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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

EDWARD C. O'BANNON, JR., on behalf of himself and all others similarly situated,
Plaintiffs
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (NCAA); ELECTRONIC ARTS, INC.; and COLLEGIATE LICENSING COMPANY,
Defendants

Case No. 4:09-cv-3329 CW

NON-PARTY THE BIG 12 CONFERENCE, INC.'S ADMINISTRATIVE MOTION TO SEAL CONFIDENTIAL TRIAL EXHIBITS

Judge: The Honorable Claudia Wilken

Pursuant to Civil L.R. 7-11 and 79-5, The Big 12 Conference, Inc. (the "Big 12"), a non-party to this case, respectfully moves this Court for an order protecting its and its non-party broadcast partners' highly confidential broadcast rights agreements and confidential internal business communications from public disclosure at the trial of this case scheduled to begin June 9, 2014. The Big 12 asks the Court to seal these trial exhibits, only allow the exhibits to be received *in camera* at trial as opposed to in open court, and close the courtroom during any trial testimony concerning the exhibits. In support of this motion, the Big 12 states as follows and provides the accompanying affidavits of Leane K. Capps, Tim Weiser, and Karen Brodkin.

Background

In August 2011, Antitrust Plaintiffs served the Big 12 with a subpoena seeking numerous categories of documents. As a non-party, the Big 12 objected to the breadth of the subpoena and expressed serious concerns regarding production of its confidential broadcast rights agreements and internal communications. The Big 12 ultimately agreed to produce the documents, but only as part of a negotiated agreement with Antitrust Plaintiffs that use of the materials would be strictly for "Outside Attorneys' Eyes Only." The Stipulated Protective Order (Dkt. No. 320) was then modified to include "Outside Attorneys' Eyes Only" protection. (Dkt. No. 401). Only with this confidentiality and assurances that these agreements would not be disclosed did the Big 12 produce documents in response to the subpoena, including broadcast rights agreements.

On May 26, 2014, counsel for the NCAA, Thane Rehn, notified the Big 12 of the NCAA's intention to use the following "Confidential" or "Outside Attorneys' Eyes Only" documents of the Big 12 as trial exhibits:

- Exhibit 1109 (BIG_12_NCAA_00000841 - BIG_12_NCAA_00000910) (Fox Agreement)

On May 27, 2014, Plaintiffs' counsel, Kelly L. Tucker, notified the Big 12 of Antitrust Plaintiffs' intention to use the following "Confidential" or "Outside Attorneys' Eyes Only" documents, produced by the Big 12, as trial exhibits:

- Exhibit 2058 (BIG_12_NCAA_00000381 – BIG_12_NCAA_00000384) (Memo from then-Commissioner of Big 12 to Big 12 Board of Directors)

- Exhibit 2060 (BIG_12_NCAA_00000001 – BIG_12_NCAA_00000009) (Email)
- Exhibit 2165 (BIG_12_NCAA_00000791 - BIG_12_NCAA_00000836 (ESPN Agreement)
- Exhibit 2229 (BIG_ 12_NCAA_00000621 – BIG_12_NCAA_00000672 (Draft Fox Agreement)
- Exhibit 2230 (BIG_12_NCAA_00000841 - BIG_12_NCAA_00000910 (Fox Agreement) (same as NCAA's Exhibit 1109)

All of these exhibits contain highly sensitive commercial and proprietary information and trade secrets, and the broadcast agreements all contain confidentiality agreements. Public disclosure of these agreements would have a negative competitive and financial impact on the Big 12.

The Big 12 promptly notified Antitrust Plaintiffs and the NCAA that it would not consent to the use of these documents in open court and explained its intention to seek an order of the Court sealing the documents. *See* Stipulated Protective Order, para. 13. The Big 12 also conferred with Antitrust Plaintiffs and the NCAA regarding this motion. The NCAA consents to the relief requested, but the Big 12 was unable to reach an agreement with Antitrust Plaintiffs. *See* Declaration of Leane K. Capps (attached). Copies of the exhibits at issue are provisionally filed under seal in connection with this Motion.

Argument

Court records may be sealed where such records are traditionally kept secret for "compelling reasons." *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). Compelling reasons for sealing records "exist when such court files might have become a vehicle for improper purposes, such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." *Id.* at 1179 (internal quotation marks omitted). A party's motion to seal will be granted where the party presents "'articulable facts' identifying the interests favoring continued secrecy and … show[s] that these specific interests … outweigh the public interest in understanding the judicial process." *Id.* at 1181 (internal citations and quotations omitted).

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

Compelling reasons to seal documents, including licensing agreements and other internal business documents, also exist where disclosure of the documents could negatively impact a business's competitiveness and profitability. *Triquint Semiconductor, Inc. v. Avago Techs. Ltd.*, 2011 U.S. Dist. LEXIS 120627, at *8-9 (D. Ariz. Oct. 17, 2011) (sealing a "Draft Patent Cross License Agreement"); *see also In re Adobe Systems, Inc. Sec. Litigation*, 141 F.R.D. 155, 159-63 (N.D. Cal. 1992). And in instances like the present, where the commercially-sensitive information is irrelevant or only tangentially related to the merits of the case, the public's need for access is diminished. *See Nursing Home Pension Fund v. Oracle Corp.*, 2007 U.S. Dist. LEXIS 84000 (N.D. Cal. Oct. 31, 2007), at *14.

Here, the draft and executed broadcast rights agreements and internal communications that Plaintiffs and the NCAA intend to use as exhibits at trial contain just the sort of commercially-sensitive information that provides a compelling justification for sealing documents. As explained in more detail in the accompanying declaration of Tim Weiser, public disclosure of the broadcast agreements, which were entered into confidentially between entities that are not parties to this litigation, would result in significant financial and competitive harm to the Big 12. In particular, the agreements contain highly confidential financial information, which is protected from disclosure by confidentiality agreements. This confidential information includes, among other things, the terms and amount of payment to the Big 12 in exchange for the assignment of its member schools' rights to broadcast certain intercollegiate athletic contests. *See* §§ 5.1-5.3, 5.6-5.7 of Exs. 1109, 2230, and 2229; § 3 of Ex. 2165. Disclosure of this

information would harm the Big 12's bargaining position in future negotiations with broadcasters and also give an unfair competitive advantage to the Big 12's competitors. Moreover, release of the broadcast partners' contracts could harm their ability to compete with their competitors. *See* Declaration of Karen Brodkin (attached).

In addition to the financial terms, these broadcast agreements also contain proprietary and trade-secret information regarding the Big 12's and its broadcast partners' game selection procedures (§ 4.2.1 and Schedule A of Exs. 1109, 2230, and 2229; §§ 4.5, 5.4, 6.4, and Schedule A of Ex. 2165), highly sensitive first negotiation and first refusal rights provisions (§§ 2.2-2.7 of Exs. 1109, 2230, and 2229; § 15 of Ex. 2165), detailed information regarding unique and proprietary sublicensing restrictions (§ 3.10 of Exs. 1109, 2230, and 2229; § 4.3(a) of Ex. 2165), as well as highly sensitive provisions regarding conference composition (§§ 5.3.2-5.3.6 and 14 of Exs. 1109, 2230, and 2229; §§ 5.3(a)(iii) and 14 of Ex. 2165), conference championship rights (§ 12 and Exhibit E of Ex. 2165), periodic meeting rights and procedures (§ 3.12 of Exs. 1109, 2230, and 2229; § 3.5 of Ex. 2165), conference distribution restrictions (§ 10.2.7 of Exs. 1109, 2230, and 2229; § 8.4 of Ex. 2165), distribution requirements (§ 4.3 of Exs. 1109, 2230, and 2229; § 4.3, 5.3, and 6.3 of Ex. 2165); minimum game requirements (§ 5.3.1 of Exs. 1109, 2230, and 2229), coordination of rights with third tier partners (§ 3.3.3(4) of Exs. 1109, 2230, and 2229; § 8.2(d) of Ex. 2165), tickets (§ 8.2.2 of Exs. 1109, 2230, and 2229, § 19 of Ex. 2165), and other similarly sensitive provisions (including § 3.4 of Exs. 1109, 2230, and 2229).

All of these provisions, and others contained in the agreements, were negotiated in confidence between non-parties to this litigation. The proprietary and trade secret information contained in these agreements, as is evidenced by the sampling of provisions described above and in the accompanying declaration of Tim Weiser, is highly sensitive and public disclosure of that information would allow the Big 12's competitors an unfair competitive advantage in future negotiations with broadcasters and in the scheduling of games – all to the Big 12's financial and competitive detriment. Further, this information is subject to negotiated confidentiality agreements and is, at best, only tangentially related to the merits of this litigation.

Indeed, the limited relevancy and highly confidential nature of these agreements is evidenced by Magistrate Cousins' ruling early in this litigation that Antitrust Plaintiffs' requests for broadcast agreements in this litigation "call[ed] for highly confidential commercial information from nonparties" and were not "tailored to minimize the potential prejudice that the nonparties could suffer by releasing such information." Order Denying Motions to Compel Production of Documents by Nonparties, p. 9 (Dkt. No. 64). Given the commercially sensitive nature of the agreements, the non-parties at issue were only required to produce the portions of the contracts that mention rights of publicity, names, images, or likenesses. *Id.* at 8-9. This Court affirmed that ruling (Dkt. No. 75), and the parties have maintained the confidentiality of the agreements throughout this litigation.

Likewise, Exhibits 2058 and 2060 contain highly confidential strategy communications of the Big 12 regarding responses to NCAA litigation and upcoming broadcast rights negotiations.

Conclusion

For the reasons described above and in the accompanying declarations, the Big 12 faces significant competitive and financial harm should the documents described above be disclosed to the public at trial. Therefore, the Big 12 respectfully requests that this Court seal Trial Exhibits 1109, 2058, 2060, 2165, 2229, and 2230, that these exhibits only be admitted for *in camera* inspection, and that the courtroom be closed for any trial testimony concerning these exhibits. This relief is narrowly tailored to protect only the most sensitive, competitive information, and the requested relief will not impede the public's understanding of this litigation.

Respectfully submitted,

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By: */s/ Leane K. Capps*
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CERTIFICATE OF SERVICE

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

By: */s/ Leane K. Capps*

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