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Plaintiffs Michael J. Bynum ("Bynum") and Canada Hockey LLC d/b/a Epic Sports (collectively "Plaintiffs") file this response in opposition to the Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim (Document No. 34 (the "Defs.' Mot.)) filed by Defendants Texas A&M University Athletic Department (the "Athletic Department"), Brad Marquardt ("Marquardt"), Alan Cannon ("Cannon"), and Lane Stephenson ("Stephenson") (Marquardt, Cannon, Stephenson, collectively, the "Individual Defendants") (the Athletic Department and Individual Defendants, collectively, the "Defendants"), respectfully stating as follows:

I. Introduction

Defendants' theft of Plaintiffs' copyrighted material was no "accident," as Defendants would have this Court believe. It was an intentional and deliberate step in furtherance of the Athletic Department's long-running and lucrative strategy of aggressively protecting and promoting its treasured 12th Man narrative.

The legend of the "12th Man" dates all the way back to the 1922 Dixie Classic football game and Texas A&M student E. King Gill. What started then has since become the identity of the Athletic Department and the collective fan base that supports its teams.

To be sure, the Athletic Department, in the years following that storied game, has sought to monetize, and has profited greatly from, its 12th Man narrative. A massive fundraising organization was in fact formed based on it—The 12th Man Foundation—which, during 2011-2015 alone, generated in excess of \$500 million in donations. As The 12th Man Foundation's website states:

Just as E. King Gill, the original 12th Man, once came out of the crowd to stand ready to help his team, our fans can still literally help our performance on the field by supporting the 12th Man Foundation. You won't be asked to sweat it out on the field, but your tax-deductible financial support will propel the Aggies to even

greater heights.

(Am. Compl. ¶ 37; Am. Compl. Ex. I.)

The Athletic Department recognizes, too, the immense continuing value of its 12th Man narrative. And, as such, it has aggressively sought to protect its cash cow in the years since it officially registered the "12th MAN" trademark in 1990. Indeed, the Athletic Department boasts that it has fought over 550 cease-and-desist actions since registration, including two separate federal court actions against the National Football League's Seattle Seahawks and Indianapolis Colts.

The Athletic Department's efforts regarding its revered 12th Man seem to have no boundaries. In this case, the Athletic Department, which at the time of the alleged unlawful conduct was in the midst of various trademark disputes over the "12th Man" trademark and a \$450 million capital campaign to renovate its football stadium, which it calls the "Home of the 12th Man," intentionally and deliberately misappropriated Plaintiffs' copyrighted material in its efforts to promote and protect the 12th Man brand at all costs. Specifically, the Athletic Department and Individual Defendants, having previously illegally obtained copies of a draft of Plaintiffs' copyrighted *12th Man* book: (1) re-typed its text; (2) intentionally removed Plaintiffs' copyright mark; (3) replaced Plaintiffs' copyright mark with the false designation, "special to Texas A&M Athletics," thus rebranding the work as its own; and (4) redistributed the misappropriated work on its website and via links to hundreds of thousands of Twitter followers and e-newsletter subscribers, all in the hopes of reaping (and no doubt actually reaping) millions of dollars in donations. Thereafter, when confronted, the Athletic Department brazenly *admitted* that, "[w]ith the Seattle Seahawks and their 12th Man getting a lot of attention in the NFL, ***[Plaintiffs' copyrighted] story was an important part of our strategic plan*** to show Texas A&M is the true owner of the 12th Man." (Am. Compl. ¶ 58.) And at all times since, Defendants have sought to

shield themselves from any liability whatsoever for their egregious and unlawful conduct with their misplaced claims of immunity.

II. Standard of Review

Defendants seek to dismiss Plaintiffs' Amended Complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), arguing that all of the claims asserted in the amended complaint are barred by the doctrine of sovereign immunity. A motion to dismiss for lack of subject-matter jurisdiction under Federal Rule 12(b)(1) should be granted only if it "appears certain that the plaintiff cannot prove a plausible set of facts that establish subject-matter jurisdiction" over the defendants. *Venable v. La. Workers' Comp. Corp.*, 740 F.3d 937, 941 (5th Cir. 2013).

Defendants also seek dismissal under Federal Rule of Civil Procedure 12(b)(6), arguing that the claims asserted against the Individual Defendants should be dismissed for failure to state a claim. A motion to dismiss under Federal Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Jones v. Tubal-Cain Hydraulic Sols., Inc.*, No. 4:16-CV-01282, 2017 WL 1177995, at *2 (S.D. Tex. Mar. 30, 2017) (Harmon, J.) (citing *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982)). The "complaint must be liberally construed in favor of the plaintiff," and "all reasonable inferences are to be drawn in favor of the plaintiff's claims, and all factual allegations pleaded in the complaint must be taken as true." *Jones*, 2017 WL 1177995, at *2 (citing *Overton v. JPMC Chase Bank*, No. H-09-3690, 2010 WL 1141417, at *1 (S.D. Tex. Mar. 20, 2010)).

To survive a Federal Rule 12(b)(6) motion to dismiss, a complaint need not include "detailed factual allegations." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint need only "contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This is satisfied when the plaintiff alleges

enough "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

If a court decides a plaintiff's complaint does fail to state a claim, it should generally give the plaintiff at least one chance to replead before dismissing the action with prejudice. *Reyes v. Rite-Way Janitorial Serv., Inc.*, H-15-0847, 2015 WL 5565882, at *2 (S.D. Tex. Sept. 21, 2015). Here should the Court find that Defendants' Motion to Dismiss has merit under Federal Rule 12(b)(6), Plaintiffs respectfully request leave to amend, particularly insofar as the Court's ruling may implicate additional constitutional arguments that require further briefing. *Cf. Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) (noting plaintiff failed to request leave to replead in district court).

III. The Athletic Department is neither the State nor an "arm of the State." It is an independent commercial enterprise that is not entitled to sovereign immunity under the Eleventh Amendment.

This is a case of first impression. No Texas or Fifth Circuit precedent has analyzed the potential immunity of modern day, corporate-like athletic departments that operate independently from their universities and the universities' educational missions. And no federal precedent has considered the effect on state sovereign immunity of a state constitutional and statutory regime like the one in Texas that explicitly prohibits an athletic department from receiving public funds.

A. The Athletic Department cannot be viewed as the State, for purposes of sovereign immunity, because it is organized and operates as an independent commercial enterprise. It is, thus, a *de facto* entity capable of being sued apart from the University.

Though the Athletic Department has not taken the formal steps of incorporating, as shown below, it should be viewed and treated as an entity separate from the University.

1. The Athletic Department's corporate structure, finances, and business operations are separate and distinct from the University.

The allegations in this case focus solely on the unlawful conduct of the Athletic Department and its employees. None of Plaintiffs' allegations are aimed at the University. Specifically, Plaintiffs allege that the Athletic Department directed its staff to gather information in order to promote its 12th Man narrative for the purpose of soliciting the massive donations the Athletic Department uses to fund its existence and operations. (Am. Compl. ¶ 39.) The Athletic Department's operational and financial independence from the University is critical to the determination of the jurisdictional issues in this case.

The Athletic Department is a highly profitable business, and its operations are separate and distinct from the University and its educational mission. During the 2015-2016 athletic year, the Athletic Department profited \$57,286,676 on \$194,388,450 in revenues. (Texas A&M University Athletics Department, Statement of Revenues and Expenses, Year Ended August 31, 2016, attached as Exhibit A.) This healthy profit margin (29.47%) is due in part to the State's deliberate decision to separate the Athletic Department's operations from the University's educational mission, and the Athletic Department's efforts to mirror the organizational structure of for-profit entities.

Unlike any other "department" of the University—but similar to a business—the Athletic Department has its own Business Office (including a Chief Financial Officer and Business Operations Manager), Human Resources Department (including a Human Resources Director), Marketing Department (including a Marketing Director), Information Technology Department, and Compliance Department. (*Staff Directory*, 12th Man, <http://www.12thman.com/staff.aspx> (last visited Nov. 16, 2017).) Notably, the University has its own versions of these same departments. (*See, e.g.*, Texas A&M University Division of Human Resources & Organizational

Effectiveness Home Page, <https://employees.tamu.edu/> (last visited Nov. 16, 2017); Texas A&M University Division of Marketing & Communications Home Page, <http://marcomm.tamu.edu/> (last visited Nov. 16, 2017); Texas A&M University Division of Information Technology Home Page, <https://it.tamu.edu/> (last visited Nov. 16, 2017); Texas A&M University Risk and Compliance, <https://urc.tamu.edu/compliance/> (last visited Nov. 16, 2017).) The University's website, in fact, while listing each department within the University and their faculty, does not list the Athletic Department or any of its employees. (Texas A&M University Faculty by Department, <http://www.tamu.edu/faculty-staff/directory.html> (last visited Nov. 16, 2017).) Rather, to find any information about the Athletic Department or its staff, one must venture to a separate website that is dedicated exclusively to the Athletic Department. (See 12th Man Home Page, <http://12thman.com/> (last visited Nov. 16, 2017).) This website, unlike the University's website, but as would be expected for any for-profit enterprise, is littered with advertisements from Pepsi, Learfield, Rudy's Country Store and Bar-B-Q, Raising Cane's, Muscle Milk, and other sponsors. (*Id.*)

In addition to being structured like a business, the Athletic Department also operates like a for-profit business. To build its brand recognition—and ultimately to drive sales and donations—the Athletic Department has a Productions Department, Event Management Department, and Media Relations Department. (*Staff Directory.*) These departments improve accessibility for, and services offered to, customers who are fans of the Athletic Department's teams. Finally, the Athletic Department has a separate budget and profit and loss statement from the University, and it is subject to its own independent audits, both internally and externally. (See, e.g., Report of Independent Accountants, Year Ended August 31, 2016, TAMUATH16-000112-134, attached as Exhibit B, which was produced by the Athletic Department during jurisdictional discovery.)

2. The University's rules do not apply to the Athletic Department.

The University's Rules and Standard Administrative Procedures do not apply to the Athletic Department; the section titled "Athletics" in the University's Rules and Standard Administrative Procedures is empty and contains no rules or procedures. (*University Rules and SAPs*, Texas A&M University Risk and Compliance, <http://rules.tamu.edu/TAMURulesAndSAPs.aspx?AspxAutoDetectCookieSupport=1#18> (last visited Nov. 16, 2017).) Rather, the Athletic Department governs itself, and has its own policies and procedures. (*See* Texas A&M University Athletic Department Policies & Procedures Manual Table of Contents, attached as Exhibit C, which was produced by the Athletic Department during jurisdictional discovery.)

3. The Athletic Department receives no public funds.

The Athletic Department operates on annual revenues of nearly two hundred (\$200) million dollars, none of which, pursuant to the Texas Constitution and other state law, comes from the State of Texas or other public dollars. Texas state law has long mandated this arrangement: The Texas Constitution prohibits use of bonds to pay for athletic facilities at public universities, Tex. Const. Art. VII, § 18(d), and a standing rider in Texas appropriations statutes provides that "no educational and general funds appropriated may be used for the operation of intercollegiate athletics." *See, e.g.*, General Appropriations Act, Art. III, Special Provisions Relating Only to State Agencies of Higher Education § 9 (Sept. 30, 2015); *see also* attached Ex. B. Like its private sector competition in the sports entertainment industry, the Athletic Department does not receive a single dollar of public funds. (*See* Ex. B at p.3 (noting the Athletic Department receives no direct state or other government support); *see also* *Frequently Asked Questions*, 12th Man Foundation, <https://www.12thmanfoundation.com/membership/faq> (last visited Nov. 16, 2017) ("The Athletic

Department at Texas A&M University is 100% self-supporting . . . TAMU Athletics receives no funding from the State of Texas.".)

In addition to its annual revenue from ticket sales, media rights, Southeastern Conference revenue sharing, and other licensing agreements, the Athletic Department is funded further by a private nonprofit entity, the 12th Man Foundation, which is completely unaffiliated with the State of Texas. (*Frequently Asked Questions* (noting the 12th Man Foundation is a Section 501(c)(3) charitable organization).) The 12th Man Foundation's FAQ page on its website explains why the Athletic Department needs private support:

The Athletic Department at Texas A&M University is 100% self-supporting, so all private gifts contribute directly to the needs of our student-athletes, coaches and staff. ***TAMU Athletics receives no funding from the State of Texas***. Gifts to the 12th Man Foundation are used to fund the TAMU Athletic Department's needs. The Foundation provides a venue through which loyal alumni, fans and friends can give financial support to the Athletic Department and receive all current tax benefits allowed by the IRS. Private support enables Texas A&M Athletics to increase its standing, in both athletics and academics, over competing universities beyond what can be accomplished with annual revenue from ticket sales, media rights and other licensing agreements.

Contributions to the 12th Man Foundation benefit every student-athlete and every Aggie sports team through scholarship, construction and maintenance of athletic facilities, and programs that enhance academic, athletic, and life skills for our student-athletes. Contributions from alumni and fans support championship athletics at Texas A&M University.

(*Id.* (emphasis added).) Importantly, the 12th Man Foundation's website notes that its contributions "fund the . . . Athletic Department's needs," not the University's needs. (*Id.*) The 12th Man Foundation is not only unaffiliated with the State of Texas, but it also operates independently from the University. (Am. Compl. ¶ 9.) The University's Board of Regents is not involved in oversight of the 12th Man Foundation. (*Board of Trustees*, 12th Man Foundation,

<https://www.12thmanfoundation.com/about-us/trustees-board> (last visited Nov. 16, 2017) (noting that the 12th Man Foundation Board of Trustees—which does not include any Members of the University's Board of Regents—governs all business conducted by the foundation).) Based on tax returns for the 12th Man Foundation for the tax years 2011 to 2015, the 12th Man Foundation's five-year total revenues were \$509,695,304. As of June 30, 2015, the 12th Man Foundation had total assets of \$293,575,803.

Finally, funds allocated to the Athletic Department are not used to teach any courses in the University's educational programs and are not used to employ any professors. (*See Staff Directory* (no athletic staff members are professors).) Nor does the Athletic Department offer any courses. The Athletic Department simply has no relation to education at the University. Texas Courts have long distinguished between educational and athletic interests in higher education. *See NCAA v. Yeo*, 171 S.W.3d 863, 870 (Tex. 2005) (holding that students have a protected liberty interest in their education, but do not enjoy such protection for athletics). Such a distinction should be drawn in this case between the educational programs of the University, and the non-educational, business-related functions of the Athletic Department that are funded entirely by private funds.

4. The Athletic Department is a de facto profit-making subsidiary of the University, capable of being sued apart from the University.

Contrary to the Defendants' suggestion, the Athletic Department is not like an unincorporated division of a corporation that cannot be sued. It is, in almost every way, a separate profit-making subsidiary (created by the University) that operates independently from the University. Texas courts have recognized that subsidiary entities created by a State university are not shielded by the university's immunity. *See Lenoir v. U.T. Physicians*, 491 S.W.3d 68, 77-82

(Tex. App.—Houston [1st Dist.] 2016, pet. denied) (holding that a clinic—which was a wholly-owned subsidiary of a university's health science center—was not entitled to immunity).¹

5. The Athletic Department is made up of, at least in part, a private, non-governmental entity.

In addition, the Athletic Department is, at least in part, comprised of an actual private, non-government entity: Texas A&M Ventures, LLC, a Missouri limited liability corporation affiliated with Learfield Communications, LLC. A comparison of the staff page on the Athletic Department's website and on the Texas A&M Aggies page of Learfield Communication's website, reveals that at least a dozen persons described as "staff" of the Athletic Department are also employed by "Learfield Texas A&M Ventures." (*See Staff Directory* (listing Jon Heidtke, Glen Oskin, Roberta Cohen, Lori Weed, Toby Howard, Greg Gilmer, Jeff Huebel, Warren Ables, Brandon Kretz, Tyler Smith, Madison Harker, Andrew Wampler and Jarret Moore as staff of the Athletic Department); *see also* Texas A&M Ventures, <http://www.learfield.com/partner/texas-a-m-ventures/> (last visited Nov. 16, 2017) (listing all of those individuals as employees of Texas A&M Ventures).) In short, this symbiotic relationship between Athletic Department staff and its for-profit business partner—described by Texas A&M Ventures as a "long-term partnership"—further demonstrates that the Athletic Department and its staff is, in actual practice, is an entity separate from the University. Alternatively, and at the very least, the Athletic Department is made up of two-separate entities: one, a government entity that should be treated as separate and distinct from the University for the reasons set forth herein, and the other, a non-governmental, for-profit entity that is not entitled to sovereign immunity under the Eleventh Amendment.

¹ Like the physician clinic in *Lenoir*, the Athletic Department is not listed among the institutions in the Texas A&M University System. *See* TEX. EDUC. CODE, Chapter 87.

* * *

For all the foregoing reasons, at this stage of the litigation, the Athletic Department's Motion to Dismiss pursuant to Federal Rule 12(b)(1) must be denied. There are clearly enough facts supporting Plaintiffs' position that the Athletic Department operates as an independent entity from the University, with a business mission that is distinct from the University's educational mission, and thus cannot be viewed as "the State" and shielded from liability for its egregious unlawful conduct pursuant to the doctrine of sovereign immunity.

B. The Athletic Department cannot be viewed as an "arm-of-the State" of Texas for purposes of sovereign immunity.

If the Court determines that the Athletic Department is not a distinct entity from the University, the Court should substitute the University for the Athletic Department as a defendant, but separate the Athletic Department from the University when conducting its Eleventh Amendment arm of the state analysis, because, among other things, the claims in this case are entirely unrelated to the University's core mission, and instead relate solely to the unlawful conduct of the Athletic Department and its employees. *See Walker v. Jefferson County Bd. of Educ.*, 771 F.3d 748, 757 (11th Cir. 2014) ("Whether [an entity] is an 'arm of the [s]tate' must be assessed in light of the particular function in which the [entity] was engaged when taking actions out of which liability is asserted to arise." (quoting *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003))). In *Walker*, the 11th Circuit Court of Appeals held that a school board was not an arm of the state with respect to "employment-related decisions." *Id.* Because the infringing conduct herein occurred solely within and under the oversight of the Athletic Department, by Athletic Department

employees, neither the Athletic Department, nor the University, are entitled to arm of the state protection under the Eleventh Amendment.

The Eleventh Amendment bars any suit in which a state is the "real, substantial party in interest." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Simply being a political subdivision of a state or state agency, however, is not enough. *Earles v. State Bd. of Certified Pub. Accountants of Louisiana*, 139 F.3d 1033, 1036 (citing *See Edelman v. Jordan*, 415 U.S. 651, 667–68 n. 12, (1974)). The issue is whether the entity "in effect, stands in the shoes of the state itself." *Earles*, 139 F.3d at 1036.

There is no "simple litmus test" that determines whether an entity is an arm of the state for purposes of Eleventh Amendment immunity. The most salient factor, however, is the source of the entity's funding. The Supreme Court has recognized that "the impetus for the Eleventh Amendment" was "the prevention of federal-court judgments that must be paid out of a State's treasury." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994). For that reason, "the vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations." *Id.* (collecting cases); *see also U.S. ex rel. Barron v. Deloitte & Touche, L.L.P.*, 381 F.3d 438, 440 (5th Cir. 2004) (noting that because "[t]he Eleventh Amendment exists mainly to protect state treasuries," an entity's funding "is the weightiest factor" in determining if it is an arm of the state). The Athletic Department is a uniquely clear case. Not only does it receive its funding entirely from private sources, but state law expressly prohibits the use of state funds to pay its expenses. (*See Ex. B.*) Moreover, a crucial component is whether the state would be liable for a judgment against the defendant. *Black v. Panola Sch. Dist.*, 461 F.3d 584, 597 (5th Cir. 2006). Here, because the Athletic Department is prohibited from using state funds for its expenses, an award against the Athletic Department would not result in damages being paid by the state.

Finding that the Athletic Department is an arm-of-the-state when it receives no state funds would be a drastic departure from precedent, and would ignore the most critical factor of the arm-of-the-state test.

Additional factors the Fifth Circuit considers as part of its arm of the state analysis include: (1) whether the state statutes and case law view the entity as an arm of the state; (2) the entity's degree of local autonomy; (3) whether the entity is concerned primarily with local, as opposed to statewide, problems; (4) whether the entity has the authority to sue and be sued in its own name; and (5) whether it has the right to hold and use property. *Clark v. Tarrant County*, 798 F.2d 736, 744-45 (5th Cir. 1986). When interpreting an entity's status as an arm of the state, the assessment must be made by looking at the specific conduct at issue in the litigation for which liability is asserted. *Walker v. Jefferson County Bd. of Educ.*, 771 F.3d 748, 757 (11th Cir. 2014).

Here, the Athletic Department makes no showing whatsoever that it is an arm of the state entitled to immunity under the Eleventh Amendment. Instead, in a single sentence, it states only that "Texas A&M University is an agency of the State of Texas." (Defs.' Mot. p.6.) When considering the absolute lack of state funding along with the additional factors assessed by courts in the Fifth Circuit, it is clear that the Athletic Department is not, and cannot be viewed as, an arm of the state of Texas.

First, no Texas statute provides that a state university's athletic department is an arm-of-the-state. There is also no Fifth Circuit case law holding that a state university's athletic department is an arm-of-the-state.

Second, as indicated by the staffing of the Athletic Department, the Athletic Department has significant autonomy. An entity that has purely local control over day-to-day operations is not an arm of the state, even if the state has some oversight over the entity's operations. *Williams v.*

Dallas Area Rapid Transit, 242 F.3d 315, 321 (5th Cir. 2001) ("[T]he day-to-day operations of DART fall under purely local control.... While there is some state oversight of DART's operations, it enjoys considerable local autonomy; this factor therefore weighs slightly against Eleventh Amendment immunity[.]"). In its Motion to Dismiss, the Athletic Department states that University policy demonstrates that the University "is *expected* to exercise meaningful oversight of the activities of its athletic department . . ." (emphasis added). This expectation fails to explain how exactly the University *exercises* oversight. Given the significant staffing and business departments of the Athletic Department, it seems clear the Athletic Department controls its own day-to-day operations. At the very least, the Plaintiffs must have thorough discovery to determine the extent of actual oversight and control exerted by the University over the Athletic Department.

The third additional factor focuses on whether the entity acts on the benefit and welfare of the state as a whole, or for the special advantage of local inhabitants. An entity that acts for the benefit of residents of a city and the surrounding community is only concerned with local concerns. *Id.* at 321-22. Here, the Athletic Department is only concerned with local problems. It only acts on behalf of Aggie athletes, alums, and fans. It certainly does not act on behalf of the state as a whole, which includes a large population loyal to institutions that compete with Texas A&M and the Athletic Department.

Fourth, for all the reasons set forth above, the Athletic Department can be viewed as a separate entity capable of being sued in its own name. By filing suit against the Athletic Department, the Complaint alleges the Athletic Department has authority to sue and be sued. Explicit authority from the legislature is not necessary to prove an entity has the ability to sue and be sued. *See U.S. ex rel. King v. Univ. of Texas Health and Sci. Ctr.-Houston*, No. 12-20795, 544 Fed. Appx. 490 498 (5th Cir. Nov. 4, 2013) (unreported) (copy attached as Exhibit D). Rather, a

servient agency of a political entity can be sued when the servient agency has been granted jural authority. *See Darby v. Pasadena Police Dept.*, 939 F.2d 311, 313 (5th Cir. 1991). As explained above in Section III(A), the University has granted significant independence to the Athletic Department such that it should be treated as a separate and distinct entity.

Finally, the Athletic Department unquestionably uses a wide variety of multi-million dollar facilities (which have cost over \$750 million in the last 20 years alone) that have been built, and are used and maintained, primarily for Texas A&M athletics. Significantly, the Texas Constitution and statutes prohibit use of state bonds or appropriations to finance the development of these properties.

* * *

When all of these factors are considered, the Court should conclude that the Athletic Department is not an arm of the state of Texas, and therefore, that it is not entitled to Eleventh Amendment Immunity. Accordingly, Defendants' motion under Federal Rule 12(b)(1) should be denied.

IV. The Athletic Department's asserted sovereign immunity defense does not shield it from Plaintiffs' copyright claims.

Even if the Athletic Department can claim the States' sovereign immunity, which, for all the reasons discussed above, it cannot, that immunity does not shield it from Plaintiffs' claims under the federal Copyright Act. State sovereign immunity must yield in two distinct circumstances. First, the states simply do not have sovereign immunity in areas, such as bankruptcy, where they surrendered their immunity "in the plan of the Convention." *Central Virginia Community College v. Katz*, 546 U.S. 356, 373 (2006). In these areas, no abrogation statute is necessary. As explained below, copyright claims are analogous to bankruptcy claims, and are therefore not subject to state sovereign immunity defenses.

Second, Congress may abrogate the states' immunity under Section Five of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Although the Fifth Circuit rejected Congress's attempt to abrogate state immunities to copyright claims under the Due Process Clause, *see Chavez v. Arte Publico Press*, 204 F.3d 601, 603 (5th Cir. 2000) and *Rodriguez v. Tex. Com'n on the Arts*, 199 F.3d 279, 280-81 (5th Cir. 2000), those precedents do not bar Plaintiffs' claims here. Post-*Chavez* decisions by the Supreme Court have made clear that abrogation is permissible where, as here, plaintiffs allege an actual constitutional violation. *United States v. Georgia*, 546 U.S. 151 (2006). Moreover, *Chavez* and *Rodriguez* relied heavily on a lack of evidence that states frequently violate copyrights. But, here, Plaintiffs can document more than one hundred fifty (150) lawsuits, either filed or brought to judgment, occurring after the Fifth Circuit's decisions in these two cases. Finally, *Chavez* expressly declined to consider whether Congress might abrogate state immunities on the ground that state infringements violate the Privileges and Immunities Clause of the Fourteenth Amendment. Plaintiffs here *do* advance that argument, which is a question of first impression.

A. The states waived their immunity to copyright claims in the plan of the Convention.

The Athletic Department's claim that sovereign immunity bars Plaintiffs' copyright claim relies entirely on the Fifth Circuit's decisions in *Chavez* and *Rodriguez*. (*See* Defs.' Mot. p. 6.) Both those cases rejected arguments that Congress had abrogated the states' sovereign immunity by statute.² Both were decided prior to the Supreme Court's decision in *Katz*. In *Katz*, the Supreme Court made clear that abrogation—where Congress passes a statute purporting to override the

² *See Chavez*, 204 F.3d at 603 ("The issue is whether Congress properly exercised its authority to subject states to suit in federal court for violation of those statutes [the Copyright and Lanham Acts]."); *Rodriguez*, 199 F.3d at 280 (considering plaintiffs' argument "that Congress's enactment of the Copyright Remedy Clarification Act of 1990, 17 U.S.C. § 511(a) (1994), validly abrogated the states' sovereign immunity from suit in copyright matters.").

states' immunity—is not the only question. In considering whether states could be sued in bankruptcy cases, the Supreme Court stated that "[t]he relevant question is not whether Congress has 'abrogated' States' immunity in proceedings to recover preferential transfers.... The question, rather, is whether Congress' determination that States should be amenable to such proceedings is within the scope of its power to enact 'Laws on the subject of Bankruptcies.'" *Katz*, 546 U.S. at 379.³ That was because the Court found "that States agreed in the plan of the [Constitutional] Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'" *Id.* at 377 (quoting U.S. Const. Art. I, § 8, cl. 4).

Katz's reference to "the plan of the Convention" invoked Alexander Hamilton's famous discussion of state sovereign immunity in Federalist 81. Hamilton wrote, that sovereign immunity "is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States." The Federalist No. 81, at 548-49 (J. Cooke ed. 1961).⁴ This principle that the states waived immunity in certain categories of cases simply by ratifying the Constitution is the reason, for example, that states may not assert their immunity in suits brought by the United States government.⁵

Katz broke new ground, however, by stating that certain of Congress's enumerated powers in Article I embody similar waivers; hence, *Katz* held that there simply is no immunity in

³ See also *Katz*, 546 U.S. at 361 (noting that although the Court had granted *certiorari* to determine whether a provision of the Bankruptcy Code purporting to abrogate state sovereign immunity was valid, "we are persuaded that the enactment of that provision was not necessary to authorize the Bankruptcy Court's jurisdiction over these preference avoidance proceedings").

⁴ See also *Alden v. Maine*, 527 U.S. 706, 713 (1999) (noting that states retain their sovereign immunity "except as altered by the plan of the Convention or certain constitutional Amendments"); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (stating that a State is not "subject to suit in federal court unless it has consented to suit, either expressly or in the 'plan of the convention'").

⁵ See *United States v. Texas*, 143 U.S. 621, 646 (1892).

bankruptcy cases because Congress's bankruptcy powers involve such a waiver.⁶ The question in the present case is whether Plaintiffs' copyright claims fall into a similar category. Plaintiffs submit that they do. Congress's enumerated power "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," U.S. Const. Art. I, § 8, cl. 8, is structurally similar to Congress's power over bankruptcy. Because the Fifth Circuit decided *Chavez* and *Rodriguez* six years before *Katz*, whether the states waived their immunity from copyright powers in the plan of the convention is a question of first impression in this Court.

The *Katz* court considered three categories of evidence about the Bankruptcy Clause. First, it noted that state courts had issued conflicting decrees in bankruptcy cases prior to the Constitution, and it concluded that "there was general agreement [among the Framers] on the importance of authorizing a uniform federal response to the problems presented in [these cases]." *Katz*, 546 U.S. at 369. Second, early federal bankruptcy legislation not only created uniform federal substantive rules, but also empowered the federal courts; in particular, it enabled them to order the release of a federally-discharged debtor from state imprisonment for debt. *Id.* at 373-77. Finally, the Court emphasized that the exercise of bankruptcy jurisdiction "does not, in the usual case, interfere with state sovereignty even when States' interests are affected." *Id.* at 370.

These factors strongly suggest that the Copyright Clause involves a similar waiver of states' sovereign immunity.⁷ James Madison argued that the Copyright Clause was necessary because "[t]he States cannot separately make effectual provisions" for copyrights and patents.⁸ Hence, the

⁶ See *Katz*, 546 U.S. at 378 (holding that, "[i]n ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in [bankruptcy] proceedings").

⁷ See James F. Caputo, *Copy-Katz: Sovereign Immunity, the Intellectual Property Clause, and Central Virginia Community College v. Katz*, 95 Geo. L. J. 1911, 1930 (2007) (collecting evidence that "the Framers understood the Intellectual Property Clause to embody a tacit waiver of state sovereign immunity similar to the one the *Katz* court found in the Bankruptcy Clause").

⁸ The Federalist No. 43, (J. Cooke ed. 1961).

legislative history of the 1976 Copyright Act concluded that "[o]ne of the fundamental purposes behind the copyright clause of the Constitution ... was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various states."⁹ Similarly, federal copyright laws have emphasized the importance of a federal judicial forum. Congress granted the federal district courts jurisdiction over copyright claims in 1819—56 years prior to granting those courts *general* jurisdiction over all federal questions.¹⁰ And since 1873, that jurisdiction has been exclusive of the courts of the states.¹¹ Finally, copyrights suits—like bankruptcy claims—do not significantly interfere with state sovereignty. *Katz* emphasized the *in rem* nature of bankruptcy jurisdiction as posing a minimal threat to state sovereignty. *See Katz*, 546 U.S. at 369-70. Similarly, "intellectual property rights are rights *in rem* that avail against the rest of the world."¹² And copyright suits—unlike the suits to recover state debts or enforce state bonds that gave rise to the Eleventh Amendment—are unlikely to pose the threat of government insolvency that has motivated most of the Supreme Court's sovereign immunity jurisprudence.

Pursuant to *Katz*, this Court should hold that state sovereign immunity does not bar Plaintiffs' copyright claims, because, like bankruptcy claims, the states waived their immunity as to copyright claims in the plan of the convention.

B. Congress has validly abrogated the states' immunity for copyright claims pursuant to its power to enforce the Due Process Clause of the Fourteenth Amendment.

The Athletic Department also may not assert sovereign immunity because Congress has validly abrogated the State's sovereign immunity by statute, pursuant to its power under Section

⁹ H. R. Rep. No. 1476, 94th Cong., 2d Sess. 129 (1976).

¹⁰ *See* Act of Feb. 15, 1819, ch. 19, 3 Stat. 481, 481.

¹¹ Rev. Stat. § 711 para. 5.

¹² Gideon Parchomovsky & Alex Stein, *Intellectual Property Defenses*, 113 Colum. L. Rev. 1483, 1487 (2013).

Five of the Fourteenth Amendment. Congress may abrogate the states' immunity when it acts to enforce the Fourteenth Amendment, so long as it clearly states its intent to do so. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003). Congress clearly subjected the states to suit in copyright cases in the Copyright Remedy Clarification Act (CRCA), which provides that "[a]ny State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . for a violation of any of the exclusive rights of a copyright owner." 17 U.S.C. § 511(a).¹³

The only question is whether the CRCA is a valid exercise of Congress's power to enforce the Fourteenth Amendment. Most cases to consider the CRCA's validity—including the Fifth Circuit's decision in *Chavez v. Arte Publico Press*, 204 F.3d 601, 603 (5th Cir. 2000), upon which the Athletic Department primarily relies—have evaluated it as "prophylactic" legislation. Congress may pass prophylactic "legislation which deters or remedies [Fourteenth Amendment] violations . . . even if in the process it prohibits conduct which is not itself unconstitutional," so long as "there [is] a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 518-20 (1997). The Fifth Circuit held in *Chavez* that the CRCA was *not* valid prophylactic legislation, relying on the fact that not all copyright violations are also constitutional violations and criticizing the legislative record before Congress for failing to take this into account.

¹³ *See also* 17 U.S.C. § 501(a).

The Supreme Court's decision in *United States v. Georgia*, 546 U.S. 151 (2006), makes clear that abrogation may also occur in a second, more straightforward way. As Justice Scalia explained:

While the Members of this Court have disagreed regarding the scope of Congress's "prophylactic" enforcement powers under § 5 of the Fourteenth Amendment . . . no one doubts that § 5 grants Congress the power to "enforce . . . the provisions" of the Amendment by creating private remedies against the States for *actual* violations of those provisions. . . . This enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States.

546 U.S. at 158-59.

The Fifth Circuit has read *Georgia* to uphold abrogation legislation, like the CRCA, whenever a plaintiff alleges an actual constitutional violation: "If the State's conduct violated both [the statute] and the Fourteenth Amendment, [the statute] validly abrogates state sovereign immunity." *Hale v. King*, 642 F.3d 492, 498 (5th Cir. 2011). On the other hand, "[i]f the State's conduct violated [the statute] but did not violate the Fourteenth Amendment, the court must then determine 'whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid'" as prophylactic legislation under the congruence and proportionality test. *Id.* (quoting *Georgia*, 546 U.S. at 159).

Plaintiffs here are entitled to proceed under the CRCA's abrogation of state sovereign immunity because (1) Plaintiffs have alleged an *actual* constitutional due process violation under *United States v. Georgia*, and (2) the CRCA is valid prophylactic legislation, notwithstanding *Chavez*, because the current record of state infringements demonstrates the Act is congruent and proportional to deprivations of property without due process of law.

1. Plaintiffs have alleged an actual constitutional violation.

The Supreme Court's decision in *United States v. Georgia*, 546 U.S. 151 (2006)—decided six years after *Chavez*—makes clear that the present claim falls outside *Chavez*'s scope. *Georgia* involved a suit under Title II of the Americans with Disabilities Act, which generally prohibits discrimination against persons with disabilities. The Court had previously held that Title II was *not* valid prophylactic legislation, because many claims of disability-based discrimination would not involve unconstitutional state conduct. *See Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). But in *Georgia*, the plaintiff—a prison inmate—alleged state actions that not only violated the ADA, but that the lower courts found to be an actual violation of the Eighth (and Fourteenth) Amendments. Based on this, the Supreme Court concluded that "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." *Georgia*, 546 U.S. at 159.

Plaintiffs in the present case have argued that the Athletic Department's conduct was intentional and that state law provides no adequate remedy. Plaintiffs have alleged, in other words, an *actual* constitutional violation of the Fourteenth Amendment. Under *Georgia*, it is irrelevant whether state copyright infringements are *always* or mostly intentional, or whether state laws sometimes provide remedies. The critical point is simply that *this* claim falls within the scope of both the Copyright Act and the Fourteenth Amendment. Here, Plaintiffs' allegations are sufficient to allege an actual constitutional violation in this particular case of copyright infringement. That is sufficient, under *United States v. Georgia*, to validate the CRCA's abrogation of the state's sovereign immunity with respect to Plaintiffs' claims, and warrants the denial of Defendants' Motion to Dismiss.

2. The Fifth Circuit's conclusion in Chavez that the CRCA is not valid prophylactic legislation has been undermined by subsequent experience.

Chavez's conclusion that the CRCA's abrogation of state immunity was not congruent and proportional to a constitutional wrong was based on three perceived deficiencies in the CRCA's legislative record. First, and most important, *Chavez* relied heavily on the absence of a significant number of reported violations of copyrights by state governments. *See Chavez*, 204 F.3d at 605-06. The Fifth Circuit noted that the Copyright Office had found "no more than seven incidents of State copyright infringement," and that "the testimony before Congress worried principally about the *potential* for future abuse." *Id.* at 606. These concerns, the Court found, were insufficient to sustain the CRCA.

In the 17 years since *Chavez*, the "potential" for abuse has become reality. In Exhibit E, Plaintiffs have identified 152 cases in which state actors have been sued for copyright infringement. The number of copyright cases filed against states since 2000 is more than an order of magnitude greater than the number that *Chavez* found inadequate. *Chavez's* conclusion that the CRCA responds to an insufficient pattern of constitutional violations is thus ripe for reexamination. Not surprisingly, other courts considering the copyright abrogation issue more recently have reached a very different conclusion. Based on the substantial number of infringement suits filed since *Chavez*, the Eastern District of North Carolina, for example, recently upheld the CRCA's abrogation provisions. That court noted that "the amount of suits filed against allegedly infringing states in recent years, even despite little chance of success, demonstrates the extent of the issue." *Frederick L. Allen & Nautilus Prods., LLC v. Cooper*, No. 5:15-CV-627-BO, 2017 WL 1102618, at *5 (E.D.N.C. Mar. 23, 2017). Given the likelihood that decisions like *Chavez* have deterred legal challenges to state infringements, the actual instances of state violations are likely much higher.

Chavez also relied on two other perceived problems with the CRCA and its legislative record: the potential availability of state law remedies for copyright infringement, and the Copyright Act's imposition of liability for merely negligent infringement. *See Chavez*, 204 F.3d at 606-07. Because the Due Process Clause has been held not to apply to negligent deprivations or where state law remedies are available, *see Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 642-45 (1999), the Fifth Circuit Court of Appeals rightly noted that—in principle—state conduct might violate the Copyright Act without also violating the Constitution. *See Chavez*, 204 F.3d at 605-07. The Fifth Circuit also found that Congress had not produced adequate evidence that these theoretical discontinuities between the Act and the Constitution would turn out to be inconsequential in practice. *See id.* Hence, *Chavez* found the CRCA not "congruent and proportional" to violations of the Fourteenth Amendment. *Id.* at 607-08. These conclusions are likewise ripe for reexamination in light of subsequent experience.

The cases in Exhibit E allege intentional acts of infringement by state governmental entities, and state remedies do not appear to have been available in those cases. It is true, as *Chavez* emphasized, that in principle an act of copyright infringement may violate the Copyright Act but *not* the Constitution because the infringement is merely negligent, or because state law provides an adequate remedy after the fact. But the mere possibility of these scenarios *in theory* does not render the CRCA not "congruent" or "proportional" unless these scenarios actually occur in a significant number of cases. The question is not whether one can imagine copyright infringements that would not violate the Constitution, but rather whether the greater proportion of such infringements *in reality* involve unconstitutional state conduct.

As the cases in Exhibit E show, the reported instances of actual state infringement are generally intentional. And although a state could, in theory, provide adequate remedies for

infringements, they do not. One need not criticize the *Chavez* court for giving states the benefit of the doubt, or for waiting to see how things would play out. *But after nearly two decades of subsequent experience, it is appropriate to now reexamine the actual record.* When this is done, it is more than clear that the CRCA's abrogation of state sovereign immunity is necessary to remedy unconstitutional deprivations of intellectual property by state government entities.

C. The CRCA validly enforces the Privileges and Immunities Clause of the Fourteenth Amendment.

Even if the CRCA is not a valid means of enforcing the Due Process Clause, it may still be upheld under the Privileges and Immunities Clause ("PI Clause").¹⁴ The Plaintiffs in *Chavez* attempted to raise the argument that the CRCA could be upheld under the Privileges and Immunities Clause of the Fourteenth Amendment, but the Fifth Circuit refused to consider it. *See Chavez*, 204 F.3d at 608 (noting that plaintiffs could have raised the argument earlier, and "[l]itigation must run its course at some point").

The Privileges and Immunities Clause unequivocally states that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const., Amdt. 14, § 1. So whereas procedural due process claims require an analysis of intent and available remedies, state denial of a privilege or immunity of national citizenship always creates an actual constitutional harm. Moreover, it is "easier for Congress to show a pattern of state constitutional violations" when addressing rights subject to heightened scrutiny—such as the PI Clause—than rational basis rights like procedural due process. *See Hibbs*, 538 U.S. at 735; *see also Saenz v. Roe*, 526 U.S. 489, 504 (holding "[n]either mere rationality nor some intermediate

¹⁴ It is well-established that Congressional abrogation may be valid under one provision but invalid under another *See, e.g., Hibbs*, 538 U.S. 721, 727 (2003) (holding abrogation valid under the Equal Protection Clause but invalid under the Commerce Clause).

standard of review should be used to judge the constitutionality of a state rule that" violates the PI Clause).

Federal copyrights—unlike most property rights, which are creatures of state law—satisfy even the narrowest definition of "privileges and immunities of citizens of the United States," and are therefore protected from state abridgment under the Fourteenth Amendment. Congress thus validly exercised its authority to "remedy and deter" unconstitutional state conduct when it abrogated sovereign immunity for copyright infringement under § 5 of the Fourteenth Amendment.

1. Federal copyrights are "privileges and immunities of citizens of the United States."

Federal copyright protections are deeply rooted in the American legal tradition and satisfy even the narrowest definition of privileges or immunities of citizens of the United States. In *Saenz*, the majority opinion provided guidance into the meaning of the term "Privileges and Immunities"—as utilized in Article IV of the Constitution and understood at the time of the founding—by citing Supreme Court Justice Bushrod Washington's landmark decision in *Corfield v. Coryell*, 6 F. Cas. 546 (E.D. Pa. 1823) (riding circuit), for the proposition that "'fundamental' rights protected by the Privileges and Immunities Clause include 'the right of a citizen of one state to pass through, or to reside in any other state.'" *Saenz*, 526 U.S. at 501 n.14. The cited passage from *Corfield* interpreted "Privileges and Immunities" to include not only a right to travel but also "the right to acquire and possess property of every kind." *Corfield*, 6 F. Cas. 546 (E.D. Pa. 1823). Because the Supreme Court has long held that copyrights constitute "property,"¹⁵ the "right[s] to

¹⁵ See, e.g., *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The production to which the protection of copyright may be accorded is the property of the author."); *Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284, 291 (1907) (an author's "property in copyright is the creation of the Federal statute passed in the exercise of the power vested in the Congress by [the Patent and Copyright Clause].").

acquire and possess" and to "take, hold and dispose of" copyrights are undeniably within the scope of "privileges and immunities" as originally established in Article IV of the Constitution and understood by the Framers and earliest sessions of Congress.

In the *Slaughter-House Cases*, the Supreme Court narrowed the scope of the PI Clause of the Fourteenth Amendment by holding that it does not furnish a basis for vindicating rights secured by state law. 83 U.S. 36, 78-79 (1872). Rather, the Court concluded that the Clause included only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws," *id.* at 79, as well as those which "depend[] on the Federal government for their existence or protection." *Id.* at 77. The PI Clause therefore must include "fundamental" rights—such as those outlined in *Corfield* and cited in *Saenz*—"which owe their existence to the Federal government, its National character, its Constitution, or its laws."

A federal copyright squarely fits this definition. While falling within the scope of *Corfield's* "right to acquire and possess property of every kind," a federal copyright undeniably "owes [its] existence to the Federal government, its National Character, its Constitution, or its laws" and "depends on the Federal government for its existence and protection." This places copyrights firmly within *Slaughter-House's* narrow understanding of "privileges or immunities" under the Fourteenth Amendment. It also differentiates copyrights from the majority of property rights—which are creatures of state law—that are excluded from protection under *Slaughter-House*.

Importantly, copyrights are also distinct from other Article I rights created by Congress, as they pre-dated, and were explicitly contemplated by, the Constitution. *See* U.S. Const. Art. I, § 8 (empowering Congress to secure to authors "the exclusive Right" to their writings); Federalist No. 43 (J. Madison) ("The copyright of authors has been solemnly adjudged in Great Britain to be a

right of common law."). Like the right to travel in *Saenz*, federal copyrights fit cleanly within the "class of rights which the federal government was 'created to establish and secure.'" *Slaughter-House*, 83 U.S. at 76; *see also* Section IV.A, *supra*; The Federalist No. 43 (J. Madison) (the States "cannot separately make effectual provision for either patents or copyrights."). Indeed, the refusal of individual states to recognize (or honor) federal copyrights would interfere with the right to travel recognized in *Saenz*, as states may not penalize citizens by forcing them to exchange their federally-imbued property rights for their equally fundamental right to "pass through, or reside in" any individual state. *Saenz*, 526 U.S. at 505 (states may not impose penalties on the right to travel).

2. Congress acted within its power when abrogating sovereign immunity for direct violations of the privileges and immunities clause.

The validity of enforcement legislation under Section Five generally turns on the level of scrutiny applicable under the constitutional principle that is being enforced. *See Hibbs*, 538 U.S. at 735-36. In *Saenz*, the Supreme Court said that "[n]either mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates" against a privilege or immunity, and "[t]he appropriate standard may be more categorical than [strict scrutiny] but it is surely no less strict." *Id.* at 504. Because the CRCA targets direct infringement of the Privileges and Immunities Clause—which is protected by heightened scrutiny—Congress' findings identifying state violations are not only entitled to maximum deference, but are sufficiently detailed to justify abrogation under any level of scrutiny. Moreover, those findings are now buttressed by an extensive subsequent record of state infringements. Hence, Congress was well-within its authority to remedy and deter ongoing and future violations of the Fourteenth Amendment when it abrogated sovereign immunity under the CRCA.

From the perspective of the Privileges and Immunities Clause, the CRCA is not "prophylactic" legislation, as *every* copyright infringement violates a privilege or immunity of

national citizenship. It is therefore unnecessary to determine whether its remedies are "proportional and congruent" to the targeted injury. *See Georgia*, 546 U.S. at 158-59. But even if the test applies, the CRCA surely satisfies it. Unlike the Due Process Clause, the Privileges and Immunities Clause does not require intent or inadequate process as an element of constitutional harm; as a result, the Privileges and Immunities ground avoids the congruence and proportionality problems noted in *Florida Prepaid* and *Chavez*. Because the CRCA's remedy simply proscribes unconstitutional state action without imposing additional substantive burdens on the states, it is both congruent and proportional to its goal of remedying and deterring violations of the Privileges and Immunities Clause.

* * *

For all of the reasons discussed above, Defendants' arguments that Plaintiffs' copyright claims must be dismissed because of its claimed sovereign immunity fail, and their Motion to Dismiss under Federal Rule 12(b)(1) should be denied. First, no abrogation statute is necessary, because the states waived their immunity to copyright claims in the plan of the Constitutional Convention. Second, to the extent the states did not waive their immunity, Congress validly abrogated the states' immunity in the CRCA pursuant to its power to enforce the Due Process Clause of the Fourteenth Amendment, where, as here, Plaintiffs have alleged an actual constitutional violation, and because, based on subsequent experience, the CRCA can be viewed as valid prophylactic legislation. Finally, Congress's abrogation of the states' immunity in the CRCA is a valid enforcement of the Privileges and Immunities Clause of the Fourteenth Amendment.

V. **Sovereign immunity does not bar Plaintiffs' Takings claims.**

A. **Plaintiffs' Takings claim under the Texas Constitution is not barred by sovereign immunity and may be pursued in this Court because the requirements for diversity jurisdiction have been satisfied.**

Plaintiffs have alleged that the Athletic Department's unlawful actions constitute a taking of Plaintiffs' property without adequate compensation in violation of Section 17, Article 1, of the Constitution of the State of Texas. (Am. Compl. ¶¶108-113.) The Athletic Department, in its Motion to Dismiss, does not challenge the sufficiency of these allegations under Federal Rule 12(b)(6); rather, it appears to simply assert that sovereign immunity bars this claim as well. (Defs.' Mot. p.6-7.) But it is well-established that sovereign immunity does not shield the State from an action for compensation under the takings clause of the Texas Constitution. *Gen. Servs. Com'n. v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 598 (Tex. 2001) (emphasis added); see also *El Dorado Land Co., L.P. v. City of McKinney*, 395 S.W.3d 798, 801 (Tex. 2013) ("[T]he Texas Constitution waives governmental immunity for the taking, damaging or destruction of property for public use."); *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007) ("[S]overeign immunity does not shield the State from a claim based upon a taking under Article I, section 17 of the Texas Constitution, known as the 'takings clause.'"); *Smith v. Lutz*, 149 S.W.3d 752, 760 (Tex. App.—Austin 2004, no pet.) ("[S]overeign immunity does not bar a claim for a constitutional taking."); *Osburn v. Denton County*, 124 S.W.3d 289, 293 (Tex. App.—Fort Worth 2003, pet. denied) ("[W]hen a governmental entity takes, damages, or destroys property for public use, the constitution waives the governmental entity's immunity from both suit and liability.").

It is also well-established that the same rules of diversity jurisdiction apply to state law takings claims that apply to any other state law claim a plaintiff might bring in diversity. See *Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 385-86 (5th Cir. 2001) ("[A] plaintiff may bring a state law takings claim in federal district court if the traditional requirements for

diversity jurisdiction are fulfilled."); *Mongrue v. Monsanto Co.*, 249 F.3d 422, 426 n.4 (5th Cir. 2001) ("Federal district courts may hear state takings claims in diversity.").¹⁶ Here, Plaintiffs have properly alleged, and there in fact exists, complete diversity between the parties under 28 U.S.C. §1332. (Am. Compl. ¶¶6-13.) And because sovereign immunity *does not* bar Plaintiffs' state takings claim, even if the Athletic Department is considered an arm of the State, Plaintiffs' state takings claim is a valid and properly pleaded claim that can, contrary to the Athletic Department's argument, be pursued in this Court under its diversity jurisdiction. Accordingly, the Athletic Department's Motion to Dismiss must be denied at least with respect to Plaintiffs' state takings claim under Section 17, Article 1, of the Constitution of the State of Texas.

B. Sovereign immunity also does not bar Plaintiffs' federal Takings claim under the Fifth and Fourteenth Amendments of the U.S. Constitution.

The Takings Clause of the Fifth Amendment reads, "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.¹⁷ The U.S. Supreme Court recognized that the Fifth Amendment mandates a compensatory remedy in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). In *First English*, the U.S. Solicitor General argued that the Fifth Amendment "is only a limitation on the power of the Government to act, not a remedial provision." *Id.* at 316 n.9. The Court rejected this notion. Instead, the Court found it "clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking." *Id.*

¹⁶ See also *Urban Developers LLC v. City of Jackson*, 468 F.3d 281, 304 n.16 (5th Cir. 2006); *McClure v. Biesenbach*, 402 F.Supp.2d 753, 758-59 (W.D. Tex. 2005); *SK Finance SA v. La Plata County, Bd. of Comm'rs*, 126 F.3d 1272, 1276 (10th Cir. 1997); *Oddo Dev. Co. v. City of Leawood, Kansas*, No. 08-2616-JWL, 2009 WL 975139, at *2-3 (D. Kan. Apr. 9, 2009); *Holt v. Town of Stonington*, No. 3:09-cv-2069, 2010 WL 2595127, at *6 (D. Conn. June 23, 2010); *Searl v. School-Dist. No. 2*, 124 U.S. 197, 200 (1888).

¹⁷ The Supreme Court held over a century ago that the Takings Clause binds the states through the Due Process Clause of the Fourteenth Amendment. See *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897). And the Fifth Circuit has acknowledged that copyrights are a form of property entitled to constitutional protection. See *Chavez v. Arte Publico Press*, 204 F.3d 601, 605 n.6 (5th Cir. 2000). The Athletic Department has not disputed this point.

First English's statements regarding a state's sovereign immunity were not necessary to that decision, but the Supreme Court's reading of the Fifth Amendment makes both textual and functional sense. *See, e.g., McCullough v. Johnson*, No. 7:05-CV-058-R, 2007 WL 3406753, at *6 (N.D. Tex. Nov. 14, 2007) (relying on *First English* in rejecting Texas's invocation of state sovereign immunity to bar a Takings claim); *T.O.F.C., Inc. v. United States*, 231 Ct. Cl. 182, 683 F.2d 389, 393 (Cl.Ct.1982) ("[Plaintiff's takings] claim, in and of itself, raises no question as to our jurisdiction since the Fifth Amendment is an express waiver of sovereign immunity"). To be sure, most takings litigation involves municipalities and other political subdivisions that lack the State's sovereign immunity. But applying sovereign immunity in cases where the state government has appropriated private property for public use would effectively gut the Fifth Amendment's guarantee. As one commentator has observed,

The main point of the Takings Clause is to limit the government's power of eminent domain, frequently by forcing the government to pay for private property it takes, even when it would prefer not to. If the government could bar suits for just compensation, the Takings Clause would be stripped of much meaning.¹⁸

The Athletic Department's assertion of sovereign immunity as a defense to Plaintiffs' federal takings claim is thus not only inconsistent with the plain text of the Takings Clause and considered statements by the Supreme Court, but it would render the Takings Clause a dead letter whenever state agencies expropriate private property.

As we have noted already, the Supreme Court's reading of the Takings Clause in *First English* dovetails with the Texas Supreme Court's understanding of similar language in the state constitution's takings clause: both clauses trump state immunity and mandate a compensatory remedy. Hence, the Texas Supreme Court has explained that "[t]he Constitution itself is the

¹⁸ Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493, 525 (2006).

authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use." *Steele v. City of Houston*, 603 S.W.2d 786, 791 (1980). Texas courts have generally construed the state constitution's Takings Clause as congruent with the federal one,¹⁹ and several state courts of appeal have explicitly treated the state's waiver of immunity as extending to Takings claims under *both* the state and federal constitutions. *See, e.g., State v. BP America Prod. Co.*, 290 S.W.3d 345, 363 (Tex. App.—Austin 2009, pet. denied); *Koch v. Texas General Land Office*, 273 S.W.3d 451, 457 (Tex. App.—Austin 2008, pet. denied); *Presidio Bridge Co. v. Presidio County*, 726 S.W.2d 212, 213 (Tex. App.—El Paso 1987, no writ). These courts have read holdings like *Steele* as authoritative constructions of the State's waiver of immunity in *both* federal and state takings cases.

The Athletic Department's brief offers no analysis in support of its position, nor does it acknowledge the Supreme Court's contrary statement in *First English* or the state court decisions finding a waiver in the state constitution. Instead, the Athletic Department simply lumps the Takings claim in with Plaintiffs' other claims. The Athletic Department does, however, cite one Fifth Circuit case, *John G. and Marie Stella Kennedy Memorial Foundation v. Mauro*, 21 F.3d 667, 674 (5th Cir. 1994), for the proposition that "the Eleventh Amendment" bars "a Fifth Amendment inverse condemnation claim brought directly against the State." The Fifth Circuit's opinion did not explain this conclusion, and the only case that it cited—*Alabama v. Pugh*, 438 U.S. 781 (1978)—did not involve or discuss Fifth Amendment Takings claims. Nor did the court of appeals address either the text of the Fifth Amendment or the Supreme Court's interpretation of that text to override state sovereign immunity in *First English*. Finally, *Kennedy Memorial*

¹⁹ *See City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 252 n.10 (Tex. 2011) ("The takings clauses in the United States and Texas Constitutions are comparable, though worded differently, and so Texas courts have looked to federal jurisprudence for guidance on the constitutionality of a taking.")

Foundation did not consider whether the Texas Constitution should be read as waiving immunity for *all* Takings claims.

The law of state sovereign immunity has changed in extensive and complex ways since *Kennedy Memorial Foundation* was decided in 1994; all of the Rehnquist Court's major decisions on the issue, from *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), through *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), occurred after the Fifth Circuit's decision. This Court should reject the Athletic Department's assertion of immunity as inconsistent with the Fifth and Fourteenth Amendments.

VI. The Athletic Department has waived sovereign immunity by its conduct.

The Supreme Court of Texas has long recognized that, although immunity is usually only waived by the Legislature, "[t]here may be other circumstances where the State may waive its immunity by conduct." *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 408 n.1 (Tex. 1997). Texas Courts have construed this doctrine quite narrowly. All of the reported decisions have involved contractual claims against governmental entities, and in that area Texas courts have generally deferred to the Texas legislature, which has established a comprehensive statutory scheme governing government contract disputes. *See Texas Natural Resource Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 857 (Tex. 2002) (plurality opinion). Yet even for contractual claims, the Court has suggested that government conduct may cause a waiver of immunity where "a government agency ... chiseled a contractor just because it could get away with doing so," *id.* at 861 (Hecht, J., concurring in the judgment), or where the government sought to "profit unfairly at [plaintiff's] expense." *Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 706 (Tex. 2003).

Consistent with that teaching, the Houston Court of Appeals found waiver by conduct in *Texas Southern University v. State Street Bank & Trust Co.*, 212 S.W.3d 893 (Tex. App.—Houston

[1st Dist.] 2007, pet. denied). There, Texas Southern University entered into negotiations to lease plant equipment from a contractor, whom it then "lured" into a lease agreement "with false promises that the contract would be valid and enforceable." *Id.* at 908. After accepting the full value of the contractor's performance, TSU "then disclaimed any obligation on the contract by taking the position that the contract was not valid after all," *id.*, resulting in a \$13 million windfall for the University. Emphasizing that the Texas Supreme Court's decision in *Catalina* "clearly establishes that the court will evaluate the waiver-by-conduct exception to sovereign immunity on the facts of each case, not as a categorical matter or bright-line rule," *id.* at 907, and noting that the "Texas Supreme Court has never addressed a waiver-by-conduct exception argument faced with the[se] 'extraordinary factual circumstances,'" the Houston Court of Appeals held that TSU could no longer invoke sovereign immunity, as its conduct was so blatantly inappropriate that it must be deemed to have waived that defense. *Id.* at 907-08.²⁰

If the waiver-by-conduct doctrine applies anywhere, it must apply here. The Athletic Department's treatment of Plaintiffs and their copyrighted material is even more egregious than TSU's conduct in *State Street*. The Athletic Department's theft of Plaintiffs' copyrighted materials

²⁰ Texas's "waiver-by-conduct" doctrine is quite distinct from the doctrine of implied or "constructive" waiver rejected by the U.S. Supreme Court in *College Savings Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 527 U.S. 666, 676-87 (1999) (overruling *Parden v. Terminal R. of Ala. Docks Dept.*, 377 U.S. 184 (1964)). Federal law imposed the doctrine of constructive waiver on the states; waiver-by-conduct is instead a function of the State's own authority to define the scope of the immunity it will assert. *City of Dallas v. Albert*, 354 S.W.3d 368, 374 (Tex. 2011) (discussing prior waiver-by-conduct decisions as involving "modify[ca]tion] and abroga[tion]" of "the common law doctrine of governmental immunity"); *City of New Braunfels v. Carowest Land, Ltd.*, 432 S.W.3d 501, 521 (Tex. App.—Austin, 2014) ("If this notion of 'waiver' of immunity 'by conduct' has any current viability, it has lived on within the rubric not of whether sovereign or governmental immunity has been waived, per se, but in the threshold determination whether immunity applies in the first place."). It would be anomalous for a federal court to hold the state immune in a situation where, under Texas law, the state's immunity does not exist. Moreover, under Texas separation of powers law, the state courts remain the last word on the boundaries of the state's immunity, even though the legislature controls waiver of that immunity in cases where it would otherwise exist. As the Texas Supreme Court has explained, waiver-by-conduct goes to "the boundaries of sovereign immunity [that] are determined by the judiciary," rather than "waivers of sovereign immunity . . . [that] must generally be found in actions of the Legislature." *Albert*, 354 S.W.3d at 374; see also *Carowest Land*, 432 S.W.3d at 521-22 ("Although [the Texas Supreme Court] defers to the Legislature to determine when and how immunity should be waived, the Texas Supreme Court has explained that the applicability and parameters of immunity *in the first instance* remain a matter of the common law and, thus, squarely within judicial rather than legislative prerogatives.") (emphasis in original).

was no "accident." It was the latest step in the Athletic Department's long-running and lucrative strategy of aggressively protecting the "12th Man" trademark while promoting the 12th Man narrative to solicit hundreds of millions of dollars in donations. The Athletic Department requested Plaintiffs' copyrighted materials under the guise of a potential book publishing negotiation in 2006 and illegally copied the copyrighted draft of Plaintiffs' 12th Man book, and later in 2010, when presented with the opportunity to view an updated version of the 12th Man book, made a second illegal copy. Then—without providing Plaintiffs with any compensation—the Athletic Department simply rebranded that work as its own and re-distributed it via links to 300,000-plus Twitter followers—and tens of thousands on the Athletic Department's websites—to advance its own "12th Man" Fundraising Campaign. These actions were neither a simple mistake nor a misunderstanding. The Athletic Department intentionally *removed* Bynum's copyright mark from the materials prior to distribution, and deliberately *replaced* Bynum's copyright with the false designation "special to Texas A&M Athletics," demonstrating a willful intent to claim ownership of Bynum's property. It then redistributed the misappropriated work to hundreds of thousands of its adoring fans. Moreover, the Athletic Department has admitted that, "[w]ith the Seattle Seahawks and their 12th Man getting a lot of attention in the NFL, *the story was an important part of our strategic plan* to show Texas A&M is the true owner of the 12th Man," and thereby generate additional fundraising over the brand's increased media exposure. (Am. Compl. ¶ 58.)

There is, moreover, no alternative remedial scheme for copyright claims as there is for contract claims; hence, the primary reason that Texas courts have been reluctant to find waiver-by-conduct does not apply to this case. Given that, and in the face of such egregious circumstances, the Athletic Department must not be allowed to hide behind sovereign immunity.

VII. Qualified Immunity

A. Standard of review.

Qualified immunity is a question of law. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). If a defendant claims qualified immunity, the burden shifts to the plaintiff to establish the inapplicability of that defense. *Kitchen v. Dallas Cty., Tex.*, 759 F.3d 468, 476 (5th Cir. 2014) (citing *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008)). When, as here, qualified immunity is asserted in a motion to dismiss, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized for objective legal reasonableness." *Ridha v. Texas A&M Univ. Sys.*, No. 4:08-CV-2814, 2009 WL 1406355, at *6 (S.D. Tex. May 15, 2009) (citing *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002)). In considering whether there is qualified immunity, "the inquiry focuses not on the defendants' actions, but on the right allegedly violated." *Lane v. First Nat'l Bank of Boston*, 687 F. Supp. 11, 16 (D. Mass. 1988), *aff'd*, 871 F.2d 166 (1st Cir. 1989).

To survive a claim of qualified immunity—raised in a motion to dismiss under Federal Rule 12(b)(6)—the plaintiff must have pled "specific facts that, if proved, would overcome the individual defendant's immunity defense; complaints containing conclusory allegations, absent reference to material facts, will not survive motions to dismiss." *Meza v. City of Port Isabel*, No. B-16-137, 2016 WL 7852530, at *6 (S.D. Tex. Dec. 5, 2016), *report and recommendation adopted*, No. B-16-137, 2017 WL 235010 (S.D. Tex. Jan. 19, 2017).

B. Individual Defendants Brad Marquardt and Alan Cannon are not eligible for qualified immunity because they are not employees of the State or an arm of the State.

The Individual Defendants have asserted that they are shielded from liability on Plaintiffs' claims by the doctrine of qualified immunity. (Defs.' Mot. p.11.) However, as an initial matter, should the Court agree with Plaintiffs' arguments set forth in Section III above that the Athletic Department is neither the State nor an arm-of-the State, then Individual Defendants Marquardt and

Cannon—as employees of the Athletic Department—cannot avail themselves of the qualified immunity doctrine. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 167-69 (1992) (private parties are not entitled to qualified immunity); *Richardson v. McKnight*, 521 U.S. 399, 402-412 (1997) (same). This is especially true when the conduct at issue (*i.e.*, copyright infringement for financial gain) is not a traditional government function. *See Richardson*, 521 U.S. at 407-08 (explaining the purpose of qualified immunity is to protect the government's ability to perform its traditional functions).

C. The Individual Defendants cannot be shielded from liability by qualified immunity because their actions were objectively unreasonable in light of clearly established law.

In this case, the Athletic Department and Individual Defendants (1) *removed* Plaintiffs' copyright mark from the materials prior to distribution, (2) *replaced* Plaintiffs' copyright with the false designation "special to Texas A&M Athletics," demonstrating a willful intent to claim ownership of Bynum's property, and (3) *redistributed* the misappropriated work to hundreds of thousands of people. Moreover, the Athletic Department has *admitted*—in a January 22, 2014 email from Brad Marquardt to Michael Bynum—that, "[w]ith the Seattle Seahawks and their 12th Man getting a lot of attention in the NFL, *the story was an important part of our strategic plan* to show Texas A&M is the true owner of the 12th Man," and thereby generate additional fundraising due to the brand's increased media exposure. (Am. Compl. ¶ 58.) The outright theft and redistribution of Plaintiffs' copyrighted work is an objectively unreasonable violation of established copyright and Digital Millennium Copyright Act (the "DMCA") laws.

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Campinha-Bacote v. Bleidt*, No. H-10-3481, 2011 WL 4625394, at *3 (S.D. Tex. Oct. 3, 2011) (copyright infringement case (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982))); *Bazan v. Hidalgo Cty.*, 246 F.3d 481, 489–90 (5th

Cir. 2001). The dispositive question is "whether an objectively reasonable official would understand that the alleged improper actions were unlawful." *Bleidt*, 2011 WL 4625394, at *3 (citing *Chavez v. Arte Publico Press*, 59 F.3d 539, 547 (5th Cir. 1995).) In considering whether there is qualified immunity, the inquiry focuses not on the defendants' actions, but on the right allegedly violated. *Lane v. First Nat. Bank of Boston*, 687 F.Supp. 11, 16 (D.Mass. 1988), *aff'd*, 871 F.2d 166 (1st Cir. 1989).

1. The rights that Plaintiffs have alleged have been violated are clearly established rights under the law.

The Individual Defendants are named in the First and Second Causes of Action in the Amended Complaint, for direct and contributory copyright infringement, respectively. Individual Defendant Marquardt is also named in the Fourth Cause of Action for violating the DMCA. Each of these rights are clearly established under the law.

The current Copyright Act, enacted in 1976 and effective since January 1, 1978, grants copyright owners, including Bynum, the exclusive rights to reproduce, distribute, publicly display, and publicly perform their copyrighted works. 17 U.S.C. § 106. Anyone who violates any of these exclusive rights is an infringer. 17 U.S.C. § 501. An aggrieved copyright owner may bring suit against any infringer to recover damages, obtain an injunction, or obtain an order requiring that the infringing materials be impounded and disposed. 17 U.S.C. §§ 501- 504.

Importantly, this Court and other courts that have considered the issue have determined that copyright protection is clearly established law. *See Campinha-Bacote v. Bleidt*, WL 4625394, at *3 (S.D. Tex. Oct. 3, 2011) ("[T]he law of copyright protection is clearly established by statute and caselaw.") (internal quotation marks omitted) (citing *Lane*, 687 F.Supp. at 16).

Plaintiffs' claims under the DMCA are also clearly established statutory law. Enacted in 1998, the DMCA confers specific rights to authors and copyright owners. Section 1202(a)

prohibits any person from, "knowingly and with the intent to induce, enable, facilitate, or conceal infringement" providing or distributing copyright management information that is false. 17 U.S.C. § 1202(a). Similarly, Section 1202(b) prohibits the intentional removal or alteration of copyright management information as well as the distribution or performance of works of authorship "knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, knowing, or ... having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement" Defendants argue that the law regarding typewritten "copyright management information" (also referred to as "CMI") is not clearly established by the plain text of the statute. (Defs'. Mot. p.20.) However, "Copyright management information" is a defined term under the DMCA that includes, among other things, the name of, and other identifying information about, the author and copyright owner of a work including the information set forth in a notice of copyright. 17 U.S.C. § 1202(c). There is nothing in the statutory definition that excludes CMI that is "typewritten." Courts, including this Court, have interpreted the definition of CMI broadly. In *Guzman v. Hacienda Records, LP*, No. 6:13-CV-41, 2015 WL 789113 (S.D. Tex. Feb. 24, 2015), this Court denied defendant's summary judgment motion to dismiss plaintiff's DMCA claim, finding that a jury could reasonably infer that the defendant had falsely portrayed himself to be the author of the song at issue by including his name underneath the song title on the album packaging. *See also Interplan Architect, Inc. v. C.L. Thomas, Inc.*, No. 4:08-CV-03181, 2009 WL 6443117, at *3 (S.D. Tex. Nov. 13, 2009) (concluding that the statutory definition of "copyright management information" "contemplates applicability to non-digital works as well."). Other courts have similarly rejected claims that CMI must be digital—whether as part of an "automated copyright protection or digital rights management system" as argued by the Individual Defendants—finding that "typewritten" CMI fits

neatly within the statutory definition. In *Murphy v. Millennium Radio Group, LLC*, the Third Circuit agreed that the definition of "copyright management information" includes non-digital attribution:

There is nothing particularly difficult about the text of § 1202.... Read in isolation, § 1202 simply establishes a cause of action for the removal of (among other things) *the name of the author of a work when it has been "conveyed in connection with copies of" the work*. The statute imposes no explicit requirement that such information be part of an "automated copyright protection or management system," as the Station Defendants claim. In fact, it appears to be extremely broad, with no restrictions on the context in which such information must be used in order to qualify as CMI. If there is a difficulty here, it is a problem of policy, not of logic. Such an interpretation might well provide an additional cause of action under the DMCA in many circumstances in which only an action for copyright infringement could have been brought previously. Whether or not this result is desirable, it is not absurd, as might compel us to make a more restrictive reading of § 1202's scope.

Murphy v. Millennium Radio Group, LLC, 650 F. 3d 295 (3d Cir. 2011) (emphasis added).

In short, for the reasons set forth above, Plaintiffs' claims for copyright infringement and DMCA violations are matters of clearly established law.

Finally, and importantly, to the extent University policies apply to the Individual Defendants, they are made aware of these established laws by the policies and guidelines of the University.²¹ For instance, the Texas A&M General Counsel's website includes links to University policy on intellectual property, which makes clear what the Department did was illegal. (*See* <http://policies.tamus.edu/17-01.pdf>; *see attached* Exhibit F (including links to the U.S. Copyright office website).) Among other things, the intellectual property policy provides very specific guidelines for accepting intellectual property from third parties—including acceptance by the Board of Regents and execution of an assignment agreement. (*See Ex. F, at Section 2.9.*)

²¹ At the very least, these policies apply to Individual Defendant Stephenson who is an employee of the University.

Moreover, the University's own Engagement Guidelines direct users of social media to "respect copyright laws." (Am. Compl. ¶ 51; Am. Compl. Ex. I.) Listed as a "basic principle" to engaging in social media on behalf of or as a representative of the University or any of its entities is the following mandate: "Respect copyright laws and give credit to sources of written content, images and ideas you reference or use." (Am. Compl. ¶ 51; Am. Compl. Ex. I.) The Engagement Guidelines further explain that employees must "[o]btain permission from the copyright owner before using copyrighted material such as original works of authorship including videos and images or literary, dramatic, musical, and artistic works. Provide a link to the original material if possible." (Am. Compl. ¶ 51; Am. Compl. Ex. I.) *None of these policies or guidelines were followed by the Individual Defendants.*²²

2. In light of such clearly established law, the Individual Defendants actions were objectively unreasonable.

Given that the rights that the Plaintiffs have alleged the Individual Defendants violated were clearly established, the only remaining issue is whether the Individual Defendants had "an objectively reasonable belief that they were in compliance with copyright law." *Bleidt*, 2011 WL 4625394, at *3. "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). For the reasons set forth below, the Individual Defendants' assertions that they are protected by the doctrine of qualified immunity must fail because the Individual Defendants' conduct, as pled in the Amended Complaint, is objectively unreasonable in light of clearly established law. *Ridha*, 2009 WL 1406355, at *6. The Individual Defendants'

²² It is important to further note that each of the Individual Defendants is a senior official in either the Athletic Department media relations (Marquardt and Cannon) or University news information services (Stephenson) departments and therefore have a sophisticated working knowledge about intellectual property issues, including copyrights and trademarks.

arguments to the contrary are self-serving legal arguments that are not based upon facts alleged in the Amended Complaint or even the Individual Defendants' own briefing.

In 1997, Bynum hired Whit Canning, a well-known sportswriter for the Fort Worth Star-Telegram, on a work-for-hire basis to use Bynum's research and write a biography of Gill, which Bynum planned to include in his *12th Man* book. (Am. Compl. ¶ 24.) Since the Gill biography was specially commissioned on a work-made-for-hire basis, upon the biography's creation, Bynum is and remains both the author and copyright owner of the entire *12th Man* book, which includes the Gill biography. (Am. Compl. ¶ 69.) *See also* 17 U.S.C. § 101 ("work made for hire"); 17 U.S.C. § 201(b) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright"). Pursuant to a publishing agreement with Bynum, Epic Sports, the publishing imprint of Canada Hockey LLC, owns the exclusive rights to publish the *12th Man* book and Gill biography. (Am. Compl. ¶ 71.)

The *12th Man* book containing the Gill biography is subject to U.S. Copyright Registration Nos. TXu002020474 and TXu002028522. (Am. Compl. ¶ 70.) At the time of registration the *12th Man* book was (and remains) unpublished. (Am. Compl. ¶¶ 5, 70.) Because registration was made before publication, Bynum's registration constitutes prima facie evidence of the validity of Bynum's authorship and copyright ownership of the *12th Man* book and the facts stated in the certificate. 17 U.S.C. § 410(c).

a. The Individual Defendants were aware at all times of Plaintiffs' copyright.

The Individual Defendants were aware of Bynum and his ownership of the *12th Man* book. In 2000 and 2001, Bynum met with the Athletic Department personnel, including Marquardt, an

Associate Director of Media Relations, and Cannon, then, an Assistant Athletic Director for Media Relations. (Am. Compl. ¶ 25.) Bynum informed Marquardt and Cannon of his research and work to develop the *12th Man* book in order to confirm certain facts about Gill's athletic tenure at Texas A&M. *Id.* On prior occasions, Bynum has similarly contacted Athletic Department personnel, including Marquardt and Cannon, to confirm facts to be incorporated into his ten sports books about football in Texas, the Southwest Conference, and the Big 12 Conference and in the past has hired three members of the Athletic Department media relations staff to assist him with his research. *Id.*

On June 18, 2010, Bynum emailed Marquardt and Glen Johnson to ask for help with locating additional photographs for use in his *12th Man* book. *Id.* ¶ 28. Bynum attached to this email the 2010 draft of the *12th Man* book in PDF format for Marquardt's and Johnson's review. *Id.*; *see also* Am. Compl. Ex. C (which is a true and correct copy of the email and attachment from Bynum to Marquardt and Johnson dated June 18, 2010.) Bynum granted Marquardt and Johnson access to the 2010 draft of his *12th Man* book for their "review" only. (Am. Compl. ¶ 28; Am. Compl. Ex. C.) Bynum explained in his email that the attachment was "a draft version of the *12th Man* book on E. King Gill and Texas A&M football." (Am. Compl. ¶ 28; Am. Compl. Ex. C.) He also explicitly stated: "Please note that this is a work in progress and is not in final form yet." (Am. Compl. ¶ 28; Am. Compl. Ex. C.) Further, he noted that the photo credits in the draft had not been updated yet. (Am. Compl. ¶ 28; Am. Compl. Ex. C.) In addition, the cover of the 2010 draft of the *12th Man* book indicated that the book was "Edited by Mike Bynum" and included the logo of Epic Sports, Bynum's publishing imprint. (Am. Compl. ¶29; Am. Compl. Ex. C.)

The 2010 draft sent to Marquardt and Johnson included a prominent copyright notice on page six, indicating that Bynum's publishing imprint, Epic Sports, owned the copyright to the *12th*

Man book and that no part of the book may be reproduced or used in any form or by any means without the permission of the publisher. (Am. Compl. ¶ 30.) Later, while finalizing his draft of the *12th Man* book before its anticipated publication in Fall, 2014, Bynum emailed Marquardt as late as December 28, 2013, to ask a question about a former A&M football coach. (Am. Compl. ¶ 33.) Marquardt replied on December 29, 2013, stating that he did not know the answer. (Am. Compl. ¶ 33; Am. Compl. Ex. C.)

b. The Individual Defendants intentionally removed Plaintiffs' copyright notice, provided false attribution, and published a near verbatim copy of Plaintiffs' work.

On January 22, 2014, only weeks after his email exchange with Marquardt, Bynum learned that the Athletic Department had taken Bynum's copy of the unpublished Gill biography and reproduced and published a near verbatim copy of it as a feature story in the January 21, 2014, edition of the TAMU Times e-newsletter. (Am. Compl. ¶ 40; Am. Compl. Ex. H.) That e-newsletter included a hyperlink to a page on the Athletic Department's website displaying the infringing copy of Bynum's Gill biography. (Am. Compl. ¶ 40; Am. Compl. Ex. H.) Bynum later discovered that the infringing article had first appeared on the Athletic Department's website on January 19, 2014. (Am. Compl. ¶ 41.)

Plaintiffs believe (and have alleged in their Amended Complaint) that Stephenson was responsible for featuring the infringing article at the top of the January 21, 2014, edition of the Texas A&M University Times e-newsletter (the "TAMU Times"), which was thereafter distributed to approximately 77,000 subscribers, and that he also placed it on the front page of the TAMU Times website. (Am. Compl. ¶¶ 40, 56–57, 77.)

Accordingly, and taking the facts as alleged in Plaintiffs' Amended Complaint as true, Plaintiffs have alleged that the Individual Defendants removed Plaintiffs' copyright notice, provided false attribution, reproduced, distributed, and displayed a near verbatim copy of the

opening chapter of the *12th Man* book as an article without authorization of the copyright owner. Such actions violate the exclusive rights granted to Plaintiffs as the copyright owner and exclusive licensee under the U.S. Copyright Act and constitute direct copyright infringement. 17 U.S.C. §§ 106, 501.

Contrary to the Individual Defendants' protestations to the contrary, Plaintiffs' copyright infringement allegations—as pled in the Amended Complaint—are sufficiently settled as a matter of law. In *Harper & Rowe, Publishers, Inc., v. Nation Enterprises*, the Supreme Court considered whether *The Nation* magazine's publication of 300 words of a 200,000-word manuscript comprising President Ford's memoirs without authorization was fair use and thus not infringing in the context of a fair use analysis. The Supreme Court rejected *The Nation's* fair use arguments finding, among other things, that substantial similarity should be evaluated in qualitative terms as well as quantitative terms.

[A] taking may not be excused merely because it is insubstantial with respect to the *infringing* work. As Judge Learned Hand cogently remarked, "no plagiarist can excuse the wrong by showing how much of his work he did not pirate." *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (CA2), cert. denied, 298 U.S. 669, 56 S.Ct. 835, 80 L.Ed. 1392 (1936). Conversely, the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression.

...The Nation article is structured around the quoted excerpts which serve as its dramatic focal points.... In view of the expressive value of the excerpts and their key role in the infringing work, we cannot agree with the Second Circuit that the "magazine took a meager, indeed an infinitesimal amount of Ford's original language." 723 F.2d, at 209.

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 565–66 (1985) (holding that copying 300 words from President Ford's unpublished 200,000-word memoir was not fair use);

see also Meeropol v. Nizer, 560 F.2d 1061, 1071 (2d Cir. 1977) (copyrighted letters constituted less than 1% of infringing work but were prominently featured).

Similarly, in another case, scientists copied entire articles out of scientific journals and then claimed that their identical copies were not infringing because the scientists had merely copied a "small fraction" of the copyrighted work when a single article was copied from a scientific journal comprised of several articles. The Court rejected this argument as "imaginative lawyering," concluding that the copying was not protected by the doctrine of fair use and therefore infringing. *Am. Geophysical Union v. Texaco Inc.*, 802 F.Supp. 1, 17 (S.D.N.Y.1992), *amended* (Oct. 26, 1992), *aff'd*, 37 F.3d 881 (2d Cir. 1994), *order amended and superseded*, 60 F.3d 913 (2d Cir. 1994), *aff'd*, 60 F.3d 913 (2d Cir. 1994).

c. The Individual Defendants' actions subsequent to the unauthorized copying and publishing of Plaintiffs' work confirm that their actions were not objectively reasonable.

The Individual Defendants argue that the contours of the rights that Plaintiffs' claim have been violated were not sufficiently clear such "that every reasonable official would have understood that what he is doing violates that right." (Defs.' Mot. p.21) (citing *Ashcroft v. alKidd*, 563 U.S. 731, 741 (2001).) The Individual Defendants advance only legal arguments in support of this legal conclusion. (Defs.' Mot. p.21-22.) However, the facts alleged by Plaintiffs in the Amended Complaint support only one conclusion—that the Individual Defendants knew their actions were not objectively reasonable.

In response to an email from Bynum about the unauthorized reproduction of the Gill biography, Marquardt responded, calling the unauthorized publication an "incredibly coincidental mix-up" and "part of our strategic plan" and indicating that the story had now been removed from their website. (Am. Compl. ¶ 58; Am. Compl. Ex. N.) Marquardt stated that he had come across

a copy of the Gill biography in his drawer on yellowed paper and that he had asked his secretary to retype it. (Am. Compl. ¶ 58; Am. Compl. Ex. N.) A few days later, in response to a question from a co-worker if he had "anything on the 12th Man," Marquardt provided the story to the co-worker and that is how the story "found its way onto the Internet." (Am. Compl. ¶ 58; Am. Compl. Ex. N.) In the same email, Marquardt also asked Bynum for permission to continue to post the story as an "excerpt" from the *12th Man* book with the following accompanying language:

This is an excerpt to an upcoming book titled E. King Gill: The Life & Legend of Texas A&M's 12th Man. It will be published in September of 2014 to honor the 75th anniversary of Texas A&M's 1939 national championship season *by Epic Sports*." (or something similar...)

(Am. Compl. Ex. N (emphasis added).)

Importantly, when Bynum questioned Marquardt in the immediate aftermath of the unauthorized reproduction and distribution of the Gill biography, Marquardt at no time questioned whether Bynum was the copyright owner of the Gill biography (Defs.' Mot. p.22), suggested that he believed that Whit Canning was the true author and owner (*id.*), suggested that he believed the Athletic Department's unauthorized reproduction and repeated distribution and promotion of the critical opening chapter of the *12th Man* book may have been permitted by the doctrine of fair use or by license (*id.* p.21–23), that Marquardt mistakenly believed that he was a co-author of the Gill biography because Bynum had given him an acknowledgement credit in the draft (*id.* p.22–23), or that the work was somehow entitled to less copyright protection since it was a compilation. (*id.* p.22) Moreover, Marquardt at no time suggested that the section that he had his secretary *retype* was not substantially similar to Bynum's *12th Man* book. (*id.*) Instead, Marquardt immediately acknowledged the error — sincerely apologizing for "this mix-up" and then, in the same email,

proceeded to ask Bynum for permission to continue reproducing and distributing the Gill biography. (Am. Compl. ¶ 58.)

Any competent University media relations officer (such as Marquardt and Cannon) or news information director (such as Stephenson), when viewing Plaintiffs' copyrighted 12th Man story would have asked: "do we have permission from the author or the copyrighted owner of the 12th Man work to reprint this story?" No such permission was ever sought or given.

* * *

For the reasons stated herein, the Individual Defendants cannot be shielded from liability by Qualified Immunity as their actions in unlawfully removing Plaintiffs' copyright, replacing it with a false attribution, and publishing the work without authorization, were objectively unreasonable in light of clearly established copyright law. Accordingly, Defendants' motion should be denied.

VIII. The Texas Tort Claims Act is irrelevant to this suit.

The Individual Defendants also argue that they are entitled to immunity under the Texas Tort Claims Act (the "TTCA"). This argument is plainly out of place in this lawsuit. As its name suggests, the TTCA applies to state law torts; it does not, and cannot, apply to federal causes of action. The Individual Defendants seek to nullify federal law and flip the Supremacy Clause on its head by arguing that the TTCA—a state law—can insulate individuals from liability under the Copyright Act. But the Supreme Court has made clear that state legislation cannot insulate state officers or entities from federal claims. In *Haywood v. Drown*, 556 U.S. 729 (2009), for example, the Supreme Court held that the federal cause of action under 42 U.S.C. § 1983 preempted New York law limiting remedies against state officers. The Court observed, "That New York strongly favors a rule shielding correction officers from personal damages liability and substituting the State as the party responsible for compensating individual victims is irrelevant." *Id.* at 737. To the

extent that the TTCA purports to accord state officers broader immunities than federal law provides, the Copyright Act preempts it.

The TTCA is also irrelevant to this matter because copyright claims cannot be brought under the TTCA. *See* TEX. CIV. PRAC. & REMEDIES CODE § 101.106(f) ("If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and *if it could have been brought under this chapter* against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only." (emphasis added)). Defendants' argument that copyright violations are "torts" falling within the scope of the TTCA directly conflicts with the text of the Copyright Act, which provides that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright ... are governed exclusively by this title" and "no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." 17 U.S.C. § 301(a). Thus, even if a copyright violation could be classified as a "tort"—a proposition the Individual Defendants offer no authority to support—Plaintiffs' copyright claims could not have been brought under the TTCA because "the Copyright Act preempts all legal and equitable rights that fall within the scope of copyright law." *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 538 n.24 (5th Cir. 1994) (citing *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 268–70 (5th Cir. 1988)).

IX. Plaintiffs have sufficiently alleged claims of direct copyright infringement, contributory copyright infringement, and DMCA violations against the Individual Defendants, and, as such, those claims should not be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

A. Direct Copyright Infringement.

Plaintiffs have pled sufficient facts that the Individual Defendants' acts constituted direct copyright infringement. "To establish a claim for direct copyright infringement, a plaintiff must

prove that: (1) he owns a valid copyright and (2) the defendant copied constituent elements of the plaintiff's work that are original." *Gen. Universal Sys. v. Lee*, 379 F.3d 131, 141 (5th Cir. 2004). Bynum owns copyright in the entire *12th Man* book including its opening chapter. (Am. Compl. ¶ 69.) His copyright registration is prima facie evidence of that ownership. 17 U.S.C. § 410(c). Epic Sports has been granted the exclusive right to publish the *12th Man* book. (Am. Compl. ¶ 71.) Bynum has alleged that the Individual Defendants have reproduced without permission the Gill biography, which was the entire opening chapter of the *12th Man* book. (Am. Compl. ¶ 5.)

Finally, when confronted with unauthorized reproduction, Marquardt apologized and asked for permission from Bynum to continue to reproduce and distribute the Gill biography as part of their 12th Man advertising campaign. (Am. Compl. ¶ 59; Am. Compl. Ex. N.) The University's own policies mandated compliance with copyright by, among other things, requesting permission before using the work of others. (Am. Compl. ¶ 51; Am. Compl. Ex. J.) In short, Plaintiffs have sufficiently pled that the Individual Defendants committed direct copyright infringement, and the facts to support the Individual Defendants' legal conclusions that they had an objectively reasonable belief that their conduct was in compliance with the law.

B. Contributory Copyright Infringement.

"To establish a claim for contributory copyright infringement, a copyright owner must show that the defendant, (1) with knowledge of the infringing activity, (2) induces, causes or materially contributes to infringing conduct of another." *Suncoast Post-Tension, Ltd. v. Scoppa*, No. 4:13-CV-3125, 2014 WL 12596472, at *4 (S.D. Tex. July 17, 2014) (citing *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 790 (5th Cir. 1999)). Regarding the first element, a plaintiff need not show "actual knowledge" of the infringement; rather, a plaintiff need only show that the defendant had reason to know of the infringement. *Scoppa*, 2014 WL 12596472 at *4 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 487 (1984)). For contributory

infringement, the plausibility standard of *Twombly* and *Iqbal* "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of the necessary claims or elements." *Flagg v. Stryker Corp.*, 647 F. App'x 314, 316 (5th Cir. 2016) (internal quotation marks omitted). For the reasons set forth below, Plaintiffs' allegations are facially plausible to allow the Court to reasonably infer that the Individual Defendants are liable for contributory infringement, or at the very least, raise a reasonable expectation that discovery will reveal the necessary evidence supporting such liability. Marquardt admits that he instructed his secretary to retype the Gill biography and provided a copy to a co-worker, just a couple of weeks after Bynum's most recent correspondence with Marquardt about Bynum's research for the *12th Man* book. (Am. Compl. ¶ 58; Am. Compl. Ex. N.) Plaintiffs allege that Stephenson, through his role in the Athletic Department's Twitter account and e-newsletter, was aware of the efforts to establish the 12th Man brand for the Athletic Department and participated in such efforts. (Am. Compl. ¶¶ 12, 54–55.) Given the connections between Bynum and the Athletic Department and the copyrighted book he was publishing, and Stephenson's role in support of the 12th Man brand, Plaintiffs' factual allegations regarding Stephenson's actions raise a reasonable expectation that further discovery would likely reveal, for example, the communications between Stephenson, the Athletic Department, and Marquardt regarding the Gill biography.

Defendants argue that Plaintiffs have asserted only that Defendant Cannon "approved" the distribution and display of the Gill biography. (Defs.' Mot. p.17.) Yet, as Associate Director of Media Relations for the Athletic Department, Cannon is responsible for the content of the articles posted on the Athletic Department's website. (Am. Compl. ¶ 11.) Taking the Plaintiffs' allegations as true, namely that Cannon was responsible for the media posted on the Athletic Department's website (which necessarily requires reproducing the copyrighted work), that such website included

an unauthorized copy of the Gill biography, and that he approved the publication and distribution of the article, the Court has sufficient facts to infer that Defendant Cannon is liable for the conduct alleged. (*See* Am. Compl. ¶¶ 11, 40, 76.)

The Individual Defendants' reliance on *Bleidt*, that a colleague's representation that materials are authorized is sufficient to support a finding for qualified immunity, is equally unavailing. In *Bleidt*, one of the employees at issue testified that her supervisor had specifically told her that the infringing materials were authorized and relied on that representation. *Bleidt*, 2011 WL 4625394 at *3. No such record of similar conduct by the Individual Defendants is before the Court here. Accordingly, the allegations in the Amended Complaint meet the applicable pleading standard, and, as such, the Defendants' Motion with respect to the contributory infringement claims against Stephenson should be denied.

Given Cannon's knowledge of Bynum's work and their earlier conversations and correspondence on the Gill biography, he could not have had an objectively reasonable belief that his actions were in compliance with copyright law.

The Individual Defendants also assert that there are no allegations that Cannon knew or had reason to know that the Gill biography was infringing. (Defs.' Mot. p.17.) To the contrary, Plaintiffs have alleged that Cannon was aware of Bynum's work on the *12th Man* book for many years and that the two had communications regarding its research. (*See* Am. Compl. ¶ 25.) Taken as true, and along with the contacts between Defendants Marquardt and Stephenson throughout Plaintiffs' interaction with the Athletic Department, the Court can draw a reasonable inference that such contact would give a reason for Cannon to know that the Athletic Department's publication of the Gill biography was not authorized. And again, none of the Individual Defendants ever thought to seek permission from the author or the copyright owner to reprint his story despite being

senior officials in the media relations and news information services departments and despite such actions being a direct violation of the policies and guidelines of the Athletic Department.

Defendants' reliance on *Bleidt*, for the same reasons noted above, is unavailing. Additionally, Plaintiffs have sufficiently alleged that Cannon induced, caused, or materially contributed to the infringing activity through his promotion of the Gill biography on the Athletic Department's Twitter account and through his role as Associate Director of Media Relations for the Athletic Department. (Am. Compl. ¶¶ 11, 40, 52–53, 76.) Notably, Defendants argue only that Plaintiffs have failed to show the knowledge element in their claims of contributory infringement against Cannon. (*See* Defs.' Mot. p.18.) As a result, Plaintiffs have alleged sufficient facts for the Court to infer that Cannon is liable for the conduct alleged. With regard to the qualified immunity defense as it may apply here, for the reasons stated above, the Plaintiffs' rights are clearly established and a reasonable officer could not have had an objectively reasonable belief that his actions were in compliance with copyright law.

C. DMCA violations.

In addition, Plaintiffs have alleged that the Gill biography was displayed on the Athletic Department website under a different title, "The Original 12th Man" with the following altered author byline, "by Whit Canning, special to Texas A&M Athletics," with no attribution to Plaintiffs. (Am. Compl. ¶¶ 3, 45, 48, 101-102.) These actions describe violations of the DMCA, 17 U.S.C. § 1202. In journalism, the phrase "special to" is commonly used to indicate that a piece was written exclusively for a newspaper, magazine, or other publication by a correspondent or freelancer who is paid for their story by the publisher. (Am. Compl. ¶ 45.) Plaintiffs allege that Marquardt intentionally removed the copyright notice and author information when he reproduced and published the Gill biography. (*See* Am. Compl. ¶¶ 4, 47–49, 72–74.) As noted above, Plaintiffs' rights under the DMCA—including whether such "typewritten" CMI is protected by the

statute—are clearly established. 17 U.S.C. § 1202(c); *see also* *Guzman v. Hacienda Records, LP*, No. 6:13-CV-41, 2015 WL 789113 (S.D. Tex. Feb. 24, 2015); *Interplan Architect, Inc. v. C.L. Thomas, Inc.*, No. 4:08-CV-03181, 2009 WL 6443117, at *3 (S.D. Tex. Nov. 13, 2009) (concluding that the statutory definition of "copyright management information" "contemplates applicability to non-digital works as well."). In light of those clearly established rights, and taking Plaintiffs allegations as true, a reasonable official could not have had an objectively reasonable belief that his actions were in compliance with copyright law. Accordingly, Marquardt is not entitled to qualified immunity.

X. Conclusion

For all the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss.

Dated: November 30, 2017

Respectfully submitted,

/s/ Jason Cross

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 30, 2017, the foregoing document was electronically submitted with the Clerk of Court for the United States District Court, Southern District of Texas, using the electronic case filing system of the Court, and served on the attorneys of record via same.

/s/ Jason Cross

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EXHIBIT A

**Texas A&M University Athletics Department
Statement of Revenues and Expenses
Year Ended August 31, 2016**

Revenues	Football	Men's Basketball	Women's Basketball	Other Sports	Non-Program Specific	Total
Ticket Sales	41,710,523	2,132,226	636,147	3,305,778	-	47,784,673
Student Fees	-	-	-	-	-	-
Guarantees	3,500,000	174,000	1,737	66,861	-	3,742,597
Contributions	32,806,054	241,468	123,657	11,360,677	30,756,484	75,286,360
Third Party Support	-	-	-	-	-	-
Direct State or Other Government Support	-	-	-	-	-	-
Direct Institutional Support	-	-	-	-	-	-
Indirect Facilities and Administrative Support	-	-	-	-	-	-
NCAA Distributions	-	-	-	-	-	-
Conference Distributions	6,898,127	2,436,390	9,435	124,716	131,329	2,701,870
Broadcast, Television, Radio, and Internet Rights	11,440,333	409,098	32,250	58,863	1,338,521	8,737,879
Program Sales, Concessions, Novelty Sales, and Parking	73,774	31,076	2,221	130,912	14,204,732	28,745,141
Royalties, Advertisements, and Sponsorships	730,000	81,085	2,221	130,912	-	257,993
Sports Camps Revenues	339,245	207,500	91,100	1,090,590	15,294,795	17,413,985
Endowment and Investment Income	1,468,984	400,442	252,002	4,666,119	98,144	5,755,952
Bowl Revenues	43,566	-	-	-	380,593	380,593
In-Kind	562,120	23,420	-	65,497	-	1,468,984
Other	98,563,726	1,602	50,284	239,825	1,097,478	168,115
Subtotal Operating Revenues	98,563,726	9,177,326	1,196,832	21,109,856	63,338,708	194,386,450
Expenses	Football	Men's Basketball	Women's Basketball	Other Sports	Non-Program Specific	Total
Athletic Student Aid	3,023,615	387,284	508,206	5,772,284	1,875	9,704,275
Guarantees	3,320,000	565,861	84,955	456,739	-	4,427,575
Coaching Salaries, Benefits, Bonuses Paid by the University and Related Parties	10,386,820	3,572,496	1,494,322	7,600,677	-	23,054,314
Coaching Other Compensation Paid by a Third Party	-	-	-	-	-	-
Support Staff/Administrative Salaries, Benefits, Bonuses Paid by the University and Related Parties	2,131,228	591,948	259,492	1,314,402	13,319,008	17,616,078
Support Staff/Administrative Other Compensation Paid by a Third Party	-	-	-	-	-	-
Severance Payments	636,221	-	-	-	576,191	1,208,975
Recruiting	884,700	460,451	297,476	472,174	-	2,114,801
Team Travel	1,093,028	1,644,763	1,099,707	4,925,646	-	8,763,145
Equipment, Uniform, and Supplies	966,111	111,692	96,381	1,202,948	614,342	2,891,473
Game Expenses	2,345,369	318,148	210,590	936,602	15,350	3,826,060
Fund Raising, Marketing, and Promotion	70,927	73,592	42,517	73,142	33,552	292,720
Sports Camps Expenses	167,029	303,962	194,583	2,701,858	119,372	3,486,805
Direct Facilities, Maintenance, and Rental	3,942	515,339	407,356	1,442,302	24,515,932	26,884,873
Split Groups	-	-	-	-	116,902	116,902
Indirect Facilities and Administrative Support	190,385	23,310	18,967	310,803	336,227	879,692
Medical Expenses and Medical Insurance	14,816	4,546	1,085	56,821	76,973	154,240
Membership and Dues	222,015	119,037	43,689	658,732	11,560,138	12,603,611
Direct Overhead, Etc.	2,143,536	497,938	204,969	1,722,889	9,419,503	13,983,835
Other Operating Expenses	2,197,086	-	-	-	-	2,197,086
Bowl Expense	158,593	111,875	73,690	473,041	1,972,766	2,796,305
Student Athlete Meals	29,945,789	9,312,263	5,038,990	30,126,624	62,678,131	137,101,777
Total Operating Expenses	69,617,957	(134,937)	(3,840,158)	(9,016,767)	660,578	57,286,673
Excess of Revenues Over (Under) Expenses						

EXHIBIT B



Texas A&M University Athletics Department

Independent Accountants' Report on Applying Agreed-Upon Procedures to the Administration of Athletics Department Funds in Accordance with NCAA Bylaw 3.2.4.15

August 31, 2016



January 12, 2017

Mr. Scott Woodward
Athletic Director
Texas A&M University
P.O. Box 30017
College Station, Texas 77842-3017

Dear Mr. Woodward:

We have performed the procedures enumerated below, which were agreed to by management of Texas A&M University, solely to assist the University in complying with National Collegiate Athletic Association (NCAA) Bylaw 20.9.7.3, Football - Attendance Requirements. Management of the University is responsible for the attendance figures and internal control over the Athletic Department. The sufficiency of these procedures is solely the responsibility of those parties specified in this report. Consequently, we make no representation regarding the sufficiency of the procedures described below either for the purpose for which this report has been requested or for any other purpose.

NCAA Bylaw 20.9.7.3 requires that once every two years, Division I-A institutions average at least 15,000 in actual or paid attendance for all home football games. The legislation further requires in NCAA Bylaw 20.9.7.2, the institution to undertake an annual certified audit to verify its football attendance. The Athletic Department followed NCAA Bylaw 20.9.7.3.1.2, Paid Attendance (I-A), for the purposes of computing attendance figures whereby tickets sold for at least a third of the highest regular established ticket price are included in the total paid attendance.

We obtained the schedule of paid attendance for the 2016 home football season along with supporting documentation from the 12th Man Foundation. We compared the amounts shown on the schedule to the corresponding amounts shown on supporting documentation. According to the schedule prepared by management, average paid football attendance for the seven home games during the 2016 season was 97,249.

All tickets were sold for at least one-third of the highest regular established ticket price. Therefore, Texas A&M University has met the requirements of NCAA bylaw 20.9.7.3, Football Attendance Requirements, for academic year 2015-2016.

This report is intended solely for the information and use of University management and governing boards, and is not intended to be and should not be used by anyone other than these specified parties.

Sincerely,

PricewaterhouseCoopers LLP

Texas A&M University Athletics Department
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Year Ended August 31, 2016

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Report of Independent Accountants

To Mr. Michael K. Young, President of Texas A&M University:

We have performed the procedures enumerated below, which were agreed to by Texas A&M University (the "University"), solely to assist you in evaluating whether the accompanying statement of revenue and expenses and related notes of the University for the year ended August 31, 2016 (the "Statement") is in compliance with the National Collegiate Athletic Association ("NCAA") Bylaw 3.2.4.15 for the year ended August 31, 2016. Management of the University is responsible for the Statement and the compliance with the NCAA requirements. This agreed-upon procedures engagement was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants. The sufficiency of these procedures is solely the responsibility of those parties specified in this report. Consequently, we make no representation regarding the sufficiency of the procedures described below either for the purpose for which this report has been requested or for any other purpose.

As discussed in Appendix D to the "2016 Agreed upon Procedures" NCAA guidelines, if a specific reporting category is less than 0.5% of the total revenues or expenses, no procedures are required to be performed for that specific category, and no procedures were performed.

The procedures that we performed and our findings are as follows.

1. We obtained from University management the accompanying statement of revenue and expenses for the year ended August 31, 2016. We obtained University prepared worksheets for each operating revenue and expense category on the Statement, which management stated are generated from its general ledger.
 - a. We mathematically checked the totals and subtotals included on the Statement.
 - b. We mathematically checked the totals and subtotals included in the University prepared worksheets.
 - c. We agreed the amounts for each operating revenue and expense category included on the Statement to those in the University prepared worksheets.
 - d. We agreed the amounts for each operating revenue and expense category included in the University prepared worksheets to the University's general ledger.
No exceptions were noted as a result of performing these procedures.
2. We obtained from University management a list of all University booster group activities, for both independent and affiliated organizations (including alumni organizations), that have a principal purpose of generating funds for the University's athletics department, during the year ended August 31, 2016.
 - a. We inquired and obtained an understanding of the accounting for University booster group activities, independent or affiliated foundations that have a principal purpose of generating funds for the University's athletic department, and any alumni organizations that have a principal purpose of generating funds for the University's athletics department during the year ended August 31, 2016. The 12th Man Foundation and the Quarterback club were identified as having a principal purpose of generating funds for the University's athletic department.
 - b. We inquired with the 12th Man Foundations audit team and noted that the report had not been issued as of the date of our filing. Per discussion, they will be issuing an unqualified opinion for the period ended August 31, 2016. No exceptions were noted as a result of performing this procedure.
 - c. We obtained the Quarterback Club bank statements for the period from September 1, 2015 to August 31, 2016, and totaled the cash receipts and cash disbursement amounts from the information shown in the bank statements. These amounts were confirmed directly with an officer of the Quarterback Club. No exceptions were noted as a result of these procedures.
 - d. We obtained a listing of all cash contributions provided by the 12th Man Foundation for the year ended August 31, 2016 and compared the totals to the cash disbursements record of the organization. The listing of total cash contributions by month from the 12th Man Foundation,

which includes contributions of monies that constitute more than 10% of all contributions received for intercollegiate athletics, are showing in the summary below:

The 12th Man Foundation	
September 2015	\$384,681
October 2015	\$330,281
November 2015	\$804,852
December 2015	\$292,986
January 2016	\$1,243,429
February 2016	\$3,269,452
March 2016	\$207,047
April 2016	\$373,187
May 2016	\$40,323,458
June 2016	\$6,035,239
July 2016	\$205,440
August 2016	\$20,667,234

3. We obtained from University management a detailed listing of operating revenue transactions included in the Statement for the year ended August 31, 2016.
 - a. We mathematically checked the totals of each operating revenue category in the detailed listing.
 - b. We agreed the total of each operating revenue category in the detailed listing to the Statement.
 - c. We haphazardly selected a sample of 10 operating revenue transactions from the detailed listing and obtained supporting documentation from University management. We compared the dollar amount, name, transaction date, and description of payment of the revenue transaction from the detailed listing to the supporting documentation maintained by the University.

Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Other Operating Revenue 1	\$3,360	N
Other Operating Revenue 2	\$8,798	N
Other Operating Revenue 3	\$9,003	N
Other Operating Revenue 4	\$3,890	N
Other Operating Revenue 5	\$2,210	N
Other Operating Revenue 6	\$1,504	N
Other Operating Revenue 7	\$2,546	N
Other Operating Revenue 8	\$5,395	N
Other Operating Revenue 9	\$14,089	N
Other Operating Revenue 10	\$9,000	N

4. We obtained from University management a detailed listing of operating expense transactions included in the Statement for the year ended August 31, 2016.
- We mathematically checked the totals of each operating expense category in the detailed listing.
 - We agreed the total of each operating expense category in the detailed listing to the Statement.
 - We haphazardly selected a sample of 20 operating expense transactions from the detailed listing and obtained supporting documentation from University management. We compared the dollar amount, name, transaction date, and description of payment of the expense transaction from the detailed listing to the supporting documentation maintained by the University.

Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Other Expense 1	\$29,572	N
Other Expense 2	\$31,518	N
Other Expense 3	\$13,021	N
Other Expense 4	\$17,884	N
Other Expense 5	\$8,361	N
Other Expense 6	\$11,514	N
Other Expense 7	\$37,657	N
Other Expense 8	\$42,592	N
Other Expense 9	\$46,265	N
Other Expense 10	\$77,907	N
Other Expense 11	\$103,818	N
Other Expense 12	\$25,900	N
Other Expense 13	\$55,517	N
Other Expense 14	\$106,213	N
Other Expense 15	\$152,000	N
Other Expense 16	\$144,118	N
Other Expense 17	\$284,787	N
Other Expense 18	\$59,647	N
Other Expense 19	\$74,154	N
Other Expense 20	\$131,675	N

5. We obtained from University management the August 31, 2016 budget and the statement of revenue and expenses as of August 31, 2016.
- We agreed the current year amounts of each operating revenue and expense category included in the Statement to the current year budgeted amounts included in the budget obtained from University management.
 - We agreed the prior year amounts included in the Statement to the prior year statement of revenue and expenses.

- c. For each major revenue account (greater than 10% of total revenues) with variances for either procedure a) or b) over the lesser of \$1,000,000 or 10% of the total revenues, we obtained explanations from management. We make no comment as to the completeness or accuracy of those explanations.
- d. For each major expense account (greater than 10% of total expenses) with variances for either procedure a) or b) over the lesser of \$1,000,000 or 10% of the total expenses, we obtained explanations from management. We make no comment as to the completeness or accuracy of those explanations.

Refer to Exhibit A for a listing of variances and, if applicable, the corresponding explanations obtained from University management.

- 6. We obtained from University management a detailed listing of ticket office sales reports comprising ticket sales revenue for all sports, including tickets sold, complimentary tickets provided during the reporting period, and unsold tickets included in the Statement for the year ended August 31, 2016.
 - a. We mathematically checked the total dollar value and the total attendance figures of the detailed listing.
 - b. We agreed the total dollar amount of the detailed listing to the amount of ticket sales included in the Statement.

No exceptions were noted as a result of performing these procedures.

- 7. We obtained from University management a detailed listing of settlement reports for away game guarantees for the year ended August 31, 2016.
 - a. We mathematically checked the total of the detailed listing.
 - b. We agreed the total revenue for away game guarantees in the detailed listing to the corresponding amount in the "Guarantees" line item of the Statement.
 - c. We haphazardly selected 3 guarantee settlement reports for away games for the year ended August 31, 2016 from the detailed listing and obtained the applicable contracts from University management. We agreed the guarantee revenue on the settlement report to amounts specified in the contracts.

Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Guaranteed Revenue 1	\$2,937,395	N
Guaranteed Revenue 2	\$24,000	N
Guaranteed Revenue 3	\$6,969	N

- 8. We obtained from University management a detailed listing of all contributions received by the University's athletics department during the year ended August 31, 2016.
 - a. We mathematically checked the total dollar amount of the detailed listing.
 - b. We agreed the total dollar amount from the detailed listing to the total dollar amount in the "Contributions" line item of the Statement.
 - c. We obtained supporting documentation for any contribution greater than ten percent of the total of all contributions received by the University's athletics department during the year ended August 31, 2016. We compared the contribution amount, purpose restrictions stipulating the contribution's use for the department of athletics and date received from the supporting details to the listing of contributions received.

Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Contributions Revenue 1	\$10,200,000	N
Contributions Revenue 2	\$25,000,000	N

9. We obtained from University management a detailed listing of in-kind contributions received by the University's athletics department during the year ended August 31, 2016. In-Kind contribution accounts did not meet the 0.5% threshold for procedures to be performed. No additional procedures were performed over this reporting category.
10. We obtained from University management a detailed listing of revenue from the University's participation in conference and other tournaments (including conference distributions of revenue generated by a post-season bowl to conference members) for the year ended August 31, 2016.
- We mathematically checked the total dollar value of the detailed listing.
 - We agreed the total revenue for the University's participation in conference and other tournaments in the detailed listing to the corresponding amount in the line item "Conference Distributions" included in the Statement.
 - We haphazardly selected 4 agreements from the detailed listing and obtained the agreements from University management. We agreed the revenue per the agreement to the detailed listing. Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Conference Distributions Revenue 1	\$429,881	N
Conference Distributions Revenue 2	\$1,176,157	N
Conference Distributions Revenue 3	\$6,512,136	N
Conference Distributions Revenue 4	\$32,550	N

11. We obtained from University management a detailed listing of revenue and expense for NCAA distributions for the year ended August 31, 2016. We agreed the dollar amount of NCAA distributions to the "NCAA Distributions" line item in the Statement and to other supporting documentation.

Item Description	Amount	Exception (Y/N)
NCAA Distributions Revenue 1	\$2,287,454	N
NCAA Distributions Revenue 2	\$23,237	N
NCAA Distributions Revenue 3	\$14,560	N
NCAA Distributions Revenue 4	\$41,070	N
NCAA Distributions Revenue 5	\$3,120	N
NCAA Distributions Revenue 6	\$12,870	N

No exceptions were noted as a result of performing this procedure.

12. We obtained from University management a detailed listing of media rights (including broadcast, radio, and television) revenue included in the Statement for the year ended August 31, 2016.
- We mathematically checked the total dollar amount of the detailed listing.
 - We agreed the total dollar value of the media rights in the detailed listing to the corresponding amount in the line item "Media Rights" included in the Statement.

- c. We haphazardly selected a sample of 4 transactions from the detailed listing. For each such revenue transaction selected, we obtained the supporting contracts from University management and agreed the dollar amounts in the supporting contracts to the amount per the detailed listing.

Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Media Rights Revenue 1	\$409,000	N
Media Rights Revenue 2	\$3,046,743	N
Media Rights Revenue 3	\$10,635,000	N
Media Rights Revenue 4	\$13,535,645	N

13. We obtained from University management a detailed listing of revenue from the University's royalties, licensing, advertisements and sponsorship agreements for the year ended August 31, 2016.
- a. We mathematically checked the total of the detailed listing.
- b. We agreed total revenue in the detailed listing to the corresponding amount in the line item "Royalties, Licensing, Advertisements, and Sponsorships" included in the Statement.
- c. We haphazardly selected a sample of 3 items from the detailed listing and obtained the supporting agreements from University management. We agreed the dollar amount of each selection to the applicable royalty, licensing, advertisement, and sponsorship agreements. Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Royalty, Licenses, Advertising, & Sponsorships Revenue 1	\$50,000	N
Royalty, Licenses, Advertising, & Sponsorships Revenue 2	\$2,452,643	N
Royalty, Licenses, Advertising, & Sponsorships Revenue 3	\$101,385	N

14. We obtained from University management a detailed listing of revenue from the University's program sales, concessions, novelty sales, and parking for the year ended August 31, 2016. These aggregated accounts did not meet the 0.5% threshold for procedures to be performed. No additional procedures were performed over this reporting category.
15. We obtained from University management a detailed listing of all sports camps for the year ended August 31, 2016.
- a. We mathematically checked the total dollar amount of the detailed listing of sports camps.
- b. We agreed the total dollar amount of the detailed listing to the line item "Sports Camp Revenue" included in the Statement.
- c. We haphazardly selected seven sports camps from the detailed listing and obtained the sports camp contracts from University management. We agreed the dollar amount of the contract to the dollar amount included in the detailed listing.
- d. We obtained a detailed listing of cash receipts by camp participants for the year ended August 31, 2016.
- e. We mathematically checked the total of the detailed listing of cash receipts by camp participants.
- f. We agreed the detailed listing of cash receipts by camp participants to the detailed listing of sports camps revenue.
- g. We haphazardly selected 10 individual camp participant cash receipts and compared each selection to the Statement. Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Football Camp Revenue 1	\$350	N
Football Camp Revenue 2	\$40	N
Swimming Camp Revenue 1	\$850	N
Swimming Camp Revenue 2	\$150	N
Soccer Camp Revenue 1	\$495	N
Basketball Camp Revenue 1	\$225	N
Basketball Camp Revenue 2	\$100	N
Baseball Camp Revenue 1	\$125	N
Volleyball Camp Revenue 1	\$440	N
Softball Camp Revenue 1	\$795	N

16. We obtained from University management a detailed listing of athletics restricted endowment accounts and their related activity for the year ended August 31, 2016. The endowment account did not meet the 0.5% threshold for procedures to be performed. No additional procedures were performed over this reporting category.
17. We obtained from University management a detailed listing of post- season bowl games revenue accounts and related activity, including expense reimbursements and ticket sales, for the year ended August 31, 2016.
- We mathematically checked the total dollar amount of the post season bowl game revenues detailed listing.
 - We agreed the total of the detailed listing to the line item "Bowl Revenues" included in the Statement.
 - We haphazardly selected a sample of 2 items from the detailed listing and obtained the supporting agreements from University management. We agreed ticket sales to the supporting ticket sales report agreed expense reimbursements to supporting documentation. Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Bowl Revenue 1	\$4,365	N
Bowl Revenue 2	\$3,050,000	N

18. We obtained from University management a detailed listing of all student athletes who received Institutional Financial Aid and the related dollar amount of the financial aid received for the year ended August 31, 2016 for each sport.
- We mathematically checked the total dollar amount for each sport and the grand total of the detailed listing.
 - We agreed the grand total dollar amount to the line item "Athletic Student Aid" included in the Statement.
 - We obtained representations from University management stating the University uses NCAA's Compliance Assistant Software to prepare athletic aid detail.
 - We haphazardly selected 10% of the total student athletes receiving aid from the detailed listing and obtained the related award letter from University management. We agreed the award dollar amount per the student's account detail to the dollar amount of the award in the related award letter.

- e. We agreed the student's information to the information reported in the NCAA's Compliance Assistant Software including recalculating the conversion of the equivalency value to a full-time equivalency value.

Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Baseball 1	\$40,816	N
Baseball 2	\$10,829	N
Baseball 3	\$21,354	N
Baseball 4	\$25,305	N
Men's Basketball 1	\$24,758	N
Men's Basketball 2	\$44,708	N
Football 1	\$21,570	N
Football 2	\$43,601	N
Football 3	\$30,304	N
Football 4	\$50,762	N
Football 5	\$25,607	N
Football 6	\$49,939	N
Football 7	\$24,754	N
Football 8	\$23,886	N
Football 9	\$31,967	N
Football 10	\$46,700	N
Football 11	\$49,263	N
Men's Golf 1	\$48,217	N
Men's Golf 2	\$33,026	N
Men's Swimming 1	\$9,564	N
Men's Tennis 1	\$24,984	N
Men's Track 1	\$800	N
Men's Track 2	\$57,195	N
Men's Track 3	\$13,596	N
Women's Basketball 1	\$42,484	N
Women's Basketball 2	\$49,216	N
Women's Diving 1	\$25,406	N
Women's Equestrian 1	\$16,938	N
Women's Golf 1	\$24,480	N
Women's Softball 1	\$4,086	N
Women's Softball 2	\$15,454	N
Women's Soccer 1	\$14,500	N
Women's Soccer 2	\$8,800	N
Women's Swimming 1	\$29,842	N
Women's Tennis 1	\$44,891	N
Women's Track 1	\$100	N
Women's Track 2	\$50,999	N
Women's Track 3	\$7,800	N
Women's Volleyball 1	\$47,197	N
Women's Volleyball 2	\$30,544	N

19. We obtained from University management a detailed listing of home game guarantee expenses for the year ended August 31, 2016.
- We mathematically checked the total dollar amount of the detailed listing.
 - We agreed the total dollar amount of the expense for home game guarantees in the detailed listing to the corresponding amount in the expense line item "Guarantees" included in the Statement.
 - We haphazardly selected 10 home game guarantee expense from the detailed listing, obtained the related contracts and settlement reports from University management, and agreed the dollar amount of the guarantee expense on the detailed schedule to dollar amounts specified in the related contracts and settlement reports.
Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Guarantees paid 1	\$1,500,000	N
Guarantees paid 2	\$222,852	N
Guarantees paid 3	\$1,200,000	N
Guarantees paid 4	\$15,000	N
Guarantees paid 5	\$25,000	N
Guarantees paid 6	\$15,000	N
Guarantees paid 7	\$82,923	N
Guarantees paid 8	\$92,000	N
Guarantees paid 9	\$22,500	N
Guarantees paid 10	\$20,000	N

20. We obtained from University management a detailed listing of all sports coaches employed by the University and their related salaries for the year ended August 31, 2016.
- We mathematically checked the total dollar amount of the detailed listing.
 - We agreed the total dollar amount of expense for coaches' salaries in the detailed listing to the corresponding amount in the line item "Coaching Salaries, Benefits, and Bonuses Paid by the University and Related Entities" included in the Statement.
 - From the listing of sports coaches employed by the University, we selected the head coaches for football, men's basketball, and women's basketball, and we haphazardly selected 7 of the remaining coaches. We obtained from University management and agreed the payroll summary registers for the reporting year for each of the coaches selected to the related expenses in the detailed listing.
 - We obtained from University management the related employment contracts for each of the coaches selected. We agreed the coaches' salaries per the contracts to the amounts included in the detailed schedule. For any salaries that did not agree, we obtained explanations from management. We make no comment as to the appropriateness of the reconciling items or sufficiency of explanations obtained.

Item Description	Amount	Exception (Y/N)
Head Football Coach	\$5,000,000	N
Head Men's Basketball Coach	\$1,000,000	N
Head Women's Basketball Coach	\$880,000	N
Coach Salaries, Benefits, & Bonuses Paid Expense 1	\$392,095	N
Coach Salaries, Benefits, & Bonuses Paid Expense 2	\$1,550,000	N
Coach Salaries, Benefits, & Bonuses Paid Expense 3	\$325,000	N
Coach Salaries, Benefits, & Bonuses Paid Expense 4	\$200,000	N
Coach Salaries, Benefits, & Bonuses Paid Expense 5	\$135,000	N
Coach Salaries, Benefits, & Bonuses Paid Expense 6	\$175,000	N
Coach Salaries, Benefits, & Bonuses Paid Expense 7	\$200,000	N

21. We obtained from University management a detailed listing of all support staff for athletics and their salaries for the year ended August 31, 2016.
- We mathematically checked the total of the detailed listing.
 - We agreed the total expense for support staff salaries in the detailed listing to the amount in the line item "Support Staff / Administrative Salaries, Benefits, and Bonuses Paid by the University and Related Entities" included in the Statement.
 - We haphazardly selected 10 support staff paid by the University from the detailed listing and obtained the respective contracts from University management. We agreed the dollar amount of the recorded salary and bonus expense per the detailed listing to the respective contracts.
 - We obtained and agreed the payroll summary registers for the reporting year for each of the support staff selections to the related expenses in the detailed listing.

Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Support Staff Expense 1	\$43,620	N
Support Staff Expense 2	\$42,500	N
Support Staff Expense 3	\$59,703	N
Support Staff Expense 4	\$103,000	N
Support Staff Expense 5	\$78,403	N
Support Staff Expense 6	\$34,000	N
Support Staff Expense 7	\$74,500	N
Support Staff Expense 8	\$51,404	N
Support Staff Expense 9	\$61,820	N
Support Staff Expense 10	\$88,294	N

22. We obtained from University management a detailed listing of severance payments for the year ended August 31, 2016.
- We mathematically checked the total of the detailed listing.
 - We agreed the total dollar amount of expense for severance to the corresponding amount in the line item "Severance Payments" included in the Statement.

- c. We haphazardly selected 4 payments from the detailed listing, and for each item selected, we obtained the related severance agreement from University management. We agreed the total dollar amount of payments related to each agreement to the severance agreements.

Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Severance Payments Expense 1	\$26,389	N
Severance Payments Expense 2	\$10,417	N
Severance Payments Expense 3	\$35,256	N
Severance Payments Expense 4	\$21,825	N

23. We obtained from University management a detailed listing of recruiting expenses for the year ended August 31, 2016.
- We mathematically checked the total of the detailed listing.
 - We agreed the total dollar amount of recruiting expense to the corresponding amount in the line item "Recruiting" included in the Statement.
 - We obtained the University's recruiting policies from University management. We compared the index of the University policies to the NCAA policies to observe that the University policies included each of the following topics included in the NCAA policies: Monitoring recruiting, Official Visits Host Form, Grant-in-Aid Procedures and Request, Campus Visits, Student Athlete Admissions Policies. We make no comment as to the appropriateness of the detailed policy. No exceptions were noted as a result of performing this procedure.
24. We obtained from University management a detailed listing of team travel expenses for the year ended August 31, 2016.
- We mathematically checked the total of the detailed listing.
 - We agreed the total dollar amount of recruiting expense to the corresponding amount in the line item "Team Travel" included in the Statement.
 - We obtained the University's team travel policies from University management. We compared the index of the University policies to the NCAA policies to observe that the University policies included each of the following topics included in the NCAA policies: Travel, Notification of Team Travel, Spousal Travel, Travel Insurance, and Student Athlete Travel We make no comment as to the appropriateness of the detailed policy. No exceptions were noted as a result of performing this procedure.
25. We obtained from University management a detailed listing of equipment, uniforms and supplies expense for the year ended August 31, 2016.
- We mathematically checked the total of the detailed listing.
 - We agreed the total dollar amount of equipment, uniforms and supplies expense to the corresponding amount in the line item "Equipment, Uniforms and Supplies" included in the Statement.
 - We haphazardly selected 10 payments from the detailed listing. For each item selected, we obtained the related invoice from University management. We compared the dollar amount, name, transaction date, and description of payment of the expense transaction from the detailed listing to the supporting invoice maintained by the University.

Item Description	Amount	Exception (Y/N)
Equipment, Uniforms, and Supplies Expense 1	\$12,451	N
Equipment, Uniforms, and Supplies Expense 2	\$26,935	N
Equipment, Uniforms, and Supplies Expense 3	\$20,418	N
Equipment, Uniforms, and Supplies Expense 4	\$9,892	N
Equipment, Uniforms, and Supplies Expense 5	\$101,385	N
Equipment, Uniforms, and Supplies Expense 6	\$91,100	N
Equipment, Uniforms, and Supplies Expense 7	\$84,500	N
Equipment, Uniforms, and Supplies Expense 8	\$81,789	N
Equipment, Uniforms, and Supplies Expense 9	\$725,000	N
Equipment, Uniforms, and Supplies Expense 10	\$345,000	N

26. We obtained from University management a detailed listing of game expenses for the year ended August 31, 2016.
- We mathematically checked the total of the detailed listing.
 - We agreed the total dollar amount of game expense to the corresponding amount in the line item "Game Expenses" included in the Statement.
 - We haphazardly selected 10 payments from the detailed listing, and for each item selected, we obtained the related invoice from University management. We compared the dollar amount, name, transaction date, and description of payment of the expense transaction from the detailed listing to the supporting invoice maintained by the University.

Item Description	Amount	Exception (Y/N)
Game Expenses 1	\$22,758	N
Game Expenses 2	\$15,123	N
Game Expenses 3	\$98,615	N
Game Expenses 4	\$21,870	N
Game Expenses 5	\$5,738	N
Game Expenses 6	\$14,800	N
Game Expenses 7	\$17,318	N
Game Expenses 8	\$13,048	N
Game Expenses 9	\$36,207	N
Game Expenses 10	\$12,056	N

27. We obtained from University management a detailed listing of fund raising, marketing, and promotion expense for the year ended August 31, 2016. The aggregated accounts did not meet the 0.5% threshold for procedures to be performed. No additional procedures were performed over this reporting category.
28. We obtained from University management a detailed listing of sports camp expense for the year ended August 31, 2016.
- We mathematically checked the total of the detailed listing.

- b. We agreed the total dollar amount of the expense to the corresponding amount in the line item “Sports Camp Expenses” included in the Statement.
- c. We haphazardly selected 10 payments from the detailed listing, and for each item selected, we obtained the related invoice from University management. We compared the dollar amount, name, transaction date, and description of payment of the expense transaction from the detailed listing to the supporting invoice maintained by the University.

Item Description	Amount	Exception (Y/N)
Sports Camp Expense 1	\$49,557	N
Sports Camp Expense 2	\$49,557	N
Sports Camp Expense 3	\$34,081	N
Sports Camp Expense 4	\$25,150	N
Sports Camp Expense 5	\$25,016	N
Sports Camp Expense 6	\$30,080	N
Sports Camp Expense 7	\$44,722	N
Sports Camp Expense 8	\$22,565	N
Sports Camp Expense 9	\$49,925	N
Sports Camp Expense 10	\$47,994	N

29. We obtained from University management a detailed listing of spirit groups expense for the year ended August 31, 2016. The spirit groups account did not meet the 0.5% threshold for procedures to be performed. No additional procedures were performed over this reporting category.
30. We obtained from University management a detailed listing of direct overhead and administrative expense for the year ended August 31, 2016.
- a. We mathematically checked the total of the detailed listing.
- b. We agreed the total dollar amount of the expense to the corresponding amount in the line item “Direct Overhead and Administrative Expense” included in the Statement.
- c. We haphazardly selected 5 payments from the detailed listing, and for each item selected, we obtained the related from University management. We compared the dollar amount, name, transaction date, and description of payment of the expense transaction from the detailed listing to the supporting documentation maintained by the University.

Item Description	Amount	Exception (Y/N)
Direct Overhead and Admin Expense 1	\$25,406	N
Direct Overhead and Admin Expense 2	\$25,406	N
Direct Overhead and Admin Expense 3	\$41,267	N
Direct Overhead and Admin Expense 4	\$52,750	N
Direct Overhead and Admin Expense 5	\$21,802	N

31. We obtained from University management repayment schedules for all athletic facility debt service, leases, and rental fees attributable to the University’s athletics department as of August 31, 2016.
- a. We mathematically checked the repayment schedules.
- b. We compared the annual maturities of debt to the debt repayment schedule for fiscal year 2016 provided by management.

- c. We agreed the total debt outstanding as of August 31, 2016 appearing in the Notes to the Statement to the University's general ledger as of August 31, 2016.
- d. We selected the top two highest facility payments and haphazardly selected eight additional facility payments from the schedule we obtained from management. We compared the dollar amount, name, and transaction date from the listing to the supporting payment schedule maintained by the University.

Item Description	Amount	Exception (Y/N)
Athletic Facility Debt Service 1	\$125,575	N
Athletic Facility Debt Service 2	\$173,144	N
Athletic Facility Debt Service 3	\$250,275	N
Athletic Facility Debt Service 4	\$25,000	N
Athletic Facility Debt Service 5	\$100,000	N
Athletic Facility Debt Service 6	\$94,417	N
Athletic Facility Debt Service 7	\$27,044	N
Athletic Facility Debt Service 8	\$29,214	N
Athletic Facility Debt Service 9	\$5,733,140	N
Athletic Facility Debt Service 10	\$10,287,408	N

32. We obtained from University management a detailed listing of medical expenses and medical insurance for the year ended August 31, 2016.
- a. We mathematically checked the total of the detailed listing.
 - b. We agreed the total dollar amount of the expense to the corresponding amount in the line item "Medical Expenses and Medical Insurance" included in the Statement.
 - c. We haphazardly selected 5 payments from the detailed listing, and for each item selected, we obtained the related invoice from University management. We compared the dollar amount, name, transaction date, and description of payment of the expense transaction from the detailed listing to the supporting invoice maintained by the University.

Item Description	Amount	Exception (Y/N)
Medical Expenses and Insurance 1	\$7,887	N
Medical Expenses and Insurance 2	\$6,244	N
Medical Expenses and Insurance 3	\$5,475	N
Medical Expenses and Insurance 4	\$9,173	N
Medical Expenses and Insurance 5	\$5,167	N

33. We obtained from University management a detailed listing of membership and dues for the year ended August 31, 2016. The membership and dues account did not meet the 0.5% threshold for procedures to be performed. No additional procedures were performed over this reporting category.
34. We obtained from University management a detailed listing of student-athlete meals (non-travel) for the year ended August 31, 2016.
- a. We mathematically checked the total of the detailed listing.
 - b. We agreed the total dollar amount of the expense to the corresponding amount in the line item "Student-Athlete Meals (non-travel)" included in the Statement.

- c. We haphazardly selected a sample of 4 items from the detailed listing, and for each item selected, we obtained the related invoice from University management. We compared the dollar amount, name, transaction date, and description of payment of the expense transaction from the detailed listing to the supporting invoice maintained by the University.

Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Student Athlete Meals Expenses 1	\$7,238	N
Student Athlete Meals Expenses 2	\$1,436	N
Student Athlete Meals Expenses 3	\$1,067	N
Student Athlete Meals Expenses 4	\$735	N

35. We obtained from University management a detailed listing of other operating expenses and transfers to institution for the year ended August 31, 2016.
- a. We mathematically checked the total of the detailed listing.
- b. We agreed the total dollar amount of the expense to the corresponding amount in the line item "Other Operating Expenses and Transfers to Institution" included in the Statement.
- c. We haphazardly selected 10 payments from the detailed listing, and for each item selected, we obtained the related invoice from University management. We compared the dollar amount, name, transaction date, and description of payment of the expense transaction from the detailed listing to the supporting invoice maintained by the University.

Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Other Expense 1	\$ 6,880	N
Other Expense 2	\$ 1,038	N
Other Expense 3	\$ 2,801	N
Other Expense 4	\$ 12,500	N
Other Expense 5	\$ 1,096	N
Other Expense 6	\$ 26,129	N
Other Expense 7	\$ 6,600	N
Other Expense 8	\$ 20,275	N
Other Expense 9	\$ 1,050	N
Other Expense 10	\$ 4,825	N

36. We obtained from University management a detailed listing of post-season bowl game expenses, for example (i) team travel, lodging and meal expenses, (ii) bonuses related to bowl participation, (iii) spirit groups, and (iv) sports equipment, uniforms, and supplies for the year ended August 31, 2016.
- a. We mathematically checked the total of the detailed listing.
- b. We agreed the total dollar amount of the expense to the corresponding amount in the line item "Bowl Expenses" included in the Statement.
- c. We haphazardly selected a sample of 5 items from the detailed listing, and for each item selected, we obtained the related invoice from University management. We compared the dollar amount,

name, transaction date, and description of payment of the expense transaction from the detailed listing to the supporting invoice maintained by the University.

Refer to the schedule below for a listing of selections made and the results of the procedures performed.

Item Description	Amount	Exception (Y/N)
Bowl Expenses 1	\$47,042	N
Bowl Expenses 2	\$49,043	N
Bowl Expenses 3	\$439,828	N
Bowl Expenses 4	\$291,600	N
Bowl Expenses 5	\$750,000	N

37. We obtained the listing of the sports sponsored reported in the NCAA Membership Financial Reporting System and agreed the listing to the squad lists obtained from University management. For variances between the NCAA Membership Financial Reporting System and the squad list provided by University management we obtained explanations from management. We noted no discrepancies between the squad lists and the NCAA Membership Financial Reporting System.
38. We obtained representations from University management that to the best of their knowledge and belief, all revenues and expenditures related to the Department of Athletics had been properly included in the Statement.

We were not engaged to and did not conduct an examination, the objective of which would be the expression of an opinion on the accompanying statement of revenue and expenses of Texas A&M University as of August 31, 2016. Accordingly, we do not express such an opinion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

This report is intended solely for the information and use of Texas A&M University and is not intended to be and should not be used by anyone other than this specified party.

PricewaterhouseCoopers LLP

January 12, 2017

**Texas A&M University Athletics Department
Statement of Revenues and Expenses
Year Ended August 31, 2016**

	Football	Men's Basketball	Women's Basketball	Other Sports	Non-Program Specific	Total
Revenues						
Ticket Sales	41,710,523	2,132,226	636,147	3,305,778	-	47,784,673
Student Fees	-	-	-	-	-	-
Guarantees	3,500,000	174,000	1,737	66,861	-	3,742,597
Contributions	32,806,054	241,488	123,657	11,360,677	30,766,484	75,286,360
Third Party Support	-	-	-	-	-	-
Direct State or Other Government Support	-	-	-	-	-	-
Direct Institutional Support	-	-	-	-	-	-
Indirect Facilities and Administrative Support	-	-	-	-	-	-
NCAA Distributions	6,899,127	2,436,390	9,435	124,716	131,329	2,701,870
Conference Distributions	11,440,353	409,098	32,250	58,883	1,338,521	6,737,879
Broadcast, Television, Radio, and Internet Rights	-	3,100,076	-	-	14,204,732	28,745,141
Program Sales, Concessions, Novelty Sales, and Parking	73,774	51,085	2,221	130,912	-	257,993
Royalties, Advertisements, and Sponsorships	730,000	207,500	91,100	1,090,590	15,294,795	17,413,985
Sports Camps Revenues	339,245	400,442	252,002	4,666,119	98,144	5,755,952
Endowment and Investment Income	1,468,954	-	-	-	360,593	380,593
Bowl Revenues	43,666	23,420	-	65,497	36,632	1,468,984
In-Kind	552,120	1,602	50,284	239,825	1,097,478	1,691,115
Other	99,563,726	9,177,326	1,198,832	21,109,856	63,398,709	1,941,308
Subtotal Operating Revenues						194,988,450
Expenses						
Athletic Student Aid	3,023,615	387,294	509,206	5,772,284	1,875	9,704,275
Guarantees	3,320,000	585,981	84,955	456,739	-	4,427,575
Coaching Salaries, Benefits, Bonuses Paid by the University and Related Parties	10,386,820	3,572,496	1,494,322	7,600,677	-	23,054,314
Coaching Other Compensation Paid by a Third Party	-	-	-	-	-	-
Support Staff/Administrative Salaries, Benefits, Bonuses Paid by the University and Related Parties	2,131,228	591,948	259,492	1,314,402	13,319,008	17,616,078
Support Staff/Administrative Other Compensation Paid by a Third Party	-	-	-	-	-	-
Severance Payments	626,221	-	-	6,563	576,191	1,208,975
Recruiting	884,700	-	-	472,174	-	2,114,801
Team Travel	1,093,028	460,451	297,476	4,925,646	-	8,763,145
Equipment, Uniform, and Supplies	966,111	1,644,763	1,098,707	4,925,646	-	2,991,473
Game Expenses	2,345,369	111,692	96,381	1,202,948	614,342	3,826,060
Fund Raising, Marketing, and Promotion	70,927	318,148	210,590	936,602	15,350	292,720
Sports Camps Expenses	167,029	73,592	42,517	72,142	33,552	3,486,805
Direct Facilities, Maintenance, and Rental	3,942	303,982	194,583	2,701,858	119,372	26,884,873
Spirit Groups	-	515,339	407,359	1,442,302	116,902	116,902
Indirect Facilities and Administrative Support	-	-	-	-	-	-
Medical Expenses and Medical Insurance	190,385	23,310	18,967	310,803	336,227	879,692
Membership and Dues	14,815	4,546	1,085	56,821	76,973	154,240
Direct Overhead, Etc.	222,015	119,037	43,689	658,732	11,560,138	12,603,611
Other Operating Expenses	2,143,586	497,938	204,969	1,722,889	9,419,503	13,968,835
Bowl Expense	2,197,096	-	-	-	-	2,197,096
Student Athlete Meals	158,953	111,875	73,690	473,041	1,972,766	2,790,305
Total Operating Expenses	29,945,769	9,312,263	5,038,990	30,126,624	62,678,131	137,101,777
Excess of Revenues Over (Under) Expenses	69,617,957	(134,937)	(3,840,158)	(9,016,767)	660,578	57,286,673

Texas A&M University Athletics Department
Notes to the Statement of Revenues and Expenses
Year Ended August 31, 2016

1. Nature of Business and Basis of Accounting and Reporting

The Texas A&M University Athletics Department (the "Athletics Department") maintains the financial statement accounts for the intercollegiate athletics program of Texas A&M University the "University"). The Athletics Department is an auxiliary enterprise of the University and is responsible for promoting an intercollegiate athletics program that is competitive on a national level. The accompanying financial statement is presented in accordance with accounting principles generally accepted in the United States of America and the principles of fund accounting and is reported on the accrual basis.

The financial statement conforms to the National Collegiate Athletic Association (the "NCAA") Agreed-Upon Procedure Guide, dated April 20, 2016.

2. Capital Assets

Capital assets are real or personal property that have an estimated life of greater than one year. Assets purchased, constructed or donated that meet or exceed the established capitalization thresholds or minimum reporting requirements are recorded as capital assets in the University's financial statements. Capital assets are recorded at historical cost and depreciated over their estimated useful lives using the straight-line method of depreciation.

3. Contributions

Contributions are reported as revenues when received. Individual cash contributions and in-kind gifts received by the Athletics Department are included in the Statement as Contributions and totaled approximately \$75,288,360 for 2016.

4. Debt

At August 31, 2016, debt outstanding in the form of bonds issued for athletic facilities was \$292,687,515. Principal and interest payments for bonds payable as of August 31, 2016 are as follows:

2016-2017	23,930,371
2017-2018	22,256,462
2018-2019	22,246,199
2019-2020	22,248,771
2020-2021	19,665,112
Thereafter	409,470,288
	<u>\$519,817,203</u>

At August 31, 2016 debt outstanding in the form of a loan from the University for general operating cash flow needs was \$10,900,000. Principal payments for the interest free loan as of August 31, 2016 are as follows:

2016-2017	1,600,000
2017-2018	1,600,000
2018-2019	1,600,000
2019-2020	1,600,000
2020-2021	1,600,000
Thereafter	2,900,000
	<u>10,900,000</u>

Texas A&M University Athletics Department
Notes to the Statement of Revenues and Expenses
Year Ended August 31, 2016

Total debt outstanding for the University as of August 31, 2016 was \$1,190,074,107.

5. Other Operating Expenses

Other operating expenses for the year ended August 31, 2016, comprised more than 10% of total expenses. The top three categories are Professional Services, University Auxiliary Assessment Fee, and Food comprising 17%, 16%, and 9% of Other Operating Expenses, respectively.

6. Additional Compensation Received by Athletics Department Staff

This financial statement does not include additional compensation received by coaches from certain outside business organizations for private services or endorsements. All Athletics Department staff (including coaches) are required by NCAA bylaw #11.2.2 to provide a written detailed account annually to the chief executive officer for all athletically related income and benefits from sources outside Texas A&M University.

7. Related Party Transactions

The 12th Man Foundation is an athletic booster organization that provides contributions to the Athletics Department. The total amount of contributions provided to the Athletics Department by the 12th Man Foundation for the year ended August 31, 2016, was approximately \$74,137,292.

8. University Revenues and Expenses

The University financial statements are incorporated into the state-wide audit of the State of Texas as of and for the year ended August 31, 2016, by the State Auditor's Office. Total revenues and expenses reported by the University for the fiscal year ended August 31, 2016, were approximately \$1,750,254,528 and \$1,710,379,257, respectively.

9. Commitments

Effective September 1, 1997, through August 31, 2020, the Athletics Department has dedicated to the 12th Man Foundation the exclusive right to market certain seats for intercollegiate football games held at Kyle Field. Donors who purchase tickets through this program will make payments for the tickets directly to the 12th Man Foundation. During this period, the 12th Man Foundation is expected to donate no less than the following amounts to the Athletics Department:

2016-2017	6,940,000
2017-2018	6,940,000
2018-2019	6,940,000
2019-2020	6,940,000
Thereafter	<u>4,454,000</u>
	<u>\$32,214,000</u>

Texas A&M University Athletics Department
Exhibit A – Current Year vs. Prior Year and Budget to Actual Explanations
Year Ended August 31, 2016

Current Year vs. Prior Year

Description	2014-2015	2015-2016	Variance (\$)	Variance (%)	Management Explanation
Ticket Sales	45,825,168	47,784,673	1,959,505	4%	There was a significant increase in football ticket sales for FY2016 due to increased capacity in association with the completion of the Kyle Field renovation. We deem this increase to be reasonable based on our understanding of the pricing structure and testing performed.
Contributions	91,796,310	75,288,360	(16,507,951)	-18%	There was a significant increase to contributions during FY2015 due to the renovation of Kyle Field. During FY2016, contributions decreased to a steady level since the construction was completed.
Media Rights	21,303,927	28,745,141	7,441,214	35%	The increase in media rights was mainly due to an increase in distributions associated with the SEC Network. Media rights further increased due to updated procedures per NCAA AUP Appendix D, since media rights applicable to other categories (bowl, conference, NCAA) now fall under this category.
Coaching Salaries, Benefits and Bonuses Paid by the University and Related Parties	19,797,192	23,054,314	3,257,122	16%	There was an increase in coaching salaries due to corresponding increases in assistant coach salaries, supplemental payments to coaches, coaching bonuses, and a signing bonus paid to new offensive coordinator.
Athletic Facilities Debt Service, Leases and Rental Fees	10,594,672	26,884,873	16,290,201	154%	The increase in debt was due to the Kyle Field Renovation Seat License Bond, an additional bond taken out in association with the renovations on Kyle Field.
Other Operating Expenses	19,603,348	13,988,835	(5,614,513)	-29%	There was a change in procedures for FY2016 per NCAA AUP Appendix D requiring bowl expenses and student athlete meals to be classified separately. As these categories used to be classified as other OPEX, the account decreased significantly.

Texas A&M University Athletics Department
Exhibit A – Current Year vs. Prior Year and Budget to Actual Explanations
Year Ended August 31, 2016

Budget to Actual

Description	2016 Budget	2016 Actual	Variance (\$)	Variance (%)	Management Explanations
Ticket Sales	44,038,721	47,784,673	3,745,952	9%	We note that football ticket sales and student sports passes are budgeted conservatively. Additionally, post season championship events, such as Baseball Regionals and Super Regionals are not budgeted.
Contributions	30,206,328	75,288,360	45,082,032	149%	We note that the department does not include capital contributions in the budget. We deem this variance to be reasonable with our review of capital contributions per the FY2016 contributions detail.
Media Rights	20,204,000	28,745,141	8,541,141	42%	The SEC Network is budgeted and reported as an SEC distribution for internal recording, while the SEC recommends that it be included in the Media Rights category for NCAA FRS reporting. We deem this reasonable per our review of NCAA procedures and revenues associated with the SEC Network for FY2016.

EXHIBIT C

TEXAS A & M UNIVERSITY

ATHLETIC DEPARTMENT POLICIES & PROCEDURES MANUAL

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EXHIBIT D



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [Klaassen v. University of Kansas School of Medicine](#), D.Kan., February 3, 2015

544 Fed.Appx. 490

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.

United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, ex
rel, Terri KING, Plaintiff–Appellant
v.

UNIVERSITY OF TEXAS HEALTH SCIENCE
CENTER–HOUSTON, Defendant–Appellee.

No. 12–20795.

|

Nov. 4, 2013.

Synopsis

Background: Former state university hospital employee brought action alleging that university violated the federal False Claims Act (FCA) by, among other things, covering up misconduct by one of its professors who received federal research grants. The United States District Court for the Southern District of Texas, [Lee H. Rosenthal, J.](#), granted university's motion to dismiss, [907 F.Supp.2d 846, 292 Ed. Law Rep. 805](#). Plaintiff appealed.

Holdings: The Court of Appeals held that:

[1] university hospital was an arm of the state, and

[2] plaintiff's claim against university hospital under FCA's anti-retaliation provision was barred by sovereign immunity.

Affirmed.

West Headnotes (3)

[1] Federal Courts**🔑 Extension of Time**

Former state university hospital employee's claim that the filing of her notice of appeal was untimely because her attorneys, who had busy dockets, initially believed that 60-day, not 30-day deadline applied because the United States was the “real party in interest” in False Claims Act (FCA) qui tam actions, was sufficient to establish “excusable neglect,” so as to warrant extension of time to file her notice of appeal of dismissal of her FCA action against university. [28 U.S.C.A. § 2107\(c\)](#); [31 U.S.C.A. § 3729 et seq.](#); [F.R.A.P.Rule 4\(a\)\(5\)](#), [28 U.S.C.A.](#)

[2 Cases that cite this headnote](#)

[2] United States**🔑 Government actors**

Factors weighed in favor of finding Texas state university hospital to be an arm of the state, and thus not a “person” who could be liable under False Claims Act (FCA) in former employee's qui tam action against university, despite university's authority to sue and be sued in its own name; hospital was part of university system that Texas statutes and courts treated as a state agency, Texas provided substantial funding to hospital, and allowing for civil recovery would interfere with the state's fiscal autonomy, governor-appointed board of regents governed university system and controlled university's right to use and hold property, and university's concerns were statewide. [31 U.S.C.A. § 3729\(a\)\(1\)\(A, B\)](#); [V.T.C.A., Education Code §§ 61.002, 65.02\(a\), 65.11, 65.30, 65.31, 65.39, 65.42](#); [V.T.C.A., Government Code §§ 572.002\(10\)\(B\), 2101.011\(b\)](#).

[3 Cases that cite this headnote](#)

[3] United States**🔑 Who May Be Liable**

State university hospital, against which former employee brought claim for monetary relief under False Claims Act's (FCA) anti-retaliation provision, was an arm of the state, and thus plaintiff's claim was barred by sovereign immunity. [31 U.S.C.A. § 3730\(h\)](#).

[6 Cases that cite this headnote](#)

Attorneys and Law Firms

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[Brian Scott McBride](#), Esq., [Michael Warren Mengis](#), Baker & Hostetler, L.L.P., Houston, TX, [Lesli Gwen Ginn](#), Esq., Assistant Attorney General, [Linda Ibach Shaunessy](#), Assistant Attorney General, Office of the Attorney General, Austin, TX, for Defendant–Appellee.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:11–CV–18.

Before [STEWART](#), Chief Judge, and [DeMOSS](#) and [CLEMENT](#), Circuit Judges.

Opinion

PER CURIAM.*

Terri King (“King”) appeals the district court's dismissal of claims she brought on behalf of the United States for alleged violations of the False Claims Act (“FCA”), [31 U.S.C. §§ 3729 et seq.](#) The district court dismissed King's claims for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted, holding that the University of Texas Health Science Center–Houston (“UTHSCH” or “the Center”) is not subject to suit under the FCA's *qui tam* provisions and, in addition, is entitled to sovereign immunity. We AFFIRM.

FACTS AND PROCEEDINGS

King is a former associate professor at UTHSCH. From 2001–2005, she served in the Center's Department of Internal Medicine. In 2005, she accepted a position in the Center's Department of Pediatrics. In March of 2001, King began working as *[492](#) a statistician and geneticist in a research lab under Dr. Dianna M. Milewicz's supervision. Milewicz's research focused on [thoracic aortic dissection](#). According to King's complaint, she began to notice discrepancies in Milewicz's data in 2004. King alleges that “[w]hen she began to bring these discrepancies to the attention of Milewicz, Milewicz began a retaliatory campaign against King that began with the writing of a false and defamatory employee performance review.”

King filed suit on January 4, 2011, alleging that Milewicz falsified research data and results and failed to obtain her human research subjects' written informed consent. She claims that the fraud was in connection with government-funded research and that Milewicz used falsified results in order to obtain federal funding. The Center is claimed to have defrauded the federal government by, among other things, covering up Milewicz's misconduct relating to federal research grants. King also claims that the Center retaliated against her for reporting this misconduct by hampering her research, relocating her to less favorable positions, and constructively firing her when she continued to raise concerns.

King's complaint alleges that the Center's actions constituted false claims under the FCA because, among other things, it “failed to fully investigate and fraudulently covered up research misconduct by Milewicz in an effort to allow her and other researchers full access to federal grants for research.” King also asserts a private action for retaliation and wrongful termination under the FCA's anti-retaliation provision, [31 U.S.C. § 3730\(h\)](#), because “UTHSCH demoted King in retaliation[,] ... derailed any chance of King becoming a tenured member of the faculty at UTHSCH[,] ... and ultimately terminated King as a result of her reports of research misconduct.” On February 22, 2012, the United States filed notice that it was not intervening.

On May 9, 2012, UTHSCH moved to dismiss King's complaint on three separate grounds: (1) UTHSCH, as a state agency, is not subject to liability under the FCA; (2) sovereign immunity bars King's FCA claims; and (3) King's complaint did not comply with the particularity

requirements of [Rule 9\(b\) of the Federal Rules of Civil Procedure](#). The district court granted the Center's motion on October 31, 2012, dismissing the case in its entirety “for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.”¹ King appeals.

STANDARD OF REVIEW

“We review a district court's ruling on a [Rule 12\(b\)\(1\)](#) motion to dismiss for lack of subject matter jurisdiction de novo.” [Raj v. La. State Univ.](#), 714 F.3d 322, 327 (5th Cir.2013). This court also “review[s] a district court's dismissal under [Rule 12\(b\)\(6\)](#) de novo, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs.” [Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys](#), 675 F.3d 849, 854 (5th Cir.2012) (internal quotation marks omitted). Finally, “sovereign immunity is a question of law which this court reviews de novo.” [Koehler v. United States](#), 153 F.3d 263, 265 (5th Cir.1998); see also [Khan v. S. Univ. & Agric. & Mech. Coll. Bd. of Supervisors](#), No. 03–30169, 2005 WL 1994301, at *2 (5th Cir. Aug. 19, 2005).

*493 DISCUSSION

King challenges the district court's dismissal of her *qui tam* claim based on its finding that UTHSCH is an “arm of the state,” its holding that the Center is entitled to sovereign immunity from her retaliation claim, and its dismissal of her complaint without first granting King an opportunity to amend. UTHSCH claims that this court lacks jurisdiction over King's appeal because she failed to timely file her notice of appeal and, as a matter of law, did not show excusable neglect or good cause in her request for an extension of time.

I. Timeliness of King's Appeal

“[T]he taking of an appeal within the prescribed time is mandatory and jurisdictional.” [Bowles v. Russell](#), 551 U.S. 205, 209, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) (internal quotation marks omitted). Under [28 U.S.C. § 2107\(a\)](#), parties must file notice of appeal “within thirty days after the entry of [any civil] judgment, order or decree.” See also [Fed. R.App. Proc. 4\(a\)\(1\)\(A\)](#). But “[t]he district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal,

extend the time for appeal upon a showing of excusable neglect or good cause.” [28 U.S.C. § 2107\(c\)](#).

The district court entered its order of dismissal on October 31, 2012. King filed her notice of appeal, along with a motion for extension of time pursuant to [Federal Rule of Procedure 4\(a\)\(5\)](#), on December 5, 2012, thirty-five days later. Although she acknowledges that her appeal was late, she argues there was “excusable neglect” because her attorneys initially believed that because the United States was the “real party in interest” in FCA *qui tam* actions, [Rule 4\(a\)\(1\)\(B\)](#) applied, giving them sixty days to file the notice of appeal. Her attorneys had busy trial dockets during November, and did not realize until early December that, under [United States ex rel. Eisenstein v. City of New York](#), 556 U.S. 928, 129 S.Ct. 2230, 173 L.Ed.2d 1255 (2009), the thirty-day deadline for filing a notice of appeal applies in FCA *qui tam* actions in which the United States has not intervened.

The Fifth Circuit follows the Supreme Court's guidance in determining when to permit extensions of time under [Rule 4\(a\)\(5\)](#).

When evaluating excusable neglect under [Rule 4\(a\)\(5\)](#), this court relies on the following standard:

The determination is at bottom an equitable one, taking account all of the relevant circumstances surrounding the party's omission. These include ... the danger of prejudice ..., the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

[Stotter v. Univ. of Tex. at San Antonio](#), 508 F.3d 812, 820 (5th Cir.2007) (quoting [Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.](#), 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). We review a ruling on a [Rule 4\(a\)\(5\)](#) motion for excusable neglect for abuse of discretion. *Id.*

UTHSCH claims that the district court abused its discretion by allowing King's [Rule 4\(a\)\(5\)](#) extension. The Center cites two cases for the propositions that neither ignorance of the rules nor counsel's busy law practice is sufficient to establish excusable neglect, [Pioneer](#), 507 U.S. at 395, 113 S.Ct. 1489, and ignorance of the law does not excuse the failure to comply with a deadline that is

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unambiguous. *Halicki v. *494 La. Casino Cruises, Inc.*, 151 F.3d 465, 470 (5th Cir.1998).

The Center overstates *Pioneer*'s holding. The Court held only that counsels' failure to file on time could be imputed to their clients, and did not create rigid rules forbidding extensions of time based on ignorance of the rules or an attorney's workload. *Pioneer*, 507 U.S. at 397–98, 113 S.Ct. 1489. Indeed, the *Pioneer* court focused on “the respondents' good faith and the absence of any danger of prejudice ... or of disruption to efficient judicial administration posed by the late filings.” *Id.* at 397, 113 S.Ct. 1489. The delay here was only five days and did not prejudice UTHSCH. *Pioneer* does not compel us to find an abuse of discretion in the district court's grant of King's motion for an extension of time.

Nor does our opinion in *Halicki* foreclose a finding of excusable neglect in this case. In *Halicki*, we rejected a litigant's contention “that misconstruction of procedural rules necessarily should result in a finding of ‘excusable neglect’ where no prejudice results to the opposing party.” *Halicki*, 151 F.3d at 469 (emphasis in original). We did not hold that misinterpretation of the rules could never constitute excusable neglect. And although we stated that “a district court's determination that the neglect was inexcusable is virtually unassailable” when “the rule at issue is unambiguous,” *id.* at 470, this observation does not control our review of a district court's finding that the neglect was excusable.²

[I] “Given the leeway granted to district courts” when evaluating excusable neglect, *Stotter*, 508 F.3d at 820, we hold that the district court did not abuse its discretion in granting King's motion for an extension of time to file her notice of appeal.

II. Ability to Sue UTHSCH Under the FCA's *Qui Tam* Provision

The FCA imposes liability to “any person who ... knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” or “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.” 31 U.S.C. § 3729(a)(1)(A)-(B) (emphasis added). In *Stevens*, the Supreme Court held “that the False Claims Act does not subject a State (or state agency) to liability” because neither a state nor state agency falls within the FCA's

definition of a “person.” *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 787–88, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000).

King argues that the district court erred in dismissing her *qui tam* claims “by erroneously concluding that UTHSCH is an arm of the State of Texas and thus ... not a ‘person’ who can be liable under the federal False Claims Act.” In her opening brief, King states also that “[t]he *Stevens* case was wrongly decided,” that it “created an unwarranted exception to the FCA for states and state agencies,” and that “[i]t is error to dismiss the *qui tam* claims against UTHSCH when *Stevens* should instead be reversed.” Because we lack the authority to reverse Supreme Court decisions, we *495 focus instead on her arguments that UTHSCH is not an “arm of the state.”

In *Stevens*, the Supreme Court stated that in cases where defendants move for dismissal on both statutory and Eleventh Amendment grounds, courts should address the statutory question first:

We ... have routinely addressed *before* the question whether the Eleventh Amendment forbids a particular statutory cause of action to be asserted against States, the question whether the statute itself *permits* the cause of action it creates to be asserted against States (which it can do only by clearly expressing such an intent). When these two questions are at issue, not only is the statutory question “logically antecedent to the existence of” the Eleventh Amendment question, but also there is no realistic possibility that addressing the statutory question will expand the Court's power beyond the limits that the jurisdictional restriction has imposed.

Stevens, 529 U.S. at 779, 120 S.Ct. 1858 (internal citations omitted). Pursuant to *Stevens*, we address first whether the FCA allows for King's suit against the UTHSCH.

As did the district court, we evaluate whether the Center is an arm of the state using the six-factor test set forth in *Clark v. Tarrant County, Texas*, 798 F.2d 736, 744–45 (5th Cir.1986). Although *Clark*'s arm-of-the-state analysis took place in the context of determining Eleventh Amendment immunity, we have applied its test when determining whether an entity was subject to FCA liability. See *U.S. ex rel. Adrian v. Regents of Univ. of Calif.*, 363 F.3d 398, 401 (5th Cir.2004).

In deciding whether a suit against an entity is in reality a suit against the state, several factors must be determined: (1) whether the state statutes and caselaw characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.

Khan, 2005 WL 1994301, at *2; see also *Richardson v. S. Univ.*, 118 F.3d 450, 452 (5th Cir.1997). We address each factor in turn.

A. Texas Statutes and Caselaw

A survey of Texas statutes and caselaw reveals that the first *Clark* factor weighs in favor of finding UTHSCH an arm of the state. The state constitution provides for the establishment of the University of Texas System. *Tex. Const. art. VII, § 10* (“The Legislature shall as soon as practicable establish, organize and provide for the maintenance, support and direction of a University of the first class, to be located by a vote of the people of this State, and styled ‘The University of Texas’, for the promotion of literature, and the arts and sciences.”). The Center is part of the University of Texas System. *Tex. Educ.Code § 65.02(a)* (“The University of Texas System is composed of the following institutions and entities: ... (9) The University of Texas Health Science Center at Houston.”). Texas statutes consider “a [public] university system or an institution of higher education” to be a “state agency.” *Tex. Gov’t Code § 572.002(10)(B)*.

Texas courts also treat UTHSCH to be a state agency. In *Klein v. Hernandez*, 315 S.W.3d 1, 8 (Tex.2010), the Texas Supreme Court held that a resident was an “employee of a state agency” in finding him entitled to immunity. See also *id.* at 6 (referencing legislative materials referring to UTHSCH as “a state agency-owned *496 school”). In *Illloh v. Carroll*, No. 14–09–01001–CV, 2012 WL 1570991, at *1 (Tex.App.-Houston [14th Dist.] May 3, 2012, no pet. h.), a Texas Court of Appeals referred to the

“governmental-entity University of Texas Health Science Center at Houston” when evaluating whether the Texas Tort Claims Act’s limited waiver of immunity applied to a UTHSCH doctor. In *Cheatham*, the court referred to “UTHSCH, a governmental unit” when reviewing claims against “two UTHSCH-employed doctors.” *Univ. of Tex. Health Sci. Ctr. at Hous. v. Cheatham*, 357 S.W.3d 747, 748 (Tex.App.-Houston [14th Dist.] 2011, review denied). The opinion goes on to refer to the defendants as “government-employed doctor[s]” and reviews statutory provisions governing the conduct of “government employee[s].” *Id.* at 749.

King argues that these cases “never actually characterize UTHSCH as an ‘arm of the state,’ ” that *Klein* never directly implicated UTHSCH or sovereign immunity, and that other cases referring to the Center as a “governmental unit” are meaningless because that term is much broader than what is required for finding an entity to be an “arm of the state.” We acknowledge that there does not appear to be any case that evaluates all six *Clark* factors and finds the Center to be an arm of the state for either FCA or sovereign immunity purposes. But we do not read *Clark*’s first factor as requiring an entity claiming sovereign immunity to first identify on-point court decisions evaluating the issue and holding it to be entitled to sovereign immunity. If that were the case, we would not need a six-factor test.

We find the aforementioned Texas authorities to weigh in favor of UTHSCH being an arm of the state.

B. Sources of Funding

According to King, “[f]rom 2005 until 2009, state funding and federal funding have contributed an approximately equal percentage of the revenue collected by UTH[S]CH” and “[s]tate funding has only contributed between 23% and 26.5% of the gross revenue for UTHSCH from 2005 to 2009.” Despite King’s attempts to downplay state funding’s importance, the magnitudes are substantial. The district court noted that in 2009, UTHSCH took in more than \$26 million from student tuition and fees, received about \$170 million in direct state appropriations, and received over \$25 million from other state agencies.

King asserts that despite the significant amounts of state funding, UTHSCH would be unable to reach into segregated state funds in order to pay a judgment here because the Center’s federal and state funding are

“strictly and carefully segregated,” with state funding only available to support state-funded missions. We disagree.

“[T]he most *significant* factor in assessing an entity's status is whether a judgment against it will be paid with state funds.” *Richardson*, 118 F.3d at 455 (quoting *McDonald v. Bd. of Miss. Levee Comm'rs*, 832 F.2d 901, 907 (5th Cir.1987)). But this does not mean we can find sovereign immunity or an arm of the state only “where payment would be directly out of the state treasury.” *United Carolina Bank v. Bd. of Regents of Stephen F. Austin State Univ.*, 665 F.2d 553, 560 (5th Cir. Unit A 1982). “The crucial question ... is whether use of ... unappropriated funds to pay a damage award ... would interfere with the fiscal autonomy and political sovereignty of Texas.” *Id.* at 560–61.

The district court in *United Carolina* found that the Eleventh Amendment did not bar suit against Stephen F. Austin State University (“SFA”) in part because “SFA could itself pay such an award because *497 it had substantial unappropriated, separately held, locally generated funds” and, as a result, “payment of an award c[ould] be made without resort to general revenues of the state or legislative appropriation.” *Id.* at 559–60. We reversed, holding that “[t]he key is not the ability to identify segregated funds, but the larger concept of jurisdiction over state sovereignty which the eleventh amendment proscribes.” *Id.* at 560. We found that the SFA's local funds were “either held in the Treasury or restricted as to use,” were “subject to audit and budget planning,” and as a result “any award from those funds would directly interfere with the state's fiscal autonomy.” *Id.* at 561.

Similarly, in *Jagnandan v. Giles*, we held that tuition refunds would implicate the state treasury. 538 F.2d 1166 (5th Cir.1976). The tuition “fees were factored into the preparation of the annual budget for [Mississippi State University] and were relied upon by the state legislature in determining the maximum amount of expenditures allowed.” *Id.* at 1176. The refunds would have “add[ed] an expenditure not figured in the budget.” *Id.* We explained:

The Eleventh Amendment was fashioned to protect against federal judgments requiring payment of money that would interfere with the state's fiscal autonomy and thus its political sovereignty. Retroactive

monetary relief ... would have just that effect. Mississippi has devised a complex statutory design which governs the state's schools of higher education and their control by the Board of Trustees. The Board is required to submit budgetary proposals for legislative acceptance. To require refund payments from the Board for overpayment of tuition fees would be the kind of tampering the Eleventh Amendment sought to avoid.

Id. (footnote omitted).

We hold that Texas provides substantial funding to the Center and that allowing for civil recovery would interfere with the state's fiscal autonomy, even if payment is not made directly from the state treasury. *Clark*'s second factor supports finding UTHSCH to be an arm of the state.

C. Degree of Local Autonomy and Right to Hold and Use Property

A board of regents, appointed by the governor with the advice and consent of the senate, governs the University of Texas System, and “govern[s], operate[s], support[s], and maintain[s] each of the component institutions.” *Tex. Educ.Code* §§ 65.11, 65.31. All UTHSCH contracts must be in accordance with board rules or specially approved by the board of regents. *Id.* § 65.35. As a state agency, the Center is required to follow specific accounting and financial reporting requirements. *Tex. Gov't Code* § 2101.011(b).

With respect to UTHSCH's right to hold and use property, “[t]he board of regents of the University of Texas System has the sole and exclusive management and control of the lands set aside and appropriated to, or acquired by, The University of Texas System.” *Tex. Educ.Code* § 65.39. “The board has the power of eminent domain to acquire for the use of the university system any land that may be necessary and proper for carrying out its purposes.... The taking of the property is declared to be for the use of the state.” *Id.* § 65.33

We find that *Clark*'s third and sixth factors support finding UTHSCH to be an arm of the state.

D. Local vs. Statewide Concerns

The University of Texas System, of which UTHSCH is a part, has locations *498 throughout the state of Texas. We do not accept King's contention that the Center is primarily concerned with local issues because it “does not provide statewide services or have a statewide presence” since “[a]ll of its facilities are in Houston.” Education and research are statewide concerns. *See e.g.*, [Tex. Educ.Code § 61.002](#) (Texas Higher Education Board created to “benefit the citizens of the state in terms of the realization of the benefits of an educated populace”); [Richardson](#), 118 F.3d at 455–56 & n. 15 (“That Southern is only one of many state-funded schools does not deprive it of Eleventh Amendment immunity.”).

Clark's fourth factor supports finding UTHSCH to be an arm of the state.

E. Authority to Sue and Be Sued in its Own Name

Texas law provides for the University of Texas System's ability to sue on behalf of a component institution “to recover a delinquent loan, account, or debt owed.” [Tex. Educ.Code § 65.42](#). Texas statutory law does not appear to authorize the Center to bring suit or allow plaintiffs to sue UTHSCH directly.

Nonetheless, King identifies several cases in which UTHSCH either sued or was sued, and in none of them did it object to proceeding in its own name or insist that the University of Texas System be substituted in its stead. *See Duncan v. Univ. of Tex. Health Sci. Ctr. at Hous.*, 469 Fed.Appx. 364 (5th Cir.2012); *Watson v. Univ. of Tex. Health Sci. Ctr.*, No. H–09–0881, 2009 WL 1476469 (S.D.Tex. May 27, 2009); *Butcher v. Univ. of Tex. Health Sci. Ctr. at Hous.*, No. H–08–cv–0244, 2008 WL 4935723 (S.D.Tex. Nov. 18, 2008); *Cheatham*, 357 S.W.3d 747. The number of cases in which the Center is a named party leads us to conclude that, for arm-of-the-state purposes, it has the authority to sue and be sued in its own name.³

[2] *Clark*'s fifth factor weighs against finding UTHSCH to be an arm of the state. But because five out of the six *Clark* factors weigh in favor of finding the Center to be one, we conclude that UTHSCH is an arm of the state and that *Stevens* applies. UTHSCH is not a “person” under the FCA, and is not subject to *qui tam* liability. We affirm

the district court's dismissal of King's *qui tam* claim under Rule 12(b)(6) for failure to state a claim under the FCA.

III. Retaliation Claim

King sues UTHSCH for retaliation pursuant to the FCA's anti-retaliation provision, [31 U.S.C. § 3730\(h\)](#). In relevant part, [§ 3730\(h\)](#) provides that:

Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated *499 others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

Congress amended this section in 2009. The previous version stated that “[a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment *by his or her employer* ... shall be entitled to all relief necessary to make the employee whole.” (Emphasis added.)

In *Elizondo*, a district court applied *Stevens*'s holding that states and state agencies are not within the FCA's definition of “any person” to the older version of [§ 3730\(h\)](#)'s use of the phrase “his or her employer” and held that states are not subject to suit under [§ 3730\(h\)](#). *Elizondo v. Univ. of Tex. at San Antonio*, No. CIVASA–04–CA–1025–XR, 2005 WL 823353, at *4–5 (W.D.Tex. Apr. 7, 2005). But the amendment to [§ 3730\(h\)](#) prevents us from applying *Elizondo*'s analysis here. *See Bell v. Dean*, No. 2:09–CV–1082–WKW, 2010 WL 1856086, at *4 (M.D.Ala. May 4, 2010) (“*Elizondo* and the other cases are no longer on all fours ... given the 2009 amendment removing the word ‘employer’ from the statute”). Unlike the Court in *Stevens*, we are unable to resolve all of our case's issues on statutory grounds, and must review the Center's argument that it is entitled to sovereign immunity from FCA anti-retaliation claims.

“Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.” *Dellmuth v. Muth*, 491 U.S. 223, 228, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985)). In *Foulds*, we held that the Eleventh Amendment barred a *qui tam* action seeking damages against Texas Tech University and Texas Tech University Health Sciences Center. *U.S. ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 294–95 (5th Cir.1999); see also *Nelson v. Univ. of Tex. at Dall.*, 535 F.3d 318, 320 (5th Cir.2008) (FMLA action against University of Texas at Dallas “subject to an Eleventh Amendment immunity defense”).

[3] King does not argue that § 3730 intends to strip states of their sovereign immunity, or any other reason to find that Congress abrogated sovereign immunity

here. Rather, she applies her arguments against finding UTHSCH to be an arm of the state in the statutory context to the sovereign immunity inquiry as well. We apply our finding that UTHSCH is an arm of the state and hold that sovereign immunity bars King's claim for monetary relief under the FCA's anti-retaliation provision.

We affirm the district court's dismissal of King's retaliation claim under Rule 12(b)(1) for lack of subject-matter jurisdiction.

CONCLUSION

We AFFIRM the district court's dismissal of King's suit.⁴

All Citations

544 Fed.Appx. 490, 301 Ed. Law Rep. 581

Footnotes

- * Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.
- 1 Because the district court focused on the Center's sovereign immunity and whether it was subject to suit under the FCA's *qui tam* provisions, it did not address UTHSCH's arguments under Rule 9(b).
- 2 We also agree with the district court's finding that “Rule 4(a)(1)(B)'s language permitting a notice of appeal to be filed within 60 days of the trial court's judgment when the United States is a party to the case is ambiguous in the context of FCA *qui tam* actions.” Although King's counsel should have known that *Eisenstein* held the 30-day rule to apply to FCA *qui tam* actions, “excusable neglect” is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” *Pioneer*, 507 U.S. at 394, 113 S.Ct. 1489.
- 3 We note that these cases focusing on an entity's ability to sue or be sued are usually within the context of determining whether a state has waived immunity. As noted above, the arm-of-the-state test was developed for sovereign immunity purposes. A recent Fourth Circuit decision case applied a four-factor test that excludes “the authority to sue and be sued in its own name” from the analysis. *U.S. ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 580 (4th Cir.2012); see also *S.C. Dep't of Disabilities & Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300, 303 (4th Cir.2008). Because our result would be the same under either our current test or the Fourth Circuit's, there is no need to change our test.
- 4 King challenges the district court's dismissal of her complaint without first granting her leave to amend. Because we affirm the district court's dismissal based on our holding that UTHSCH is an arm of the state and not because of any pleading deficiency under Rule 12(b)(6) or Rule 9(b), amendment would be futile. We find no error in the district court's decision not to grant leave to amend before dismissing King's case.

EXHIBIT E

**COPYRIGHT INFRINGEMENT LAWSUITS
AGAINST STATE ACTORS SINCE 2000 CHAVEZ RULING**

1. Planet Earth Found v. University of Washington, 2:1999-cv-00861 (W.D. Wash. 2000) (copyright infringement cause of action against the University of Washington)
2. CyberSports Inc. v. University of Alabama et al, 8:2001-cv-00566 (D. Mary. 2001) (copyright infringement cause of action against the University of Alabama)
3. Corcoran v. State of Wisconsin, 2:2001-cv-00710 (E.D. Wisc. 2001) (copyright infringement cause of action against the State of Wisconsin)
4. Half-Day v. Texas State University, 1:2000-cv-00798 (W.D. Tex. 2001) (copyright infringement cause of action against Texas State University)
5. Erkins v. Garrison et al, 3:2000-cv-00022 (D. Alaska 2001) (copyright infringement cause of action against State of Alaska, remanded to state court on motion by State of Alaska on May 23, 2001)
6. Parkman & Weston Associates Ltd. et al v. Ebenezer African Methodist Episcopal Church et al, 1:2001-cv-09839 (N.D. Ill. 2001) (copyright infringement against the State of Illinois Housing Authority)
7. Lewis v. State of Colorado et al, 1:2001-cv-01643 (D. Colo. 2001) (copyright infringement against the State of Colorado)
8. Salerno v. City University of New York, 191 F. Supp. 2d 352 (S.D. N.Y. 2001) (copyright infringement cause of action against the City University of New York)
9. Lucchesi, Galati Architects Inc. v. State of Nevada, 2:1999-cv-00083 (D. Nev. 2002) (copyright infringement cause of action against the State of Nevada)
10. Harrington v. State of Maine et al, 1:2002-cv-00025 (D. Me. 2002) (copyright infringement cause of action against the State of Maine)
11. Meta-Wa-Wake-Lonewalker Morris v. The Board of Regents of the University of California et al, 3:2002-cv-05869 (N.D. Cal. 2003) (copyright infringement cause of action against the University of California)
12. Bosch v. Ball-Kell et al, 1:03-cv-01408-MMM-JAG (C.D. Ill. 2003) (copyright infringement cause of action against the University of Illinois)
13. Garcia-Goyco et al v. Commonwealth of Puerto Rico Highway Authority, 275 F.Supp.2d 142, 147-49, 154 (D. P.R. 2003) (copyright infringement cause of action against the Commonwealth of Puerto Rico Highway Authority)

14. Wei et al v. Delaware State University, 2:03-cv-02453 (W.D. Wash. 2003) (copyright infringement cause of action against Delaware State University)
15. Miami Film et al v. West Avenue Films et al, 1:2002-cv-23375 (S.D. Fla. 2003) (copyright infringement cause of action against Florida International University)
16. Lopez v. Johnson et al, 1:2002-cv-01572 (D. N.M. 2004) (copyright infringement cause of action against the State of New Mexico and several officials)
17. Smith v. Lutz, the University of Texas et al, No. 03-04-00074-cv (Court of Appeals of Texas 2004) (copyright infringement cause of action against the University of Texas)
18. CBT Nuggets Inc. v. Milwaukee Area Technical College et al, 2:2004-cv-00286 (E.D. Wisc. 2004) (copyright infringement cause of action against the State of Wisconsin Technical College System)
19. Porter v. Arkansas Game and Fish Foundation et al, 2:2005-cv-02168 (E.D. Ark. 2005) (copyright infringement cause of action against a 501c3 auxiliary of the Arkansas Game and Fish Commission)
20. Hairston v. North Carolina Agriculture & Technical State University, 1:04-cv-1203, 2005 WL 2136923, at *1 (M.D. N.C. 2005) (copyright infringement cause of action against North Carolina A&T State University)
21. IME Administrators LLC et al v. State of Colorado Dept. of Regulatory Agencies, Dept. of Insurance et al, No. 04-1243 (Court of Appeals, 10th Circuit 2005) (copyright infringement cause of action against the State of Colorado Dept. of Regulatory Agencies, Dept. of Insurance)
22. Pavlica v. New York Academy of Sciences and The Research Foundation of State University of New York, 397 F.Supp.2d 519 (S.D. N.Y. 2005)* (copyright infringement cause of action against the State University of New York)
23. Kettenburg v. University of Louisville, 3:05-cv-384-R, 2005 WL 4444100 (W.D. Ky. 2005) (copyright infringement cause of action against the University of Louisville)
24. Newport-Mesa Unified School District v. State of California Dept. of Education et al, 371 F.Supp 2d 1170 (C.D. Cal. 2005) (copyright infringement cause of action against the State of California Dept. of Education)
25. Bergen v. County of Middlesex, New Jersey et al, 2:2004-cv-03015 (D. N.J. 2005) (copyright infringement cause of action against Rutgers, the State University of New Jersey)

26. Hayes E-Government v. Florida House of Representatives, 4:2003-cv-00193 (N. D. Fla. 2005) (copyright infringement cause of action the State of Florida House of Representatives and their officers)
27. Haley v. University of Pittsburgh et al, 2:2004-cv-00734 (W.D. Pa. 2005) (copyright infringement cause of action against the University of Pittsburgh)
28. Rachlin Architects Inc. v. Los Angeles Unified School District et al, 2:2004-cv-06670 (C.D. Cal. 2005) (copyright infringement cause of action against Los Angeles Unified School District, an agency of the State of California)
29. Abramowitz v. State of New Jersey et al, 2:2003-cv-01663 (D. N.J. 2006) (copyright infringement cause of action against the State of New Jersey)
30. De Romero v. Institute of Puerto Rican Culture, 466 F. Supp. 2d 410 (D. P.R. 2006) (copyright infringement cause of action against the Commonwealth of Puerto Rico's Institute for Puerto Rican Culture)
31. State of Florida Division of Emergency Management v. Flock, 4:06-cv-00562 (N.D. Fla. 2006) (copyright infringement counterclaim case of action against the Florida Division of Emergency Management)
32. Motorcycle Safety Foundation v. Oregon State University, 8:06-cv-01209 (C.D. Cal. 2006) (copyright infringement cause of action against Oregon State University)
33. Superior Edge v. Maricopa County Community College District, 2:2007-cv-00822 (D. Ariz. 2007) (copyright infringement cause of action against the Arizona Community College system)
34. InfoMath. Inc. v. University of Arkansas, 663 F. Supp. 2d 674 (E.D. Ark. 2007) (copyright infringement cause of action against the University of Arkansas)
35. Guarente v. Patterson et al, 1:2006-cv-12032 (D. Mass. 2007) (copyright infringement against the University of Massachusetts and several others)
36. Trevino v. University of Southern Mississippi et al, 2:2004-cv-01546 (E.D. La. 2007) (copyright infringement cause of action against the University of Southern Mississippi)
37. Rescue Training v. Louisiana State University et al, 9:2005-cv-81146 (S.D. Fla. 2007) (copyright infringement cause of action against Louisiana State University)
38. Student Lifeline Inc. v. The Senate of the State of New York et al, 2:2004-cv-05484, 2006 WL 2577849 (E.D. N.Y. 2007) (copyright infringement cause of action against the State of New York Senate)

39. Arcadia Publishing Inc. et al v. University of Nebraska et al, 2:2007-cv-02377 (D. S. Car. 2007) (copyright infringement cause of action against the University of Nebraska)

40. Collins v. University Press of Mississippi, 1:2007-cv-07067 (S.D. N.Y. 2007) (copyright infringement cause of action against University Press of Mississippi)

41. Alliance for Telecommunications Industry Solutions Inc. v. Hall, 5-cv-00440 CCB 2007 WL 3224589 (D. Mary. 2007) (conversion case against subcontractor for Bay Area Transportation Authority of California preempted by Copyright Act)

42. Bleck v. Metropolitan Sports Facilities Commission, 0:2008-cv-00152 (D. Minn. 2008) (copyright cause of action against the State of Minnesota)

43. Borchardt v. Reid, 8-cv-03086 DOC, 2008 WL 4810791 (M.D. N.C. 2008) (copyright infringement cause of action against the State of California Administrative Office of the Courts, inter alia)

44. Marketing Information Masters v. The Trustees of the California State University, 522 F. Supp. 2d 1088 (S.D. Cal. 2008) (copyright infringement cause of action against California State University)

45. Cambridge Press, Sage Publications & Oxford University Press v. Georgia State University, 1:2008-cv-01425 (N.D. GA 2008) (copyright infringement cause of action against Georgia State University)

46. Blevins v. Suarez et al, 4:08-cv-00014 (W.D. Va. 2008) (copyright infringement cause of action against Mountain Empire Community College)

47. Chapman v. New York State Division for Youth, 546 F.3d 230 (2nd Cir. 2008) (copyright infringement cause of action against the State of New York Division for Youth)

48. Matthew Bruce Brown v. Fox Sports Net Inc. et al, 8:2008-cv-00833 (N.D. Cal. 2008) (copyright infringement cause of action against California State University, Long Beach)

49. Romero v. California Dept. of Transportation, 2009 WL 650629 (C.D. Cal. 2009) (copyright infringement cause of action against the State of California Dept. of Transportation)

50. Collins v. University of Alabama at Birmingham et al, 2:09-cv-00856-JEO (N. D. Ala. 2009) (copyright infringement cause of action against the University of Alabama at Birmingham)

51. Health Grades Inc. v. Robert Wood Johnson University Hospital Inc., 634 F.Supp.2d 1226 (D. Colo. 2009)* (copyright infringement cause of action against Robert Wood

Johnson University Hospital, a unit of Rutgers University, the State University of New Jersey)

52. Constantin v. University Press of Mississippi, 3:2009-cv-00291 (M.D. La. 2009) (copyright infringement cause of action against University Press of Mississippi)

53. Burgin v. LaHaye et al, 2:2007-cv-1425 RDP (D. N. Ala. 2009) (copyright infringement cause of action against University of Tennessee Press)

54. Regos v. Wayne State University Press et al, 2:2009-cv-12156 (E.D. Mich. 2009) (copyright infringement cause of action against Wayne State University Press)

55. Camphinha-Bacote D/B/A Transcultural C.A.R.E. Associates v. Gibson et al Florida Atlantic University 9:10-cv-80671 (S.D. FL 2010) (copyright infringement cause of action against Florida Atlantic University and an university professor)

56. Langford v. Texas Dept. of Public Safety et al, 10-510 (216th Judicial District, Kendall County 2010) (copyright infringement cause of action against the Texas Dept. of Public Safety, the Texas Dept. of Criminal Safety and Steve McGraw, the director of the Texas DPS)

57. American Dental Industries Inc. v. Northeast Wisconsin Technical College et al, 3:2010-cv-00613 (D. Ore. 2010) (copyright cause of action against the State of Wisconsin Technical College System)

58. Molinelli-Freytes et al v. University of Puerto Rico et al, 792 F.Supp.2d 150 (D. P.R. 2010) (copyright infringement cause of action against the University of Puerto Rico)

59. Jacobs v. Memphis Convention & Visitors Bureau, 710 F.Supp.2d 663 (W.D. Tenn. 2010) (copyright infringement cause of action against the State of Tennessee Dept. of Tourist Development)

60. Gourmet Curriculum Press Inc. v. Socorro Independent School District, 5:200-cv-00271 (W.D. Tex. 2010) (copyright infringement cause of action against the Socorro Independent School District)

61. Parker v. Dufresne et al (Grand Valley State University), 09-1859 (W.D. La. 2011) (copyright infringement cause of action against Grand Valley State University)

62. The Authors Guild et al v. HathiTrust, the University of Michigan et al, (S.D. N.Y. 2011) (copyright infringement cause of action against the University of Michigan, the University of California, the University of Wisconsin and Indiana University)

63. Camphina-Bacote D/B/A/ Transcultural C.A.R.E. Associates v. Bleidt et al, 4:10-cv-03481 (S.D. Tex. 2011) (copyright infringement cause of action against Texas A&M University and its employees)

64. Association for Information Media & Equipment v. Regents of the University of California, cv-10-9378 CVM (MANx) (C.D. Cal. 2011) (copyright infringement cause of action against the University of California, Los Angeles)

65. National Association of Boards of Pharmacy v. Board of Regents University System of Georgia, U.S. Court of Appeals, 08-13417 (11th Cir. 2011) (copyright infringement cause of action against the University of Georgia)

66. Whipple v. Utah, 2:2010-cv-811-DAK (D. Utah 2011) (copyright infringement cause of action against the State of Utah Office of Tourism)

67. Campinha-Bacote v. Tenney, 10-cv-3165 (E.D. N.Y. 2011) (copyright infringement cause of action against an employee of the State of New York)

68. Kathleen A. Quinn v. Los Angeles Unified School District et al, 2:2011-cv-09500, (C.D. Calif. 2011) (copyright infringement cause of action against the Los Angeles Unified School District, an agency of the State of California, and others)

69. TxSatMaps LLC v. East Texas Council of Governments, 6:2010-cv-00692 (E.D. Tex. 2012) (copyright infringement cause of action against East Texas Council of Governments)

70. Applied Professional Training Inc. v. Mira Costa College et al, 3:2010-cv-01372 (S.D. Cal. 2012) (copyright infringement cause of action against Mira Costa College)

71. DeMartino v. Golston et al, 4:12-cv-00372, (E.D. Tex. 2012) (copyright infringement cause of action against the University of Oklahoma and a university professor)

72. Macswan et al v. Arizona State University Board of Regents et al, 2:12-cv-01404 (D. Ariz. 2012) (copyright infringement cause of action against Arizona State University)

73. McFarland v. University of Mississippi Medical Center et al, 3:12-cv-00349 (S.D. Miss. 2012) (copyright infringement cause of action against the University of Mississippi Medical Center)

74. Van de Bovenkamp v. The State of Nebraska Dept. of Roads et al, 1:2011-cv-06881 (S.D. N.Y. 2012) (copyright infringement cause of action against State of Nebraska Dept. of Roads)

75. Fleurimond v. New York University, 876 F.Supp 2d 190 (E.D. N.Y. 2012) (copyright infringement cause of action against New York University.)

76. Align Assess Achieve LLC v. Toledo Public Schools, 2:2012-cv-00016 (S.D. Ohio 2012) (copyright infringement cause of action against Toledo, Ohio, Public Schools)

77. Align Assess Achieve LLC v. Urbana City Schools, 2:2012-cv-00131 (S.D. Ohio 2012) (copyright infringement cause of action against Urbana City, Ohio, Schools)
78. Maisha v. University of North Carolina et al, 1:2012-cv-00371 (M.D. N.C. 2013) (copyright infringement cause of action against the University of North Carolina and several individuals)
79. Wilcox v. Career Step LLC, 929 F.Supp.2d 1155 (D. Utah 2013) (copyright infringement cause of action against West Virginia Community and Technical University)
80. National Council on Teacher Quality v. Minnesota State Colleges and Universities et al, A12-2031 Minnesota Court of Appeals 2013 (copyright infringement cause of action against the State of Minnesota's universities and colleges)
81. Neri v. Monroe, 726.F.3d 989 (U.S. Court of Appeals, 7th Cir. 2013) (copyright infringement cause of action against Board of Regents of the University of Wisconsin System and several individuals)
82. Asia Dove v. Los Angeles Unified School District et al, 2:2013-cv-01222 (C.D. Calif. 2013) (copyright infringement cause of action against the Los Angeles Unified School District, an agency of the State of California, and others)
83. Gray v. Clark County School District, 3:2013-cv-00901 (W.D. Ky. 2013) (copyright infringement cause of action against the Clark County, Nevada, School District)
84. Juranic v. Western Michigan University et al, 1:2013-cv-00410 (W.D. Mich. 2013) (copyright infringement cause of action against Western Michigan University)
85. Diversey v. Schmidley, No. 2058, U.S. Court of Appeals, (10th Cir. 2013) (copyright infringement cause of action against the University of New Mexico)
86. Hill v. Ohio State University T&L et al, 2:2012-cv-984, 2013 WL 2354065 (S.D. Ohio 2013) (copyright infringement cause of action against the Ohio State University)
87. Philpot v. WUIS/University of Illinois, Springfield, 1:2014-cv-01791 (S.D. Ind. 2014) (copyright infringement cause of action against the University of Illinois)
88. Coyle v. University of Kentucky et al, 5:2012-cv-00369 (E.D. KY. 2014) (copyright infringement cause of action against the University of Kentucky)
89. Whittle Consulting Group Ltd. v. West Geauga, Ohio, Local School District, 1:2014-cv-01261 (N.D. Ohio 2014) (copyright cause of action against the West Geauga, Ohio, School District)

90. John T. Fodor et al v. Los Angeles Unified School District et al, 2:2012-cv-08090 (C.D. Cal. 2014) (copyright infringement cause of action against the Los Angeles Unified School District, an agency of the State of California, and others)
91. Issaenko v. University of Minnesota et al, 57 F.Supp.3d 985 (D. Minn. 2014) (copyright infringement cause of action against the University of Minnesota)
92. Josepha Campinha-Bacote d/b/a Transcultural C.A.R.E. Associates v. Evansville Vanderburgh School Corporation et al, 3:14-cv-00056-RLY-WGH (S.D. Ind. 2014) (copyright infringement cause of action against the Evansville Vanderburgh School Corporation)
93. Laborde-Perez et al v. Pineiro-Caballero et al, 14-01276-CVR (D. P.R., 2014) (copyright infringement cause of action against the Commonwealth of Puerto Rico Dept. of Education and Puerto Rico Dept. of Justice)
94. Frazier v. Commonwealth of Pennsylvania et al, 2:2014-cv-00756, 2014 WL 2445801 (E.D. Pa. 2014) (copyright infringement cause of action against the Commonwealth of Pennsylvania)
95. Tomelleri v. Greenwalt et al, 2:2014-cv-00163 (S.D. Ohio 2014) (copyright infringement cause of action against the State of Ohio Dept. of Natural Resources)
96. Denison v. Larkin et al, 63 F.Supp. 3d 1127 (N.D. Ill. 2014) (copyright infringement cause of action against the State of Illinois Attorney Registration and Discipline Commission)
97. Fullerton v. Florida Atlantic University Board of Trustees, 9:2014-cv-81021 (S.D. Fla. 2014) (copyright infringement cause of action against Florida Atlantic University)
98. National Council of Teachers Quality Inc. v. Curators of the University of Missouri (W.D. 76785 Missouri Court of Appeals 2014) (copyright infringement cause of action against the Curators of the University of Missouri)
99. Rubio v. Barnes & Noble Inc. et al, 1:14-cv-06561, 2014 WL 6769150 (S.D. N.Y. 2014) (copyright infringement cause of action against the Fashion Institute of Technology at the State University of New York)
100. Olisa Foundation v. Purdue University, 2:2014-cv-00795, 2014 WL, 11512590 (D. N. Mex. 2014) (copyright infringement cause of action against Purdue University)
101. Bell v. Hinsdale Township High School District 86 et al, 1:2014-cv-04441 (N.D. Ill. 2014) (copyright infringement cause of action against Hinsdale Township, Ill., High School District 86 and others)

102. Educational Impact Inc. v. Rochester City School District, 6:2014-cv-06503 (W.D. N.Y. 2014) (copyright infringement cause of action against Rochester, N.Y. City School District)

103. Flaherty v. Gatlinburg Convention & Visitors Bureau et al, 1:2015-cv-00157 (E.D. Tenn. 2015) (copyright infringement cause of action against the State of Tennessee Dept. of Tourism)

104. Roy v. New Hampshire Dept. of Corrections et al, 1:13-cv-00438-PB (D. N.H. 2015) (copyright infringement cause of action against the State of New Hampshire Dept. of Corrections)

105. Rahn v. Board of Trustees of Northern Illinois University et al, 14-2402 (7th Cir. 2015) (copyright infringement cause of action against Northern Illinois University)

106. Intersal Inc. v. Kluttz et al, 157887-cvS-9995, (General Court of Justice, Superior Court, Wake County, NC 2015) (copyright infringement cause of action against the State of North Carolina Dept. of Natural and Cultural Resources)

107. Mobile Active Defense Inc. v. Los Angeles Unified School District et al, 2:2015-cv-08762 (C.D. Calif. 2015) (copyright cause of infringement against the Los Angeles Unified School District, an agency of the State of California, and others)

108. Diaz v. City University of New York et al, 13-2038 (S.D. N.Y. 2015) (copyright infringement cause of action against the City University of New York)

109. American Shooting Center v. Secfor International et al, 13-cv-1847 BTM (JMA) (S.D. Cal. 2015) (copyright infringement cause of action against Mira Costa College)

110. Ramirez v. Puerto Rico Tourism Company et al, 3:2015-cv-02487 (S.D. Fla. 2015) (copyright infringement cause of action against the Commonwealth of Puerto Rico)

111. Regents of the University of California v. Aisen et al, 3:2015-cv-01766 (S.D. Cal 2015) (copyright infringement cause of action against the University of California)

112. Campinha-Bacote v. University of Washington et al, 1:2015-cv-00277 (S.D. Ohio 2015) (copyright infringement cause of action against the University of Washington)

113. Campinha-Bacote v. Board of Trustees of the California State University et al, 1:2015-cv-00307 (S.D. Ohio 2015) (copyright infringement cause of action against California State University-Channel Islands and Sonoma State University)

114. Keeton v. The Board of Education of Sussex Technical School District et al, 2:2015-cv-01036 (D. Del. 2015) (copyright infringement cause of action against The Board of Education of Sussex Technical School District)

115. Fumero et al v. Blue Man Productions LLC et al, 1:2015-cv-04115 (S.D. N.Y. 2015) (copyright infringement cause of action against the State of New Jersey Transit Corp.)
116. Gillan and Hartmann Inc. v. Kimmel Bogrette Architecture + Site Inc. et al, 2:2015-cv-01035 (E.D. Penn. 2015) (copyright infringement cause of action against Montgomery County Community College and others)
117. Camphinha-Bacote D/B/A Transcultural C.A.R.E. Associates v. Regents of the University of Michigan et al, 1:15-cv-330 (S.D. Ohio, Western District 2016) (copyright infringement cause of action against the University of Michigan)
118. 180 Skills LLC v. Tulsa Community College et al, 4:2015-cv-00417 (N.D. Okla. 2015) (copyright infringement cause of action against Tulsa Community College and the Tulsa Community College Board of Regents)
119. Patricia Ward Kelly v. University Press of Mississippi, 2:16-cv-02960-PA-(GJSx) (C.D. Cal. 2016) (copyright infringement cause of action against University Press of Mississippi)
120. Tresona Multimedia LLC v. Burbank High School Vocal Music Association et al, 2:2016-cv-04781-SVW-FFM (C.D. Calif. 2016) (copyright infringement cause of action against the Burbank High School Vocal Music Association)
121. Mobile Active Defense Inc. v. Los Angeles Unified School District et al, 2:2015-cv-08762, 2016 WL 7444876 (C.D. Cal. 2016) (copyright infringement cause of action against Los Angeles Unified School District, an agency of the State of California)
122. Nettleman v. The Florida Atlantic University Board of Trustees, 16-cv-81339 (S.D. Fla. 2016) (copyright infringement cause of action against Florida Atlantic University)
123. Wolf v. Oakland University et al, 2:2015-cv-13560 (E.D. Mich. 2016) (copyright infringement cause of action against Oakland University)
124. Oracle America Inc. v. Oregon Health Insurance Exchange Corp., D/B/A Cover Oregon, et al, Nos. 15-35950, 15-35975 (9th Circuit 2016) (copyright infringement cause of action against the State of Oregon)
125. Philpot v. WKMS/Murray State University, 1:2014-cv-01789-SEB-DML (S.D. Ind. 2016) (copyright infringement cause of action against Murray State University)
126. Berio-Ramos v. Flores-Garcia et al (Senate of Puerto Rico), 13-1879 (PAD) (D. P.R. 2016) (copyright infringement cause of action against the Commonwealth of Puerto Rico)

127. Bell v. Indiana University, 1:16-cv-02463 (S.D. Ind. 2016) (copyright infringement cause of action against Indiana University)

128. Bell v. Daniels et al, 1:16-cv-02488 (S.D. 2016) (copyright infringement cause of action against Purdue University)

129. Altman v. University Press of Mississippi, 3:2016-cv-00883 (S.D. Miss 2016) (copyright infringement cause of action against University Press of Mississippi)

130. Eiselein v. University of Idaho, 3:2016-cv-00448 (D. Idaho 2016) (copyright infringement cause of action against the University of Idaho)

131. Vincheski v. University of Minnesota et al, 1:2016-cv-04590 (S.D. N.Y. 2016) (copyright infringement cause of action against the University of Minnesota)

132. Architettura Inc. v. Mission Village of Pecos LLC et al, 3:2016-cv-02793 (N.D. Tex. 2016) (copyright infringement cause of action against the Texas Dept. of Housing and Community Affairs)

133. Architettura Inc. v. DSGN Associates Inc. et al, 3:2016-cv-03021 (N.D. Tex 2016) (copyright infringement cause of action against the State of Texas Dept. of Housing and Community Affairs)

134. Black v. Patrick et al, 2:2014-cv-00651-WKW-CSC (M.D. Ala. 2016) (copyright infringement cause of action against the Alabama State University Board of Trustees, the Alabama Educational Television Commission and several individuals)

135. Design Collective Inc. v. Beaufort-Jasper Higher Education Commission et al, 9:2015-cv-03089 (D. S.C. 2016) (copyright infringement cause if action against Beaufort-Jasper Higher Education Commission)

136. Allen and Nautilus Productions LLC v. Cooper et al, 5:2015-cv-627-BO (E.D. N. C. 2016) (copyright infringement cause of action against the State of North Carolina)

137. Reiner v. Saginaw Valley State University, 2:2016-cv-11728 (E.D. Mich. 2016) (copyright infringement cause of action against Saginaw Valley State University and its employees and students)

138. Flaherty v. Board of Regents of the University System of Georgia et al, 1:2016-cv-01624 (N.D. Ga. 2016) (copyright infringement cause of action against the University of Georgia)

139. Editorial Panamericana Inc. et al v. The Commonwealth of Puerto Rico Dept. of Education et al, 3:2016-cv-03086 (D. P.R. 2016) (copyright infringement cause of action against the Commonwealth of Puerto Rico).

140. Commonwealth of Puerto Rico, Treasury Dept. v. OPG Technology Inc., 15-3125 (D. P.R. 2016) (copyright infringement cause of action to determine non-infringement by the Commonwealth of Puerto Rico)

141. DynaStudy Inc. v. Houston Independent School District, 4:2016-cv-01442, (S.D. Tex. 2016) (copyright infringement cause of action against the Houston Independent School District)

142. DynaStudy Inc. v. Prosper Independent School District, 4:2016-cv-00930, (E.D. Tex. 2016) (copyright infringement cause of action against the Prosper Independent School District)

143. DynaStudy Inc. v. Rockwall Independent School District, 4:2016-cv-03376, (N.D. Tex. 2016) (copyright infringement cause of action against the Rockwall Independent School District)

144. DynaStudy Inc. v. Clear Creek Independent School District, 4:2017-cv-00976, (S.D. Tex. 2017) (copyright infringement cause of action against the Clear Creek Independent School District)

145. Bynum et al v. Texas A&M Athletic Dept. et al, 4:2017-cv-00181, (S.D. Tex 2017) (copyright infringement cause of action against Texas A&M University)

146. Israel v. University of Utah et al, 2:2015-cv-741-TS, WL 1383694 (D. Utah 2017) (copyright infringement cause of action against the University of Utah)

147. Tulk v. Cavender et al, 2:2015-cv-11653, 2016 WL 4030950 (S.D. W. Va. 2017) (copyright infringement cause of action against West Virginia State University and several others)

148. Porkka v. University of South Florida Board of Trustees et al, 3:2017-cv-00245 (M.D. Fla. 2017) (copyright infringement cause of action against the University of South Florida Board of Trustees)

149. Tulk v. Marshall University et al, 2:2017-cv-03079 (S.D. W. Va. 2017) (copyright infringement cause of action against Marshall University and West Virginia University)

150. Hill v. Waters et al, 2:2017-cv-00532 (S.D. Ohio 2017) (copyright infringement cause of action against The Ohio State University Marching Band)

151. Bell v. Powell et al, 16-cv-02491 TWP, 2017 WL 2533698 (S.D. Ind. 2017) (copyright infringement cause of action against Prosecuting Attorneys Council, for which Indiana Prosecuting Attorneys Council had immunity under Eleventh Amendment)

152. Shanton et al v. St. Charles Community Unit School District No. 303 et al, 1:2017-cv-03402 (N.D. Ill. 2017) (copyright infringement cause of action against St. Charles, Ill., Community Unit School District No. 303 and others)

EXHIBIT F

17.01 Intellectual Property Management and Commercialization

Approved May 25, 2001 (MO 98-2001)
Revised May 26, 2006 (MO 143-2006)
Revised March 26, 2009 (MO 070-2009)
Revised August 3, 2012 (MO 186-2012)
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Policy Statement

This policy ensures that the new ideas, discoveries and technologies arising from research conducted as a part of the educational process are used in the best interest of The Texas A&M University System (system), its members and the public it serves.

Reason for Policy

This policy addresses the ownership and management of intellectual and tangible research property.

Procedures and Responsibilities

1. GENERAL POLICY STATEMENTS

1.1 Introduction

The system is committed to teaching, inquiry-driven learning and the research associated with it, and public service. Research is one of the most important and rewarding aspects of the educational process, regularly leading to the development of new ideas, discoveries and technologies with the potential to benefit the public at large.

This policy is based on three fundamental principles: enhancing academic freedom, providing a clear pathway for pursuing technology commercialization and protecting all interested parties. To that end, the purposes of this policy are to:

- (a) ensure that the commercial development of research results enhances the system's education, research and public service missions;
- (b) protect the academic freedom of faculty with respect to the publication of their research findings;

- (c) foster an entrepreneurial environment through incentives and protections that encourages the creation, discovery, development and rapid transfer of new knowledge for the public benefit;
- (d) educate and assist faculty, staff and others in the use of the intellectual property process with respect to their discoveries and inventions; and
- (e) establish the principles for determining and protecting the interests of the system, creator, and sponsor with respect to discoveries and inventions created by faculty, staff and others in a manner that is equitable to all parties.

The Office of Technology Commercialization (OTC) was created in December 2005 to facilitate technology transfer for the system. It is the mission of the OTC to encourage broad practical application of system research for public benefit; to encourage and assist those associated with the system in the protection, licensing and commercialization of their discoveries; to ensure the equitable distribution of royalties and other monetary benefits resulting from the commercial application of intellectual property; and to see that commercialization activities benefit the research, education and outreach missions of the system into the future.

1.2 Applicability

This policy applies to all employees of the system and its members including, but not limited to, full and part-time faculty and staff and all persons using system facilities under the supervision of system personnel including visiting and adjunct faculty and researchers, undergraduate students, candidates for master's and doctoral degrees, post-doctoral students, and non-degree seeking graduate students, provided that visiting and adjunct faculty may be excluded in a written agreement negotiated by the system or its member in advance of employment or visitation. The ownership and rights to technology-mediated materials are governed by System Regulation *17.02.02, Technology-Mediated Instruction*.

2. OWNERSHIP OF INTELLECTUAL PROPERTY AND TANGIBLE RESEARCH PROPERTY (TRP)

Rights in intellectual property and TRP are as follows:

2.1 Creator or Third Party-owned

2.1.1 Intellectual property which is unrelated to an individual's employment responsibilities and developed on his or her own time without the support of the system or any of its members or significant use of their facilities as defined in Section 2.2.3 of this policy, is owned by the creator, subject to the rights of third parties.

2.1.2 The system recognizes and affirms the traditional academic freedom of its faculty and staff to publish pedagogical, scholarly or artistic works without restriction. In keeping with this philosophy, the system does not claim copyright to pedagogical, scholarly or artistic works, regardless of their form of expression, unless required by a funding or research contract. Such works

include, but are not limited to, faculty-prepared works such as textbooks, course materials and refereed literature, and copyrightable works of students created in the course of their education, such as dissertations, papers and journal articles. Furthermore, the system claims no ownership in popular nonfiction, novels, poems, musical compositions or other works of artistic imagination that do not constitute significant use of resources and/or are not works for hire as defined in Section 2.3.1 of this policy.

2.1.3 If an author retains title to copyright in teaching or course materials that are not works for hire, such as class notes, curriculum guides and laboratory notebooks, the system will retain a royalty-free right to use the materials for educational purposes.

2.1.4 Authors of copyrightable works that are not owned by the system, its members or another party such as a research sponsor, own the copyright in their works and are free to publish them, register the copyright and receive any revenues which may result.

2.2 System-owned

2.2.1 Except as otherwise expressly provided in this policy, intellectual property conceived or developed (1) as a result of activities related to an individual's employment responsibilities, and/or (2) with support from the system or any of its members in the form of administered funds, and/or (3) with significant use of resources as defined in Section 2.2.3 of this policy, shall be owned by and is hereby assigned to the system by such individuals.

2.2.2 Intellectual property that is conceived or developed in the course of or resulting from research supported by a grant or contract with the federal government (or an agency thereof) or a nonprofit or for-profit nongovernmental entity or by a private gift or grant to the system or its members, shall be determined in accordance with the terms of the sponsored grant or contract or, in the absence of such terms and to the extent consistent with applicable law, shall be owned by and is hereby assigned to the system by such individuals.

2.2.3 Intellectual property that is not institutional work or work for hire as defined in Section 2.3.1 of this policy, but is work that is developed with significant use of funds, space, hardware or facilities administered by a member, where use was essential and substantial rather than incidental, shall be owned by and is hereby assigned to the system by such individuals. The system will not construe the provision of salaries, offices or library facilities as constituting significant use of system resources, and therefore these works may be owned by the creator in accordance with Section 2.1.2.

2.3 Member-owned

2.3.1 Intellectual property that is either (1) created by an employee who was hired by a member specifically or required as part of his or her employment to produce intellectual property for institutional purposes, or (2) commissioned or

contracted by the member and assigned to the member in writing, will be owned by the member and is hereby assigned to the member on whose behalf the work was performed. For example, work assigned to programmers is institutional work or work for hire as defined by law, as is software developed for the member by staff working collaboratively. Brochures, training programs, CD-ROMs, videos and manuals developed by staff are other examples of institutional works or works for hire. The general expectation that faculty teach, research and publish does not by itself make intellectual property an institutional work or work for hire under this Section 2.3.1. The member is responsible for the commercialization of all institutional works or works for hire.

2.3.2 The member that first adopts and uses a trademark in connection with its goods or services will own and is hereby assigned that trademark.

2.4 Intellectual Property Involving Sponsored Research

2.4.1 Except as provided by Section 2.4.3, intellectual property conceived or developed in the course of or resulting from research supported by a grant or contract with governmental entities or a nonprofit or for-profit nongovernmental entity shall be owned by the system as provided in Section 2.2. The research sponsor should be offered an option to acquire license rights to develop and commercialize any intellectual property resulting from the project, subject to system policy and in accordance with the licensing guidelines in Section 4.3 of this policy.

2.4.2 The OTC, in coordination with the sponsored research offices of the members, shall ensure that all reporting requirements and other obligations to research sponsors regarding intellectual property including, but not limited to, obligations to the U.S. government under 37 CFR 401, are met. Intellectual property developed under sponsored research should be promptly disclosed to the OTC through the relevant member chief executive officer (CEO) or designee so all sponsor requirements and obligations can be met.

2.4.3 The acceptance of a contract, grant or agreement which does not require ownership of intellectual property by the system may be approved by the OTC or by a member CEO or designee with notification to the OTC if the benefit from the level of funding for proposed research and/or other consideration from the sponsor, licensee or other party outweighs the potential value of system ownership.

2.5 Intellectual Property Arising from Consulting Activities

The system recognizes that external faculty consulting can be an effective mechanism for professional development and for establishing good relationships with industry. Notwithstanding anything to the contrary in this policy, System Policy *31.05, External Employment and Expert Witness*, and regulations promulgated pursuant to such policy shall solely govern all intellectual property arising under consulting or external employment subject to any of the system's prior legal obligations to third parties.

2.6 Tangible Research Property

The system owns TRP related to an individual's employment responsibilities and/or developed with support from system-administered funds, facilities, equipment or personnel. Prior to the transfer, distribution and/or sale of system-owned TRP, the creator of the TRP must notify the OTC through his or her CEO or designee. The member and the OTC will review the developmental history of the TRP to assess any obligations and to determine the conditions of such proposed transfer, distribution or sale.

If the TRP is determined by the member and the OTC to have commercial value, it will be managed by the OTC as system intellectual property, including licensing and distribution of income from commercialization in accordance with Sections 4.2, 4.8.1 and 4.8.2.

If the member and the OTC determine that the TRP can be distributed or sold outside of the system for non-commercial research purposes with no financial consideration beyond the recovery of costs associated with shipping and handling, the member will manage and facilitate the transfer and distribution with assistance from the OTC as needed.

Any transfer, distribution or sale of TRP for commercial purposes must include a written agreement between the system and the recipient of the TRP, and any transfer or distribution of TRP for non-commercial purposes must include a written agreement between the member and the recipient of the TRP.

2.7 Multiple Creators

In the event of multiple creators, the creators will agree between or among themselves as to their relative contributions and how they will share any benefits accruing to the creators consistent with the terms of this policy. Final determination of each creator's share shall be made only upon receipt by the OTC of a signed agreement between or among the creators. In the event that the creators cannot agree upon an appropriate sharing arrangement as evidenced by a clear and unequivocal written agreement within three months of the submission of a completed invention disclosure form, that portion of income to which the creators are entitled under Section 4.8 of this policy will be distributed amongst the creators as the member CEO may deem appropriate under the circumstances. Such a decision shall be binding on the creators.

2.8 Joint Employment

In the event that a creator is a joint employee of two or more members or in the event that multiple creators represent two or more members, the member CEOs will agree as to the relative contribution of each member and how the members will share any benefits accruing to the members, considering such factors as annualized FTE by member and level of financial support by the member. If the member CEOs cannot agree upon the appropriate sharing arrangement, the chancellor or designee will make

the decision as deemed appropriate under the circumstances and such decision shall be binding on the members.

2.9 Offers of Intellectual Property

2.9.1 If an owner of intellectual property chooses to offer to the system intellectual property in which the system has no claim, the system may accept ownership of the intellectual property provided that (1) the owner makes the offer through the system or one of the members as if the intellectual property had been created within the system; (2) the owner agrees to all provisions (including distribution of income provisions) of this policy; (3) the owner warrants that he or she owns all right, title and interest to the intellectual property and that, to the best of his or her knowledge, the intellectual property does not infringe upon any existing intellectual property legal rights; and (4) the gift is accepted by the Board of Regents (board) pursuant to System Policy *21.05, Gifts, Donations, Grants and Endowments*.

2.9.2 The member CEOs shall advise the OTC of all such offers.

2.9.3 Should the board agree to accept the offer of intellectual property on behalf of the system, the owner will execute an assignment agreement transferring all right, title and interest in the intellectual property to the system, and acknowledging that the owner agrees to all provisions of this policy. In cases in which the owner has already expended funds toward obtaining patent or other legal protection for the intellectual property, the owner and the member may negotiate terms to allow recovery of legal and/or patent expenses from license fees and/or royalty income. Such an agreement would modify normal royalty-sharing provisions until such expenses are recovered by the party entitled to recovery of the expenses.

2.9.4 The board may accept charitable donations of intellectual property from governmental or private organizations in accordance with System Policy *21.05*. Upon the transfer of title in the intellectual property to the system, the intellectual property will be managed in accordance with this policy.

2.9.5 OTC, in consultation with the relevant member, will determine the distribution of income at the time of donation.

2.10 Software Ownership

Except as otherwise stated in this policy, the system may assert ownership in software as an invention and/or as a copyrightable work consistent with the other provisions of this policy.

3. EVALUATION AND PROTECTION OF INTELLECTUAL PROPERTY

3.1 Responsibility

The OTC is responsible for administering the system's rights and obligations, evaluating the commercial potential, determining inventorship, obtaining the necessary legal protection and taking the required actions to maximize the benefits of any intellectual property to the public, the creator(s), the system and its members. The OTC will also advise the creator(s) and the members on the process and best practices of protecting and commercializing intellectual property.

3.2 Disclosure

Individuals subject to this policy are required to promptly disclose to the OTC, through their CEO, all inventions, copyrightable work and tangible research property in which the system has an ownership interest under the provisions of Section 2 of this policy or for which disclosure is required by contract or law. Prompt disclosure is especially important for inventions conceived and/or made with federal or state agency funding so that the system may meet its legal obligations under such funding agreements.

Questions about whether an idea or discovery constitutes an invention, and is therefore patentable, can be complex. Any publication or verbal disclosure that describes a patentable invention prior to filing for patent protection may entirely preclude patenting in foreign countries and may also preclude protection in the United States unless a patent is filed within one year of publication. In recognition of this complexity, individuals covered by this policy are encouraged to disclose as soon as possible after the conception of the invention or seek guidance from a technology licensing professional at the OTC as soon as questions arise as to what is patentable and what must be disclosed to the OTC.

Disclosure shall be made in a form prescribed by and available from the OTC, include a full and complete description of the discovery or development, and identify all contributing participants. Disclosure will initiate the evaluation process. Disclosure forms are available on the OTC website.

3.3 Disclosure Evaluation Process

Upon receipt of a completed disclosure form, the OTC will conduct a review of the disclosure to determine the rights and obligations of all parties concerned and the commercial significance of the discovery, and will evaluate patentability issues. The first step in this process is typically a meeting with the creator(s) to better understand the disclosure's scientific and commercial merit and, if necessary, devise strategies for protection, development and commercialization. It is the obligation of the creator(s) to make available to the OTC additional information as needed in all stages of this process.

The OTC will inform the creator of the outcome of its review regarding rights and obligations as soon as practical, but no later than 90 calendar days from receipt of a complete disclosure in the case of inventions and tangible research property and no later than 60 days in the case of works subject to copyright.

Members are encouraged to review disclosures for scientific and commercial merit and share the results with the OTC to assist in the management of intellectual property owned by the system.

3.4 Assignment of Rights

All persons subject to this policy shall, upon request by the chancellor, the CEO or designee of the respective member, or the OTC, execute an assignment agreement available through the OTC to set forth effectively the ownership and rights to intellectual property of the system or member. Such written assignment is to confirm, in a specific instance, the allocation and present assignment of intellectual property rights mandated by this policy and shall not be construed as making the present assignment of rights in this policy conditional upon the execution of such written agreement.

3.5 Protection of Intellectual Property

3.5.1 The system will not generally seek protection for innovations that the OTC determines are not commercially attractive even if the intellectual property has intellectual merit, unless required by the sponsor or the member CEO, in which case the sponsor or the member shall reimburse the OTC for all related costs associated with protecting the intellectual property. The associate vice chancellor for commercialization (AVCC) or designee, through the vice chancellor for federal and state relations of the system (VCFSR), shall notify the relevant member CEO of his/her decision; if the decision is not to seek protection, the CEO or designee shall notify the OTC if the member requires the OTC to seek protection.

3.5.2 The OTC may fund all of the costs associated with the protection of intellectual property subject to ownership by the system or it may request funding at any time from the member originating the intellectual property. Unless the member is requiring protection of the intellectual property, the decision whether to provide such funding shall be at the discretion of the member CEO or designee. In either case, costs associated with the protection of the intellectual property will be recovered for the funding party before distributing royalties, license fees or sale proceeds as outlined in Section 4.8.

4. COMMERCIAL DEVELOPMENT

4.1 Creator Assistance

With few exceptions, the involvement of the creator(s) in the commercialization process is critical to success. The subject matter expertise, industry contacts and ongoing research of the creator(s) often facilitate commercialization. Successful commercialization requires that the OTC, member and the creator(s) all work in consultation with one another.

4.2 Licensing of Inventions and Copyright to Third Parties

Licensing intellectual property to third parties is the most common strategy for technology transfer. In the case of exclusive licensing, the third party is given the necessary rights to justify the often significant investment of time and resources in the commercial development of the technology. Given the breadth of research taking place within the system and the diversity of the intellectual property created, each license agreement is somewhat unique to the technology being licensed. However, there is a need to ensure consistency with respect to certain legal principles in each agreement.

4.2.1 The OTC and the Office of General Counsel (OGC) shall cooperatively develop a model license agreement for licensing system intellectual property which shall include, as a minimum, the guidelines set forth below. The model agreement shall be submitted to all potential licensees for system intellectual property, and individuals involved in negotiation of license agreements shall endeavor to achieve utilization of the significant aspects of the model agreement for all licenses of system intellectual property under the administration of the OTC. Any exceptions to the model agreement, other than special terms set out in a member-approved sponsored research agreement, must be approved by the VCFSR or designee and the OGC.

4.2.2 In the case of member-owned intellectual property, the licensing guidelines in Section 4.3 do not apply. The member has the primary responsibility and authority, with assistance from the OGC, for negotiating with third parties having an interest in using, developing or otherwise commercializing intellectual property resulting from institutional works or works for hire and trademarks. The member CEO or designee may also request that the OTC conduct the commercialization of certain intellectual property resulting from institutional works or works for hire.

4.3 Licensing Guidelines

The following guidelines are applicable to license agreements with private entities including those formed primarily for the purpose of developing and/or commercializing system-owned intellectual property. The VCFSR or designee may approve exceptions to these guidelines from time to time.

- (a) No entity shall be granted the exclusive right to the development and/or commercialization of all intellectual property created at a member. Agreements should grant rights only under specified projects.
- (b) If an entity is granted the exclusive rights with respect to a particular invention, product, process, utility, methodology or other item of intellectual property, the agreement should provide that such rights will revert to the system in the event the entity fails to develop and commercialize the property within a specified period of time that is appropriate to the particular circumstances as determined by the OTC.
- (c) An entity that is granted exclusive rights to develop or commercialize intellectual property that is patentable should be required to reimburse or bear all expenses incurred by the system in obtaining the licensed patent(s).

- (d) The system, the member and the employees of each should be protected and indemnified from all liability arising from the development, marketing or use of the particular intellectual property.
- (e) The OTC will work with the creator to ensure that the licensing process does not restrict publication rights of the creator.
- (f) Commitments should not be made for future inventions even when improvements are expected. The VCFSR or designee may make exceptions occasionally as appropriate including, without limitation, to handle subordinate patents and well-defined derivative works for software.

License agreements shall contain such other provisions as may be determined by the OTC and the OGC to be in the best interest of the system.

4.4 Licensing of System-owned Intellectual Property to Creators

Individuals subject to this policy may also request a license to commercially develop system-owned intellectual property they conceived where such licensing would best achieve the transfer of technology, is consistent with system obligations to third parties, does not involve a conflict of interest and follows the licensing guidelines set forth above. For additional information on conflicts of interest, see System Policies *07.01, Ethics*, and *07.03, Conflicts of Interest, Dual Office Holding and Political Activities*, System Regulation *31.05.01*, and Section 4.6 of this policy.

4.5 Waiver or Release of System Rights

Subject to any federal research or other sponsorship agreements and with appropriate approval from the sponsor, following notice and approval by the member, the OTC may waive or release the system's rights to specified intellectual property for or to the creator(s), clearing the way for the creator(s) to seek ownership. At any time, a creator(s) may request a waiver or release of system rights in writing to the OTC through the creator's member CEO or designee. The following provisions will apply to any waiver or release of system rights:

- 4.5.1 The system shall retain a perpetual, royalty-free license to use the intellectual property and any corresponding patents, copyrights, service marks or trademarks for research and educational purposes.
- 4.5.2 In the case of significant use of resources as defined in Section 2.2.3 of this policy, the system may elect to receive a share, to be negotiated at the time of waiver or release of system rights, of proceeds generated from commercialization of the intellectual property after the creator recovers documented out-of-pocket costs for obtaining legal protection for the intellectual property. If there was not a significant use of resources, no such share of proceeds shall be sought. Use of significant resources will be resolved by the member CEO or designee.

4.5.3 In the case of a waiver or release of system rights to the creator, the creator will not receive a share of the proceeds received by the system in consideration of the waiver or release of the system's rights.

4.5.4 Creators receiving a waiver or release of system rights should review potential conflicts of interest with their department head. For additional information on conflicts of interest, see System Policies *07.01* and *07.03* and System Regulations *31.05.01* and *15.01.03*, *Conflict of Interest in the Design, Conduct and Reporting of Sponsored Research and Educational Activities*.

4.6 Board of Regents Approval Requirement

In accordance with Texas Education Code, Section 51.912, a creator of intellectual property who wishes to participate as an employee, officer or member of the governing board or authority of a business entity that has agreements with the system relating to the research, development, licensing or exploitation of the creator's intellectual property, must obtain approval from the board. See also System Regulation *31.05.01* for additional information.

4.7 Tangible Research Property

Commercial distribution of system-owned tangible research property will be managed by the OTC. The OTC shall ensure that the TRP distribution agreement contains provisions which address proper use, limits on creator's and member's liability for the TRP or products derived therefrom and other necessary terms. Sharing of any income resulting from the distribution of TRP will be made in accordance with Sections 4.8.1 and 4.8.2 of this policy.

4.8 Distribution of Royalties, License Fees and Sale Proceeds from Licensing

Royalties, license fees and sale proceeds received by the system from the licensing or sale of intellectual property will be distributed at the end of each quarter in which they were collected.

The chancellor, subject to approval by the board, may adjust the allocation of royalties, license fees and sale proceeds set forth herein.

4.8.1 Distribution of Royalties, License Fees and Sale Proceeds from Licensing or Sale of Patentable Inventions, Plant Varieties and TRP, Licensed or Sold Before June 1, 2006

Step 1 – Deduct from gross royalties, license fees or sale proceeds the cost of obtaining legal protection for the intellectual property (when such costs are not already paid in full by another source at the time of distribution) and payments to any third parties to arrive at net income.

Step 2 – Distribute forty-two and one-half percent (42.5%) of net income to the creator(s) as personal income.

Step 3 – Distribute thirty-nine and one-half percent (39.5%) of net income to the member supporting the research leading to the disclosure.

Step 4 – Distribute eighteen percent (18%) of net income to the OTC. This deduction is directed toward covering the administrative costs associated with evaluating, protecting, marketing and managing intellectual property.

4.8.2 Distribution of Royalties, License Fees and Sale Proceeds from Licensing or Sale of Patentable Inventions, Plant Varieties and TRP, Licensed or Sold On or After June 1, 2006

Step 1 – Deduct from gross royalties, license fees or sale proceeds the cost of obtaining legal protection for the intellectual property (when such costs are not already paid in full by another source at the time of distribution) and payments to any third parties to arrive at net income.

Step 2 – Distribute thirty-seven and one-half percent (37.5%) of net income to the creator(s) as personal income.

Step 3 – Distribute thirty-seven and one-half percent (37.5%) of net income to the member supporting the research leading to the disclosure.

Step 4 – Distribute twenty-five percent (25%) of net income to the OTC. This deduction is directed toward covering the administrative costs associated with evaluating, protecting, marketing and managing intellectual property.

4.8.3 Distribution of Royalties, License Fees and Sale Proceeds from Copyrightable Works Licensed or Sold On or After June 1, 2006

Step 1 – Deduct from gross royalties, license fees or sale proceeds the cost of obtaining legal protection for the intellectual property (when such costs are not already paid in full by another source at the time of distribution) and payments to any third parties to arrive at net income.

Step 2 – Distribute forty percent (40%) of net income to the creator(s) as personal income.

Step 3 – Distribute forty percent (40%) of net income to the member supporting the research leading to the disclosure.

Step 4 – Distribute twenty percent (20%) of net income to the OTC. This deduction is directed toward covering the administrative costs associated with evaluating, protecting, marketing and managing intellectual property.

4.8.4 In those cases in which the OTC and the member originating the copyrightable work agree that the member will conduct the commercialization, the distribution of royalties, license fees and sale proceeds shall be determined by the member.

4.8.5 Notwithstanding the provisions of Sections 4.8.1, 4.8.2, 4.8.3 and 4.8.4, the member shall be entitled to all income from the distribution or

commercialization of institutional works, works for hire and trademarks as defined in Section 2.3.1 of this policy.

4.9 Equity as a Consideration in Licensing

The OTC may negotiate an equity interest in lieu of or in addition to royalty and/or other monetary consideration as a part of an agreement relating to rights in intellectual property owned by the system. The system is not restricted in the percentage of equity it may take in a company as a part of an agreement relating to rights in intellectual property owned by the system.

The distribution of income from equity received as consideration for a license agreement will be distributed in the same manner as royalties and license fees as described in Section 4.8 of this policy. The system may, in its discretion, distribute shares of equity when appropriate. Should the system elect not to distribute shares, it shall control the disposition of equity at its sole discretion. This may include agreeing to receive the equity interest under terms that restrict its ability to sell, distribute or otherwise deal with the equity interests.

As stated in Texas Education Code, Section 153.007, and except as otherwise provided by law, the board, the system, members and employees of the system do not owe a fiduciary duty to any person claiming an interest in consideration received by the system or a member in exchange for technology.

Individuals subject to this policy should also refer to System Regulation *31.05.01* regarding equity ownership.

4.10 Revenue from Enforcement of Intellectual Property Rights

If the system receives revenue from third parties as a result of settlement or litigation related to the enforcement of system rights in intellectual property, such revenue will be first used to reimburse the system (or the sponsor or licensee, if appropriate) for expenses related to such actions. The creator(s) and the member are entitled to the recovery of lost royalties from the remaining net revenue according to the distribution formula outlined in Section 4.8 of this policy.

4.11 Research Support as Consideration in Licensing

If the system accepts research support in the form of a sponsored research agreement or unrestricted grant as part of an agreement relating to rights in intellectual property owned by the system in addition to or in lieu of royalties, license fees, equity and/or other monetary consideration, the creator shall have no entitlement to receive a share of the research support or grant as personal income.

4.12 Distribution of Income from Intellectual Property in Case of Death

In the case of death or incapacitation of a creator, royalty distributions, including any equity to which the creator was entitled, shall be made pursuant to the Texas Probate Code and the United States Internal Revenue Code.

5. FORMATION AND INVESTMENT IN OR ASSISTANCE PROVIDED TO VENTURES DEVELOPING OR COMMERCIALIZING SYSTEM INTELLECTUAL PROPERTY OR ESTABLISHED TO ASSIST INDIVIDUALS COVERED BY THIS POLICY TO COMMERCIALIZE INTELLECTUAL PROPERTY

5.1 General

- 5.1.1 Following disclosure, evaluation and protection of intellectual property, the OTC may elect to form and operate a business entity or assist with the formation and operation of a business entity, or enter into a new venture with another party for the purpose of developing and/or commercializing system intellectual property.
- 5.1.2 The commercialization process should include the means by which the system and members will be able to receive a return on investment of system and member resources. If monetary or non-monetary support is exchanged in part or in whole for equity, the exchange of equity must comply with this policy and Texas Education Code, Chapter 153. Equity received by the system or member in exchange for monetary or non-monetary support will not be subject to distribution of funds in Section 4.8.
- 5.1.3 Creators of intellectual property covered by this policy or members from which the intellectual property originated shall be offered equity in a company formed or business venture entered into by the OTC or any of its centers based on their level of involvement in the formation and ongoing operations of the company or venture. Offers of equity in OTC ventures will be recommended by the AVCC through the VCFSR and approved by the chancellor.

5.2 Company Formation by the OTC

- 5.2.1 The OTC is responsible for determining the organizational structure and the financing strategy, executing a license agreement subject to the guidelines set forth in this policy between the company and the system, and other activities related to company formation, such as selection of a CEO, other company officers and members of the governing board or authority. The system will obligate the company to comply with applicable laws, regulations and system requirements.
- 5.2.2 Outside counsel services may be contracted to assist with the formation of a company or to review and prepare documents associated with a venture whose purpose is to develop and commercialize system intellectual property with the consent of the VCFSR or designee and the OGC and, as required by law, the attorney general of the state of Texas. Outside counsel contracts are subject to System Regulation *09.04.01, Legal Counsel and Attorney General Opinion Requests*.
- 5.2.3 The OTC and the OGC shall review all shareholder or member agreements for the protection of the system's interest in a company subject to this policy.

- 5.2.4 A license agreement will be executed with the company following the licensing guidelines set forth in Section 4.3 of this policy.
- 5.2.5 The system is not restricted in the percentage of equity it may own in an entity formed for the purpose of developing and/or commercializing system intellectual property.

5.3 Due Diligence Process

Before the OTC elects to form a business venture or assist with the formation of a business venture, or enter into a business venture with an existing company for the purpose of developing and/or commercializing system intellectual property, the OTC will perform due diligence on the proposed business venture. OTC shall determine the extent of the due diligence to be performed which will depend on the extent to which system resources are involved.

- 5.3.1 To guide the consideration of OTC business ventures, the OTC will be responsible for the development and maintenance of the minimum requirements for OTC business ventures, subject to approval by the VCFSR and chancellor. Business ventures may not be considered unless they meet the minimum requirements.
- 5.3.2 The OTC is responsible for submitting a commercialization plan for review including (1) an analysis of the potential business venture's business model and financial plan; (2) its probability of succeeding in commercialization; (3) a plan for addressing conflicts of interest; and (4) potential return to the system in terms of investment return or increased research revenue. The AVCC, subject to approval of the VCFSR and chancellor, will have authority for approving the commercialization plan, consistent with the results of the review and analysis, and the responsibility for setting milestones for the business venture.
- 5.3.3 Due diligence documents for OTC business ventures will include (1) a review of the manner in which conflicts of interest will be addressed; (2) background checks on the CEO and other corporate officers; (3) evaluation of the competence of management to execute the business plan; (4) evaluation of the financial risk and reward profile of the company and (5) a review of legal risks by the OGC, including a review of the commercialization plan.
- 5.3.4 The OTC is responsible for reviewing the business venture's progress every six months. If the venture receives a financial investment from the OTC, the initial review shall be conducted in three months. Review will focus on compliance with the commercialization plan and the achievement of established milestones. Results of all reviews will be provided to the VCFSR, chancellor and the chief financial officer and treasurer.
- 5.3.5 OTC business ventures must have an exit strategy which indicates how any financial interest will be returned to investors. In the event a business venture distributes publicly traded securities to the system, securities will be

immediately transferred to the Office of the Chief Financial Officer and Treasurer for management.

5.3.6 To ensure that potential and actual conflicts of interest are promptly identified and resolved, the OTC shall provide to the OGC the information required by this subsection.

(a) The OTC shall obtain annual financial disclosures from all individuals who serve, at the request of the system, as a member of the governing board of business entities that have agreements with the system relating to the research, development, licensing or exploitation of intellectual property in which the system has an ownership interest.

(b) The OTC shall promptly disclose to the OGC information revealing the existence of a potential or actual conflict of interest regarding OTC employees or the individuals listed in a) of this subsection. The OGC, in consultation with the Office of the Chief Financial Officer and Treasurer and the System Internal Audit Department, shall review information provided by the OTC in this subsection and shall report to the board, the chancellor, and the OTC the status of its review and recommendations for resolving any potential or actual conflicts. The OGC's recommendations shall be implemented to the satisfaction of the board chairman and the chancellor.

5.4 Assistance Programs Offered by the OTC

As described by the Texas Education Code, Section 153.004, the OTC may operate programs to provide assistance to individual persons and companies in commercializing technology owned wholly or in part by the system or in which the system has an interest, including individuals covered by this policy. Assistance may include providing monetary support or non-monetary support, including the use of premises, computers, computer software, telecommunications terminal equipment, office equipment and supplies, machinery, custodial services, utilities or other services that are customarily treated as overhead expenses.

5.5 Technology Commercialization Funds

5.5.1 The chancellor may establish one or more technology commercialization funds at the system level to aid in the establishment, maintenance and operation of the OTC or to aid in the discovery, development, protection or commercialization of technology. The fund or funds may accept state appropriations, gifts, grants, contracts and donations. Members and their affiliates, at the discretion of the CEO or designee, may contribute to the fund or funds. All gifts, grants and donations from individuals and corporations outside of the system are subject to System Policy 21.05. The OTC may solicit gifts to the system for the purpose of supporting commercialization efforts. The chancellor may delegate to the VCFSR or, with the prior approval of the board, may delegate to another employee of the System Offices, management oversight responsibility of the fund or funds.

- 5.5.2 Any additional financial, intellectual, administrative and/or infrastructure support for the OTC endeavors related to company formation may come from members or affiliated entities, at the discretion of each respective CEO or designee.
- 5.5.3 As provided in the Texas Education Code, each board member has the legal responsibilities of a fiduciary in the management of funds under the control of the system on behalf of the system.
- 5.5.4 Investment of fund assets into any single business venture will be limited to the greater of \$250,000 or ten percent (10%) of a fund's total value consistent with System Policy 22.02, *System Investment*.

6. CONFLICTS OF INTEREST

In all activities addressed by this policy, system employees are responsible for avoiding (or, if applicable, disclosing/managing) potential and actual conflicts of interest and conflicts of commitment in compliance with federal and state requirements and applicable system policies and regulations, such as System Policies 07.01; 07.03; 07.04, *Benefits, Gifts and Honoraria*; 31.05; 33.03, *Nepotism*; 33.04, *Use of System Resources*; and System Regulations 15.01.03; 31.05.01; and 33.04.01, *Use of System Resources for External Employment*. The reporting requirements listed in Section 7.4 are in addition to the requirements of System Policy 07.03.

7. ADMINISTRATION

7.1 Operation and Support of the OTC

The OTC was established by the board under Texas Education Code, Chapter 153, to manage, transfer, market and otherwise commercialize technology owned by the system or in which it owns an interest. The board authorizes the system, through the OTC and/or through any other center created by the board for the commercialization of technology, to undertake all of the activities described in Sections 153.004 and 153.006 of the Texas Education Code.

7.2 Delegation of Authority

Chapter 153 of the Texas Education Code authorizes the system to engage in technology development and transfer activities under authority provided to the board and other state and federal law.

- 7.2.1 The board delegates to the chancellor responsibility for the management of intellectual property subject to ownership by the system to include the authority to negotiate and execute, on behalf of the system, legal documents relating to the system's rights in intellectual property, including, but not limited to, license agreements, assignments of intellectual property, letter agreements, option agreements, inter-institutional agreements, commercial material transfer agreements, shareholder agreements, corporate agreements, applications, declarations, affidavits, powers of attorney, disclaimers, non-disclosure

agreements and other such documents related to patents, copyrights and trademarks and the formation and operation of companies for the commercialization of system technologies including, without limitation, the authority to do all things necessary to effectuate the operation of such companies.

7.2.2 The chancellor may delegate to the VCFSR or designee the authority to negotiate and execute, on behalf of the system, legal documents relating to the system's rights in intellectual property including, but not limited to, license agreements, assignments of intellectual property, letter agreements, option agreements, inter-institutional agreements, commercial material transfer agreements, shareholder agreements, corporate agreements, applications, declarations, affidavits, powers of attorney, disclaimers, non-disclosure agreements and other such documents related to patents, copyrights and trademarks and the formation and operation of companies for the commercialization of system technologies. Furthermore, the chancellor may delegate to the VCFSR or designee the authority to do all things necessary to effectuate the operation of companies that the system forms or in which the system has an equity interest.

7.2.3 The AVCC is responsible for the day-to-day operations of the OTC and reports directly to the VCFSR. The AVCC shall file annually with the chancellor an Annual Financial Disclosure Report as required for vice chancellors in System Policy *07.03*.

7.2.4 The chancellor or designee is authorized to serve, in his or her official capacity, on the governing board or as an officer of entities formed for the purpose of development and commercialization of technology owned by the system that have met the requirements of this policy. At the next regular meeting of the board, following the date on which the chancellor or designee becomes a member of the governing board, the AVCC through the VCFSR will provide information concerning the company and the system's involvement to the board with a request for authorization for the chancellor or designee to continue serving or serve as a member of the governing board.

7.3 Intellectual Property Committees

The Intellectual Property Oversight Committee (Oversight Committee) is chaired by the chancellor and comprised of the VCFSR, the AVCC, the CEO from each member principally involved in research and commercialization as determined by the chancellor, and one faculty representative who is the chair of the Intellectual Property Constituent Committee (Constituent Committee). The Oversight Committee shall advise the chancellor on matters related to intellectual property and may be expanded by the chancellor to include additional members.

The Constituent Committee is chaired by a faculty representative and comprised of no fewer than three faculty or research representatives, three deans and three administrators within the system. This committee shall review quarterly reports

provided by the OTC and make recommendations on policies and other matters relating to intellectual property affecting faculty to the Oversight Committee.

7.4 Reporting Requirements

The chancellor shall ensure that the following reports are prepared and submitted:

- 7.4.1 Annually, within 60 days of the end of each fiscal year, the AVCC shall prepare and route through the VCFSR a report listing the titles and a brief description of each disclosure received under Section 3.2 of this policy since the last report for the board, chancellor and the participating member CEO.
- 7.4.2 The AVCC shall prepare a semi-annual report on all license agreements and commercialization activities involving system intellectual property. The AVCC through the VCFSR shall present the semi-annual report to the Oversight and Constituent Committees. For third party license agreements, the report should include an overview of each licensee's compliance with license terms and resulting gains to the system through financial return or increased research funding.
- 7.4.3 In compliance with Section 51.912 of the Texas Education Code, the board must file a report identifying (a) all employees who conceive, create, discover, invent or develop intellectual property and have an equity interest in or serve as an employee, officer or member of the governing board of business entities that have agreements with the system relating to the research, development, licensing or exploitation of intellectual property for which they are the creator and in which the system has an ownership interest, and (b) all individuals who serve, at the request of the system, as a member of the governing board of business entities that have agreements with the system relating to the research, development, licensing or exploitation of intellectual property in which the system has an ownership interest. The report will be filed in accordance with the requirements of Section 51.005 of the Texas Education Code.
- 7.4.4 The AVCC through the VCFSR will submit to the board's Committee on Finance and the Oversight and Constituent Committees an annual report on technology commercialization investments within 60 days of the end of each fiscal year. The investment report will include detailed investment holdings, transaction reports, valuation of holdings and material events that will affect the value of the investments since the last report.

7.5 Dispute Resolution

Disputes related to this policy can be made in writing to the chancellor who will submit the dispute to a panel, chaired by the faculty representative on the Oversight Committee and composed of no less than three disinterested members of the Oversight Committee. This panel may be expanded by the chancellor as needed. Once the panel has conducted its review of the dispute, it will forward its recommendation to the full Oversight Committee for consideration. The chancellor will be the final arbiter in

matters relating to this policy. The OGC will provide legal advice to the panel and to the Oversight Committee.

Related Statutes, Policies, or Requirements

[37 CFR 401](#)

[Tex. Educ. Code §51.004](#)

[Tex. Educ. Code §51.005](#)

[Tex. Educ. Code §51.912](#)

[Tex. Educ. Code Ch. 153](#)

[Office of Technology Commercialization Disclosure Form](#)

[System Policy 07.01, Ethics](#)

[System Policy 07.03, Conflicts of Interest, Dual Office Holding and Political Activities](#)

[System Policy 07.04, Benefits, Gifts and Honoraria](#)

[System Regulation 09.04.01, Legal Counsel and Attorney General Opinion Requests](#)

[System Regulation 15.01.03, Financial Conflicts of Interest in Sponsored Research](#)

[System Regulation 17.02.02, Technology-Mediated Instruction](#)

[System Policy 21.05, Gifts, Donations, Grants and Endowments](#)

[System Policy 22.02 System Investment](#)

[System Policy 31.05, External Employment and Expert Witness](#)

[System Regulation 31.05.01, Faculty Consulting and External Professional Employment](#)

[System Policy 33.03, Nepotism](#)

[System Policy 33.04, Use of System Resources](#)

[System Regulation 33.04.01, Use of System Resources for External Employment](#)

The May 2006 version of this policy superseded:

System Policy 17.02, Patents

System Regulation 17.02.01, Management of Intellectual Property

Definitions

Copyrightable Work – An original work of authorship which has been fixed in any tangible medium of expression from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, such as books, journals, software, computer programs, musical works, dramatic works, videos, multimedia products, sound recordings, pictorial and graphical works. A copyrightable work may be the product of a single author or a group of authors who have collaborated on a project.

Creator – A person who invents, authors or otherwise creates intellectual property.

Intellectual Property – Collectively, all forms of intellectual property including but not limited to issued patents, patentable inventions, copyrightable works, trademarks, mask works, and trade secrets.

Invention – Any art or process (*way of doing or making things*), machine, manufacture, design, or composition of matter, or any new and useful improvement thereof, or any variety of plant, which is or may be patentable under the patent laws of the United States.

Patent – A property right granted by a government to an inventor to exclude others from making, using, offering for sale, or selling the invention in a territory, or importing the invention into a territory, for a limited time in exchange for public disclosure of the invention when the patent is granted.

Tangible Research Property (TRP) – Tangible items produced in the course of system research that can be physically distributed, including such items as biological materials, engineering drawings, integrated circuit chips, software, computer databases, prototype devices, circuit diagrams, and equipment. Individual items of tangible research property may be associated with one or more intangible properties, such as inventions, copyrightable works and trademarks.

Trademark (including Service Mark) – A distinctive word, design or graphic symbol, or combination word and design, that distinguishes and identifies the goods and services of one party from those of another, such as names or symbols used in conjunction with plant varieties or computer programs.

Member Rule Requirements

A rule is not required to supplement this policy.

Contact Office

Texas A&M System Technology Commercialization
(979) 847-8682

