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1 REPORTER'S RECORD
2 VOLUME 1 OF 1 VOLUME
3 TRIAL COURT CAUSE NO. 4-9557
4 LANCE ARMSTRONG AND * IN THE DISTRICT COURT
TAILWIND SPORTS, INC. *
5 VS. * DALLAS COUNTY, TEXAS
6 SCA PROMOTIONS, INC. * 298TH JUDICIAL DISTRICT
7
8
9 *****
10 HEARING
11 FOURTH SUPPLEMENTAL MOTION TO
APPOINT ARBITRATOR AND MOTION
TO STRIKE DEFENDANT'S ARBITRATOR

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19 BE IT REMEMBERED that on the 20th day
20 of December, 2004, the above-styled and -numbered
21 cause came on for hearing before the HONORABLE ADOLF
22 CANALES, Judge of the 298th District Court of Dallas
23 County, Texas.
24 Proceedings reported by machine
25 shorthand.

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1 PROCEEDINGS
2 (In open court)
3 THE COURT: Cause Number 4-9557, Lance
4 Armstrong and Tailwind Sports, Inc. versus SCA
5 Promotions, Inc. If you would state your name and
6 who you represent.
7 MR. HERMAN: Your Honor, my name is Tim
8 Herman and I represent the Movant, Lance Armstrong
9 and Tailwind Sports, along with Ms. Lisa Blue of
10 Baron & Budd.
11 MS. BLUE: Good afternoon, Your Honor.
12 MR. LYNN: Mike Lynn along with Jeff
13 Tillotson representing SCA.
14 THE COURT: You may proceed.
15 MR. HERMAN: Your Honor, it's our
16 motion. And what we have before the Court this
17 afternoon is the claimant's Fourth Supplemental
18 Motion to Appoint Arbitrator and Motion to Strike
19 Defendant's Arbitrator. This motion -- or motion as
20 a combined one, contains both a request that the
21 Court appoint the third arbitrator in this matter;
22 and at the same time we're moving to strike the
23 appointment of a Monsieur Montbrial who was appointed
24 by SCA as its proposed arbitrator in this matter.
25 As the Court may recall, Your Honor,

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1 this case arises out of a contract between SCA
2 Promotions, Inc., and the predecessor and interest of
3 Tailwind Sport's, Inc., which was executed back in
4 2001.
5 That contract provided that should
6 Mr. Armstrong win the 2001 and 2002 Tour de France
7 bicycle race that SCA would pay Tailwind and
8 Mr. Armstrong implicitly the sum of one and a half
9 million dollars.
10 If Mr. Armstrong were to win the 2003
11 race, they were to pay three million dollars.
12 In 2002 and 2003 SCA, pursuant to the
13 very explicit terms of the contract which require
14 only that Tailwind be obligated to pay those bonuses,
15 which it is undisputed they are, and that
16 Mr. Armstrong satisfied the only condition precedent
17 in the contract, which was to win the sporting events
18 in which he competed, then SCA was to pay. And, of
19 course, they did that in 2002 and 2003.
20 In 2004 the contract also provided
21 should Mr. Armstrong win the 2004 race, they were to
22 pay five million dollars, which they have refused to
23 do. That payment was due on or about September 1,
24 2004.
25 As the Court will recall, we filed a

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1 motion under the Texas Arbitration Act to request the
2 Court to appoint an arbitrator or arbitrators, which
3 is authorized under Chapter 171 of the Civil Practice
4 and Remedies Code, because the contract at issue
5 states only that a dispute will be subject to
6 arbitration in Dallas County, Texas with no mention
7 of the number of arbitrators or how they are to be
8 chosen.

9 Subsequent to our instituting this case
10 in Your Honor's court, the parties have agreed to
11 each appoint an arbitrator and for those two to
12 select the third arbitrator or, failing that, the
13 Court to appoint the third arbitrator.

14 The case that will be -- that will be
15 adjudicated with the arbitration panel is -- contains
16 several different claims, one of which is a breach of
17 contract claim, Deceptive Trade Practice Act claim,
18 violation of 2121 of the Insurance Code and other
19 tort or contort type claims all involving Texas law,
20 Texas defendant, Texas claimant, Texas contract.

21 In -- early on after the oral agreement
22 that we entered into to name these arbitrators, we,
23 the claimants, appointed Mr. Ted Lyon, who -- I don't
24 know. But if the Court is not familiar with
25 Mr. Lyon, he served for -- had a distinguished career

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1 in the Texas Senate. He is a highly qualified lawyer
2 with impeccable credentials both professionally and
3 for integrity. No relationship between Mr. Lyon and
4 myself or my firm, Mr. Lyon and Mr. Armstrong,
5 Mr. Lyon and Ms. Blue or anyone else. So -- and I
6 don't think there has been a suggestion then or is
7 there one now that Mr. Lyon is in any way predisposed
8 to prejudice or has any conflict of interest at all
9 involved in this matter.

10 Now, the defendants did not appoint
11 their arbitrator for some period of time. We had a
12 hearing before the Court, as the Court will recall,
13 back in October at which time the Court ordered the
14 defendants to appoint their arbitrator within two
15 weeks. And I'm going to say more or less on November
16 1 they did that.

17 They appointed a gentleman named -- I
18 think it's pronounced Thibault De Montbrial, but I'm
19 not going to swear to that presumption being correct,
20 so I'm going to refer to him as Mr. Montbrial.

21 They appointed Mr. Montbrial, who is a
22 French national, to my knowledge not licensed to
23 practice law in Texas. He is -- at least at this
24 point there has been no demonstration that he has any
25 understanding of Texas contract law.

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1 But that's not the big problem, Your
2 Honor. The big problem is that -- I guess it was
3 about 18 months ago a gentleman by the name of David
4 Walsh published a scurrilous book which has not been
5 able to secure publication in either the U.K. or the
6 United States, as far as I know. But in any event
7 there are lawsuits pending in Europe -- one in the
8 U.K. and one in France -- where Mr. Armstrong is the
9 Plaintiff and is suing Mr. Walsh and his publishers
10 et cetera, for defamation, for slander, for liable.
11 And it is a very sizeable sum, indeed, that is at
12 stake in the outcome of that litigation.

13 Mr. Montbrial is the attorney of record
14 for the defendants in that French case. There is --
15 we have proof of that available, but I don't think
16 it's disputed. Everyone agrees that he's not only
17 not impartial, he's not only not prejudiced, he is
18 the attorney of record for a party adverse to
19 Mr. Armstrong in ongoing litigation with serious
20 potential economic consequences.

21 So we say, Your Honor, that
22 Mr. Montbrial is not qualified to serve and should be
23 stricken as an arbitrator in this matter. And if the
24 Court please, I would like to present our position on
25 why he should not -- why he should be stricken. And

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1 Ms. Blue, with the Court's indulgence, will present
2 our presentation on the arbitrator, which we believe
3 would be suitable for the third appointment, if
4 that's all right with the Court.

5 THE COURT: That's fine.

6 MR. HERMAN: Now --

7 MR. LYNN: Excuse me, Your Honor. Is
8 that the end of the opening and they're going into
9 presentations? Do you want us to open at this
10 juncture or --

11 MR. HERMAN: I'm just going to argue,
12 Your Honor. It's my motion.

13 MR. LYNN: Your Honor, it's obviously
14 up to you. But generally when we're in here, as I
15 recollect, we always have an opening and then there
16 is a presentation. Obviously, Your Honor, do as you
17 feel absolutely fit; but I would like to open if at
18 all possible.

19 MR. HERMAN: Well, Your Honor, the only
20 evidence that we would propose to put on is a
21 pleading confirming that Mr. Montbrial's -- the
22 status as attorney for the parties that I've
23 mentioned. So that's not much evidentiary hearing;
24 but we're in your courtroom, Your Honor.

25 THE COURT: I'll listen to him. Go

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1 ahead.
2 MR. LYNN: Thank you, Your Honor.
3 Your Honor, the actual merits of this
4 case we disagree with entirely. We think that they
5 are going to be a number of defenses that will be
6 raised once we're joined in arbitration with respect
7 to the fact that the Tour de France 2004 very well
8 may have had influences and Mr. Armstrong may have
9 had influences related to that race that would
10 basically create a situation where there is a
11 material breach of the agreement and relieve us of
12 responsibility.
13 I don't want to necessarily get in on
14 the record what it is we're going to allege because
15 of arbitration. Hopefully a lot of that stuff is
16 relatively confidential. But, Your Honor, in July of
17 2004 there was a book that came out. We obviously
18 have copies of it in preparation for our case. And
19 that book does discuss a number of witnesses,
20 eyewitnesses as well as others, who can
21 circumstantially show that a lot of what occurred in
22 the race of 2004 was not according to the rules of
23 the Tour de France.
24 In particular I think that there will
25 be a number of people who actually were either in

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1 discussions with Lance Armstrong earlier in his
2 career, there will be those who administered to him a
3 variety of services while he was riding; and those
4 people we have been in touch with either directly or
5 through representatives. And, of course, that is
6 what the case will ultimately be about when we go to
7 the merits. And so we don't at all believe that this
8 is the kind of case that will be open and shut
9 whatsoever. We have been diligently investigating
10 those facts. And if we get into it, we'll go ahead
11 and -- have to demonstrate those to Your Honor in
12 open court, we'll do that; but I would rather not do
13 that if we don't have to.
14 But let me go through what we have
15 done. We have followed every rule that we can. And
16 the only reason we're not in arbitration right now
17 and we have not gotten to the point where we can make
18 these allegations we wish to make and resolve them in
19 a manner that is legal and justifiable is because of
20 Mr. Armstrong and his lawyers. The situation is
21 this: You ordered us to come up with someone on
22 November 1, and we did. And Mr. Tillotson will go
23 through his credentials in just a moment and why he
24 is exactly the right person we need at this time.
25 Number 2, as to the neutral they

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1 proposed Harlan Martin. It was their proposal. We
2 exceeded to that and said that's fine; we'll go with
3 Harlan Martin if that's what you want.
4 We suggested as the second that if
5 Harlan Martin for some reason couldn't serve that we
6 go to Jay Madrid. We also proposed Earl Hail. So we
7 proposed three people who we thought could be
8 neutrals in this case. Jay Madrid would follow
9 theirs; and apparently Harlan Martin decided not to
10 because he has relationships with some of the people
11 at SCA or -- I remember earlier that they've had
12 discussions with him. I don't know what the real
13 reason is. But Jay Madrid is the neutral that we
14 have suggested that we went over with them; that I
15 thought we had a deal on. And apparently we didn't
16 have a deal on, because I received a letter saying we
17 didn't have a deal on him. I don't want to
18 misrepresent it.
19 And Jay Madrid has said that he has no
20 conflict and he would be willing to serve as the
21 neutral.
22 Now, as to Ted Lyon, we have said we
23 don't have any objection. He is a party appointed
24 arbitrator. We have our right to appoint a party
25 appointed arbitrator.

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1 Now, we have provided a brief to Your
2 Honor. And what I would like to do is, if I could,
3 direct you to the third page of that. While we're
4 not governed by the AAA here, I think this is
5 indicative of the kind of case law that we've been
6 able to find out there, and I thought it might be
7 helpful to the Court.
8 Party arbitrators -- do you have a copy
9 of that brief up there, Your Honor?
10 THE COURT: I was just going to let you
11 make an opening statement first, a brief opening
12 statement, and then we'll continue.
13 MR. LYNN: I'll continue then, Your
14 Honor. If you look at the third page of the brief
15 and the fourth page, which you'll see --
16 THE COURT: I'll get to that in a
17 second.
18 MR. LYNN: AAA has basically said --
19 and this will be our position with Montbrial -- that
20 they're party appointed arbitrators; they're
21 advocates and we can appoint whoever we wish.
22 As to the qualifications of
23 Mr. Montbrial, Mr. Montbrial is a man who is steeped
24 in the history of the Tour de France. He knows the
25 rules of the Tour de France. He knows the issues

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1 related to drugging in the Tour de France. He is a
2 man who has enormous amounts of expertise in this
3 particular area and that he can bring to bear on the
4 facts of this case.

5 So while we have Texas lawyers, I think
6 that the factual portion of this case and the one
7 that's going to be central to the arbitrators is
8 something that we tried to bring in here. So we went
9 out and we found a guy, one who is a lawyer in
10 France; and we will be pleased to present his
11 qualifications when we're given an opportunity.
12 Thank you, Your Honor.

13 THE COURT: Mr. Herman.

14 MR. HERMAN: Yes, Your Honor. Your
15 Honor, clearly under the Arbitration Act -- I don't
16 think it's at issue here -- the Court has the
17 authority and the responsibility to appoint -- it
18 doesn't say only this arbitrator or only that
19 arbitrator, but the Court has the authority to
20 appoint arbitrators under the provisions of the
21 Arbitration Act.

22 Now, as I mentioned before, Your Honor,
23 we orally agreed that we would appoint one and they
24 would appoint one.

25 But, Your Honor, the fundamental issue

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1 here is the alternative or alternative dispute
2 resolution process. Arbitration carries with it the
3 same sort of safeguards of due process that are
4 available and guaranteed by this Court and by all
5 tribunals.

6 Now, the fundamental and the minimum
7 demands of due process, Your Honor, are effective
8 notice, a meaningful right to be heard, and an
9 impartial tribunal. Those are the three fundamental
10 guarantees of due process as articulated by the
11 United States Supreme Court on numerous cases.

12 The Federal Arbitration Act, Your
13 Honor, can be argued -- and the Supreme Court has
14 held this -- that the Federal Arbitration Act trumps
15 the Texas act when you're talking about commercial
16 disputes that affect interstate commerce. I'm not
17 necessarily going to argue that that is necessarily
18 the law here, but it's instructive, Your Honor.

19 Because if you look at the Federal
20 Arbitration Act, which is codified at 9 USC 1 and
21 thereafter, particularly Section 10, it talks about
22 the requirement of impartiality.

23 And more importantly, Your Honor, for
24 this case the ability to sustain an award that came
25 out of an arbitration where -- this is beyond the

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1 pate, Your Honor. It would be as if I went to my law
2 partner and asked him to serve as our independent --
3 our appointed arbitrator in this matter where he has
4 a clear conflict of interest. He has a clear
5 economic or pecuniary interest in the outcome where
6 the issues that Mr. Lynn claims will be raised, which
7 I vehemently disagree with. But we're not here on
8 the merits, Your Honor, so I'm not going to get into
9 it. But where he has a predisposition, where his
10 whole role is to assert or approve in another
11 proceeding exactly what Mr. Lynn's client's burden is
12 to prove in this proceeding.

13 Now, the impartiality provisions of the
14 Federal Arbitration Act have been strictly construed
15 by the United States Supreme Court. For example, in
16 Commonwealth Coating, the Continental Casualty which
17 is found at 393 US 145, the Court not only attacked
18 the employee and imposed the impartiality requirement
19 but talked further of the appearance of
20 impartiality.

21 Now, there are a lot of reasons, Your
22 Honor, that Mr. Montbrial should be stricken. They
23 have been articulated by the United States Supreme
24 Court, the objectives of arbitration. The first is
25 accuracy.

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1 Mr. Montbrial will be called upon to
2 draw inferences or conclusions. And if you can --
3 I'm not directly analogizing, Your Honor; but if you
4 have a member of a jury panel out there in response
5 to a question that says, well, yes, I am suing the
6 Plaintiff in another matter, certainly you wouldn't
7 have to go any further about the impropriety of
8 seating such a juror in a case.

9 The second focus or the second element
10 is fairness of outcome. And as the Court
11 understands, you can't have fairness of outcome
12 unless you have fairness of process. Because no
13 matter how a case turns out, somebody is going to be
14 unhappy. Somebody is going to think it's not fair.
15 So the only way to ensure fairness is to ensure that
16 there is fairness in the process employed, fairness
17 in the impartiality of the tribunal.

18 It also should be efficient. The
19 efficiency of this proceeding is dramatically
20 impaired by Mr. Montbrial. He lives in France. He's
21 engaged in litigation with this very Plaintiff in
22 France. The ability of us to carry through this
23 arbitration in a prompt, fair and efficient manner
24 with a minimum of expense in both money, personnel
25 and other resources is greatly hindered by his

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1 presence. He doesn't possess the necessary
2 qualifications. This is a contract case. This is a
3 contract case with the overtones of bad faith, which
4 you would almost be entitled to a directed verdict if
5 you were alleging bad faith and seeing the insured
6 here appoint a lawyer who is opposite, actively a
7 claimant or an insured, and appoint that lawyer to
8 adjudicate the coverage and the entitlement to the
9 benefits under the policy, which is precisely what
10 they're doing here.
11 Plus, Your Honor, it's very important
12 for the public to have faith in the alternative
13 dispute resolution process.
14 For this defendant to appoint someone
15 who is directly in an ongoing basis, hostile toward a
16 claimant in an arbitration proceeding, Your Honor,
17 sends a message not just to Mr. Armstrong but to the
18 public that this sort of alternative dispute
19 resolution which has been endorsed as a favorable and
20 favored public policy of our state and by all the
21 Courts of our state and by the Legislature is not to
22 be trusted. And we submit, Your Honor, that that is
23 a very serious consideration.
24 Now, let me just address briefly -- and
25 I'm thankful that Mr. Lynn included it in his brief.

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1 On page 3 of Mr. Lynn's brief he talks about the
2 rules of the -- the Commercial Arbitration Rules of
3 the American Arbitration Association which existed
4 prior to July 1, 2003. And he's quoted those with
5 some authority.
6 But fortunately I have handed the Court
7 the excerpts of the rules from the Commercial Section
8 of the Commercial Dispute Section of the American
9 Arbitration Association which are actually in force
10 today, which is December 20, 2004.
11 If you'll notice, Your Honor, there are
12 provisions in R, hyphen, 12 there for the direct
13 appointment by a party of a party arbitrator, which
14 we have done in this case.
15 Now, if you will look over, Your Honor,
16 to R-17, which appears on -- I think it's page 11 of
17 12, it says any "arbitrator," not the third
18 arbitrator. It says, Any arbitrator shall be
19 impartial and independent and shall perform his or
20 her duties with diligence and in good faith and shall
21 be subject to disqualification for partiality or lack
22 of independence, inability or refusal to perform his
23 or her duties with diligence and a good faith any
24 grounds for disqualification provided by applicable
25 law.

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1 There is a provision that the parties
2 may agree in writing that arbitrators appointed by
3 the parties do not have to be neutral and subject to
4 disqualification. But we never agreed to that, Your
5 Honor. And we submit, really in summary, that what
6 SCA has done here goes so far beyond the pale of what
7 is appropriate in this sort of dispute resolution
8 that the Court must step in to preserve the
9 credibility and integrity of the process.
10 We're not telling them who to appoint
11 or asking the Court to tell them who to appoint.
12 We're only asking the Court to say you've gone too
13 far. You cannot select someone who is so biased and
14 so tainted that it destroys or severely impairs the
15 credibility or trustworthiness of the process. So,
16 yes, I would expect SCA to select an arbitrator that
17 they may feel has a background that would be more
18 favorable than less favorable. And I would expect
19 them -- both of us to appoint arbitrators like that.
20 But to come out of left field with such
21 an unfair and prejudicial and such blatant bad faith,
22 Your Honor, we submit that this is precisely the sort
23 of condition or situation of which the Court must
24 impose or intervene.
25 Now, Mr. -- I'm not going to address

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1 anything Mr. Lynn said except one thing. He knows
2 that I never agreed the way he claims I did. He
3 knows it and he's misrepresented that to the Court.
4 So I just want to make that clear that we never had
5 an agreement.
6 Now, Ms. Blue can address the neutral
7 arbitrator or however you want to do it.
8 MS. BLUE: I would like to add just a
9 little bit to this argument.
10 May it please the Court. Your Honor,
11 obviously this is very, very important, these two
12 motions, especially to Mr. Armstrong and the
13 mediation. But let me just add to what Mr. Herman
14 said because of how important it is.
15 Discovery in France is very, very
16 different than what occurs in the United States. And
17 what I want you to do, Your Honor, is just think
18 about, if the French attorney is allowed to be a
19 mediator in this case, what it's going to look like.
20 Because if the French mediator is part
21 of the three-person panel, first of all he's going to
22 be asking questions that are totally improper. This
23 is a contract case. SCA paid Mr. Armstrong the last
24 two years. They didn't want to pay him this year.
25 But it's going to get ugly. There's

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1 going to be objections. And it is so beyond the
2 bounds of what anybody could consider fair and
3 impartial. And what I think has happened, Judge
4 Canales, I will tell you more than anything what my
5 client Mr. Armstrong wants is for this to be over,
6 for the mediation to happen. And I think it really
7 is just a process of slowing the whole process down.

8 But based on their theory, it doesn't
9 matter if this guy is the King of France. It would
10 be the same as putting an ex spouse who was a lawyer
11 -- because you would say, well, they're a lawyer and
12 they should be able to be an arbitrator.

13 This lawyer from France is totally
14 adverse, and there is nothing saying that if whatever
15 questions he may ask during the arbitration he's not
16 going to try and use in the case in France. So this
17 is a lose/lose situation, and it is certainly
18 important to my client that the French lawyer be
19 stricken.

20 And in addition to what we're asking,
21 for the Court to strike Montbrial, we're asking for
22 the Court to have the opponent pick another
23 arbitrator within three days. So that's what we're
24 asking the Court to do.

25 MR. TILLOTSON: Your Honor, may we

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1 respond to that particular issue? And Mr. Lynn will
2 respond to the appointment of the neutral, if I
3 could. First let me directly address on the
4 allegations made by Ms. Blue. One of the reasons
5 they don't like the appointment of our arbitrator is
6 because he has specific expertise in the subject
7 matters that we're going to arbitrate. He is a
8 French lawyer. He's about 40 years old. He made his
9 name as a criminal trial lawyer in France. He
10 handled the first cycling doping case, the Festina
11 case, back in 1998 and 2000 time period where he
12 represented the manager of the team.

13 Through that representation he learned
14 about the world of professional cycling, how it
15 worked. He became an expert in the rules of not only
16 the Tour de France but of cycling and the UCI. And
17 he knows a lot about the subject matter which is
18 going to be involved in our arbitration.

19 Now, when we went looking for someone
20 and we telegraphed the Court back at our hearing that
21 we were looking outside the United States, the reason
22 was is that we wanted someone who had firsthand
23 expertise in the subject matter that's the dispute;
24 cycling, whether or not the rules were complied with,
25 what those rules were and how they worked.

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1 Because one of the issues in our case
2 is, is that our contract incorporates those rules
3 into the contract meaning that there has to be
4 compliance with the cycling rules of the Tour de
5 France and the contest and the UCI rules. So it made
6 sense to us to find someone who is an expert in those
7 rules.

8 There are not many people in the United
9 States, as the Court may not be surprised, that have
10 that expertise. And there is even fewer lawyers in
11 the U.S., if any, that we could find that had the
12 expertise in the cycling world. That's why we picked
13 this man.

14 It's interesting they are so fearful of
15 him, because this man made his career representing
16 professional cyclists against many of the same
17 allegations that they've raised here. So he has
18 knowledge about that, and that's why we picked him.

19 We also picked him for another reason.
20 I'll just be blunt with the Court. Is that we wanted
21 someone who was not intimidated or in any other way
22 influenced by the star quality of the other side. We
23 wanted someone outside the U.S., someone who would
24 not in any way be bashful about hearing evidence and
25 making the right calls and raising issues. We wanted

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1 someone far outside the influence of our state given
2 that nature. That's why we picked the individual.
3 Let me address two allegations that
4 they alleged about him. First is that somehow this
5 is an effort by our party appointed arbitrator to
6 gather evidence he could use in France. That's just
7 simply not true. And the reason is French procedural
8 law, not U.S. law. In France when a case for
9 defamation is filed, the defendant has ten days to
10 file his list of witnesses and evidence. And that
11 was filed when this -- the defamation case -- which
12 I'll talk about in a second -- was filed a long time
13 ago. Therefore, anything that our party appointed
14 arbitrator hears or gathers is simply not going to be
15 admissible or usable in France, because in effect his
16 evidence is already cemented in stone. So this is
17 not some effort by him to get evidence that he could
18 use in France, because it is simply not permitted by
19 their procedural rules. And this is not a point of
20 this. It doesn't help us, our client, to allow our
21 party to pick someone that is going to help in an
22 unrelated lawsuit. That was not our intent.

23 Second is that there is somehow a
24 conflict of interest. Our party appointed
25 arbitrator, when this book came out called LA

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1 Confidential that was published in France, there was
2 an initial lawsuit filed by Mr. Armstrong. The
3 initial lawsuit, as I understand it, was an effort to
4 require some statements to be put in the book. In
5 effect, a defamation case under French law was
6 filed.

7 The book, one, prevailed.
8 Mr. Armstrong appealed and the book won again on
9 appeal. And that case has since ended.

10 A second defamation case was filed
11 against the publisher, the writers and some of the
12 people who gave statements. At least one of those
13 cases in the United Kingdom, as I understand it; and
14 our party appointed arbitrator is not involved in any
15 of that.

16 What our party appointed arbitrator has
17 been involved in is he has filed an appearance on
18 behalf of the publisher and one of the writers of the
19 book in France.

20 Now, here's the scheduling of that.

21 That case was filed. It's a defamation case under
22 French law, which is different from the United States
23 law. That case, the first preliminary hearing on
24 that case will be held in December of 2005, a year
25 from now, long after arbitration is over. It is

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1 likely then that the trial in France will be held in
2 the summer of 2006, long after these proceedings are
3 over.

4 The reason for that long delay, as I
5 understand it, is because Mr. Armstrong has sued
6 people who are not residents of France including one
7 person who resides apparently in New Zealand. And in
8 France you calculate out the time of the lawsuit,
9 depending upon how far the people are away. So those
10 proceedings are not active. It is unclear if our
11 party appointed arbitrator is even going to be the
12 lawyer when these trials are had. And when those
13 trials are had the issues presented relate to French
14 defamation law and are not the issues in our
15 arbitration. They involve what the authors had in
16 their head when they wrote this specific book and
17 involved not our contract or the specific issues that
18 we'll bring to the Court.

19 Now, that's the background on the
20 arbitrator and that's why we chose him. It wasn't an
21 effort to vex the other side to cause them grief. It
22 wasn't an effort to delay the process. If they had
23 agreed to Mr. Madrid as arbitrator, we would have
24 already been well on our way towards arbitrating. It
25 was an effort to find someone outside of Texas,

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1 outside the influence of their client. And I mean
2 that in the broadest sense, not in any mean sense.

3 And to find someone that had expertise
4 in an area that Mr. Lynn and I and frankly our client
5 don't have much expertise in; professional cycling
6 and those rules.

7 Now, here's the standard to be employed
8 by Your Honor in evaluating whether our party
9 appointed arbitrator should be struck or not.

10 First, Your Honor, we are under the
11 Texas Arbitration Act, not the Federal Arbitration
12 Act. The reason we are is because our contract says
13 we will be bound by the TAA. So that's the governing
14 law.

15 Secondly, the only way that the Texas
16 Arbitration Law allows Your Honor to step in and
17 appoint an arbitrator is under Section 171. And, for
18 short, there is really two requirements. One is --
19 well, there are several but the only two that really
20 would apply is, one is, is where the agreed method
21 has failed or there is no agreed method.

22 Now, our contract doesn't specify how
23 to pick the arbitrators. But, as Mr. Herman said,
24 the parties agreed on a method. Each side would
25 appoint their own person, and then their third, or

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1 neutral, would be appointed. That's the agreed
2 method, and that method has not failed.

3 The parties have both thrown out names,
4 and both appointed arbitrators, and no one is here in
5 front of you saying we just simply can't get this
6 on. So we haven't got to the procedural safeguard
7 that the statute lays out.

8 But, second, there are two methods by
9 which you can have an arbitration. As Your Honor
10 knows, one is pure neutral where everyone is a
11 neutral arbitrator -- you get one or three or five
12 even -- and they have satisfied all the neutrality
13 qualifications. They're like jurors. And everything
14 Mr. Herman said about bias and influence and
15 conflicts is absolutely true if they are neutral.
16 They have to be clean as a whistle for all the
17 reasons he said.

18 The second is where you have party
19 appointed arbitrators where each side gets to appoint
20 someone. Now the case is pretty clear on this
21 particular issue, which says you would be nuts to
22 appoint someone who wasn't for your side, because
23 that's the whole point.

24 And the case law further recognizes
25 that this process, what really happens, it is the

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1 sole neutral who decides the case; and the party
2 appointed arbitrators act, in effect, of de facto
3 lawyers at the proceeding. And they have sustained
4 or overruled challenges to party appointed
5 arbitrators because they have a prior business
6 relationship or they have a potential appearance of a
7 conflict. For that very reason they are party
8 appointed, and you get to pick who you want.
9 And I have to use Mr. Herman's
10 example. I have been involved in arbitrations where
11 people picked a lawyer from a different office in
12 their law firm or even a lawyer that previously
13 represented their client. And that's clearly the
14 appearance of some sort of bias. But they're party
15 appointed, and the real action is with the neutral.
16 And that's the way it works.
17 And the whole idea is, is that you get
18 to pick someone who might have some different
19 expertise from yourself who can serve that role.
20 Now, the parties have agreed on party
21 appointed arbitrators. We can agree that the process
22 hasn't failed. So the only question is whether or
23 not our arbitrator somehow is so beyond the bounds of
24 party appointed arbitrator that you should exercise
25 the extreme remedy of striking him.

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1 The only statute that I can find that
2 the cases allude to, to give Your Honor guidance, is
3 under 171.008 of the Texas Civil Practice and
4 Remedies Code.
5 If I may approach, Your Honor, I have
6 just a copy of that page. This is the section on
7 vacating an award. And I've put a little red dot
8 there where it deals with partiality. And you can
9 see 2(a) you can vacate an award where there was
10 evidence of partiality by an arbitrator appointed as
11 a neutral arbitrator.
12 So if you appoint someone who is a
13 neutral and that neutral is biased, it's ground to
14 vacate an award.
15 What the Courts have said about reading
16 this statute -- and we cited it in our brief -- is
17 because no right is given to the Court to vacate an
18 award for evident partiality of a party appointed
19 arbitrator, it is okay for them to be biased or
20 partial. Indeed, that's their role. So that's the
21 only guidelines given is that neutrals should be
22 governed under the very strict standard that
23 Mr. Herman set out. No doubt about it.
24 Party appointed arbitrators are
25 completely different, and you are allowed to have

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1 your choice. And you may pick people as you see fit
2 absent some extraordinary reason the case law doesn't
3 really seem to even recognize so we couldn't find any
4 examples of that type. So that's the overall ruling.
5 And we cited some case law that says
6 that this is the point of party appointed
7 arbitrators. Of course you appoint someone who is
8 pro your side. Of course you appoint someone who is
9 going to vigorously argue your case. That's why you
10 have the process.
11 Now, we could have agreed to something,
12 which was three neutrals. We did not. And that's
13 the process I have, and that's why we picked this
14 gentleman.
15 I will last point out that although he
16 is from France, Mr. Lynn and I have assured ourselves
17 that he is fluent in English. He understands legal
18 concepts. He understands in our judgment the issues
19 that will be presented in this arbitration, and he is
20 willing to make himself available in the United
21 States under whatever circumstances and whatever the
22 arbitration would be. It has nothing to do with
23 delay. We want to get it over as well too.
24 Now that's in response to our
25 particular party appointed arbitrator. I'm going in

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1 defer to Mr. Lynn after Ms. Blue speaks about the
2 neutral and let Your Honor ask questions.
3 THE COURT: You said you had some law
4 on your issue, the issue you raised.
5 MR. LYNN: Yes, Your Honor. It's
6 quoted in our brief, but I'll hand you -- one of the
7 better cases that we found that I think explains the
8 role of the party appointed arbitrator was found in
9 the AdMed case. And then it kind of explains what
10 the rule of party appointed arbitrators is. And I'll
11 provide the Court with one other case from Texas that
12 talks about the particular statute that I talked
13 about.
14 There is a Texas Supreme Court case of
15 Burlington Northern Railroad in which the Supreme
16 Court essentially said, looking at the statute I
17 showed you, since you could only strike an
18 arbitration award on the basis of partiality of a
19 neutral arbitrator by implication, you can have a
20 biased party appointed arbitrator.
21 THE COURT: It's a Texas case?
22 MR. TILLOTSON: Yes, Your Honor, Texas
23 Supreme Court case.
24 MS. BLUE: Your Honor, can I --
25 MR. HERMAN: Will we be able to respond

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1 Mr. Tillotson?

2 MS. BLUE: I just wanted to make one
3 point I forgot. Judge Canales, you have no
4 jurisdiction over a lawyer from France. And I don't
5 care if this lawyer comes and says I'm going to sign
6 something saying I'm going to be subject to the
7 jurisdiction of the United States Courts. Because
8 let's say the Frenchman signs that, and you say just
9 like you have -- certainly have jurisdiction over me,
10 Mr. Herman, Mr. Lynn, everybody in this room, because
11 we're American lawyers. And if you say to me,
12 Ms. Blue, I don't like the way you handled something
13 in arbitration. I'm going to hold you in contempt.
14 I'm going to turn something over to the grievance
15 committee.

16 You have absolutely no power
17 whatsoever. And I don't care what the French lawyer
18 says or signs to regulate his conduct. Because all
19 he has to do is say, gee, you know, Judge Canales
20 didn't like that I did that or he didn't like that I
21 did that; but I'm out of here; I'm back in France.
22 And you have no ability to control what he does.
23 So, I mean, you know enough about this
24 case. Just something in response to what the other
25 lawyer said, just so you know that these types of

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1 allegations about drug use, they have been going on
2 since 1902, 1903. And yet the defendant paid him
3 just like they said that they would.

4 If the French lawyer is allowed to
5 serve -- and, I mean, you've heard it over and over.
6 He represents the defendant in France. -- it's going
7 to cause Mr. Armstrong to be so agitated. It's like
8 having somebody that you know dislikes you and you
9 know is conflicted and you know is out to get you and
10 win your case in France. And it can't even pass any
11 kind of smell test of impartiality or fairness.

12 MR. HERMAN: If Your Honor please, I'll
13 just briefly respond to Mr. Tillotson. In the first
14 place, as you will see by reading the opinion in the
15 Burlington Northern case, the Court essentially,
16 while they talk about the Texas Arbitration Act, rely
17 heavily on the decisions and so forth under the
18 Federal Arbitration Act, because there is a dearth of
19 case law that was in under Texas law.

20 But here's the real significant point.
21 If we had agreed, if we had set out in writing that
22 impartiality -- you can appoint anybody as the
23 American Arbitration Association Rules provide for
24 or, if we had set out in writing that you can appoint
25 one of your law partners, which is the -- when you

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1 extend this logic, that's exactly where you get.
2 That would be one thing, but we never agreed to
3 that.
4 We simply agreed that we would appoint
5 an arbitrator; they would appoint an arbitrator. We
6 never said anything about them being biased,
7 prejudicial and have prejudgment or it's okay if they
8 have a pecuniary interest in the outcome. We never
9 said that. And if you'll look at what I assume
10 they're trying to dodge now, the American Association
11 rules, which they originally put in their brief, that
12 is the pre 2003 rules, obviously they made a change
13 in those rules for a reason.
14 And in the new rules they don't talk
15 about any arbitrator or only the third arbitrator.
16 They talk about any arbitrator must be impartial
17 unless the parties have agreed in writing otherwise,
18 and we never have.
19 So, Your Honor, what I will reassert,
20 what we have said before, that not only is there law,
21 but just for starters how about the Fifth and
22 Fourteenth Amendments and numerous Supreme Court
23 pronouncements after that? Not only is there law but
24 there is a real public policy at stake here, Your
25 Honor. And if we are to expect litigants to embrace

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1 alternative dispute resolution, if we are to expect
2 litigants to stop clogging the courts and to address
3 their disputes in an alternative form, we have got to
4 provide assurance to those litigants, to the public,
5 to the Legislature, to the judiciary that it is a
6 fair process; that you're going to get a fair shake.
7 And, Your Honor, believe me, as I said
8 before, I'm not hear trying to tell them who to
9 appoint. All I am saying is that they have gone so
10 far beyond the pale. Mr. Montbrial is the only guy
11 that knows what the UCI cycling rules are? There is
12 a huge cycling community in the United States, if
13 that were relevant, which SCA, I assume, is going to
14 bring upon itself the right to adjudicate the winner
15 of the 2004 Tour de France.

16 Mr. Armstrong has been tested more than
17 most Ph.D.'s. And there is a federation. There is a
18 sanctioning body that decides who wins the Tour de
19 France. And that's why this is all a smoke screen,
20 Your Honor. It's rabbit trails. Because this is a
21 contract case.

22 And, clearly, even if they really
23 thought that there was somebody that would bring
24 something to the table by knowing the UCI rules and
25 the rules of the Tour de France, I could get you 15

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1 of them here in about an hour and a half. So that's
2 not the case, Your Honor. This just goes beyond the
3 pale.

4 MR. TILLOTSON: Your Honor, may I just
5 make one last point and then we'll get to the other
6 issues. I know the Court is running out of time.

7 Two things: Ms. Blue mentioned that if
8 the Court strikes the arbitrator, they wanted us to
9 appoint another one within three days. Their brief
10 said that they wanted us to appoint one by December
11 31st. Because of the holidays I request we be given
12 the time they asked in their brief, because Mr. Lynn
13 is going to be gone. It would be difficult for us to
14 do that. Whatever Your Honor does -- and I'd forgot
15 to mention that, but whatever Your Honor does, if
16 Your Honor does require us to appoint a new
17 arbitrator, we would ask until the end of the year
18 rather than the three days that she mentioned in her
19 oral statement. And with that I'll push on to the
20 other issues.

21 MR. HERMAN: We don't have an objection
22 to that, Your Honor.

23 MR. TILLOTSON: Thank you.

24 Your Honor, I'm going to read from this
25 case, because I think it states our position; and it

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1 also contests or demonstrates why we believe Ms. Blue
2 and Mr. Herman's arguments really are confusing, two
3 different elements.

4 MR. HERMAN: Which case?

5 MR. TILLOTSON: This is the Louisiana
6 case. It's cited working with the Texas Arbitration
7 Act, I think. It says, It would be strange indeed if
8 an interested party with a right to select an
9 arbitrator would select one antagonistic to it. An
10 arbitrator selected by one of the contesting parties
11 is effectively an advocate of such parties. The
12 third party mutually selected by them is expected to
13 be the impartial and final judge.

14 Now, that is the way these party
15 arbitration proceedings have always gone forward, as
16 best I can tell. That's why you want a strong
17 neutral.

18 THE COURT: There appears to be a
19 definite difference of opinion as to what the
20 agreement was among yourselves.

21 MR. TILLOTSON: The agreement was that
22 there would be two party arbitrators. And party
23 arbitrators, as you can see, is a term of art meaning
24 that a party can appoint them and that person is an
25 advocate.

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1 In fact, in Mr. Herman's opening
2 statement he said that Mr. Lyons would be somebody
3 they believe would be favorable to their position but
4 that he didn't go so far as to go over the line. I
5 think that is almost a quote from what Mr. Herman
6 said.

7 So the idea that we both agree to
8 having each of us appoint someone who would be
9 favorable to our position was indeed agreed to. And
10 they've appointed Mr. Lyons, and he is favorable to
11 their position, will argue their position, and we
12 expect him to argue their position to the neutral.
13 He is a strong-willed person, as you know. He is an
14 effective advocate, and he will be an effective
15 advocate for their side.

16 We need someone to balance him who will
17 be equally strong and equally able to persuade the
18 neutral. Now, that is what we both agreed to and
19 that's what we are proceeding with. So it's unfair
20 to say that these parties have tried to select
21 somebody who is not biased or not going to be
22 favorable to one position or another. That was
23 precisely why Mr. Lyons was selected.

24 Now, I would like to move on to the
25 issue of the neutral. I know the Court knows

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1 Mr. Madrid. I know the Court knows that he is a man
2 of integrity and honesty.

3 THE COURT: His partner is right in the
4 back.

5 MR. LYNN: Good. We can call him as a
6 witness, too.

7 But we would ask the Court to basically
8 appoint Mr. Madrid for the purposes of being the
9 neutral partly because I think that -- I know Lisa
10 knows him, we know him, and the Court knows him. And
11 I don't think there is any question as to his
12 integrity or his ability. And I don't think he has
13 any issues of conflicts, the best I can tell. He
14 said he would be interested in the case.

15 Once more, I think that he's the kind
16 of guy who basically, if he says something is to be
17 maintained as confidential, he'll maintain it as
18 confidential. That's just the kind of guy he is.

19 So to go down to Austin to try to pick
20 somebody from Austin that we've never heard of, the
21 Court has probably never heard of, and to try to get
22 that person appointed as a neutral gives us some
23 pause. Because we believe we know and the Court
24 knows this neutral ought to be somebody who is truly
25 neutral, and Jay Madrid is a guy who can be -- a

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1 lawyer who has impeccable credentials and could be
2 neutral under these circumstances.

3 THE COURT: Are you agreeing to
4 Madrid?

5 MS. BLUE: Absolutely not, Your Honor.

6 MR. LYNN: Well, we would ask the Court
7 to appoint --

8 THE COURT: The Court almost feels like
9 picking all three arbitrators on my own without
10 consulting either side.

11 MR. LYNN: Well, we would ask that the
12 Court to permit us to go through this process that
13 we've gone through, which is the process that we
14 agreed to; that we each select our own --

15 THE COURT: I don't know that I want to
16 do that at this point. I may just select all three
17 myself if y'all can't get along.

18 MR. LYNN: If Your Honor would permit
19 us, we would like to still have our freedom to
20 appoint our party arbitrators. And I think they
21 would too, and I think we would like to appoint our
22 neutral.

23 THE COURT: Well, I'm not sure I'm
24 going to let you do it.

25 MR. HERMAN: Your Honor, may I respond

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1 just very briefly to Mr. -- and I just got this

2 authority that he handed us, this Louisiana case,
3 today. And I haven't had a chance to even look at it
4 until now.

5 This case, whatever it stands for, is a
6 1999 case. It was an agreement that was governed by
7 the American Arbitration Association and the rules
8 that were in effect prior to 2003.

9 Now, those are not the rules that are
10 present now. Mr. Lynn brought in the pre-2003
11 rules. But if this case were decided today -- and I
12 haven't even read the facts, but that is a Louisiana
13 case. It involved the American Arbitration
14 Association. It doesn't touch the Texas Arbitration
15 Act, top side or bottom, and it doesn't employ the
16 rules that are currently in place, unless there is a
17 written agreement to the contrary, that all the
18 arbitrators have to be impartial.

19 THE COURT: What about his point saying
20 that you selected someone that was slightly favorable
21 to your side?

22 MR. HERMAN: Well, Your Honor, my point
23 is that that is not -- it's just like picking a jury,
24 Your Honor. You may feel like a juror who has had no
25 contact with the case, who has no relationship with

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1 the lawyers or the parties may be responding better
2 to your presentation.

3 There is nothing wrong with that.

4 That's the purpose of the peremptory strike
5 limitation, and that's the purpose of jury
6 selection.

7 But there is a huge distinction between

8 Mr. Lyon and Mr. Montbrial. I haven't any
9 relationship with Mr. Lyons professionally or
10 otherwise other than we may be both members of TTLA
11 or something. And he's got no relationship with
12 Mr. Armstrong or anyone associated with him nor has he any
13 relationship or association with someone who is
14 antagonistic to SCA.

15 The point is, Your Honor, regardless of
16 what a person's background or culture is, they have
17 to be able to get in the jury box or get on the
18 arbitration panel, listen to the evidence and
19 testimony and draw inferences which are not tainted
20 by prejudice or hostility. And that's precisely
21 what we did when we asked Mr. Lyon to serve.

22 And, frankly -- I'll be honest with the
23 Court. If Mr. Lynn's philosophy were accurate, what
24 would be the purpose for lawyers representing
25 litigants in an arbitration? Why not have them

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1 represented by the lawyers who you've appointed as
2 arbitrators? That's Mr. Lynn's argument. That's
3 absurd, Your Honor. That puts the whole ADR process
4 in a light that runs contrary to every public policy
5 of this state. And I didn't mean to -- I'm just
6 responding to the Court's request. Ms. Blue will
7 address the neutral argument.

8 THE COURT: I'm going to take about a
9 five-minute recess.

10 (Recess taken)

11 MR. HERMAN: Your Honor, Ms. Blue is
12 next going to do the honors.

13 MS. BLUE: May it please the Court.
14 Your Honor, first of all, thank you. You've been so
15 patient with us, and I'm sorry if we took a little
16 more time than we said.

17 This second motion is extremely
18 important, Your Honor. And I feel like -- I mean,
19 you know my love for jury selection and how
20 important, when you're picking a jury in a jury
21 trial, how to you make sure that the jurors that sit
22 have an open mind, they're impartial, and they can
23 consider all of the evidence. And so I'm going to
24 make this quick, but I want to leave you with this
25 thought.

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1 We certainly want to you strike the
2 French lawyer, because he is representing the
3 defendant and has a terrible conflict in this case.
4 But what we're asking is that the other side appoint
5 someone from Texas. And we have our arbitrator that
6 we've named. And we have a list of lawyers that we
7 think are very reputable and honorable; Mark Stanley,
8 the president of TTLA; the Honorable Glenn Ashworth.
9 But I want to just suggest this to you. Because it's
10 likely to be a male panel, I'm going to suggest that
11 perhaps you have some diversity on this arbitrator
12 panel and that you consider a female, somebody who is
13 well qualified, a good background, who is board
14 certified and somebody that you trust and know, Your
15 Honor. But one thing I do --
16 MR. LYNN: We'll agree to Barbara Lynn.
17 THE COURT: Well, I thought she was
18 suggesting herself.
19 MR. HERMAN: Well --
20 MS. BLUE: Well, you know a lot of very
21 well qualified people in the community so this is
22 what I would like to say to you, if you don't want to
23 be constrained between the list, that's fine. I am
24 suggesting that you have some diversity. But this is
25 what is most important to me and it is so important

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1 -- Mr. Armstrong wanted to be here, because he
2 realizes the importance of who the third arbitrator
3 is. It is this, Judge Canales: That person has to
4 have an open mind as to what the claimant is asking
5 for.
6 In other words, just like a juror, if
7 the arbitrator, the neutral arbitrator, was to say,
8 you know what, I don't believe in punitive damages or
9 I don't believe in awarding attorneys' fees, or I
10 don't believe in that, that person would not be the
11 right person.
12 So it is essential -- and you're going
13 to do what you want, Your Honor. Your job is to pick
14 the third arbitrator. And like I said, you don't
15 have to be confined. But, please, what I am asking
16 you is that you pick somebody -- because you're the
17 ultimate jury consultant. You're the ultimate
18 attorney in this case. Your job is to pick somebody
19 who is impartial and has an open mind on all the
20 elements and can consider what the burden of proof
21 is. And if we prove it, we should be entitled to get
22 it.
23 And with that I'll see if Mr. Herman
24 has anything else. And thank you for your time,
25 Judge Canales.

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1 MR. HERMAN: Your Honor, I'd never
2 disagree with Ms. Blue publicly about anything; but I
3 would say only, Your Honor, that, of course, our
4 first preference would be one of the three that we've
5 suggested; Mr. Stanley, the former Judge Ashworth,
6 and then Dickey Greg from Austin, who has had a lot
7 of experience in arbitration.
8 But I just wanted to reemphasize what
9 Ms. Blue said, that choosing one from either list is
10 still, I suppose, employing at least the suggestion
11 of one of the other parties.
12 So if the Court feels it appropriate
13 that the Court determine the third arbitrator, the
14 arbitrator who hasn't been suggested by either side,
15 I just wanted to concur with Ms. Blue's suggestion
16 that perhaps it might be a good idea to bring some
17 balance to the panel and so forth.
18 And, of course, the Court has the
19 authority and the responsibility to do whatever it
20 wishes in these circumstances, but certainly that
21 might be a way to at least ensure in the Court's mind
22 that whoever the third party is will carry out the
23 desires that the Court has for a fair, prompt and
24 responsive arbitration under Texas law. So I guess
25 basically that's a long way of saying I totally

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1 concur with what Ms. Blue said.
2 MR. LYNN: May I respond, Your Honor?
3 THE COURT: Yes.
4 MR. LYNN: First of all, with respect
5 to the neutral, we again go back and suggest haven't
6 heard any good reason why Jay Madrid shouldn't be
7 appointed. You know him. We think he's an effective
8 neutral, and I think he would be the kind of person
9 that we all could respect his decision. I know the
10 Court knows him. That's why we suggested him.
11 We have difficulties with Mark Stanley
12 being, one, we may be representing his firm in a
13 variety of -- in some issues and I don't think that
14 that would be -- and he is the neutral. And with
15 respect to Mr. Ashworth -- and I don't know Dickey
16 Greg from -- if he walked in the room. But I believe
17 that to the extent that we know and have the
18 experience with someone like Jay Madrid, that should
19 weigh heavily. Judge Ashworth I really don't know
20 all that well. I think I've only appeared before him
21 once in one matter, and I would think that that would
22 be someone that is -- well, here's what I am worried
23 about in this case. And I think Lisa hit the nail on
24 the head. We are the ones who are most likely to be
25 prejudiced by anyone who is elected in Texas.

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1 We are dealing with a situation where
2 we will be calling Mr. Armstrong to task for
3 allegations that are extraordinarily serious; that
4 suggest that what he accomplished, he accomplished
5 with the aid of a variety of things. Now, that is
6 not a popular cause in the Texas. It is not a
7 popular cause in the United States. It is one where
8 we are calling into question someone who has become
9 an icon and is respected by lots of folks across the
10 country, not only adults and children but all sorts
11 of folks crossing all different economic strategy.
12 The judge that we pick is not immune to that.
13 So what we're seeking here is someone
14 who is truly able to put that outside of the decision
15 making, and that's why we went outside the country.
16 But certainly the request or the demand that whoever
17 we appoint come within Texas we think is unfair. And
18 it's unfair because what they're doing is attempting
19 to sort of stack the jury in their favor. We need to
20 go outside the state, perhaps outside the country in
21 order to get people who will be able to look
22 objectively at the facts. And if the emperor does
23 not wear clothes then they need to be able to say the
24 emperor doesn't wear any clothes. And in this
25 circumstance, that's what we're trying to prove.

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1 MS. BLUE: Your Honor, I'm just
2 confused. Outside of Texas for your pick.
3 MR. LYNN: Or the one that I selected
4 was someone I thought would not be influenced by an
5 icon, who I knew over a period of 30 years
6 professional life would not be somebody who would
7 make a decision based upon, you know, the reputation
8 or the fame of a particular person. And that's what
9 we're worried about.
10 And if Your Honor picks three people
11 out of a hat --
12 THE COURT: Well, I hadn't proposed
13 going that far.
14 MR. LYNN: -- that's going to cause us
15 a lot of problems. With respect to the neutral, we
16 ask Your Honor to think about this in terms of the
17 kind of person that we need. I mean, Lance
18 Armstrong, good or bad, has right now got advertising
19 campaigns running on all sorts of TV shows. You
20 can't even run Tivo and ignore them. So with respect
21 to getting somebody who is truly going to be neutral
22 and is truly going to give us a fair shake, we need
23 to have somebody that we think that the Court knows
24 will not permit that reputation to come between us
25 and justice. And if it means we have to say the

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1 emperor --
2 THE COURT: I think the Court is well
3 aware of the terms "fair and impartial," and that's
4 what I would be seeking; fair and impartial to all
5 sides.
6 MR. LYNN: We believe that to the
7 extent that we have agreed -- and I think we have
8 agreed to these facts -- it is fair to say -- and I
9 think we stipulated to this, and they I'm sure will
10 object if I'm incorrect. -- that we did appoint our
11 party arbitrator on time; that they did appoint their
12 party arbitrator on time; that we have gone through
13 the process of coming up with a list; that we did
14 agree to Harlan Martin as the neutral, which was
15 their suggestion; that Harlan Martin said that he
16 couldn't serve; and that we have proposed another
17 person, who we believe certainly can't be viewed in
18 bad faith as not going through the process of
19 arbitration; and that would be Jay Madrid. I know
20 they've alleged Montbrial is bad faith in argument,
21 and I understand. So, Your Honor, we ask that to be
22 taken as a stipulation amongst the parties.
23 THE COURT: What is the stipulation?
24 MR. LYNN: The stipulation is we
25 appointed our party arbitrator on time. They

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1 appointed their party arbitrator on time. We
2 selected their neutral, their suggested neutral
3 Harlan Martin, when they requested it. We proposed
4 three names. But Jay Madrid was the one that we have
5 been a proponent of and that the Court can, I guess,
6 take some sort of -- well, we won't ask the Court to
7 take any notice of the kind of man Jay Madrid is.
8 But we would like that stipulated on the record if
9 the other side will so stipulate.
10 MR. HERMAN: Your Honor, I admit that
11 they did -- after the Court ordered them to appoint
12 an arbitrator, they complied with the Court's order.
13 I'll agree to that. And, secondly, that with respect
14 to Mr. Martin, we, as I told Mr. Lynn, we did not
15 contact Mr. Martin not so as to impair his
16 neutrality. And I told him I would contact him,
17 which I did. And he plays bridge with some SCA guy
18 every Friday night so, of course, he couldn't serve.
19 So with that modification, I agree to that
20 stipulation.
21 MR. TILLOTSON: I just wanted to also
22 add on the record, with respect to the Court's
23 considering the neutrals that the parties have thrown
24 out, we do believe we have a conflict of interest
25 with Mr. Mark Stanley, who they named. We've been

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1 asked to represent him in a case. He's also been in
2 cases with the Baron & Budd firm, which I've been
3 part of. Also, we believe we probably have a
4 conflict of interest with respect to Judge Ashworth.
5 We're involved in arbitration with him. There is
6 still proceedings ongoing with him, so I believe he
7 would be an inappropriate choice as well.

8 And the last thing I want to make this
9 part of the record is that we -- SCA does not believe
10 that the process that the parties put into place to
11 appoint arbitrators has failed. And we are prepared
12 to throw out more names of neutral arbitrators that
13 we would hope would be acceptable to the other side
14 and have thrown out at least two other names; Earl
15 Hail and former Judge Lane Phillips from the Western
16 District of Oklahoma as additional possible
17 neutrals. So we think that the process itself has
18 not failed, and under the law that the parties should
19 be allowed to respect their contract and continue
20 trying to select the panel.

21 MR. HERMAN: I avoid doing this, Your
22 Honor, for obvious reasons. But may I make an
23 inquiry of Mr. Tillotson?

24 Are you taking the position that Judge
25 Canales does not have the authority to appoint the

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1 third neutral because you are alleging that the
2 process has not failed? Is that the position you're
3 taking?

4 MR. TILLOTSON: Under the statute,
5 before the Court can take the arbitration process out
6 of the hands of the party, certain procedural
7 requirements have to be satisfied, one of which the
8 agreed upon method has failed. And we still think
9 there are names out there that we have actually
10 proposed or would be willing to propose between now
11 and year end that might satisfy that. Arbitration is
12 a contract. Parties agree to do certain things.
13 It's not like a jury selection. You agree to who
14 your people are going to be. It's not twelve
15 impartial people.

16 And the law says respect that and only
17 take it away from them when it falls apart and they
18 can't reach an appointment of arbitrators. And that
19 sometimes happens, and that is why the Texas
20 Arbitration Act gives the Court that power.

21 MR. HERMAN: Your Honor, let me remind
22 Mr. Tillotson the agreement was that we were going to
23 submit three names, they submit three names and, if
24 they couldn't agree, Judge Canales was going to
25 appoint them. That's exactly what's happened.

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1 MR. LYNN: I don't think that was the
2 agreement.

3 MR. HERMAN: Well, the agreement was
4 that we were going to submit three names, they were
5 going to submit three names and, if we couldn't agree
6 on them, that then the process has been stymied.
7 I would not waste the Court's time up
8 here, Your Honor, if we were able to reach an
9 agreement. And so one of the principal objectives
10 here, Your Honor, is to get this thing going. They
11 owed the money September 1st.

12 THE COURT: Mr. Tillotson, according to
13 what you're saying that you could go on proposing
14 names ad infinitum.

15 MR. TILLOTSON: No, Your Honor.

16 THE COURT: At that point do you say
17 it's stymied?

18 MR. TILLOTSON: At the point that it
19 appears the parties are being unreasonable and
20 they're turning down names.

21 THE COURT: And who decides that?

22 MR. TILLOTSON: Well, I guess we'll
23 come to Your Honor. They won't respond.

24 THE COURT: They have come here.

25 MR. TILLOTSON: Well, the point is, is

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1 that we still have names out there that we've
2 proposed that they've rejected. And now they've
3 turned the process on its head and said it's failed;
4 please appoint yet another name we've thrown out.
5 They've not come to the Court and said, please
6 appoint someone; we don't care who it is. They're
7 still throwing out names. Dickey Greg is a fourth
8 name they've added who is a plaintiff's lawyer down
9 in Austin that we don't know. So they're asking Your
10 Honor to appoint that person.

11 THE COURT: I don't know Mr. Greg.

12 MR. TILLOTSON: That's not a failure of
13 the process; that's them trying to seize the process;
14 throw out names to Your Honor and hope that you pick
15 their person.

16 MR. HERMAN: That's why we suggested,
17 Your Honor, that to avoid this sort of, you know,
18 going back and forth that's precisely why I --

19 THE COURT: I could wait another week
20 and let you throw three other names out, they reject
21 all three, and we're back to where we are now.

22 MR. HERMAN: That's why we're saying
23 the Court exercise its judgment.

24 MR. TILLOTSON: Typically that's what
25 would happen is the Court would say there are certain

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1 deadlines and absent that I'm going to deem the
2 process a failure. We've been through that with some
3 of the other judges where the Court has said, okay,
4 you've had a certain amount of time. If you cannot
5 -- and that happens -- the Court is going to take it
6 over as failed. So I don't disagree that could never
7 happen. I don't believe that we're to that process
8 yet.

9 MR. LYNN: And how can it be deemed a
10 failure when we agreed to their neutral? We tried to
11 agree to their neutral, Harlan Martin, and we ended
12 up -- then they withdraw him once they determined
13 that there might be a conflict -- or Mr. Harlan
14 Martin did. So we have tried to agree to the
15 neutral, but we're not exactly getting great
16 cooperation from the other side in terms of the folks
17 that we're throwing out.

18 THE COURT: That's exactly why we're
19 here.

20 MR. TILLOTSON: I think Your Honor can
21 derive from the people that we threw out as neutrals
22 that we are taking the process as in good faith as
23 possible. We did throw out what we thought were
24 people with impeccable credentials; that there was no
25 relationship to it; that would be easy choices

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1 among. We threw out Jay Madrid, Earl Hail and a
2 former federal judge.

3 So we tried to throw out people to
4 suggest to the Court that Your Honor didn't think we
5 were screwing around and trying to buy time. We
6 threw out people that the Court would say, well,
7 those are good choices; they may reject them, but
8 those are good choices. The parties are trying. And
9 we even agreed to one of their guys. Unfortunately,
10 he has a conflict or we would probably be in
11 arbitration by now. But that shows our good faith
12 that we are willing to keep at the process to allow
13 the parties to, in effect, pick their judges.

14 MS. BLUE: Judge, I just want to make
15 sure you heard what the defense lawyer said. They
16 just objected to Mark Stanley and Judge Ashworth
17 because they had conflicts.

18 Now, if that's their position, I want
19 to make sure you understand they've got to agree that
20 the lawyer from France has a conflict here.

21 MR. TILLOTSON: I don't have any
22 problem with Mark Stanley being their party appointed
23 arbitrator. I've got no objection to Glenn Ashworth
24 being their party appointed arbitrator.

25 MS. BLUE: So I just want to make sure

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1 you understand we object to their list as well, Your
2 Honor.

3 THE COURT: Because of the holiday
4 season, would y'all please leave me with your numbers
5 where I can reach you?

6 MR. LYNN: I'm going to be out quite a
7 bit over the holidays, Your Honor.

8 THE COURT: Do you have a cell phone?

9 MR. TILLOTSON: We'll be able to reach
10 him, no problem.

11 MR. HERMAN: Your Honor, hopefully
12 without being presumptuous, Your Honor, I do have a
13 proposed order that has blanks in it for the Court.
14 So I'm not suggesting that the Court necessarily
15 enter this order now, but it essentially strikes the
16 Frenchman and then gives -- has blanks for the Court
17 to appoint the neutral parties.

18 MS. BLUE: Thank you, Your Honor.

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1 STATE OF TEXAS :
2 COUNTY OF DALLAS :

3 I, SANDRA A. HUGHES, CSR, Deputy Official Court
4 Reporter in and for the 298th Judicial District Court
5 of Dallas County, Texas, do hereby certify that the
6 above and foregoing contains a true and correct
7 transcription of all portions of evidence and other
8 proceedings requested in writing by counsel for the
9 parties to be included in this volume of the
10 Reporter's Record, in the above-styled and numbered
11 cause, all of which occurred in open court or in
12 chambers and were reported by me.

13 I further certify that the Reporter's Record of
14 the proceedings truly and correctly reflects the
15 exhibits, if any, admitted by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is \$ and
18 was paid/will be paid by

19 Witness my hand this the ____ day of
20 _____, 2005.

21
22
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25