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JAMES N. HATTEN, Clerk
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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

DECLARATION OF DANIEL HERRERA

I, Daniel O. Herrera, declare as follows:

1. I am an attorney at the law firm of Cafferty Faucher LLP, counsel for the Plaintiffs in the above-captioned litigation. I make this declaration in support of Plaintiffs' Motion to Compel Production of Documents from Non-Party, Turner Broadcasting System ("TBS"). I certify that in an effort to obtain the requested discovery without the intervention of this Court, I have complied with the duty to confer in good faith with TBS' counsel, as required by Fed. R. Civ. P. 37(a)(2)(A)(B), in an effort to obtain it without court action, but my attempts have been unsuccessful. I have personal knowledge of the matters set forth in this

Declaration.

Meet and Confer Process with TBS

2. Beginning in approximately mid-July, attorneys at Cafferty Faucher prepared and effected service of subpoenas *duces tecum* on various non-parties, including NCAA member conferences and schools, Plaintiffs' former agents, licensing entities, and various major television networks. As part of this effort, Plaintiffs served a subpoena on TBS on August 2, 2011 (the "Subpoena"). The Subpoena requests production of 27 categories of documents. A true and correct copy of the Subpoena (including proof of service) is attached hereto as Exhibit A.

3. On August 17, 2011, TBS served its written responses and objections through a letter from James Lamberth ("Lamberth"), counsel for TBS, to Bryan Clobes ("Clobes"), a partner at Cafferty Faucher. In that letter, TBS objected in boilerplate fashion to the Plaintiffs' requests, and the definitions and the instructions on various bases, including relevance, burden and privilege. A true and correct copy of Lamberth's August 17 letter is attached hereto as Exhibit B.

4. In an effort to address TBS' objections, on August 31, 2011, Ellen Meriwether ("Meriwether"), a partner at Cafferty Faucher, sent Lamberth a letter narrowing the list of documents requested in the Subpoena from the 27 originally

requested to 8 ("the Narrowed Requests"). The letter also stated that Plaintiffs would consider a complete production of the documents sought by the Narrowed Requests to be full compliance with the subpoena. A true and correct copy of Meriwether's August 31 letter is attached hereto as Exhibit C.

5. The parties initially met-and-conferred by telephone on September 9, 2011. Meriwether and I joined Lamberth on the call. Lamberth confirmed that he received Meriwether's August 31, 2011 letter describing the narrowed list of documents, but noted that he failed to see the relevance of the requested materials.

6. During this initial call, Lamberth expressed his view that the litigation ("the Antitrust Action") is more limited in scope than the Narrowed Requests implied. Lamberth asserted that, based on his understanding of the Antitrust Action, Plaintiffs defeated several rounds of motions to dismiss solely because the Complaint alleged a conspiratorial agreement between the NCAA and EA Games. Lamberth expressed his view that the Complaint and various orders did not support Plaintiffs' requests for agreements between TBS and NCAA member schools and conferences.

7. During this call, Lamberth claimed that TBS' responsive television agreements should be obtained from the NCAA rather than TBS. Lamberth stated

that TBS would not produce these agreements if the NCAA also refused to do so, and that TBS would move to quash the Subpoena to accomplish that result. Lamberth did not address the existence of relevant broadcast and licensing agreements between TBS and other non-parties.

8. In response, Meriwether explained the relevance of each request by category. For example, with respect to Narrowed Request Nos. 1-3, she explained that television and broadcast agreements are relevant because that is often the first place where rights to use image and likeness are impacted and conveyed. Meriwether also explained that television contracts entered into by the NCAA or its members are relevant because the NCAA is an association of member schools and conferences and is alleged to act through its members, whom the Complaint identifies as unnamed co-conspirators. Meriwether also informed Lamberth that Plaintiffs allege that the NCAA and its members impose regulations that require student athletes to relinquish their rights to receive compensation for the exploitation of their names, images and likenesses. She made clear that television and licensing agreements may contain provisions that impact those rights, and are essential to understanding the flow of revenues to the NCAA and its members.

9. The parties also discussed Plaintiffs' need for documents identifying

payments made or received in connection with TBS' responsive agreements. Although Lamberth asserted that payment information would be reflected in the agreements themselves, Meriwether noted that actual payments may have differed from the contractual language and would need to be substantiated through financial records. Lamberth agreed to discuss the Narrowed Requests with his client and ascertain whether TBS possessed responsive documents.

10. Plaintiffs' counsel met-and-conferred again with Lambert on September 27, 2011. I was joined by Bryan Clobes on this call. During this call, Lamberth stated unequivocally that TBS would not produce its responsive agreements for three reasons: (1) TBS' television agreements with entities other than the NCAA are irrelevant to Plaintiffs' claims; (2) TBS' agreements with the NCAA must be produced by the NCAA; and (3) Lamberth's "extreme view" of confidentiality that assumes that anything produced eventually will be made public, despite the protective order entered in the litigation.

11. In response, Clobes again addressed the relevance of TBS' broadcast contracts and licensing agreements. Clobes explained that the Complaint clearly alleges that the NCAA and its members instituted an anticompetitive framework that requires student athletes to relinquish their rights to their names, images and

likenesses in perpetuity. The NCAA and its members then claim to own those rights and exploit them through broadcast agreements – entered into with networks like TBS – in exchange for payments that should be directed, at least in part, to Plaintiffs and the Class.

12. Clobes also explained that Plaintiffs initially sought to involve the NCAA in a cooperative venture to gather and produce non-party information, but that the NCAA refused. Moreover, he noted that although Plaintiffs continued to meet-and-confer with the NCAA, the NCAA's eventual production would not include the vast majority of documents responsive to the TBS Subpoena.[1]

13. Clobes and I met-and-conferred with Lamberth for the last time on October 3, 2011. During that call, Lamberth confirmed that TBS would not produce its responsive television agreements or related financial information for the reasons discussed during prior calls. Lamberth made clear that his client's refusal to produce any responsive documents was based on his view that Plaintiffs will not be able to prove a conspiracy between the NCAA and its members.

14. During this call, Lamberth also questioned the relevance of

[1] The NCAA has since produced only a redacted version of the NCAA Tournament Agreement. Accordingly, Plaintiffs still require production of an unredacted version of this highly relevant and discoverable contract.

communications discussing or concerning the litigation. Clobes provided Lamberth with several examples of relevant communications, including non-privileged communications with the NCAA that discuss the litigation, or communications with other non-parties regarding the same. He explained that these types of communications may contain statements or admissions made by the NCAA or its members, or reveal coordination between the NCAA and subpoena recipients. Clobes also made clear that we did not expect communications solely between TBS and Lamberth's firm to be included on a privilege log. However, we did expect that documents or communications with a party to the lawsuit (such as the NCAA) or with another non-party, would either be produced or identified in a privilege log if there was a claim of privilege. Lamberth noted that TBS would assert a privilege over any responsive documents involving counsel, regardless of whether the communications involved third-parties. Lamberth agreed that TBS would search for responsive documents to determine, if anything, existed.

15. On November 3, 2011, Lamberth contacted Meriwether and Herrera by phone. He explained that due to scheduling difficulties, he had yet to ascertain the existence of communications referencing the litigation. He also reiterated that TBS would not voluntarily produce its television and licensing agreements.

16. Lamberth left me a voicemail on November 16, 2011. In his voicemail message, Lamberth advised that TBS was unable to locate responsive documents referencing or discussing the litigation.

17. In light of the fact that after over two months of discussion regarding the subpoena and its scope, TBS was not prepared to produce a single document, we concluded that further meet-and-confer efforts were not likely to be productive.

I declare under penalty of perjury that the foregoing is true and correct.

Daniel O. Herrera

Executed: Dec 12, 2011