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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

EDWARD O'BANNON, *et al.*,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; COLLEGIATE LICENSING COMPANY; and ELECTRONIC ARTS INC.,

Defendants.

Case No. 4:09-CV-3329-CW

DEFENDANT NCAA'S ADMINISTRATIVE MOTION TO SEAL CONFIDENTIAL TRIAL EXHIBITS

Judge: Hon. Claudia Wilken

Judge: Hon. Claudia Wilken
Courtroom: 2, 4th Floor
Trial: June 9, 2014

Pursuant to Civil Local Rules 7-11 and 79-5, the National Collegiate Athletic Association ("NCAA") respectfully submits this Administrative Motion to Seal Confidential Trial Exhibits. In particular, the NCAA moves to seal Plaintiffs' proposed Trial Exhibits 400 and 2218. In determining whether compelling reasons exist to seal, the court shall consider "all relevant factors," including the "'public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets.'" *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (quoting *EEOC v. Erection Co*., 900 F.2d 168, 170 (9th Cir. 1990)).

At the pretrial conference, the parties agreed to meet and confer regarding the portions of trial exhibits that contain confidential information, and to agree on appropriate redactions. Tr. of Pretrial Conference at 71. The NCAA and Plaintiffs have met and conferred regarding a number of confidential documents on both parties' trial exhibit lists, and have reached agreement regarding appropriate redactions in most cases. The parties have been unable to reach agreement on an appropriate redaction of Exhibits 400 and 2218, however.

In an effort to resolve this issue and reduce the burden on the Court, the NCAA has asked Plaintiffs to identify the portions of these exhibits on which they intend to rely. At the pretrial conference, the Court requested that the parties not put voluminous trial exhibits into evidence when the parties only seek to rely on particular provisions. *See id.* at 32 ("I don't need the whole book in evidence. I only need the page that has the paragraph you are talking about. Maybe the cover page and the page with the paragraph, and that's what goes into evidence, not the whole thing."); *id.* at 30-31 ("[Y]ou don't have to put in the complete document. You can put in only the part that they testify about."). Plaintiffs have not responded to NCAA's requests to identify which portions of these exhibits they would actually seek to admit into evidence. This would enable the parties to narrow their disagreement and more specifically address what redactions would be necessary to preserve confidential information.

A. <u>Exhibit 400</u>

Exhibit 400 is the "Multi-Media Agreement" between Turner Broadcasting System, Inc. ("Turner" or "TBS"), CBS Broadcasting Inc. and the NCAA, dated April 22, 2010, and produced

at Bates Number NCAAPROD00292647. The NCAA designated the Multi-Media Agreement as "Highly Confidential – Outside Counsel Only" under the terms of the protective order in this case. *See* Decl. of Robert J. Wierenga in Supp. of Antitrust Pls.' Mot. to Seal, *Keller*, Case No. 09-CV-1967-CW ("*Keller*"), Dkt. No. 539, ¶ 64.

Both the Antitrust Plaintiffs and the NCAA previously have relied on excerpted and redacted versions of the Multi-Media Agreement. In support of their motion for class certification, the Antitrust Plaintiffs filed an exhibit containing excerpts of the Multi-Media Agreement with redactions that disclosed only the table of contents and selected provisions on four pages. *See Keller*, Dkt. No. 655. Magistrate Judge Cousins recognized that these redactions covered "competitively sensitive portions" of the Multi-Media Agreement and agreed that they "balance[d] the public interest in judicial records against the interests of the NCAA and nonparties Turner and CBS in protecting their competitive standing." *See Keller*, Dkt. No. 626 at 8. The NCAA also filed a redacted version of an excerpt from the Multi-Media Agreement in support of its motion for summary judgment, containing only one page from the Multi-Media Agreement. *See Keller*, Dkt. No. 931-8. In ruling on the NCAA's motion to seal the redacted provisions in this excerpt from the Multi-Media Agreement, the Court agreed that paragraph 13.1 of the agreement "could be used by competing broadcasters to gain a competitive advantage over TBS in future negotiations for broadcast distribution rights." *Keller*, Dkt. No. 989 at 11.

The NCAA does not object to the use at trial of the portions of the Multi-Media Agreement that have previously been filed in the public record, and does not believe the terms that were previously redacted are relevant to any issue in this case. The NCAA has proposed the use of a redacted version of the contract that reflects the Court's prior orders. Plaintiffs have refused to accept this proposal, but have not responded to the NCAA's requests for them to identify any additional provisions of the contract on which they might rely at trial.

The Multi-Media Agreement contains competitively sensitive information, including content licensing terms and licensing rights obtained for consideration that could benefit third parties who wish to participate in future negotiations for the licensing and distribution of NCAA content. This information includes heavily negotiated contractual provisions about the planning,

implementation, execution, and obligations of the parties with respect to the over-the-air and cable television multi-channel coverage of the NCAA Men's Division I Basketball Championship and the March Madness Live web/internet platform. *See* Decl. of Scott A. Bearby in Supp. of Mot. to Seal. The simultaneous coverage of tournament games on four different cable and over-the-air channels is unique and developed at great expense and creativity. *Id.* The specific technical, business, and other proprietary aspects of this agreement are interwoven and difficult to redact in specific provisions because of their connected nature. *Id.* Further, the Multi-Media Agreement has an express confidentiality clause, providing that no party may distribute a public statement or disclose the terms of the Agreement "without the prior approval of all other Parties to the Agreement."

B. Exhibit 2218

Exhibit 2218 is the 2010 "Digital Rights Agreement" between the NCAA and Turner Sports Interactive, Inc., a subsidiary of Turner, produced at Bates Number NCAAPROD00295333. The Digital Rights Agreement is a unique contract that contains negotiated terms regarding the scope of the rights being granted and the digital platforms on which the content will be distributed. The NCAA designated the Digital Rights Agreement as "Highly Confidential – Outside Counsel Only" under the terms of the protective order in this case.

Antitrust Plaintiffs previously filed the Digital Rights Agreement in redacted form, *see Keller*, Dkt. No. 653, after the Court found the NCAA and Turner showed good cause for redaction of particular terms that contained confidential business information. *See Keller*, Dkt. No. 645. The Court recognized that the redacted terms contain "contain commercially valuable information that could competitively disadvantage [the NCAA and Turner] in future negotiations." *Id.* at 4. The disclosure of this information would prejudice Turner, which is not a party to this litigation, by allowing content providers or competitors to gain a strategic advantage in negotiating with Turner or competing against Turner for the acquisition of digital rights.

The NCAA does not object to the use at trial of the portions of the Digital Rights Agreement that have previously been filed in the public record, and does not believe the terms that were previously redacted are relevant to any issue in this case. The NCAA has proposed the use at

trial of the redacted version of the Agreement previously used at the class cert stage and approved by the Magistrate Judge. Plaintiffs have refused to accept this proposal.

The Digital Rights Agreement contains heavily negotiated provisions about the planning, implementation, execution, and obligations of the parties with respect to the www.ncaa.com web site. These provisions include proprietary, technical information and business planning; specific financial information and benchmarks; exclusive rights and parameters on multiple content platforms; and delineation of rights that are shared with other media companies. *See* Decl. of Scott A. Bearby in Supp. of Mot. to Seal. The specific technical, business, and other proprietary aspects of this agreement are interwoven and difficult to redact in specific provisions because of their connected nature. *Id*. Disclosure of this information would result in the unfair advantage of Turner competitors and future bidders for NCAA services.

If Plaintiffs seek to introduce any portion of these exhibits at trial beyond the provisions previously made public, the NCAA requests that the trial exhibit be kept under seal and that appropriate measures be taken during trial to prevent disclosure of the information therein.

DATED: June 9, 2014

Respectfully submitted,

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By: */s/ Glenn D. Pomerantz*
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