

NORTH CAROLINA
COUNTY OF WAKE

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
SPECIAL PROCEEDINGS

2011 OCT 12 AM 11:48

File No. 11-SP 4962

The North Carolina Secretary of State,
Petitioner,

BY _____)

PETITIONER'S APPLICATION
FOR AN ORDER TO COMPEL

National Collegiate Athletic Association
Respondent.

NOW COMES the Petitioner, the North Carolina Secretary of State, by and through undersigned counsel, pursuant to N.C. Gen. State. §§ 78C-27 and 78C-87, and moves the Court for an Order compelling the National Collegiate Athletic Association ("NCAA") to produce documents and records in response to a Subpoena Duces Tecum issued July 29, 2011. In support of this Application, Petitioner submits the following:

PARTIES

1. The Secretary of State administers the Uniform Athlete Agents Act, N.C. Gen. Stat. Chapter 78C, Article 9, (the "Athlete Agents Act") and serves as the Administrator of the Chapter. N.C. Gen. Stat. § 78C-26(a).

2. The NCAA is an unincorporated association with a headquarters in Indianapolis, Indiana and members in every state. According to its website "[t]he NCAA is a membership organization composed mainly of four-year higher education institutions and collections of institutions known as conferences. Representatives from those institutions and conferences create NCAA rules and policies" See www.ncaa.org.

JURISDICTION

3. The Secretary of State, as Administrator of Chapter 78C, “[m]ay make any investigation within or outside of this State as the Administrator deems necessary to determine whether any person has violated or is about to violate any provision of this Chapter or any rule or order hereunder, or to aid in the enforcement of this Chapter or in the prescribing of rules and forms hereunder.” N.C. Gen. Stat. § 78C-27(a). “For the purpose of any investigation or proceeding under [Chapter 78C], the Administrator may subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the Administrator deems relevant or material to the inquiry.” Id § 78C-27(b). N.C. Gen. Stat. § 78C-27(c) provides that “[i]n case of . . . refusal to obey a subpoena issued to any person, any court of competent jurisdiction, upon application by the Administrator, may issue to the person an order requiring him to appear before the Administrator.”

4. The NCAA has 1,096 members nationwide and forty-five (45) members in North Carolina as shown on Exhibit A. The NCAA distributes substantial amounts of money to its members, including its North Carolina members. For its 2008-09 fiscal year, the NCAA distributed approximately \$388 million to its members. For its 2009-10 fiscal year, the NCAA distributed approximately \$434 million to its members. For its 2009-10 fiscal year, the NCAA distributed approximately \$36 million to the members of the Atlantic Coast Conference. The NCAA derives substantial revenue from sales of broadcast rights, licensing of collegiate sports items, and related activities. Many of those activities take place in North Carolina or involve the conduct of its North Carolina members. See Oliver v. NCAA, 920 N.E.2d 203 (Ohio Com. Pl.

Feb. 12, 2009) *vacated pursuant to settlement* (concluding that the NCAA was subject to Ohio's unincorporated-business-association law since it has members in the state of Ohio).

5. This proceeding is brought to compel compliance of a person with the lawful Subpoena Duces Tecum issued by the Administrator. This court has subject matter jurisdiction under N.C. Gen. Stat. Chapter 78C, and personal jurisdiction over the NCAA pursuant to N.C. Gen. Stat. § 1-75.4(1)(d) and (2) and § 1 A-1, **Rule 4(j)(8)**.

FACTUAL BACKGROUND

The Secretary's Investigation

6. The Athlete Agents Act defines terms such as athlete agent and student-athlete. N.C. Gen. Stat. § 78C-86. The Act also imposes registration requirements and prescribes prohibited conduct. N.C. Gen. Stat. §§ 78C-89 and 78C-98. Athlete agents are required to register with the Secretary to initiate contact with a student-athlete. N.C. Gen. Stat. § 78C-88. An athlete agent who furnishes anything of value to a student-athlete or any individual with the intent to induce a student-athlete to enter into an agency contract is guilty of a Class I felony. N.C. Gen. Stat. § 78C-99. In addition, the Secretary may assess a civil penalty against an athlete agent for a violation of the Athlete Agents Act. N.C. Gen. Stat. § 78C-101.

7. The Secretary is investigating athlete agents' conduct with respect to student-athletes at the University of North Carolina at Chapel Hill ("University"). The investigation began in 2010 and has utilized the investigative tools granted by statute, including issuance of subpoenas and application for search warrant. A true and accurate copy of the search warrant obtained in the course of the investigation is attached hereto as Exhibit B.

8. The University is a Division I member of the NCAA and member of the Atlantic Coast Conference. Upon information and belief, since 2010, the NCAA has conducted an

investigation and/or inquiry involving the University, which includes an investigation and/or inquiry of athlete agents' conduct with respect to student-athletes at the University. The NCAA has compelled documents and records pertaining to the same acts and conduct that are the focus of the Secretary's investigation.

9. On June 21, 2011, the NCAA issued a Notice of Allegations to the University, a copy of which is attached hereto Exhibit C.

10. Upon information and belief and as represented by counsel for the NCAA, in the course of its investigation, representatives of the NCAA travelled to North Carolina to conduct eleven interviews of student-athletes at the University in North Carolina. Upon information and belief, representatives of the NCAA travelled to North Carolina to conduct interviews of former University student-athletes, University coaches, and/or University employees in North Carolina. Upon information and belief, the NCAA conducted interviews of individuals acting as or in conjunction with athlete agents with respect to student-athletes at the University. Upon information and belief, these interviews were conducted close in time to the facts giving rise to the NCAA's and Secretary's investigation, and therefore offer probative value. Upon information and belief, the NCAA conducted interviews of individuals acting as or in conjunction with athlete agents with respect to student-athletes at the University.

11. Upon information and belief, the NCAA has in its possession a record of the January 21, 2011 interview of Marvin Sanders, a former University of Nebraska assistant football coach, relating to the contact of former University Assistant Football Coach John Blake with former University of Nebraska student-athlete Ndamukong Suh.

12. Upon information and belief, the NCAA used the information, documents, and records that originated in North Carolina against or in relation to North Carolina student-athletes and the University in North Carolina.

13. On July 18, 2011 and prior to issuing a Subpoena Duces Tecum, counsel for the Secretary wrote to the NCAA, requesting documents and records in furtherance of the Secretary's investigation of athlete agents' conduct with respect to student-athletes at the University. A true and accurate copy of the July 18, 2011 correspondence is attached hereto as Exhibit D.

14. On July 28, 2011, counsel for the NCAA wrote to counsel for the Secretary, and refused to provide the information requested in the Secretary's July 18, 2011 letter. A true and accurate copy of the July 28, 2011 correspondence submitted by the NCAA is attached hereto as Exhibit E.

The Subpoena Duces Tecum Served Upon the NCAA

15. On July 29, 2011, as a result of the NCAA's refusal to comply with the Secretary's request and in furtherance of the Secretary's investigation of athlete agents' conduct with respect to student-athletes at the University, the Secretary issued an investigative Subpoena Duces Tecum ("NCAA Subpoena") to the NCAA pursuant to N.C. Gen. Stat. §§ 78C-27 and 78C-87. A true and accurate copy of the NCAA Subpoena and the cover letter attached to the NCAA subpoena are collectively attached hereto as Exhibit F.

16. In furtherance of the Secretary's investigation of athlete agents' conduct with respect to student-athletes at the University, the NCAA Subpoena commanded the NCAA as follows:

1. *Produce a true, accurate, complete, and unredacted copy of the Notice of Allegations (Case No. M357) that the National Collegiate Athletic Association (hereinafter, the "NCAA") provided to the University of North Carolina at Chapel Hill (hereinafter, the "University") on or about June 21, 2011 (hereinafter, the "Notice of Allegations");*
2. *Produce to the Department a record of any and all statements made by, or interviews of, University student-athletes, former University student-athletes, University coaches, and University employees since January 1, 2010 relating to the NCAA's investigation of the University, including but not limited to any transcription, writing, or audio recording;*
3. *Produce to the Department a record of any and all statements made by, or interviews of Todd Stewart since January 1, 2010 relating to the NCAA's investigation of the University, including but not limited to any transcription, writing, or audio recording;*
4. *Produce to the Department a record of any and all statements made by, or interviews of John Blake since January 1, 2010 relating to the NCAA's investigation of the University, including but not limited to any transcription, writing, or audio recording;*
5. *Produce to the Department any and all statements made by, or interviews of Marvin Sanders since January 1, 2010 relating to John Blake's contact with Ndamukong Suh, including but not limited to any transcription, writing, or audio recording;*
6. *Produce a copy of John Blake's July 6, 2010 credit report, referenced in Paragraph 8, subpart (b) of the Notice of Allegations.*

17. On July 30, 2011, Special Agent John Lynch, a sworn law enforcement officer employed by the Secretary, served the NCAA Subpoena via certified mail, return receipt requested, on (a) Naima Stevenson, legal counsel for the NCAA in the NCAA's office located in Indianapolis, Indiana; (b) Dr. Mark Ernert, President of the NCAA; and (c) Dr. Nathan Hatch, a North Carolina citizen and resident and Member of the NCAA Division I Board of Directors, as evidenced by the three Returns of Service, sworn to by Special Agent John Lynch. A true and accurate copy of the three Returns of Service are collectively attached hereto as Exhibit G.

18. On August 1, 2011, Dr. Nathan Hatch received the NCAA Subpoena, and on August 3, 2011, Naima Stevenson and Dr. Mark Emmert received the NCAA Subpoena. See Exhibit G.

19. On August 11, 2011, William K. Davis, attorney with the firm Bell, Davis & Pitt in Winston-Salem, North Carolina, representing the NCAA, submitted a formal Objection to counsel for the Secretary pursuant to 18 NCAC .06C .0102. A true and accurate copy of the NCAA's Objection is attached hereto as Exhibit H.

20. On September 2, 2011, counsel for the Secretary wrote to the NCAA's counsel in an effort to narrow the issues and schedule a time to discuss and resolve the remaining issues prior to and without seeking a Court Order. A true and accurate copy of the September 2, 2011 correspondence is attached hereto as Exhibit I.

21. On September 8, 2011, counsel for the NCAA and counsel for the Secretary discussed the remaining issues in a telephone conversation. On September 14, 2011, counsel for the NCAA and counsel for the Secretary again discussed the remaining issues in a telephone conversation. In the September 14, 2011 discussion, counsel for the NCAA stated that the NCAA possesses documents and records responsive to the NCAA Subpoena but will only produce those documents and records in response to a subpoena issued through the State of Indiana. Counsel for the NCAA stated that even if served with a subpoena issued through the State of Indiana, the NCAA would assert confidentiality and redact information from the documents and records. This proposal by the NCAA does not comply with the lawful terms of the NCAA Subpoena and would frustrate the investigation conducted by the Secretary.

MOTION FOR ORDER COMPELLING COMPLIANCE

22. The Secretary has tried to resolve the matter prior to and without seeking an Order from the Court. As of the date of the filing of this Application, the NCAA has not provided any of the information sought by the NCAA Subpoena issued July 29, 2011. Because the NCAA refuses to produce documents and records in response to the NCAA Subpoena lawfully issued in the course of an investigation by the Secretary, the Secretary respectfully moves the Court for an Order compelling the NCAA to produce responsive documents and records.

23. The NCAA's June 21, 2011 Notice of Allegations to the University contains allegations that athlete agents provided benefits to University student-athletes. These allegations potentially relate to conduct that constitutes violations of the Athlete Agents Act. Statements and/or interviews of University student-athletes, former University student-athletes, University coaches, University employees, and athlete agents that relate to athlete agents' provision of benefits to University student-athletes are relevant and material to the Secretary's investigation. The production of witness statements, such as University student-athlete interview transcripts and the other interview transcripts requested, is essential to the Secretary's investigation. The Secretary has narrowly tailored the request in substance and time, requesting records of statements or interviews since January 1, 2010.

24. This matter is properly instituted as a special proceeding. "An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." N.C. Gen. Stat. § 1-2. "Every other remedy is a special proceeding." *Id.* § 1-3.

25. In In re Ernst & Young, LLP, 363 N.C. 612, 684 S.E.2d 151 (2009) the North Carolina Supreme Court held that the statute governing the Secretary of Revenues' summons enforcement proceedings prescribed a specialized procedure. The Supreme Court found that "[i]n filing an application for the enforcement of an administrative summons, the Secretary seeks merely to question persons and examine records in the course of an investigation." *Id.* at 363 N.C. at 617, 684 S.E.2d at 154. The Ernst & Young matter is nearly identical to the matter at hand. In this proceeding, the Secretary seeks merely to examine records in the course of an official investigation, pursuant to a specialized procedure set forth in N.C. Gen. Stat. § 78C-27 and § 78C-87.

26. In In re Investigation of Death of Miller, 357 N.C. 316, 584 S.E.2d 772 (2003), the North Carolina Supreme Court concluded that the Superior Court had jurisdiction to hear and consider the merits of the State's petition, which was filed in the nature of a special proceeding requesting a hearing to determine whether the attorney-client privilege should be waived or whether compelled disclosure of communications between attorney and client was warranted for the proper administration of justice. See also In re Albemarle Mental Health Ctr., 42 N.C. App. 292, 256 S.E.2d 818 (1979) (holding that Superior Court had jurisdiction to determine district attorney's motion to conduct in camera examination, brought in the nature of a special proceeding, to determine whether disclosure of information to law enforcement officers was necessary to proper administration of justice).

27. In N.C. Bd. of Dental Examiners v. Woods, 202 N.C. App. 89, 688 S.E.2d 84 (Jan. 19, 2010), the North Carolina Court of Appeals recognized the necessity of documentary evidence to a state agency's investigation, concluding that even the privacy provisions of the

Health Insurance Portability and Accountability Act (“HIPAA”) did not prohibit disclosure of records to an investigating governmental agency.

28. The United States Supreme Court emphasized the necessity of an agency's ability to obtain information relevant to an investigation in U.S. v. Morton Salt, 338 U.S. 632, 642-43 (1950), stating:

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may make steps to inform itself as to whether there is probable violation of the law.

See also Myers v. Holshouser. 25 N.C. App. 683, 214 S.E.2d 630 (1975) (citing U.S. v. Morton Salt and upholding authority of the N.C. Board of Alcoholic Control to require records production).

THE NCAA PETITIONED FOR THE UNIFORM ATHLETE AGENTS ACT BUT FAILS TO COMPLY WITH ITS MANDATES

29. The Uniform Law Commissioners, formerly known as the National Conference of Commissioners on Uniform State Laws, drafted, approved, and recommended for enactment in all the states the Uniform Athlete Agents Act in 2000.

30. The Prefatory Note to the Uniform Athlete Agents Act, a true and accurate copy of which is attached hereto as Exhibit J, states that “[b]ecause of the lack of uniformity and lack of reciprocity provisions in existing statutes, the NCAA and several universities asked the Conference to undertake the drafting of a Uniform Act . . . The Drafting Committee [acting for

the National Conference of Commissioners on Uniform State Laws] met over a period of three years and had valuable input from athlete agents, coaches, individuals responsible for administering existing acts, and representatives of the players associations of the National Football League, the National Hockey League, major league baseball and the NCAA."

31. As stated in the Prefatory Note to the Uniform Athlete Agents Act, the NCAA asked the Conference to undertake drafting the Act and provided valuable input. It appears that the NCAA advocated for enactment of these laws.

32. North Carolina adopted the Uniform Athlete Agents Act in 2003, S.L. 2003-375, legislative action placing it in N.C. Gen. Stat. Chapter 78C. The two prior North Carolina Acts regulating athlete agents had also been placed in Chapter 78C and administered by the Secretary. Because Article 4 of Chapter 78C provides specific enforcement powers for the Chapter, the General Assembly was not required to incorporate additional provisions into the Uniform Athlete Agents Act in order for the Uniform Athlete Agents Act to be enforced and administered under principles of North Carolina law.

WHEREFORE, the Secretary prays the Court to enter an order compelling the NCAA to comply with the Subpoena Duces Tecum served upon it, assessing the costs of this action against the NCAA, and awarding all other relief permitted by law.

Respectfully submitted this the 12th day of October, 2011.

**ELAINE F. MARSHALL
SECRETARY OF STATE AND
SECURITIES ADMINISTRATOR
OF THE STATE OF NORTH CAROLINA**

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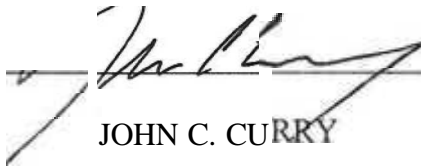
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STATE OF NORTH CAROLINA
COUNTY OF WAKE

AFFIDAVIT OF JOHN C. CURRY

THE UNDERSIGNED, John C. Curry, being first duly sworn, deposes and says as follows:

1. That I am the Special Agent in Charge for the Securities Division of the Department of the Secretary of State of North Carolina (hereinafter "the Department").
2. I supervise the Security Division's law enforcement officers and have participated in the underlying investigation described in the Application for Order.
3. On October 11, 2011, I examined the website of the National Collegiate Athletic Association (the "NCAA"), www.ncaa.org.
4. I have read paragraph number four (4) of the Application listing the North Carolina members of the NCAA. The number of all members, North Carolina members and the amounts of revenues distributed to members I found on the NCAA website during my examination. I compiled the list of North Carolina NCAA members from information I obtained from the NCAA website.



JOHN C. CURRY

Duly Sworn and Subscribed Before Me
This the 11th day of October, 2011

NOURHAN MANSOUR
NOTARY PUBLIC
WAKE COUNTY, N.C.

(SEAL)

NOTARY PUBLIC *Nourhan Mansour*
My Commission Expires: 2/9/2013