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8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 OAKLAND DIVISION

11 EDWARD O'BANNON, et al.,
 12 Plaintiff,
 13 v.
 14 NATIONAL COLLEGIATE ATHLETIC
 ASSOCIATION; COLLEGIATE LICENSING
 15 COMPANY; and ELECTRONIC ARTS,
 16 Defendants.
 17
 18

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

**NON-PARTY CBS BROADCASTING
 INC.'S NOTICE OF MOTION AND
 MOTION TO INTERVENE FOR
 THE LIMITED PURPOSE OF
 PROTECTING THE PUBLIC
 DISCLOSURE OF PLAINTIFFS'
 TRIAL EXHIBIT 400 AND BRIEF IN
 SUPPORT OF DEFENDANT
 NATIONAL COLLEGIATE
 ATHLETIC ASSOCIATION'S
 ADMINISTRATIVE MOTION TO
 SEAL CONFIDENTIAL TRIAL
 EXHIBITS**

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

21 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

22 PLEASE TAKE NOTICE that as soon as the matter may be heard in the courtroom of
 23 the Hon. Claudia Wilken, non-party CBS Broadcasting Inc. ("CBS") will move, and does
 24 hereby move, to intervene in this matter for the limited purpose of protecting the public
 25 disclosure of Plaintiffs' Trial Exhibit 400. This Motion is based upon the attached
 26 Memorandum of Points and Authorities and the Supplemental Declaration of Daniel Weinberg
 27 (the "Supplemental Weinberg Declaration") filed concurrently herewith.
 28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Non-party CBS Broadcasting Inc. (“CBS”) respectfully submits this Motion to
3 Intervene for the Limited Purpose of Protecting the Public Disclosure of Plaintiffs’ Exhibit
4 400—the Multi-Media Agreement between Turner Broadcasting System, Inc. (“TBS”), CBS
5 and the National Collegiate Athletic Association (“NCAA”), dated April 22, 2010 (the “Multi-
6 Media Agreement”) and this brief to join NCAA’s Administrative Motion to Seal Confidential
7 Trial Exhibits (Dkt. 200), which CBS incorporates by reference, and in response to Plaintiffs’
8 Opposition to NCAA’s Administrative Motion to Seal (Dkt. 202).

9 CBS should be allowed to intervene in this case for the limited purpose of protecting the
10 disclosure of certain of its confidential information in the Multi-Media Agreement because, as
11 described in more detail in CBS’ Brief In Support of Defendant National Collegiate Athletic
12 Association’s Administrative Motion To Seal Confidential Trial Exhibits (“CBS’ Brief in
13 Support of Motion to Seal”) (Dkt. 200), such disclosure would put CBS at a competitive
14 disadvantage in future negotiations and would benefit CBS’ competitors in similar negotiations.

15 This risk of competitive disadvantage is amply demonstrated in CBS’ Brief in Support
16 of Motion to Seal. Moreover, in light of the Court’s recent Order (Dkt. 201) denying in part
17 Non-parties Conference USA’s and the Big 12 Conference’s Motion to Seal, and Plaintiffs’
18 Opposition to NCAA’s Administrative Motion to Seal, CBS is concurrently filing with this
19 Motion the Supplemental Declaration of Daniel Weinberg, dated June 11, 2014, which provides
20 particularized information about the sensitive nature of specific provisions of the Multi-Media
21 Agreement.

22 **A. CBS SHOULD BE GRANTED LIMITED INTERVENTION AS A**
23 **MATTER OF RIGHT**

24 Federal Rule of Civil Procedure 24 affords non-parties the opportunity to intervene in
25 litigations potentially affecting their interests. Fed. R. Civ. P. 24. In determining whether
26 intervention is appropriate, courts are guided primarily by practical and equitable
27 considerations, and the requirements for intervention are broadly interpreted in favor of
28

1 intervention. *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004).
2 Furthermore, a non-party can intervene pursuant to Rule 24 for a limited purpose in the
3 litigation without becoming a full party to the action. *See LG Electronics Inc. v. Q-Lity*
4 *Computer Inc.*, 211 F.R.D. 360, 364 (N.D.Cal.2002); *Apple, Inc. v. Samsung Electronics Co.,*
5 *Ltd.*, 11-CV-01846-LHK, 2013 WL 3958232, *2 (N.D. Cal. July 29, 2013) (“a non-party
6 seeking to intervene may also intervene for a limited purpose”).

7 The Ninth Circuit has interpreted Rule 24(a)(2) to require proof of four elements from
8 the applicant seeking intervention as of right: (1) the application must be timely; (2) the
9 applicant must have a significantly protectable interest relating to the transaction that is the
10 subject of the litigation; (3) the applicant must be so situated that the disposition of the action
11 may, as a practical matter, impair or impede the applicant’s ability to protect its interest; and (4)
12 the applicant’s interest must be inadequately represented by the parties before the court. *Smith*
13 *v. Marsh*, 194 F.3d 1045, 1049 (9th Cir. 1999). As discussed in more detail below, each of
14 these elements supports CBS’ motion to intervene.

15 **1. CBS’ Motion To Intervene is Timely**

16 On June 9, 2014, the NCAA filed its Administrative Motion to seal Confidential Trial
17 Exhibits (the “NCAA’s Motion”) indicating that the parties have not been able to reach an
18 agreement on appropriate redactions to Trial Exhibit 400—the Multi-Media Agreement.
19 Within hours of learning of this, CBS filed a brief in support of the NCAA’s Motion on June 9,
20 2014 (Dkt. 200). In addition to its brief in support of the NCAA’s Motion, CBS has promptly
21 moved to intervene in this case for the limited purpose of challenging disclosure of its
22 confidential and proprietary information (Dkt. 200-9). Because CBS only just learned of
23 plaintiffs’ intent to admit the Multi-Media Agreement in unredacted form, CBS’ motion is
24 timely. *Smith*, 194 F.3d 1045 at 1052 (“The crucial date for assessing the timeliness of a
25 motion to intervene is when proposed intervenors should have been aware that their interests
26 would not be adequately protected by the existing parties.”).

1 Additionally, because CBS only intends to intervene for the limited purpose of
2 protecting certain of its confidential information in the Multi-Media Agreement, there is no risk
3 that CBS' intervention would prolong the litigation, threaten any potential settlement or upset
4 what the parties have been able to accomplish so far in the litigation. Therefore, there are no
5 prejudicial effects which render this motion untimely. *See Smith ex rel. Thompson v. Los*
6 *Angeles Unified Sch. Dist.*, CV 93-7044 RSWL GHKX, 2014 WL 176677 (C.D. Cal. Jan. 16,
7 2014) ("Prejudice may be found where intervention would prolong the litigation, threaten the
8 Parties' settlement, or upset a delicate balance achieved after years of litigation.").

9
10 **2. CBS Has a Significantly Protectable Interest Relating to the
Transaction That is the Subject of the Litigation**

11 In determining whether a putative intervenor has demonstrated the "significantly
12 protectable" interest necessary for intervention of right, courts in the Ninth Circuit have held
13 that the operative inquiry is whether the interest is protectable under some law and whether
14 there is a relationship between the legally protected interest and the claims at issue. *Smith*,
15 2014 WL 176677, at *9. "Whether an applicant for intervention demonstrates sufficient
16 interest in an action is a practical, threshold inquiry. No specific legal or equitable interest need
17 be established." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001).
18 Courts have held an interest in protecting proprietary trade secrets and other confidential
19 information sufficient to warrant intervention. *See Armour of America v. U.S.*, 70 Fed.Cl. 240,
20 243-44 (Fed. Cl. 2006) (noting that "[i]nterests in property are the most elementary type of
21 right that Rule 24(a) is designed to protect" and holding protection of trade secrets and other
22 confidential information from public disclosure was sufficient).

23 Here, CBS' interest in protecting the confidential terms of the Multi-Media Agreement
24 and its proprietary business information contained therein clearly constitutes a significantly
25 protectable interest necessary for intervention of right. *See Beckman Indus., Inc. v. Int'l Ins.*
26 *Co.*, 966 F.2d 470, 472 (9th Cir. 1992). Indeed, the Court previously recognized that portions
27 of the Multi-Media Agreement contained competitively sensitive information, public disclosure
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1 of which would harm the parties thereto, including CBS. *See* Case No. 09-CV-1967-CV, Dkt.
2 No. 626 at 8. CBS has kept this information secret, and as described more fully below and in
3 the Supplemental Weinberg Declaration, at ¶¶ 3-8, public disclosure of this information would
4 cause CBS serious and irreparable harm.

5
6 **3. CBS Is So Situated that the Disposition of the Action May, as a
7 Practical Matter, Impair or Impede CBS' Ability to Protect Its
8 Interest**

9 Denial of the NCAA's Motion would impair or impede CBS' ability to protect its rights.
10 In determining whether the disposition of an action would impair or impede putative
11 intervenors' ability to protect their interests, Ninth Circuit courts "follow the guidance of Rule
12 24 advisory committee notes that state that '[i]f an absentee would be substantially affected in a
13 practical sense by the determination made in an action, he should, as a general rule, be entitled
14 to intervene.'" *Berg*, 268 F.3d at 822.

15 If the NCAA's Motion is denied and CBS' highly confidential information contained in
16 the Multi-Media Agreement is disclosed in the public record, CBS will be irreparably injured.
17 The nonpublic provisions of the Multi-Media Agreement contain competitively sensitive
18 information, including content licensing terms and licensing rights obtained for consideration,
19 that are highly sensitive to CBS. *See* Declaration of Daniel Weinberg, dated June 9, 2014
20 ("Weinberg Decl.") at ¶ 7. CBS competes with a number of entities to obtain rights to
21 broadcast content, and takes steps to ensure that the Multi-Media Agreement and the highly
22 confidential information therein are not disclosed outside of a group of persons within CBS
23 who have a business reason to know their contents. *Id.* at ¶ 7-8; *see* Supplemental Weinberg
24 Decl.

25 Public disclosure of such information could benefit third parties who wish to participate
26 in future negotiations for the licensing and distribution of NCAA content, including competitors
27 of CBS. In particular, the redacted terms of the Multi-Media Agreement were heavily
28 negotiated, and if the terms therein are publicly disclosed, entities with which CBS negotiates
for rights, and entities with which CBS competes to obtain rights, will be able to use knowledge

1 of those terms to the detriment of CBS in its efforts to negotiate future rights agreements. *Id.* at
2 ¶ 8; see *In re Electronic Arts, Inc.*, 298 Fed.Appx. 568, 569–570 (9th Cir. 2008) (reversing trial
3 court’s denial of motion to file document under seal and finding that a licensing agreement
4 containing “pricing terms, royalty rates, and guaranteed minimum payment terms” constituted
5 information that would “irreparably damage[]” petitioner if disclosed); see also *Nixon v.*
6 *Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) (“the common-law right of inspection
7 has bowed before the power of a court to insure that its records are not used . . . as sources of
8 business information that might harm a litigant’s competitive standing”). Indeed, this is
9 precisely why CBS takes measures to protect its confidential information. If the NCAA’s
10 Motion is denied, CBS’ ability to protect its interest will be impaired and impeded.

11
12 **4. CBS’ Interest is Inadequately Represented by the Parties before the Court**

13 A party seeking to intervene bears a “minimal” burden of showing that their interest is
14 inadequately protected by the existing parties—the applicant need only show that representation
15 of its interests by existing parties “may be” inadequate. *Berg*, 268 F.3d at 822-23 (citing
16 *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)). In making this
17 determination, courts consider: (1) whether the interest of a present party is such that it will
18 undoubtedly make all the intervenor’s arguments; (2) whether the present party is capable and
19 willing to make such arguments; and (3) whether the would-be intervenor would offer any
20 necessary elements to the proceedings that other parties would neglect. *Berg*, 268 F.3d at 822.

21 While the NCAA and CBS have both sought to protect the Multi-Media Agreement
22 from public disclosure, CBS, as a broadcaster, has different potential harm from public
23 disclosure than the NCAA, given CBS’ business transactions with other sports entities.
24 Supplemental Weinberg Decl. at ¶ 9. Accordingly, NCAA will not “undoubtedly” make all of
25 CBS’ arguments.

26 CBS and the NCAA are both parties to the heavily-negotiated Multi-Media Agreement,
27 but have different interests with respect to the confidential information contained therein. The
28

1 NCAA necessarily takes into account different considerations in negotiation than does CBS as a
2 broadcaster. CBS operates in a different market than does the NCAA. The nature of CBS’
3 business means it must take into account the potential effects of disclosure of confidential
4 information in a manner completely separate and apart from the NCAA. CBS must consider
5 different types of potential business partners and competitors than the NCAA. This unique
6 knowledge and perspective on CBS’ own competitive concerns brings new elements to the
7 proceeding that warrants intervention. *See Nikon Corp. v. ASM Lithography B.V.*, 222 F.R.D.
8 647, 650 (finding that intervenor had made a sufficient showing of inadequacy of representation
9 where it brought a “unique [] level of expertise” to the litigation despite the fact that its “core
10 litigation objective” was the same as the existing party’s).

11 Therefore, CBS has met its minimal burden to show that its interest in protecting its
12 confidential information may not be adequately represented by the NCAA.

13
14 **B. CBS SHOULD ALTERNATIVELY BE ALLOWED TO PERMISSIVELY INTERVENE**

15 Rule 24(b) provides for permissive intervention when: (1) the motion is timely; and (2)
16 the movant’s “claim or defense . . . shares with the main action a common question of law or
17 fact.” Fed. R. Civ. P. 24(b). As discussed in more detail above, CBS’ motion is timely as CBS
18 only recently discovered that the plaintiffs intend to admit the unredacted version of the Multi-
19 Media Agreement at trial. Additionally, courts in this district have held that where the movant
20 seeks to intervene for the limited purpose of ensuring that an agreement between the movant
21 and a party is maintained under seal, the movant need not demonstrate a common question of
22 law of fact. *See Apple*, 2013 WL 3958232, *2 (allowing non-party to intervene pursuant to
23 Rule 24(b) for the limited purpose of ensuring that a license agreement containing sensitive
24 commercial information was maintained under seal). Accordingly, CBS requests that the Court
25 exercise its discretion and allow CBS to intervene for the limited purpose of opposing the
26 disclosure of its confidential information in the Multi-Media Agreement.

1 **C. PUBLIC DISCLOSURE OF THE REDACTED TERMS OF THE MULTI-**
2 **MEDIA AGREEMENT WILL CAUSE COMPETITIVE HARM TO CBS**

3 As described in more detail in the Weinberg Declaration and Supplemental Weinberg
4 Declaration, there is good cause and compelling reasons to protect the confidential information
5 that was already redacted in previous filings. In the alternative, the Court should at a minimum
6 protect the specific provisions of the Multi-Media Agreement identified in the Supplemental
7 Weinberg Declaration. The sections described in the Supplemental Weinberg Declaration
8 contain highly sensitive and proprietary business information that is not currently in the public
9 domain, and disclosure would hinder CBS' ability to negotiate licensing agreements in the
10 future. Alternatively, CBS requests that the Court conduct an in camera review of Exhibit 400.
11 *See Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1182 (9th Cir. 2006).

12 Plaintiffs' Opposition to the NCAA's Administrative Motion to Seal proposed Trial
13 Exhibit 400 agrees that most of the Multi-Media Agreement should be redacted, but seeks to
14 publicly disclose seven provisions. While there are valid bases to redact all unsealed portions
15 of the Multi-Media Agreement, CBS is willing to allow most of what Plaintiffs have identified
16 as provisions of interest. Of these provisions however, CBS objects to public disclosure of only
17 certain portions four previously redacted provisions: limited Subsections of Section 1; just two
18 of the sixty-three definitions contained within (the definitions of the terms "Broadcaster Multi-
19 Sport Package," and "Broadcaster Platform,"), Section 2 (other than 2.11) ("Broadcaster Rights
20 and Restrictions"), Subsection 9.5 ("Promotional Inventory") and Ex. B. Dkt. No. 202 at 3.
21 For the reasons set out in the Supplemental Weinberg Declaration, the above-referenced
22 portions of these four sections should remain redacted in any public trial exhibit along with the
23 additional sections discussed in the Declaration that Plaintiffs do not seek to disclose.¹

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26
27 ¹CBS has submitted specific bases for sealing only these limited provisions that Plaintiffs do not
28 agree should remain under seal, but reserves the right to provide further explanation if needed on
other provisions if the Court takes an even more restrictive view than Plaintiffs on redactions.

