And this is sent around to a number of executives by James Allard. It says, "this is the preliminary version of release and Questions and Answers for Bill's [Bill Gates] announcement tonight. We're going to be announcing equity stakes in Internet provider and a licensing deal with spyglass for a web client, not related directly to BSD, but if questions come up through here, here is the party line."

What's the party line back in January of 1995? I will tell you what the party line was. The party line—and we'll put the question and answer into evidence, but the party line was that they couldn't expect to get a browser with the operating system. And this was as late as January of 1995.

Let me go back to the one, if I could. Here is another reference to "frosting." This is February 1995. "O'Hare is the code name for our Internet client, and we plan to ship it in the Win 95 frosting package, which SIM ships with Windows 95."

Again, they are still talking about O'Hare in February of 1995 being a frosting package, being separate and being something they are going to charge for.

You still have people, even as late as October of 1996, talking about a stand-alone browser strategy. By that time, of course, the party line is now that Windows and browsers are all the same and, indeed, at some point, browsers dropped out of the lexicon. Sometime in last few months, browsers become a nonword. And they talk about browsing bits or browsing technology.

Back in 1996, they are still talking about a need to have a stand-alone-browser strategy. And one of the things that goes through the arguments that Microsoft makes, Your Honor, is not only the inconsistency with the written record, but also the fact that their documents are internally inconsistent and their arguments are internally inconsistent.

On the one hand, they say, "all we wanted to do was to improve the operating system," and yet they are spending huge amounts of money to induce and force people to take stand-alone versions of Internet Explorer: stand-alone versions for Windows and stand-alone versions for Macintosh. Their goal was not to improve Windows.

Their goal was to prevent the development of a competitive platform that would erode the applications programming barrier to entry for Windows. And that is crystal clear as you look at these documents.

This is Mr. Allchin to Mr. Maritz, December 20, 1996. "The first priority is insuring that we leverage Windows." Now, here he is not talking about "We're going to use Internet Explorer to make Windows better." He is not saying "We need to get Internet Explorer out there, because that way people will buy Windows." What he is saying is "We need to leverage Windows in order to make Internet Explorer a success. That is, we have to leverage our money-making, profit-making machine to make our no-revenue product a success."

"I don't understand how IE is going to win," he says. "My conclusion: we must leverage Windows more. Treating IE as just an add-on to Windows, which is cross-platform, loses our biggest advantage — Windows market share. We should think first about an integrated solution. That is our strength."

Integration or combination comes not because it is a technological imperative, not because it's efficient, not because it is going to result in a better product or more innovation, but because that is way they leverage Windows, their strength, their market share, and their monopoly, in order to make Internet Explorer dominant.

Here is Mr. Allchin on January 2, 1997. "You see browser share as job 1. The real issue deals with not losing control of the APIs on the client and not losing control of the end user experience. For Netscape, this is synonymous with winning the browser battle. That is because they don't have Windows. We have an asset which has APIs and control the end-user experience: Windows."

And then, just to be clear, when he talks about leverage, he is not talking about anything technological, he says: "We are not leveraging Windows from a marketing perspective. We do not use our strength — which is that we have an installed base of Windows, and we have a strong OEM shipment channel for Windows."

"I am convinced we have to use Windows. This is the one thing they don't have. We have to be competitive with features, but we need something more — Windows integration." In other words, we have to tie Windows to the operating system. We have to tie Internet Explorer to the operating system in order for Internet Explorer to succeed in their goal.

Here is a message from Mr. Maritz to Mr. Allchin. "I agree that we have to make Windows integration our basic strategy." This is in response to Mr. Allchin saying, "you have got to integrate Windows or we're going to lose the browser war."

Does Mr. Maritz say, "That is a really great idea, because if we integrate Windows in IE, we're going to have a really great product"? No. He says, "The pain of this strategy is we have to subordinate other OEM Windows objectives to this. However, I see little option but to declare that we will sync IE4 in Memphis, even if it means missing 6/97 OEM window with Memphis."

So in order to tie IE and Windows together, they are prepared even to inflict pain on their core monopoly asset. And they can afford to do that, Your Honor, because they know the OEMs have nowhere else to go. And you're going to hear that from OEM, after OEM, in the deposition testimony — that they have no other viable alternative. And it is only because of their monopoly power that they can afford to use that monopoly power in a way that they have in order to stop Netscape's distribution and enforce IE's distribution.

Here is Paul Maritz in January of 1997. Quote: "To combat Netscape, we have to position the browser as, quote, going away, close quote, and do deeper integration on Windows" — in other words, integrate it so deeply and combine it in such a way that nobody can find where the browser is, and position it as, quote, going away.

They have got two separate products: an operating system and a browser. They have got a major competitor in the browser market that doesn't have an operating system, because nobody else has a competitive operating system. And they know that if they can tie these two together — if they can tell people the browser is simply going away and it's becoming part of the operating system, that is the way that they combat Netscape. And what you see here is clear evidence that what they are doing is designed to combat Netscape, to do the integration to accomplish this particular goal.

This is a February 24, 1997, memorandum to Mr. Gates and Mr. Maritz and Mr. Allchin. And it is reporting on how do they get people who are now using Navigator to switch.

And Mr. Houck — I mentioned the spectacle of Microsoft running around the country and trying to find people to say negative things about Netscape and suing M.I.T. and Harvard to see if they can get some authors to reveal some tapes that have some critical things about Netscape on them.

When business was being done or when people were actually engaged in evaluating Netscape as a company and a browser as a product, they knew how effective Netscape was, and they knew how good the browser was, and they knew that the Navigator users would not switch — would not want to download IE 4 to replace their Navigator browser. However, Microsoft executives are told, "Once everything is in the OS and right there integrated in the OS — in their face, so to speak, then they said they would use it because there was no more need to use something separate."

The stunning insight is this: "to make them switch away from Netscape, we need to make them upgrade to Memphis." That is, we need to make them upgrade to a product where we have combined, or integrated, or packaged the browser and the operating system together so that when they get the new operating system, they get the browser. And now they have no need for Netscape's browser.

The same day, a similar memo, Christian Wildfeuer: "It seems clear that it would be very hard to increase browser market share or the merits of IE 4 alone. It will be more important to leverage the OS asset to make people use IE instead of Navigator." In other words, they internally knew they weren't going to increase browser market share on the merits of IE 4 alone. It was only by tying to the OS asset—the monopoly asset and making people use IE were they going to succeed.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VIII. Plaintiff's Opening Argument to Court--Microsoft Antitrust Case/§VIII.9 b. Internet Service Providers (ISPs)

§VIII.9 b. Internet Service Providers (ISPs)

Now, we had a channel of the OEMs. They approached the OEM channel by eliminating screen restrictions and by tying. The second major channel is ISP's. How were they going to close off the ISP channel?

Well, they had several tools to work with. The first tool was simply giving it away free, and that had an effect. But the next tool was to go to the ISPs and say, "we'll grant you favorable access to Windows box, the Windows monopoly display, the thing nobody else has, if you will agree to give our browser preferred status."

And here is a report on AT&T. AT&T—they really like to be browser neutral and are strongly motivated to preserve their partnership with Netscape. In other words, they don't want to switch. But Brad Silverberg has told them that to get in the box, they need to give us preferred status. Then it goes on to say "it is very clear that they really, really want to be in the Windows box."

Of course they did. It was an essential element of their survival, because if you put certain ISPs in the box and not others, those ISPs had a tremendous advantage over their competitors. And because Windows had a monopoly, because there was no substitute for Windows, Microsoft had the ability to trade off that advantage to discriminate and to use its monopoly power to force ISPs to give preferred status to their browser.

AT&T is still fighting the battle. This is March 15, 1996. They are telling Microsoft that they want to talk separately about IE. They would like to talk separately. They don't want to tie these two things together. They want to have a separate negotiation. They want to very badly be in the Windows box, but they don't want to tie that decision to taking IE.

What does Mr. Silverberg report? "I have told them that the only way we can even consider AT&T being in the Windows box is if AT&T gives IE exclusive or very, very preferential treatment, a la what we have with AOL. Parity is completely unacceptable for them to be in the box." He groaned, "I told him it was completely nonnegotiable and he had to decide."

Because Microsoft has a monopoly, they can afford to say, "these are nonnegotiable demands." And because they have a monopoly, ISPs are strongly motivated to give them what they want.

Here is a description of what the preferred license means. It means that the ISP agrees that IE will be the preferred and default browser they distribute to their customers. They will announce that publicly. And as an enforcement mechanism, they are going to report to Microsoft on a quarterly basis how many browsers they ship and they will also display the IE logo on their home page.

Now, this is a Prodigy document that talks about the Microsoft Internet Explorer agreement. And it says it is absolutely critical.

Could we have a blowup of this first graph here?

As you know, it was absolutely critical to the Prodigy agreement that Prodigy obtain Microsoft's agreement to include Prodigy's icon in the online service desktop folder, which appears in Windows 95. This was essential in order to remain competitive.

And then if we can blow this one up, on most major issues, Microsoft is not willing to negotiate.

In any event, what it says is what Microsoft wouldn't do—most issues they wouldn't negotiate on and what they particularly wouldn't negotiate on was the browser.

Are we able to pull that up?

THE COURT: Tell me what it says.

MR. BOIES: What it says is that it won't negotiate on the browser. It is non-negotiable.

Let me show you this: "There were many objectionable provisions in the original draft of the agreement which Microsoft forwarded to Prodigy. Consequently, we requested numerous changes to the Microsoft draft, but on most issues, Microsoft was not willing to negotiate. For example, the original draft contained a provision that"—and I can't read this. I was doing just fine.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VIII. Plaintiff's Opening Argument to Court--Microsoft Antitrust Case/§VIII.10 c. Internet Content Providers (ICPs)

§VIII.10 c. Internet Content Providers (ICPs)

Anyway, I figure if Windows can crash for Bill Gates—well, let's go on to ICPs, because not only did they do this with the Internet service providers, but they went on to Internet content providers and imposed a variety of restrictions. And one of the most important Internet content providers is Intuit. And Intuit has a number of different functions. It's obviously widely known as the most successful and most widely used financial services software.

It was very important to Intuit to get access to Windows so that it could be updated through the Internet easily. There were many other things that only Microsoft could offer Intuit. And Microsoft came to Intuit, much as they came to AOL, saying, "what do we have to pay you? What do we have to do for you to get you to screw Netscape?" And what Microsoft and Intuit entered into was an agreement. And in that agreement, Intuit agreed to bundle IE 3 and IE 4 with all new '97 and '98 releases and to not enter into any marketing or promotion agreements with other browser manufactures for distribution or promotion of Intuit content. In other words, as a price of getting access to what Intuit needed, Intuit had to agree to boycott Netscape, and Intuit had to agree to create a differentiated content area for Intuit channel that is available to only IE users.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VIII. Plaintiff's Opening Argument to Court--Microsoft Antitrust Case/§VIII.11 3. Additional Restrictions on Intel and Apple

§VIII.11 3. Additional Restrictions on Intel and Apple

Now, after shutting off the OEM and the ISP channels, or contemporaneous with doing that, Microsoft also went to other major industry players, Intel and Apple, and tried to get them to agree not to support Netscape's browser or Java.

And here is an August 2, 1995, memo—Intel memo—where Gates is saying to Intel that there is a fundamental problem with free software from an Intel software group. We're going to come back to that. And then he says, "Microsoft is very sensitive to what Intel might do on the client side. For example, Java is a showstopper." And Bill Gates says, "supporting certain third party deals would be a problem. We need to consider the context of their pervasive Internet program to assure we are not unknowingly stepping on one of their key strategies." And, of course, their most key strategy of all was browsers.

And this is Bill Gates in June of 1996. This is reporting on a conversation that he had with Andy Grove, the chief executive officer of Intel. "On Java," Gates writes, "I told Andy it's inappropriate for their group to take anything resembling a Windows API and wrap it as a Java API."

The next paragraph down—this is the next memo. It's blowup number ten, which is on the previous page. Nine was about Java. Ten is about the browser. "I thank Andy for pushing his web people in our direction. I said it was important for us that they NOT"—capitalization by Mr. Gates—"ever publicly say they are standardizing on Netscape browsers."

Now, what you have here is using that relationship to stop Intel from supporting Netscape's browser or Java.

This is, again, Gates on February 20, 1997. Here is a situation in which Microsoft is being asked by a competitor of Intel, AMD, to—Microsoft is being asked by a competitor of Intel, AMD, to support an AMD technology. And Gates doesn't think that Intel is going to want that. So when Gates writes to his top executives, it is that maybe they can use this as a bargaining chip in order to get Intel to back off of Java.

Bill Gates writes, "If Intel has a real problem with us supporting this"—that is the AMD technology—"then they will have to stop supporting the Java multimedia the way they are. I would gladly give up supporting this if they would back off from their work on Java, which is terrible for Intel. I have a call with Andy on this topic coming up on Monday."

In other words, Mr. Gates is suggesting a deal with Intel. "You stop supporting my competitor, and I will stop supporting your competitor." A clearer example of the kind of thing the antitrust laws are designed to prevent—indeed to criminalize—is difficult to imagine.

This is a memorandum on May 27, 1997, in which Eric Enstrom, who I believe Microsoft has added to their witness list, and you will be able to ask Mr. Enstrom about this document when he comes—says that he is moving aggressively with Intel on three fronts: one is Intel to stop helping Sun create Java multimedia APIs, especially ones that run well IE native implementation on Windows.

Why in the world, Your Honor, would the seller of Windows want to stop Intel from creating something that runs on Windows, especially the better they run, the more they want to stop it? And the answer is because the need and the desire to stop Java and non-Microsoft browsers from fulfilling their promise of creating cross-platform solutions that would erode the applications barrier to entry was something that was given primary importance by Microsoft at this point in time.

Now, that was Intel. Microsoft did the same thing with Apple. That is, they used their relationship with Apple in order to get Apple to stop using the Netscape browser or stop promoting to make the Internet Explorer browser the default browser and to reduce the commitment that Apple had to Java.

June 23, 1996. This is a memo from Mr. Gates, talking about how last Tuesday night he met with top Apple executives, and he says, "I have two key goals in investing in the Apple relationship. One is: Retain our application share on the platform, and two is: See if we can get them to embrace Internet Explorer in some way."

He goes on to say that this e-mail is going to focus exclusively on number 2. He is talking exclusively about how he can get Apple to embrace Internet Explorer in some way. And he says he offered them a deal, and the deal would look like this. Then he spells out what Microsoft gets.

"Apple endorses Microsoft Internet Explorer technology. Apple agrees to maintain Activex support in the browser for a period.

They agree to immediately ship IE on all of their systems as the standard browser."

So they are trying to get Apple to help them distribute IE. And what is wrong with that? Let's go to what's wrong with that, Your Honor, because what's wrong with that is in part what they did and in part how they did it.

June 27, 1997: The pace of our discussions with Apple, as well as their recent unsatisfactory response, has certainly frustrated a lot of people at Microsoft. The threat to cancel Macoffice 97 is certainly the strongest bargaining point we have, as doing so will do a great deal of harm to Apple immediately. Now, when I questioned Mr. Gates about this at his deposition, he said, "Well, why would we ever cancel Macoffice? That was a profitable product for us."

What this shows is they were prepared to threaten to cancel profitable products in order to put pressure on companies to do what they wanted them to do.

THE COURT: I think we will take our noontime recess now. We're going to resume at 2:00 o'clock.

MR. BOIES: Thank you, Your Honor.

[Whereupon the above matter was adjourned for lunch.]

THE COURT: Mr. Warden, I don't know how long your opening is going to be, but I have an investiture that I have to go to this afternoon of a new colleague at 4:00, so my thought would be that I would put you over until tomorrow morning and let Mr. Boies finish up this afternoon.

MR. WARDEN: That's fine, Your Honor.

THE COURT: All right.

[Continued opening statement by counsel for plaintiffs.]

MR. BOIES: Thank you, Your Honor. Before the luncheon break, Your Honor, we were talking about the extent to which, and the ways in which, Microsoft used its power to induce and threaten and require companies to agree to favor Internet Explorer and disfavor Navigator and disfavor Java. And we were talking about Apple, and I think we had just looked at a June 27, 1997, memorandum to Mr. Gates from Mr. Waldman, in which they were talking about the strongest bargaining point that Microsoft had was the threat to cancel Macoffice '97 as doing so would do a great deal of harm to Apple immediately. And the court is going to hear the testimony of Mr. Tevanian from Apple, and Mr. Tevanian will testify about the nature of that threat and about how seriously Apple took that threat. But here again, we have contemporaneous Microsoft evidence that confirms that that threat was made and that they knew the seriousness of it.

Now, here is a document dated August 8, 1997, from Mr. Gates. And this is a particularly significant document because in this document, Mr. Tevanian first writes to Mr. Gates complaining that QuickTime, an Apple product, is not working because Windows breaks Apple—Apple's QuickTime. And Mr. Gates sends this memorandum on to his chief executive. He's got three lines. First line, "I want to get as much mileage as possible out of our browser and Java relationship here."

Two, "In other words, a real advantage against Sun and Netscape." Third line, "Who should AVI"—that's Mr. Tevanian—"be working with? Do we have a clear path on what we want Apple to do to undermine Sun?"

So again, you have an attempt to use the power that Microsoft has in terms of the Apple relationship to get Apple to agree to do things that will undermine Netscape and Java. August 21, 1997, this is a memorandum that discusses Mr. Gates' priorities. First paragraph says, "Bill's top priority is for us to get the browser in the October OS release from Apple. We should do whatever it takes to make this happen. If we are getting shut out, we should escalate to Bill. You should make sure that we are engaging deeply with Apple on this one and resolving any and all issues."

So, what you have is, again, Microsoft being willing to do whatever it takes to require Apple to prefer the Microsoft browser to the Netscape browser, use that relationship to use the power of Macoffice to use all of the relationship that they have. And, indeed, the significance of that, in part, is pointed out by the last paragraph, where it says, the last three lines, "Bill was clear that his whole goal here is to keep Apple and Sun split. He doesn't care that much about being aligned with Apple. He just wants them split from other potential allies." This is not business as usual, Your Honor. This is an attempt by a company, Microsoft, with monopoly power, to use that power and to use all of the inducements that it has available, to try to get one group of customers to agree not to work with other customers. It's always competition on the merits that the antitrust laws foster, where two companies are offering competing products on the merits, offering better products and lower prices, not where they're getting together in private meetings and threatening one company and inducing another company to agree to disfavor a third competitor's products. This is not a situation of competition on the merits. This is a situation, I respectfully suggest, Your Honor, of clear restraint of trade.

Again, this is the document, the date I can't read, but it's subsequent to the immediately preceding one, and again it repeats, "Macoffice is the biggest Apple carrot. From a browser, mail client and Java perspective, Apple has other options and will try to sit on the fence. Negotiating from a single point centered around Macoffice will give us better leverage. Believe Apple would have a strong negative reaction to IE moving into the Windows organization from a general principle and perspective." Again, what you see here is Microsoft being unwilling to compete on the merits with respect to the browser or the mail client or the Java. What they want to do is they want to tie the resolution of those issues to the threat to cancel Macoffice. They want to use the threat that they have of canceling Macoffice to require Apple to agree to make IE the default browser and disadvantage Netscape. Here as late as February 13, 1998—this is February of this year—Apple wants to keep both Netscape and Microsoft developing browsers for Mac, believing that if one drops out the other will lose interest, and also not really wanting to pick up the development burden. Perfectly logical sensible position for Apple, as a customer, to be in. They want to have two suppliers.

"Getting Apple to do anything that significantly materially disadvantages Netscape will be tough. Do agree that Apple should be meeting the spirit of our cross-license agreement and that Macoffice is the perfect club to use on them." Again, explicit, Your Honor. Apple doesn't want to disadvantage Netscape. It wants to keep Netscape. It wants to keep that product. They were competing on the merits. It's perfectly clear that Apple would stay with both Netscape and Microsoft. Microsoft recognizes that getting them to change is tough, and Macoffice is the perfect club to use on them. Let me turn to another area, Your Honor, and this is, again, relating to Intel, and this relates to an Intel effort in its so-called architecture labs, a part of Intel that has 750 engineers dealing in software. This is an Intel memo dated August 2, 1995. It says, "On August 2, 1995, in a meeting of Intel and Microsoft executives, Bill Gates told Intel CEO Andy Grove to shut down Intel architecture labs. Gates didn't want Intel's 750 engineers interfering with his plans for domination of the pc industry. Gates made vague threats about support for other platforms, and on the same day he announced a major program to support digital equipment's alpha microprocessor, an Intel competitor. Gates was livid about Intel's investments in the Internet and wanted them stopped. All of this was said in the presence of executives from both companies."

Again, Your Honor, not low-level people, but the very highest level of Microsoft going to the highest level of a competitor and telling the competitor to shut down a competing software operation, and threatening that if they didn't, there was going to be retaliation.

Here is Bill Gates writing an e-mail to Andy Grove, again complaining about some of Intel's activities here relating to something called NSP, native single processing. And Gates is complaining to Grove, "I don't understand why Intel funds a group that is against Windows 95." Now, of course, in a competitive industry where companies are free to make their own choices, companies are always free to fund groups, whether it's in favor of Windows 95 or not. But what Gates is saying to Intel, as you saw Microsoft say to Apple and Intel before and Intuit, "you cannot fund things that compete with us or we will retaliate."

Here is something that's even clearer. July 7, 1995. The prior memo was from Mr. Gates to Mr. Grove. Here is Mr. Gates reporting to his chief executives about an in-person dinner that he had with Andy Grove. It begins by saying, "I spent three hours in San Jose Wednesday night having dinner with Andy Grove."

He goes on to say, "The main problem between us right now is NSP. We are trying to convince them to basically not ship NSP." Again, what you have is Microsoft trying to tell another company what products it can and cannot ship.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VIII. Plaintiff's Opening Argument to Court--Microsoft Antitrust Case/§VIII.12 4. Microsoft's Additional Pressure on OEMs to Favor Microsoft Browser

§VIII.12 4. Microsoft's Additional Pressure on OEMs to Favor Microsoft Browser

Now, ultimately, Intel agreed, and part of the pressure was that—and the evidence will show that Microsoft went around to all the OEMs, and as we saw in connection with the tie-in and the OEM foreclosure documents, the OEMs are dependent on Microsoft. And in the documents that we previously saw, what Microsoft told the OEMs was, "You got to start favoring the Microsoft browser and shutting out the Netscape browser." Here, what Microsoft did was went to the OEMs and said, "We don't want you to have anything to do with Intel and NSP," and the OEMs fell into line, and Intel backed off. And you have a Gates memorandum—again, this is a memorandum from Mr. Gates personally—October 18, 1995, and he says, "Paul," directing this to Paul Maritz, "Intel feels we have all the OEM's on hold with our NSP chill." That's referring to what they did.

Mr. Gates continues, quote, "For example, they feel Hewlett-Packard is unwilling to do anything relative to MMX exploitation or the new audio software Intel is doing using Windows 95 unless we say it's okay."

What Microsoft has done is it has gotten the OEMs, and it has told them they're not supposed to do anything in connection with software and Intel unless Microsoft approves.

Mr. Gates goes on. He doesn't say, "Well, this is against company policy." He doesn't say, "that's a bad thing to do." It would be wrong, that's for sure. What he says is, "This is good news because it means OEMs are listening to us." And then he goes on—this is very interesting—"Andy," referring to Andy Grove, "believes Intel is living up to its part of the NSP bargain," its part of the NSP bargain—that is, the bargain that they won't ship NSP—"and that we should let OEMs know that some of the new software work Intel is doing is okay." In other words, Your Honor, as Mr. Gates is admitting, they made this bargain with Intel, and now what Intel is saying is, "Okay, we have agreed to give you what you want, now will you tell the OEMs it's okay to work with us in some other software."

And Mr. Gates finishes, "If Intel is not sticking totally to its part of the deal, let me know."

III. CONCLUSION

§VIII.13 A. How Microsoft's Conduct Violates Antitrust Laws

The burden of the antitrust laws is the competitors are not supposed to go and make bargains and make deals as to what they will ship and what they will not ship, who they will compete with and who they will compete against, what competitor they favor and what competitor they disfavor. And yet, what you see is a consistent pattern of Microsoft doing this with OEMs, with ISPs, with ICPs, with Intel, with Apple, with Intuit, using its monopoly power, using its leverage, and using everything that it has to threaten and induce competitors and customers to agree not to do what the antitrust laws say they are supposed to do, which is to compete and make purchasing decisions on the merits. Now, one of the things that you may hear from Microsoft, and I certainly suggested this when they were arguing that they ought to take the depositions of those professors up at Harvard and M.I.T., is that there were some mistakes made by Netscape. And I suppose it is probably so that every company makes mistakes. No company is perfect. And we have certainly seen a lot of documents from Microsoft about the bugs in the Microsoft systems, but I thought it was useful to just keep in perspective what Microsoft was saying about Netscape, not in this litigation, but while they were competing against Netscape.

And first—and this is kind of interesting for the date—January 11th, 1995, the court will recall Mr. Gates saying at his deposition that we played at the beginning, that he just didn't have any idea about what Netscape was doing in the first half of 1995. He was actually following it, as the documents will show, quite closely.

Indeed, here is a situation where Dan Rosen reports to him about Jim Barksdale, who is going to be our first witness, leaving AT&T Wireless to go to work as chief executive officer of Netscape. And Dan Rosen writes to Gates that this is going to make Netscape an even bigger competitive threat than they had anticipated. That's important for two reasons: one, it makes clear they are already anticipating in January of 1995 Netscape as a competitive threat; and second, it's recognizing that the increased management depth that's being brought in is going to be important. And Bill Gates writes back not "I don't care about Netscape," but "I am really surprised. Barksdale is a very good manager and very experienced. Netscape is getting more and more important for us to watch."

This is Steve Ballmer, not necessarily a person known to give out compliments to competitors too freely, quote, "have no confusion in your head: job one for us right now is the Internet and defeating Netscape, says Microsoft executive vice president Steve Ballmer. They are simply our smartest competitor."

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/VIII. Plaintiff's Opening Argument to Court--Microsoft Antitrust Case/§VIII.14 B. Effect of Microsoft's Conduct on Netscape's Market Share

§VIII.14 B. Effect of Microsoft's Conduct on Netscape's Market Share

This is Bill Gates writing to his top executives: "During this thinkweek, I had a chance to play with a number of Netscape products. This reinforced the impression that I think all of us share, that Netscape is quite an impressive competitor. They are moving at full speed." And in December of 1996, again, Bill Gates, "I think on the UI [user interface] front and the technology front, Netscape has taken the basic IE 4 idea and is executing on it far better than we are." So, you have a formal competitor in Netscape, competitor with a good product, with a big head start, and then you have the effects of Microsoft's conduct. I want to show the court just a few charts that demonstrate some of that effect. Let me go to exhibit 5. Exhibit 5 shows Netscape's share at the top and Microsoft's share at the bottom. And this is some data according to a company called Adknowledge, and it relates to browser usage.

And what you see is starting in January of 1997 until August of 1995, Netscape's share starts high and comes down, starts around 75 percent, comes down to about 50 percent. Microsoft starts about 20 percent and goes up. Now, that's important. And the next chart will also show Microsoft's own estimate of essentially the same thing. This is Microsoft's estimate, and this is government exhibit 14, and it shows both actual and projected market shares that Microsoft has for browser, and it shows Microsoft's share climbing sharply and then continuing to climb as it's projected to go up to somewhere between 59 and 67 percent, depending on the internal estimate. Now, that's important, Your Honor, but even more important is to show how that share breaks down. The court will remember that when we were talking about America Online and ISPs, we talked about how Microsoft was prepared to do whatever it took to get AOL, in particular, to sign an exclusive or almost exclusive agreement. And the court will recall that one of the Microsoft people said that they gave away so much access to AOL that it was like, quote, "putting a bullet through the head of MSN," which was Microsoft's online service provider, and what you had was Microsoft being willing to sacrifice one of its children, MSN, in order to gain an advantage in the browser war, and this shows you why Microsoft was prepared to do that.

[Boies now points to a chart as he speaks]

On this chart, the bottom blue line is Microsoft's share of the browser market, according to Adknowledge, for ISPs that Microsoft classifies—not me or somebody else, but Microsoft classifies—as having IE parity; that is, Internet Explorer and Navigator are treated in parity.

What you see is a little change but not a heck of a lot of change, certainly not compared to the other lines. The red line is what shows what happens with Microsoft's share of all ISPs; and the top line, the solid blue line, shows Microsoft's share of AOL and Compuserve, the two biggest online service providers, the ones that Microsoft gave the best deal to, got the most exclusive dealing arrangements from, the service providers that they were prepared to put a bullet through the head of MSN in order to get it. Now, this reflects the same kind of data in a different chart. That came from Adknowledge. This comes from Microsoft's internal documents.

And you will remember that Microsoft, when it was dealing with ISPs, required them to report regularly on what their shipments were, and the purpose was to allow Microsoft to keep track of how people were shipping its browser compared to Netscape's browser.

Now, first, these first two bars right here, what that compares is the weighted average Microsoft share of browser shipments from ISP's. All the ISPs that are tracked in these particular Microsoft documents take a weighted average. If you look at ISPs where IE was the default browser—that is, where there was an exclusive or near exclusive arrangement to make IE the default browser—94 percent of the browsers those ISPs ship are Internet Explorer. On the other hand, for people where IE was not the default browser, they only ship less than 14 percent. Same thing with browser usage. Over 60 percent IE browser usage among customers of ISPs were they have a special deal, less than 20 percent where they don't have a special deal. And this chart, together with the previous exhibit, Your Honor, demonstrates in one way—it doesn't take all the things into account, but it demonstrates one impact that Microsoft's conduct is having, an impact that isn't related to whether they made mistakes, isn't related to the quality of the browsers. It's related to the nature of the restrictions that Microsoft was imposing.

Now, we said from the beginning, Your Honor, that there is an urgency here, and the reason we said there is an urgency, even though these lines are not moving particularly—well, they are actually moving pretty sharply, but they're not moving as sharply as these lines are, and the reason is the original market share charts, and in most of the market share charts that the court has, are charts that measure total browser usage. That means that it's an installed-base measurement. What that means is that it includes in the market share for Netscape everybody that got the browser one, two, three years ago, when Netscape's share was very high. What's important, of course, is what's happening for people who are getting their browsers now. And what this shows, from

Microsoft's own documents, taking what Microsoft classifies as the top accounts, 76 percent are getting the Microsoft browser as of May, and they project that at the end of this year that will go to 88 percent, so that if you just look at new users, these are the people that are being foreclosed by the bundling, by the tie-in, by the screen restrictions, by the foreclosure of the OEM channel, by the foreclosure of the ISP channel; when you strip out the installed-base effect of having the old people who have been using Netscape for a long time and haven't shifted—and remember: The Microsoft documents all said, "We are not going to get these people to shift on the merits. We are only going to get them to shift as we upgrade them to a new operating system to which we have bundled or tied the browser."

But as that happens over time, what happens is that Microsoft gets the overwhelming majority of all new users, and Netscape is relegated to a smaller share of an ever declining group of people; that is, people who have had their computers for more than a couple of years. Microsoft got a company called Giga Information Group Research to do some research on actual and projected market shares, and they then took these market shares, and they gave them to perspective customers to convince the customers that they ought to go with Microsoft because Microsoft is going to prevail, and not to Netscape. And what this chart demonstrates is where the future of the browser market is going in the absence of some kind of intervention. And what the previous chart shows is it's going there very, very fast. What I have tried to do, Your Honor, is go through, in an amount of time appropriate for an opening, some of our evidence. There is a great deal more evidence. I think for every document that we used there are many more. Certainly, for every deposition clip that we have used there are many more.

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§VIII.15 C. Summary of Trial Presentation

What we are going to be doing over the trial is trying to show the court the evidence that exists, the documents, the testimony, the exhibits, and the facts, the figures, and the statistics. We would ask the court, as the evidence comes in both from our side and from the other side, to do what I know the court will, which is to look at that evidence in context; and when somebody attacks the evidence, to ask yourself, "is that a fact consistent with the contemporaneous records? Is it consistent with common sense? Is what I'm being told something that can be squared from the written record that people left behind at the time that they were actually doing these things?" Thank you very much.

THE COURT: All right. What's your pleasure, Mr. Warden? Do you want to start now, or would you prefer to defer until tomorrow morning?

MR. WARDEN: Tomorrow morning would be fine, Your Honor.

THE COURT: All right. I have received a third motion—I don't recall who is the movant—to deal with confidential information that might come into evidence. I think, perhaps, the best way to do that is to allow both sides to respond to these motions and then, perhaps, set aside for one day for hearing all of them.

MR. WARDEN: That's fine, Your Honor.

MR. BOIES: Your Honor, I have one housekeeping matter. We have been asked by the press whether we could make available to them the documents and materials that we used in the opening today. That stuff is obviously not in evidence yet, but it has been used in court, and I wasn't sure how to interpret the court's order.

MR. WARDEN: Our position is, if it's not in evidence, it's under the discovery protective order; and when it comes into evidence, it's under the final pretrial order.

THE COURT: Fair enough. That's a bright-line rule, and I think we will adhere to it.

MR. BOIES: Thank you, Your Honor.

MR. HOLLEY: Your Honor, may I raise one issue about this confidentiality point?

THE COURT: Sure.

MR. HOLLEY: With Netscape, we have agreed, subject to Your Honor's approval, that we will redact certain documents to take out information that we agree with Netscape is proprietary and should not be disclosed in open court, and we propose to use the redacted versions of those documents, but I didn't want to do that unless Your Honor—

THE COURT: That's perfectly all right. That's fine.

MR. HOLLEY: Thank you, Your Honor.

THE COURT: All right. We will see you tomorrow morning at 10:00.

[The hearing was adjourned until 10:00 a.m. the following day.]

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IX. Plaintiff's Opening Statement to the Jury--Violation of Federal Civil Rights, Conspiracy, and Punitive Damages/Chapter Outline

IX.

Plaintiff's Opening Statement to the Jury—Violation of Federal Civil Rights, Conspiracy, and Punitive Damages

Judi Bari v FBI

CASE SUMMARY: *In this case, Judi Bari and Darryl Cherney of Earth First!, an environmental group, brought a federal civil rights lawsuit against four FBI agents and three Oakland police officers. The suit arose in the aftermath of a bomb explosion in plaintiffs' car after which plaintiffs were arrested as the bombers and their homes were searched. The jury found that six of the seven defendants violated plaintiffs' First and Fourth Amendment rights and awarded plaintiffs a verdict of \$4.4 million dollars, which included punitive damages. This is the opening statement by plaintiffs' lead counsel Dennis Cunningham in United States District Court in Oakland, California, before Judge Claudia Wilken on April 9, 2002.*

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IX. Plaintiff's Opening Statement to the Jury--Violation of Federal Civil Rights, Conspiracy, and Punitive Damages/§IX.1 I. INTRODUCTION

§IX.1 I. INTRODUCTION

MR. CUNNINGHAM: Good morning, ladies and gentlemen. Good afternoon and thank you for your patience and thank you for your service on this jury.

I'm Dennis Cunningham. I'm the lead attorney, as they call it, for the plaintiffs. Tony Serra is co-counsel, and we have another co-counsel Robert Bloom who has a slight medical problem. We expect that to clear up in the next day or so, and he'll be with us certainly by next week.

Our plaintiffs are Darryl Cherney who is one of the people who was spoken about and Darlene Comingore who is the executor of Judy Bari's estate. Judy Bari as you heard, passed away several years ago, but her estate succeeds on the claims and rights to enforce those claims in the court. And so Ms. Comingore is in that capacity. And Lisa Bari is Judi's daughter, and she's here on her behalf as well.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IX. Plaintiff's Opening Statement to the Jury--Violation of Federal Civil Rights, Conspiracy, and Punitive Damages/ II. STATEMENT OF FACTS AND ARGUMENT/§IX.2 A. Efforts of FBI and Oakland Police Department to Harm Earth First

II. STATEMENT OF FACTS AND ARGUMENT

§IX.2 A. Efforts of FBI and Oakland Police Department to Harm Earth First

This is a case about—in which we claim that the defendant police officers and FBI agents violated the rights of Judi and Darryl after this bombing of their car. The car was bombed in Oakland near the freeway on Park Boulevard and on May 24, 1990, just about noon.

Judi and Darryl at that time were, as at this time Darryl certainly still is, part of Earth First. Earth First is many things. You'll hear a good deal about it. It's basically a proenvironment or environmentalist group, activist group—group formed around the concept of activism and determined activism to include civil disobedience as well. I think you've heard that referred to where they felt it was necessary to include all kinds of activities that they could generate on behalf of and in defense of the environment.

The fact that they were with Earth First and part of Earth First became immediately evident to the people who responded to the bombing. And there were a number of rescuers who came to the scene and police officers and FBI agents. And you'll hear about that, and I'll talk more about it this morning.

The main thing that happened in the first aftermath of the bombing when there—it was learned that they were with Earth First and when the FBI came on the scene—is that the FBI agents there spoke to the police officers who came and told them and told Sergeant Sitterud in particular, who was the case officer or the Oakland detective who was assigned to respond to the case, one of two, but he was the lead officer, that the FBI was familiar with these people already as terrorist suspects, as people who—in his words—the kind of people who would be carrying a bomb. And that was told to the police officers within the first hour after the explosion. And then Sergeant Sitterud said by the time he got to the scene and was told that Judi and Darryl had already been removed to the hospital.

But that was, you'll see it in the evidence, something that set the tone for the entire case from that moment on and was a crucial event after the bombing and crucial meeting of those two groups, the FBI and Oakland police, around a purpose that immediately arose, and that we say was instigated by the FBI because of a preexisting desire to harm Earth First in the First Amendment context, harm this group to disrupt its work, to misdirect its work, to smear the group in the public mind. And this was a golden opportunity for that and the people in the car who had been bombed to be represented as bombers. And the headlines could reflect that fact, and the world would be told that Earth First had bombers in it and these environmentalists were dangerous and had to be feared.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IX. Plaintiff's Opening Statement to the Jury--Violation of Federal Civil Rights, Conspiracy, and Punitive Damages/§IX.3 1. Frame-up of Plaintiffs as Bombers by FBI and Oakland Police

§IX.3 1. Frame-up of Plaintiffs as Bombers by FBI and Oakland Police

And the mechanism of this was in classic terms a frame-up, a frame-up that was concocted by the FBI and Oakland police, by various FBI agents who are among these defendants and these Oakland police officers. And the frame-up was based on false evidence, fabricated evidence, which I'll talk about in more detail, that was cooked up more or less on the spot and in the succeeding hours and days as a pretended basis for charges against Judi and Darryl that they were possessing an explosive device, transporting a explosive device in violation of law and with a terrorist purpose, taking it somewhere to plant it to do some damage in some hideous way.

You'll see that particulars of the frame-up were pretty much all—not all, but mostly—generated by the FBI agents. But you'll see also that the Oakland officers in no sense were duped. Although I believe they were lied to, and I believe you'll see that.

But they were willing coparticipants. They jumped right in. They thought it was a fine idea, and they made their own contributions. And they took on the burden of making the arrests themselves and putting the case into their system instead of in the federal system so that they were operating at the front for the case, for the false case, and the FBI was in the background.

The FBI had a major role. They took possession of all the evidence. They took it to their laboratory. They made reports back about it and in the attempt to sustain the case in the following days and weeks, and they were really the driving force behind the case.

The actual case itself was never quite brought in the courts. Judi and Darryl were booked by the Oakland police. The case where the things—the bombing happened on a Thursday. There were still searches being carried out in other police operations on Friday. Then came the weekend. Then was the Memorial Day holiday on Monday. And Tuesday, when they went to court, the district attorney announced he was not yet prepared to file charges. He was going to wait until he saw what came back from the laboratory before he would do that.

And that is the way things stood and continued to stand for the next several weeks, I think about seven weeks, until it was finally decided that there were—no charges would be filed. And the case as a formal case was dropped. The investigation was supposedly to remain open by the Oakland police. I think you'll see they didn't do anything more about it.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IX. Plaintiff's Opening Statement to the Jury--Violation of Federal Civil Rights, Conspiracy, and Punitive Damages/§IX.4 2. Sham Investigation of Bombing by FBI

§IX.4 2. Sham Investigation of Bombing by FBI

The FBI continued their investigation of the plaintiffs and supposedly of the bombing for a couple more years and kept on doing things, and there were other agents involved besides those who had been working on it on the first day.

And you'll find that the investigation that they conducted was in fact really a sham. There was not a serious or good faith attempt to solve the bombing either—with Judi and Darryl either as the victims or perpetrators. There was just a kind of aimless activities—of a number of things started and not finished.

And within the cover of that, they made a lot of, they did a lot of work investigating Earth First, the environmental movement in the north counties, in California here, Humboldt and Mendocino counties in particular where the logging is going on, where Earth First in the months and couple years prior to the bombing had been doing demonstrations, doing organizing, doing public education trying to slow down the cutting of the forest up there, in particular, the taking of the old-growth redwood trees, which they had focused on particularly as an objective to try to save the redwood trees, the old-growth redwood trees still in private hands.

And they started organizing for a campaign that was going to go on that summer of a series of demonstrations that would—and what they call woods actions, everything from sitting in trees, blocking roads, chaining themselves to a bulldozer, or have a march, or rally in town, talk to people. And a whole gamut of activities that were planned.

And I think you'll see that it was because this campaign was coming up and promised to be a strong thing and because there—the work they were doing was already strong and was drawing notice and was having effect, that this is a reason why the—they were targeted.

Earth First was a target and presented, as I said, an opportunity in this event here for a blow to be struck at them for an attempt to neutralize the work that they were doing. Obviously, the big mechanism of that attempt to neutralize would be the headlines, would be news. Earth First are arrested or these are Earth Firsters—are arrested as bombers.

And there was indeed something that made the headlines across the country and was on the top of the TV news here in the Bay Area for days on end and kept coming back. And there was a drastic effect over time on the public and the public image of Earth First and the reputation of Earth First.

And there's no question but what the—that those false charges had a tremendous effect on the circumstances that Earth First was working on and the things they were trying to do.

§IX.5 3. FBI's Fabrication of Evidence

The frame-up was constructed around, as I said, evidence that was fabricated. In particular it had to do with the alleged location of the bomb in the car when it went off. And this is the—actually, the focal point of the evidence that was used or cited in the—as a basis for the criminal charges, that the difference between whether the bomb had been under Judi's seat where it was hid, where it had been planted by someone who was trying to hurt her or kill her, or where it had been, as the agents and officers said they believed (pretended to believe, we would say), on the floor in the back seat behind the driver's seat where it would have been more or less in open view, and where they would have seen it supposedly when they loaded their stuff in the car to drive away from where they were.

And the bomb went off. I'm going to tell you more about what happened with the bomb and how it worked and what happened as a basis for that—for the fabrication of the evidence based on that idea that the bomb had been in plain view, and, therefore, must have been visible when they loaded the car and must have been theirs.

Judi was removed to the hospital. She was in surgery immediately. She was terribly injured by the explosive force up through the driver's seat into her body. Her pelvis was shattered. Her coccyx was blown. She had extensive nerve damage in the pelvic area. She had problems in her nerves in her legs and problems walking. They told her she'd never walk again. She did. She was—it was a very severe injury and left her in pain for the rest of her life, and just as she was left fighting these false charges against her for the rest of her life and beyond to this day.

The officers and agents met that evening at the Oakland police headquarters. Mr. Reikes, one of the defendants, is head of the FBI terrorist squad in San Francisco, came to Oakland, gave them a briefing on what was known about Earth First and this alleged terrorist background of the group or members of the group.

There had been a case in Santa Cruz several weeks before where someone who was never caught cut down poles supporting some power lines. And actually that happened on two successive nights. One night they [the power poles] fell over, and there was a blackout in Santa Cruz county for several hours.

And the FBI had opened the terrorism investigation of that event. And they immediately connected these people with that event and with that crime, even though there was no basis to connect them at all, other than the fact that they thought they suspected Earth First members in Santa Cruz, which was baseless. And so they made that association with these two people immediately.

There had been other things that Mr. Reikes talked about to the assembled officers and agents as a basis, a previous case also involving power lines that were taken down in Arizona where the people were caught. And you'll hear more about that as well.

There was—they wrote a search warrant affidavit by an officer—Sergeant Chenault, who is here, which he said was almost dictated to him by one of the FBI agents, Mr. Frank Doyle, who was a bomb technician, specialist in bombing investigations, who totally told him what to put in the affidavit.

And they cooked it up, put in some extra things of their own, and presented it to a judge at 2:00 in the morning, got a search warrant, searched the homes of Darryl and Judi overnight. And the next day, the news was there. It was all on the news. They took several of their friends into custody. And then they went ahead with this case.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IX. Plaintiff's Opening Statement to the Jury--Violation of Federal Civil Rights, Conspiracy, and Punitive Damages/§IX.6 4. No Serious Effort to Catch Bomber

§IX.6 4. No Serious Effort to Catch Bomber

Within a week, they received a letter or someone received a letter, journalist received a letter, reporter in the Santa Rosa Press Democrat, from a person who signed that he was the Lord's Avenger. And he said that it was he who had planted the bomb, and he did it to strike at Judi Bari, who had been described as a devil woman.

And he wrote in very heated, superconcentrated religious rhetoric in the letter, and he said he was striking at her because of a time a couple years earlier, year and a half earlier, when she had participated in a demonstration at an abortion clinic in Ukiah, where she lived. And there had been such a demonstration, and they both had been at it or others.

There had been two demonstrations, pro and con demonstrations, started out as a demonstration by antiabortionists. And they had gone to more or less defend the clinic, Planned Parenthood clinic. And this man as—and he said he was the man in the letter—said that she had to be struck down for that.

And that he described the bomb quite "to a T." He spelled out the construction of the bomb, and he spelled out the construction of another bomb, which had been set off in Cloverdale earlier, about two weeks earlier, and so that he would establish the authenticity of his claim because, as he put it, only he would know the way the bomb was constructed.

The FBI and lab in Washington verified indeed it was an accurate description of both bombs, almost 100 percent accurate, and leaving the law enforcement with a letter from the bomber. But what they did from then on is decide they believed or pretended to believe that Judi had sent the letter. Obviously, they knew Judi was in the hospital when it was sent. It was postmarked on May 29, received on May 31.

But the implication was apparently that she had confederates who had sent this letter. They never investigated the letter beyond that. They used it as part of a pretext for a second search later on that generated a new round of headlines about a month after the bombing. They never made any serious effort to investigate that letter and any serious effort to investigate, as I said, the evidence that showed that Judi and Darryl were victims of these crimes.

In fact, the upshot of it was that they let the bombers go free. There was no serious effort; I think you'll see this over the course of the evidence; there was no serious effort to try and find who really bombed them. There was no serious basis to continue to believe it was their bomb. And they just let this thing happen. And it went on and on. And in fact, as you can tell, the bombers are still free. No one has ever been caught or charged.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IX. Plaintiff's Opening Statement to the Jury--Violation of Federal Civil Rights, Conspiracy, and Punitive Damages/§IX.7 B. Violation of Constitutional Rights

§IX.7 B. Violation of Constitutional Rights

These things constituted a violation of their rights, violation of rights under the Fourth Amendment against unreasonable search and seizure. The searches were based on fraudulent warrants. The arrest was based on fabricated evidence. The judge there will instruct you an arrest is a seizure under [the] Fourth Amendment. And there—so that a false arrest is an unreasonable seizure and violation of your rights.

The underlying point is that these activities—action, frame-up was aimed at neutralizing them and discrediting them completely for the work they were doing. That violates their First Amendment rights. And that's the fundamental claim that we brought here. And the reason we're here is to counteract and to expose that activity, that action against them.

And the evidence is going to show you that the mechanism by which this was done amounted to a conspiracy among these agents and officers, an express or implied agreement. You'll also receive instruction on the law that what it boils down to, the law defines a conspiracy as a meeting of the minds. And you'll see there was a big meeting of the minds to do this. And there were a series of meetings of the minds to do—to take the various steps as they went along to make it happen and keep it happening and keep the smear going.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IX. Plaintiff's Opening Statement to the Jury--Violation of Federal Civil Rights, Conspiracy, and Punitive Damages/§IX.8 1. Backgrounds of Earth First and Plaintiffs

§IX.8 1. Backgrounds of Earth First and Plaintiffs

Earth First is, as the judge said, unstructured. It's not an organization. It's not *not* an organization. It's not a movement, but it is a movement. It's a slogan. It's all of these things and more.

It started in the early eighties and had been more or less announced in a sensational way by a small group of people who said they were going to start an activist campaign to save the environment against the big corporations who, they said, were destroying the environment and that they would use whatever tactics came to hand as long as they were not harmful to people or other living things.

But this included, as they proclaimed it then, an intention to do what they call monkey wrenching, which would be to tamper with or destroy heavy equipment, for example, or to—something that Earth First is often associated with—to spike trees, drive iron steel spikes into trees so they couldn't be seen, and then put up a sign—these trees have been spiked. Don't cut them because otherwise you might run into a spike.

And those were the things that Earth First immediately became famous for. Those were sensational things for the media to report on. I think that that was a central thing in the concept of it. We can't get any attention to the cause of protecting the environment by more conventional means. We need to do something that will make the press and the public pay attention to us. And that was where that started. By the time Judi got involved in Earth First, and here in California, in the late eighties, there had been a little of that actual activity going on. There had been a whole lot more talk about it.

Darryl was here in California. He had started working with Earth First in about 1986, earlier '87. Judi met him and others probably in '87 early '88 and got organized into this movement, environmental movement, not to do sabotage, but to do public demonstrations. Judi came out of the antiwar movement when she was in high school. She came from Baltimore, grew up in a middle-class household.

She had been—as she got older—she had been working in a department store. She became a member of the retail clerks union. She then became an organizer and led a strike of the retail clerks in her area. She had worked in the post office there. She worked in a big postal distribution center in Baltimore, outside Baltimore, and had gotten into the union there and had become an organizer, and again, a wildcat strike leader, and had established herself as an activist and as an "aginner"; you know, a dissenter, a person who had strong critique of things as they are in our society and meant to devote her life as much as she could to changing things and to changing them through activism. And she believed in that in a strong central way and that was who she was.

That's also the kind of person Darryl Cherney is. And the kind of things he also believes and they had got a great rapport and for a while [had been] lovers, and had begun to do organizing together. And one thing in particular you'll hear about is whenever they did rallies and demonstrations, they also sang. They played the guitar and Judi played the fiddle.

Darryl plays a guitar. He's quite a prodigious performer and song writer. He would write satirical songs about things that were going on. It became more and more, in Northern California—they're against the big logging companies and what they were doing.

And they would go out and Darryl would compose these songs about this guy's the head of this company, or these guys in this incident. And they would sing songs and have rallies and demonstrations. They did tree sits. They would get a person up in a big tree that was planned to be cut, and they could rig a platform up there 70, 80, 150 feet in the area on a big old redwood or Douglas fir. And a person would stay up for days. You might have heard of a person up there a couple years ago in a tree recently in order to save that one big tree from the logging action?

And they did that. They did sit-ins at different times and places, worked through the system as much as they could, went to hearings. They would come in and oppose timber harvest plans when they were filed. And people—they organized local people, and other activists would go and tend these hearings and testify. They did research, helped pass some laws in the state of California that were at least some attempt—involved in controlling the logging and regulating the logging because of the effect it had on the environment and it had on—particularly on the watershed in north counties.

When they're logging on hillsides, when the trees are gone, there's nothing to hold the soil. It washes down into the riverbeds and chokes the fish. The breeding grounds are cut off, stuff like that. And they worked very hard to try both to bring this to public consciousness the need to—for change and the need for pressure for change. And also, to impede the—those logging operations

by direct action.

There were three big corporations operating in the logging business in Northern California then: Louisiana Pacific, Georgia Pacific, and Pacific Lumber. Pacific Lumber in particular had been taken over by one of these corporate raiders, a guy name[d] Hurwitz from Texas who bought it and used junk bonds to finance the purchase of the corporation or the takeover of the corporation. And then to their damage, tripled the cut of trees in order to pay off the junk bonds and suck all the profit out of the forest as fast as they could.

Judi was saying from the beginning that we—the corporations are the ones we're against. The loggers are not the ones we're against. In fact, we have to reach out to loggers and timber workers and mill workers because when those trees are cut, that's the end of the jobs. That's the end of the economy in these communities because there is nothing else for companies to do. They're going to cut and run.

And she was talking about that from the very beginning of—when she got involved. And she had in fact begun to reach out to the loggers, and she had made a bunch of contacts with people, with workers in the timber industry, mill industry. And this was one of the things we believe that drew a lot of special attention to her because she was really effective in this case.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IX. Plaintiff's Opening Statement to the Jury--Violation of Federal Civil Rights, Conspiracy, and Punitive Damages/§IX.9 2. Nonviolence of Plaintiffs; Threats Against Plaintiffs

§IX.9 2. Nonviolence of Plaintiffs; Threats Against Plaintiffs

The other thing she had done and begun to do and had done by the time she was bombed was to insist that within Earth First that the sabotage stuff, the monkey wrenching, tree spiking, any of that stuff had to go, had to stop. And the movement had to be nonviolent and strictly nonviolent because there was no getting away from the negative effect, just the image of tree spiking had on people, had on the public, had on the people in the timber community, had on the workers because it seemed to threaten them directly, which, of course, it did.

She said this is counterproductive. I don't care what the people who started this movement thought we ought to do. We shouldn't do it. And we've got to turn that image around. We've got to reassure the people in these communities and the workers that we're not about that, and that we're going to be nonviolent and militantly nonviolent.

And the Redwood Summer campaign in—which was being planned at that time of the bombing, which was going to happen over that summer, was explicitly modeled after Mississippi Summer. It was about nonviolence. Nonviolence was central to the approach. And that was the way it was advertised to people they were trying to get to come and support it.

You had to sign a pledge, and go through training how to be nonviolent, how to be nonviolent in the face of violence Because in the time leading up to the bombing, and the actions that they had done up there, they had received a lot of hostility, a lot of threats. They had been met with silence. They had—a couple people had been beat up. And there had been a lot of threats and some of them very public.

She went to a county board meeting with a couple of loggers that had—were beginning to see Earth First's way a little bit. And they had their—Louisiana Pacific had just announced they were getting ready to shut a mill or shut another mill. And she told the county board they ought to take over those mills by the power of eminent domain so the economy of the town would not collapse.

And we believe this was another thing that drew a lot of notice and attention from people somewhere on the other side that were increasingly aware of the power of her organizing and the strength of her voice and the threats that she posed to them or to their ability to take profit out of these forests on their own terms.

There had been, in addition to the open threats and hostility that they had encountered, there had been a number of written threats and anonymous threats, seemed like death threats, seemed to be quite unconditional. Get out and go back where you came from. You won't get a second warning, one of them said.

Another one was mailed to the office that they had up there. A picture of her cut out of a newspaper with a rifle scope, cross hairs, written across her face. And there were, you know, quite a number of these—up to maybe a dozen in writing on papers. And they had copies of them when they were bombed in the car.

And they had copies as well of two or three documents that [were] got up to look like they were press releases from Earth First. And they had—would have the logo on it and the name Earth First at the top, and then the writing would say we don't buy this nonviolence stuff. We're going to fight. We're going to do what we have to do, blah, blah, if we have to resort to violence, that's what we're going to do.

These were fakes. They had been got up by someone on the other side, again, to discredit them, again, to turn people against them. And they were passed out in the break rooms and to—at the mills and passed out in the laundromats in logging towns and passed out—they were not passed out by anyone in Earth First and no one in Earth First ever heard of them.

They had Darryl's name spelled wrong, didn't have a contact number, a phone number, which they always would put. They had—one of them was signed by Earth First in Arcata. There was no Earth First group in Arcata and so forth.

They were—like the threats, these documents were serious indications of the hostility on the other side, of the danger to the Earth Firsters that had been arisen because of the intensity of the feelings that came out of their making these protests.

There was another meeting at the county board where Judi was trying to lay out what the plan was for Redwood Summer and persuade everyone their intentions were not violent in any way, and they were committed to nonviolence. And she showed the cross hairs picture, that threat she got. There were a lot of people from the other side in the room. She said, held it up, the person who sent this is probably in this room. And the person on the county board said you brought this on yourself.

They were, in short, in an atmosphere of—where there was hostility, conflict, you know, apprehensiveness, anger, and which had given rise to these very explicit threats and these—information about the circumstances that existed when the bombing took place that good faith investigators would have found out right away. They had threats, written threats, in their hands. They ignored them. They ignored all that information that pointed to the fact that Judi and Darryl were victims of the bombing. And that they looked only for a basis to prove up their false claim they were perpetrators.

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§IX.10 3. Location of Bomb

The big aspect of the frame-up, as I said, was this issue about the location of the bomb inside the car when it went off. And you're going to see when you finally do see the photographs that—and when you see the car, which you'll see, and when you hear from the FBI's own expert and also from the plaintiffs' expert, that you'll see yourself anyone could see that this bomb was under the seat.

Anyone could see that—where the bomb was located, you're looking, it's either under here or it's back here if this is the driver's seat. And you'll see the seat blown up. It's like this one where the rescuers took her up off the seat.

When the bomb went off, she was driving down the street following another car. The young woman Shannon Marr, who will testify, who was leading them from the place where she had spent the night back to a house in Berkeley. They had a meeting in Berkeley the day before with people from down here that were going to help with the Redwood Summer campaign, particularly a group named Seeds of Peace.

There were several groups that had a coalition to make Redwood Summer happen and were working on it this time in May. And asked, after that meeting had gone on all day into the night, and one of the people had a house in Oakland. He told Judi, I got a spare room. You can spend the night there. You don't have to sleep on the floor. You can get away from the confusion of all these people. And she went over there.

And then Darryl came over in the morning, and Shannon, and did work there. They sang their songs, and then they left. And they were going to go back to Berkeley to the house briefly and going to Santa Cruz. And they had a concert scheduled at the University in Santa Cruz that night, an organizing event for Redwood Summer.

They drove away from the house and [were] driving down Park Boulevard, and Shannon was in the car ahead of them. And Judi said that she got into a lane to make a left-hand turn and Judi saw her late, jerked the car to turn it into the other lane, and that's what happened when the bomb blew up.

And the car—she lost consciousness and control of the car. It coasted down the street on the corner by Park Boulevard and MacArthur, just under the freeway there, and came to rest against one of those railings that they put on the corner when they don't want you to make a pedestrian crossing there.

And it was—the car was up against the railing like this, and they had to cut the railing to move it back out of the way to get her out. And then they had the firemen with the jaws of life, different tools they have to cut the side of the car out, it was the door and—off and to get a board underneath her, a body board underneath her body in the chair and lift it out and put her on the gurney to go in the ambulance.

The fireman will testify he opened the back door and got in behind her, held her head here, and put the seat back a little bit. And then when they picked her up off the driver's seat, he had to disengage some of the springs in the seat from the flesh in her butt where the bomb had blown up the seat assembly into her. And so that they could get the board all the way under and lift her out.

And after that was done, the Oakland police evidence people were on the scene right away and took pictures. Those were the pictures you'll see. And there is also some news footage at the time. By the time they could get her out, the news was on the scene. And this is on videotape that—and you'll see the seat is all pulled up here where the bomb had—the force of the bomb had driven up through the seat into her.

And then there's a hole in the floor of the car that starts back here behind the seat. The fireman actually said he stood on the pavement with his feet through the hole in the floor of the car. And the hole goes from the front of the—to the front of the seat almost to the foot pedals, a huge open gaping hole in the floor pan of the car after the seat is taken out, which you'll see.

And the bomb had been under the seat, in the well under the seat and where it was surrounded on three sides by the drive train housing, where the gear shift, emergency brake is, on the right side, and by the frame of the car coming up on the left side. And there's a brace across—piece under the—on the floor towards the front of the car, the seat. And the bomb looked as if it had been snug up against the brace, which is blown away.

And it had—so there was open space behind the seat to force—much of the force of the bomb, other than what went down, blew the hole, and went up into her, came out this way and went up the back of the seat and tore it apart. And you'll see also that

apparently the force of the bomb went to the right and hit the drive train housing, that hump in the car, and went up and drove the roof of the car up like this. You'll see that too, like a tented effect in the front over the windshield where it would be flat up like this, just to the right in the middle of the car.

These things—and there are several details to it, to the—what you would say—the analysis of the physical car after the bomb had exploded from which you could see very plainly, and I believe you'll all see very plainly without any doubt, that the bomb was under the seat. And there's no question about it but the agents, in particularly Mr. Doyle, insisted that the bomb had been in the back seat at the beginning of the hole where it would have blown in both directions because that's the way bombs blow, in [a] spherical way. Wherever the explosion takes place, it comes out all directions.

And so that is one particular of the technical evidence—that a bomb doesn't blow a hole in one direction. It blows it in both directions or all directions. And that is the kind of thing that we would say would have told him, would have told anyone, but certainly would have told a number of trained bombing investigators, different levels of experience and expertise that came to the scene at various times, that the bomb was under the seat; there was really not much doubt about it.

But what happened was the opposite. The consensus was developed, and you'll hear them assert it, that the bomb had been in open view in the back seat. And there were indeed others besides the defendants who supposedly or apparently or—may come in here and affirm they did believe that. But it wasn't true. And you can't—it's unsupportable, and you'll see that.

You'll see a number of things I said. I'm getting ahead of myself. There were other—there were officers from the Oakland Department, colleagues of Sergeant Sitterud and Chenault, Lieutenant Sims who were assigned to bomb investigation duty, who said that—variously that they would support the consensus that the bomb was behind the seat.

One in particular, Sergeant Hanson, had just been to a bomb school in Eureka at College of the Redwoods that was conducted by the FBI and in which Mr. Doyle was the main instructor. And Sergeant Hanson said, "I wasn't about to agree—disagree with my teacher." There were other FBI agents. There was an agent from Alcohol, Tobacco, and Firearms, couple of them.

One way or another it will be represented that they all agreed that the bomb must have been in open view. But you're going to see from the physical evidence that they would have known it wasn't true, and they weren't really standing behind them in any event. That people who stood behind it were the defendants, FBI defendants, Mr. Reikes and Mr. Doyle, and the Oakland defendants who adopted this as the basis for the arrest and for the search warrant. And the search warrant affidavit that Sergeant Chenault wrote.

I looked at the car with FBI agents. Agent Doyle is very experienced. He recited the experience. You'll read the documents. He told me his opinion with the location of the bomb was based on a large hole in the car, that it had been at the rear seat floor board.

And there will be a claim, I think: Well, we didn't look at it as closely as we might have. We didn't see—we couldn't see it because of the seat was in the way. But, in fact, you'll see from the photographic record that the seat was out of the car while the car was still at the scene. And everybody can see the shape of the hole, the size of the hole, and the hole in the seat.

And they could see also the fact that the back seat, which is right where—would be about here, a bench seat in front of where the bomb supposedly went off, was really not damaged at all. There's a seam on the seat cover that was ripped. And you can see the foam rubber cushion of the seat showing through it. But it's not burned up. It's not ripped apart. It's not destroyed by the force of the bomb going off right next to it, as this seat was. It is pretty well intact.

And even more than that, you're going to see, and you're going to see this very graphically—I wish I could show you now—of the two doors on the driver's side. The front door is blown out with a huge bulge in the bottom, all smashed up and jammed in there. And they had to use the jaws of life to spread the door to pop it open.

But the back door wasn't affected. The back door was undamaged. There's a little bit of facing on the inside, ripped off. In fact, the fireman who came, first man who came there, will tell you he walked up and opened that car and got into the car behind her and reached down to hold her head steady and get her oxygen and hold her head and neck steady so there would be no cervical damage by any movement before they were able to brace her head with the body board and keep it. So that's what you do when an accident or occasion of that type—immobilize the person to protect the neck and spine.

And he walked in that door. But the front door was smashed up against this railing—cut the railing away. They opened the door this way, the front door. Then they cut the door post right up here and the frame down here, and was blown apart over there so they could take the whole back door assembly off, see it lying on the pavement. The door is undamaged, and the other door is all blown out. That's probably the single most graphic thing you'll see—that the bomb was next to the front door, which is all blown up, and not next to the back door, which is not damaged.

§IX.11 4. Police's Arrest of Plaintiffs

That didn't—none of that, and there's certainly more to it, affected them or deterred them from going ahead with this arrest based on the idea the bomb was in open view, nor did the letter they got from the Lord's Avenger, apparent religious fanatic; you'll see yourselves. You can make your own judgment. We don't have the language, the writing, the rhetoric in this letter. Seems quite authentic, although; fanatical and crazy.

It's consistent, thorough, going throughout the text of three pages of closely typed writing, full of quotations from the Bible that supposedly bear out the views that are being expressed, and the reasons that the writer gives for attacking Judi, in trying to kill her. And then he expressed satisfaction she didn't die. Now she is going to live in pain. The—expressed the satisfaction that even though he said he had put the bomb in the car [a] whole day before, 24 hours or so before, that the Lord stayed the hand of the clock so it didn't go off until the devil woman's consort was in the car with her the next day and could also taste the vengeance of the Lord's Avenger. They didn't investigate that. They associated it with Judi instead.

There was a lot of controversy about this case because Earth First didn't lie down or sit still for it. They were down at the police station immediately. Judi and Darryl were under arrest 3:00 o'clock that afternoon. Three hours and four or five minutes after the explosion. Judi is in surgery. Darryl is in the emergency room being tended to.

You'll see a police report that is filled out—time of arrest: 1500 hours on May 24th, 3:00 o'clock in the afternoon. Another police report: I was called to duty at 4:00 o'clock in the afternoon to guard a prisoner—and it was Darryl in the hospital—and then to take him downtown to the police station.

A good friend of theirs who was a Bay Area Earth First person, Karen Pickett, who you'll hear testify, came to the hospital to find out what had happened and their condition and try and do something. She was taken into custody. Shannon Marr who was driving the other car was taken into custody. David Kemnitzer whose house it was Judi stayed in night before was taken into custody. The house of Seeds of Peace, they went there to make sure there were no more bombs there. They arrested everybody—

MS. BEE: Objection, your honor. Violates the court's order.

MR. CUNNINGHAM: I don't think so, judge.

THE COURT: Try to stay as far away from that as possible.

MR. CUNNINGHAM: The people were taken into custody at the police station. And so there was a huge ferment in their group with everybody they knew—and came there, and press came there, and the people—most of the people in custody, the other people, were released through the evening.

Darryl was questioned. He—and he was questioned by both police officers and FBI agents, who ultimately accused him. He asked for a lawyer. They wouldn't get him one. He was booked into the jail. And his arrest report was filled out at 3:00 a.m.—in the morning, the next morning. But he was under arrest. And you'll be instructed on the law of arrest.

Also, immediately—immediately before any of this evidence could be analyzed, before any attempt could be made to sort out what happened, before—he had a folder with copies of all these threats and the fake press releases in his backpack, Judi had one in a duffle bag. She had one in a backpack, a box of files in the car. They were all in the possession of the police. They didn't bother to look at them. They didn't bother to look at anything that would have gotten in the way of putting them under arrest and telling the press these are the people. This is the case, and we believe that Earth First—these are Earth Firsters—were carrying this bomb.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Appendix Sample Statements and Arguments/IX. Plaintiff's Opening Statement to the Jury--Violation of Federal Civil Rights, Conspiracy, and Punitive Damages/§IX.12 5. FBI Analysis of Bomb; Other Possibly Related Bombs

§IX.12 5. FBI Analysis of Bomb; Other Possibly Related Bombs

The controversy had gone on then in the following days and next couple weeks. They finally—and they sent—as I said, the FBI took possession of all the physical evidence of the bombing, all the stuff taken from the cars, all the stuff taken from their homes, stuff that was taken from the other people. And they were going to analyze this in their lab. And the prosecutor, as I said, was waiting for this analysis at the lab to decide whether or not he should actually file the charges.

But, as it happened, they didn't send it to the lab. They sat on it in the FBI office in San Francisco for the next week. And only when that letter came and was publicized—that a letter had come describing the bombs and—did they finally take the evidence to Washington DC. And I said bombs plural. There had been another bomb set off at a lumber mill in Cloverdale, north Sonoma county, just a couple weeks earlier.

It had not really gone off. It had been rigged with a gas can, put on the porch of an office of the lumber company. The pipe had exploded. It was a pipe bomb also, but just one end flew off and the bomb went rocketing this way, hit a wall, bounced out into the lawn, and the gas can didn't go off. A sign was left there, LP screws mill workers. No fire took place, and no investigation took place of that bomb either, until this bomb went off.

Then they went and got that bomb, sent all the stuff finally to Washington to a lab analyst named David R. Williams, who was put in charge by the FBI—lab routines—of making the analysis of this evidence. And he put out a report where he described the bomb—the bomb in Judi's car as having been rigged with a motion device, which was—consisted of [a] ball bearing that is put in a little square of wires, positive, negative, positive, negative. And the ball bearing is in the middle. And it's either put in a little indentation or maybe it's glued to one of the wires, or otherwise lightly fixed in that spot but comes loose easy. The car goes over a bump. It rolls together, connects the two wires. That's when the circuit is completed and the bomb went off.

There was a timing device with it, a switch with it. There was a battery. You have a circuit that starts in the battery, goes through a switch, a timing device, a clock rigged up to—so when the hour hand comes around hits the screw that's imbedded in it, that completes that part of the circuit. Then it goes to the motion device. And the wire goes into the explosive substance and comes back to the battery. So there's a complete circuit there as long as these three things happen. The switch is pulled when the bomb is placed. The time elapses and the clock connection is made. The car moves away and hits a bump or like—she turned suddenly. The ball bearing is jarred loose and makes the connection. The bomb blows up. He said that's what happened. He testified in his deposition that he believed the bomb functioned as it was designed to function.

He also, when he—when the controversy went on so long, it was heated enough. There were, you know, countercharges made by Earth First and friends in the movement, that this was a frame-up indeed. And so they brought him out from Washington to inspect the car firsthand. And he told them this bomb was under the driver's seat.

And he said that he could tell just where it was placed because he knew from the many hundreds of bombing cases he's investigated and pipe bombing cases he's investigated that where you have a piece of pipe with two endcaps on it, and you have an endcap like a little shallow cup, and around the base of the cup, which they call the shoulder of the endcap, is a weak spot fabricated there. And it's where the top is fitted to the sides. Right around that circumference is a weakness. And when the bomb pipe bombs go off, they always—the endcaps they call them endcap tops—blow out this way. They always do it that way.

Now, the pipe is fabricated with a seam. The seam opens up in the explosion first. That will rocket the rest of the pipe in the opposite direction. It's speculation that one way or the other the main force goes to the bottom and the top. But the endcaps blow out.

And there's a spot he finds in the frame of the car here and another spot on the other side of the drive train housing where those endcaps hit. He said you can always look for where the endcaps hit. That will tell you where the pipe was when it went off. He looked at the car and said that's where the pipe was, under the seat.

Well, did they then go out and call the—Judi and Darryl's lawyers and tell them: We were wrong. There's no case here. Did they call the press and say, "It's a mistake. The bomb wasn't in open view." No, they didn't do anything. They didn't even write a report of that visit by Agent Williams where this was discovered and ascertained. There's no report at all about that finding by this top expert.

They'll tell you, Agent Doyle will tell you, he's not a real expert. He's just an experienced technician who examines crime scenes.

Williams is an expert with all the knowledge, all the learning. Turns out Williams got mixed up in the lab scandal of the FBI that took place a few years later. He had been guilty, apparently, of some questionable practice.

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§IX.13 6. Questionable Search Warrant

He was guilty of questionable practice in this case, not in connection with the location of the bomb, but there was another feature to the frame-up that was central, which was the bomb had been wrapped with finishing nails with tape, holding finishing nails by the pipe, some quantity of finishing nails when it blew up. These nails were spread around. Agent Doyle said this is there for shrapnel effect when the explosion took place.

And on that first day, when they were putting the search warrant together, Sergeant Chenault wrote in the search warrant—Agent Doyle had told him that there were nails affixed to the pipe bomb and a separate bag of identical nails had been found in the back of the car. And this was given to the magistrate with the search warrant affidavit as proof associating the occupants of the car with the bomb because the nails they used to make the bomb, there were more of them in the bag.

But the fact was that there were two bags of nails in the back of the car and neither one had finishing nails in them. One of them had roofing nails, one had framing nails in it. Both of those nails are nails with a flat head. Judi was a carpenter. That was her occupation in those years.

And indeed, she said she had come to her first realization about the redwoods and about the environment when she found herself putting redwood siding on some person's country hideaway or fancy house, that this—she was working on, a contractor she worked for. And somebody told her those are the trees that are getting cut down that are being used for that.

She was a carpenter. She had nails in her car. The nails were different, not even similar to the nails that were called—that they were called in the warrant identical to. That was to mislead the magistrate to think they had a case here. When it came time to send the evidence to Washington, those nails were not sent; neither was the backseat that was undamaged. They weren't part of the analysis.

But that night when they searched her house, they found a box of finishing nails and sent those to Washington. And Agent Williams recorded he had compared a nail from the bomb and a nail from the box microscopically and he believed they had been made in the same batch. The gripper marks he looked at by microscope were the same. And therefore, it could be relied—he said that they had been made on the same machine and in the same batch.

You'll find he never had done such a comparison before, that it was incomplete, that the science of it, you'll be able to tell yourselves without being scientists, was more than imperfect. And that they never did anything to ascertain the size of the batch of nails in any case.

They put—the second time they went for a search warrant, they said our evidence is that these nails were made in the same batch of 800 to 1000 nails. Sergeant Sitterud put that in his sworn affidavit. He said that's what Agent Williams told him. Agent Williams said I never said such a thing. I never knew how big a batch. How could you make a comparison. You knew what the batch—being in the same batch meant in the case? Didn't you have to know how many nails were in it in order to say there would be one batch of nails in the whole West Coast, or in order to say with any accuracy that you could associate one nail with another in that type of proximity?

They found out finally these nails were fabricated in Saudi Arabia, shipped in 50-pound boxes distributed in hardware stores up and down the coast, and they—whatever association there was with the nails had no significance as evidence to tie the bomb to the person who was the owner—apparent owner—of the nails that were in the car.

So the case came unraveled at least by that time. That was June 14, after May 24, when Agent Williams came to San Francisco—to Oakland and examined the car and the photographs of the car and him examining it. And made a—he made a mockup of what the bomb could have looked like on a wooden base with the pipe there and with the parts that he detected from the bomb, the switch, battery, the clock, the—I think he left the motion device out of his mockup, and also, a light bulb socket that supposedly was there, that he inferred was there, to test the circuit width, although that's questionable as well.

Anyway, you can see in the picture he's holding the mockup right in the place where he said the bomb, the actual bomb, would have been at the time of the explosion. And then they went—and went to a car dealership, found another Subaru. This was a 1981 Subaru GL station wagon, four doors, and they found another car like that. And they took the driver's seat out, and he showed them on the intact car where the bomb would have been.

And we got an intact car to show you. When you see the bomb car, you'll see an intact car with it. The seat will come out—see the

comparison of the two seats where—the place where the driver's seat is damaged, what's left of it. The rip comes up through the seat, the foam is gone, some is gone. You'll see all these details.

What you'll see mostly from that is that it was completely, by that time, June 14, clear that that bomb was under the driver's seat, not behind it. It was hid[den], not in open view, put there by somebody who was trying to kill Judi or maim her, and not by Judi herself.

And there never was any accounting for that notion these people were crazy enough to be carrying a bomb that was armed and rigged to go off like that and put it in the car and drive away with it all set up to explode, instead of in some safe—sense they would have—even the switches pulled, if they were carrying it somewhere and put it somewhere so it would go off later.

They hardly would have put it right next to them; certainly the time would hardly have been elapsed. People would have had to have been crazy to do that. That doesn't figure in the equation or the logic of the charges against them that was ignored like the threats were ignored.

As I said, whatever it was—a week, ten days—after Agent Williams was here, without letting anyone know what he told them, they applied for another search warrant saying that they needed more nails, even though they already supposedly had this comparison.

And they wanted to go in Judi's house to see if they could find the typewriter the Lord's Avenger letter was written on, and see if they could find, although they'd been there already, some tools that had been used to rig the bomb, or tape that had been used or wire that had been used.

They had taken all that stuff. What they did the second search for was—the story was starting to flag. They got a whole new set of headlines out of that. They came and told the press—Sergeant Sitterud spoke to the press—Well, the bomb may have been a little further forward than we thought. But we got these nails and we just found some more nails in her house, and that match the nails in the bomb. We know we got the right person—instead of admitting they didn't have any evidence. They built up the pretense there was still evidence at this point a month after the bomb, even more.

They weren't able to convince the prosecutor they had anything to go on. And the prosecutor, another week after that, on July 17, announced he wasn't going to file any charges. And Oakland said, we'll see what we can do in the future. We don't have any other evidence right now. But the FBI, the terror squad—Mr. Reikes wrote the headquarters in Washington DC and said, we've got evidence. We're going to keep going on this Lord's Avenger letter and the other evidence we have here. We're going to keep this investigation alive.

And he told him at that time, something I didn't tell you about, the first night that—when they were working out the search warrant—and you'll see that in the end of his affidavit—Sergeant Chenault wrote, I believe, that the occupants of the car were part of a terrorist group involved in making and planting of the explosive devices. And that they may be planning more terrorist acts.

And when he was asked about what went into that, he said, Well, Mr. Doyle told me he believed that they were carrying the bomb and said that in the briefing meeting, they told us they had these other cases against Earth First, why he thought that meant these people were guilty, and guilt by association. We'll see what he said.

He told them that—he also told us that at that time, at that point when they were ready to finish up the affidavit and go to the judge and get the search warrant and make the searches, that the FBI and particularly Agent Sena, who is one of our defendants here, told him not only are—all this stuff, but we have an informant in Earth First. We got a tip that something like this was going to happen. We were ready. We believe this was planned and that this person that we have that we talked to had predicted some effort, and this was the event.

You're going to learn from the evidence that was also very much false, bogus, just a fabrication. There was a person—her identity is going to be concealed in the trial; she'll be referred to as Ms. X or some—probably Ms. X, now that I've said it. He had talked to such a person in connection with the terrorism investigation—that this had been going on in Santa Cruz. And she had given a lot of vague gossip about the political groups that were doing this and that in the Santa Cruz area.

And at some point in—and he wrote a report, couple pages, lot of parts marked out. There's a rule that involves the government's right to keep the identity of informants secret. So this informant's identity has been kept formally secret in any event. And there was one paragraph in the letter that—or in the report where he said that this person told him, well, there were some heavy hitters from up north in town last week or heavy hitters from Canada and the western United States that gathered last week and left to return at the end of May for a major action.

From what the officers told us, Officer Chenault, Lieutenant Sims in his—their depositions—he told them he had an informant

close to leadership of Earth First who told them this action was going to take place in Santa Cruz. And that they didn't want to reveal the fact they had an informant so they should keep that out of the warrant affidavit. So they kept it out.

Lieutenant Sims and Sergeant Chenault testified that they didn't know what this action is going to be. They didn't know even that it was going to be something illegal. It was just an action. You'll see that is what the paragraph says in Agent Sim's report. It doesn't say anything about Earth First or leadership.

They said—the Oakland officer said that the tip was heavy hitters from up north, but the paragraph says Canada and the western United States. There's a further wrinkle to it. Agent Sena and supervising Agent Reikes, head of the terror, squad will say this was a tip about a bomb, that there wasn't an action. It was a bomb. But the paragraph and whole document—and no other document says anything about anybody.

And we're going to see the files, that the FBI built up in the case, reflect a lot of things like that, a lot of contradictions that can't be explained, a lot of activity that was and wasn't. Things that—leads taken up and dropped, other leads that were reported to them and ignored.

There were irregularities in the file and that there are holes in the information, that any logical person would expect to find a fingerprint on this Lord's Avenger letter. There's no record they compared it to Judi and Darryl's fingerprints. There's a series of those, that kind of contradiction reflected in these files, and they were never investigated.

There was some DNA evidence possibly available that was not investigated. There were people that could have been investigated that were—there was—instead there was an effort to gather information about Earth First. And the information that was gathered was even misrepresented in the file. And you'll see that.

You'll see that the files as a whole reflect a sham investigation, bogus investigation of the bombing, intelligence-gathering operation about the political spying operation, about the Earth First movement, and about the environmental movement in northern California.

You'll see the threats and fakes were never investigated, even when they finally got around to obtaining the originals, which had been received or papers that had been received. They just sat on them. They never even dusted them for fingerprints. They never did anything about them.

§IX.14 C. Explanation of Potentially Damaging Evidence; Other Evidence Issues

They had—there's was a photograph of Judi holding a gun, machine gun, like an Uzi or something, that had been taken as a joke by some guy. And it had appeared in a newspaper up in Mendocino County a year before. And it—they were saying it was going to be used for—when it was taken, there was one of Darryl taken, one of a guy, and it was going to be—said we'll use it on a cover of an album. They were going to bring out an album of the songs that they wrote. And the album was going to be called, "They Don't Make Hippies Like They Used To"—a little bit of a miscalculation as to what might work and what might not in terms of good Earth First propaganda.

There was a photograph; it had been in the newspaper, and Judi had been captioned the poster gal of the week. And it was a joke. But it turned out that someone had sent a letter to the chief of police in Ukiah with that photograph and said, I can give you information, inside information, about Earth First. I can set Judi Bari up to be busted for selling marijuana through the mail. I can show you what—with this picture—they're doing weapons training and planning violent terrorist acts. And that was written up in the newspaper when the bomb went out in Oakland. The police chief sent out copies of that picture to the police agency in the area. This might be of interest.

It got into the newspaper, and the story about the letter from this person who wanted to be an informant. And this is another letter in the case, a mystery letter. He said if you want to get in touch with me, put an ad in the paper for Argus. That was his signature, Argus. And they never went to get the letter and see what they could find out about the letter. They never went to get the photograph that the police chief had received.

And the letter—there was a letter came in an envelope, and there was another envelope from one of the threats that had come to Judi. And you look at these two envelopes and see the ad, the typing, addresses are exactly the same. There's a strange double space between the name and address and city, and both the same. They never bothered to look at that. They didn't want to know. They definitely didn't want to solve the crime against Judi and Darryl. They wanted to get the slander going.

§IX.15 III. CONCLUSION

You're going to hear from the defense that they made a reasonable response to the events that happened, and that they may have made mistakes or may have been off in their assessments or may have not gathered all the information that was available to them. But that they—these are reasonable mistakes. This was just miscalculations. They were in good faith. They weren't out to get Judi and Darryl in any way, or Earth First. They'll tell you: We're environmentalists. We believe in protecting the environment. We have the same views. We wouldn't do that.

They did do it. You'll see from the evidence that those explanations are hollow. They'll tell you we don't investigate groups like Earth First. We investigate crimes and individuals who may be involved in crime. You'll see they were out to get Earth First, smear Earth First, disrupt Earth First. They were out to neutralize activities. They were out to make sure people had a view of them of—dangerous terrorists.

You'll see the irony of it. Judi, who was insisting on nonviolence, who was involved in a pretty heavy debate within the Earth First circles in the larger world. It was clear, Earth First group in Northern California was committed to this in connection with Redwood Summer, and specifically they publicized it—this is—first it was called Mississippi Summer in the redwoods and changed it to Redwood Summer.

They evoked the civil rights movement specifically for the nonviolence. She was the one they picked to brand as a terrorist. She was the one they targeted because she had a big mouth, and she was effective, and she moved people. And you'll see that she moved the people she was working with to work hard and great dedication and believe in the cause. She moved people she spoke to and she moved people. It would have an effect.

That's why they struck at her. That is what they struck at, the bombers struck at them. And then the law enforcement struck at them. When they didn't die, when she didn't die, then she was—it was character assassination. And that is not allowed in our society, in our country under our constitution.

We don't let the police do that sort of thing here. We don't let the police meddle in politics here. We don't let the police get out and disrupt the activities of the people who are critical of the government, or critical of the system, and want to change, and who are active about it, and who get into people's face, and who are willing to sit in the road, climb a tree, just like the civil-righters would sit in at the lunch counter, ride the freedom rides on the buses.

We can't allow the police to respond that way. They can lock them up for sitting in the road. They can investigate them for any crime that's committed. Power lines went down; that's a legitimate investigation. But to use that investigation as a pretense to stir up a whole broad charge and a branding, smearing of this movement the way they did after this bombing, is not permitted. It's against the Constitution, violates the Bill of Rights, violates the First Amendment.

That's the judgment that we're asking you to make here. I'm quite sure after you see all this evidence over the next few weeks, hear the witnesses testifying, hear from the defendants trying to justify what they did, you'll conclude there is no doubt that's what they did. That's why they did it. That's what they were doing when they faked up this case and framed these people, put it all on the news and the headlines, scare everybody about the—turn people against them.

You bring back a judgment. You bring back a judgment for money damages. That's the way our system works in a civil case. That's the remedy the law provides, an award of money damages to compensate Judi and Darryl, Judi's estate, for the loss that they sustained, for the injury to them, the injury to their First Amendment interest, the things they were trying to promote, the way they were trying to do it, the ideas of change that they were trying to get people to open their minds to, and things of—about the ideas about stopping the destruction of the environment and controlling the practices of the corporations that are so destructive to the environment they were fighting for, they dedicated their lives to.

You'll see they are good people, not by any stretch of imagine—anyone to be perceived as terrorists. That's the judgment we're asking you to make. That's the conclusion that we believe you'll have to draw from the evidence in the case. And we're going to ask you for punitive damages, which are separate awards, separate type of damages from the compensation for the loss and to the injury, and as damages sometimes called exemplary. You make an example out of the officers to let everybody else know this kind of conduct won't be tolerated, some kind of activity which violates people[s] rights with this purpose. This negation of democratic free expression and self-rule will not be tolerated.

I'm going to ask you for both those things in the case, money to compensate for a great loss and money that makes an example out of officers for causing the problems. I believe you'll see quite clearly when you sit to deliberate; the facts will be plain, that what happened is all I've told you happened. And you'll return judgment for the plaintiffs.

I thank you for your attention this morning. I see I've talked most of the day. And we're going to go home, probably go home, and you'll hear from them tomorrow. And then we'll go on with the evidence. I thank you for your attention to that as well.

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Update/Selected Developments

Selected Developments

Since Last Update: A prosecutor's references to the Bible during closing argument did not constitute reversible error. *People v Hughes* (2002) 27 C4th 287, 390, 116 CR2d 401. See Update §3.2.

Crime-scene and autopsy photographs may be used in a prosecutor's closing argument in a criminal penalty phase proceeding under certain circumstances. *People v Anderson* (2001) 25 C4th 543, 593, 106 CR2d 575. See Update §3.3.

A prosecutor's argument, inviting the jury to reflect on all that the victim had lost through her death, was an appeal for sympathy for the victim, and therefore was improper at the guilt phase of a capital trial. *People v Kipp* (2001) 26 C4th 1100, 1130, 113 CR2d 27. See Update §3.7.

Additionally, a prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand. *People v Hughes* (2002) 27 C4th 287, 371, 116 CR2d 401. See Update §3.8.

A prosecutor's introduction as evidence during trial of defendant's incriminating, postarrest, unMirandized statement to police was reversible error. *People v Cleland* (2003) 109 CA4th 121, 134 CR2d 479. See Update §3.8. A trial court committed error when it allowed the prosecutor to reopen and offer rebuttal evidence in the middle of closing argument without giving defendant an opportunity to offer surrebuttal. *People v Cuccia* (2002) 97 CA4th 785, 792, 118 CR2d 668. See Update §3.9.

A prosecutor's remarks during closing argument would be understood by the jury as an admonition not to be misled by the defense interpretation of the evidence, rather than as a personal attack on defense counsel; thus, there is no reasonable likelihood that the jury was improperly influenced by the prosecutor's remarks. *People v Cunningham* (2001) 25 C4th 926, 108 CR2d 291. See Update §3.11.

In a New York decision, defendant's conviction was reversed for prejudicial error after the prosecutor repeatedly told the jury in closing argument that defendant had lied. *People v Goldstein* (2003) 2003 NYS Misc Lexis 980. See Update §3.11.

Several defendants in criminal trials have argued unsuccessfully that the brevity of their counsel's closing argument consisted of inadequate representation. See *People v Lewis* (2001) 25 C4th 610, 674, 106 CR2d 629; *People v Weaver* (2001) 26 C4th 876, 979, 111 CR2d 2, discussed in Update §3.13A.

Another prosecutor arguably misstated the law during closing argument, but the error amounted to prosecutorial misconduct during argument, rather than trial and resolution of the case on an improper legal basis. *People v Morales* (2001) 25 C4th 34, 43, 104 CR2d 582. See Update §3.15.

In 2002, we added the opening statement of Dennis Cunningham in *Judi Bari v FBI*, a lawsuit in the Northern District of California that alleged that the FBI had violated plaintiffs' constitutional rights. See Appendix, Part IX.

Since the Book's Publication. We conduct thorough reviews of the relevant law each year. With the exceptions noted in this update, there have been no significant developments in that law since the book was published.

For a case in which a nonsuit after the opening statement was reversed on appeal, see *Galanek v Wismar* (1999) 68 CA4th 1417, 81 CR2d 236. See Update §2.4.

For an example of a nonsuit after the opening statement that was upheld by the California Supreme Court, see *Hoff v Vacaville Unified Sch. Dist.* (1998) 19 C4th 925, 80 CR2d 811; Update §2.4. There is new discussion of focus groups and mock trials in Update §§2.6A-2.6C. We have also added discussion of the use of computers in keeping the judge and jury interested in your opening statement and closing argument. See Update §§2.17A-2.17H.

A prosecutor does not commit misconduct in an opening statement by offering a "social history" of the victim. *People v Millwee* (1998) 18 C4th 96, 74 CR2d 418. See Update §3.7.

An otherwise proper opening statement does not become objectionable because it is delivered with dramatic language in a manner meant to hold the jurors' attention. *People v Dennis* (1998) 17 C4th 468, 71 CR2d 680. See Update §3.7.

Brief comments by the prosecutor during closing argument noting the absence of evidence contradicting prosecution evidence on several points do not constitute misconduct when the comments could not fairly be interpreted as referring to the defendant's failure to testify. *People v Bradford* (1997) 15 C4th 1229, 65 CR2d 145. See Update §3.8.

Commenting on a criminal defendant's invoking his or her right not to testify is misconduct that, along with the commenter's other misconduct, justifies a new trial for that defendant, even though the offending party is the attorney for a codefendant and not the prosecutor. *People v Estrada* (1998) 63 CA4th 1090, 75 CR2d 17. See Update §3.8.

A prosecutor's continually emphasizing in closing argument that another party has cooperated with police and has testified but the defendant has not cooperated is improper and requires reversal. *People v Guzman* (2000) 80 CA4th 1282, 96 CR2d 87. See Update §3.8.

A prosecutor does not engage in misconduct in an opening statement by characterizing as obsessive the defendant's interest in using a plastic tie as a method of killing when the prosecutor simply overstates the extent of that interest as described by subsequent testimony. *People v Coddington* (2000) 23 C4th 529, 587, 97 CR2d 528. See Update §3.9.

A prosecutor engages in misconduct in a closing statement when he or she implies that the uncalled witness (a police officer) would have corroborated another police officer's testimony on the defendant's alleged possession of a controlled substance. *People v Hall* (2000) 82 CA4th 813, 817, 98 CR2d 527. See Update §3.9.

When the trial court does not admit evidence for a limited purpose, the prosecutor may use the evidence in her or his closing argument for any legally permissible purpose. *People v Lucero* (2000) 23 C4th 692, 719, 97 CR2d 871. See Update §3.12.

When defense counsel does not object to any of the prosecutorial comments that purportedly constitutes prejudicial misconduct, the defendant's claim for prosecutorial misconduct is waived. *People v Frye* (1998) 18 C4th 894, 77 CR2d 25; see *People v Lewis* (2001) 25 C4th 610, 669, 106 CR2d 629. See Update §3.15.

When, in an opening statement, a prosecutor wrongly attributes a motive to a defendant's change in appearance, the conduct is not prejudicial if the jury was admonished that the opening statement was not evidence and if the defendant had an opportunity to confront all witnesses and to challenge and rebut the evidence. *People v Cunningham* (2001) 25 C4th 926, 108 CR2d 291. See Update §3.15.

Since publication, we have added several opening statements and closing arguments to the Appendix. In 1990, we presented the winning closing argument made by Joseph W. Cotchett, one of the authors of the book, in the liability phase of a multimillion-dollar securities fraud case. Added in 1991 was his argument for punitive damages in the penalty phase of that same trial.

In 1992, we arranged to publish the winning closing argument of Frank Rothman, the coauthor of the book, in the liability phase of a multimillion-dollar case involving claims under an alleged oral law partnership agreement. In the 1993 update, we published his closing argument to the court in a major antitrust case. In 1994 we published the winning opening statement made by Joseph W. Cotchett in a multimillion-dollar fraud class action against a failed savings and loan association and its professional advisers. In 1996, we published an opening statement by Frank Rothman in a multimillion-dollar antitrust case that settled following a mistrial. In 1997, we presented his closing argument in that same case.

In 2001, we added the opening statement of David Boies, arguing for the Department of Justice, in the government's antitrust case against Microsoft. See Appendix, Part VIII.

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