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2
3 IN THE UNITED STATES DISTRICT COURT
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA

5
6 IN RE NCAA STUDENT-ATHLETE
7 NAME & LIKENESS LICENSING
8 LITIGATION

No. C 09-1967 CW
ORDER RESOLVING
MOTIONS TO SEAL
(Docket Nos. 896,
932, 941, 960,
984)

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11 Plaintiffs, a group of current and former collegiate
12 athletes, and Defendant National Collegiate Athletic Association
13 (NCAA) have filed cross-motions for summary judgment. They move
14 to seal various documents filed in connection with those motions.
15 Each of these sealing motions is resolved separately below.

16 LEGAL STANDARD

17 When a party seeks to file documents under seal in connection
18 with a dispositive motion, it must demonstrate compelling reasons
19 to seal the documents. Kamakana v. City & County of Honolulu, 447
20 F.3d 1172, 1178-79 (9th Cir. 2006). "The party requesting the
21 sealing order must articulate compelling reasons supported by
22 specific factual findings that outweigh the general history of
23 access and the public policies favoring disclosure, such as the
24 public interest in understanding the judicial process." Id. at
25 1178-79 (internal citations and alterations omitted). "In turn,
26 the court must conscientiously balance the competing interests of
27 the public and the party who seeks to keep certain judicial
28 records secret." Id. at 1179 (internal citations and alterations

1 omitted). "The mere fact that the production of records may lead
2 to a litigant's embarrassment, incrimination, or exposure to
3 further litigation will not, without more, compel the court to
4 seal its records." Id. (citing Foltz v. State Farm Mut. Auto.
5 Ins. Co., 331 F.3d 1122, 1136 (9th Cir. 2003)). Nor will the
6 moving party's reference to a "stipulation or protective order
7 that allows a party to designate certain documents as
8 confidential." Civil L.R. 79-5(d)(1)(A).

9 DISCUSSION

10 I. Plaintiffs' Motions to Seal

11 A. Documents Filed in Connection with Plaintiffs' Opening
12 Summary Judgment Brief (Docket No. 896)

13 Plaintiffs move to seal portions of their opening summary
14 judgment brief and portions of exhibits 1, 2, 7, 12, 19, 20, 22,
15 and 24 to the supporting declaration of Hilary K. Scherrer.

16 1. Exhibit 1

17 This exhibit contains Daniel Rubinfeld's September 2013
18 expert report, portions of which have been designated confidential
19 by NCAA. In particular, NCAA seeks to seal paragraph 140 of the
20 report, which mentions certain terms of NCAA's broadcast licensing
21 agreements with ESPN. Because the public disclosure of some of
22 these terms may undermine NCAA's ability to negotiate future
23 licensing agreements with other broadcasters, these terms may be
24 sealed. However, only the specific dollar amounts mentioned in
25 this paragraph may be sealed. The rest of this paragraph -- and
26 the rest of this exhibit -- must be filed in the public record.¹

27 ¹ NCAA asserts that the magistrate judge in this case previously
28 sealed documents similar to this exhibit and other exhibits discussed in
this order. However, as this Court has previously explained, those

1 2. Exhibit 12

2 This exhibit contains Roger Noll's September 2013 expert
3 report. Defendant Electronic Arts Inc. (EA) and the National
4 Basketball Association (NBA), a third party, have designated as
5 confidential portions of pages 89-90 of this report and exhibits 7
6 and 8A of the report.²

7 The portion of page 89 that the NBA has designated
8 confidential refers generally to the division of licensing income
9 between the NBA and its players' union. The NBA has not
10 adequately explained how public disclosure of this information
11 would impede future negotiations between the NBA and the players'
12 union. The league and the union are the only two parties capable
13 of altering or re-negotiating their existing income-sharing
14 agreement and they both know the terms of that agreement already.
15 It is not clear how the public disclosure of this information --
16 which is the subject of considerable discussion among the experts
17 in this case -- would cause competitive harm to either the NBA or
18 its players' union. Accordingly, the two sentences that the NBA
19 seeks to redact on page 89 are not sealable.

20 Likewise, the portion of page 90 pertaining to the division
21 of certain videogame licensing revenue between the National

22 prior sealing orders were decided under the "good cause" standard and
23 not the more stringent "compelling reason" standard that governs the
24 instant motions. See Pintos v. Pac. Creditors Ass'n, 605 F.3d 665, 678-
25 79 (9th Cir. 2010) (recognizing that parties must satisfy a higher
standard than "good cause" to seal documents filed in connection with a
dispositive motion).

26 ² NCAA also submitted a declaration, well after the deadline set
27 forth in the local rules, supporting sealing of these documents. Docket
28 No. 920. However, the declaration contains only conclusory
justifications for sealing the redacted portions of Noll's report.
Further, most of the redacted information -- including pages 89-90 and
Exhibit 7 of the report -- does not even pertain to NCAA at all.

1 Football League (NFL) and its players' union must also be
2 unsealed. Neither the NFL nor its players' union has submitted a
3 declaration in support of this sealing request³ and, as with the
4 NBA's income-sharing agreement, it is not clear how the disclosure
5 of this information would cause either of them competitive harm.
6 Because EA's declaration does not provide compelling reasons for
7 redacting this information -- which appears in the first full
8 sentence on page 90 -- it may not be filed under seal.

9 In contrast, the two sentences on page 89 which describe EA's
10 process for negotiating certain licensing agreements may be filed
11 under seal. These sentences contain information that could
12 potentially be used by other videogame developers to gain an
13 advantage over EA in competing for future licensing agreements
14 with professional sports leagues. Thus, these sentences -- which
15 begin on page 89 and continue onto page 90 -- may be redacted from
16 the version of this exhibit filed in the public record.

17 Neither, EA nor the NBA has provided compelling reasons for
18 sealing Exhibits 7 and 8A to the Noll report in their entirety.
19 Exhibit 7 to the Noll report provides a table listing the specific
20 terms of various agreements between the NBA and certain licensees.
21 The only portions of this table that may be sealed are the time
22 periods and royalty rates⁴ for each licensing agreement, listed in
23 the second and sixth columns of the table, as well as the names of

24 ³ NCAA cites to a prior declaration submitted by David Greenspan in
25 support of a prior sealing motion but this declaration does not provide
26 any compelling reasons for sealing this information. Instead, it simply
27 cites prior sealing orders decided under the "good cause" standard.

28 ⁴ Only the specific royalty rates may remain sealed. All other
information contained in this column, including the division of
licensing revenue between the NBA and the players' association, must be
unsealed.

1 any individual athletes that appear in this table. All other
2 portions of Exhibit 7 to the Noll report must be unsealed.

3 Exhibit 8A to the Noll report is a bar graph that purports to
4 show the total revenue generated by certain universities from the
5 sale of sports broadcasting rights between 2005 and 2010. NCAA
6 has not adequately explained how the disclosure of this
7 information -- which does not contain any data for the last three
8 years and provides only aggregate information for football and
9 basketball broadcasting licenses -- would cause it to suffer
10 competitive harm. Thus, Exhibit 8A to the Noll report must be
11 filed in the public record.

12 3. Exhibit 24

13 This exhibit is the first page of a broadcast licensing
14 agreement between non-parties Conference USA (CUSA) and CSTV
15 Networks. CUSA has designated the entire exhibit confidential and
16 filed a declaration from its commissioner to support that
17 designation.

18 The commissioner's declaration, which was submitted well
19 after the deadline set forth in the local rules, does not support
20 sealing this exhibit. It does not acknowledge that the exhibit
21 contains publicly available information, such as the names of
22 CUSA's member schools. More importantly, the declaration fails to
23 explain how the disclosure of the limited information in this one-
24 page document -- most of which simply provides information
25 relevant to parts of the contract that were not included in the
26 exhibit -- would harm CUSA's future negotiations with CSTV or
27 other broadcasters. Accordingly, this exhibit may not be filed
28 under seal.

1 4. Exhibits 2, 7, 19, 20, and 22

2 Portions of all of these exhibits have been designated
3 confidential by Defendants or third parties. However, no
4 declarations have been filed to support that designation.
5 Accordingly, all of these exhibits must be filed publicly without
6 any redactions.

7 5. Plaintiffs' Opening Brief

8 Plaintiffs' opening summary judgment brief discusses, quotes,
9 or refers to documents that have been designated confidential by
10 Defendants or third parties. No declarations have been filed by
11 Defendants or third parties to support these designations and none
12 of the redacted portions of Plaintiffs' brief appears to contain
13 any confidential information. The entire brief must therefore be
14 filed in the public record.

15 B. Documents Filed in Connection with Plaintiffs' Combined
16 Opposition and Reply Brief (Docket No. 960)

17 Plaintiffs move to seal portions of their summary judgment
18 opposition and reply brief and portions of exhibits 1, 2, 8, 18,
19 25, 66, 68, and 69 to the supporting declaration of Hilary K.
20 Scherrer.

21 1. Exhibit 2

22 This exhibit contains the declaration of Edwin Desser,
23 portions of which have been designated confidential by NCAA.
24 NCAA's declaration supports sealing the specific dollar amounts
25 mentioned in paragraph 45 of the declaration because the public
26 disclosure of these amounts may be used by other broadcasters to
27 gain a competitive advantage over NCAA in future negotiations.
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1 The rest of paragraph 45, however, and the rest of Dresser's
2 declaration must be filed in the public record.

3 2. Exhibit 25

4 This exhibit contains a 2007-08 annual operations report of
5 an NCAA executive subcommittee. NCAA has designated as
6 confidential three paragraphs on pages 8 and 9 of this report
7 which discuss NCAA's bargaining strategy with respect to media
8 rights contracts. Because the public disclosure of this strategy
9 discussion could undermine NCAA's efforts to negotiate media
10 rights contracts in the future, these paragraphs (i.e., the first
11 three paragraphs of section I.B.3 of the report) may be redacted
12 from the version of this exhibit filed in the public record. No
13 other portions of the report may be redacted.

14 3. Exhibits 1, 8, 18, 66, 68, and 69

15 These exhibits have been designated confidential by
16 Defendants or third parties. However, no declarations have been
17 filed to support that designation. Accordingly, all of these
18 exhibits to must be filed in the public record without redactions.

19 4. Opposition and Reply Brief

20 Plaintiffs represented that their summary judgment opposition
21 and reply brief quotes or refers to documents that have been
22 designated confidential by Defendants or third parties. No
23 declarations have been filed by Defendants or third parties to
24 support these designations. Further, none of the redacted
25 portions of Plaintiffs' brief appears to contain any confidential
26 information. Thus, an unredacted version of this brief must be
27 filed in the public record.

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1 II. Defendants' Motions to Seal

2 A. Documents Filed in Connection with Defendants' Opening
3 Summary Judgment Brief (Docket Nos. 932, 941)

4 NCAA moves to seal portions of exhibits 29, 36, 39, 40, 48,
5 65, 78, and 83 to the declaration of Carolyn H. Luedtke submitted
6 in support of its opening summary judgment brief.

7 1. Exhibit 29

8 This exhibit contains Rubinfeld's September 2013 expert
9 report. NCAA moves to seal the specific dollar amounts mentioned
10 in paragraph 140 of the report. As noted above, these dollar
11 amounts may be sealed. The rest of Exhibit 29 must be filed in
12 the public record.

13 2. Exhibit 36

14 This exhibit contains Rubinfeld's November 2013 expert
15 rebuttal report. Defendant Collegiate Licensing Company (CLC),
16 NCAA, and third parties seek to seal several portions of this
17 report. After reviewing the report, as well as the various
18 declarations and prior orders that NCAA has cited in support of
19 its sealing motion, the Court concludes that only the following
20 portions of the report are sealable: the specific dollar amounts
21 mentioned in paragraph 134; the athlete names and dollar amounts
22 listed in the first and fourth columns of the table in Exhibit 1;
23 the athlete names and licensee names listed in the first and third
24 columns of the table in Exhibit 2; and the athlete names and
25 dollar amounts listed in the first and second columns of the table
26 in Exhibit 3. The other information that Defendants and the third
27 parties seek to redact consists of non-specific descriptions of
28 their business practices, references to non-sealable portions of

1 opposing experts' analyses, and vague estimates of some schools'
2 football- and basketball-related revenue from certain years.
3 Neither Defendants nor the third parties have adequately explained
4 how they would be harmed by the disclosure of this information.
5 Accordingly, these portions of Exhibit 36 to the Luedtke
6 declaration must be filed in the public record or the exhibit
7 withdrawn.

8 3. Exhibit 39

9 This exhibit contains Neal Pinson's November 2013 expert
10 rebuttal report. NCAA seeks to seal portions of this report that
11 refer to non-sealable portions of an opposing expert's report. As
12 noted above, these references are not sealable. This exhibit must
13 therefore be filed in the public record without redactions or the
14 exhibit withdrawn.

15 4. Exhibit 40

16 This exhibit contains Lauren Stiroh's November 2013 expert
17 rebuttal report. Once again, NCAA seeks to seal portions of this
18 report that refer to non-sealable portions of an opposing expert's
19 report. These references -- most of which refer to publicly
20 available information about the athletics budget of a state
21 university -- are not sealable. Thus, an unredacted version of
22 this exhibit must be filed in the public record or the exhibit
23 withdrawn.

24 5. Exhibit 48

25 This exhibit contains excerpts from Jay Bilas's deposition
26 transcript. Bilas designated these excerpts confidential but
27 failed after notice to file a declaration to support that
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1 designation. Accordingly, this exhibit must be filed in the
2 public record.

3 6. Exhibit 65

4 This exhibit contains excerpts from William Russell's
5 deposition transcript, which were designated confidential by
6 Plaintiffs. Plaintiffs' supporting declaration asserts that the
7 disclosure of certain licensing terms discussed at the deposition
8 would undermine Russell's ability to negotiate future licenses for
9 the use of his name, image, and likeness. This declaration
10 justifies redacting the specific dollar amounts mentioned on pages
11 66 and 68-71 of the transcript. It does not, however, justify
12 redacting entire questions or answers which refer to those dollar
13 amounts.

14 Nor does it justify sealing the dollar amounts mentioned on
15 pages 74 and 96, which pertain to payments Russell received for
16 his work as an "NBA ambassador" (which involves more than simply
17 licensing his name, image, and likeness) and for his appearances
18 at specific NBA charitable events (which are non-commercial and
19 organized by his employer). Plaintiffs have not adequately
20 explained how the disclosure of the information on pages 74 and 96
21 would undermine Russell's ability to negotiate future licensing
22 agreements.

23 Thus, the only portions of this exhibit that may be redacted
24 are the specific dollar amounts mentioned on pages 66 and 68-71.
25 The rest of the exhibit must be unsealed.

26 7. Exhibit 78 and Paragraph 178 of the Luedtke
27 Declaration

28 Exhibit 78 contains a broadcasting agreement between Turner

1 Broadcasting System, Inc. (TBS), CBS Broadcasting Inc., and NCAA.
2 Both NCAA and TBS have submitted declarations asserting that their
3 competitive interests would be undermined by the public disclosure
4 of certain terms of this agreement. Specifically, they contend
5 that paragraphs 12.2 and 13.3 of the agreement could be used by
6 competing broadcasters to gain a competitive advantage over TBS in
7 future negotiations for broadcast distribution rights. While this
8 assertion justifies sealing paragraph 13.1, which describes
9 specific licensing rights, it does not justify sealing paragraph
10 12.2, which includes terms that would apply equally to any
11 broadcasters who sought to obtain distribution rights for NCAA
12 events. Paragraph 12.2 of the agreement must therefore be filed
13 publicly or the exhibit withdrawn.

14 Paragraph 178 of the Luedtke declaration quotes paragraph
15 12.2 of the broadcasting agreement contained in Exhibit 78.
16 Because paragraph 12.2 must be filed publicly for the reasons
17 explained above, paragraph 178 of the Luedtke declaration must
18 also be filed publicly or withdrawn.

19 8. Exhibit 83 and Paragraph 184 of Luedtke Declaration
20 Exhibit 83 contains an e-mail sent from Candice Lee to Chase
21 Garnham. The first three sentences of this e-mail, which are
22 quoted in paragraph 184 of the Luedtke declaration, were
23 designated confidential by Garnham. No declarations have been
24 filed to support that designation. Accordingly, Exhibit 83 and
25 paragraph 184 of the Luedtke declaration must be filed in the
26 public record or withdrawn.

1 B. Documents Filed in Connection with Defendants' Reply
2 Brief (Docket No. 984)

3 NCAA moves to seal portions of exhibits 3, 5, and 7 to the
4 declaration of Kelly Klaus submitted in support of its summary
5 judgment reply brief.

6 1. Exhibit 3

7 This exhibit contains excerpts of Noll's deposition
8 transcript, which Plaintiffs have designated confidential. No
9 declarations have been filed to support that designation. Thus,
10 this exhibit must be filed publicly.

11 2. Exhibit 5

12 This exhibit contains excerpts from Daniel Rascher's
13 deposition transcript. NCAA seeks to seal portions of the
14 transcript that refer to damage estimates in Rascher's expert
15 report because, according to NCAA, these estimates could be used
16 to calculate the confidential financial information of a certain
17 private college. NCAA has failed to explain adequately how
18 Rascher's damage estimates could be used in this way and the
19 college itself has not filed any declaration to support sealing
20 these estimates. Thus, NCAA has not presented compelling reasons
21 for redacting these portions of Rascher's deposition transcript.
22 An unredacted portion of this exhibit should therefore be filed in
23 the public record or the exhibit withdrawn.

24 3. Exhibit 7

25 This exhibit contains excerpts of Rascher's September 2013
26 expert report. NCAA and CLC seek to seal portions of this report
27 which tabulate aggregate damage estimates for student-athletes who
28 attended a handful of (mostly public) schools in the America East
conference. NCAA also seeks to seal portions of the report that

1 mention the average cost of attendance, average financial aid
2 awards, and estimated damage awards for student-athletes who
3 attended a public university in Indiana. The supporting
4 declarations submitted by NCAA and CLC do not provide compelling
5 reasons to seal these portions of Rascher's report. Accordingly,
6 this exhibit must be filed in the public record or withdrawn.

7 CONCLUSION

8 Plaintiffs' motions to seal (Docket Nos. 896, 960) are
9 GRANTED in part and DENIED in part; NCAA's motions to seal (Docket
10 Nos. 932, 941, 984) are GRANTED in part and DENIED in part.

11 Exhibits 2, 7, 19, 20, 22, and 24 to the first Scherrer
12 declaration, submitted in support of Plaintiffs' opening summary
13 judgment brief, must be filed in the public record without
14 redactions. An unredacted version of Plaintiffs' opening brief
15 must also be filed publicly. Exhibits 1 and 12 to the Scherrer
16 declaration must be redacted as outlined above.

17 Exhibits 1, 8, 18, 66, 68, and 69 to the second Scherrer
18 declaration, submitted with Plaintiffs' combined opposition and
19 reply brief, must be filed publicly without any redactions along
20 with an unredacted version of Plaintiffs' combined opposition and
21 reply brief. Exhibits 2 and 25 to the second Scherrer declaration
22 must be redacted as outlined above.

23 Exhibits 39, 40, 48, and 83 to the Luedtke declaration,
24 submitted with NCAA's opening summary judgment brief, must be
25 filed in the public record without redactions. Exhibits 29, 36,
26 65, 78 to that declaration must be redacted as outlined above.

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Exhibits 3, 5, and 7 to the Klaus Declaration, filed in support of NCAA's summary judgment reply brief, must be filed publicly without any redactions.

IT IS SO ORDERED.

Dated: 2/20/2014



CLAUDIA WILKEN
United States District Judge