

EXHIBIT D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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In re NCAA Student-Athlete

Name and Likeness

Case No. 09-cv-1967-CW

Licensing Litigation

_____ /

Deposition of
KERWIN RAY ELLIS

Thursday, November 3, 2011

MAY CONTAIN CONFIDENTIAL INFORMATION

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

REPORTED BY: JOHN WISSENBACH, RDR, CRR, CBC, CCP,
CLR, CSR 6862

09:30:03 1 antitrust plaintiffs.

09:30:06 2 MR. KING: Jon King, from Hausfeld, for

09:30:08 3 plaintiffs and the witness.

09:30:11 4 MR. CLOBES: Bryan Clobes, from Cafferty

5 Faucher, for the plaintiffs.

6 (Discussion off the record.)

7 MR. CLOBES: There's our telephone --

8 MR. SLAUGHTER: Yeah.

09:30:16 9 MR. CLOBES: Someone on the telephone.

09:30:17 10 MR. SLAUGHTER: Leonard, your turn.

09:30:19 11 MR. ARAGON: Leonard Aragon, from Hagens

09:30:21 12 Berman Sobol Shapiro, for the right-of-publicity

13 plaintiffs.

09:30:34 14 KERWIN RAY ELLIS,

09:30:34 15 having been first duly sworn, testified as follows:

16 THE VIDEOGRAPHER: You may now proceed.

09:30:36 17 EXAMINATION BY MR. SLAUGHTER

09:30:36 18 Q. Good morning.

09:30:36 19 A. Good morning.

09:30:39 20 Q. Would you please state your name for the

09:30:39 21 record.

09:30:41 22 A. Kerwin Ray Ellis.

09:30:43 23 Q. Where do you live, Mr. Ellis?

09:30:51 24 A. My address is 4666 East Olney Drive -- I'm

25 sorry, Avenue, Gilbert, Arizona 85234.

09:31:53 1 Q. Yeah. Who do you work for, and what do you

09:31:53 2 do?

09:31:57 3 A. I work for a company called World Talk

09:32:01 4 Radio, and I am the sports channel director.

09:32:04 5 Q. And what do you do -- how long have you

09:32:07 6 been the -- been at World Talk Radio?

09:32:11 7 A. I've been employed by World Talk Radio for

09:32:14 8 the last, I'd say, two years.

09:32:18 9 Q. So about 2009?

09:32:19 10 A. Yes.

09:32:23 11 Q. Okay. And have you been the sports channel

09:32:26 12 director the entire time you've been at World Talk

09:32:26 13 Radio?

09:32:27 14 A. Yes.

09:32:29 15 Q. And what do you -- what are your

09:32:33 16 responsibilities as the sports channel director?

09:32:40 17 A. I oversee a channel of which we have -- I

09:32:42 18 produce Internet sports talk shows.

09:32:48 19 Q. Are you the on-air personality, so to

09:32:50 20 speak, or are you just the producer behind the

09:32:53 21 scenes?

09:32:55 22 A. For my -- I have a show myself, right.

09:32:56 23 Q. Okay.

09:32:59 24 A. And I am the on-air personality for that

25 show.

09:51:07 1 Q. You were born in Canton, Ohio?

09:51:07 2 A. Yes.

09:51:10 3 Q. Did you go to high school in Ohio?

09:51:10 4 A. Yes.

09:51:14 5 Q. You went to Ohio State?

09:51:15 6 A. Yes.

09:51:21 7 Q. After Ohio State, you were drafted by the

09:51:23 8 Eagles, and you played for the Eagles for five

09:51:25 9 seasons?

09:51:26 10 A. Yes.

09:51:30 11 Q. So you moved from Ohio to Pennsylvania to

09:51:32 12 play for the Eagles?

09:51:33 13 A. Yes.

09:51:38 14 Q. You played for the Eagles for

09:51:44 15 approximately -- through the end of the 1985 season;

09:51:44 16 is that right?

09:51:46 17 A. Longer than that.

09:51:48 18 Q. Through the end of the '86 season?

09:51:50 19 A. No, to the week of the first game.

09:51:52 20 Q. Of the '86 -- you were traded just before

09:51:52 21 the --

09:51:53 22 A. I was --

09:51:56 23 Q. -- beginning of the '86 season?

09:51:58 24 A. I was fired. I was cut.

25 Q. Oh, you were cut by the Eagles and then

09:52:02 1 picked up by the Browns?

09:52:04 2 Or did you sign with the Browns? You went

09:52:05 3 to --

09:52:06 4 A. I signed with the Browns.

09:52:07 5 Q. You signed -- you were signed by the

09:52:07 6 Browns?

09:52:08 7 A. Right.

09:52:10 8 Q. Okay. You played -- so did you move to

09:52:12 9 Cleveland to play for the Browns, or did you -- or

09:52:15 10 did you have family, and they stayed back in

09:52:15 11 Pennsylvania?

09:52:18 12 Where were you living when you were playing

09:52:19 13 for the Browns?

09:52:23 14 A. We actually had -- my wife and I had an

09:52:25 15 apartment in -- in Ohio.

09:52:26 16 Q. Okay.

09:52:29 17 A. But we retained our home in Pennsylvania.

09:52:31 18 Q. Okay. And how many years did you play for

09:52:32 19 the Browns?

09:52:34 20 A. Two.

09:52:39 21 Q. So your last season in the NFL was 1987?

09:52:42 22 A. Start of the 1987 season, correct.

09:52:46 23 Q. Yes. Finished -- the season finishes up

09:52:46 24 in --

25 A. '88.

09:52:49 1 Q. -- in the beginning of '88?
2 A. Uh-huh.
09:52:50 3 Q. Okay.
09:52:51 4 A. Yes.
09:52:56 5 Q. What position did you play in the pros?
09:52:57 6 A. Strong safety.
09:53:00 7 Q. What number did you wear for the Eagles?
09:53:01 8 A. 24.
09:53:02 9 Q. Did you wear that same number for the
09:53:06 10 Browns?
09:53:10 11 A. Yes.
09:53:13 12 Q. You -- what round were you drafted in by
09:53:16 13 the Eagles?
09:53:22 14 A. 12th round.
09:53:24 15 Q. After you -- after you completed your pro
09:53:30 16 career, in the late eighties, were you employed or
09:53:35 17 did you take some time off?
09:53:35 18 A. I was employed.
09:53:37 19 Q. Okay. And what did you do immediately
09:53:41 20 after the end of your pro career?
09:53:44 21 A. The very next day I went to work at an
09:53:47 22 office at Metropolitan Graphics.
09:53:50 23 Q. Metropolitan Graphics?
09:53:51 24 A. Yes.
25 Q. And where was Metropolitan Graphics?

10:38:41 1 Q. Okay. And what caused you to choose to go
10:39:21 2 to Ohio State?
10:39:21 3 A. Pssh. Man. Pretty tough.
10:39:22 4 MR. CLOBES: Quick break?
10:39:22 5 BY MR. SLAUGHTER:
10:39:26 6 Q. Would you like to take a break, Mr. Ellis?
10:39:30 7 A. My mother.
10:39:32 8 Q. She wanted you to go to Ohio State?
10:39:35 9 A. Yes.
10:39:39 10 Q. Why did she want you to go to Ohio State?
10:39:43 11 A. She wanted me to get a good education. She
10:39:51 12 wanted me to be close. And Coach Hayes makes a damn
10:39:53 13 good impression on parents.
10:39:55 14 Q. Coach made -- was a big role in -- was a
10:40:00 15 big part of your decision to go to Ohio State?
10:40:04 16 A. Yes.
10:40:08 17 Q. You had a successful career at Ohio State?
10:40:09 18 A. Yes.
10:40:11 19 Q. You were All-Big Ten?
10:40:12 20 A. Yes.
10:40:16 21 Q. Co-captain your senior year?
10:40:17 22 A. Yes.
10:40:22 23 Q. You -- that senior year your team went
10:40:23 24 11-0; is that right?
25 A. No.

10:40:25 1 Q. Or was that your junior year?

10:40:26 2 A. Junior year.

10:40:28 3 Q. And was that the year that you guys went to

10:40:30 4 the Rose Bowl?

10:40:30 5 A. Yes.

10:40:33 6 Q. And that was a great game, that Rose Bowl

10:40:37 7 game, against USC, right? Tough game.

10:40:37 8 A. Tough game.

10:40:40 9 Q. 17-16?

10:40:40 10 A. Correct.

10:40:43 11 Q. You had an interception in that game?

10:40:45 12 A. Yes.

10:40:59 13 Q. You enjoyed your time at Ohio State?

10:40:59 14 A. Most of it.

10:41:02 15 Q. Did you enjoy your time on the -- as a

10:41:06 16 student-athlete?

10:41:07 17 A. Most of it.

10:41:14 18 Q. What didn't you enjoy?

10:41:16 19 A. The Coach Hayes stuff bothered me. He was

10:41:17 20 a great man. And --

10:41:19 21 Q. But he could be a little rough?

10:41:24 22 A. Oh, no, I didn't mind. I enjoyed that.

10:41:26 23 The fact he was a stern guy, I enjoyed that. Just

10:41:28 24 that he was fired, I --

25 Q. Yeah.

11:28:51 1 Q. Did you ever ask EA to stop doing it?
11:28:58 2 A. No.
11:29:00 3 Q. Have you ever approached EA and tried to
11:29:03 4 sell your likeness to EA?
11:29:06 5 A. No.
11:29:08 6 Q. Are you aware of any actions that EA has
11:29:12 7 taken to prevent you from selling your name, image,
11:29:18 8 or likeness?
11:29:19 9 A. No.
11:29:28 10 Q. Have you ever spoken to anyone from EA?
11:29:30 11 A. I don't recall.
11:29:35 12 Q. Other than this Bill Walsh College series
11:29:42 13 football game that you saw in December 1995, are you
11:29:48 14 aware of EA using your image in any other format,
11:29:50 15 any other way, any other time?
11:29:54 16 A. Are we talking Ohio State, or --
11:29:55 17 Q. Yes.
11:29:56 18 A. -- what are we talking?
11:29:58 19 Q. Yes, not the -- I'm going to exclude the
11:30:01 20 Madden -- Madden games. Thank you for pointing that
11:30:02 21 out. I'm just talking about the --
11:30:03 22 A. Okay.
11:30:05 23 Q. -- what -- what you're -- what you --
11:30:06 24 strike that.
25 Are you aware of EA ever using your

11:55:22 1 THE WITNESS: You're asking the question,
11:55:25 2 but you're making a statement. And is there a
11:55:26 3 yes-or-no answer to that question?

11:55:26 4 BY MR. SLAUGHTER:

11:55:27 5 Q. Yeah, I'm asking you, do --

11:55:30 6 A. I am not here representing current players.

11:55:30 7 Let me -- that's my answer.

11:55:32 8 Q. Okay. Why not?

11:55:34 9 A. Because they have not fulfilled their

11:55:39 10 requirements in terms of their status as a college

11:55:43 11 athlete. They still are a current college athlete.

11:55:43 12 Q. Okay.

11:55:45 13 A. This is -- I'm here today to represent

11:55:45 14 former athletes.

11:55:46 15 Q. Okay.

11:55:48 16 A. They will become a former athlete one day.

11:55:57 17 Q. Okay. Let's turn to the question of the --

11:56:01 18 of the broadcasts, okay, we -- that we were

11:56:04 19 discussing earlier. It's your opinion that people

11:56:06 20 who appear on those -- in those TV broadcasts ought

11:56:08 21 to be compensated?

11:56:08 22 MR. CLOBES: Objection; form.

11:56:08 23 BY MR. SLAUGHTER:

11:56:11 24 Q. Those team members?

25 A. Okay.

11:56:13 1 Q. Is that -- that's my -- I'm asking you. Is
11:56:16 2 it -- it's your opinion that the team members who
11:56:18 3 appear on TV ought to be compensated, correct?

11:56:19 4 A. Yes.

701 11:56:21 5 Q. And what's the -- why do they need to wait
11:56:26 6 until they're former players to be compensated?

11:56:32 7 MR. CLOBES: Objection; form.

11:56:34 8 THE WITNESS: Because they are -- they
11:56:37 9 still have an obligation of which they're fulfilling
11:56:42 10 as it pertains to the university and themselves.
11:56:47 11 They are still student-athletes under the
11:56:49 12 university's -- their agreement with the university,
11:56:52 13 and they're not a former -- they haven't fulfilled
11:56:54 14 their -- their eligibility requirements, nor are
11:57:06 15 have they -- are they finished playing; they've
11:56:57 16 moved on.

11:56:58 17 BY MR. SLAUGHTER:

11:57:00 18 Q. And what's the agreement they enter into
11:57:03 19 with the university?

11:57:05 20 A. I haven't seen the current players'
11:57:05 21 agreement.

11:57:08 22 Q. What's your -- was there an agreement in
11:57:10 23 place when you were an athlete?

11:57:28 24 A. I do not recall.

25 Q. What do you want to get out of this case?

11:59:31 1 My understanding of your testimony is that
11:59:33 2 you're representing former players, and they ought
11:59:34 3 to be --

11:59:34 4 A. Yes.

11:59:37 5 Q. -- paid for the use of their likenesses.

11:59:38 6 A. Yes.

11:59:39 7 Q. And my question is, do you think that that
11:59:43 8 is just a use, for instance, of broadcasts of the
11:59:46 9 game, of a game that you were in, your team was
11:59:50 10 in -- if that broadcast occurs after you've
11:59:54 11 graduated, you think you ought to be compensated for
11:59:56 12 it, correct?

11:59:56 13 A. Correct.

11:59:58 14 Q. I'm asking you, okay, if a broadcast
12:00:01 15 occurred while you were in school, do you think some
12:00:03 16 money ought to be set aside to be paid to you after
12:00:08 17 you've left school?

12:00:11 18 A. Again, I -- I've just got to be honest
12:00:13 19 here. I think you're fully aware of the fact that
12:00:15 20 those discussions are being -- are had now with NCAA
12:00:18 21 and current players. I think they just talked about
12:00:20 22 giving them \$2,000. I didn't know I was here to
12:00:22 23 talk about that, current players being compensated.

12:00:24 24 Q. Well, I'm -- I'm just trying to understand
25 what you think ought to happen from this lawsuit and

12:00:30 1 what you ought to get out of this lawsuit. You've
12:00:33 2 said that you want to represent former players and
12:00:34 3 they ought to be compensated. I'm just trying to
12:00:37 4 figure out what you think they ought to be
12:00:38 5 compensated for.

12:00:39 6 MR. CLOBES: Objection; form.

12:00:40 7 THE WITNESS: Former players, once our
12:00:45 8 obligation has been fulfilled, and the continuing
12:00:49 9 use of our likeness once our obligation has been
12:00:51 10 fulfilled, we should be compensated for that, the
12:00:53 11 continuing usage of a player's --

12:00:54 12 BY MR. SLAUGHTER:

12:00:54 13 Q. So --

12:00:57 14 A. -- likeness or images once he or -- has
12:01:00 15 fulfilled his requirements to eligibility with the
12:01:03 16 university. I hope that's clear.

12:01:05 17 Q. Okay. So I'm just trying to make clear.
12:01:06 18 So you don't think they ought to be compensated for
12:01:09 19 use that occurred before they graduated, before they
12:01:10 20 finish their eligibility?

12:01:13 21 A. I did not say that.

12:01:17 22 Q. I'm sorry. I think the -- I'm a little bit
12:01:20 23 confused here. Maybe -- maybe my question was
12:01:20 24 unclear.

25 When you said "I didn't say that," what

12:14:02 1 "Q. At the time that you joined the team
12:14:04 2 and at the time you played, you knew your
12:14:06 3 games were broadcast, and you knew you
12:14:08 4 weren't getting paid, and you played
12:14:54 5 anyway, correct?")

12:14:59 6 THE WITNESS: Yes.

12:15:00 7 BY MR. SLAUGHTER:

12:15:05 8 Q. You mentioned earlier that you -- in 1995
12:15:10 9 you saw a video game that you think included your
12:15:14 10 likeness in it. Did you talk to anybody about that
12:15:18 11 at or near the time, 1995?

12:15:19 12 A. Anybody? Yes.

12:15:21 13 Q. Who?

12:15:24 14 A. My -- my nephew, for one.

12:15:28 15 Q. Who was playing the game.

12:15:29 16 A. Yes.

12:15:31 17 Q. And it was pretty fun for your nephew to
12:15:35 18 play it, and thinking that, "Hey, my uncle's on that
12:15:35 19 squad"?

12:15:36 20 A. You're asking if my --

12:15:37 21 MR. CLOBES: Objection; form.

12:15:37 22 Go ahead.

12:15:38 23 THE WITNESS: Are you asking me if my
12:15:39 24 nephew was having fun --

25 BY MR. SLAUGHTER:

16:01:42 1 A. That's correct.

16:01:43 2 Q. And some other organizations that try to

16:01:45 3 help young people do the right thing?

16:01:46 4 A. That is correct.

16:01:52 5 Q. And would it be part of your goal, in doing

16:01:54 6 those things, to help young people get a good

16:01:57 7 education and go to school for the right reasons,

16:01:59 8 and things like that?

16:02:00 9 A. That is correct. It would be.

16:02:03 10 Q. And I gather from what you said earlier

16:02:06 11 today that you had some family encouragement when

16:02:09 12 you were a student-athlete, or a prospective

16:02:12 13 student-athlete, to go to school for the right

16:02:13 14 reasons?

16:02:19 15 A. Yes.

16:02:22 16 Q. And I take it that you are a believer that

16:02:25 17 the opportunities that student-athletes get at

16:02:30 18 schools like Ohio State and Michigan, when they are

16:02:33 19 big-time football players or basketball players,

16:02:37 20 include the opportunity to get a fine education?

16:02:38 21 A. I agree.

16:02:43 22 Q. And I'm putting Ohio State in there now.

23 And --

16:02:43 24 A. I --

25 Q. -- this is not easy for me.

16:08:36 1 Q. Yeah, I -- I wasn't suggesting otherwise.
16:08:40 2 But you were aware, even as a 17-year-old, that they
16:08:41 3 weren't supposed to do that?

16:08:44 4 A. I cannot say I -- I cannot truthfully say I
16:08:46 5 was aware that they were not supposed to do that.
16:08:48 6 It was a generation where that was kind of running
16:08:50 7 rampant.

16:08:54 8 Q. Did anybody ever discuss with you, when you
16:09:00 9 were being recruited, that after you left school,
16:09:03 10 you might get some residual benefits from what you
16:09:07 11 did while you were in school?

16:09:08 12 A. No.

16:09:10 13 Q. And did you have an understanding that you
16:09:13 14 had no interest in the -- during the time you were
16:09:17 15 in school, getting paid off later for what you did
16:09:23 16 while you were in school?

16:09:25 17 A. At that time, no.

16:09:28 18 Q. All right. And so you knew full well you
16:09:31 19 were going there to play football and get as good a
16:09:36 20 education as you could, and maybe, when you got out
16:09:39 21 of school, you'd be good enough to go into the NFL
16:09:43 22 and famous enough to get some good gigs. Is that
16:09:45 23 right?

16:09:48 24 A. The university does talk about the strength
25 of their alumni to help players upon graduation. So

16:09:55 1 I would throw that in there. But yes.

16:09:57 2 Q. Okay. And the strength of the alumni to

16:10:01 3 help players would be in contacts and jobs and that

16:10:02 4 sort of thing?

16:10:06 5 A. Yes.

16:10:10 6 Q. But nobody ever said that "If you come here

16:10:17 7 to school," that "we're going to give you a share of

16:10:21 8 some game film royalties that might get sold 20 or

16:10:23 9 30 years from now?

16:10:25 10 A. Nobody ever said that to me.

16:10:28 11 Q. And what about the reverse of that? Did

16:10:32 12 anybody ever say, "And by the way, you're not going

16:10:34 13 to get a share of anything down the road"?

16:10:37 14 Was it discussed one way or the other?

16:10:39 15 A. It was -- it was not discussed.

16:10:41 16 Q. Anybody ever ask you to sign anything in

16:10:44 17 which you gave up your rights?

16:10:47 18 A. I do not recall.

16:10:51 19 Q. So you've now been out in the world and had

16:10:54 20 experience in the NFL and the NFLPA. You've seen

16:10:57 21 these kinds of rights agreements, right?

16:10:59 22 MR. CLOBES: Objection to form.

16:11:01 23 THE WITNESS: I don't know what kind, sir.

16:11:01 24 BY MR. CURTNER:

25 Q. Okay. So do -- you understand what a --

1 CERTIFICATE OF REPORTER

2 I, JOHN WISSENBACH, a Certified Shorthand
3 Reporter, hereby certify that the witness in the
4 foregoing deposition was by me duly sworn to tell
5 the truth, the whole truth, and nothing but the
6 truth in the within-entitled cause;

7 That said deposition was taken down in
8 shorthand by me, a disinterested person, at the time
9 and place therein stated, and that the testimony of
10 the said witness was thereafter reduced to
11 typewriting, by computer, under my direction and
12 supervision;

13 That before completion of the deposition,
14 review of the transcript [X] was [] was not
15 requested. If requested, any changes made by the
16 deponent (and provided to the reporter) during the
17 period allowed are appended hereto.

18 I further certify that I am not of counsel
19 or attorney for either or any of the parties to the
20 said deposition, nor in any way interested in the
21 event of this cause, and that I am not related to
22 any of the parties thereto.

23 DATED:

24

25

JOHN WISSENBACH, CSR No. 6862