ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE, *ex rel.* ESPN, INC.,	:	Case No. 2011-1177
Petitioner,	:	
v.	:	Original Action in Mandamus
THE OHIO STATE UNIVERSITY,	:	
Respondent.	:	

MEMORANDUM OF ESPN, INC. IN OPPOSITION TO THE MOTION OF THE OHIO STATE UNIVERSITY FOR REFERRAL TO MEDIATION AND STAY OF THE SCHEDULING ENTRY

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CLERK OF COURT
SUPREME COURT OF OHIO

This Court should deny the motion of the Ohio State University ("OSU") to refer this matter to mediation and to stay the scheduling entry. OSU's motion is not timely, nor would mediation be likely to resolve key issues underlying the litigation. Mediation would unnecessarily delay the progress of this case and continue the delay tactics that OSU has employed since ESPN first requested the records at issue.

1. The Request For Mediation is Untimely.

This case has been pending since July 11, 2011. OSU has not proposed mediation at any time prior to filing this motion. It is significant that OSU has allowed more than two months to pass before deciding that the case is appropriate for mediation. It is even more significant that OSU waited until after this Court set a briefing schedule to seek mediation and a stay of the schedule. Mediation should not be used as a stalling tactic.

The Public Records Act (PRA) requires that a public body provide requested records "promptly."[1] OSU has been anything but prompt, and this request makes a bad situation worse. Similarly, ESPN needs to provide timely information to viewers. OSU should not be permitted to interfere with ESPN's mission to an even greater extent.

2. The "Cooperation" Described by OSU Consists Largely of ESPN's Efforts to Obtain OSU's Compliance With the Public Records Act.

In its original response to two of ESPN's record requests here, OSU's sole objection was that the requests were "overly broad." In subsequent correspondence, OSU continued to assert this point, and added that "the request is inconsistent with the manner in which our records are organized." But OSU has to this day not complied with R.C. 149(B)(2), which provides in pertinent part:

[1] R.C. 149.43(B)(1).

> If a requester makes an ambiguous or overly broad request ... the public office ... may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

While OSU has attempted to shift the burden to ESPN to somehow "refine" its request, OSU has never informed ESPN about the manner in which it maintains its records, as it is statutorily obligated to do. This matter should not be referred to mediation, nor stayed, simply so that OSU can finally comply with the law.

Moreover, the nature of OSU's overbreadth objection is significant. OSU isn't contending that records subject to this objection are not public records. Thus, by producing responsive records prior to a decision on this case, OSU is not waiving any defense, as it could be if the dispute was whether the documents were public records at all. Even if OSU ultimately prevails on its overbreadth claim, it would still need to produce responsive records that are readily available. This process needs to take place by operation of law, not by a mediated agreement.

3. Mediation Will Not Resolve the Action.

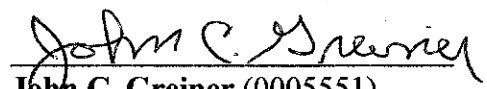
While this case presents side issues of overbreadth and the manner in which OSU maintains its records, the overriding issue is whether the records are covered by FERPA. It is clear that OSU and ESPN disagree on this point, and the correspondence attached to OSU's motion underscores this fact. (See Exhibit F to OSU's motion.)

Given the binary nature of this issue – either FERPA applies or it doesn't; either ESPN is entitled to unredacted records or it isn't – it is not reasonable to believe that the parties will find common ground on this point in a mediation session. Given that mediation will not resolve the overriding dispute, there is no reason to delay the proceedings to engage in a fruitless exercise.

CONCLUSION

For all of the reasons stated above, ESPN respectfully requests that this Court deny OSU's motion in its entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing ***Memorandum of ESPN, Inc. in Opposition to the Motion of The Ohio State University for Referral to Mediation and Stay of the Scheduling Order*** was served via regular U.S. Mail, postage prepaid, this 30th day of September, 2011, upon the following:

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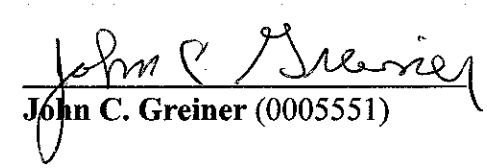

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