Michael P. Lehmann (Cal. Bar No. 77152)
Arthur N. Bailey, Jr. (Cal. Bar No. 248460)
HAUSFELD LLP
44 Montgomery St., 34th Floor
San Francisco, CA 94104
Tel: (415) 633-1908
Fax: (415) 358-4980
Email: mlehmann@hausfeldllp.com
abailey@hausfeldllp.com

Michael D. Hausfeld (*pro hac vice*)
Hilary K. Scherrer (Cal. Bar No. 209451)
Sathya S. Gosselin (Cal. Bar No. 269171)
HAUSFELD LLP
1700 K Street, NW, Suite 650
Washington, DC 20006
Tel: (202) 540-7200
Fax: (202) 540-7201
Email: mhausfeld@hasfeldllp.com
hscherrer@hausfeldllp.com
sgosselin@hausfeldllp.com

Plaintiffs' Interim Co-Lead Class Counsel
With Principal Responsibility for the Antitrust Claims

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EDWARD C. O'BANNON, JR. on behalf of himself and all other similarly situated, Plaintiff, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (NCAA); ELECTRONICC ARTS, INC.; and COLLEGIATE LICENSING COMPANY, Defendant.	Case No.: 4:09-cv-3329 CW **PLAINTIFFS' COMBINED OPPOSITION TO MOTIONS OF BIG 12 CONFERENCE AND CONFERENCE USA TO SEAL TRIAL EXHIBITS** Dept: Courtroom 2, 4th Floor Judge: Hon. Claudia Wilken Complaint filed: May 5, 2009 Trial June 9, 2014

I. INTRODUCTION

Non-parties the Big 12 Conference ("Big 12") and Conference USA ("CUSA") (collectively, the "Designating Parties") have moved to seal several documents for use at trial,

including broadcast agreements, a memorandum, and electronic mail communications. The administrative motion should be denied because the Big 12 and CUSA have not demonstrated compelling reasons to overcome the strong presumption of public access required to seal documents at trial.

II. LEGAL STANDARD

The Ninth Circuit follows the long-standing, strong presumption in favor of the public's right to access. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). "[T]he resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the public's understanding of the judicial process and of significant public events." *Id.* (internal citation and quotation omitted). The party requesting that a record be sealed at trial must present a "compelling reason" to do so and must articulate a specific factual basis for denying public access to that record. *Foltz v. State Farm Mutual Auto Insurance Co.*, 331 F.3d 1122, 1135-36 (9th Cir. 2003).

As this Court has recognized "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning" are not sufficient. Order Denying Defendant's Motion to Seal; Granting in Part Plaintiffs' Motion to Seal, No. 4:09-cv-01967, Dkt. No. 897, at 3 (citing *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992)) [hereinafter, Dkt. No. 897]. "[E]very sealing request must be supported by a sworn declaration demonstrating with particularity the need to file each document under seal." *Id.* at 2 (citing Civil Local Rule 79–5(a)).

III. THE DESIGNATING PARTIES HAVE NOT MET THEIR BURDEN WITH RESPECT TO THE DESIGNATED DOCUMENTS

The Designating Parties must affirmatively "describe the harm that will result if the content is not sealed" by providing "articulated reasons" with "specific demonstrations of fact" supporting their motion to seal. September 28, 2012 Order Denying Motion to Seal, No. 4:09-cv-01967, Dkt. No. 529 (citing *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1162 (9th Cir. 2011)

and quoting *Contratto v. Ethicon, Inc.*, 227 F.R.D. 304, 307 (N.D. Cal. 2005)) [hereinafter Dkt. No. 529]. The Designating Parties have not met this burden.[1]

A. The Declarations of Britton Banowsky and Karen Brodkin do not Adequately Support CUSA's Request to File Exhibits 2133, 2134, 2213, and 2226 Under Seal

CUSA moves to file four broadcast agreements under seal (Exs. 2133, 2134, 2213, and 2226). Dkt. No. 177. This Court has already held that broadcast agreements, including one that is the subject of the current motion, are not entitled to wholesale sealing and *in camera* review. *See* Order Resolving Motions to Seal, No. 4:09-cv-01967 (Dkt. No. 989), at 5 (denying motion to seal portion of CUSA and CSTV contract, designated as Exhibit number 2134 for purposes of this motion) [hereinafter Dkt. No. 989]. In that earlier motion, CUSA provided a declaration in support of sealing an entire exhibit. *Id.* The Court denied the motion to seal and noted that CUSA's declaration in support of that motion, like the present motion, failed to "acknowledge that the exhibit contains publicly available information." *Id.* Once again, CUSA proposes sealing entire exhibits (including one of the very same documents) without acknowledging that much of the exhibit contains publicly available information. Indeed, CUSA's motion completely ignores this Court's prior Order that excerpts of Exhibit 2134 are not properly filed under seal.

CUSA's motion to seal the entirety of Exhibits 2165, 2229, and 2230 is not in accordance with the spirit of public access, nor this Court's prior Orders relating to the filing of documents under seal. *See generally Kamakana*, 447 F.3d at 1179; (Dkt. Nos. 529; 897; 989). Despite its request to seal entire exhibits, CUSA only alleges harm related to the disclosure of certain provisions of the exhibits (Banowsky Declaration, Dkt. No. 177-2) or the contracts in their entirety (Brodkin Declaration, Dkt. No. 177-3). Because CUSA does not identify any harm related to the majority of the provisions in the contract exhibits with the required specificity, it

[1] Plaintiffs have met and conferred with counsel for CUSA and the Big 12 to discuss a possible resolution to redact only agreed-upon confidential contractual provisions. An impasse was reached when counsel for the two conferences made clear that their clients would only agree to the filing of the entire exhibits under seal, and that no discussion regarding redaction would be fruitful.

has not met its burden, and thus these provisions should not be filed under seal. (Dkt. No. 989, at 5).

Even where CUSA discusses specific sections of the contract exhibits, its assertions of harm are utterly vague. For example, CUSA alleges it would suffer harm if certain provisions that relate to game selection were publicly disseminated. Banowsky Decl., Dkt. No. 177-2, at ¶ 9. Those provisions identified by CUSA include a provision with language related to the number of games broadcast per sport, per year. *See, e.g.*, Dkt. No. 177-11 at § 7(a). However, CUSA fails to articulate a single reason why or how public disclosure of this provision would result in harm. *See* Banowsky Decl., Dkt. No. 177-2 at ¶¶ 9-10. Furthermore, that information is publicly available.[2] Thus, this provision is not entitled to be filed under seal. *See, e.g.*, Dkt. No. 989, at 5 (publicly available information not sealable). As such, at a minimum, CUSA should be required to propose specific, limited redactions to any truly sensitive information.

For all exhibits subject to this Motion, CUSA refers to the Stipulated Protective Order and Addendum as a justification to file the exhibits under seal. *See* Banowsky Decl., Dkt. No. 177-2 at ¶¶ 3-4. Additionally, for Exhibits 2133, 2134, and 2226, CUSA cites to confidentiality provisions in the contracts as a justification for sealing those exhibits. *Id.* at ¶ 12. This Court has already considered and rejected these arguments. Dkt. No. 989 (citing *Foltz v. State Farm Mut. Ins. Co.*, 331 F.3d 1122, 1137-38 (9th Cir. 2003); Civil L.R. 79-5.

B. The Declarations of Tim Weiser and Karen Brodkin do not Adequately Support the Big 12's Request to File Exhibits 2058, 2060, 2165, 2229, and 2230 Under Seal

The Big 12 moves to file the entirety of three broadcast agreements (Exs. 2165, 2229, and 2230) under seal. (Dkt. No. 178). Once again, this Court has already held that broadcast agreements such as the ones subject to this motion are not entitled to be filed under seal and reviewed *in camera* in their entirety. *See* Dkt. No. 989, at 5 (denying motion to seal portion of

[2] Conference USA, May 29, 2014 Press Release, *at* http://www.conferenceusa.com/sports/m-footbl/spec-rel/052914aah.html

CUSA and CSTV contract). Additionally, like CUSA, the Big 12 only provides broad allegations of harm rather than specific factual allegations to justify sealing these exhibits.

Just as with CUSA, the Big 12's motion to seal the entirety of Exhibits numbered 2165, 2229, and 2230 is at odds with both the governing principle of public access, and this Court's prior Orders. *See generally Kamakana*, 447 F.3d at 1179; Dkt. Nos. 529; 897; 989.

Despite its request to seal entire exhibits, the Big 12 only alleges harm related to the disclosure of certain provisions and sections of the exhibits (Weiser Declaration, Dkt. No. 178-2) or the contract in its entirety (Brodkin Declaration, Dkt. No. 178-3). Because the Big 12 does not identify any harm related to the majority of the provisions in the contract exhibits, it has not met its burden, and thus these provisions should not be filed under seal. Dkt. No. 989 at 5.

Furthermore, even where the Big 12 does discuss specific provisions, its assertions of interest and harm are extremely vague and unspecific. For example, the Big 12 contends that it would be harmed if a provision of an exhibit that relates to conference composition was publicly disseminated, but does not allege how it would be harmed. Weiser Decl., Dkt. No. 178-2, at ¶¶ 9-10. The Big 12's failure to specify harm is fatal to its request. *See, e.g.*, Dkt. No. 897, at 2 (noting that a specific factual explanation of how an entity will be harmed is required)). Additionally, many provisions of these exhibits contain publicly available information, such as the names of the Big 12 member institutions. *See, e.g.*, Dkt. No. 178-10 at § 1.37. Information that is already publicly available is not properly filed under seal. *See* Dkt. No. 989, at 5. At a minimum, the Big 12 should be required to propose specific, limited redactions covering only truly sensitive information and to explain how it would be harmed if this information becomes public.

The Big 12 also moves to file Exhibit 2058 (memorandum from then-Big 12 Commissioner to Big 12 Board of Directors) under seal. Dkt. No. 178. In support, the Big 12 only generally claims that financial harm would result from disclosing its "negotiation strategy and priorities" again, without providing *any* specific details – as is its burden articulating the very specific harm that public disclosure of the memorandum would cause it. Weiser Decl., Dkt.

No. 178-2, at ¶ 12. Its motion to seal this document should therefore be denied. *See* Dkt. No. 897 (requiring a specific factual basis to support allegations of proposed harm).

Finally, the Big 12 moves to file Exhibit 2060 (e-mail chain) under seal. Dkt. No. 178. In support, the Big 12 claims that its disclosure would "harm the conference," but provides no detail whatsoever explaining this alleged harm, including how it would occur or even what it might be. Weiser Decl., Dkt. No. 178-2, at ¶ 13. As such, its motion to seal this document should also be denied.

For all exhibits subject to this Motion, the Big 12 refers to the Stipulated Protective Order and Addendum as a justification for the court to keep the exhibits under seal. *See* Weiser Decl., Dkt. No. 178-2 at ¶¶ 3-4. Additionally, for Exhibits 2230, 2165, and 2229, the Big 12 cites to confidentiality provisions in the contracts as a justification for sealing those exhibits. *Id.* at ¶ 11. This Court has already considered and rejected these arguments. Dkt. No. 989 (not recognizing this argument as valid and citing *Foltz v. State Farm Mut. Ins. Co.*, 331 F.3d 1122, 1137-38 (9th Cir. 2003)); Civil L.R. 79-5.

C. The Public Has A Right To Access CUSA's and Big 12's Highly Relevant Documents

Both CUSA and the Big 12 argue that the broadcast agreements that license the use of student-athlete names, images, and likenesses are "tangential" to the claims and defenses in this case and should therefore be filed under seal. This issue has been extensively litigated in this case, and this Court has already determined that licensing agreements in broadcast contracts are central to the issues in the case. *See, e.g.*, 2014 WL 1949804 at 81 (court identifies relevant product market as "the 'group licensing' market, in which broadcasters and videogame developers compete for group licenses to use the names, images and likenesses of student-athletes on Division I football and basketball teams in live game broadcasts, archival footage, and videogames."); *see also* Dkt no. 325 at p.12 ("[Plaintiffs'] claims also encompass agreements for rights to televise games, DVD and on-demand sales and rentals, and sales of stock footage of competitions, to name a few.")

IV. CONCLUSION

For the reasons explained herein, CUSA's motion to seal in their entirety Exhibits 2133, 2134, 2213, 2226 and the Big 12's motion to seal Exhibits 2058. 2060, 2165, 2229, and 2230 should both be denied in their entirety. In the alternative, this Court should order that the Designating Parties identify and redact specific, limited, truly confidential provisions.

Dated: June 6, 2014

Respectfully Submitted,

By: */s/ Hilary K. Scherrer*

Michael D. Hausfeld (*pro hac vice*)
Hilary K. Scherrer (Cal. Bar No. 209451)
Sathya S. Gosselin (Cal. Bar No. 269171)
HAUSFELD LLP
1700 K Street, NW, Suite 650
Washington, DC 20006
Tel: (202) 540-7200
Fax: (202) 540-7201
Email: mhausfeld@hasfeldllp.com
hscherrer@hausfeldllp.com
sgosselin@hausfeldllp.com

Michael P. Lehmann (Cal. Bar No. 77152)
Arthur N. Bailey, Jr. (Cal. Bar No. 248460)
HAUSFELD LLP
44 Montgomery St., 34th Floor
San Francisco, CA 94104
Tel: (415) 633-1908
Fax: (415) 358-4980
Email: mleyhmann@hausfeldllp.com
abailey@hausfeldllp.com
Plaintiffs' Interim Co-Lead Class Counsel With Principal Responsibility for the Antitrust Claims

CERTIFICATE OF SERVICE

I, Hilary K. Scherrer, declare that I am over the age of eighteen (18) and not a party to the entitled action. I am a partner in the law firm of HAUSFELD LLP, and my office is located at 1700 K Street NW, Suite 650, Washington, DC 20006.

On June 6, 2014, I caused to be filed the following:

PLAINTIFFS' COMBINED OPPOSITION TO MOTIONS OF BIG 12 CONFERENCE AND CONFERENCE USA TO SEAL TRIAL EXHIBITS

with the Clerk of Court using the Official Court Electronic Document Filing System, which served copies on all interested parties registered for electronic filing.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Hilary K. Scherrer
Hilary K. Scherrer