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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 OPPOSITION TO MOTION TO ADMIT EXHIBITS

Judge: Hon. Claudia Wilken

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

The NCAA opposes Plaintiffs' motion to admit the following trial exhibits.

PX 2564: This exhibit was prepared by Dr. Rascher and purports to list "possible related-party transactions" at college athletic departments. Plaintiffs' claim that this is a "summary exhibit" is incorrect. PX 2564 does not summarize the content of voluminous data or writings contained in admissible evidence, as required by Fed. R. Evid. 1006. Rather, this exhibit is simply an argumentative list of supposed "revenues under-valued" and "expenses over-valued" in college athletics budgets. Plaintiffs have not identified any underlying data or writings that would be admissible evidence and that are accurately summarized by this exhibit. Dr. Rascher testified regarding his opinion about how expenses and revenues in athletic departments are accounted for, and the proposed exhibit is merely a summary of his testimony, which is not admissible as evidence. "Summary of purely testimonial evidence is … not within the purview of FRE 1006." *Sims v. Lakeside Sch.*, C06-1412RSM, 2008 WL 189674 (W.D. Wash. Jan. 17, 2008).

PX 2282: This is a Knight Commission report, and the Court has already ruled that "Plaintiffs may not introduce any media reports or reports produced by third-party groups, such as the Knight Commission, for the truth of the matter asserted in those reports." Order Resolving Motions in Limine, Dkt. 166, at 7. Plaintiffs' end-run around the Court's order should be rejected. Plaintiffs now argue that the report is admissible because former NCAA President Cedric Dempsey was one of 27 people who signed the letter of transmittal accompanying the report. PX 2282-6. There is no indication that in signing the letter of transmittal, Mr. Dempsey intended to adopt all the statements in the report itself as his own, and much less is there any indication that Mr. Dempsey intended to adopt the statements in the report as statements of the NCAA. To the contrary, the report actually contains quotations from Mr. Dempsey, PX 2282-16-17, which belies Plaintiffs' suggestion that the entire report should be characterized as a statement of Mr. Dempsey.

PX 2046: This document is a hearsay statement by a university president that relays a second hearsay statement by an athletic director at a different university. Plaintiffs contend these two declarants were acting as agents of the NCAA by virtue of their participation in a task force, and argue that their statements are admissible under Fed. R. Evid. 801(d)(2)(D). To determine the admissibility of a statement under Rule 801(d)(2)(D), the Court "must undertake a fact-based

inquiry applying common law principles of agency." *United States v. Bonds*, 608 F.3d 495, 504 (9th Cir. 2010). The "essential ingredient [in determining the existence of an agency relationship] is the extent of control exercised by the employer." *Id.*, at 505. Here, there is not a shred of evidence that university employees who sit on NCAA task forces act as agents of the NCAA. The NCAA does not exercise any control or authority over members of task forces, who at most could be characterized as outside advisors who are not authorized to speak on behalf of the NCAA. *Cf. id.* (independent contractors are not agents for purposes of Rule 801(d)(2)(D). Plaintiffs alternatively argue that Mr. Spanier's statement is admissible under the co-conspirator exception, but they simply assert that this statement was in furtherance of the alleged conspiracy without offering any evidentiary basis for this assertion. Even if Mr. Spanier's hearsay statement were admissible under the co-conspirator exception, that would not apply to the double-hearsay statement of Ms. Altmaier, which is not admissible for its truth.

PX 280: This document collects various hearsay statements made by presidents of universities in the Atlantic Coast Conference regarding a variety of issues in intercollegiate athletics. Among other topics, the statements refer to the ACC academic collaboration report, NCAA championships air travel policy, and the equitable treatment of pregnant student-athletes. Plaintiffs contend all of these statements are admissible as co-conspirator statements. This argument serves only to illustrate the overbreadth of Plaintiffs' reliance on the co-conspirator exception. It appears that under Plaintiffs' theory, any statement by any college employee regarding any issue in collegiate athletics would be admissible under the co-conspirator exception. Plaintiffs also assert that these particular statements were "made to determine how best to protect the conspiracy from the antitrust laws," but there is no basis in this document for suggesting that this was the purpose of any of these statements. Only one of the comments, from Nancy Zimpher, refers vaguely to the concept of an antitrust exemption, but the document says that "Nancy did not support that option." In any event, Plaintiffs have not proposed admitting only Ms. Zimpher's comment, but have sought to admit this entire document.

PX 2598: The NCAA does not object to this exhibit.

PX 2603: The NCAA does not object to this exhibit.

PX 2604: The NCAA does not object to this exhibit.

PX 2014: This is an internal CLC document; there is no indication that anyone at the NCAA was ever aware of this document or its contents. Plaintiffs contend that this document is admissible because "CLC remains an adverse party-opponent in this litigation." That might make the document admissible against CLC, but it is no basis for admitting the document against the NCAA. *See, e.g., United States v. Castro*, 887 F.2d 988, 999-1000 (9th Cir. 1989) ("Statements by party-opponents are not hearsay and are admissible *provided the statement is offered against the party and is the party's own statement*.") (emphasis added).

PX 2487: This document is a NCAA report based on a survey of Division I Presidents. The NCAA does not contest that the report itself is non-hearsay because it was requested and authorized by the NCAA. However, much of the report consists of comments made by anonymous Division I Presidents, and there is no indication that the NCAA either intended to adopt these statements as its own or made any attempt to verify the accuracy of these comments. All of these comments and the summaries of these comments contained within the report are hearsay within hearsay, and are not admissible for their truth. *See Shimozono v. May Dep't Stores Co.*, 00-04261 WJR (AJWx), 2002 WL 34373490, *13 (C.D. Cal. Nov. 20, 2002) ("If the records contain information obtained from a customer, thus constituting hearsay within hearsay, the records will come within the business records exception only 'if it is shown that the business's standard practice was to verify the information provided.'") (quoting *U.S. v. Mitchell*, 49 F.3d 769, 778 (D.C.Cir.1995)).

PX 2095: This document is an email from an independent consultant to the NCAA, attaching a presentation authored by two university presidents. Plaintiffs again attempt to rely on the co-conspirator exception, but again their argument is overbroad. The statements in this presentation touch on a wide variety of issues in intercollegiate athletics. Most of the presentation refers to a number of proposed reforms to collegiate athletics that have nothing to do with Plaintiffs' alleged conspiracy. In the alternative, Plaintiffs suggest this presentation is admissible to show "the feasibility of reforms." But the NCAA has not contested the feasibility of the

specific reforms identified in this presentation, so it is inadmissible for that purpose. *Burleson v. Samson*, 2:00-CV-01591-JKS, 2007 WL 2688840 at *1 (E.D. Cal. Sept. 13, 2007).

PX 2527: Plaintiffs again rely on the co-conspirator exception to seek to admit a document that discusses a wide range of issues in intercollegiate athletics. For the reasons given above, the Court should reject this argument. Plaintiffs also assert that this document shows the feasibility of reforms, but the NCAA has not contested the feasibility of the specific reforms identified in this document.

PX 2616: The NCAA does not object to the admission of this exhibit.

PX 2287-1 and -17: Plaintiffs propose admitting these pages from the Knight Commission to show the fact that a proposal to change the NCAA's revenue distribution model was made and not acted upon by the NCAA. Admission of this exhibit for that purpose would be cumulative, as Plaintiffs already questioned Dr. Emmert at length about this proposal in Court. Tr. 1993:15-1996:12.

PX 2057-20: This is a page from a presentation that was attached to a NCAA email. The author of the presentation is unidentified, and Plaintiffs have now taken two positions as to who authored and made this presentation. In Court, Mr. Isaacson represented that the presentation is "a deck from Jamie Zaninovich. He was the Commissioner of the West Coast Conference" Tr. 1811:23-24. Mr. Isaacson then went on to specifically say that page 2057-20 represents the views of Mr. Zaninovich. Tr. 1813:23; Tr. 1814:15-16. In their motion to admit this document, Plaintiffs now claim that the presentation was made "by Mr. Shaheen," a former NCAA employee. Plaintiffs' contradictory positions establish that this document is inadmissible. If Plaintiffs cannot even identify who authored this presentation, or whether it was made by a NCAA employee or a conference employee, then there is no foundation for the admission of this document.

DX 3081: This document is titled "Discussion of the Application of the Recommendations of the NCAA Study Group on the Use of Student-Athletes' Names and Likenesses." There is no author identified on the document, nor does the document indicate what its purpose was or the context in which it was prepared. Plaintiffs have had the opportunity at trial to question Chris Plonsky, who was a member of the Study Group, about this document to lay some foundation for

its admission, but they declined to do so. Plaintiffs assert that the document should be admitted merely because it was produced by the NCAA in discovery. Courts have rejected exactly that argument for similar documents lacking any author or context. *See, e.g., Adams v. United States*, CIV. 03-0049-E-BLW, 2009 WL 1922250 (D. Idaho June 30, 2009) ("This is an August 28, 2000, 'Issue Paper'. … While the document was produced by the BLM in discovery, there is no author identified on the document. The document was prepared by someone on the "Idaho State Office EFR Team," but the nature and duties of that team are not clear from the submission. If there has been testimony on this at trial, the Court does not recall it. For these reasons, the Court finds this exhibit inadmissible at this time under Rules 106, 611, and 403 because there is no supporting witness to explain the creation of this document.").

DATED: June 24, 2014

Respectfully submitted,

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