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19 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
20 **SAN FRANCISCO DIVISION**

21 BERNARD PAUL PARRISH, HERBERT
ANTHONY ADDERLEY, WALTER
22 ROBERTS III,

23 Plaintiffs,

24 v.

25 NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION and NATIONAL
26 FOOTBALL LEAGUE PLAYERS
INCORPORATED d/b/a/ PLAYERS INC,

27 Defendants.
28

Case No. C 07 0943 WHA

**DEFENDANTS' MEMORANDUM
REGARDING SEALING OF
CONFIDENTIAL DOCUMENTS**

1 Pursuant to the Court's Order dated August 6, 2008, Defendants hereby submit
2 this memorandum setting forth the compelling reasons that certain of the documents attached to
3 their summary judgment papers (or to Plaintiffs' Opposition) that contain Defendants'
4 confidential and trade secret information should be filed under seal. The instant memorandum
5 narrows the documents covered by Defendants' Motions to File Under Seal dated June 13, 2008,
6 July 10, 2008 and August 1, 2008, and, as the Court instructed, seeks sealing treatment only for
7 those documents that meet the standard set forth by the Ninth Circuit for sealing documents used
8 in dispositive motions.

9 **1. Defendants' Third-Party License Agreements**

10 The following documents are license agreements between Defendants and various
11 third-party licensees: Exhibits 22, 40, 41, 43, and 44 to the Declaration of David Greenspan in
12 Support of Defendants' Motion for Summary Judgment ("Motion Declaration"); Exhibits C, D,
13 U, V, W-MM, and KKK to the Declaration of Ryan S. Hilbert in Support of Plaintiffs'
14 Opposition to Defendants' Motion for Summary Judgment ("Opposition Declaration"); Exhibits
15 2 and 3 to the Declaration of David Greenspan in Further Support of Defendants' Motion for
16 Summary Judgment ("Reply Declaration"); and Exhibits 1, 2, and 4 to the Declaration of Jeffrey
17 Kessler in Support of Defendants' Letter Brief to the Court dated August 1, 2008 ("Reply Letter
18 Brief Declaration").¹

19 Specifically, these exhibits are non-public, commercial documents, the terms of
20 which are trade secrets, and the type of documents that are regularly found to present a
21 compelling need of sealing. See Cal. Civ. Code § 3426.1; Kamakana v. City and County of
22 Honolulu, 447 F.3d 1172, 1179 (finding that "compelling reason" to file under seal exists when
23 the document contains a trade secret); Pharm. Care Mgmt. Ass'n v. Rowe, 307 F. Supp. 2d 164,
24 177-78 (D. Me. 2004) (finding that confidential terms of contracts and financial information
25 constitute trade secrets); Den-Tal-Ez, Inc. v. Siemens Capital Corp., 389 Pa. Super. 219, 250-51
26 (finding that "confidential license agreements" were trade secrets). The confidential terms

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28 ¹ For the Court's convenience, the documents reviewed in this memorandum that Defendants believe should be filed under seal are listed in Exhibit A hereto.

1 contained in these documents include the specific price terms of the agreements (including the
2 precise amounts and timing of the guaranteed payments and royalties), the specific scope of the
3 rights granted and the services to be rendered under the agreements, the terms and conditions of
4 payment, and the various contingencies and other contractual terms that Players Inc and the
5 respective licensees negotiated. These exhibits should be filed under seal because they contain
6 competitively sensitive, non-public commercial information of the Defendants and third-parties.

7 Indeed, Defendants would be seriously harmed if these documents were publicly
8 filed because the terms of these confidential agreements, which constitute trade secrets, would
9 become publicly available to other licensees and licensors that compete in the marketplace.
10 These other parties would be sure to alter their business behavior in negotiations with Defendants
11 if they became aware of the terms of Defendants' license agreements with its third-party
12 licensees. This would severely harm Defendants' bargaining positions, and cause substantial
13 competitive and commercial injury to Defendants. See Declaration of Gene Upshaw ¶¶ 7-8
14 (Rec. Doc. 187) (Nov. 21, 2007) ("Upshaw Decl.").

15 Public disclosure of the terms of these license agreements would similarly harm
16 the third-party licensees. See Declaration of Joel Linzner ¶ 3 (Rec. Doc. 186) (Nov. 21, 2007)
17 ("[P]ublic disclosure of this information would harm competition by divulging to EA's and
18 Players Inc's competitors the confidential price and other terms that EA and Players Inc
19 negotiated in these contracts. The harm to EA and others from public disclosure of these
20 documents would be severe and immediate.").

21 For all of these reasons, there is compelling reason for filing these exhibits under
22 seal.

23 **2. E-mail Correspondence Regarding Players Inc's License
24 Agreement with EA and the Pro Football Hall of Fame**

25 Exhibits E, F, and G to the Opposition Declaration are e-mail correspondence
26 among Players Inc employees and with EA employees concerning Players Inc's license
27 agreement with EA and the Pro Football Hall of Fame, one of the third-party licensee agreements
28 identified above. These exhibits discuss the non-public commercial terms of the license
agreement, which constitute trade secrets. Thus, as with the other license agreements, there is

1 compelling reason for filing these exhibits under seal.

2 **3. Declaration of Joel Linzner**

3 The document attached to the Motion Declaration as Exhibit 21 is a declaration
4 submitted by Joel Linzner, the Executive Vice President of Business and Legal Affairs of
5 Electronic Arts Inc. (“EA”). Mr. Linzner’s declaration discusses the scope and terms of EA’s
6 license agreement with Players Inc (which is attached to his declaration), its separate license
7 agreement with Players Inc and the Pro Football Hall of Fame, and ad hoc group licensing deals
8 with specifically identified retired players, all of which are commercial trade secrets, and should
9 be filed under seal for the same compelling reasons as discussed above in connection with the
10 third-party license agreements.

11 **4. NFL Sponsorship and Internet Agreement**

12 Exhibit RR to the Opposition Declaration is an agreement between Players Inc
13 and NFL Properties, Inc. (“NFL Sponsorship and Internet Agreement”). Exhibit TT to the
14 Opposition Declaration is a memorandum on the terms and application of the NFL Sponsorship
15 and Internet Agreement. Exhibit 6 to the Reply Declaration is a letter from counsel for
16 Defendants to counsel for Plaintiffs describing Defendants’ internal business practices regarding
17 revenues paid under the NFL Sponsorship and Internet Agreement.

18 Specifically, Exhibit RR is a non-public, commercial document, the terms of
19 which are trade secrets. See Cal. Civ. Code § 3426.1; Kamakana, 447 F.3d at 1179; Pharm. Care
20 Mgmt. Ass’n, 307 F. Supp. 2d at 177-78; Den-Tal-Ez, 389 Pa. Super. at 250-51. The
21 confidential terms contained in Exhibit RR include the specific price terms of the agreement
22 (including the precise amounts and timing of the guaranteed payments and royalties), the specific
23 scope of the rights granted and the services to be rendered under the agreement, the terms and
24 conditions of payment, and the various contingencies and other contractual terms between
25 Players Inc and NFL Properties, Inc. The other exhibits in this category refer to these types of
26 information contained in Exhibit RR. These exhibits should be filed under seal for the same
27 compelling reasons requiring the filing of the third-party license agreements and other
28 documents discussing the confidential terms contained therein. See discussion at ¶¶ 1-3, supra.

1 **5. Information Regarding the Terms of Licensing of Retired Players**

2 The documents attached to the Motion Declaration as Exhibits 17, 19, 23, and 24,
3 and to the Opposition Declaration as Exhibit EEE contain the identities of specific retired players
4 – almost all of whom (with the sole exception of Plaintiff Herbert Adderley) are not named
5 parties to this action – who entered into ad hoc licensing agreements, the amounts and the
6 manner in which they were paid under those agreements, and the amounts (if any) paid to
7 Players Inc. These types of information implicate these retired players’ privacy concerns and
8 constitute Defendants’ commercial trade secrets, public disclosure of which would seriously
9 harm Defendants and their non-party licensees. See Upshaw Decl. ¶ 4. For all of these reasons,
10 there is more than sufficient compelling reason for filing these documents under seal. See Green
11 v. Baca, No. CV 02-4744-MMM(MANX), 2004 WL 1151649, *1 (C.D. Cal. May 19, 2004)
12 (ordering that documents reflecting the names or information of non-parties be filed under seal).

13 Exhibit JJJ to the Opposition Declaration is a letter from counsel for Defendants
14 to counsel for Plaintiffs containing these types of information for specific licensing programs,
15 and should be filed under seal for the same compelling reasons.

16 **6. Commercial Agreements Between the NFLPA and Players Inc**
17 **Concerning the Distribution of Funds, and Other Documents**
18 **Referring to this Information**

19 The documents attached to the Motion Declaration as Exhibit 32, 35, 36, and 33
20 and to the Opposition Declaration as Exhibits T, OO, and PP are agreements between Players Inc
21 and the NFLPA, and an amendment thereto, concerning various business matters including an
22 NFLPA grant of rights to Players Inc in connection with Players Inc’s licensing activities and
23 regarding a redistribution of certain funds under the Defendants’ agreement. Exhibit 33 to the
24 Motion Declaration is a series of internal memoranda also regarding the distribution of certain
25 funds under the Defendants’ agreement. Exhibits 45 and 46 to the Motion Declaration and
26 Exhibits PPP to the Opposition Declaration are written discovery responses discussing
27 information contained in these documents, and Exhibit PPP also contains confidential
28 commercial and trade secret information regarding the NFL Sponsorship and Internet Agreement
discussed above.

1 These documents are confidential commercial agreements between Players Inc
2 and the NFLPA regarding their business arrangements, or are documents explaining or
3 describing those business arrangements. The terms of these agreements include descriptions of
4 revenue amounts received by Defendants pursuant to their licensing agreements with certain
5 licensees, as well as the method by which such revenue is distributed. These documents also
6 describe the distribution of revenue received from third parties, such as NFL Properties, Inc., and
7 certain trading card companies.

8 The specific terms of these commercial agreements have not been made public
9 and constitute trade secrets regarding the operation of Defendants' licensing businesses. See
10 Cal. Civ. Code § 3426.1; Kamakana, 447 F.3d at 1179; Pharm. Care Mgmt. Ass'n, 307 F. Supp.
11 2d at 177-78; Den-Tal-Ez, 389 Pa. Super. at 250-51. Public disclosure of these agreements
12 would reveal to Defendants' competitors, counter-contracting parties, and potential counter-
13 contracting parties detailed financial information relating to the operations of Defendants'
14 licensing businesses and contractual arrangements with third parties. Such information could
15 cause these entities to change their business behavior to Defendants' commercial disadvantage.
16 Upshaw Decl. at ¶¶ 7-8. Accordingly, there is sufficient compelling reason to file these
17 documents under seal.

18 **7. Defendants' Financial Statements and Reports**

19 The document attached to the Motion Declaration as Exhibit 39 is an excerpt from
20 the NFLPA's Fiscal Year 2007 Annual Financial Report, and the documents attached to the
21 Opposition Declaration as Exhibits WW and XX are the NFLPA's Annual Reviews from 2005
22 and 2006. These documents, which have not been disseminated to the public, contain sensitive
23 and confidential information regarding Defendants' consolidated finances and business practices,
24 including matters not involving player licensing, and constitute trade secrets.² For the same
25 reasons as discussed above, Defendants would be seriously harmed by the public disclosure of

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27 ² See Pharm. Care Mgmt. Ass'n, 307 F. Supp. 2d at 177-78 (finding that confidential terms of
28 contracts and financial information constitute trade secrets); Alexander & Alexander Benefit
Servs. v. Benefit Brokers & Consultants, Inc., 756 F. Supp. 1408 (D. Or. 1991) (holding that
financial information constituted a trade secret).

1 such sensitive non-public commercial information and trade secrets. Accordingly, there is more
2 than sufficient reason to file these exhibits under seal.

3 **8. Declaration of Andrew Feffer**

4 The document attached to the Motion Declaration as Exhibit 15 and to the
5 Opposition Declaration as Exhibit YY is the Declaration of Andrew Feffer, Executive Vice
6 President and Chief Operating Officer of Players Inc. Mr. Feffer's declaration contains the same
7 type of confidential, commercial information that constitute trade secrets described above,
8 including descriptions and explanations of both the financial and non-financial terms of ad hoc
9 agreements between Players Inc's third-party licensees and retired players who are not parties to
10 this action, as well as the underlying agreements and documents as attachments to his
11 declaration. See Cal. Civ. Code § 3426.1; Kamakana, 447 F.3d at 1179; Pharm. Care Mgmt.
12 Ass'n, 307 F. Supp. 2d at 177-78; Den-Tal-Ez, 389 Pa. Super. at 250-51. Thus, for the same
13 reasons stated above, public disclosure of Mr. Feffer's declaration would cause competitive and
14 commercial harm to Defendants and non-party licensees, and there is sufficient compelling
15 reason for filing these exhibits under seal.

16 **9. Information in Expert Reports**

17 The documents attached to the Motion Declaration as Exhibits 16, 18, and 20, to
18 the Opposition Declaration as Exhibits R, S, and NNN, and to the Reply Declaration as Exhibits
19 10 and 11 are the reports (or excerpts thereof) by experts retained by the parties, namely Philip
20 Y. Rowley, Daniel A. Rascher, and Roger G. Noll. These reports contain the very same
21 confidential commercial information and trade secrets described above, including explanations
22 of Players Inc's internal business practices with respect to retired player licensing. Public
23 disclosure of these reports would therefore cause competitive and commercial harm to both
24 Defendants and to its non-party licensees. Accordingly, there is compelling reason to file these
25 exhibits under seal.

26 **10. Non-Party Retired Players' Personal Information**

27 The documents attached to the Opposition Declaration as Exhibits P, VV, III, and
28 the Reply Letter Brief Declaration as Exhibit 9 contain the identities and personal information of

1 specific retired players, almost all of whom (with the sole exception of Plaintiff Herbert
2 Adderley) are not named parties to this action. For example, Exhibit 9 to the Reply Letter Brief
3 Declaration is a listing of the GLA Class Members included as an exhibit to Philip Y. Rowley’s
4 expert report, and Exhibit P to the Opposition Declaration contains excerpts from the NFLPA
5 Retired Members Directory, which includes the addresses and phone numbers of retired players.
6 The privacy concerns raised by the public disclosure of these exhibits are more than sufficient
7 compelling reason for filing these documents under seal. Green, 2004 WL 1151649 at *1
8 (ordering that documents reflecting the names or information of non-parties to be filed under
9 seal).

10 **11. Players Inc Monthly Report**

11 The document attached as Exhibit O to the Opposition Declaration is a Players
12 Inc monthly report for June 2005, and contains many of the types of confidential commercial
13 information concerning Defendants’ trade secrets, such as the terms of license agreements and
14 the licensing of retired players. See Cal. Civ. Code § 3426.1; Kamakana, 447 F.3d at 1179;
15 Pharm. Care Mgmt. Ass’n, 307 F. Supp. 2d at 177-78; Den-Tal-Ez, 389 Pa. Super. at 250-51.
16 For the same reasons discussed above, public disclosure of this information would cause
17 commercial harm to Defendants and there is compelling reason for filing these documents under
18 seal.

19 **12. Excerpts of Deposition Transcripts**

20 The documents attached to the Motion Declaration as Exhibits 5, 8, 27, 34, and
21 37, to the Opposition Declaration as Exhibits J, K, QQ, and HHH, to the Reply Declaration as
22 Exhibit 12, and to the Letter Brief Declaration as Exhibits 6 and 7 are excerpts of deposition
23 testimony given in this action that have been designated “Confidential” or “Highly Confidential -
24 Attorneys’ Eyes Only” by Defendants or – in the case of Exhibits 5 and 27 to the Motion
25 Declaration, Exhibit QQQ and HHH to the Opposition Declaration, and Exhibits 6 and 7 to the
26 Letter Brief Declaration – by non-party The Topps Company. Defendants request to file these
27 deposition transcript excerpts under seal because they contain testimony describing the
28 confidential, commercial and trade secret information described above, including, for example:

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- Descriptions and explanations of the terms of Defendants’ license agreements with non-party licensees; and
- Descriptions and explanations of Defendants’ internal business practices with respect to active and retired player licensing.

Thus, for the same reasons stated above, public disclosure of this deposition testimony would cause competitive and commercial harm to Defendants and to non-party licensees and there is compelling reason for filing these exhibits under seal. See Upshaw Decl. ¶ 9.

13. Unredacted Versions of the Third Amended Complaint, Defendants’ Motion for Summary Judgment, Plaintiffs’ Opposition, Defendants’ Reply, Plaintiffs’ Letter Brief, and Defendants’ Reply Letter Brief

Exhibit 1 to the Motion Declaration is the unredacted version of the Third Amended Complaint in this case. Exhibit 1, as well as Defendants’ Motion for Summary Judgment, Plaintiffs’ Opposition, Defendants’ Reply, Plaintiffs’ Letter Brief, and Defendants’ Reply Letter Brief contain much of the very same confidential and trade secret information described above, including extensive quotations and descriptions of the non-public license agreements and the deposition testimony of Defendants’ non-party licensees. For the same reasons as discussed above, public disclosure of unredacted versions of these documents would cause competitive and commercial harm to both Defendants and to its non-party licensees. Accordingly, there is compelling reason to file these documents under seal, and for only the redacted versions to be made publicly available.

CONCLUSION

For the reasons stated above, Defendants respectfully request that this Court grant this Miscellaneous Administrative Motion to File under Seal, as amended by the narrowed list of documents submitted herewith.

Date: August 8, 2008

DEWEY & LEBŒUF LLP

BY: /s/ David G. Feher

David G. Feher
Attorneys for Defendants