IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

In re NCAA Student-Athlete Name and Likeness Licensing Litigation	Civil Action No: 4:09-cv-01967-CW *Pending in the United States District Court for the Northern District of California*
	Misc. No. 1:11-MI-0129

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL PRODUCTION

Movants, by their attorneys, respectfully request this Court to enter an Order pursuant to Rule 37(a)(1) and Rule 45(c)(2)(B)(i) of the Federal Rules of Civil Procedure, and Local Rule 37.1(A)(1), compelling non-party Turner Broadcasting System ("TBS") to produce the documents requested in the subpoena *duces tecum* served on TBS on August 2, 2011 (the "Subpoena").

The grounds for this motion are set forth below and in the Declaration of Daniel Herrera (hereafter "Herrera Decl."), filed herewith.

I. INTRODUCTION

Movants ("Plaintiffs") filed the above-captioned federal antitrust class action (the "Antitrust Action") in the Northern District of California against Defendants National Collegiate Athletic Association ("NCAA"), Collegiate Licensing

Company ("CLC") and Electronic Arts Inc. ("EA Sports") (collectively "Defendants"). The Plaintiffs include basketball legends Bill Russell, Oscar Robertson and UCLA basketball great Ed O'Bannon, among others.

In brief, the Complaint alleges that the NCAA, its member schools and conferences, and various other co-conspirators have violated the federal antitrust laws by conspiring to foreclose Plaintiffs and class members from receiving compensation in connection with the commercial exploitation of their names, images, and/or likenesses following their college playing days. (Compl. ¶ 9.)[1] The Complaint further alleges that the NCAA, its members, and its for-profit business partners reap billions of dollars in annual revenue from the commercial exploitation of student athlete images through, among other things, television broadcasts and rebroadcasts, sales and rentals of DVD game and highlight films, on-demand streaming and sales of games and clips, video games, and other business ventures. Plaintiffs and other former players, whose names, images and likenesses are utilized to generate this revenue, receive absolutely no compensation whatsoever and never will under the current regime. (Compl. ¶ 18.)

[1] "Compl." refers to the Second Consolidated and Amended Complaint (Dkt. No. 327) in the consolidated action.

After the Court denied several rounds of dismissal motions, Plaintiffs began merits discovery and, in that connection, served subpoenas on various non-parties, including TBS. (Herrera Decl. at ¶ 2.) As described more fully below, among the documents sought from TBS are: (1) agreements affecting or concerning the broadcast, licensing or other use of all or any portion of Division I Football or Division I Basketball games, as well as any related financial reports; (2) exemplar waiver forms that purport to require student athletes to relinquish their rights to their names, images and likenesses; (3) documents "relating to policies governing when TBS must or should secure a likeness release or consent form from a student athlete"; (4) documents "relating to policies regarding copyright, ownership and/or licensing of game footage and photographs"; and (5) documents relating to EA Sports video games. (Herrera Decl. at ¶ 4; Ex. C.)

Despite over two months of meet-and-confer discussions, during which Plaintiffs expended significant time and effort both narrowing the scope of their document requests and explaining the relevance of responsive documents, **TBS has refused to produce a single document.** (Herrera Decl. at ¶ 17.)

TBS is an integral source of information regarding the antitrust claims in the litigation. Plaintiffs allege that the NCAA, along with its member schools and conferences, worked with various third parties, including networks like TBS, to

"monetize" the student athletes' images by selling, licensing and marketing them to businesses and consumers, thus creating and controlling a lucrative collegiate licensing market. (Compl. ¶¶ 11, 351.) TBS is a premier participant in the collegiate licensing market through, among other things, its agreements to broadcast the NCAA Division I Men's Basketball Tournament, and licensing agreements through which TBS acquired the right to broadcast Division I Football Games. These agreements and the other documents sought in the Subpoena are plainly relevant to the litigation and should be produced to Plaintiffs.

II. LITIGATION BACKGROUND

Plaintiffs in the consolidated Antitrust Action are various former college basketball and football players who are pursuing claims on behalf of themselves and a class of all others similarly situated.[2] Defendant NCAA is an unincorporated association of various colleges, universities and athletic conferences that governs collegiate athletics. The association is subdivided into divisions. Plaintiffs' claims concern practices and agreements related to NCAA "Division I" men's basketball

[2] The Complaint brings claims on behalf of two putative classes: an Antitrust Damages Class consisting solely of former student athletes, and an Antitrust Injunctive Relief Class consisting of both current and former student athletes. (*See* Compl. ¶ 8.) The Antitrust Injunctive Relief Class seeks to enjoin the NCAA (as well as its member conferences and schools) from enforcing the rules and regulations that foreclose Plaintiffs from being compensated for the exploitation of their image and likeness after they have graduated. (*See id.*)

teams and NCAA "Football Bowl Subdivision" men's football teams (formerly known as "Division I-A"). Defendant CLC handles NCAA's license agreements, and Defendant EA develops, publishes and distributes video games featuring NCAA teams and athletes (collectively, "Defendants").

Plaintiffs' claims are premised on the Defendants' alleged conspiracy to restrain trade in violation of Section 1 of the Sherman Act. Plaintiffs allege that the Defendants and their named and unnamed co-conspirators – including NCAA member conferences – violated and continue to violate federal antitrust laws by engaging in a price-fixing conspiracy and a group boycott/refusal to deal that has unlawfully foreclosed the class members from being compensated in connection with the commercial exploitation of their names, images, and/or likenesses following the end of their college playing days. (*See* Compl. ¶¶ 9, 175.)

The Complaint alleges that the NCAA, its members, and its for-profit business partners make billions of dollars from the commercial exploitation of student athlete names, images and likenesses through, among other things, television broadcasts and rebroadcasts, sales and rentals of DVD game and highlight films, on-demand streaming and sales of games and clips, video games, and other outlets. (Compl. ¶ 18.) Plaintiffs allege that the NCAA, acting by and through its members, accomplishes the scheme in part by requiring all student

athletes, as a condition of their eligibility to compete in NCAA athletic events, to sign a form each year that purports to require each of them to relinquish in perpetuity all rights to the commercial use of their images even after they graduate and are no longer subject to NCAA rules. *See, e.g.*, Compl. ¶ 23. The release language contained in these required forms mirrors the NCAA's Bylaw 12.5.1.1.1 which states:

> The NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] may use the name or picture of an enrolled student-athlete to generally promote NCAA championships or other NCAA events, activities or programs.

Id. ¶ 283 (bracketed text in original).

Release forms such as Form 08-3a (attached to the Complaint as "Exhibit A") and NCAA rules, such as Bylaw 12.5.1.1.1, are relied on by the NCAA and its member conferences and schools to execute agreements with licensees and broadcasters that purport to convey the rights to utilize footage containing the images and likenesses of student athletes in order to create and collect a broad range of multimedia revenue streams. This money flows from, among other things, "classic" games shown on ESPN Classic and other cable television networks, sales and rentals of DVDs of game films, sales of on-demand game

films, "stock footage" for corporate advertisers and video games. (Compl. ¶ 307.) The "collegiate licensing market" is dominated and controlled, through various licensing and other agreements, by the NCAA and its members. (Compl. ¶¶ 306-09.) The NCAA and its members make billions from these arrangements while the former players make nothing. *Id.*

In denying Defendants' motions to dismiss, Judge Claudia Wilken confirmed that the Complaint adequately alleges a conspiracy to restrain trade among the NCAA, its member schools and conferences, and the defendant licensees CLC and EA. *See O'Bannon v. Nat'l Collegiate Athletic Ass'n,* No. C 09-1967 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010). Specifically, she concluded that "O'Bannon . . . pleads agreements among NCAA, its members, CLC and various distributors of material related to college sports . . . **[relating to] licenses to distribute products or media containing the images of O'Bannon and other former student athletes**." *Id.* at *3 (emphasis added). Judge Wilken also held that the allegations of the Complaint "sufficiently support O'Bannon's theory that, after NCAA and its members obtain releases from student athletes, CLC [the licensing arm of the NCAA and its members] brokers agreements that do not compensate him or the putative class members for the use of their images." *Id.*

Moreover, Judge Wilken specifically acknowledged that Plaintiffs' antitrust claims were not predicated solely on licenses involving the use of image and likeness in video games. To the contrary, **Plaintiffs' § 1 claims "also encompass agreements for rights to televise games**, DVD and on-demand sales and rentals, and sales of stock footage of competitions, to name a few." (*See, e.g., id.*, Dkt. No. 325 at 12 (*citing* Compl. ¶¶ 332-60 (emphasis added))). Judge Wilken further acknowledged that Plaintiffs' allegations concerning the numerous agreements entered into by NCAA and its members, **including agreements for the broadcast of athletics events**, support Plaintiffs' allegations of a relevant product market described as the "collegiate licensing market." *O'Bannon*, 2010 WL 445190, at *5 (emphasis added).

III. SERVICE OF THE SUBPOENA AND MEET AND CONFER EFFORTS

Plaintiffs served the TBS Subpoena on August 2, 2011. (Herrera Decl. at ¶ 2.) The Subpoena required TBS to produce responsive documents by August 26, 2011. (*Id.*; Ex. A.) On August 17, 2011, Plaintiffs' counsel, Bryan L. Clobes ("Clobes"), received a letter from James Lamberth ("Lamberth"), counsel for TBS, which contained TBS' objections to the Subpoena. (Herrera Decl. at ¶ 3; Ex. B.)

In an effort to address and respond to TBS' objections, Plaintiffs sent Lamberth a letter on August 31, 2011, narrowing the document requests in the

Subpoena (the "Narrowed Requests"). (Herrera Decl. at ¶ 4; Ex. C.) Plaintiffs offered to limit TBS' response to eight categories of documents on the condition that TBS produce all responsive materials. (*Id.*)

The parties first met-and-conferred on September 9, 2011. (Herrera Decl. at ¶ 5.) During this call, Lamberth indicated that despite Plaintiffs' substantial narrowing of the Subpoena, the requests still sought the production of documents not relevant to Plaintiffs' claims. (Herrera Decl. at ¶¶ 5-6.) Lamberth asserted that his analysis of the various orders denying Defendants' motions to dismiss did not support Plaintiffs' requests for agreements between TBS and NCAA member schools and conferences, although he did not state whether TBS was party to such agreements. (Herrera Decl. at ¶ 6.) Moreover, he informed Plaintiffs that TBS would not produce agreements with the NCAA itself because they should instead be produced by the NCAA.[3] (Herrera Decl. at ¶ 7.)

During this first discussion, Plaintiffs spent significant time and effort responding to Lamberth's objections. (Herrera Decl. at ¶ 8.) Plaintiffs explained in detail the Complaint's allegations that the NCAA conspired with its member

[3] Plaintiffs subsequently acquired a copy of **a redacted** agreement between TBS, CBS and the NCAA for the broadcast of the NCAA Division I Men's Basketball Tournament. Accordingly, Plaintiffs require TBS to produce an unredacted version of this agreement.

schools and conferences to foreclose former student athletes from receiving compensation in connection with the use of their images and likenesses. (*Id.*) Plaintiffs further explained that the NCAA and its members perpetuate this scheme by imposing rules and regulations requiring student athletes to relinquish those rights, and then proceed to exploit those rights through, among other things, television agreements between the conferences and networks like TBS. (*Id.*) Plaintiffs also made clear that any production must include accounting/financial records sufficient to understand any payments made by TBS under their various agreements. (Herrera Decl. at ¶ 9.)

The parties resumed discussions on September 27, 2011. (Herrera Decl. at ¶ 10.) During this call, Lamberth stated unequivocally that TBS would not produce its responsive documents. (*Id.*) In addition to the objections raised during the initial meet-and-confer, Lamberth asserted that TBS' position also was premised on Lamberth's "extreme view" regarding confidentiality. (*Id.*) Lamberth asserted that despite the Stipulated Protective Order entered in the underlying litigation, he assumes that anything produced eventually will be made public. (*Id.*) Plaintiffs again explained the relevance of the requested materials, and noted that the NCAA's eventual production was unlikely to contain documents responsive to the Subpoena issued to TBS. (Herrera Decl. at ¶¶ 11-12.)

The parties last met-and-conferred on October 3, 2011. (Herrera Decl. at ¶ 13.) During the call, Lamberth made it absolutely clear that TBS would not produce responsive agreements or financial information for the reasons detailed above. (*Id.*) However, Lamberth did agree to search for communications concerning or referencing the litigation or the Subpoena. (Herrera Decl. at ¶ 14) Because Lamberth asserted that TBS would claim privilege over any communications involving attorneys, Plaintiffs requested that TBS prepare a privilege log detailing any documents withheld on that basis. (*Id.*) Plaintiffs informed Lamberth that the log need not include post-subpoena communications between Lamberth and his client, TBS. (*Id.*)

Lamberth contacted Plaintiffs on November 3, 2011 to provide an update regarding TBS' search for communications responsive to Modified Request No. 8. (Herrera Decl. at ¶ 15.) Thereafter, on November 16, 2011, Lamberth advised that TBS does not possess documents responsive to this request. (Herrera Decl. at ¶ 16.) In light of the fact that (after over two months of discussion regarding the subpoena and its scope) TBS refused to produce a single document, further meet-and-confer efforts were not warranted. (Herrera Decl. at ¶ 17.)

IV. ARGUMENT

As a result of the extensive meet-and-confer discussions described above and in the Herrera Declaration, Plaintiffs narrowed their document requests on the condition that TBS produce all responsive, discoverable documents. (Herrera Decl. at ¶ 4; Ex. C.) These documents are, from January 1, 2000 to the present:

1. Any television or broadcast contracts affecting or concerning men's Division I basketball or Division I football.

2. Any Licensing Agreements with the NCAA or any of its member schools or conferences in which the license granted includes rights to the name, image, or likeness of student athletes competing (or who competed in the past) in men's Division I football or basketball.

3. Any documents, including, but not limited to, reports relating to the Licensing Agreements described above.

4. Any specific documents regarding the question of who has rights to continue to license, use, or sell all products containing images of former student athletes, including any name, image, or likeness release or consent form used or administered by TBS. TBS need only produce exemplar forms rather than copies actually signed by student athletes.

5. Any documents relating to policies governing when TBS must or should secure a likeness release or consent form from a student athlete.

6. Any documents relating to policies regarding copyright, ownership and/or licensing of game footage and photographs.

7. Documents relating to EA Sports games, including, but not limited to, any materials or information provided by TBS to EA (footage, broadcasts, player bios and stats, consents or licenses from players) and information on payments by or from EA to TBS.

(the "Narrowed Requests"). (*See id.*) TBS objects to producing documents responsive to these categories on grounds of relevance and confidentiality. Plaintiffs address the requests, and TBS' baseless objections, below.

A. Legal Standard

Federal Rule of Civil Procedure 45 provides that "[if] an objection is made [to a request to produce documents] ... (i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production...." Fed. R. Civ. P. 45(c)(2)(B)(i). Because TBS refuses to produce its responsive documents, Plaintiffs "may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a)(1); N.D. Ga. LR 37.1(A)(1). Plaintiffs have done that here.

"The scope of discovery under a Rule 45 subpoena to non-parties is the same as that permitted under Rule 26." *Liles v. Stuart Weitzman, LLC*, No. 09-61448-CIV, 2010 WL 1839229, at *2 (S.D. Fla. May 6, 2010). "Pursuant to [Rule] 26(b)(1), parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense." *Morris v. Sequa Corp.*, No. 11–CV–0053–SLB, 2011 WL 3300697, at *1 (N.D. Ala. July 21, 2011) (internal quotations

omitted). "Relevant information need not be admissible at trial so long as the discovery sought appears reasonably calculated to lead to the discovery of admissible evidence." *Liles*, 2010 WL 1839229, at *2. The documents requested by Plaintiffs are highly relevant to Plaintiffs' Antitrust Claims and NCAA's defenses, particularly under the broad criteria for relevance applied to non-party subpoenas. *See Coker v. Duke & Co., Inc.*, 177 F.R.D. 682, 685 (M.D. Ala. 1998) (noting that even "[w]here there is a doubt over relevancy, the court should still permit discovery.").

"When ruling on motions to compel in the Rule 45 context, courts apply a balancing test, weighing the probative value of the documents sought against the burden of complying with the subpoena." *S.E. Mech. Servs. v. Brody*, No. 09-CV-0086-GET, 2009 WL 3095642, at * 3. (N.D. Ga. June 22, 2009). Among the factors this Court may consider are the relevance of the information requested, the requesting party's need for the documents, the breadth of the document request, the time period covered by the request and the burden imposed on the non-party. *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004). A party seeking to avoid discovery on the basis of burden "must substantiate that position with detailed affidavits or other evidence establishing an undue burden ... [and] cannot rely on simple conclusory assertions about the difficulty of complying with

the discovery requests." *Coker*, 177 F.R.D. at 686. Because Plaintiffs' need for the requested relevant documents is great and the (alleged) burden imposed on TBS is small, the Court should grant Plaintiffs' Motion to Compel.

B. TBS' Television and Licensing Agreements and Related Revenue Reports Are Relevant and Discoverable.[4]

Plaintiffs seek agreements affecting or concerning the broadcast, licensing or other use of all or any portion of Division I Football or Division I Basketball games, and financial reports detailing payments made pursuant to the agreements. (Modified Request Nos. 1-3; Ex. C.) TBS refuses to produce agreements pertaining to NCAA member conferences and schools, as well as related financial records, on relevance grounds, claiming that that the agreements are irrelevant because they are with non-parties, rather than the NCAA. Furthermore, TBS contends that its agreements – including its agreement for the broadcast of the NCAA Basketball Tournament – and financial data are confidential and proprietary, and cannot be produced even if protected by a confidentiality order. (Herrera Decl. at ¶¶ 10, 13.)

[4] Modified Request Nos. 1-3 seek TBS's television and licensing agreements, as well as related financial reports. (Herrera Decl. at Ex. C.) Plaintiffs address these requests together because of the significant overlap between the documents sought by the requests and TBS' objections.

The broadcast and licensing agreements and related financial reports sought by Plaintiffs are highly relevant to the claims and defenses in this suit. For example, since 2011, TBS and its network affiliates have broadcast "March Madness," the NCAA Men's Division I championship tournament. This agreement, entered into between Defendant NCAA and TBS, is clearly relevant and discoverable.

Moreover, although TBS has not identified additional responsive materials in its possession, it certainly has other documents responsive to these requests. From 2002-2006, TBS regularly broadcast games featuring athletes from the Big 12 and Pacific-12 conferences through its *Big Play Saturday* programming. News reports indicate that TBS secured the rights to these lucrative properties through licenses provided by FOX Sports.[5] TBS has neither confirmed the existence of these agreements, nor indicated whether it possesses additional, similarly responsive agreements. (Herrera Decl. at ¶ 7.)

In addition, TBS may be party to licensing agreements that grant the right to use all or any portion of Division I Football or Division I Basketball games. As the home of the NCAA Division I Men's Basketball Tournament, TBS may have licensed footage from these contests, footage that contains the images and

[5] *See* http://www.fanblogs.com/big12/006967.php

likenesses of former athletes. Similarly, TBS broadcasted Southeastern Conference football games, as well as other Division I Football events, during the 1980s and 1990s. TBS may own the rights to the footage of these contests and, thus, may have entered into licensing agreements during the relevant time period that granted third-parties the right to utilize this footage. These documents are relevant and must be produced.

First, as Judge Wilken has already determined, Plaintiffs' antitrust claims "encompass agreements for rights to televise games, DVD and on-demand sales and rentals, and sales of stock footage of competitions, to name a few." (Dkt. No. 325 at 12 (citing Compl. ¶¶ 332-60)). Judge Wilken also confirmed that "agreements for the broadcast of athletic events" are alleged to impact and define the "Collegiate Licensing Market," the defined relevant market in the case. *See O'Bannon*, 2010 WL 445190, at *5 (O'Bannon "identifies numerous agreements entered into by the NCAA and its members, including for the broadcast of athletic events. These allegations suggest that the market exists.") Market definition is an essential element of Plaintiffs' claims. *Gulf States Reorganization Group, Inc. v. Nucor Corp.*, No. 1:02–CV–2600–RDP, 2011 WL 5320620, at n. 41 (N.D. Ala. Sep. 29, 2011) (Sherman Act §1 claims require plaintiffs to define the relevant

market and establish that defendants possessed power in that market (*citing Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir.1996))).

Second, another district court has already confirmed the discoverability of the broadcast and licensing agreements requested by Plaintiffs. On November 15, 2011, Judge Marc Treadwell in the Middle District of Georgia granted Plaintiffs' motion to compel the Atlantic Sun Conference to produce its broadcast and licensing agreements, as well as related revenue reports and other documents. *Keller v. Nat'l Collegiate Athletic Ass'n*, Case No. 5:11-mc-00014-MTT, Dkt. No. 9 (M.D. Ga. Nov. 15, 2011) (attached hereto as Exhibit D). In response to Plaintiffs' motion to compel, Atlantic Sun argued that the agreements were irrelevant because "none of these contracts ... directly involve the Defendants or any conspiracy to restrain trade." (*Id.*, Dkt. No. 7 at 7.) The court disagreed and compelled production, noting that "at this point it's really not a question of relevancy that we're looking at ... if it's just relevancy, you know, particularly since we do have the protective order in the underlying case, I don't think that's grounds for not producing it." (Nov. 15, 2011 Hr'g Tr. at 3) (attached to Herrera Decl. as Exhibit E).[6]

[6] In addressing a related issue, the court also noted that "it seems to me that there is a sufficient nexus between the claims against NCAA and the member conferences...." (Ex. E to Herrera Decl. at 3.)

Third, Plaintiffs are entitled to the production of these television contracts and licensing agreements because they help demonstrate how NCAA rules and regulations are used to carry out this scheme and impair the future rights of student athletes. As discussed above, release forms required by NCAA rules are incorporated into their members' agreements with licensees and broadcasters (such as TBS) and purport to convey the rights in perpetuity to utilize footage containing the names, images and likenesses of student athletes. These agreements create a broad range of multimedia revenue streams totaling tens of billions of dollars.

Fourth, Plaintiffs also seek money damages and require the production of the agreements (and related financial information) to determine the value of the rights conveyed as a consequence of the anticompetitive scheme. *Bailey Indus. v. CLJP, Inc.*, 270 F.R.D. 662, 669 (N.D. Fla. 2010) (compelling production of unredacted invoices from a non-party and noting relevance of production to determining an appropriate measure of damages in the underlying litigation).

TBS objects to producing these agreements to the extent that the agreements are with *NCAA member conferences*, rather than the NCAA itself, claiming that such agreements are irrelevant to Plaintiffs' claims against the NCAA. (Herrera Decl. at ¶¶ 10, 13.) This objection is meritless. Plaintiffs' claim (confirmed by Judge Wilken) is that the NCAA **and its members**, along with its

for-profit business partners, conspired to restrain trade by requiring student athletes to relinquish their rights to compensation for the commercial exploitation of their images and likenesses after their playing days are over. *O'Bannon*, 2010 WL 445190, at *3. While the NCAA itself enters into some broadcast or licensing agreements,[7] most of the agreements that attempt to convey rights to use student athlete names, images and likenesses are entered into by NCAA members, such as the SEC. Thus, agreements relating to the broadcast or use of NCAA members' athletic events are the by-product of the alleged conspiracy, entered into by an alleged co-conspirator. (Compl. ¶ 18.) Their relevance cannot be questioned. *See, e.g., O'Bannon*, 2010 WL 445190, at *5 ("[O'Bannon] identifies numerous agreements entered into by the NCAA **and its members, including agreements for the broadcast of athletics events**.") (emphasis added)). In light of the broad scope of discovery permitted by the Federal Rules, as well as the presiding court's rulings, even if this Court has "doubt[s] over relevancy, the [Court] should still permit discovery." *Coker*, 177 F.R.D. at 685.

[7] For example, the NCAA Division 1 Basketball tournament contract is between the NCAA and the Networks (TBS and CBS) that televise the games. As noted above, Plaintiffs require an unredacted version of this agreement.

C. Exemplar Student Release Forms And Documents Concerning Policies Or Practices Regarding The Use Of Student Athletes' Names, Images And Likenesses Are Relevant To The Plaintiffs' Claims.[8]

Plaintiffs requested that TBS produce unsigned, exemplar waiver forms that purport to require student athletes to relinquish their rights to their names, images and likenesses; documents "relating to policies governing when TBS must or should secure a likeness release or consent form from a student athlete; and documents "relating to policies regarding copyright, ownership and/or licensing of game footage and photographs." (Modified Reqs. Nos. 4-6; Herrera Decl. Ex. C.)[9]

There is no question that the waiver forms sought by Narrowed Request No. 4 are relevant to the claims or defenses in the suit, as they are the focus both of specific allegations in the complaint, (¶¶ 22-24), and of several of the NCAA's affirmative defenses. (*See e.g.*, Dkt. 330 at 55 (Affirmative Defense 13) ("Plaintiffs' claims are barred, in whole or in part, because they acquiesced in,

[8] Plaintiffs also address Narrowed Request Nos. 4-6 contemporaneously due to the significant overlap between the requests.

[9] Plaintiffs do not know whether TBS possesses documents responsive to these requests, or Narrowed request No. 8, discussed below. TBS neither confirmed nor denied the existence of these documents during the meet-and-confer process, and instead chose to focus only on the relevance of television and licensing agreements to the underlying litigation.

consented to, waived, disclaimed, represented that they had no cognizable property interest ....")).

Likewise, TBS's documents reflecting policies regarding the use of student athletes' names, images and likenesses (Narrowed Request No. 5) or ownership and licensing of game footage (Narrowed Request No. 6) are clearly relevant and discoverable. Plaintiffs' claims focus on the conveyance of rights from student athletes, to the NCAA and its members, and to third parties such as TBS and licensees. The manner by which the rights to student athlete names, images and likenesses are purportedly conveyed is an issue central to the litigation.

D. Documents Relating to EA Sports Are Likewise Relevant and Discoverable.

Narrowed Request No. 8 seeks documents related to EA Sports, including agreements entered into by TBS, materials provided by TBS to EA, and royalty reports detailing related revenues. (Herrera Decl., Ex. C.) Plaintiffs' Complaint is replete with references to Defendant EA Sports, an alleged coconspirator, and the revenues that EA, the NCAA and NCAA member conferences derive directly from the exploitation of current and former student athlete likenesses. *See* Compl. ¶ 401 ("The NCAA, as well as individual schools and conferences, benefits financially from the NCAA's license agreement with EA."); *see generally Id.* ¶¶ 371-419. Documents relating to EA's use of player likenesses and biographical information

provided to EA by TBS are integral to the continuing exploitation of image and likeness in EA Sports games.

E. TBS Cannot Refuse To Produce Relevant Documents On The Basis Of Confidentiality.

TBS objects to producing its responsive documents on the basis of confidentiality (Herrera Decl. at ¶10), even though its production of confidential material may be made subject to the provisions of the broad Protective Order entered in this case. (*See* Dkt. No. 320.)[10] By its terms, that Order allows documents produced by a non-party to be designated as confidential and even provides for a "Counsel Only" designation for "the financial terms of a party's licensing, broadcast or other commercial agreements ... the net revenues a party

[10] The Middle District of Georgia and the Texas Attorney General's Office rejected identical objections raised by the Atlantic Sun and Big 12, respectively. Based in part on the Protective Order entered in the underlying litigation, the Judge in the Middle District of Georgia ordered Atlantic Sun to produce its broadcast and licensing agreements. (*See* Ex. E at 4-11.) Indeed, Judge Treadwell noted that, "I'm inclined, unless there's a specific document that you could make a particular showing with regard to, I'm inclined to assume and rule that the protective order gives [Atlantic Sun] the protection they need." (*Id.* at 7.) Similarly, the Texas Attorney General ordered the University of Texas to produce broadcast and licensing agreements and related revenue reports pertaining to the University of Texas and the Big 12 in response to Plaintiffs' Open Records requests. Although the University of Texas and the Big 12 contended that the requested information was confidential and therefore should be withheld from production, the Texas Attorney General overruled their objections and ordered production. (Nov. 4, 2011 Ltr. from J. Luttral to Z. Angadicheril, at 4-7 (attached as Ex. F to Herrera Decl.)).

receives for sales of products, licenses, rights, etc., and the royalty, licensing or similar payments made or received by a party." (*Id.* at ¶ 11.) Moreover, the court recently entered a stipulated Addendum to the Protective Order that provides an "Outside Attorneys' Eyes Only" designation for materials that are "especially sensitive such that the producing party believes in good faith that it would suffer competitive harm if publicly known or known by agents and employees of other parties or non-parties who would have access under the Stipulated Protective Order to Confidential Material." (Dkt. No. 401 at ¶ 2.) As such, the Protective Order contemplates and protects the production of the very documents that TBS refuses to produce. In light of the broad scope of and protections provided by the Stipulated Protective Order, including the various designations provided therein, TBS' "confidentiality concerns are not sufficiently compelling." *Festus & Helen Stacy Found. v. Merrill Lynch, Pierce Fenner & Smith Inc.*, 432 F. Supp. 2d 1375, 1380 (N.D. Ga. 2006) (compelling production of confidential financial information because "there is no absolute privilege for trade secrets and similar confidential information ... the appropriate solution is rather to compel discovery of the documents subject to a protective order." (*relying on Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 362 (1979)).[11]

[11] *Accord. S.E. Mech. Svcs.*, 2009 WL 3095642, at *7 (ordering non-party to

CONCLUSION

Through its agreements with the NCAA and member institutions, TBS is a major participant in the collegiate licensing market. Thus, its responsive documents are highly probative of the claims and defenses raised in the underlying litigation. Accordingly, this Court should not sanction TBS's complete refusal to respond. Plaintiffs respectfully request that the Court enter an order compelling TBS to produce its responsive documents.

Respectfully submitted,

This 13th day of December 2011

DOFFERMYRE SHIELDS
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produce unredacted confidential contractual provisions since they "may be produced pursuant to the parties' Consent Protective Order with the appropriate confidential designation.") (internal citations omitted); *Urim Corp. v. Krongold*, No. Civ.A. 05-CV-0633-GET, 2006 WL 22224012, at *3 (N.D. Ga. Aug. 2, 2006) ("Accordingly, [the non-parties] have stated insufficient grounds to escape their obligation to produce the requested documents ... in light of legitimate privacy concerns for private financial information ... all documents produced ... are subject to plaintiff's execution of a reasonable confidentiality agreement."); *Melder v. State Farm Mut. Auto. Ins. Co.*, No. 08-CV-1274-RWS, 2008 WL 4682180, at *1 (N.D. Ga. Oct. 21, 2008) (denying motion to quash 30(b)(6) subpoena relating to "confidential and proprietary information" as "[the non-party's] concerns about confidential proprietary information can be resolved by a confidentiality agreement.")

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CERTIFICATE OF COMPLIANCE

Pursuant to N.D. Ga. L.R. 7.1D, I hereby certify that the foregoing brief complies with the font and point selections approved by the Court in L.R. 5.1B. It was prepared on a computer, using Times New Roman 14-point font.

An Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2011, I caused a true and correct copy of the Motion to Compel Production of Documents by Non-Party, Turner Broadcasting System, Plaintiffs' Supporting Memorandum of Law and the Declaration of Daniel Herrera to be served on Counsel for non-party Turner Broadcasting System, by First Class U.S. Mail and electronic mail at the following address:

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