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CAUSE NO. 2013-70769

HOUSTON BASEBALL PARTNERS, LLC,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
v.	§	**HARRIS COUNTY, TEXAS**
	§	
MCLANE CHAMPIONS, LLC, R. DRAYTON MCLANE, JR., COMCAST CORPORATION, and NBCUNIVERSAL MEDIA, LLC,	§	
	§	
Defendants.	§	**80th JUDICIAL DISTRICT**
	§	
MCLANE CHAMPIONS, LLC,	§	**IN THE DISTRICT COURT OF**
	§	
Counter Plaintiff And Third Party Plaintiff,	§	
	§	
v.	§	**HARRIS COUNTY, TEXAS**
	§	
HOUSTON BASEBALL PARTNERS, LLC,	§	
	§	
Counter Defendant,	§	
	§	
and	§	
	§	
HBP TEAM HOLDINGS, LLC	§	
	§	
Third Party Defendant.	§	**80th JUDICIAL DISTRICT**

THE MCLANE DEFENDANTS' MOTION TO DISMISS UNDER CHAPTER 27 OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE AND, SUBJECT THERETO, THEIR VERIFIED ANSWER AND SPECIAL EXCEPTIONS AND COUNTERCLAIM

McLane Champions, LLC ("Champions") and R. Drayton McLane, Jr. ("McLane") (collectively the "McLane Defendants") file their Motion to Dismiss pursuant to Chapter 27 Tex. Civ. Prac. & Remedies Code ("TCPA"), Their Verified Answer and Special Exceptions, subject

thereto and Champions' Counterclaim as follows:

I. MOTION TO DISMISS UNDER CHAPTER 27 OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE

A. Procedural History

1. Plaintiff Houston Baseball Partners, LLC ("Plaintiff" or "HBP") filed this case on November 21, 2013, and its Original Petition is the live pleading subject to the McLane Defendants' TCPA Motion to Dismiss ("Motion"). The McLane Defendants were served on January 7, 2014, but the case had previously, on December 12, 2013, been abated by the federal bankruptcy judge after co-defendant Comcast Corp. ("Comcast") removed this case to that court. The abatement was lifted on September 6, 2019 when the case was remanded. On September 12, 2019 Plaintiff filed a notice, pursuant to Tex. R. Civ. P. Rule 237a, informing this Court and the parties of the remand.

2. Plaintiff seeks damages and declaratory relief because, it says, McLane Champions breached a Purchase and Sale Agreement "dated as of May 16, 2011" Pet. ¶ 20 ("Purchase Agreement") regarding the sale of the Houston Astros Baseball Club and an interest in a regional sports network. The TCPA has been applied to contract claims like this one. *See Lona Hills Ranch LLC v. Creative Oil & Gas Operating, LLC,* 549 S.W.3d 839 (Tex. App.— Austin, 2018)(explanatory).

3. The Petition also claims fraud and misrepresentation against all defendants and alleges that there was a conspiracy among them and the TCPA has been applied to these types of claims as well. *See Woodhull Ventures 2015, L.P. v. Megtal Homes III, LLC,* No. 03-18-00504-CV, 2019 WL 3310509 at *2-3 (Tex. App.— Austin July 24, 2019, no pet.) (applying TCPA to fraud claim arising from exercise of free speech); *see Wholesale TV & Radio Adver., LLC v. Better Bus. Bureau of Metro. Dallas, Inc.,* No. 05–11–01337–CV, 2013 WL 3024692, at *4 (Tex. App.—Dallas

Jun. 14, 2013, no pet.) (mem.op.) (applying TCPA to dismiss negligent misrepresentation claim); *see also In re Lipsky,* 460 S.W.3d 579, 597 (Tex. 2015) (applying TCPA to dismiss claim for civil conspiracy).

4. Critically, Plaintiff is without standing to bring this claim. In its petition, Plaintiff makes no mention of the amendment to the Purchase Agreement which assigned all of its rights to a third party, HBP Team Holdings, LLC ("HBP Team").

B. Summary

5. The Court should dismiss Plaintiff's suit against the McLane Defendants pursuant to Chapter 27 of the Texas Civil Practice and Remedies Code, known as the Texas Citizens Participation Act ("TCPA"). The gist of Plaintiff's suit is its allegation that the McLane Defendants, Les Alexander, the Houston Rockets Basketball Team and Defendants Comcast and NBC Universal Media, LLC ("NBC") joined together to collectively express, promote, and pursue their common interests by communicating regarding a matter of public concern, specifically the economic well-being of the Houston Regional Sports Network ("Network"), a public figure (The Astros), and a good, product or service in the marketplace (Astros baseball games and Associated Television Broadcasts). The TCPA is triggered when the party moving to dismiss demonstrates by a preponderance of the evidence that the plaintiff's legal action relates to the exercise of the right of free speech, right to petition, or right of association. Tex. Civ. Prac. & Rem. Code § 27.003(a). Once this is established, the burden shifts to the plaintiff to establish by "clear and specific evidence" each essential element of a prima facie claim. The McLane Defendants satisfy their burden here because the activities in question relate to their right of association and to a matter of public concern (The Astros Team and TV Broadcasts) thereby implicating their right of free speech. Plaintiff cannot establish a prima facie case by clear and specific evidence for its claims against the McLane Defendants, which claims they deny.

II. BACKGROUND OF THE TEXAS CITIZENS PARTICIPATION ACT

6. The TCPA applies to a "legal action,"[1] which is defined broadly to mean "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." Tex. Civ. Prac. & Rem. Code § 27.001(6). It is to be "construed liberally to effectuate its purpose and intent fully." *Id*. § 27.011(b).

7. The TCPA provides that when, as here, "a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action." *Id*. § 27.003(a). Upon filing of a motion to dismiss under the TCPA, "a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association," ***unless*** the plaintiff "establishes by ***clear and specific evidence*** a prima facie case for ***each essential element of the claim*** in question." *Id.* § 27.005(b)-(c) (emphasis added). This would include a showing that it has standing. If the plaintiff does not meet this burden, a court must dismiss the action. *Id*. § 27.005(b). If a court orders dismissal, the court "shall award to the moving party: (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter." *Id.* § 27.009(a).

8. A motion to dismiss is decided on the basis of the pleadings and any affidavits. *See id*. § 27.006(a). A hearing on the motion to dismiss must generally be held within sixty (60) days after the date of service of the motion, unless the Court's calendar necessitates a later hearing; however, subject to an exception not applicable here, in no event shall the hearing occur more than

[1] Tex. Civ. Prac. & Rem. Code § 27.003.

90 days after service of the motion. *See id.* § 27.004(a). The Court then has thirty (30) days following the hearing to rule on the motion to dismiss. *Id.* § 27.005(a).

III. ARGUMENT AND AUTHORITIES

A. The TCPA applies because Plaintiff's claims are in response to the exercise of the right of free speech and the right of association

9. First, the TCPA applies because Plaintiff's claims are based on, relate to, or are in response to the exercise of the right of free speech and the right to association. The TCPA defines the "exercise of the right of free speech" as "a communication made in connection with a matter of public concern,"[2] and a "matter of public concern" is defined to include an issue related to "(A) health or safety; (B) environmental, ***economic***, or ***community well-being***; (C) the government; (D) a public official or ***public figure***; or (E) ***a good, product, or service in the marketplace.***" Tex. Civ. Prac. & Rem. Code § 27.001(7) (emphasis added). Courts have repeatedly held that statements regarding economic well-being are statements relating to "community well-being." *See Schimmel v. McGregor*, 438 S.W.3d 847, 858-59 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); *see also Campone v. Kline*, No. 03-16-00854-CV, 2018 WL 3652231, at *7 (Tex. App.—Austin Aug. 2, 2018, no pet. h.) (mem. op.); *Neyland v. Thompson*, No. 03-13-00643-CV, 2015 WL 1612155, at *5 (Tex. App.–Austin Apr. 7, 2015, no pet.) (mem. op.).

10. Here, Plaintiff's claim is based on, relates to, or is in response to the exercise of the right of free speech because it involved the economic well-being of the Astros, the Network, Astros fans and, as Mr. James R. Crane, one of the owners of the Astros, noted "our City of Houston." *See* § 27.001(7)(B). It also involved "a good, product or service in the marketplace", that is, the Astros and the television network allowing fans to see the games live or on TV. *See* § 27.001(7)(E). The Astros (HBP) is a public figure and thus a matter of public concern. *See* § 27.00(7)(D).

[2] Tex. Civ. Prac. & Rem. Code § 27.001(3).

11. The Plaintiff's legal action "is (also) based on, relates to or is in response to" the McLane Defendants' right of association, which the statute defines as: "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." *See* § 27.001(2)

12. According to the Plaintiff's Petition, "Defendants hatched a business plan to set the price for access to the television network [HRSN] at subscription rates they secretly knew none of the largest television distributors would pay." Pet. At ¶ 3. They did this, Plaintiff says, because "[B]etween around October 2010 and November 22, 2011, each Defendant became aware that the other desired to inflate the value or profitability of the Network and each formed the specific intent to assist the other in bringing about this artificially inflated value of profitability of the Network." ¶ 83.

13. The effect of this association among the Defendants as well as non-parties Les Alexander and the Houston Rockets was, Plaintiff alleges, to injure "the fans of the Houston Astros" thereby depriving "thousands of fans the ability to watch Houston Astros games on their televisions" and "thereby dooming the franchise for years to come." Pet at ¶ 4.

14. Indeed, at a press conference discussing this case, Crane said, "Drayton (McLane), Leslie (Alexander) and Comcast all participated in setting a business plan at rates that were secretly known, including inflated rates that none of the other distributors had paid to date except Comcast." He went on to say that "these misrepresentations" have "hurt our fans and they have hurt our city of Houston." A true and correct copy of excerpts of a transcript of the press conference and a video/audio recording of the press conference is attached to this motion as Exhibit 1. (Declaration of Kevin Kunec). A true and correct copy of the contract at issue along with Amendment 1 thereto is attached hereto as Exhibit 2. (Declaration of Webb Stickney). True and correct excerpts of a hearing before the Honorable Lynn Hughes, United States District Judge, in this case is attached

hereto as Exhibit 3. (Declaration of Charles L. Babcock). Under the Plaintiff's pleading, which the TCPA instructs the Court "to consider," and the Declarations filed in support of the Motion, the TCPA applies. *See* § 27.006(a). Thus, the burden shifts to Plaintiff to establish by clear and specific evidence a prima facie case for each essential element of their claim including a showing that it has standing. *Id.* The Plaintiff cannot meet this burden.

IV. PRAYER

15. For the foregoing reasons, the McLane Defendants respectfully request that the Court dismiss with prejudice Plaintiff's claim against them; that the McLane Defendants be awarded all allowable costs and attorneys' fees pursuant to Section 27.009 of the Texas Civil Practice and Remedies Code; that the Court award mandatory sanctions pursuant to Section 27.009(a)(2), and that the Court grant the McLane Defendants such other and further relief to which The McLane Defendants may be justly entitled.

THE MCLANE DEFENDANTS' VERIFIED ANSWER TO PLAINTIFF'S ORIGINAL PETITION AND SPECIAL EXCEPTIONS SUBJECT TO THEIR MOTION TO DISMISS

McLane Champions, LLC ("McLane Champions") and R. Drayton McLane, Jr. (collectively, the "McLane Defendants") file their Answer And Special Exceptions to Plaintiff's Original Petition, subject to their motion to dismiss and would show as follows:

GENERAL DENIAL

1. The McLane Defendants deny each and every, all and singular, allegation contained in Plaintiff's Original Petition and Defendants demand that Plaintiff be required to prove its allegations as required by the law.

VERIFIED DENIAL

2. Pursuant to Texas Rule of Civil Procedure 93(4), McLane Defendants assert that there is a defect of parties and that Plaintiff lacks standing to sue. By way of an Assignment Agreement, Plaintiff Houston Baseball Partners, LLC ("HBP") assigned its interest in the Purchase and Sale Agreement, dated May 16, 2011 (the "PSA"), to HBP Team Holdings, LLC. The Amendment to the Purchase and Sale Agreement and the Assignment Agreement are attached hereto in Exhibit 2. Without standing, the Court lacks subject matter jurisdiction to hear the dispute. *Austin Nursing Ctr. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005).

SPECIAL EXCEPTIONS

3. Subject to and without waiver of the foregoing, the McLane Defendants except to the Plaintiff's Original Petition as follows:

4. The Texas Rules of Civil Procedure authorize special exceptions because each party is entitled to notice of his adversary's claims and defenses, as well as notice of the relief sought. *See Perez v. Briercroft Serv. Corp*., 809 S.W.2d 216, 218 (Tex. 1991). Rules 45 and 47 require

pleadings to give fair and adequate notice of each claim asserted so that the opposing party will have information sufficient to enable it to prepare a defense. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000); *Paramount Pipe & Sup. Co. v. Muhr*, 749 S.W.2d 491, 494-95 (Tex. 1988). Special exceptions inform the opponent of pleading defects so the party can cure them, if possible, by amendment. *Horizon/CMS Healthcare Corp*., 34 S.W.3d at 897.

5. The McLane Defendants specially except to the fact that Plaintiffs have not asserted their maximum amount of damages sought. The McLane Defendants further specially except to Plaintiff's failure to plead its alleged damages so as to provide the McLane Defendants with fair notice of the Plaintiff's alleged damages. The McLane Defendants respectfully request that this Court grant this special exception and require the Plaintiff to plead the maximum amount of their damages and to provide the McLane Defendants with fair notice of the alleged damages within a reasonable time set by the Court.

6. The McLane Defendants specially except to Plaintiff's pleading for attorneys' fees under the Texas Civil Practices and Remedies Code § 38.000. Original Petition, p. 35. (Prayer Paragraph 5). Texas courts have uniformly held that Chapter 38 does not permit a prevailing plaintiff to recover attorneys' fees against a limited liability company, limited partnership, or limited liability partnership.[3] The only alleged claim for attorney's fees under Chapter 38 is against McLane Champions LLC. Accordingly, the McLane Defendants request that this special exception

[3] *See Fleming & Assocs. LLP v. Barton*, 425 S.W.3d 560, 575 (Tex. App.—Houston [14th Dist.], pet. denied); Ganz v. Lyons Partnership, L.P., 173 F.R.D. 173, 176 (N.D. Tex. 1997); *Alta Mesa Holdings, LP v. Ives*, 488 S.W.3d 438, 455 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) ("Despite this loose relationship between the common usage of the terms 'company' and 'corporation,' it is clear that as used in Texas statutes, the legal entities identified by the terms 'corporation' and 'limited liability company' are distinct entities with some but not all of the same features…. [The] use of the term 'corporation' does not encompass an LLC."); *TEC Olmos, LLC v. ConocoPhillips Co*., 550 S.W.3d 176, 188 (Tex. App.—Houston [1st Dist.] 2018, pet. filed) (attorneys' fees were unavailable against a limited liability company under Chapter 38 and, under applicable law, also could not be awarded under Chapter 37); *Choice! Power, LP v. Feeley*, 501 S.W.3d 199, 211-14 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *8305 Broadway Inc. v. J & J Martindale Ventures, LLC*, 04-16-00447-CV, 2017 WL 2791322, at *5 (Tex. App.—San Antonio June 28, 2017, no pet.); *Varel Int'l Indus., L.P. v. PetroDrillbits Int'l, Inc*., No. 05-14-01556-CV, 2016 WL 4535779, at *8 (Tex. App.—Dallas Aug. 30, 2016, pet. denied).

be sustained, and that the Court order Plaintiff to amend its Original Petition to eliminate the request for attorneys' fees under the Texas Civil Practices and Remedies Code § 38.001.

AFFIRMATIVE DEFENSES

7. The McLane Defendants deny the causes of action asserted by Plaintiff, but in the alternative, assert the following affirmative defenses without conceding that some or all of the following may not be matters upon which Defendants bear the burden of proof, but rather are elements of Plaintiff's cause of action:

8. The McLane Defendants are not liable to the Plaintiff, in whole or in part, because Plaintiff was contributorily negligent in its management of the Houston Regional Sports Network ("HRSN").

9. The McLane Defendants are not liable to Plaintiff, because, on information and belief, Plaintiff understood full well that carriage on the network would be adversely affected if the Astros performed poorly on the field. Nevertheless, under the actual or constructive management of Plaintiff, the Astros elected to "tank" on field performance in a variety of ways including, without limitation, the trade or release of its high performing players thereby putting a team on the field that lost over 100 games (out of 162) in the season prior to the network's launch and for two seasons thereafter.

10. The McLane Defendants are not liable to Plaintiff because Plaintiff failed to mitigate its damages.

11. The McLane Defendants are not liable to Plaintiff because Plaintiff's claims are barred by the applicable statute of limitations.

12. The McLane Defendants deny that any injunctive or equitable relief should be available to Plaintiff because of its unclean hands and because its conduct has been marked by fraud

and a lack of good faith. Contrary to Plaintiff's allegations, it is the McLane Defendants who have been damaged by Plaintiff.

13. The McLane Defendants deny that Plaintiff may recover exemplary or punitive damages. First, an award of exemplary or punitive damages is not warranted because of a lack of clear and convincing evidence of malice, fraud, or gross negligence. Second, Plaintiff does not have a legal right or basis to assert any causes of action for which the recovery of exemplary or punitive damages is permissible. Third, a plaintiff cannot recover exemplary damages where no actual damages are due on claims for which exemplary damages are permissible or for which the plaintiff only seeks and recovers nominal or liquidated damages instead of actual damages. Fourth, recovery of punitive damages would be a violation the United States and Texas Constitutions and specifically their due process clauses. Alternatively, the McLane Defendants assert all limitations on exemplary damages set forth in Texas Civil Practice and Remedies Code Chapter 41.

RECOVERY OF ATTORNEYS' FEES AGAINST PLAINTIFF

14. Plaintiff has asserted a declaratory judgment claim pursuant to Texas Civil Practice and Remedies Code § 37.001 *et seq.* The McLane Defendants assert their right to recover attorneys' fees and costs related to such claims pursuant to the terms of that statute.

PRAYER

For these reasons, the McLane Defendants ask the Court to enter judgment that Plaintiff take nothing, dismiss Plaintiff's suit with prejudice, assess costs against Plaintiff, and award the McLane Defendants all other relief to which they may be entitled.

MCLANE CHAMPIONS, LLC'S COUNTER AND THIRD PARTY CLAIM

McLane Champions, LLC ("Champions" or "Counter/Third Party Plaintiff") files its Counterclaim against Houston Baseball Partners, LLC ("HBP") and third party claim against HBP Team Holdings, LLC ("HBP Team") (collectively, "Counter/Third Party Defendants") as follows:

I. DISCOVERY CONTROL PLAN

1. Counter/Third-Party Plaintiff intends to conduct discovery under Level 3 of Texas Rule of Civil Procedure 190.

II. CLAIM FOR RELIEF UNDER TEXAS RULE OF CIVIL PROCEDURE 47

2. Counter/Third-Party Plaintiff seeks non-monetary relief and damages, including specifically attorneys' fees, that are within the jurisdictional limits of this Court, that are over $1,000,000.00.

III. JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this dispute and the amount in controversy is within the jurisdictional limits of this Court.

4. Venue is proper in Harris County, Texas pursuant to the general venue statute, Texas Civil Practice & Remedies Code § 15.002(a)(1) because all or a substantial part of the events or omissions giving rise to the claims occurred in Harris County; and under § 15.035 because this matter concerns a contract in writing.

IV. PARTIES

5. Champions is a limited liability company organized under the laws of the State of Delaware and has appeared in this lawsuit.

6. Counter-Defendant Houston Baseball Partners LLC is a limited liability company organized and existing under the laws of the State of Delaware and has appeared in this lawsuit.

7. Third-Party Defendant HBP Team Holdings, LLC is a limited liability company organized and existing under the laws of the State of Delaware. HBP Team has engaged in business in the State of Texas by, among other things, entering into contracts with Texas residents where one or both parties was to perform the contract in whole or in part in Texas. This action arises out of such business in Texas. Under Section 17.044 of the Texas Civil Practice & Remedies Code, the Texas Secretary of State is deemed to be HBP Team's agent for service of process because HBP Team is required to maintain a resident agent in Texas but has failed to do so. Under Section 17.045 of the Texas Civil Practice & Remedies Code, the Secretary of State shall mail a copy of the process to HBP Team's principal place of business at 501 Crawford Street, Ste. 500, Houston, Texas 77002.

V. SUMMARY OF THE ARGUMENT

8. HBP and/or HBP Team purchased the Houston Astros and a share of the Houston Regional Sports Network (the "Network") from Champions and then proceeded to intentionally and deliberately destroy the Network which it accomplished, in part, by "tanking" the baseball team. The destruction of the Network was undertaken so HBP could recapture what it believed were undercompensated Astros broadcast fees. In short, HBP thought its television rights agreement with the Network was a bad deal which it could escape if the Network defaulted. That plan was thwarted when Comcast threw the Network into bankruptcy thus halting the contemplated default.

9. Ever nimble, shortly after the bankruptcy proceeding commenced, HBP filed this suit against Champions and R. Drayton McLane, Jr. alleging fraud (a few days short of two years ***after*** owning and operating the baseball team and owning a share of the Network) publicly claiming that the Astros' and Network's problems were not its fault but rather the responsibility of the prior owner (McLane) (HBP/ HBP Team claimed that "they sold us a stripped down franchise with a barren farm system") and broadcast partner (Comcast) which allegedly participated in a "secret"

scheme to defraud HBP. The destruction of the Network, which was accomplished, in part, by tanking the team, deprived Champions of substantial "earnout" monies it would have received pursuant to the purchase agreement had the team and Network been operated in good faith and pursuant to the terms of the parties' agreement by HBP/HBP Team.

VI. FACTUAL BACKGROUND

10. HBP maintains that the McLane Defendants and Comcast Corporation and NBCUniversal Media, LLC (collectively, "Comcast") conspired to commit fraud and Champions breached the parties' agreement. In reality, the only evil afoot was the current owners' decision to destroy the Network and "tank" the team for the purpose of obtaining a more lucrative agreement to televise the Astros baseball games.

11. This effort began shortly after the current owners purchased the Astros from McLane Champions. In 2011, HBP and/or HBP Team purchased the Astros and the Astros equity interest in the Network.

12. The Network had been formed in May 2003 by the Astros and Rocket Ball Ltd. ("Rockets") (collectively "the Teams") who "licensed their respective media rights to the Network." The Network did not launch, that is, begin broadcasting, until October 2012, after the current owners purchased the Astros.

13. In early 2011, HBP and Champions began negotiations for the purchase and sale of the Astros and equity in the Network. After a series of negotiations and meetings wherein Champions and McLane disclosed all of its information concerning the team and the Network, Champions and HBP entered into an agreement, dated May 16, 2011, for the purchase of the Astros and the Astros' equity interest in the Network ("PSA"). Thereafter, HBP assigned its interest in the PSA to HBP Team by way of an Assignment Agreement. HBP Team and Champions executed an Amended Purchase and Sale Agreement (the "Amended PSA") on November 16, 2011, whereby

HBP Teams and Champions agreed to amend certain provisions of the PSA.

14. The PSA closed on November 22, 2011, with a purchase price of approximately $615 million. The Network launched in October of 2012, almost a year after closing.

15. A significant aspect of the transaction was HBP, and later HBP Team's, agreement to make certain Earnout Payments to Champions. Under Section 3.5 of the PSA, HBP agreed to pay certain Earnout Payments to Champions if the Network met certain financial performance benchmarks as outlined in the PSA. In connection with this promise, HBP, and subsequently HBP Team, promised Champions that it would not take any adverse actions that would detrimentally impact the Network, and consequently, Champions' right to the Earnout Payments (the "Earnout Clause"):

> Purchaser shall not, and shall cause its Affiliates not to, take any action that is designed to materially and adversely impact Free Cash Flow for any Earnout Period if (i) Seller would have been entitled to receive the Earnout Payment for such Earnout Period under clause (e), (f) or (g) of this Section 3.5, as applicable, in the absence of such action, and (ii) as a result of such action, Seller is not entitled to receive the Earnout Payment for such Earnout Period under clause (e), (f) or (g) of this Section 3.5, as applicable.

Section 3.5(K), PSA.

16. Despite this promise, HBP and HBP Team engaged in efforts to destroy the Network in order to obtain a more lucrative television deal for HBP Team. For example, during HBP Team's oversight of the Network, HBP Teams refused to allow the Network to enter into carriage agreements with *any* of the major cable and satellite television carriers. It was HBP Team's claimed concern that HBP Team would not receive sufficient revenue for such deals under its Media Rights Agreement with the Network. Comcast, on the other hand, urged HBP Team to enter into the carriage agreements to keep the Network alive. Indeed, Comcast offered to purchase HBP Team's interest in the Network, but HBP Team refused to sell its interest in the Network. Unquestionably, it was HBP Team's plan from the very moment it acquired an interest in the

Network to use its veto power under the governance provisions of the HRSN LLC Agreement to hobble the Network, causing a payment default which allowed for HBP Team to terminate the Media Rights Agreement with the Network.

17. In addition to destroying the Network, HBP Team also tanked the team that was supposed to attract fans to watch the Network. Indeed, the Astros were the worst team in baseball following the sale.[4] After years of success on the field, the Astros' demise began with the current ownership trading many of the Astros' star players for minor league prospects and even ordering prior ownership to trade high performance players prior to the sale. The success (or in this case failure) of the Astros and the Network was beyond the control of Champions after the closing. It was entirely in the hands of HBP Team.

18. These actions, or inactions, ultimately led to affiliates of Comcast placing the Network into Chapter 11 involuntary bankruptcy. Instead of taking responsibility for the downfall of the Network, HBP filed this lawsuit against the McLane Defendants claiming that they were at fault for over-valuing the Network during the sale of the team. But it was Champions, not HBP and/or HBP Team, that was ultimately harmed by HBP's and HBP Team's actions.

19. As a result of HBP's and HBP Team's efforts to drive the value of the Network down for the purpose of causing the demise of the Network, Champions was prevented from recovering the Earnout Payments contemplated by the PSA. During the negotiations of the PSA, Champions readily agreed to an Earnout Clause, putting $25 million of its own money at risk based on whether the Network met its business projections, because it was confident in the Network business model. Champions, believing it was dealing with a good faith business partner, had no idea that HBP and HBP Team would intentionally and deliberately attempt to destroy the Network for its

[4] In 2011, the Astros finished 56-106 following the trade over several key players. In 2012, the Astros finished 55-107. The team fared even worse in 2013 finishing 51-111. HBP filed this lawsuit following the 2013 season.

own gain and for the purpose of depriving Champions of the Earnout Payments. HBP's and HBP Team's actions, or inactions, were material breaches of Section 3.5(k) of the PSA, and such breaches caused significant loss to Champions.

VII. CAUSES OF ACTION

COUNT 1: BREACH OF CONTRACT

20. Champions adopts all of the foregoing factual allegations into this section by reference. Tex. R. Civ. P. 58.

21. HBP Team (as assignee of HBP) and Champions are parties to the PSA which is a binding, unambiguous agreement. Pursuant to Section 3.5(k) of the PSA, HBP Team and HBP had an obligation not to take any action that would impact the cash flow for any Earnout Period for the Network. HBP Team and HBP directly violated Section 3.5(k) of the PSA when it took actions that detrimentally impacted the performance of the Network and the Astros. Such material breaches by HBP Team and HBP have caused significant actual, economic damages to Champions for which it files this Counterclaim.

22. Champions has been forced by Counter/Third-Party Defendants to engage the undersigned attorneys in the defense and prosecution of this suit. Accordingly, Champions is entitled to recover its reasonable and necessary attorneys' fees, expenses, and costs incurred in this matter as provided by agreements and/or by governing law.

23. All conditions precedent have been performed or have occurred.

VIII. PRAYER

Champions respectfully prays that it have judgment against Counter/Third-Party Defendants, and respectfully requests that the Court award:

(1) Judgment and the award of damages against Counter/Third-Party Defendants for breach of contract;

(2) Costs and attorneys' fees as permitted by law;

(3) Prejudgment and post-judgment interest as provided by law; and

(4) Such other relief to which Champions may be justly entitled.

Respectfully submitted,

FISHER, BOYD, JOHNSON, & HUGUENARD, L.L.P.

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ATTORNEYS FOR McLANE CHAMPIONS, LLC

Certificate of Service

I hereby certify that on September 27, 2019 the foregoing instrument was served pursuant to the Texas Rules of Civil Procedure to all parties registered to receive electronic notice.

By: */s/ Harris J. Huguenard*
Harris J. Huguenard