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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

PLAINTIFFS' OPPOSITION TO DEFENDANT NCAA'S ADMINISTRATIVE MOTION TO SEAL TRIAL EXHIBITS

Judge: Hon. Claudia Wilken
Courtroom: 2, 4th Floor

I. INTRODUCTION

Defendant NCAA has moved to seal two trial exhibits Plaintiffs intend to use at trial: its current March Madness contract and its contract with Turner to operate the NCAA's web site, NCAA.com. Dkt. 200. Plaintiffs filed excerpts of each of these documents earlier in the litigation, at class certification, and the Court determined the confidentiality of those excerpts. The NCAA's administrative motion should be denied because the NCAA has not demonstrated compelling reasons to overcome the strong presumption of public access necessary to seal documents at trial.

II. LEGAL STANDARD

The Ninth Circuit recognizes a 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). A 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). Mere reference to a protective order is insufficient to designate certain documents confidential. Civil L.R. 79-5(d)(1)(A). Indeed, this Court has repeatedly recognized that "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning" are not sufficient to seal documents. Order Denying Defendant's Motion to Seal; Granting in Part Plaintiffs' Motion to Seal, No. 09-cv-01967 ("*Keller*"), Dkt. 897, at 3 (citing *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992)).

III. THE NCAA HAS NOT MET ITS BURDEN WITH RESPECT TO THE TWO TRIAL EXHIBITS

A. Exhibit 400

The NCAA has not presented a compelling reason to seal Trial Exhibit 400, a Multi-Media Agreement between Turner Broadcasting System, Inc., CBS Broadcasting Inc., and the NCAA dated April 22, 2010 ("March Madness contract"), in its entirety (save for those aspects that are already in the public record). The NCAA's request is overbroad; it seeks to seal the vast majority of the March Madness contract—including, e.g., nearly all of the *definitions*—without

providing any reason why the specific provisions identified contain "competitively sensitive" information. *See* Dkt. 200-2 at 2-7. The only provision of the March Madness contract that the NCAA specifically discusses in its motion is paragraph 13.1, which the Court has already held is subject to sealing. Mot. at 2 (citing *Keller*, Dkt. 989 at 11). In that same order, the Court rejected the NCAA's bid to seal paragraphs 12.2 and 13.3 of the agreement because those paragraphs included terms that would apply equally to any broadcaster seeking licensing rights. *Keller*, Dkt. 989. at 11. Absent a showing of a compelling reason, the same should be true of the remainder of the contract.

Mr. Bearby's declaration, submitted in support of the NCAA's motion, does not present a compelling reason for sealing the agreement either. Mr. Bearby simply concludes that the provisions are "heavily negotiated," "innovative," "unique," and "developed at great expense and creativity," and so their disclosure would unfairly allow media competitors to benefit. Dkt. 200-5 (Bearby Decl.) at 2. The same broad statements are found in TBS and CBS's briefs in support of the NCAA's motion to seal: both briefs merely repeat that the provisions are "heavily negotiated" and contain "competitively sensitive" information, and therefore TBS and CBS are "likely to be harmed" by public disclosure. *See* Dkt. 200-7 at 4-5; Dkt. 200-8 at 3. Such conclusory statements—whether from the NCAA, TBS, or CBS—fail to satisfy the NCAA's burden of articulating the very specific harm public disclosure of these terms would cause. Judge Cousins already rejected the NCAA's argument that competitive disadvantage will result from disclosure of agreements because "the decision to seal such records must still be based on articulated reasons." *Keller*, Dkt. 576.

At trial, Plaintiffs intend to rely on numerous provisions that the NCAA seeks to seal. Among the provisions that Plaintiffs will introduce during witness examinations are Chapters 1 ("Definitions"), 2 ("Broadcaster Rights and Restrictions"), 5 ("Division I Men's Basketball Championship"), 9 ("Commercial Matter and Promotion"), 17 ("Warranties"), 18 ("Indemnification"), and Ex. B (the total of which the NCAA has itself publicized: http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement). Sealing these portions of the contract would require the Court to clear

the courtroom prior to this testimony—without any specific reason why this information is commercially sensitive. Dkt. 200-2 at 26-29.[1]

B. Exhibit 2218

The NCAA has similarly failed to present a compelling reason for sealing Exhibit 2218, a 2010 Digital Rights Agreement between the NCAA and Turner Sports Interactive, Inc, in its entirety (save for those aspects that are already in the public record). Rather than identify the specific provisions of Exhibit 2218 that might contain "commercially valuable information," the NCAA proposes redacting large swaths of the document on the basis that those contract terms are *irrelevant*. *See* Mot. at 3. For example, the NCAA seeks to seal portions of the agreement dealing with the NCAA's exclusive rights (Dkt. 200-4 at 14-16) and third party rights (*id*. at 17-19) without any explanation of the commercial sensitivity of those rights or how disclosure of those terms would actually result in harm. The NCAA also proposes to seal the entirety of Exhibits A, B, C and F, again without any explanation of the harm that would result if they were disclosed.

As with the March Madness contract, the declarations and briefs submitted in support of the motion to seal do not carry the NCAA's burden of showing a "compelling reason" for sealing. The Bearby declaration vaguely summarizes the agreement's terms and explains that those terms were "intended to be confidential" and that disclosure would "result in an unfair advantage" to Turner's competitors and future bidders for NCAA services. *Id*. at 3-4. Mr. Bearby does not provide "specific examples of the consequences of including these exhibits in the public record." *Keller*, Dkt. 576 (denying motion to seal where the NCAA claimed it would be "commercially harmed when negotiating" by disclosure). The same is true of TBS's brief, which merely concludes that knowledge of the Digital Rights Agreement's terms "could then be used strategically to TBS, Inc.'s detriment" without bothering to articulate the *specific* consequences of the disclosure of *specific* terms. Dkt. 200-7. Indeed, the NCAA's request to seal large portions of

[1] Finally, as this Court has recognized, the fact that the March Madness contract (and the Digital Rights Agreement discussed below) contain confidentiality clauses (Mot. at 4) is insufficient to justify sealing trial exhibits. *Keller*, Dkt. 989 at 1-2 (citing *Foltz*, 331 F.3d at 1136); Civil L.R. 79-5.

the Digital Rights Agreement is akin to Conference USA ("CUSA") and the Big 12's request to seal entire portions of certain broadcast licensing agreements, which the Court rejected this morning as overbroad. *See* Order Granting in Part Motions to Seal, Dkt. 201 at 2. The only portion of the agreements the Court agreed to seal for CUSA and the Big 12 were the specific dollar amounts mentioned in the agreements because those dollar amounts could "hinder the conferences' ability to negotiate licensing agreements with broadcasters in the future." *Id*. at 3. The NCAA has made no showing, much less a compelling one, that large portions of the Digital Rights Agreement must be sealed on the same basis.

Again, Plaintiffs intend to rely on numerous provisions that the NCAA seeks to seal at trial. Among the provisions that Plaintiffs will introduce during examination of witnesses are Section vi. on p. 3; Section vii. on p. 4; Section c. on p. 8; Section 3.A. on p. 10; Section D. on p. 11; and Sections 6 and 7 on p. 19.

IV. CONCLUSION

The NCAA has failed to articulate compelling reasons for sealing trial exhibits 400 and 2218. Plaintiffs respectfully request that the Court deny the NCAA's motion. In the spirit of compromise and accommodation, however, Plaintiffs are willing to excise or redact significant portions of both exhibits that the NCAA contends are confidential—not because Plaintiffs agree but rather because Plaintiffs do not intend to elicit testimony concerning these portions. As to trial exhibit 400, Plaintiffs are willing to excise or redact all but those portions previously made public by the Court and Chapters 1 ("Definitions"), 2 ("Broadcaster Rights and Restrictions"), 5 ("Division I Men's Basketball Championship"), 9 ("Commercial Matter and Promotion"), 17 ("Warranties"), 18 ("Indemnification"), and Ex. B. As to trial exhibit 2218, Plaintiffs are willing to excise or redact all but those portions previously made public by the Court and Section vi. on p. 3; Section vii. on p. 4; Section c. on p. 8; Section 3.A. on p. 10; Section D. on p. 11; and Sections 6 and 7 on p. 19.

Dated: June 10, 2014

Respectfully submitted,

By: */s/ Sathya Gosselin*

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 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/ Sathya S. Gosselin*

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