

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE OHIO STATE UNIVERSITY	:	
	:	
Plaintiff,	:	
	:	Case No. 2:10-CV-00890
v.	:	
	:	Judge Watson
	:	
MAPLE STREET PRESS, LLC	:	Magistrate Judge Preston Deavers
	:	
Defendant.	:	

**AFFIDAVIT OF DIANA SABAU IN SUPPORT OF PLAINTIFF THE OHIO
STATE UNIVERSITY’S MOTION FOR PRELIMINARY INJUNCTION**

STATE OF OHIO)
) SS:
COUNTY OF FRANKLIN)

The undersigned, being first duly sworn, submits this Affidavit in support of the Motion of Plaintiff The Ohio State University (“Ohio State”) for a Preliminary Injunction:

1. I am the Associate Athletics Director for External Relations for The Ohio State University. I have held that position since April 2009. Prior to holding this position, I was the Assistant Athletics Director and Director for Branding for The Ohio State University. In all, I have worked for the Athletics Department of The Ohio State University for 17 years.
2. As the Associate Athletics Director for External Relations, I am responsible for the management of nine units, including fan experience, public relations and branding, and creative services. My oversight of creative services involves the visual management of Ohio State’s athletic programs. I am familiar with the

records kept by Ohio State with respect to its athletic programs. These records are maintained in the ordinary course of business.

3. Ohio State publishes athletic programs for all men's and women's fall, winter and spring sports, including football, basketball, baseball, soccer, ice hockey, and track & field, and sells such programs for football, men and women's basketball, men's ice hockey and baseball. The football gameday programs are the most extensive, and can be nearly 200 pages long. These programs contain schedules, player statistics, rosters, photographs of players, articles relating to Ohio State athletics and paid advertising for both local and national businesses. All of Ohio State's official gameday programs make extensive use of the Ohio State Trademarks, including the famous block "O", buckeye leaves, the trade dress of Ohio State football uniforms and helmets, the school colors and font styles, and prominent use of the mark "Buckeyes" to refer to the Ohio State football team. Attached hereto as Exhibit A are examples of football gameday programs from the 2007-08, 2008-09 and 2009-10 school years.
4. The athletic programs are a substantial source of revenue to Ohio State's Athletics Department and to its licensees. From 2000 through 2007, the programs were printed by The Dispatch Printing Company, which paid an annual sponsorship fee to Ohio State in exchange for retaining the advertising revenue. For the 2005-06 school year, The Dispatch agreed to pay a sponsorship fee of \$600,000. Starting with the 2008-09 school year, IMG Communications, Inc. took over printing the programs, and paid Ohio State \$1.4 million for the rights to do so.

5. Prior to the fall of 2010, Ohio State retained all revenues from the game program sales. For the 2008-09 school year, Ohio State sold more than 50,000 football game programs, with revenues in excess of \$400,000. Between licensing fees and program sales, Ohio State's revenue associated with the football programs was close to \$2 million.
6. I have reviewed Defendant's "Buckeye Battle Cry" publication, a copy of which is attached as Exhibit A to the Affidavit of Joseph R. Dreitler, filed in support of this Motion. This publication is clearly directed to the same audience – fans of Ohio State athletics --- as Ohio State's athletic programs.
7. The publication is also confusingly similar to Ohio State athletic programs. For example, Ohio State's current football program publication, its Official Gameday Magazine, includes extensive information on the Ohio State coaches, the team roster, statistics and season schedule, information on the opposing team, including team rosters and statistics, feature articles on Ohio State players, articles about Ohio State players currently in the NFL and in the Pro Football Hall of Fame, and articles about Ohio State traditions. The lyrics to Ohio State's famous fight song, *Buckeye Battle Cry*, appear on page 45. A copy of Ohio State's current Official Gameday Magazine is attached hereto as Exhibit B.
8. Defendant's "Buckeye Battle Cry" uses the title of Ohio State's famous school fight song as the publication's name, the publication contains many other uses of other Ohio State trademarks, trade dress and content that is competitive with Ohio State's athletics publications, including repeated use of "Buckeye Battle Cry" and "Buckeyes" throughout the publication; a detailed article on the

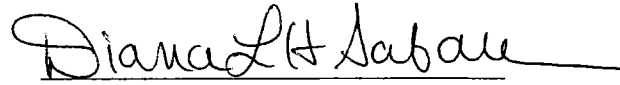
members of the Ohio State 2010 football team titled “Primed – The 2010 Ohio State Roster” which includes a listing of each player by name, number, position, height, weight, eligibility and high school; a detailed article entitled “Know They Enemy – The 2010 Ohio State Schedule”; a chart listing “2009 Buckeye Statistics”; several in-depth articles on current and former Ohio State football players and coaches; an article entitled “Graduate School – A look at former Buckeyes in the NFL”; and numerous photographs depicting current and former Ohio State football players in competition, wearing uniforms that prominently display the Ohio State Trademarks. The publication also claims to provide “Everything you need to know about the 2010 Buckeyes.”

9. As the Associate Athletics Director for External Relations, I am also responsible for the www.ohiostatebuckeyes.com website, which is “The Official Website of Ohio State University Athletics”(the “Official Website”). I am familiar with the records kept by Ohio State with respect to the Official Website. These records are maintained in the ordinary course of business. The Official Website has been promoting Ohio State athletics since 1997. For the time period July 2007 through June 2010, the Official Website averaged more than 80,000 hits per day. However, during football season (September 1 through November 20) usage spikes. During the 2007 football season, the Official Website averaged 119,332 hits per day, it received 114,459 hits per day during the 2008 football season, and for the 2009 football season, it received 132,223 hits per day.
10. Ohio State strictly controls the content on the Official Website, which is run by a third party. The Official Website makes prominent use of Ohio State trademarks,

including the school colors, the athletic logo, and repeatedly uses the terms “Buckeye” and “Buckeyes” to refer to Ohio State students, alumni, marching band and athletes. The Official Website provides content of interest to fans of Ohio State athletics, such as blogs, news stories, photographs, videos and team schedules. It has a section on “Football Traditions” that includes reference to the Ohio State Marching Band and *Buckeye Battle Cry*. The Official Website is intended to be a prime destination for fans of Ohio State sports and related information and services. Annual advertising revenue from the Official Website was \$109, 760 for the 2007-08 school year, \$101, 580 for the 2008-09 school year, and \$132,700 for the 2009-2010 school year.

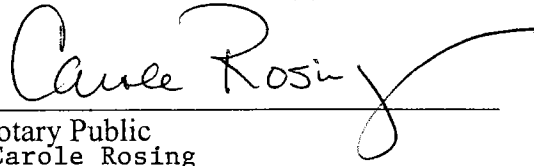
11. Until 2009 Ohio State published and sold an annual printed media guide for its football program which was filled with stories, statistics and other materials about Ohio State football. Since 2009, the Ohio State media guide has become an online publication, at the website www.OhioStateBuckeyes.com. Attached hereto as Exhibit C are copies of media guides from 1992, 1994, 1995, 1997, 1998, 1999, 2000 – 2008. Attached hereto as Exhibit D is a copy of 2010 Gridiron Guide that is produced by IMG in partnership with Ohio State athletics. The 2010 Gridiron Guide is sponsored by Marathon Oil, and is given away at Marathon service stations.
12. In my opinion, Defendant’s “Buckeye Battle Cry” publication, or any other publication by Defendant that is devoted to Ohio State football, will divert purchasers of Ohio State’s Official Gameday Magazine and other publications licensed by Ohio State, and viewers from the Official Website.

Further Affiant Sayeth Naught.



Diana Sabau
Associate Athletics Director, External Relations
The Ohio State University

SUBSCRIBED and SWORN to before me this 14th day of October 2010.



Notary Public
Carole Rosing

My Commission expires: 12/18/12