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

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

15 EDWARD C. O'BANNON, JR., on behalf
 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

**DECLARATION OF BRITTON
 BANOWSKY IN SUPPORT OF NON-
 PARTY CONFERENCE USA, INC.'S
 ADMINISTRATIVE MOTION TO SEAL
 CONFIDENTIAL TRIAL EXHIBITS**

Judge: The Honorable Claudia Wilken

1 I, Britton Banowsky, declare that the following is true:

2 1. I am the Commissioner of Conference USA, Inc. ("CUSA"). I make this
3 declaration of my own personal knowledge and, if called to do so, could testify competently to
4 the facts stated herein under oath.

5 2. I submit this declaration in support of CUSA's June 4, 2014 Administrative
6 Motion to Seal Confidential Trial Exhibits.

7 3. CUSA is not a party to this litigation but has fully cooperated with all the demands
8 placed on it by the litigants. As part of this litigation, CUSA has produced a number of
9 documents related to its operations as an intercollegiate athletic conference. These documents
10 contain sensitive business information, including information that has been designated "Outside
11 Attorneys' Eyes Only" pursuant to an agreement with Antitrust Plaintiffs' and the Protective
12 Orders entered in this action.

13 4. Following a subpoena from Antitrust Plaintiffs, CUSA repeatedly refused to
14 produce the agreements at issue unless the documents were protected from public disclosure
15 through the ability to make "Outside Attorneys' Eyes Only" designations. CUSA would not have
16 produced this type of confidential information in this case if it had not been able to make such a
17 designation.

18 5. A number of the documents containing CUSA's confidential business information
19 have been listed on the NCAA's and the Antitrust Plaintiffs' trial exhibit lists. For the reasons
20 stated below, these documents should only be received by the Court *in camera*, not in open court,
21 and should thereafter be sealed because CUSA will suffer specific prejudice or harm if these
22 documents are available to, or viewed by, the public. Likewise, the courtroom should be closed
23 during any testimony concerning these documents to avoid specific prejudice or harm to CUSA.

24 6. Antitrust Plaintiffs' Exhibits 2133 and 2134 and the NCAA's Exhibit 3028 are
25 broadcast rights agreements between CUSA and CSTV Networks, Inc. Antitrust Plaintiffs'
26 Exhibit 2213 and the NCAA's Exhibit 3186 is a broadcast rights agreement between CUSA and
27 CBS College Sports Network. Antitrust Plaintiffs' Exhibit 2226 and the NCAA's Exhibit 3207 is

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1 a broadcast rights agreement between CUSA and FOX. NCAA's Exhibit 3185 is a Bowl
2 Championship Series Agreement between CUSA and several athletic conferences and sports bowl
3 organizations. These documents are all designated "Outside Attorneys' Eyes Only." In addition,
4 Antitrust Plaintiffs' Exhibits 2133, 2134, and 2226 and the NCAA's Exhibits 3028 and 3207
5 contain confidentiality clauses pursuant to which the parties to the agreements agree not to
6 disclose the terms of the agreements to third parties.

7 7. These agreements contain highly confidential commercial information including,
8 among other things, the terms and amount of payment to CUSA in exchange for the assignment
9 of its member schools' rights to broadcast certain intercollegiate athletic contests. *See* § 6 of Exs.
10 2133, 2134, and 3028; § 9 of Ex. 2213 and 3186; § 6 of 2226 and 3207. The disclosure of this
11 information to the public would harm CUSA in future negotiations for the purchase of the
12 broadcast rights to its member schools' athletic contests. Specifically, release of this information
13 would substantially harm CUSA's negotiating power and bargaining strategy when negotiating
14 future television broadcast agreements, potentially resulting in less revenue to the conference and
15 its members. CUSA engages in competitive negotiations with television networks in order to
16 maximize revenues for the broadcast of its members' athletic contests. The public release of
17 these agreements would give a decisive advantage to the television networks in these
18 negotiations. If the television networks had this information they would know exactly how much
19 they need to offer the conference for its members' broadcast rights in order to be the highest
20 bidder. This would likely result in the conference receiving less money for the right to broadcast
21 its members' athletic contests than if the television networks did not have this information.

22 8. In addition, the release of these agreements would give an advantage to other
23 conferences that are competing with CUSA in negotiating for television broadcast agreements.
24 Each television network has a limited pool of money to spend on broadcast rights for
25 intercollegiate athletic contests. If other conferences that compete with CUSA know the amount
26 of money CUSA is receiving for its members' broadcast rights, this would allow the other
27 conferences to likely obtain more lucrative contracts than they otherwise would without access to
28

1 the terms of CUSA's agreements. This would reduce the pool of money available to CUSA in
2 future broadcast rights negotiations.

3 9. In addition to the financial provisions discussed above, the provisions of the
4 agreements that contain proprietary and trade secret information that could harm CUSA's
5 competitive and financial positions if publically disclosed include, among others, provisions
6 regarding CUSA's and its broadcast partners' game selection procedures (§§ 4 and 7 of Exhibits
7 2133, 2134, and 3028; §§ 4 and 5 of Exhibits 2213 and 3186; §§ 3(a), 3(d), and 4 of Exhibits
8 2226 and 3207), highly sensitive first negotiation and first refusal rights provisions (§§ 5(d) and
9 5(f) of Exhibits 2133, 2134, and 3028; §§ 2 and 3 of Exhibits 2213 and 3186; §2 of Exhibits 2226
10 and 3207), provisions regarding conference composition ((§ 9(i) of Exhibits 2133, 2134, and
11 3028; §10 of Exhibits 2213 and 318; § 8 of Exhibits 2226 and 3207), distribution requirements
12 (§§ 4(b), 4(c), 4(d) and 4(e) of Exhibits 2133, 2134, and 3028; §§ 4(A) and 4(B) of Exhibits 2213
13 and 3186; §3(c) of Exhibits 2226 and 3207), minimum game requirements (§ 6(c)-(e) of Exhibits
14 2226 and 3207), and provisions regarding scheduling of certain opponents (§ 9(f) of Exhibits
15 2133, 2134, and 3028).

16 10. For example, if the game selection procedure provisions of the agreements were
17 disclosed, it could allow schools that CUSA's members compete against to manipulate schedules
18 in order to obtain more favorable broadcast programming. Disclosure of the "first
19 negotiation/first refusal" rights provisions would allow CUSA's competitors insight into when
20 CUSA can, and cannot, negotiate broadcast rights agreements, which could allow its competitors
21 to time their own negotiations in a way that could disadvantage CUSA. Likewise, CUSA's
22 competitors could use information in the distribution requirements, changed circumstances,
23 performance bonuses, conference composition, reductions in rights fees, and opponent scheduling
24 provisions to gain a competitive advantage against CUSA in negotiating future broadcast rights
25 agreements. These and the other provisions mentioned above also contain what CUSA believes
26 to be unique, proprietary, trade secret information concerning CUSA's membership and methods
27

1 of operation. Disclosure of this information could harm CUSA's competitive position in the
2 marketplace and lead to its financial detriment.

3 11. Exhibit 3185, like the broadcast agreements discussed above, contains highly
4 sensitive commercial information regarding how CUSA, other athletic conferences, and the sports
5 bowl organizations run their organizations. The 174-page exhibit contains information
6 regarding programming, financial payments, selection criteria, and other similarly sensitive
7 information, which CUSA and the other non-parties involved in the agreement do not wish to
8 have made public.

9 12. Finally, the agreements in Exhibits 2133, 2134, 2226, 3028, and 3207 contain
10 confidentiality clauses which prohibit the disclosure of the terms of the contracts to third parties.
11 Exs. 2133, 2134, 3028 at § 9(h) ("the specific terms and conditions included in this Agreement
12 shall remain confidential . . ."); Exs. 2226 and 3207 at § 14 ("The parties agree that this
13 Agreement is confidential and that not party shall disclose, promulgate, publish, or otherwise
14 disseminate the terms, provisions, or substance of this Agreement to any party . . .").

15 13. Thus, for all of the reasons discussed above, if Antitrust Plaintiffs' Exhibits 2133,
16 2134, 2213, 2226 and the NCAA's Exhibits 3028, 3185, 3186, and 3207 are disclosed to the
17 public or made publically available it could cause substantial competitive and financial harm to
18 CUSA.
19

20 I declare under penalty of perjury of the laws of the United States of America that the
21 foregoing is true and correct and that this declaration was executed on June 4, 2014 in Dallas, TX.

22
23 Respectfully submitted,

24
25 By: Britton Banowsky (per A.O.F.)
26 Britton Banowsky
27 Commissioner
28 Conference USA, Inc.

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