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Attorneys for Defendant
 National Collegiate Athletic Association

16 UNITED STATES DISTRICT COURT
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 18 NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

19 EDWARD O'BANNON, *et al.*,

20
 21 Plaintiffs,

22 v.

23 NATIONAL COLLEGIATE ATHLETIC
 ASSOCIATION; COLLEGIATE
 24 LICENSING COMPANY; and
 ELECTRONIC ARTS INC.,
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Defendants.
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 27
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Case No. 4:09-CV-3329-CW

**DEFENDANT NCAA'S NOTICE OF
 MOTION AND MOTION TO ADMIT
 EXHIBITS**

Judge: Hon. Claudia Wilken

Judge: Hon. Claudia Wilken

Courtroom: 2, 4th Floor

Trial: June 9, 2014

1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on June 27, 2014, or as soon as it may be heard, in the
3 above-referenced Court, Defendant National Collegiate Athletic Association (“NCAA”) will move
4 to admit certain exhibits, as further described herein.

5 **1. Books Authored By Named Plaintiffs**

6 The NCAA respectfully moves to admit TX 3741 and 3742, which are autobiographies
7 authored by class representatives David Lattin and Oscar Robertson.

8 These exhibits are non-hearsay statements of a party opponent under Federal Rule of
9 801(d)(2)(A), (B), and (C). *See, e.g., Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1202 (9th Cir.
10 2008) (representative of the class is a party-opponent for Rule 801 purposes).

11 TX 3741 and 3742 discuss named plaintiffs’ experiences as student-athletes, and thus are
12 highly relevant to NCAA’s joint venture defense and procompetitive justifications and to refute
13 Plaintiffs’ representations that student-athlete football and men’s basketball players do not take
14 their education seriously. This testimony is not cumulative: The NCAA did not have reason to
15 explore the themes of education and live broadcast at the depositions of Lattin or Robertson,
16 which were taken before the addition of Plaintiffs’ live broadcast theory in this case. Further,
17 these excerpts provide additional context regarding student-athletes’ collegiate experience that is
18 necessary to compliment the testimony of the three plaintiffs, Ed O’Bannon, Tyrone Prothro, and
19 Chase Garnham, that Plaintiffs hand-picked to provide live testimony at trial.

20 Specifically, the NCAA moves to admit the following excerpts of named plaintiffs’ books:

- 21 • TX 3741 at 1, 5-6, 9-11, 15-16, 25-27, 31, 37, 66-67, 75, 81-84, 142, 148 (attached
22 hereto as Exhibit A), which is excerpts of a book titled “The Big O: My Life, My
23 Times, My Game” authored by class representative Oscar Robertson. Mr.
24 Robertson stated during deposition that he co-authored TX 3741. *See* 12/7/2012
25 Depo. at 216:12-18 (attached hereto as Exhibit K). TX 3741 contains descriptions
26 of Mr. Robertson’s collegiate experience, including that basketball provided an
27 opportunity to attend college, that it was “really something” to appear on television,
28

1 and that playing basketball in college was a different experience than playing
2 basketball professionally.

- 3 • TX 3742 at 1, 3-4, 13-14, 73, 76, 229 (attached hereto as Exhibit B), which is
4 excerpts of a book titled “Slam Dunk to Glory” authored by class representative
5 David Lattin. Mr. Lattin identified himself as the author of TX 3742 at his
6 deposition in this case. *See* 12/7/2012 Depo. at 44:18-45:2 (Dkt. No. 237-15). In
7 TX 3742, Mr. Lattin describes his experience receiving an education at Texas
8 Western and also playing basketball, including that his coach encouraged education
9 and an athletic scholarship was the “only way” for him to receive a college
10 education. *See, e.g.*, TX 3742 at 73, 76.

11 **2. Contracts**

12 The NCAA also respectfully moves to admit the following exhibits, which are contracts
13 for the broadcast of college football and basketball games: TX 2102, 2110, 2117, 2119, 2141,
14 2147, 2179, and 3086. These contracts are squarely relevant to Plaintiffs’ claims that there is a
15 market for NIL rights in live broadcasts. The contracts are not hearsay because they are being
16 offered as legal acts rather than the truth of their contents. *See, e.g., W. Coast Truck Lines, Inc. v.*
17 *Arcata Cmty. Recycling Ctr., Inc.*, 846 F.2d 1239, 1246 n.5 (9th Cir. 1988) (“It is well established
18 that statements which may themselves affect the legal rights of the parties are not considered
19 hearsay under the Federal Rules of Evidence.”); *Mueller v. Abdnor*, 972 F.2d 931, 937 (8th Cir.
20 1992) (“A contract, for example, is a form of verbal act to which the law attaches duties and
21 liabilities and therefore is not hearsay.”); Fed. R. Evid. 801(c), advisory committee note (“The
22 effect is to exclude from hearsay the entire category of ‘verbal acts’ and ‘verbal parts of an act,’ in
23 which the statement itself affects the legal rights of the parties or is a circumstance bearing on
24 conduct affecting their rights.”). In addition, the contracts are being admitted to show the absence
25 of any contractual provision granting NIL rights in live broadcasts, and thus not for a hearsay
26 purpose. *See United States v. Oaxaca*, 569 F.2d 518 (9th Cir. 1978) (“In order to constitute
27 hearsay, evidence must be assertive or testimonial in character and must be introduced to prove the
28 truth of the matter asserted.”); 4 Jones on Evidence § 24:15 (7th ed.) (“Most courts hold that in the

1 absence of an identifiable ‘declarant’ who intended his silence to communicate, silence or the
2 absence of a statement is not hearsay.”). Accordingly, the contracts should be admitted, as
3 numerous others were during the course of the trial.

4 During meet-and-confer, Plaintiffs’ only objection to the admission of these contracts was
5 that they are “cumulative” of other contracts that have already been admitted. Plaintiffs are
6 wrong. Evidence of broadcast licenses is directly relevant and should be received. Plaintiffs have
7 alleged a national market for group licenses of supposed rights to use student-athletes’ NILs in
8 live broadcasts of college football and basketball games. The claim concerns hundreds of colleges
9 and dozens of conferences that have multiple agreements with numerous networks. As such,
10 evidence reflecting broadcasting practices around the country is particularly relevant to evaluating
11 Plaintiffs’ claims in this case.

12 Specifically, the NCAA moves to admit the following contracts:

- 13 • TX 2102 (attached hereto as Exhibit C), which is an agreement between
14 Southeastern Conference (“SEC”) and ESPN, Inc., dated as of May 31, 1994,
15 granting ESPN exclusive television rights to broadcast certain SEC athletics events.
- 16 • TX 2110 (attached hereto as Exhibit D), which is an agreement between
17 Southeastern Conference (“SEC”) and ESPN, Inc., dated as of June 4, 1999,
18 granting ESPN exclusive television rights to broadcast certain SEC athletics events.
- 19 • TX 2117 (attached hereto as Exhibit E), which is an agreement between The Big
20 Twelve Conference and ABC Sports, ESPN, Inc., and ESPN Regional Television,
21 dated March 11, 2000, relating to the exclusive television broadcast of Conference
22 football games.
- 23 • TX 2119 (attached hereto as Exhibit F), which is an agreement between the
24 Atlantic Coast Conference (ACC) and Raycom Sports, Inc. and Jefferson-Pilot
25 Sports, Inc., dated as of June 23, 2000, regarding exclusive telecast rights to certain
26 ACC men’s and women’s basketball games.
- 27 • TX 2141 (attached hereto as Exhibit G), which is an agreement between the
28 University of Georgia Athletic Association and Cable Sports Southeast, LLC, dated

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May 5, 2005, regarding the television broadcast and rebroadcast of certain University of Georgia athletics events.

- TX 2147 (attached hereto as Exhibit H), which is an agreement between Atlantic 10 Conference and CSTV Networks, Inc., dated as of December 31, 2005, regarding the television broadcast rights to certain athletics events.
- TX 2179 (attached hereto as Exhibit I), which is an agreement between University of Notre Dame and NBC Sports, dated June 13, 2008, regarding the television broadcast rights to certain football games.
- TX 3086 (attached hereto as Exhibit J), which is an agreement between the Atlantic Coast Conference, Big East Conference, Big Ten Conference, The Big Twelve Conference, Inc., Conference USA, Mid-American Conference, Mountain West Conference, Pacific-10 Conference, Southeastern Conference, Sun Belt Conference, and Western Athletic Conference, and University of Notre Dame, and Fox Sports Productions, Inc., dated as of April 1, 2006, regarding the exclusive television rights to broadcast certain National Championship collegiate football games.

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

DATED: June 27, 2014

By: /s/ Jeslyn A. Miller
JESLYN A. MILLER

Attorneys for Defendant
National Collegiate Athletic Association