

REBUTTAL OF TODD MCNAIR

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TABLE OF CONTENTS

I.	Introduction.....	Page 1
II.	Issues Addressed on Rebuttal	Page 4
	A. The COI Based Its Credibility Determination On The Erroneous Conclusion That McNair Denied That ██████ Had Agreed To Be Represented By Lake And That ██████ Had Accepted Benefits From Lake.....	Page 4
	B. The COI Has Not Rebutted McNair's Claim That The COI Based McNair's Unethical Conduct Finding On False And Factually Incorrect Statements	Page 8
	1. The COI Improperly Resolved Conflicts And Discrepancies In Lake's Testimony Against McNair	Page 9
	2. The COI Made A Phantom Finding Against McNair Without Giving Him Notice And An Opportunity To Be Heard.....	Page 10
	3. The COI Unfairly Drew Negative Inferences Against McNair From Immaterial Facts.....	Page 12
	C. The COI's Response Contains Arguments Not Responsive To McNair's Appeal	Page 15
	D. The COI's Response To The Duff Report Appellate Recommendations Confirms That The IAC Should Strike The COI's New Rationales And Bases For Its Finding.....	Page 20
	E. Contrary To The COI's Claim, The COI Rejected Lake's Allegations About The Faulk Party Weekend.....	Page 21
	F. NCAA Enforcement Procedures Do Not Authorize The COI To Send Its Draft Infractions Report <i>Ex Parte</i> To The Enforcement Staff One Week Before The Public Release So The Staff May Correct Factual Errors	Page 23
	G. The COI Trivialized The Osburn Statement.....	Page 25
	H. The COI Continues To Assert Mutually Inconsistent And Contradictory Theories.....	Page 27
	I. McNair Did Not Invent Martin Bayless Or ██████████ As Alibi Witnesses	Page 28
	J. The COI Still Refuses To Acknowledge It Had No Basis To Find That McNair Never Started A Record Label	Page 311
III.	Conclusion	Page 33

EXHIBITS

Exhibit 1	September 11, 2006, Memorandum re: Reaction from the COI to Duff Report Appellate Recommendations.....	Page 20
Exhibit 2	Pages 3-9 of Senderoff Appeal and pages 22-25 of Senderoff Rebuttal.....	Page 24
Exhibit 3	January 5, 2010 Letter from Shepard Cooper to Todd McNair attaching procedures and other information for the COI hearing	Page 24

I. INTRODUCTION

The COI's response to McNair's appeal confirms that the COI's finding against McNair is clearly contrary to the evidence. Among other things, the COI based its finding on numerous improper factors. For example, the COI decided the case based on an erroneous understanding of McNair's defense. Inexplicably, the COI imputed to McNair USC's denial of the █████-Lake partnership and of allegations that Lake gave █████ money.

McNair was never asked to take a position on those allegations and he did not take a position. Nonetheless, the COI erroneously believed that the "primary thrust" of McNair's defense was that it was not credible that █████ would enter into a partnership with Lake. That was USC's position, but it was never part of McNair's defense. It is procedural error for the COI to base its decision on a defense that McNair did not present.

The COI also based its decision on other improper factors. The response claims it is "significant" and "telling" that Lake was never charged criminally for reporting false information, that █████ refused to cooperate with the investigation and that █████ settled his lawsuits with Michaels and Lake. Those events and transactions had nothing to do with McNair and it is procedural error for the COI to base its decision on immaterial facts.

The COI's response also shows that the COI made a finding against McNair that he knew before January 8, 2006, that Lake was giving benefits to █████. But McNair was not given notice and an opportunity to be heard. Specifically, the COI explained that it believed Lake's claim that McNair watched Lake get █████ friends hotel rooms and that █████ told Lake that McNair "knew about certain things." These allegations were not alleged in the Notice of Allegations and, therefore, McNair never provided a defense to these vague, unsubstantiated allegations. The

COI's response is the first time the COI informed McNair that it based its unethical finding on Lake's claims.

The response also confirms McNair's argument in his appeal that the COI based its adverse credibility determination on mutual inconsistent and contradictory findings. Specifically, the COI said it believed Lake's claim that McNair called him on the night of October 29, 2005, because McNair knew Lake and knew Lake was with ██████ that night. But the COI also found it is likely that McNair's friend, Faison Love, *introduced* Lake to McNair later that night. If McNair knew Lake and called him like the COI said, McNair would not have been *introduced* to Lake later that night. Thus, the COI denounced McNair's credibility based on inconsistent and contradictory findings.

The COI also attempted to use its response to expand and supplement its stated rationale for its finding against McNair. For example, the COI now claims for the first time that McNair's testimony about ██████ internship with Ornstein, ██████ 1996 Impala, ██████ parents' house on Apple Street and ██████ parents' attendance at away games demonstrates that McNair is not credible. These arguments are not responsive to the errors McNair raised in his appeal, they have nothing to do with the allegations brought against McNair and they are not included in the COI's rationale for McNair's finding in the Infractions Report. It is impermissible for the COI to attempt to use its response to expand and supplement its stated rationale for the finding on appeal.

Regarding its post-hearing *ex parte* communications with the enforcement staff, the COI claims there was nothing improper about the communications but it has not described the communications, provided copies of the communications or otherwise attempted to show that the

communications did not prejudice McNair. Regarding the NCAA's public statement endorsing the COI's Infractions Report before McNair had even started working on his appeal, the COI trivializes McNair's concern of prejudgment.

Perhaps most importantly, the COI did not rebut McNair's illustration that it based McNair's unethical conduct finding on factually incorrect statements. The COI said McNair's argument is "bogus," but it does not even challenge McNair's illustration showing the factually incorrect statements in red type. An unethical conduct based on factually incorrect statements must be set aside.

In summary, not only did the COI fail to refute the arguments in McNair's appeal, the response provided new and independent reasons to set aside the unethical conduct finding.

II. ISSUES ADDRESSED ON REBUTTAL

A. The COI Based Its Credibility Determination On The Erroneous Conclusion That McNair Denied That ██████ Had Agreed To Be Represented By Lake And That ██████ Had Accepted Benefits From Lake

The COI determined that Lake was more credible than McNair because despite overwhelming evidence to the contrary, McNair denied in his response and at the hearing that ██████ had agreed to be represented by Lake or had accepted benefits from Lake.

- "McNair assailed Lake's credibility denying that ██████ was ever 'in partnership' with or agreed to be represented by Lake and Michaels or their sports agency." COI Response at p. 6 (without a supporting citation to the record).
- "McNair argued . . . that the COI should reject Lake's statements about the benefits he provided ██████ and his family because he was not a credible witness." Id. (without a supporting citation to the record).
- "[A]s the infractions report details, the evidence conclusively demonstrates that despite his checkered past, Lake was telling the truth about this effort to launch a sports agency featuring ██████." Id.
- "The National Football League Players Association (NFLPA) Committee on Agent Regulation and Discipline also found 'overwhelming evidence' that Lake/Michaels were involved in a sports agency partnership with ██████." Id.
- "In criticizing the COI for attacking his 'successful defense,' McNair once again downplays the significance of the fact that Lake's story about his efforts to form an

agency that included giving money and benefits to █████ and his family was true." Id.
at p. 15 (without a supporting citation to the record).

Thus, part of the reason the COI decided McNair was not credible is because the COI believed McNair argued that there was no partnership between █████ and Lake. The COI also found McNair was not credible because despite overwhelming evidence, the COI believed McNair asked it to reject Lake's claims that Lake provided benefits to █████. In other words, the COI discounted McNair's credibility because it believed he advocated positions that were not credible.

However, there is a fundamental flaw with the COI's reasoning – McNair *never* denied that █████ had agreed to be represented by Lake or that █████ had accepted benefits from Lake.¹ Not in his two lengthy interviews with the enforcement staff, not in his response to the Notice of Allegation and not at the hearing. McNair never stated, represented or argued that █████ had not agreed to be represented by Lake or that █████ had not accepted benefits from Lake. Thus, the COI made credibility determinations based on an erroneous understanding of McNair's defense.

McNair was not named in the allegations concerning the agency agreement and impermissible benefits and, therefore, he did not respond to these allegations.² McNair was not asked to take a position on these allegations. Moreover, McNair had no knowledge whether there was an agency agreement or whether impermissible benefits had been provided.

¹ The COI did not include a single citation to the record supporting its claim that McNair denied that █████ had agreed to be represented by Lake or that █████ had accepted benefits from Lake.

² The only benefit McNair was alleged to have known about was the hotel room that Lake claimed that he provided to █████ in San Diego during the Faulk party weekend. See Allegation 1.b (1). McNair denied knowing that Lake had provided █████ with the hotel room, but McNair did not take a position on whether Lake had actually provided the room to █████. See McNair Response at pp. 1-5 to 1-12. The COI found only that █████ used the room in some fashion but rejected the allegation that █████ stayed overnight in the room (Infractions Report at p. 9), and most importantly, the COI rejected Lake's claim that McNair knew about the hotel room.

Those allegations were directed at USC. See Notice of Allegations at 1.a (1)-(14). Only USC responded to those allegations; not McNair. It is true that USC disputed some of the allegations, but McNair played no role in USC's decision in how to respond. USC and McNair had separate legal counsel and they submitted separate responses to the Notice of Allegations.

It is fundamentally unfair and procedural error for the COI to find that McNair is not credible because USC disputed whether ██████ was in partnership with Lake or had accepted benefits from Lake. There is no legislative authority or case precedent which would permit the COI to impute the position of an institution to an involved individual. To the contrary, NCAA enforcement procedures specifically permit an involved individual the right to separate legal counsel and the right to submit an independent response to a Notice of Allegations.

McNair took full advantage of those rights in this case and was very careful not to claim that there was no agency agreement or that ██████ had not accepted benefits from Lake. Nonetheless, the COI's response to McNair's appeal makes clear that the COI concluded incorrectly that the "*primary thrust*" of McNair's defense "was that it was totally incredible to believe that ██████ would ever enter into any sort of partnership with an inexperienced, ex-con like Lake." COI Response at p. 6 (emphasis added). Not only was that not the "primary thrust" of McNair's defense, it was never a position that McNair advocated. The COI committed prejudicial procedural error because the COI judged McNair based on a defense that he never presented. This constitutes a new and independent basis for setting aside Finding B-1-b.

Moreover, the fact that Lake and ██████ entered into an agency agreement or that ██████ accepted benefits from Lake does not prove that Lake called McNair on January 8, 2006, and told McNair about it. The only issue in McNair's appeal is whether McNair's unethical conduct finding is

clearly contrary to the evidence; not whether there was an agency agreement or Lake provided benefits to [REDACTED]. The COI can talk all day about the overwhelming evidence of the [REDACTED]-Lake partnership and impermissible benefits, but it does not change the fact that the COI based McNair's unethical conduct finding on statements the COI invented and attributed to Lake but which Lake never made.

B. The COI Has Not Rebutted McNair's Claim That The COI Based McNair's Unethical Conduct Finding On False And Factually Incorrect Statements

The crux of McNair's appeal is that the COI based McNair's unethical conduct finding on factually incorrect statements. See McNair Appeal at pp. 6-13. McNair illustrated in red type the factual assertions which are incorrect or mischaracterized. Id. at p. 13. Thus, there can be no confusion about exactly which statements McNair is contending are factually incorrect.

The COI's response does not challenge or dispute McNair's illustration of the incorrect factual assertions upon which the COI based McNair's unethical conduct finding.³ Rather, the COI attempts to direct the IAC's attention away from the undeniable fact that the COI based a career-ending unethical conduct finding on demonstrably false and incorrect statements. It does this by: (1) suggesting Lake did not describe the call correctly because he had difficulty remembering it; (2) chastising McNair for not including a portion of Lake's interview transcript in his appeal; and (3) drawing negative inferences against McNair from the fact that ██████ refused to cooperate with the enforcement staff and settled Lake's lawsuit against him after the hearing.

McNair will address each of the COI's arguments below. However, the IAC need not even consider the COI's arguments because the COI has failed to rebut the fact that the COI based McNair's unethical conduct finding on materially false and incorrect statements. A finding based on false and incorrect statements is clearly contrary to the evidence. If the NCAA infractions process is going to have any credibility with the NCAA membership and the public, the finding must be set aside.

³ The COI's response does not mention even once McNair's red type illustration of how the COI based McNair's unethical conduct finding on factually incorrect statements.

1. **The COI Improperly Resolved Conflicts And Discrepancies In Lake's Testimony Against McNair**

The COI attempts to excuse Lake's factually incorrect testimony by suggesting that he was not adequately prepared for his interview and, therefore, may not have remembered the details of the telephone call the COI used to make an unethical conduct finding against McNair.

[B]efore the interview with Lake, no one from the NCAA staff went over with Lake the areas of inquiry and prepared him for the interview. Moreover, in his interview of November 6, 2007, Lake was trying to recount a whole series of events dating back to 2004, including the January 8, 2006, phone call. It is perfectly understandable, therefore, that Lake may not have remembered who initiated that particular call 22 months earlier or the exact words used.

COI Response at p. 8.

First, if Lake cannot remember and describe the call accurately and credibly, it is not the job of the COI to make excuses for him and change his testimony to make it consistent and credible. That is precisely what the COI did with Lake's testimony about the call. See McNair Appeal at pp. 6-13. The COI is supposed to make findings based "on information presented to it that it determines to be credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs." See Bylaw 32.8.8.2 (Basis of Findings). The COI is not supposed to take information presented to it and change it to make it credible and persuasive.

Second, if Lake called McNair to ask him to intercede with █████ and get him to adhere to the agency agreement, it is very hard to believe that Lake would have forgotten that he initiated the call and not McNair. Calling an assistant coach and threatening to "go public with the matter and implicate the institution" is not something any person forgets easily or quickly.⁴ If the call

⁴ It is important to remember that this is how the COI claimed that Lake described the call. Lake's actual testimony was much different.

actually occurred as the COI found, Lake would have reported that he initiated the call and asked McNair to intercede in his dispute with [REDACTED]. He would not have described something that did not happen, i.e., that McNair called Lake unprompted "trying to resolve it . . . and basically [said] don't implement the school." See McNair Appeal at p. 9.

Finally, the COI is simply incorrect when it says Lake said he called McNair on January 8 at 1:34 a.m. trying to get his money back. See COI Response at p. 10. McNair addressed this in his Appeal at p. 8, fn. 2. In fact, Lake reported making a call that did not occur because the only call in the phone records is the call on January 8, which Lake claims was McNair calling him "trying to resolve it."

2. The COI Made A Phantom Finding Against McNair Without Giving Him Notice And An Opportunity To Be Heard

The COI claims McNair left out a relevant portion of Lake's transcript in his appeal. See COI Response at p. 8. Specifically, the COI claims that the excerpt below is relevant because it shows "that McNair may well have known that [REDACTED] was receiving improper benefits from Lake before January 8, 2006." Id. at pp. 8-9.

Lloyd Lake: Yeah, bec, he knew [REDACTED] took money from me. There's no doubt he knew about that.

Johanningmeier: And why do you say that?

Ms. Cretors: Yeah, we need to know why you, why you believe that he knew that?

Lloyd Lake: Cause he was around a lot and, you know, it's like he watched me get them guys, his friends, hotel rooms, [REDACTED] told me he knew about certain things he was doing but he's cool. You know what I mean? It's like basically through [REDACTED] –

Ms. Cretors: [REDACTED] said he –

Lloyd Lake: -- 'cause I told [REDACTED] you shouldn't be having the, no, he's cool, the coach, that's my, he's my friend. He's not –

Johanningmeier: What, what's your understanding of the relationship that [REDACTED] had with McNair?

Lloyd Lake: I mean, he was his coach but they were also friends. You know, outside of, outside the field.

Johanningmeier: Did they socialize?

Lloyd Lake: Yeah.

Johanningmeier: Besides when you guys –

Lloyd Lake: That's how we were at the club that night. I mean, yeah

Id.

There are two very good reasons McNair did not include the complete excerpt in his appeal. First, McNair is appealing the finding that Lake called him on January 8, 2006, and told him about the agency agreement. The excerpt is not relevant to what Lake claimed was said during that call. Thus, it is not relevant to McNair's appeal.

Second, there was no allegation nor any finding that McNair watched Lake get [REDACTED] friends hotel rooms or that [REDACTED] had told Lake that McNair "knew about certain things." The Notice of Allegations did not contain this allegation and the Infractions Report does not contain a finding that McNair watched Lake get [REDACTED] friends hotel rooms or that [REDACTED] had told Lake that McNair "knew about certain things." The COI's response to McNair's appeal is the very first time the NCAA has put McNair on notice that the COI decided that McNair "may well have known that [REDACTED] was receiving impermissible benefits from Lake before January 8, 2006" because the COI believed Lake's vague claim that McNair watched Lake get [REDACTED] friends hotel rooms and that [REDACTED] told Lake that McNair "knew about certain things."

If the COI wants to make a finding against McNair, it must follow the enforcement procedures and give notice and an opportunity to be heard. It may not suggest for the first time in its response to McNair's appeal that it made a phantom finding that McNair watched Lake get █████ friends hotel rooms or that █████ had told Lake that McNair "knew about certain things" in order to support its vague finding that "[a]t least by January 8, 2006," McNair knew that █████ and Lake/Michaels were engaged in violations.⁵ See Infractions Report at Finding B-1-b.

If McNair had known that he was at risk for a finding based on Lake's vague, unsubstantiated allegations about McNair watching Lake get █████ friends hotel rooms or █████ alleged statement to Lake that McNair "knew about certain things," McNair would have submitted a supplemental response disputing the allegations. It is truly Kafkaesque – not to mention a violation of fundamental principles of due process - for the COI to tell McNair for the first time, eight months after the hearing, that it relied on Lake's vague, unsubstantiated allegations – which the enforcement staff did not even allege in the Notice of Allegations – to conclude "that McNair may well have known that █████ was receiving improper benefits from Lake before January 8, 2006." This procedural error constitutes a new and independent basis for setting aside Finding B-1-b.

3. The COI Unfairly Drew Negative Inferences Against McNair From Immaterial Facts

The COI's response shows that in making the unethical conduct finding against McNair, the COI considered irrelevant and immaterial facts that were entirely outside the control of McNair and drew negative inferences against McNair from those facts. Specifically, the COI stated:

⁵ It is deeply troubling that the COI would rely on such vague, unsubstantiated allegations to base an unethical conduct finding.

It is significant that, despite his criminal background, no criminal charges were ever filed against Lake as they likely would have been had Lake been unable to substantiate his claims of providing money to ██████.

It is also significant that after his initial interview, neither ██████ nor his family cooperated in this matter or provided access to records that might refute Lake's claim. This failure is particularly telling in light of ██████ obvious motive to protect his own reputation and defend his school, coaches and teammates by coming forward with exculpatory evidence if any existed. Instead, Michaels received a sizable settlement from ██████ and his family, which included a provision barring him and ██████ from discussing the settlement. [Exhibit G]

It is also telling that Lake's lawsuit against ██████ to recoup his money was not settled until after the infractions hearing was conducted. [Exhibit C]

COI Response at pp. 14-15 (emphasis added).

The COI describes these facts as "significant" and "telling". *Id.* Not only are they not significant or telling, they are irrelevant to the finding against McNair.⁶ Whether criminal charges were filed against Lake has nothing to do with Lake's false claim that McNair called him on January 8, 2006, to intercede in Lake's dispute with ██████. Neither state nor federal law enforcement authorities investigate or prosecute false statements made during an NCAA infractions investigation.

Moreover, the events and transactions the COI describes as "significant" and "telling" had nothing to do with McNair. It is fundamentally unfair to base a finding against an individual on events which are entirely beyond the individual's control. Consider the following:

- As explained above, McNair never denied that Lake provided money to ██████.

McNair had nothing to do with that arrangement, which Lake himself said was so

⁶ That the COI has resorted to immaterial and irrelevant facts to support its finding demonstrates just how weak the finding is.

secret that it reminded him of a drug deal. See McNair Response to Notice of Allegations at p. 1-11. Moreover, that Lake gave money to ██████ does not form a basis for an unethical conduct finding against McNair.

- The decision of ██████ and his family not to cooperate with the investigation was their decision, not McNair's. McNair cooperated fully with the investigation and should not be penalized because ██████ chose not to cooperate.
- ██████ decision to settle with Michaels was ██████ decision, not McNair's. Moreover, the settlement has nothing to do with the unethical conduct finding against McNair.
- ██████ decision to settle Lake's lawsuit after the infractions hearing also was ██████ decision, not McNair's. Further, it also is entirely irrelevant to the unethical conduct finding against McNair.

Thus, in making the unethical conduct finding against McNair, the COI considered facts that are not probative of whether Lake called McNair on January 8, 2006 and told him about the agency agreement. It was procedural error for the COI to consider these facts and use them to draw negative inferences against McNair. This constitutes a new and independent basis for setting aside Finding B-1-b.

C. The COI's Response Contains Arguments Not Responsive To McNair's Appeal

The COI's response to McNair's appeal should be just that, a document that responds directly to the arguments in McNair's appeal. The COI's response is not an opportunity to supplement and expand the COI's rationale in the Infractions Report. Nonetheless, that is exactly what the COI has done. For example, under the heading "Selective Memory," the COI makes the following assertions, apparently in support of its determination that McNair was not credible.

The Ornstein Allegations

- "[A]lthough McNair knew [REDACTED] was employed by Ornstein, McNair claimed he and [REDACTED] never talked about [REDACTED] internship with Mike Ornstein. [Exhibit Q at 11]. So McNair had no idea how [REDACTED] got the internship or what he did for Ornstein."

COI Response at p. 32.

First, the Ornstein allegations are totally irrelevant to and disconnected from the issues raised in McNair's appeal. Thus, the COI's gratuitous statement should be stricken from the record. Further, McNair was never named or even referenced in the allegation involving [REDACTED] internship with Ornstein. See Notice of Allegations at Allegation 2. The Ornstein allegations also have nothing to do with the allegations in which McNair was named. Thus, he did not respond to those allegations. Finally, the COI's Rationale for McNair's unethical conduct finding says nothing about whether McNair talked to [REDACTED] about [REDACTED] internship with Ornstein or how [REDACTED] got the internship. This is an impermissible attempt by the COI to expand and supplement its stated rationale for McNair's unethical conduct finding.

██████████ 1996 Impala

- "McNair was unaware that ██████████ was driving an old truck but knew he got the Impala." [Hearing Tr. At 127]
- "McNair never talked to him about how ██████████ got the Impala or paid for it." [Exhibit E at 10, 11]
- "McNair never talked about work done to the Impala or that it was on the cover of a car magazine." [Exhibit E at 11]

McNair's attempt to downplay the significance of ██████████ Impala speaks to his credibility. At the hearing, McNair suggested it was just an ordinary car that "most people in my neighborhood could afford." [Hearing Tr. at 127] The Impala was hardly your typical older model of car. It was featured on the cover of a car magazine [Hearing Tr. at 143] and ██████████ subsequently sold the car to one of his New Orleans Saints' teammates for a reported \$22,500 - \$25,000 [Case Summary at 1-46; Ex. 4 at 11 of USC Response to the NOA (Summary of April 30, 2009, ██████████ interview)]

Id. at p. 32-33.

First, ██████████ Impala has absolutely nothing to do with the errors McNair raised in his appeal. Thus, the COI's gratuitous discussion about the Impala is nonresponsive and should be stricken from the record.

Second, there were never any allegations against McNair that involved the Impala. There was an allegation directed at USC that Lake gave ██████████ father money to purchase the car, but McNair was not named or referenced in the allegation, nor was he ever alleged to have known that Lake bought the car for ██████████. See Notice of Allegations at Allegation 1.a (4).

Third, the COI's rationale for McNair's unethical conduct finding says nothing about the COI basing its credibility determination on "McNair's attempt to downplay the significance of ██████████

Impala." This is either another example of the COI making a phantom finding against McNair in violation of NCAA enforcement procedures and fundamental principles of due process, or it is another example of the COI after the fact trying to expand and supplement its stated rationale for McNair's unethical conduct finding. Either way, it is unfair.

Finally, the COI's criticism of McNair's personal opinion about ██████ Impala is unfair and misleading. For example:

- The car was not featured on the cover of a car magazine until *after* ██████ had declared himself eligible for the NFC draft. Hearing Transcript at p. 144. Moreover, the Magazine did "a complete overhaul [to] make it worthy of being in their magazine." Id. What ██████ did with his car after he declared for the draft is irrelevant to this infractions case.
- Even after it had been overhauled by the car magazine, it sold for at most \$25,000. What does the COI find so incredible about McNair saying that most people in his neighborhood could afford a \$25,000 car?
- Former head coach Pete Carroll shared McNair's opinion of the car.

Mr. Carroll: Okay I just wanted to say we left something out there, that Missy [Conboy] said that the car was a cool car. It was not. It was not a car that kids really cherished and all that. That is – anyway, the kind of car that everybody would covet. It was kind of why would you get that one? It was really more so. You kind of left it out there like it was a hot-shot car and it really wasn't.

Id. at 142-43.

- The COI never even saw the car. McNair and Carroll at least saw the car in person and, therefore, their opinion was at least based on personal knowledge.

Thus, the COI made a credibility determination against McNair in connection with an allegation that he was not named in and did not respond to. The COI also made a credibility determination against McNair for expressing his personal opinion. The COI has wide latitude in making credibility determinations. But that latitude does not extend so far as to denounce a person's credibility for voicing his personal opinion about a 1996 Impala.

██████ Parents' House on Apple Street

- McNair never talked to ██████ about ██████ and his parents moving into their new home on Apple Street in March 2005 [Hearing Tr. at 214], even though in March 2005 McNair made 92 phone calls to ██████. [Case Summary Exhibit at 3-1]

COI Response at p. 32.

Again, the ██████ house on Apple Street has absolutely nothing to do with the errors McNair raised in his appeal. The IAC should strike the COI's statement from the record.

Further, although there was an allegation directed at USC regarding Lake and Michaels alleged purchase of the Apple Street house for the ██████, McNair was not named or referenced in the allegation. See Notice of Allegations at Allegation 1.a(9). No one ever alleged that McNair was involved in or aware of the purchase of the house. McNair was never even at the house.

And again, the COI's rationale for McNair's unethical conduct finding makes no mention of McNair's denial that he talked to ██████ about the Apple Street house. This is yet another example

of the COI either making a phantom finding against McNair or attempting to justify its unethical conduct finding after the fact by expanding and supplementing its rationale.

██████ Parents Attendance At Away Games

- McNair never talked to ██████ about ██████ parents attending away games. [Exhibit Q at 15]

COI Response at p. 32.

The same analysis about the Ornstein internship, ██████ Impala and the Apple Street house applies to the issue of whether McNair talked to ██████ about ██████ parents attending away games. It is not responsive to McNair's appeal, McNair was never alleged to have done anything impermissible in connection with ██████ parents attendance at away games and the COI's rationale for McNair's unethical conduct finding says nothing about that being a basis for the COI's finding.

D. The COI's Response To The Duff Report Appellate Recommendations Confirms That The IAC Should Strike The COI's New Rationales And Bases For Its Finding

In 2006, the NCAA commissioned attorney James Duff to review the Association's enforcement, infractions and reinstatement processes. Duff submitted a report that included various recommendations. In a memorandum dated September 11, 2006, the COI commented to the IAC about the Duff Report Appellate Recommendations. Among the COI's concerns was that the IAC restrict its review of arguments to only those arguments that had been properly presented to the COI. See September 11, 2006, Memorandum from Division I COI to Division I IAC re: Reaction from the COI to Duff Report Appellate Recommendations at pp. 3-5, attached as Exhibit 1.

Despite the COI's concern that *appellants* be restricted in their presentation of arguments to the IAC, the COI has no concern about itself expanding the record on appeal. The COI has raised for the very first time in its response to McNair's appeal numerous new bases and rationales in support of its finding against McNair. McNair had absolutely no reason to believe the COI based his unethical conduct finding on such extraneous issues like whether McNair discussed ██████ internship with Ornstein, McNair's opinion of ██████ 1996 Impala, the house on Apple Street and whether McNair talked to ██████ about ██████ parents attendance at away games. If the COI based McNair's unethical conduct finding on these findings, the COI should have included them in its infractions report so McNair would be informed of them and could properly address them in his appeal. These new findings by the COI are no different than arguments an appellant raises for the first time on appeal and as such, they should be treated the same way. The IAC should strike all new bases and rationales from the COI's response.

E. Contrary To The COI's Claim, The COI Rejected Lake's Allegations About The Faulk Party Weekend

In refusing to concede that McNair was more credible than Lake with respect to Lake's allegations involving the Faulk party weekend, the COI also refuses to acknowledge obvious inferences from its own infractions report. For example, the COI stated:

Thus, even though the COI ultimately did not make a specific unethical conduct finding with respect to the information McNair provided pertaining to the Marshall Faulk birthday party weekend of March 2005, McNair's claim that 'the COI found McNair to be more credible than Lake is simply inaccurate.

COI Response at p.15.

Lake made allegations against McNair involving the Faulk party weekend, McNair contested the allegations and the COI did not make any findings supporting Lake's allegations. That should be enough to show that with respect to the allegations involving the Faulk party weekend, McNair was more credible than Lake.

But the COI claims it did not reject Lake's allegations, it only "did not find sufficient evidence in the record to support [the] allegation." Id. Well, here is indisputable proof from the COI's own findings that the COI did, in fact, reject Lake's allegation and found Lake to be *not credible*.

Allegation 1.b.(2) alleged:

Concerning McNair's knowledge that [REDACTED], Lake and Michaels were engaged in possible violations:

(2) On the night of March 5 (2005), while at the Faulk party, Lake and McNair engaged in conversation. Lake told McNair that he was establishing a sports agency and asked if McNair could recommend any potential clients.

McNair disputed the allegation arguing: (1) the facts alleged do not constitute a violation of NCAA legislation; and (2) he does not recall speaking to Lake at the Faulk party and the credible evidence strongly suggests the conversation Lake described *never happened*. McNair Response to Notice of Allegations at pp. 1-13 to 1-18. McNair cited several facts that directly contradicted Lake, including the testimony of Lake's girlfriend who said Lake did not meet McNair until the night of October 29, 2005, over seven months *after* the Faulk party. *Id.* at 1-16 to 1-18. In other words, if Lake did not meet McNair until October 29, 2005, it follows that Lake did not have a conversation with McNair at the Faulk party in March 2005.

The COI found it likely that McNair's friend, Faison Love, *introduced* Lake to McNair on the night of October 29, 2005. Infractions Report at p. 25. Implicit in that finding is that Lake had not previously met McNair at the Faulk party; otherwise there would have been no need for Love *to introduce* the two men. Thus, the COI's own finding proves that the COI rejected and did not find credible Lake's allegation that he met McNair at the Faulk party in March 2005.

F. NCAA Enforcement Procedures Do Not Authorize The COI To Send Its Draft Infractions Report *Ex Parte* To The Enforcement Staff One Week Before The Public Release So The Staff May Correct Factual Errors

The COI claims it followed "its long standing practice dating back to 2003" by sending its final version of the infractions report to the enforcement staff so it can catch any typos or factual errors. See COI Response at p. 35. The COI claims the same opportunity is afforded to the institution and any coach. Id. Notably, the COI claims "[t]he process does not allow any party *to propose* any substantive changes to the report." Id. (emphasis added). The COI cites a September 15, 2003, NCAA News Release summarizing a revised process for the release of infractions reports. Id. at Exhibit R.

The COI neglects to mention several key points.

- According to the NCAA News Release, the COI is to provide a copy of the infractions report to the enforcement staff *48 hours* before release to the public. In the USC case, the enforcement staff had the report by at least June 4, 2010 - and possibly much earlier - but the report was not released to McNair and the public until June 10, 2010. There is no authority for the COI to provide the report to the staff a week before it is given to the coach and the COI has offered no explanation why it was done that way in this case. Indeed, the fact that the draft report was given to the staff a week before the release – and possibly even longer – strongly suggests the staff did more than proofread the report for typos and factual errors.
- The COI is simply wrong when it says the process does not allow the enforcement staff to propose any substantive changes to the report. The Appeal of the Former Indiana University Assistant Men's Basketball Coach in 2009 proves that the

enforcement staff proposes substantive changes. In that case, the COI attempted to modify an unethical conduct finding against the former assistant coach by narrowing the scope of the finding *after receiving feedback from the enforcement staff*.⁷ In other words, the enforcement staff communicated *ex parte* with the COI *about the scope of an unethical conduct finding*. Modifying an unethical conduct finding is a substantive change to an infractions report. Pages 3-9 of Senderoff's appeal and 22-25 of Senderoff's rebuttal are attached as Exhibit 2. Thus, the COI does allow the enforcement staff to propose *ex parte* substantive changes to infractions reports.

- NCAA enforcement procedures do not authorize the COI to share *ex parte* its draft report with the enforcement staff to correct factual errors. Further, the COI never told McNair that it intended to share its draft report with the enforcement staff at least one week before it was provided to McNair to allow the staff to correct "factual errors." See letter with attachments of January 5, 2010 from Shepard Cooper to Todd McNair describing in detail the procedures to be followed at the hearing and reciting Bylaw 32.8.8 (Post-hearing Committee Deliberations), attached as Exhibit 3.
- Most notably, the COI has not provided or even described the *ex parte* communications that occurred in this case or otherwise attempted to overcome the rebuttable presumption of prejudice that arises once an *ex parte* communication has been established. See McNair Appeal at pp. 48-49. The COI's failure to rebut the presumption of prejudice establishes that McNair was prejudiced by the *ex parte* communications.

⁷ However, the COI did not make a proportionate reduction in the coach's penalty, which the original report clearly stated was based on the original, unmodified unethical conduct finding.

G. The COI Trivialized The Osburn Statement

The COI chastises McNair for his concern that the Osburn statement endorsing the COI's decision demonstrated bias and tainted the process.

There is absolutely no basis for McNair's assertion that a staff member's statement shows that the appeals process itself has been tainted or for his truly astounding claim that such a statement demonstrates that the IAC is biased.

COI Response at p. 36.

First, it was not simply "a staff member's statement." The statement was made by Stacy Osburn, the NCAA's associate director for public and media relations. She is one of only a few officials authorized to speak for the entire Association. This was not some low-level staffer expressing a personal opinion. It was an official NCAA spokesperson issuing an official endorsement of the USC infractions report before McNair had even filed his Notice of Appeal.

Second, the COI's response says nothing about the facts and circumstances leading to the Osburn statement. There is no explanation why it was made, who instructed or authorized Osburn to make the statement or any other justification for the statement. The COI's response is basically that despite the statement's implication of prejudgment by the NCAA, McNair should not be concerned about it.

Finally, the statement itself together with other procedural errors – like secret post-hearing *ex parte* communications – more than justify McNair raising the issue in his appeal. All McNair knows is that the NCAA issued a public statement endorsing the COI's Infractions Report before he had even begun preparing his appeal. The only thing "truly astounding" is the COI's callousness and insensitivity to McNair's concern about a statement that at a minimum, raises the

appearance of impropriety and calls into question whether the NCAA has prejudged McNair's appeal.

H. The COI Continues To Assert Mutually Inconsistent And Contradictory Theories

As set forth in McNair's appeal, the COI's rationale for McNair's unethical conduct finding contains contradictory and internally inconsistent findings concerning the events of October 29, 2005. See McNair Appeal at pp. 41-42. Specifically, the report said the COI found that McNair called Lake because he knew Lake and knew Lake was with [REDACTED]. Infractions Report at p. 25. But the COI also found it likely that McNair's friend, Faison Love, *introduced* Lake to McNair at the club *later that night*. Id. It is nonsensical to believe both events happened as described by the COI.

Not only did the COI fail to attempt to explain this material contradiction, the COI's response continues to assert that both events occurred. See COI Response at p. 28 ("As the infractions report states, the COI believed that McNair was calling Lake, knowing that he was with [REDACTED], so that he could meet up with [REDACTED] and ensure that he had not just blown Harvin off"), and at p. 31 ("The COI found it highly unlikely given Lake and McNair's shared close friendship with Love that Love would not have introduced Lake and Michaels to McNair"). Thus, the COI does not dispute that it relied on contradictory and mutually inconsistent rationales for questioning McNair's credibility.

As McNair stated in his appeal, he is not challenging the authority of the COI to make credibility determinations. See McNair Appeal at p. 15. But credibility determinations, like any other finding of fact, must be internally consistent and logical. The COI may not arbitrarily pick and choose inconsistent and contradictory versions of events to support an unethical conduct finding without regard to logic and common sense. The COI's credibility determinations against McNair are internally inconsistent and mutually contradictory.

I. McNair Did Not Invent Martin Bayless Or ██████████ As Alibi Witnesses

The COI picks apart and over analyzes every minor inconsistency involving the testimony of Martin Bayless and ██████████ in an effort to make it appear that McNair invented them as alibi witnesses to defend against Lake's allegations involving the Faulk party weekend. See COI Response at pp. 16-23. The IAC should understand very clearly that neither Bayless nor ██████████ were invented as alibi witnesses nor were they even necessary to defend against Lake's allegations involving the Faulk party weekend, which it is important to remember were rejected by the COI.

Scott Tompsett: I now want to respond to the staff's claim that Todd offered Martin Bayless as an alibi witness, and that Todd then invented another alibi in ██████████, when as the staff put it, Bayless' alibi fell apart, because that is simply not true.

First, you need some background about how Todd was questioned concerning the Faulk party week. That issue was not raised until Todd's second interview, which was February 2008. Of course, he had no prior knowledge that he was going to be asked about the Faulk party.

He had no prior knowledge that he was going to be – he had no prior knowledge that anyone had accused him of being at the Hyatt that weekend. He didn't know what the interview was going to be about.

When Todd told the staff that he went to the party with Bayless, that was very early on in the questioning. I think it was about the third or fourth question that he was asked about the Faulk party, and this is on McNair's February 15, 2008 transcript at p. 12.

That was before he knew that anyone had suggested that he had been at the Hyatt. So, in other words, when Todd said that he went to the party with Bayless, he had no idea that anyone had accused him of doing anything improper that weekend or that anyone had accused him of being in the Hyatt hotel room with Lake and ██████████.

Now by definition, an alibi is a defense whereby a defendant attempts to prove he was elsewhere when the crime in question is committed, or in this case, where the violation is committed.

Todd did not even know he was going to be accused of being at the Hyatt at the time that he mentioned Bayless. So, obviously, he was not using Bayless as an alibi witness. Moreover, Todd McNair never said and never suggested that Martin Bayless could vouch for the fact that Todd was not at the Hyatt. Bayless was never an alibi.

Further, contrary to the staff's claim, the information that Todd reported about Bayless did not fall apart, and this is the point that Mr. King touched upon just before I began to speak after we returned from lunch.

I don't need to recount all that information. But as the record stands today, the information that Todd reported about Bayless and the information that Bayless reported about going to the party and planning and talking to Todd about going to the party is consistent, and they corroborate each other.

So, in summary, not only was Bayless never offered as an alibi witness, but he and Todd corroborate each other about talking about going to the party and about how Todd had gotten into the party.

Now, I want to respond to the staff's claim that Todd invented the [REDACTED] alibi to defend against this allegation. I was directly involved in this. We did not supplement the record in this case with [REDACTED] interview that she went to the Faulk party because we felt we needed her testimony to defend the allegation.

The evidence refuting the allegation, in my opinion, is overwhelming without [REDACTED]. The reason we did this is because we had an obligation to correct the record. This issue came up shortly after I had been retained to represent Coach McNair.

I was not retained until pretty late in the game. It was September, just prior to the Notice of Allegations being released. My first meeting with Coach McNair was after the Notice of Allegations was released. It was sometime in October.

During my initial interview with Coach McNair, he told me that [REDACTED] had gone to the party with him. I advised Coach McNair that he needed to correct the record, and I told him that as his attorney I had an ethical obligation to ensure that the committee had an accurate record in this case.

And we consulted with USC and their counsel, and a group decision was made that we would advise the enforcement staff of the issue, invite them to attend the [REDACTED] interview, and that is exactly what happened.

Make no mistake about it, I have been doing this for a little while, and I have a few hearings under my belt. I fully realized, and I believe USC

fully realized, and I know Coach McNair fully realized that doing this was going to cloud the record a little bit. It was going to raise some questions.

It was going to raise questions about why Todd didn't tell the staff about ██████ at his first interview. He is here to answer your questions about that. And I am sure you are going to have questions.

Because we fully realized it was going to cloud the issue and raise those questions, *we would have preferred not to have had to interview ██████, but we could not go forward without correcting the record.*

So, ██████ was not invented as an alibi to defend this allegation. We did not need, and we still don't think we need ██████ to defend the allegation. In fact, I submit to you that you can take ██████ out of the analysis entirely and you will still reach the conclusion that Lloyd Lake is the only person that claims the Hyatt meeting occurred.

Todd and ██████ both denied it happened. Todd was not in San Diego the day that Lake checked ██████ in the room and claims meeting Todd. Lake's girlfriend says Lake never said anything to her about meeting Todd, and she was deeply involved in Lake's arrangement with ██████. Moreover, the girlfriend said that Lake did not meet Todd until eight months later.

Hearing transcript at pp. 507-512 (emphasis added).

Thus, neither Bayless nor ██████ were invented as alibi witnesses. McNair did not need them to defend Lake's allegations. The COI obviously agreed because the COI rejected Lake's allegations concerning the Faulk party weekend.

J. The COI Still Refuses To Acknowledge It Had No Basis To Find That McNair Never Started A Record Label

Even after McNair demonstrated conclusively that there is no evidence to support the COI's finding that McNair never started a record label ("No such enterprise was ever started"), the COI still refuses to admit its error. See McNair Appeal at pp.18-21. The COI discounts AD Garrett's statement at the hearing that head coach Pete Carroll knew that McNair had a record label and was fine with it as long as McNair was performing his coaching duties. Then the COI admitted it failed to review ██████ transcript, which explained in detail the work she did for over three years for Blakout Records.⁸ Finally, the COI refuses to acknowledge the very clear meaning of its own finding – "*No such enterprise was ever started.*" Instead, the COI says it merely expressed "its skepticism that McNair's independent record company ever really got off the ground." See COI Response at p.24.

Well, the COI never expressed any skepticism at the hearing about whether McNair actually started the record label. As explained in McNair's Appeal, instead the COI debated California's moonlighting law with USC's general counsel. See McNair Appeal at p. 21. If anyone had asked for proof that the record label was started, McNair could easily have supplemented the record with any number of documents proving that he had a record label and that ██████ worked on it. In fact, McNair could have used his counsel's laptop computer to show the COI promotional videos of Blakout Records that are still available on the internet today. But no one asked for

⁸ McNair understands the materials submitted to the COI were voluminous. See COI Response at p. 24. He also understands the members of the COI are volunteers who devote considerable time to adjudicating the cases brought before them. Nonetheless, this infractions case is the most important event in McNair's coaching career. His reputation and job hung in the balance. McNair and his counsel went to great lengths to prepare his response and he expected the COI to carefully review all the materials submitted to it before making its findings. It is simply unacceptable for the COI to make a false statement in a major infractions report because the COI failed to review all the materials submitted to it. McNair also notes that if the COI had shared its draft report with him and his counsel a week before the public release, like the COI did with the enforcement staff, he would have caught that factual error and informed the COI so it could correct it.

proof or even suggested that McNair never started a record label. The fact of the matter is that the COI had no basis to find that McNair never started a record label and the COI should simply acknowledge its mistake.

III. CONCLUSION

For all of the above reasons, the IAC should set aside finding B-1-b and the associated penalties.

Respectfully submitted,
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