

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

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

9 Attorneys for Non-Party
 10 The Big 12 Conference, Inc.

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

14
 15 EDWARD C. O'BANNON, JR., on behalf of
 16 himself and all others similarly situated,
 Plaintiffs
 17 v.
 18 NATIONAL COLLEGIATE ATHLETIC
 ASSOCIATION (NCAA); ELECTRONIC
 19 ARTS, INC.; and COLLEGIATE LICENSING
 COMPANY,
 20 Defendants
 21

Case No. 4:09-cv-3329 CW

**DECLARATION OF TIM WEISER IN
 SUPPORT OF NON-PARTY THE BIG 12
 CONFERENCE, INC.'S
 ADMINISTRATIVE MOTION TO SEAL
 CONFIDENTIAL TRIAL EXHIBITS**

Judge: The Honorable Claudia Wilken

**DECLARATION OF TIM WEISER IN SUPPORT OF NON-PARTY THE BIG 12 CONFERENCE, INC.'S ADMINISTRATIVE
 MOTION TO SEAL CONFIDENTIAL TRIAL EXHIBITS**

Case No. 09-cv-3329-CW

1 I, Tim Weiser, declare that the following is true:

2 1. I am the Deputy Commissioner of The Big 12 Conference, Inc. ("the Big 12"). I
3 make this declaration of my own personal knowledge and, if called to do so, could testify
4 competently to the facts stated herein under oath.

5 2. I submit this declaration in support of the Big 12's June 4, 2014 Administrative
6 Motion to Seal Confidential Trial Exhibits.

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

13 4. Following a subpoena from Antitrust Plaintiffs, the Big 12 repeatedly refused to
14 produce the broadcast agreements and other documents at issue unless the documents were
15 protected from public disclosure through the ability to make "Confidential" and "Outside
16 Attorneys' Eyes Only" designations. The Big 12 would not have produced this type of
17 confidential information in this case if it had not been able to make such a designation.

18 5. A number of the documents containing the Big 12's confidential business
19 information have been listed on the NCAA's and the Antitrust Plaintiffs' trial exhibit lists. These
20 documents include NCAA's Exhibit 1109 and Antitrust Plaintiffs' Exhibits 2058, 2060, 2165,
21 2229, and 2230, which are the subject of the Big 12's Administrative Motion to Seal. For the
22 reasons stated below, these documents should only be received by the Court *in camera*, not in
23 open court, and should thereafter be sealed because the Big 12 will suffer specific prejudice or
24 harm if these documents are available to, or viewed by, the public. Likewise, the courtroom
25 should be closed during any testimony concerning these documents to avoid specific prejudice or
26 harm to the Big 12.

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1 6. Exhibits 1109 and 2230 are executed versions of a broadcast rights agreement
2 between FOX Sports Net, Inc. and the Big 12. Exhibit 2229 is a draft version of the same
3 agreement. Exhibit 2165 is an executed version of a broadcast rights agreement between
4 ABC/ESPN and the Big 12. Exhibit 2060 is an email chain between then-Commissioner of the
5 Big 12, Dan Beebe, and members regarding a suggested strategy for responding to issues raised in
6 this litigation. Exhibit 2058 is an internal memorandum from then-Commissioner of the Big 12,
7 Dan Beebe, to the Big 12's Board of Directors regarding the Big 12's strategy for ongoing
8 broadcast rights negotiations. Exhibits 2058, 2060, 2165, 2229, and 2230 have been listed on the
9 Antitrust Plaintiffs' exhibit list. Exhibit 1109 has been listed on the NCAA's exhibit list. These
10 documents are designated "Confidential" or "Outside Attorneys' Eyes Only," and the broadcast
11 agreements contain confidentiality clauses pursuant to which the parties to the agreements agree
12 not to disclose the terms to third parties.

13 7. The broadcast agreements at issue contain highly confidential commercial
14 information including, among other things, the terms and amount of payment to the Big 12 in
15 exchange for the assignment of its member schools' rights to broadcast certain intercollegiate
16 athletic contests. *See* §§ 5.1-5.3, 5.6-5.7 of Exs. 1109, 2230, and 2229; § 3 of Ex. 2165. The
17 disclosure of this information to the public would harm the Big 12 in future negotiations for the
18 purchase of the broadcast rights to its member schools' athletic contests. Specifically, release of
19 this information would substantially harm the Big 12's negotiating power and bargaining strategy
20 when negotiating future television broadcast agreements, potentially resulting in less revenue to
21 the conference and its members. The Big 12 engages in competitive negotiations with television
22 networks in order to maximize revenues for the broadcast of its members' athletic contests. The
23 public release of these agreements would give a decisive advantage to the television networks in
24 these negotiations. If the television networks had this information they would know exactly how
25 much they need to offer the conference for its members' broadcast rights in order to be the
26 highest bidder. This would likely result in the conference receiving less money for the right to
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1 broadcast its members' athletic contests than if the television networks did not have this
2 information.

3 8. In addition, the release of these agreements would give an advantage to other
4 conferences that are competing with the Big 12 in negotiating for television broadcast
5 agreements. Each television network has a limited pool of money to spend on broadcast rights for
6 intercollegiate athletic contests. If other conferences that compete with the Big 12 know the
7 amount of money the Big 12 is receiving for its members' broadcast rights, or knew other
8 information about what rights were included and how those rights were structured, this would
9 allow the other conferences to likely obtain more lucrative contracts than they otherwise would
10 without access to the terms of the Big 12's agreements. This would reduce the pool of money
11 available to the Big 12 in future broadcast rights negotiations.

12 9. Among the provisions of the broadcast agreements that contain proprietary and
13 trade secret information that could harm the Big 12's competitive and financial positions if
14 publically disclosed, include provisions regarding the Big 12's and its broadcast partners' game
15 selection procedures (§ 4.2.1 and Schedule A of Exs. 1109, 2230, and 2229; §§ 4.5, 5.4, 6.4, and
16 Schedule A of Ex. 2165), highly sensitive first negotiation and first refusal rights provisions (§§
17 2.2-2.7 of Exs. 1109, 2230, and 2229; § 15 of Ex. 2165), detailed information regarding unique
18 and proprietary sublicensing restrictions (§ 3.10 of Exs. 1109, 2230, and 2229; § 4.3(a) of Ex.
19 2165), as well as highly sensitive provisions concerning conference composition (§§ 5.3.2-5.3.6
20 and 14 of Exs. 1109, 2230, and 2229; §§ 5.3(a)(iii) and 14 of Ex. 2165), conference
21 championship rights (§ 12 and Exhibit E of Ex. 2165), periodic meeting rights and procedures (§
22 3.12 of Exs. 1109, 2230, and 2229; § 3.5 of Ex. 2165), conference distribution restrictions (§
23 10.2.7 of Exs. 1109, 2230, and 2229; § 8.4 of Ex. 2165), distribution requirements (§ 4.3 of Exs.
24 1109, 2230, and 2229; § 4.3, 5.3, and 6.3 of Ex. 2165); minimum game requirements (§ 5.3.1 of
25 Exs. 1109, 2230, and 2229), coordination of rights with third tier partners (§ 3.3.3(4) of Exs.
26 1109, 2230, and 2229; § 8.2(d) of Ex. 2165), tickets (§ 8.2.2 of Exs. 1109, 2230, and 2229, § 19
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1 of Ex. 2165), and other similarly sensitive provisions (including § 3.4 of Exs. 1109, 2230, and
2 2229).

3 10. For example, if the game selection procedure provisions of the broadcast
4 agreements were disclosed, it could allow schools that the Big 12's members compete against to
5 manipulate schedules in order to obtain more favorable broadcast programming. Disclosure of
6 the "first negotiation/first refusal" rights provisions would allow the Big 12's competitors insight
7 into when the Big 12 can, and cannot, negotiate broadcast rights agreements, which could allow
8 its competitors to time their own negotiations in a way that could disadvantage the Big 12.
9 Likewise, the Big 12's competitors could use information in the distribution restrictions,
10 distribution requirements, minimum game requirements, third-party rights coordination, and
11 periodic meeting rights provisions to gain a competitive advantage against the Big 12 in
12 negotiating future broadcast rights agreements. These and the other provisions mentioned above
13 also contain what the Big 12 believes to be unique, proprietary, trade secret information
14 concerning the Big 12's membership and methods of operation. Disclosure of this information
15 would harm the Big 12's competitive position in the marketplace and lead to its financial
16 detriment.

17 11. The agreements in Exhibits 1109, 2230, 2165, and 2229 also contain
18 confidentiality clauses which restrict the parties' ability to disclose the terms of the contracts to
19 third parties. Exs. 1109, 2230, and 2229 at ¶ 13.13 ("no party hereto shall disclose, promulgate,
20 publish, or otherwise disseminate the terms, provisions, or substance of this Agreement to any
21 Person . . ."); Ex. 2165 at ¶ 24.9 ("Each party shall maintain the confidentiality of this Agreement
22 and its terms, and any other Confidential Information . . .").

23 12. Exhibit 2058 is an internal memorandum between then-Commissioner of the Big
24 12, Dan Beebe, and the Big 12's Board of Directors regarding the Big 12's strategy for
25 conducting ongoing broadcast rights negotiations. As such, this document reveals confidential
26 information regarding the Big 12's negotiation strategy and priorities, and the disclosure of this
27 information regarding the Big 12's negotiation strategy and priorities, and the disclosure of this

1 information could place the Big 12 at a competitive disadvantage in future negotiations and result
2 in financial harm.

3 13. Exhibit 2060 is an email chain in which the then-Big 12 Commissioner, Dan
4 Beebe, communicates with members regarding the Big 12's strategic response to issues raised in
5 this litigation. This email chain contains the confidential strategy and planning of the Big 12
6 regarding its strategic response to issues raised in this litigation and proposed resolutions. This
7 document shows the inner-workings and contemplated actions of the Big 12 and its disclosure
8 could harm the conference.
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10 14. Thus, for all of the reasons discussed above, if Exhibits 1109, 2058, 2060, 2165,
11 2229, and 2230 are disclosed to the public or made publically available it could cause substantial
12 competitive and financial harm to the Big 12.

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

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18 By: Tim Weiser (by proxy ADF)
19 Tim Weiser
20 Deputy Commissioner
21 The Big 12 Conference, Inc.
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