

EXHIBIT B

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE NCAA STUDENT-ATHLETE) CASE NO.
NAME & LIKENESS LICENSING) 4:09-cv-1967 CW (NC)
LITIGATION)

The videotaped deposition upon oral examination of DAVID BERST, a witness produced and sworn before me, Debbi S. Austin, RMR, CRR, Notary Public in and for the County of Hendricks, State of Indiana, taken on behalf of the Plaintiffs, at the offices of Faegre Baker & Daniels, 300 North Meridian Street, 27th Floor, Indianapolis, Marion County, Indiana, on the 25th day of May, 2012, commencing at 9:00 a.m., pursuant to the Federal Rules of Civil Procedure with written notice as to time and place thereof.

- 18 Q Good morning, Mr. Berst. For the record, can
19 you state your full name?
20 A Samuel David Berst, Jr.
21 Q You go by David Berst?
22 A Yes.

2 Q What's your current position title?

3 A I'm the vice president for Division I.

4 Q What do you do?

5 A I manage the governance structure of the
6 association in Division I, and that means that
7 issues that come up to the board of directors,
8 the presidential group within Division I, I try
9 to assess the thinking of conferences that have
10 votes in Division I. And I attempt to manage,
11 then, the agendas and initiatives that are
12 working their way through the association from
13 the various committees, cabinets, councils,
14 groups within the NCAA. I'm a facilitator, a
15 professional bureaucrat.

16 Q How long have you had your current job?

17 A About 13 years.

18 Q What was your job directly before that?

19 A I was the -- well, a whole host of titles, but I
20 for 25 years worked in the enforcement area
21 beginning as what you would call a field
22 investigator with a different title and then
23 directed that program with differing titles
24 beginning in 1975 through '98, I believe.

4 Q I'm going to mark an excerpt -- excerpts of the
5 D-I manual.

9 Q Looking at what's been marked as Exhibit 267,
10 does this appear to you to be selected excerpts
11 from the NCAA 2011-2012 Division I manual?

20 A It appears to be excerpts at least related to
21 bylaws 12, maybe 15. 15, yes. Not -- I don't
22 see 14, I don't think. But okay, it does appear
23 to be a couple of the bylaws, yes.

16 Q And according to the definition contained in the
17 Division I manual, what is an amateur?

18 A Well, it's one who pursues athletics as an
19 avocation and is part of -- well, does not use
20 their name, reputation, or likeness for pay or
21 promise of pay in any form. It is one that
22 defines the grant-in-aid provisions that may be
23 provided and begins to set forth some of the
24 exceptions to -- to enhance the grant-in-aid.
25 So it's a general description of what kinds of

1 individuals are qualified or eligible to
2 participate in an NCAA -- at an NCAA member
3 institution.

4 So bylaw 12 then, you know, affects the
5 eligibility of student-athletes if they don't
6 adhere to these guidelines or principles or
7 rules, then that doesn't mean they can't do
8 whatever it is that the action may be, but they
9 are no longer eligible for competition at an
10 NCAA member institution.

25 Q There's no age limit to be an amateur under the

1 NCAA rules?

2 A There are some limitations related to organized
3 competition after the age of 21 and when you can
4 continue to participate on a Division I level.
5 It's a different rule than what applies to
6 Divisions II and III, where it's just based on
7 enrollment and X number of semesters or
8 quarters. But there is an effort to sort of
9 say, you know, wait a minute, a cross country
10 runner who becomes mature and can beat everybody
11 at 26 may not be the right kind of individual to
12 fit into the competition on a collegiate level.
13 So it's a different place that you would go. I
14 think actually bylaw 14.

15 Q All right. Let's talk about men's basketball
16 and football. Is there any age limit in those
17 sports in order to be considered an amateur?

18 A It would apply just the same way I described.
19 If they're involved in organized competition,
20 and it's pretty easy to be in organized
21 competition, then you start ticking off years of
22 eligibility. You only have four years of
23 eligibility in a five-year period once you begin
24 enrollment at a collegiate -- any collegiate
25 institution. So you -- by not being enrolled

1 and participating in organized competition, you
2 can use up some of those years.

3 Q Okay. Let me --

4 A So the technical answer is you're right, but
5 you'd have to not be playing, and then it's
6 unlikely you're going to be good enough to be at
7 a Division I institution.

8 Q Okay. Let's talk specifically -- let me give
9 you an example. An 18-year-old can be drafted
10 and sign with a professional baseball team, play
11 baseball, let's say, for six years. So he's 24.
12 He can then enter college and be considered an
13 amateur for purposes of football; correct?

14 A It's possible for that to occur, if all the
15 other caveats don't apply. That's right.

16 Q Let's go back to that same multisport athlete,
17 good baseball player, can sign a million dollar
18 signing bonus to play baseball, play baseball
19 for a number of years, then decide to enroll in
20 college and be a football amateur; correct?

21 A Yes. That person is considered a professional
22 in the sport in which they were paid and not a
23 professional in the sport that would be
24 considered an avocation at that point, that's
25 right.

1 Again, that changed probably 1974. But
2 prior to that time, once you became -- actually,
3 once you even thought about being a
4 professional, you were. So you didn't even have
5 to be drafted, you just declared, you know what,
6 I'm going to become a pro, you were in all
7 sports, and that was the end of your collegiate
8 career.

9 So the rules have changed or evolved over
10 that period of time where, yes, you can be a pro
11 in one sport and not in another.

19 Q Am I correct that an individual can play
20 professional hockey and then subsequently enroll
21 in college and play collegiate hockey and be
22 considered an eligible student-athlete?

23 A Unless I misheard you, I don't think so, no.

24 Q You can't play in the Canadian Junior League and
25 be compensated and then enroll in college and

1 play college hockey at the D-I level?

2 A Not compensated, no. You can sign a deleted

3 contract and not be paid and still play amateur

4 hockey. You can't play professional hockey.

5 There's major junior A, major junior B, I think,

6 and other programs. But it would be complicated

7 to do that.

8 In addition, if any of those people you're

9 talking about, gets an agent, they're out in all

10 sports. So it doesn't quite work the way you're

11 describing it. There is a way to design a

12 hockey experience and come back and play hockey,

13 but not on the professional level.

2 Q Let me give you an example of a proposed consent
3 form, and then I would like you to tell me if
4 this consent form violates any NCAA bylaws.
5 Okay.

6 "When you sign this consent form, you will
7 allow the University of Kentucky to promote NCAA
8 championships or other NCAA events, activities
9 or programs, or Kentucky basketball games in
10 which you played. The University of Kentucky
11 promises to share with you any revenues derived
12 after your eligibility ends for the use of your
13 name, image, or likeness."

14 A Yes, that would violate NCAA rules. That would
15 be the promise of pay to a student-athlete who
16 remains eligible. So you could do that, just
17 don't be a student-athlete anymore. It would be
18 fine to do that and move on.

19 But the actual receive of pay for your
20 athletic reputation or skill, either while a
21 student-athlete or the promise of pay in the
22 future is the same under our rules. And that
23 frankly is the nonstarter I've been talking
24 about with our membership. Our presidents
25 simply won't go there.

9 Q Kentucky -- can Kentucky have an institutional
10 rule that says, at the University of Kentucky,
11 we will share with our former student-athletes
12 revenues derived from the use of their name,
13 image, or likeness when they were a Kentucky
14 student-athlete?

17 A My answer would be no, they could not do that.
18 I think they're -- they're essentially
19 establishing a contract that is a promise for
20 pay for the reputation or skill of that
21 particular student-athlete. I think it's really
22 the same answer. Kentucky can't do that, nor
23 can anyone else. If -- yeah, I don't know
24 how -- any form that you could end up doing
25 that. I suppose there's -- yeah, I don't know

1 how to get there from here.

2 Q Can Kentucky -- I'm going to go back and give
3 you a hypothetical first. Let's say the
4 starting five of Kentucky has -- of Kentucky's
5 championship team from this last year's
6 Division I championship, has all declared
7 themselves eligible for the draft, have all
8 retained agents.

9 Can Kentucky issue those players, former
10 players, checks, write out a check to them,
11 saying, we're going to be using your name,
12 image, and likeness in the future because, you
13 know, we won and it's going to be on our website
14 and we're going to show clips, we're going to
15 give you a hundred thousand dollars each,
16 thanks. Can they do that?

17 A The --

20 A I think you need the academic and membership
21 affairs group to help with that kind of thing.
22 If you somehow can distinguish that sort of
23 arrangement from the eligibility of a current
24 student-athlete or some understanding that
25 that's what's going to happen, if you go to

1 Kentucky versus Memphis versus whatever the
2 other schools are, then it's -- it's not
3 inconceivable to me that you could do something
4 like that. You know, Kentucky is just going to
5 be a part of their professional life by using
6 them down the road.

7 And so I can imagine how you could possibly
8 conjure up that sort of a scenario, but I
9 would -- I'd say you have to really make sure
10 there's a disconnect between what the
11 expectations are when you're a student-athlete
12 and what's going to happen in the future, that
13 connection -- there has to be a clear cut to the
14 professional life. You know, our schools can't
15 be agents for student-athletes and can't be the
16 professional enterprise either for an enrolled
17 student-athlete's -- student-athlete. They can
18 enter into business relationships with -- with
19 former student-athletes.

14 Q I'm showing you what's been marked Exhibit 283,
15 which is a two-page e-mail string Bates numbered
16 NCAA production 00181574, 75.

17 Can you take a moment to orient yourself to
18 this document, please.

19 A Yes, I know what this is or have seen it, yes.

20 Q What was the purpose in you writing this e-mail
21 to Jim Isch?

22 A Isch.

23 Q Isch.

9 A

10 The -- this was at least my attempt to give
11 Jim Isch, who had been the acting president of
12 the association, my take on issues. So it
13 represents my thinking on various topics for his
14 information.