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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

SAMUEL MICHAEL KELLER, ET AL, :
PLAINTIFF, :
: Case No. 5:11-MC-14 (MTT)
V. :
: November 15, 2011
: Macon, Georgia
NATIONAL COLLEGIATE ATHLETIC :
ASSOCIATION, DEFENDANT, :
: TED GUMBART, MOVANT :
:

TELEPHONE CONFERENCE

BEFORE THE HONORABLE MARC T. TREADWELL
UNITED STATES DISTRICT JUDGE, PRESIDING

APPEARANCES:

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P R O C E E D I N G S**November 15, 2011****(In Chambers)****THE COURT:** Good afternoon, everybody.**COUNSEL COLLECTIVELY:** Good afternoon, Your Honor.**THE COURT:** Who do I have for the plaintiffs?

MS. JOHNSON: Yes, Your Honor, for the plaintiffs you have Kim Johnson from Doffermyre, Shields, Canfield, and Knowles, as well as my co-counsel, Daniel Herrera of Cafferty Faucher.

THE COURT: All right.

MR. NOLAND: And, Judge, William Noland here for A-Sun. It's just me today.

THE COURT: Okay. All right, I'm looking at Mr. Noland's October 7th e-mail where he lists five categories of documents. Are those what we are talking about this afternoon?

MS. JOHNSON: Yes, they are, Your Honor.

THE COURT: All right. On the fifth item, the correspondence, this just says Correspondence from the NCAA, but as I understand Mr. Noland's brief, he's talking about correspondence between and among attorneys for A-Sun and the NCAA, and he's claiming a joint defense privilege. Mr. Noland, have I said that right?

MR. NOLAND: You have, Judge.**THE COURT:** All right. Mr. Herrera or Ms. Johnson,

1 whoever is going to take the lead, what's your position on
2 that?

3 **MS. JOHNSON:** Well, Your Honor, this is Kim Johnson,
4 the first we heard of any privilege whatsoever or that this
5 correspondence may have involved, you know, attorney
6 correspondence was Mr. Noland's filing from yesterday, late
7 yesterday morning. You know, it's never been raised. The
8 subpoena was served almost three months ago, and the issue has
9 never yet been raised. We think there's certainly, you know,
10 a waiver argument to be made here in regard to that.

11 **THE COURT:** Well, I don't know about that. You know,
12 given how I understand things have unfolded, it doesn't seem
13 to me that that objection has got -- things have gotten to the
14 point where that objection would be waived. It's not
15 surprising to me, given the little bit I understand about the
16 underlying case, that NCAA lawyers have been in communication
17 with A-Sun. And, also, as I understand, and I think Mr.
18 Noland quoted from your brief as well, it seems to me that
19 there is a sufficient nexus between the claims against NCAA
20 and the member conferences that unless -- on the substance of
21 that claim of privilege, unless you have some reason why that
22 privilege should not apply, you know, I'm inclined to say that
23 those communications do not have to be produced. We can talk
24 about a privilege log if we need to, but --

25 **MS. JOHNSON:** Thank you, Judge Treadwell, that's

1 exactly what my next thought is. We would certainly, you
2 know, appreciate being able to -- we can't evaluate other than
3 in a vacuum the substance of any privilege or work product
4 without seeing, you know, to who and from this correspondence
5 was sent and get a general idea of what the topics were, and
6 we would certainly, you know, appreciate the chance if the
7 Court is not inclined to, you know, reject the privilege claim
8 out of hand, we'd like to update a response, you know, on
9 paper on the merits to these arguments that were just brought
10 up yesterday, but certainly one thing we would also, you know,
11 we think we are entitled to have to help us evaluate the
12 merits of the substance of any such claims would be the
13 privilege log.

14 **THE COURT:** Okay. Mr. Noland, is there any objection
15 to a privilege log on those materials? Mr. Noland?

16 **MR. NOLAND:** Yes, sir, I'm sorry, I was contemplating
17 for a moment. I suppose a -- I wouldn't have a valid
18 objection to a privilege log, Judge. We can -- I can produce
19 that if Your Honor wanted that.

20 **THE COURT:** Yes, I think that's reasonable under the
21 circumstances. Now, getting back to the e-mail, item one is
22 not in dispute, and that leaves us with items two, three, and
23 four. I understand, I don't think it's in the materials that
24 we have, but I understand that there's a confidentiality order
25 entered in the underlying litigation that would apply to

1 documents produced in response to a subpoena; is that correct?

2 **MS. JOHNSON:** Yes, Your Honor, there is an underlying
3 protective order, and it does have two tiers of protection,
4 you know, in the case of anything that is being highly
5 confidential that is an attorney's eyes only designation that
6 can be made to offer a second level of protection if A-Sun
7 believes that's necessary.

8 **THE COURT:** And I gather, Mr. Noland, that your client
9 thinks that that protective order is not sufficient to protect
10 its interest with regard to these documents?

11 **MR. NOLAND:** That is their position, Your Honor.

12 **THE COURT:** And why is that?

13 **MR. NOLAND:** I think it is, I suppose one level is a,
14 just a general scepticism of it in the first place as to who
15 is going to have these things, and just object in general to
16 producing them, these ongoing business relationships between
17 them and their partners, our client.

18 **THE COURT:** I thought perhaps the grounds for your
19 objection was that the A-Sun has never had anybody featured in
20 the video game?

21 **MR. NOLAND:** I can say that that is true. Now, some of
22 these claims obviously relate to video footage and that sort
23 of thing, but as I think as it relates to the A-Sun, and I've
24 mentioned in the brief, the only thing that has ever been
25 authorized or even ever been asked for, Judge, as far as video

1 games has been concerned is possibly the logo. And we are --

2 **THE COURT:** Well, I was being facetious.

3 **MR. NOLAND:** I knew you were, Judge, and as Your Honor
4 knows, this is the A-Sun and is not -- and I think the
5 evidence would bear out, Judge, that the A-Sun is not getting
6 rich off anybody's license.

7 **THE COURT:** Well, let me ask this, Ms. Johnson or Mr.
8 Herrera. I assume that similar subpoenas have gone out to
9 conferences across the country. Is that a fair assumption?

10 **MS. JOHNSON:** Yes, sir, they have.

11 **THE COURT:** And what has typically been your experience
12 with regard to the responses from those other conferences?

13 **MS. JOHNSON:** Let me defer to Mr. Herrera to answer
14 that question, Your Honor.

15 **MR. HERRERA:** Good afternoon, Your Honor. Quite
16 frankly, it's varied. We've had some conferences that have
17 given some pushback, but in a significant number of other
18 cases we've received production that have included these types
19 of materials from conferences both large and small. So
20 materials we've received have not been limited to large
21 conferences, like, let's say, the SEC, and there are a number
22 of other smaller conferences throughout the United States that
23 have produced very similar documents without hesitation
24 because they've availed themselves of the protections afforded
25 by the protective order.

1 **THE COURT:** Okay. Well, that doesn't have any strong
2 bearing, but maybe out of curiosity, more than anything else,
3 I was interested in that. Well, Mr. Noland, I understand your
4 client's, any business's, general concern about turning over
5 documents that they consider to be important and somewhat
6 confidential, but, you know, that's what protective orders are
7 for.

8 **MR. NOLAND:** Yes, sir.

9 **THE COURT:** And I'm inclined, unless there's a specific
10 document that you could make a particular showing with regard
11 to, I'm inclined to assume and rule that the protective order
12 gives them the protection they need.

13 **MR. NOLAND:** Yes, sir. And if I may just ask a
14 question. I understand Your Honor's thoughts on it and
15 ruling. There are three categories in my mind as far as these
16 contracts. One is the contract itself. Obviously that comes
17 under what Your Honor just said. The second thing would be
18 the reports, which are generally, the way it works, Judge, is
19 you have these contracts and there are monthly reports and
20 everything to let everybody know, kind of like invoicing,
21 where everybody know stands with the money, and then there's a
22 third category of our client had e-mails and things where the
23 negotiations were going on before the contracts were entered
24 into. And I think certainly under Your Honor's ruling the
25 contracts obviously, but as to the other two categories of

1 documents, in particular I question, I guess, the relevance of
2 the negotiations that have taken place as far as the terms of
3 the contract would end up being.

4 **THE COURT:** Okay. Well, let me hear from the
5 plaintiffs on that particular point. You're differentiating
6 between the end document, the contract, and the negotiations
7 that led up to it which, of course, are not part of the
8 contract.

9 **MR. NOLAND:** We have a file on the contract, you know,
10 Judge, like any business or law firm, and it has
11 correspondence.

12 **THE COURT:** All right. What do the plaintiffs say
13 about that?

14 **MS. JOHNSON:** Well, Your Honor, insofar as the monthly
15 reports, the invoices and reporting, you know, the amounts
16 earned, I think those are essential to the plaintiffs' claims
17 and their damages in the underlying litigation. In regard to
18 the second category, the sort of the contract file, the
19 e-mails, the negotiations of the contract, like you said, I
20 think they'd be entitled to confidentiality protection under
21 the protective order, and I think they -- without seeing them,
22 it's difficult to evaluate the relevancy. But if they are
23 negotiating the fact that, look, the NCAA rules, we're
24 supposed to put in -- we have to put in something about what
25 happens in the likelihood of anyone who's a student athlete,

1 obviously there's the chances that it's very relevant and
2 essential to the issues being litigated in the class action,
3 and we would ask they be produced as well.

4 **THE COURT:** I can see that. Okay. Here's what we'll
5 do with that category, and I'm talking now about the documents
6 reflecting negotiations leading up to the contract. Mr.
7 Noland, if your client truly feels that there's something in
8 those materials or in a particular document that just rises
9 above the normal desire for confidentiality in business
10 dealings, submit it to me in camera --

11 **MR. NOLAND:** Right.

12 **THE COURT:** -- along with a privilege log for those as
13 well.

14 **MR. NOLAND:** I don't know that there'll be any
15 particular document.

16 **THE COURT:** Okay. Well, I don't know one way or the
17 other.

18 **MR. NOLAND:** I know, Your Honor.

19 **THE COURT:** I understand the plaintiffs' concerns, and
20 I think that will protect your client's interests if there
21 truly is some particular reason that a document that falls in
22 that category is sensitive, I'll look at it, and we can make a
23 decision. Any other category of documents that, Mr. Noland,
24 you think is entitled to special protection?

25 **MR. NOLAND:** I feel like, Judge, the number three

1 category with the photography contract that kind of just falls
2 under what you've already discussed, so I won't argue over
3 that. The contract for use of the logo was one thing we just
4 felt like wasn't relevant. I think it probably peeked the
5 interest of the plaintiffs because I put in there, and it's
6 true, that the contract for the use of the logo mentioned EA
7 Sport as far as the logo. That's why I said and the logo may
8 have been used in the video game. But, again, I go back to
9 the brief, this is not a particularly important contract, but
10 it appears to be not relevant, I don't see how the plaintiffs
11 could have any interest.

12 **THE COURT:** Of course, at this point it's really not a
13 question of relevancy that we're looking at. I'll put that,
14 though, in the same category that we just discussed, that is
15 the communications leading to the contracts. If there's a
16 particular reason that your client is concerned about that, I
17 will look at it, but if it's just relevancy, you know,
18 particularly since we do have the protective order in the
19 underlying case, I don't think that's grounds for not
20 producing it.

21 **MR. NOLAND:** I understand, Judge.

22 **THE COURT:** Okay. Any other particular or specific
23 category we need to talk about?

24 **MR. NOLAND:** I don't think so. I think the only thing
25 that's been left open, other than if we have some issues that

1 we wanted Your Honor to review a document in camera, I think
2 the only thing left would be the correspondence between
3 counsel related to this litigation, and I've been ordered as I
4 understand it to produce a privilege log on that?

5 **THE COURT:** Yes. That's right, and we can go from
6 there on that. All right. Well, how about for the
7 plaintiffs, anything further?

8 **MS. JOHNSON:** Not from me, Your Honor, but if Mr.
9 Herrera has something, I'd like for him to have the
10 opportunity to be heard as well.

11 **THE COURT:** All right, Mr. Herrera, anything further?

12 **MR. HERRERA:** Your Honor, to the extent that the
13 A-Sun's production will include those materials discussed in
14 Mr. Noland's e-mail, at this point we see nothing further to
15 raise, and we will certainly revisit the issues should it
16 become apparent that something has been left out, but as of
17 this moment I don't think we have further issues.

18 **THE COURT:** Okay. All right, well, thank you all very
19 much.

20 **COUNSEL COLLECTIVELY:** Thank you, Your Honor.

21 **(TELEPHONE CONFERENCE CONCLUDED)**

22
23 **I HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT**
24 **TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE**
ABOVE-ENTITLED MATTER THIS 16th DAY OF NOVEMBER, 2011.

25 **/s/ SALLY L. GRAY, USCR,**
U.S. DISTRICT COURT-MIDDLE DISTRICT OF GEORGIA

