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13 *Plaintiffs' Class Counsel*

14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 OAKLAND DIVISION

18 EDWARD C. O'BANNON, JR. on behalf
 19 of himself and all others similarly situated,

20 Plaintiffs,

21 v.

22 NATIONAL COLLEGIATE ATHLETIC
 ASSOCIATION (NCAA); ELECTRONIC
 23 ARTS, INC.; and COLLEGIATE
 LICENSING COMPANY,

24 Defendants.
 25

Case No. 4:09-cv-3329 CW

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO ADMIT EXHIBITS

Judge: The Honorable Claudia Wilken
 Courtroom: 2, 4th Floor
 Trial: June 9, 2014
 Hearing: June 25, 2014

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2 **NOTICE OF MOTION AND MOTION**

3 PLEASE TAKE NOTICE that on June 25, 2014, or as soon as it may be heard, in the
4 above-referenced Court, Plaintiffs will move to admit certain exhibits, as further described herein.

5 Having met and conferred with the National Collegiate Athletic Association (“NCAA”),
6 Plaintiffs hereby move to admit the following trial exhibits over the NCAA’s objections.

7 PX 2564 (attached hereto as Exhibit A): PX 2564 is an amended version of Exhibit 10 to
8 Dr. Daniel Rascher’s September 25, 2013 merits report. During its use at trial, counsel for the
9 NCAA objected that the exhibit contained references to examples from various universities on
10 which Dr. Rascher did not rely in forming his opinion. Counsel for the NCAA stated, “If you
11 want to submit it to the court later, I would suggest striking those universities.” Tr. 856:18-19.
12 Plaintiffs removed the references to these universities, as reflected in the revised PX 2564. This
13 exhibit is admissible as a summary exhibit of materials upon which Dr. Rascher relied in
14 rendering his opinions.

15 PX 2282 (attached hereto as Exhibit B): Over the NCAA’s hearsay objection, PX 2282 is
16 admissible as a statement of a party opponent under Rule 801(d)(2)(A), (C), and/or (D). PX 2282
17 is a 2001 Knight Commission Report signed by the then-president of the NCAA, Cedric
18 Dempsey. He signed it expressly as the President of the NCAA. PX 2282-6. As the president of
19 the NCAA with representative capacity, the report is admissible regardless of whether Mr.
20 Dempsey was acting in a representative capacity when making the statements. Fed. R. Evid. 801,
21 note to subdivision (d) (“If he has a representative capacity and the statement is offered against
22 him in that capacity, no inquiry whether he was acting in the representative capacity in making
23 the statement is required”).

24 PX 2046 (attached hereto as Exhibit C): Over the NCAA’s hearsay objection, PX 2046 is
25 admissible as a statement of a party-opponent. Graham Spanier was chair of the Task Force on
26 Commercial Activity and Betsy Altmaier was a member of that task force at the time they wrote
27 these emails, and thus each was an agent of the NCAA. The statements contained in the e-mails
28 were made regarding the work of that committee and thus were made within the scope of that

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2 authority. Fed. R. Evid. 801(d)(2)(D). Mr. Spanier's statement is also admissible as a statement
3 of a co-conspirator in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E); *see also* Pls.'
4 June 8, 2014 Bench Mem. (Dkt. No. 197) at 8-9 ("Pls.' Bench Mem."). As president of a co-
5 conspirator institution, Mr. Spanier's recommendation that Ms. Altmaier's opinion regarding
6 amending the alleged restraint not be included in the final report was in furtherance of the
7 conspiracy to restrict payment to student athletes for their NIL rights. Alternatively, Ms.
8 Altmaier's statements may be offered not for their truth but to show the effect on the hearer. Mr.
9 Spanier, an NCAA agent, responded to Betsey Altmaier's email and offered his view of the
10 opinion that Ms. Altmaier offered in her email. Furthermore, Ms. Altmaier's statements are
11 admissible as statements of belief. Fed. R. Evid. 803(3).

12 PX 280 (attached hereto as Exhibit D): Over the NCAA's hearsay objection, the
13 statements in PX 280 are admissible as co-conspirator statements in furtherance of the
14 conspiracy. Fed. R. Evid. 801(d)(2)(E). They are statements from the various presidents of the
15 Atlantic Coast Conference schools, who are co-conspirators in the conspiracy alleged by
16 Plaintiffs. They are statements made to determine how best to protect the conspiracy from the
17 antitrust laws, and so are made in furtherance of the conspiracy. Alternatively, the statements are
18 admissible as statements of belief. Fed. R. Evid. 803(3).

19 PX 2598 (attached hereto as Exhibit E): Over the NCAA's hearsay objection, PX 2598 is
20 admissible as non-hearsay. It is a printout of an image that Georgia Tech Marketing tweeted on
21 June 19, 2014. The image is not hearsay, and it is not being admitted for the truth.

22 PX 2603 (attached hereto as Exhibit F): Over the NCAA's hearsay objection, PX 2603 is
23 admissible as non-hearsay. It is a printout from the Florida State University Seminoles' shopping
24 website showing that the university is selling a Jameis Winston trading card. The image is not a
25 statement.

26 PX 2604 (attached hereto as Exhibit G): Over the NCAA's hearsay objection, PX 2604 is
27 admissible as non-hearsay. It is a printout from the University of Oregon's shopping website
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2 showing that the university is selling a jersey with one of its star player's number on it. The
3 image is not a statement.

4 PX 2014 (attached hereto as Exhibit H): Over the NCAA's hearsay objections, PX 2014 is
5 composed of non-hearsay statements of agents of a party-opponent acting within the scope of
6 their employment. Fed. R. Evid. 801(d)(2)(D). In the e-mail, CLC personnel are discussing
7 estimates of a potential licensing deal involving Vince Young. CLC remains an adverse party-
8 opponent in this litigation, so these statements are non-hearsay.

9 PX 2487 (attached hereto as Exhibit I): Over the NCAA's hearsay objections, PX 2487 is
10 admissible as non-hearsay. It is titled "The State of NCAA Division I Football: A Survey of
11 Division I-A & I-AA Presidents & Chancellors" from January 2002, prepared for the NCAA by
12 an outside consultant. The report itself is non-hearsay because it was requested and authorized by
13 the NCAA. Fed. R. Evid. 801(d)(2)(C). The statements of presidents and chancellors within the
14 report are non-hearsay because the NCAA has manifested a belief in, and an intent to adopt, the
15 statements made in the survey by virtue of making the report public on their own website. *See*
16 [http://www.ncaapublications.com/p-4142-state-of-ncaa-d1-football-a-survey-of-division-i-a-i-aa-](http://www.ncaapublications.com/p-4142-state-of-ncaa-d1-football-a-survey-of-division-i-a-i-aa-presidents-chancellors.aspx)
17 [presidents-chancellors.aspx](http://www.ncaapublications.com/p-4142-state-of-ncaa-d1-football-a-survey-of-division-i-a-i-aa-presidents-chancellors.aspx) (last visited June 22, 2014). Therefore, the report and the statements
18 contained therein are non-hearsay.

19 PX 2095 (attached hereto as Exhibit J): Over the NCAA's hearsay objections, PX 2095 is
20 admissible as a co-conspirator statement in furtherance of the conspiracy. Fed. R. Evid.
21 801(d)(2)(E). This is a presentation to NCAA Division I Board of Directors Subcommittee on
22 Restructuring the NCAA, made by President Bernie Machen of the University of Florida and
23 Chancellor Harvey Perlman of the University of Nebraska. Those institutions, and their leaders,
24 are co-conspirators in the conspiracy alleged by the Plaintiffs. The letter contains statements
25 regarding proposed modifications to the conspiracy so that it can remain intact in the face of
26 mounting pressure. PX 2095-3 (suggesting modifications in order to "preserve the enterprise").
27 Such statements are in furtherance of the conspiracy and its objectives. Alternatively, the
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2 presentation demonstrates the feasibility of reforms and can be offered not for the truth on those
3 grounds.

4 PX 2527 (attached hereto as Exhibit K): Over the NCAA's hearsay objections, PX 2527 is
5 admissible as a co-conspirator statement in furtherance of the conspiracy. Fed. R. Evid.
6 801(d)(2)(E). This is a letter signed by each of the presidents of Pac-12 conference member
7 institutions urging other members of the conspiracy to make reforms in order to protect the
8 conspiracy from outside pressure. Such statements are in furtherance of the conspiracy and its
9 objectives. Alternatively, the letter demonstrates the feasibility of reforms and can be offered not
10 for the truth on those grounds.

11 PX 2616 (attached hereto as Exhibit L): This document is a compilation of GSR and FGR
12 reports for all Big Ten member institutions, which were taken from the NCAA's website. The
13 NCAA's only objection to this exhibit is that it lacks a sponsoring witness. This position has no
14 basis in the Federal Rules of Evidence. *See* Pls.' Bench Mem. at 2-3. Furthermore, counsel for
15 Plaintiffs addressed his intent to introduce the graduation rates for Big Ten schools, and the
16 NCAA raised no objection at that time, when the Big Ten commissioner was still available to
17 testify. *See* Tr. 2122:5-12. Given that the NCAA has no objection to PX 2616's admissibility,
18 this exhibit should be admitted.

19 PX 2287-1 and -17 (attached hereto as Exhibit M): PX 2287-17 is a Knight Commission
20 report which recommends that the NCAA change the way in which it distributes money to the
21 schools and conferences. This statement is not offered for the truth but for the fact that the
22 proposal was made and not acted upon by the NCAA. PX 2287-1 is offered only for context.

23 PX 2057-20 (attached hereto as Exhibit N): Over the NCAA's hearsay objection, PX
24 2057-20 is admissible as non-hearsay. PX 2057-20 is a slide from a presentation which was
25 attached to an email sent by Greg Shaheen, a high-level NCAA executive. Mr. Shaheen's email
26 suggests that the presentation was an NCAA presentation, made by Mr. Shaheen. PX2057-1 ("I
27 really appreciate the time to be with you and your members today.... Attached is a copy of the
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2 presentation.”).¹ Therefore, the presentation constitutes a statement of a party-opponent. Fed. R.
3 Evid. 801(d)(2)(D).

4 DX 3081 (attached hereto as Exhibit O): Over the NCAA’s foundation objection, DX
5 3081 is admissible because the foundation for it is evident from the document. The document
6 was produced by the NCAA in discovery and is entitled “Discussion of the Application of the
7 Recommendations of the NCAA Study Group on the Use of Student-Athletes’ Names and
8 Likenesses.” The document itself describes the NCAA Study Group on the Use of Student-
9 Athletes’ Names and Likenesses and goes on to discuss the group’s recommendations. As such,
10 the document lays the foundation for itself. To the extent that the NCAA’s foundation objection
11 is actually a call for a sponsoring witness, as discussed above and in Plaintiffs’ Bench
12 Memorandum, no sponsoring witness is necessary.

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14 Dated: June 23, 2014

Respectfully submitted,

15 By: /s/ Swathi Bojedla

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¹ The NCAA has stipulated to the admissibility of PX 2057-1. (Dkt. Nos. 236, 239).

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification to the e-mail addresses registered.

/s/ Swathi Bojedla _____
Swathi Bojedla
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