KING, HOLMES, PATERNO & BERLINER, LLP
HOWARD E. KING, ESQ., STATE BAR NO. 77012
KING@KHPBLAW.COM
1900 AVENUE OF THE STARS, 25TH FLOOR
LOS ANGELES, CALIFORNIA 90067-4506
TELEPHONE: (310) 282-8989
FACSIMILE: (310) 282-8903

Attorneys for Respondents MATHANGI "MAYA" ARULPRAGASAM ("M.I.A.") and $10 PROTOCOL, INC.

BEFORE THE

AMERICAN ARBITRATION ASSOCIATION/ICDR

NFL Enterprises LLC, Claimant, vs. Mathangi "Maya" Arulpragasam ("M.I.A.") and $10 Protocol, Inc., Respondents.	CASE NO. 50 140 T 00210 12

ANSWER OF RESPONDENTS MATHANGI "MAYA" ARULPRAGASAM ("M.I.A.") AND $10 PROTOCOL, INC. TO AMENDED AND SUPPLEMENTAL DEMAND FOR ARBITRATION

Respondents Mathangi "Maya" Arulpragasam ("M.I.A.") and $10 Protocol, Inc. ("Respondents") hereby respond to the Amended and Supplemental Demand for Arbitration ("Demand") of Claimant NFL Enterprises, LLC ("NFL"), as follows:

I.

INTRODUCTION

Respondents deny the charging allegations of the Demand, and deny that (a) either of the Respondents is liable to NFL as alleged or at all, (b) NFL has been damaged at all, and (c) NFL is entitled to any relief from Respondents whatsoever. Quite simply, nothing in the performance of Maya in the 2012 Superbowl Halftime Show ("Show") did anything to damage the reputation

or goodwill of NFL, or to cause injury to NFL. The FCC has not commenced any claim against anybody over the subject Show, and undoubtedly deems there to be no basis to pursue the matter in light of applicable law. Over two years have elapsed since the Show, and applicable statutes of limitation probably have run. There is no reason to believe that the FCC will arise like a slumbering giant now to deal with "old news."

NFL contends that Maya should pay NFL at least $1.5 Million for non-existent damage to the allegedly wholesome reputation and goodwill of NFL. Further, in a newly-minted additional claim, NFL claims that Maya should pay NFL $15.1 Million in "restitution" as the value of the public exposure she received for appearing – without pay – in the two minute, ten second show segment of "*Gimme All Your Luv*," on the theory that advertisers paid that much per minute for placing their ads in the Superbowl. The claim for restitution lacks any basis in law, fact, or logic.

The indemnity claim is baseless as well. No one (including NBC) has made any claim against NFL, and there has been no notice to Respondents of any such claim having been made. Such notice is a condition precedent to making any indemnity claim. Accordingly, NFL fails to present an actual, ripe, justiciable controversy over indemnity.

The continued pursuit of this proceeding is transparently an exercise by NFL intended solely to bully and make an example of Respondents for daring to challenge NFL. Such aggressive posture toward Respondents stands in marked contrast to how NFL looks the other way and does nothing to sanction its players, the coaching staff of its member teams, and even its team owners for engaging in precisely the sort of conduct it accuses Maya of here ("flipping the bird"), or for even dramatically worse conduct.

Without limitation to other matters of defense that may arise through the fruits of discovery to be conducted in this proceeding, Respondents note here the following matters bearing on the defense to NFL's Demand.

II.

THERE IS NO LIABILITY BECAUSE THERE IS NO DAMAGE HERE

New York law recognizes that there must be damages in order to establish a breach of contract claim. At its core, NFL's claim is founded upon the false assertion that NFL has a wholesome reputation, that its goodwill has been damaged, or that it is somehow has been damaged.

A. There are No Damages to NFL's Reputation or Goodwill

Claimant has no damages to its reputation or goodwill and cannot establish any. The language of the contract, unilaterally drafted by NFL, merely provides that $10 Protocol's and Maya's performance shall not abridge the level of wholesomeness, goodwill and reputation actually enjoyed by NFL. The ambiguity in contract language is to be interpreted against the favor of NFL under the doctrine of *contra proferentem*.

Notably, however, the actual, long-entrenched, demonstrable reputation of NFL is for profane, bawdy, lascivious, demeaning and/or unacceptable behavior by its players, team owners, coaching and management personnel, and by performers chosen and endorsed by NFL to perform in its halftime shows.

As a first example regarding NFL show performers, Michael Jackson performed in the 1993 Superbowl Halftime Show, during which he repeatedly grabbed or fondled his genitalia, especially while he sang "Billie Jean." This was NFL's first foray into salacious performances in their Halftime Shows. See R. Sandomir, "*How Jackson Redefined the Super Bowl*," NEW YORK TIMES (June 29, 2009), http://www.nytimes.com/2009/06/30/sports/football/30sandomir.html?_r=0. Discovery will demonstrate that NFL was fully aware that Jackson was going to engage in such "genitalia adjustments" in his performance. That was a well-known aspect of his "act," and discovery likely will demonstrate NFL even observed such behavior in rehearsal, without any admonishment to Jackson to desist. NFL wanted that "edge" to Jackson's performance.

As another example, Prince appeared in the 2007 Superbowl Halftime Show. During part of his performance, he was illuminated against the backdrop of a billowing sheet of fabric to project a huge shadow of himself. His oversized shadow was shown caressing the neck of his stylized trademark guitar (shaped like his personal symbol signifying "the performer formerly known as Prince"), as if stroking an erect oversized phallus in a manner reminiscent of Jimi Hendrix performances where he fondled his guitar's neck. Discovery is expected to confirm that NFL knew in advance exactly what would be presented, from pre-game rehearsal and from the stage set configuration.

Yet another example is the 2012 Show with Madonna at issue here, in which Maya appears center-screen only very briefly. The Show prominently features scenes of very young women dancers (possibly not even of adult age) poised in reclining positions, with their feet and hands and/or shoulders planted on the ground behind them. The women lewdly thrust their elevated pelvic areas in a manner unmistakably evocative of sexual acts (very probably qualifying as "indecent" under the FCC definition), or at the very least, in a manner wholly consistent with the *scenes a faire* in a strip club. Given that NFL contends that it insisted on a rehearsal before that performance, NFL is charged with full knowledge of the lascivious character of the performance NFL *intended and encouraged* to be presented by such young women. This conduct is part of the standard by which NFL's purported good reputation for wholesomeness must be gauged.

Similarly, the advertising broadcast during the Superbowl Halftime Shows for many years has frequently tilted in a titillating and salacious direction in instances too numerous to catalogue here.

Time and time again, NFL players,[1] coaches[2] and team owners[3] have been seen and heard on screen during broadcast NFL games "flipping the bird," uttering profanities (the mildest of

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[1] Ryan Wilson, Report: "*NFL Won't Fine Randy Starks for Flashing Middle Finger*," CBSSPORTS.COM (September 13, 2013)(re Randy Starks, Dolphins defensive tackle); "*Justin Francis Flips Bird*," THE MEATLOCKERSPORTS (August 27, 2012),

which is the scatological term NFL accuses Maya of mouthing), and making racist comments. Discovery from NFL broadcast archives will demonstrate the pervasive incidence of such matters. The racist comments have been so commonplace that NFL was recently reported to be considering (only now, after many years of misbehavior) the imposition of a 15 yard penalty against players who utter the "N-word" on the field. See http://espn.go.com/nfl/story/_/id/10500657/nfl-expected-penalize-players-using-racial-slurs-games ("NFL to penalize use of racial slur"). This proposed 15 yard penalty contrasts with NFL's demand for a total of $16.6 Million from Maya.

In another recent scandal, Miami Dolphins player Richie Incognito, and others, subjected teammate Jonathan Martin "to 'a pattern of harassment' that included racial slurs and vicious sexual taunts about his mother and sister, according to a report released by NFL investigator Ted Wells." "*Incognito, others tormented Martin*," ESPN.COM news service (updated February 15, 2014), http://espn.go.com/nfl/story/_/id/10455447/miami-dolphins-bullying-report-released-richie-incognito-others-responsible-harassment.

The "goodwill" and reputation of NFL also has taken a hard "hit" in the public eye in the last year over the massive proposed settlement of an NFL player's class action. That action arises out of the long-concealed knowledge of NFL officials that players having been suffering grievous neurological damage from concussions and rushing injured players back onto the field while glorifying and profiting from the kind of bone-jarring hits that make for spectacular highlight-reel footage. Earlier this year, U.S. District Court Judge Anita Brody, presiding over

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http://www.youtube.com/watch?v= EdDEkfLJ7Vg ("New England Patriots' [Defensive End] Justin Francis flips the bird on the NFL Network").

[2] See Dan Anzus, "*Raiders Coordinator Jason Tarver Flips Bird To Officials*," NFL WEBSITE (October 27, 2013), http://www.nfl.com/news/story/0ap2000000270771/article/raiders-coordinator-jason-tarver-flips-bird-to-officials; Jason Whitteker, "*NFL Coach Flips off ref*," http://www.youtube.com/watch?v=NAakFum2e1E.

[3] See Ryan Wilson, Report: "*NFL Won't Fine Randy Starks for Flashing Middle Finger*," CBSSPORTS.COM (September 13, 2013)(citing and linking to clip "*[Tennessee] Titans [Owner]Bud Adams Flipping Bird Middle Finger*,") http://www.youtube.com/watch?v=FTxHuUGG_2c.

the class action in Philadelphia, rejected a proposed $765 Million settlement (offered by NFL "to do the right thing") as being inadequate to cover all the injuries suffered. See K. Belson, "*Judge Rejects N.F.L. Settlement, For Now*," NEW YORK TIMES (January 14, 2014), http://www.nytimes.com/ 2014/01/15/sports/football/judge-questions-whether-sum-of-nfl-settlement-is-enough.html.

Against all this backdrop, NFL strains credulity to the breaking point by arguing that Maya's conduct somehow damaged or abridged the reputation of NFL for wholesomeness and tastefulness, or caused it damage.[4] Only profound hubris on NFL's part can explain why NFL pursues the arbitration demands made here.

B. <u>There is No Liability or Damage Based on Speculated FCC Action</u>

In trying to invent damages, NFL asks the Arbitrator to find that the FCC will do something that all evidence indicates it has not done, and will not do: take action against the broadcaster of the Show. NFL merely speculates what the FCC might do. It is implausible the

[4] Indeed the "goodwill" of NFL is so atrophied that it is a frequent comedic punching bag. In connection with the announcement of NFL prospect Michael Sam that he is gay, Jon Stewart aired a segment on the "Daily Show with Jon Stewart" about reaction to such announcement. As one commentator noted:

> "However, the ultimate driving point of the segment was to skewer the idea that Sam's draft stock is dropping because team's are afraid of the "controversy" that would ensue should a team draft the Missouri product. Stewart compared the speculative controversy over Sam's presence on an NFL team to a number of notable NFL players that have committed serious crimes before returning to an NFL roster (if they were even removed at all).
>
> > [Quoting from Stewart:] 'No team wants the controversy that having a gay player would cause," Stewart said. "If he had just been accused of DUI vehicular manslaughter [picture of **<u>Donte Stallworth</u>** appears] or obstruction of justice in connection with a murder [**<u>Ray Lewis</u>**] or had been accused of sexual assault [**<u>Ben Roethlisberger</u>**] or screamed the n-word a[t] a concert [**<u>Riley Cooper</u>**] or killed a bunch of dogs [**<u>Michael Vick</u>**] and buried them in his [expletive] yard, you know, NFL material.'"

N. O'Malley, MASSLIVE.COM (February 11, 2014), http://www.masslive.com/sports/index.ssf/2014/02/the_daily_show_gets_into_micha.html.

FCC will take action, when in the face of two years of inaction, the FCC has done absolutely nothing. The FCC received a mere 222 complaints from over 111.3 million viewers over the 2012 Halftime Show, as compared with "over 542,000 complaints over the Janet Jackson "wardrobe malfunction" matter in the 2004 Superbowl Halftime Show. (Some of those 222 complaints were over the commercials). "*FCC complaints reflect ire over Superbowl*," ESPN OUTSIDE THE LINES (March 15, 2012), http://espn.go.com/espn/otl/blog/_/name/ assael_shaun/ id/7692328/hundreds-complain-fcc-nfl-super-bowl-half-appearances-madonna-mia-nicki-minaj.

While federal law permits the FCC to police the broadcast of indecent language and material, there is a serious question whether the FCC could treat Maya's performance as violating the applicable regulations. For over two decades following the Supreme Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (addressing broadcast of George Carlin's "Seven Dirty Words" monologue), the FCC routinely took the position that "fleeting" utterances of the "F-word" or "S-word" were not actionable *per se*. It was not until 2004 that the FCC took the position that broadcast of non-repetitive fleeting *utterance* of those words *might* be grounds to impose sanctions for the broadcast of fleeting utterances. In 2009 the Supreme Court held that broadcast of fleeting utterances might be actionable, in a context – based analysis. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). However, in June 2012 – after the 2012 Superbowl – the Supreme Court declined to review, and let stand, a federal Third Circuit Court of Appeal case which rejected (after remand in *F.C.C. v. Fox*) the imposition of fines upon CBS and CBS stations for fleeting images of Janet Jackson's exposed breast in the 2004 Superbowl (the so-called "wardrobe malfunction"). *C.B.S. Corp v. F.C.C.*, 663 F.3d 122 (2011).

As further telling evidence of the FCC's inclinations not to pursue fleeting *indecent* matters, it has taken no action over the recent instance of actress Elaine Stritch "dropping the

F-bomb" in an interview with Kathy Gifford on NBC.[5] There is no evidence nor indication that the FCC has commenced forfeiture proceedings against NBC over Stritch "dropping the F-bomb." Indeed, the inaction by the FCC corroborates it disposition to not pursue "fleeting" instances of profanity.

C. No Financial Impact to NFL Caused By Maya's Performance

Discovery will demonstrate that Maya's performance did not have one iota of financial impact on NFL. In fact, discovery also will demonstrate that NFL, and CBS as broadcaster, in fact reaped **greater** revenues for the 2013 and 2014 Superbowl programming and advertising. That directly contradicts any notion that NFL suffered any damage.[6]

D. Damages Must Be Certain and Not Speculative

It is fundamental contract law, in New York and elsewhere, that damages – including lost profits – need to be established with reasonable certainty. Recoverable damages may not be speculative, and must be capable of measurement based upon known and reliable factors. There are no such factors here.

E. Damage to Goodwill Not Recoverable For Breach of Contract Under New York Law

A further fundamental flaw in NFL's claim for damages is that NFL seeks recovery for purported damage to goodwill. Under New York law, recovery for loss of or damage to goodwill is not recoverable under contract law.

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[5] See http://www.mediaite.com/tv/elaine-stritch-hilariously-drops-f-bomb-live-on-today-show/ ("After [Kathy] Gifford pointed out Stritch's reputation for saying whatever she feels, the actress said it's the only natural way to go. '"If you just say things naturally, it's fine," she elaborated. "You know, they're just thinking 'fuck.'"). Gifford's reaction was just priceless."

[6] CBS announced in May 2012 – 3 months after the 2012 Superbowl Show – that advertising for the 2013 program was already 50% sold, and could reach 80% within a matter of weeks. Brian Steinberg, ADAGE.COM (May 30, 2012), http://adage.com/article/special-report-super-bowl/cbs-2013-super-bowl-50-sold/235049/. This demonstrates that NFL was not damaged in the least by any aspect of Maya's performance in the 2012 Superbowl Halftime Show.

F. Failure to Use 5 Second Delay

NFL, and NBC, failed to exercise ordinary care in the conduct of the Halftime show by not activating the "5 second delay" system in place for the broadcast. NFL stated in a public announcement: "There was a failure in NBC's delay system." Any alleged fault or liability of Respondents should be diminished by NBC's dereliction. Discovery has not been taken yet to determine whether contractually NBC owed a duty to NFL to properly operate the delay system. Very likely that is indeed the case.

III.

THE RESTITUTION/UNJUST ENRICHMENT CLAIM IS UNTENABLE

In the face of the patent lack of damages to NFL, the league resorts to the untenable approach of seeking recovery for purported "unjust enrichment" to Maya, arguing that Maya must pay "restitution" for the supposed value or benefit to her from the public exposure she received from being "center-screen" for a few seconds. NFL suggests that such value should be measured by how much per second advertisers paid for broadcasting their ads during the 2012 Superbowl.

This attempt at misdirection fails. Under New York law, a claim for unjust enrichment is not allowed where, as here, there is a contract in place governing the transaction. Unjust enrichment is a substitute approach to relief only where there is **no contract**.

Even if it were permitted under New York law, a restitution theory would rely upon matters not capable of being summarily adjudicated, nor ever being proved by NFL. It would require an impossible finding that Maya did not appear at all on the Show, and that NFL has been altogether "deprived" of any performance by Maya at all. In addition, such theory would require proving with reasonable certainty the value of the benefit Maya allegedly enjoyed from her appearance in the program. Just as a party cannot establish a claimant's damages if they are uncertain or speculative, a restitutionary claim cannot be based on uncertain benefit to an allegedly breaching party.

NFL relies upon a fanciful notion that Maya effectively received a speculative $15.1 Million in advertising value for herself by appearing as part of a cast of dozens in the two minute, ten second long performance of "*Gimme All Your Luv*," long showing, and appearing center-screen for approximately 15 seconds. NFL arrives at this conclusion by calculating, on the basis of what a Forbes magazine article says was the total advertising revenue to NBC for Madonna's 2012 Halftime Show ($86 Million), and blithely assuming that a performer would pay corresponding pro-rated amounts for however many minutes or seconds the performer appeared on screen as part of a cast in the Halftime Show and receiving public exposure. This is precisely the sort of "junk science" that cannot be the subject of expert testimony under applicable law, such as *Daubert* and *Kumho Tire*. There is, of course, no market in which performers pay to perform on television. Even celebrities appearing on television "interview shows" get paid a nominal amount (so-called "union scale"), despite the fact that they typically are there to promote themselves or their current projects, such as a new movie or show. It is therefore baseless to assume, in the absence of such an established market, that one can determine a recoverable restitutionary amount.

IV.

THERE IS NO RIPE OR JUSTICIABLE CLAIM REGARDING INDEMNITY

NFL's claim for a declaration of a right to indemnification by Maya does not present a ripe, justiciable claim – an indispensable requirement to being able to pursue a claim. In reality it is presented as a request for a consolation price over NFL having no damages, and looking for prospective, potential recovery as a way to save face. There is no evidence of a third party having made demand upon NFL for indemnification, and no "timely notice" has been given of such a demand, which is a condition precedent contract to any right to indemnification under the terms of the contract. Moreover, it is now over two years since the February 2012 Superbowl Halftime Show, and there is no suggestion that the FCC will give notice of a claim for forfeiture.

In a similar vein, NFL cannot recover attorney's fees for its pursuit of prospective indemnity on a speculative possibility that it might have to indemnify some unknown third party.

Under New York law, even if a party is indeed entitled to indemnity under a contract, the indemnified party may not recover its attorney's fees in establishing (such as in court or arbitration) its right to indemnification for liabilities to third parties absent an explicit, unambiguous right to such fees in a written contract. There is no such right in any written contract here.

V.

ADDITIONAL ISSUES BEARING ON DEFENSE

Respondents raise several other matters for consideration here.

A. Fair Use

NFL implies, in passing, that there is something inappropriate about any reference to or inclusion in a YouTube clip pertaining to Maya, of the very brief segment of Maya in the Show. However, any use of excerpts or clips of the 2012 Superbowl program by others or by Maya herself, to comment on Maya or the NFL, constitutes privileged "fair use." The public is entitled to "fair use" of even copyrighted works. It takes only the most rudimentary Google or YouTube search to yield countless instances in which members of the public have made "fair use" of excerpts of the 2012 Superbowl Show, as well as excerpts of likely all of the 48 Superbowl shows that have aired since the inception of the annual event. Discovery will demonstrate that, in recognition of the right of "fair use," NFL does not take steps to bar such "fair use."

B. The $10 Protocol Status Issue

NFL grossly overstates the significance of $10 Protocol having its registration suspended by the Delaware Secretary of State. The annual registration inadvertently was not timely filed, resulting in administrative suspension, which is curable. The papers for reinstatement are in process, and possibly by the time this answer is served, or at least soon thereafter, the corporation will be reinstated and in good standing.

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VI.

CONCLUSION

No doubt NFL will continue to pursue this baseless claim. Respondents should be awarded their costs and all appropriate relief that this tribunal deems just and proper.

DATED: March 14, 2014

KING, HOLMES, PATERNO & BERLINER, LLP

By: _____
HOWARD E. KING
Attorneys for Respondents MATHANGI "MAYA" ARULPRAGASAM ("M.I.A.") and $10 PROTOCOL, INC.