

1 Leane K. Capps (*Pro Hac Vice*)
 2 POLSINELLI PC
 2501 N. Harwood Street, Ste. 1900
 3 Dallas, TX 75201
 Telephone: (214) 397-0030
 4 Facsimile: (214) 397-0033

5 Wesley D. Hurst (CA #127564)
 POLSINELLI LLP
 6 2049 Century Park East, Suite 2300
 7 Los Angeles, CA 90067
 Telephone: (310) 556-1801
 8 Facsimile: (310) 556-1802

9 Attorneys for
 10 Non-Party Conference USA, Inc.

11 **UNITED STATES DISTRICT COURT**
 12 **NORTHERN DISTRICT OF CALIFORNIA**
 13 **OAKLAND DIVISION**

14 EDWARD C. O'BANNON, JR., on behalf
 15 of himself and all others similarly situated,
 16 Plaintiffs

17 v.

18 NATIONAL COLLEGIATE ATHLETIC
 ASSOCIATION (NCAA); ELECTRONIC
 19 ARTS, INC.; and COLLEGIATE
 LICENSING COMPANY,
 20

21 Defendants

Case No. 4:09-cv-3329 CW

**NON-PARTY CONFERENCE USA, INC.'S
 ADMINISTRATIVE MOTION TO SEAL
 CONFIDENTIAL TRIAL EXHIBITS**

Judge: The Honorable Claudia Wilken

1
2 Pursuant to Civil L.R. 7-11 and 79-5, Conference USA, Inc. (“CUSA”), a non-party to
3 this case, respectfully moves this Court for an order protecting its and its non-party broadcast
4 partners’ highly confidential broadcast rights agreements from public disclosure at the trial of this
5 case scheduled to begin June 9, 2014. CUSA asks the Court to seal these trial exhibits, only
6 allow the exhibits to be received *in camera* at trial as opposed to in open court, and close the
7 courtroom during any trial testimony concerning the agreements. In support of this Motion,
8 CUSA also attaches the declarations of Leane K. Capps, Britton Banowsky, and Karen Brodtkin.

9
10 **Background**

11 In August 2011, Antitrust Plaintiffs served CUSA with a subpoena seeking numerous
12 categories of documents. CUSA objected to the subpoena, and Plaintiffs filed a motion to compel
13 CUSA’s production of the agreements at issue. CUSA ultimately agreed to produce the
14 agreements, but only as part of a negotiated agreement with Antitrust Plaintiffs that use of the
15 materials would be strictly for “Outside Attorneys’ Eyes Only.” The Protective Order (Dkt. No.
16 320) was then modified to include “Outside Attorneys’ Eyes Only” protection. (Dkt. No. 401).
17 Only with this confidentiality and assurances that these agreements would not be disclosed, did
18 CUSA produce documents in response to the subpoena, including broadcast rights agreements.

19
20 On May 26, 2014, counsel for the NCAA, Thane Rehn, notified CUSA of the NCAA’s
21 intention to use the following “Outside Attorneys’ Eyes Only” documents of CUSA as trial
22 exhibits:

- 23
- 24 • Exhibit 3028 (CUSA_NCAA00000571 - CUSA_NCAA00000601) (CSTV Agreement)
 - 25 • Exhibit 3185 (CUSA_NCAA00077102 – CUSA_NCAA00077275) (Bowl Championship Series Agreement)
 - 26 • Exhibit 3186 (CUSA_NCAA00000509 - CUSA_NCAA00000520) (CBSC Rights Agreement Extension Term Sheet)
- 27
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1 (internal quotation marks omitted). A party’s motion to seal will be granted where the party
2 presents “‘articulable facts’ identifying the interests favoring continued secrecy and ... show[s]
3 that these specific interests ... outweigh the public interest in understanding the judicial
4 process.” *Id.* at 1181 (internal citations and quotations omitted).

5
6 The Ninth Circuit and the Northern District of California have sealed records of licensing
7 agreements where the agreements are trade secrets. *In re Electronic Arts*, 298 Fed. Appx. 568,
8 569 (9th Cir. 2008); *Powertech Tech., Inc. v. Tessera, Inc.*, 2012 U.S. Dist. LEXIS 75831, at *4
9 (N.D. Cal. May 31, 2012). A trade secret includes “any formula, pattern, device, or compilation
10 of information which is used in one’s business, and which gives him an opportunity to obtain an
11 advantage over competitors who do not know or use it.” Restatement of Torts § 757, cmt. b;
12 *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972). Trade secrets also include “a detailed
13 plan for the creation, promotion, financing, and sale of contracts.” *Clark*, 453 F.2d at 1009.

14
15 Compelling reasons to seal documents, including licensing agreements, also exist where
16 disclosure of the documents could negatively impact a business’s competitiveness and
17 profitability. *Triquint Semiconductor, Inc. v. Avago Techs. Ltd.*, 2011 U.S. Dist. LEXIS 120627,
18 at *8-9 (D. Ariz. Oct. 17, 2011) (sealing a “Draft Patent Cross License Agreement”); *see also In*
19 *re Adobe Systems, Inc. Sec. Litigation*, 141 F.R.D. 155, 159-63 (N.D. Cal. 1992); *Bauer Bros.*
20 *LLC v. Nike, Inc.*, No. 09cv500–WQH–BGS, 2012 WL 1899838, at *3-4 (S.D. Cal. May 24,
21 2012). And in instances like the present, where the commercially-sensitive information is
22 irrelevant or only tangentially related to the merits of the case, the public’s need for access is
23 diminished. *See Nursing Home Pension Fund v. Oracle Corp.*, 2007 U.S. Dist. LEXIS 84000
24 (N.D. Cal. Oct. 31, 2007), at *14.

25
26 Here, the agreements that Antitrust Plaintiffs and the NCAA intend to use as exhibits at
27 trial contain just the sort of commercially-sensitive information that provides a compelling
28

1 justification for sealing documents. As explained in more detail in the accompanying
2 declarations of Britton Banowsky and Karen Brodtkin, public disclosure of these agreements,
3 which were entered into confidentially between entities that are not parties to this litigation,
4 would result in significant financial and competitive harm to CUSA. In particular, the broadcast
5 agreements contain highly confidential financial information, which is protected from disclosure
6 by confidentiality agreements. This confidential information includes, among other things, the
7 terms and amount of payment to CUSA in exchange for the assignment of its member schools'
8 rights to broadcast certain intercollegiate athletic contests. *See* § 6 of Exs. 2133, 2134, and 3028;
9 § 9 of Ex. 2213 and 3186; § 6 of 2226 and 3207. Disclosure of this information would harm
10 CUSA's bargaining position in future negotiations with broadcasters and also give an unfair
11 competitive advantage to CUSA's competitors. Moreover, release of the broadcast partners'
12 contracts could harm their ability to compete with their competitors. *See* Dec. of Karen Brodtkin.

15 In addition to the financial terms, the broadcast agreements also contain proprietary and
16 trade-secret information regarding CUSA's and its broadcast partners' game selection
17 procedures (§§ 4 and 7 of Exs. 2133, 2134, and 3028; §§ 4 and 5 of Exs. 2213 and 3186; §§ 3(a),
18 3(d), and 4 of Exs. 2226 and 3207), highly sensitive first negotiation/first refusal rights
19 provisions (§§ 5(d) and 5(f) of Exs. 2133, 2134, and 3028; §§ 2 and 3 of Exs. 2213 and 3186; §2
20 of Exs. 2226 and 3207), as well as proprietary information regarding conference composition ((§
21 9(i) of Exs. 2133, 2134, and 3028; §10 of Exs. 2213 and 318; § 8 of Exs. 2226 and 3207),
22 distribution requirements (§§ 4(b), 4(c), 4(d) and 4(e) of Exs. 2133, 2134, and 3028; §§ 4(A) and
23 4(B) of Exs. 2213 and 3186; §3(c) of Exs. 2226 and 3207), provisions regarding minimum game
24 requirements (§ 6(c)-(e) of Exs. 2226 and 3207), as well as provisions regarding scheduling of
25 certain opponents (§ 9(f) of Exs. 2133, 2134, and 3028).

1 All of these provisions, and others contained in the agreements, were negotiated in
2 confidence between non-parties to this litigation. The proprietary and trade secret information
3 contained in these broadcast agreements and in the Bowl Championship Series Agreement, as is
4 evidenced in the accompanying declarations, is highly sensitive and public disclosure of that
5 information would allow CUSA's competitors an unfair competitive advantage in future
6 negotiations with broadcasters and in the scheduling of games – all to CUSA's financial and
7 competitive detriment. Further, Exhibits 2133, 2134, 2226, 3028, and 3207 contain
8 confidentiality clauses which prohibit the disclosure of the terms of the contracts to third parties
9 (Exs. 2133, 2134, 3028 at §8(h); Exs. 2226 and 3207 at §14), and the information contained in
10 these agreements is, at best, only tangentially related to the merits of this litigation.¹
11

12 Conclusion

13 For the reasons described above and in the accompanying declarations, CUSA faces
14 significant competitive and financial harm should the documents described above be disclosed to
15 the public at trial. Therefore, CUSA respectfully requests that this Court seal Exhibits 3028,
16 3185, 3186, 3207, 2133, 2134, 2213, 2226 at trial, admit the exhibits for *in camera* inspection
17 only and not in open court, and close the courtroom for any testimony concerning the exhibits.
18

19 Respectfully submitted,

20 POLSINELLI LLP

21 By: /s/ Leane K. Capps

22 LEANE K. CAPPS (*Pro Hac*)

23 WESLEY D. HURST (CA #127564)

24 Polsinelli LLP

25 Attorneys for Non-Party Conference USA, Inc.

26 ¹ The limited relevancy and highly confidential nature of these agreements is evidenced
27 by Magistrate Cousins' ruling, early in this litigation, that the requested broadcast agreements
28 contained "highly confidential commercial information" and therefore the non-parties at issue
were only required to produce the portions that mention rights of publicity, names, images, or
likenesses. Dkt. No. 64 at p. 8-9; *see also* Dkt. No. 75.

CERTIFICATE OF SERVICE

1 I hereby certify that on June 4, 2014, I electronically filed the foregoing document with the
2 Clerk of the Court using the CM/ECF system which will send notification to the e-mail addresses
3 registered.
4

5
6 By: /s/ Leane K. Capps
7 LEANE K. CAPPS (*Pro Hac*)
8 WESLEY D. HURST (CA #127564)
9 Polsinelli LLP
10 Attorneys for Non-Party Conference USA, Inc.
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