

# **EXHIBIT K**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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

\*\* CONFIDENTIAL - ATTORNEYS EYES ONLY \*\*

VIDEOTAPED DEPOSITION OF  
DAVID F. KIRKPATRICK  
NOVEMBER 14, 2012  
9:00 A.M.

KILPATRICK TOWNSEND & STOCKTON, LLP  
1100 PEACHTREE STREET, SUITE 2800  
ATLANTA, GEORGIA

REPORTED BY:

STEVEN S. HUSEBY, RPR  
CCR-B-1372

Designation Color Key  
Blue = NCAA Affirm Desigs.  
Orange = Pls' Counter Desigs.  
Fuchsia = NCAA Rebuttal Desigs

1 right of publicity plaintiffs.

2 MR. HENN: Charlie Henn with  
3 Kilpatrick Townsend on behalf of the witness and  
4 Collegiate Licensing Company. Also with me is  
5 Bruce Siegel, in-house counsel at Collegiate  
6 Licensing Company.

7 MR. WIERENGA: Robert Wierenga,  
8 Schiff Hardin, on behalf of the defendant NCAA.

9 MR. BRAUNIG: Warren Braunig, Keker  
10 & Van Nest, on benefit of defendant Electronic  
11 Arts.

12 MR. POTEPAN: Jim Potepan,  
13 LeClairRyan, on behalf of Collegiate Licensing  
14 Company.

15 DAVID F. KIRKPATRICK,  
16 being first duly sworn, was examined and  
17 testified as follows:

18 EXAMINATION

19 BY MR. GILMORE:

20 Q. Good morning, Mr. Kirkpatrick.

21 A. Good morning.

22 Q. We met previously before this morning.

23 As I stated my name is Lucas Gilmore, I represent

24 the antitrust plaintiffs in this lawsuit. Can

25 you state your full name for the record?

1           A.     David Fordyce Kirkpatrick.

2           Q.     And what is your date of birth,

3     Mr. Kirkpatrick?

4           A.     September 15, 1970.

5           Q.     And where do you reside?

6           A.     Atlanta, Georgia.

7           Q.     And Mr. Kirkpatrick, have you ever had  
8     your deposition taken?

9           A.     No.

10          Q.     Before we proceed with the deposition  
11     I'm just going to go through some basic ground  
12     rules because it's probably not like an everyday  
13     experience. The first is you are represented  
14     here by counsel, correct?

15          A.     Correct.

16          Q.     And that's Mr. Henn?

17          A.     Correct.

18          Q.     When I ask a question Mr. Henn and the  
19     other counsel will have the opportunity to object  
20     to the form. But unless you're instructed not to  
21     answer, you're to answer my questions. Do you  
22     understand that?

23          A.     I understand.

24          Q.     And the next ground rule is you have to  
25     understand what I'm saying. As you can see the

1 Q. Did you do any postgraduate work?

2 A. No.

3 Q. And you're currently employed by  
4 Collegiate Licensing Company?

5 A. Correct.

6 Q. What's your position with Collegiate  
7 Licensing Company?

8 A. Vice president of non-apparel brand  
9 management.

10 Q. What is your understanding of the  
11 business that CLC conducts?

12 A. CLC is a trademark licensing agency.  
13 Collegiate institutions hire CLC to administer  
14 their licensing processes.

15 Q. Is it true that CLC represents nearly  
16 200 colleges?

17 A. I don't think it's that many colleges.  
18 I think it's probably closer to 150 colleges.

19 Q. I guess 200, in collection, 200  
20 colleges, universities, bowl games, athletic  
21 conferences?

22 A. That's more accurate.

23 Q. Okay. And among its clients is the  
24 Heisman trophy trust; is that right?

25 A. Correct.

1 MR. HENN: Object to the form.

2 MR. BRAUNIG: Same objection.

3 THE WITNESS: I don't know what you  
4 mean by that.

5 BY MR. GILMORE:

6 Q. Do you have an understanding of what  
7 ancillary intellectual property assets are?

8 A. No.

9 Q. Does CLC handle licensing programs for  
10 former collegiate athletes?

11 A. CLC does not handle licensing programs  
12 as far as I know for any former student athletes  
13 at this time.

14 Q. Has CLC handled licensing programs for  
15 former student athletes at any time?

16 MR. WIERENGA: I'll object as vague,  
17 but go ahead.

18 THE WITNESS: When Peyton Manning  
19 graduated from Tennessee, we managed a Peyton  
20 Manning in conjunction with University of  
21 Tennessee licensing program. So that was  
22 probably ten years ago. We did something similar  
23 with Danny Wuerffel and the University of  
24 Florida. Those are the only two that I can  
25 recall.

1           A.     Like a painting that was -- a painting.

2           Q.     And so did CLC obtain a licensing  
3           agreement with a printer for a painting of  
4           Mr. Manning?

5           A.     Yes, a licensee obtained rights to the  
6           University of Tennessee and Peyton Manning's  
7           image in conjunction with the University of  
8           Tennessee. They received a licensing agreement  
9           from us.

10          Q.     And in terms of the rights that were  
11          licensed to the licensee that CLC was involved  
12          in, can you describe that?

13          A.     Just pertaining to the trademarks?

14          Q.     The trademarks of Tennessee.

15          A.     The trademarks of Tennessee.

16          Q.     Was CLC involved in any kind of transfer  
17          of rights from Mr. Manning?

18          A.     Mr. Manning, yes, he saw the print and  
19          approved the print. Or his agent did, I should  
20          say. I'm not certain he did.

21          Q.     And do you recall any other licensing  
22          deals that CLC was involved in with Mr. Manning?

23          A.     I don't.

24          Q.     How about with Mr. Wuerffel?

25          A.     I think it was the same artist. I don't

1 recall the person's name, but I think it was a  
2 print.

3 Q. And do you have any knowledge of any  
4 licensing programs with Mr. Crouch?

5 A. I do not.

6 Q. In the deal that you described with  
7 Mr. Manning, did CLC transfer any rights relating  
8 to Mr. Manning?

9 A. I don't know what you mean by transfer.

10 Q. In terms of the agreement that CLC  
11 entered into with the licensee, you identified  
12 that there were license -- there was licensing  
13 rights to Tennessee's trademark. Did that  
14 agreement, did CLC also facilitate the name,  
15 likeness and image rights with Mr. Manning?

16 MR. WIERENGA: Object to the form.

17 THE WITNESS: Peyton Manning hired  
18 CLC to explore what market may be out there for  
19 products that combined Peyton Manning in  
20 conjunction with the University of Tennessee's  
21 trademarks.

22 BY MR. GILMORE:

23 Q. So in doing -- so Mr. Manning released  
24 his name, likeness and image as it relates to  
25 his -- in his college time; is that correct?



1           A.    He didn't --

2                   MR. HENN:   Object to the form.

3                   THE WITNESS:   He did not release his  
4   rights.   He maintained full approval of  
5   everything that came through.

6                   MR. BRAUNIG:   Can we confirm on the  
7   record that an objection for one defendant is an  
8   objection for all?

9                   MR. WIERENGA:   That was a yes,  
10   Lucas?

11                   MR. GILMORE:   Yes.

12   BY MR. GILMORE:

13           Q.    When did you first obtain employment  
14   with Collegiate Licensing Company?

15           A.    December 16th, 1994.

16           Q.    And what was the title of your position?

17           A.    I should clarify.   I was hired on the  
18   Battle Enterprises side of our company, and so I  
19   think my title was marketing manager for NASCAR  
20   properties.   NASCAR took their licensing program  
21   in-house, and I switched over to CLC right around  
22   January 1st of 1996.

23           Q.    And when you joined January 1st of 1996,  
24   what was the title of your position?

25           A.    Retail marketing manager.

1 MR. HENN: Object to the form, calls  
2 for a legal conclusion.

3 THE WITNESS: I don't know.

4 BY MR. GILMORE:

5 Q. Who at CLC would know?

6 A. I don't know.

7 Q. And going back to the Peyton Manning  
8 management program, you mentioned that there was  
9 licensing related to a print of Mr. Manning's  
10 face.

11 A. I don't remember. He had his helmet on,  
12 so I don't know if -- it was a long time ago, I  
13 don't remember exactly what it looked like, so I  
14 don't know how much the face was seen.

15 Q. But in that instances, Mr. Manning  
16 provided consent, correct?

17 A. Correct.

18 Q. And Mr. Manning was providing consent to  
19 use his likeness, correct?

20 MR. HENN: Object to the form.

21 MR. BRAUNIG: Object to the form.

22 THE WITNESS: Again, I don't know if  
23 it was Peyton Manning or his agent, but they had  
24 full approval rights on the product.

25 BY MR. GILMORE:

1 Q. Okay. Either Peyton Manning or his  
2 agent were approving or granting consent to use  
3 his likeness, correct?

4 MR. HENN: Object to the form,  
5 misstates the testimony.

6 MR. WIERENGA: And foundation.

7 THE WITNESS: He was approving the  
8 product.

9 BY MR. GILMORE:

10 Q. Based on your understanding, what rights  
11 did Mr. Manning have in terms of approving the  
12 product?

13 A. Full approval rights, that the  
14 university has rights to the trademarks and  
15 Peyton Manning had full approval rights on the  
16 product.

17 Q. And those approval rights based on your  
18 understanding was Mr. Manning's name, likeness  
19 and image, right?

20 MR. HENN: Object to the form.

21 MR. WIERENGA: Foundation as well.

22 MR. HENN: Asked and answered.

23 THE WITNESS: He had approval rights  
24 on the product, the artwork that came through,  
25 the concept, the licensee, Peyton Manning had --

1 or his agent had full approval rights on the  
2 product.

3 BY MR. GILMORE:

4 Q. Going back to the annual review and  
5 preview meetings you discussed, who regularly  
6 attends those meetings?

7 A. Representatives from EA Sports,  
8 representatives from the NCAA, representatives  
9 from CLC. That would be the regular group.

10 Q. The representatives from the NCAA, can  
11 you identify those individuals that regularly  
12 attend?

13 A. Regularly would be Peter Davis. David  
14 Clendenin hasn't been there that long, but David  
15 the last one or two.

16 Q. So the NCAA's equivalent of the  
17 licensing contact?

18 A. Correct.

19 Q. Okay. Anyone else with NCAA?

20 A. I believe that Scott Bearby in their  
21 legal department has attended. I don't know that  
22 he's attended every one but he's been to some.

23 Q. Anybody else?

24 A. I don't believe so.

25 Q. And the representatives from EA, who are

1 Q. Does the NCAA get a copy of the game  
2 prior to it going to market?

3 A. No.

4 Q. And that's the same for both basketball  
5 and football?

6 A. Correct.

7 Q. When if ever does CLC receive a final  
8 cut of the video game?

9 A. Probably ten days after it's been  
10 released, we receive a copy, maybe sooner.

11 Q. In the process in which EA is uploading  
12 materials on the iCLC, during your tenure at CLC  
13 have you ever been notified of EA uploading a  
14 document in an Excel format?

15 A. No.

16 Q. Has anyone ever told you that EA  
17 maintains Excel spreadsheets that have the number  
18 of the player in one column matching it with the  
19 actual name of the real player in another column,  
20 and the actual height and weight of the real  
21 player along with specific in-game ratings?

22 MR. HENN: Object to the form,  
23 foundation.

24 MR. BRAUNIG: Object to the form.

25 THE WITNESS: No.

1 Mr. Kirkpatrick, after reviewing Deposition  
2 Exhibit 616, can you confirm that these are  
3 accurate copies of e-mails you either sent or  
4 received?

5 A. Yes, it appears to be, yes.

6 Q. And you sent and received that in the  
7 ordinary course of your business, correct?

8 A. Yes.

9 Q. Mr. Kirkpatrick, showing you what's been  
10 previously marked as Deposition Exhibit 556, a  
11 February 21, 2007 e-mail string. Do you  
12 recognize these e-mails?

13 A. Yes.

14 Q. Were these e-mails that you either sent  
15 or received?

16 A. It appears to be, yes.

17 Q. And they are true and correct copies?

18 A. Yes.

19 Q. And you sent and received them in the  
20 ordinary course of your business?

21 A. Yes.

22 Q. Can I have you take a look at the top  
23 e-mail from Mr. Davis --

24 A. Uh-huh.

25 Q. -- to among others you?

1           Do you see where Mr. Davis is referring to an  
2           EA/ESPN on-line initiative and he writes: It  
3           uses currently eligible student-athlete names and  
4           warrants a C&D. Do you see that?

5           A. I do.

6           Q. By C&D, does Mr. Davis, is he referring  
7           to a cease and desist?

8                       MR. WIERENGA: Objection,  
9           foundation.

10                      THE WITNESS: I would imagine so.

11           BY MR. GILMORE:

12                      Q. Does this refresh your recollection of  
13           the NCAA voicing a concern about EA animations on  
14           ESPN of college football?

15                      MR. BRAUNIG: Object to the form.

16                      MR. WIERENGA: Foundation, misstates  
17           the --

18           BY MR. GILMORE:

19                      Q. I'm sorry. College basketball?

20                      A. Yeah, this is related to basketball, and  
21           I cannot recall the -- really the context of what  
22           this was about. So what was the question?

23                      Q. Whether it refreshed your recollection  
24           of the NCAA voicing concern about EA animations  
25           used by ESPN?

1 THE WITNESS: I would say, I mean,  
2 I'm familiar with Tim Tebow, and I recog -- and  
3 that's the extent of it.

4 MR. ARAGON: Okay. I have no  
5 further questions at this time. Thank you very  
6 much for your time.

7 EXAMINATION

8 BY MR. WIERENGA:

9 Q. Good afternoon, sir. My name is Bob  
10 Wierenga. I represent the NCAA and I have just a  
11 few questions for you.

12 You testified this morning about a licensing  
13 program that involved Peyton Manning after he  
14 graduated in the University of Tennessee. Do you  
15 recall that testimony?

16 A. I do.

17 Q. Was the NCAA involved in that licensing  
18 program at all?

19 A. No.

20 Q. Did the NCAA make any effort to  
21 interfere with that licensing program?

22 A. No.

23 Q. You also testified earlier today that EA  
24 has been in talks with the NFLPA, the NFL Players  
25 Association, about potentially using current NFL



1 I was contacted by the offices of  
2 Veritext Reporting to provide court  
3 reporting services for this deposition.  
4 I will not be taking this deposition under  
5 any contract that is prohibited by O.C.G.A.  
6 15-14-7 (a) or (b).

7 I have no written contract to  
8 provide reporting services with any party  
9 to the case, any counsel in the case, or  
10 any reporter or reporting agency from whom  
11 a referral might have been made to cover  
12 this deposition. I will charge my usual  
13 and customary rates to all parties in the  
14 case.

15 This, the 18th day of November, 2012.

17 \_\_\_\_\_  
18 STEVE S. HUSEBY, CCR-B-1372  
19 My Commission Expires  
20 January 20th, 2015.  
21  
22  
23  
24  
25